

Federal Court of Australia

District Registry: New South Wales

Division: General

On appeal from the Federal Court of Australia

Nationwide News Pty Limited and another

Appellants

Geoffrey Roy Rush

Respondent

APPEAL BOOK

PART A

CORE SET OF STANDARD ITEMS

The index to Part A of the Appeal Book has been agreed by the parties.

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Ashurst

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HWL Ebsworth

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Filed on behalf of	Nationwide News Pty Ltd and Jonathan Moran, Appellants		
Prepared by	Robert Todd		
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Federal Court of Australia

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Geoffrey Roy Rush

Respondent

INDEX TO PART A

[Note: Documents highlighted in yellow are the subject of suppression orders.]

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NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/12/2017 11:20:00 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application - Form 15 - Rule 8.01(1)
File Number:	NSD2179/2017
File Title:	GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	First Case Management Hearing
Time and date for hearing:	08/02/2018, 9:30 AM
Place:	Court Room Not Assigned, Level 17 Law Courts Building Queen's Square, Sydney



A handwritten signature in blue ink, which appears to read "Warwick Soden".

Dated: 8/12/2017 3:57:53 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 Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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



Form 15
Rules 8.01(1); 8.04(1)

ORIGINATING APPLICATION

No. of 2017

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

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED & ANOR in the Schedule

First Respondent

To the Respondents

The Applicant applies for the relief set out in this application.

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

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

Time and date for hearing:

Place: Levels 17 - 22 Law Courts Building
Queens Square Sydney NSW 2000

Date:

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

Filed on behalf of

Geoffrey Roy Rush, Applicant

Prepared by

Nicholas Pullen, Solicitor

Law firm

HWL Ebsworth Lawyers

Tel (03) 8644 3565

Fax 1300 365 323

Email npullen@hwle.com.au

Attention: Andrew Miers and Jeremy Marel

HWL Ebsworth Lawyers

Address for service

Level 14, Australia Square, 264-278 George Street
Sydney NSW 2000

Doc ID 455910273/v1



Details of claim

On the grounds stated in the statement of claim, the Applicant claims:

1. Damages including:
 - (a) General damages;
 - (b) Aggravated damages;
 - (c) *Andrews* damages;
 - (d) Special damages.
2. An order that each of the respondents be permanently restrained from publishing the:
 - (a) first matter complained of;
 - (b) second matter complained of;
 - (c) third matter complained of;

(collectively, the "**matters complained of**"), or any matter to the same effect.
3. An order that each of the respondents be permanently restrained from publishing the imputations found by the Court to be carried by any of the matters complained of, of and concerning the applicant, and any imputations that do not differ in substance.
4. Costs.
5. Interest pursuant to sections 51A and 52 of the *Federal Court of Australia Act 1976* (Cth) including interest on costs.
6. Such further and other orders as the Court deems fit or thinks necessary.



Applicant's address

The Applicant's address for service is:

Place: HWL Ebsworth Lawyers
Level 14, Australia Square, 264-278 George Street
Sydney NSW 2000

The Applicant's address is:

HWL Ebsworth Lawyers
Level 14, Australia Square, 264-278 George Street
Sydney NSW 2000

Service on the Respondent

It is intended to serve this application on all the Respondents.

Date: 8 December 2017

A handwritten signature in blue ink, appearing to read "Nicholas Pullen", is written over a horizontal line.

Signed by Nicholas Pullen
Lawyer for the Applicant



Schedule

No. of 2017

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

Respondents

Nationwide News Pty Limited

First Respondent

Jonathon Moran

Second Respondent

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/12/2017 11:20:00 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
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: 8/12/2017 3:57:57 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.



STATEMENT OF CLAIM

No. of 2017

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

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED

First Respondent

JONATHON MORAN

Second Respondent

The Applicant relies on the following facts and assertions:

Parties

1. The first respondent is:
 - (a) a company duly incorporated;
 - (b) liable to be sued in and by its corporate name and style;
 - (c) the publisher at all material times of a newspaper known as *The Daily Telegraph* (the "**DT Newspaper**");
 - (d) the publisher at all material times of a website located at URL address www.dailytelegraph.com.au (the "**the DT website**").

Filed on behalf of	<u>Geoffrey Roy Rush, Applicant</u>		
Prepared by	<u>Nicholas Pullen, Solicitor</u>		
Law firm	<u>HWL Ebsworth Lawyers</u>		
Tel	<u>(03) 8644 3565</u>	Fax	<u>1300 365 323</u>
Email	<u>npullen@hwle.com.au</u>		
Address for service		Attention: Andrew Miers and Jeremy Marel HWL Ebsworth Lawyers Level 14, Australia Square, 264-278 George Street Sydney NSW 2000	

2. The second respondent is:
 - (a) a journalist;
 - (b) an employee and/or agent of the first respondent.

First Matter complained of

3. On or about 30 November 2017 the first respondent published of and concerning the applicant, in New South Wales and in all of the other States and the Territories of Australia, the words set forth in **Schedule A** hereto (the "**first matter complained of**").

Particulars of publication

- (a) The first matter complained of was published in print by the first respondent who distributed or caused to be distributed the first matter complained of to newsagents throughout Australia.
 - (b) The first matter complained of was displayed outside newsagencies throughout Australia, an example of which is set forth in **Schedule A1** hereto, which appeared on Macquarie Street in the central business district of Sydney.
 - (c) Further particulars of the extent of publication of the first matter complained of will be provided after admissions, discovery and interrogatories.
4. In its natural and ordinary meaning, the first matter complained of was defamatory of the applicant and carried the following defamatory meanings (or meanings not different in substance):

Particulars of meaning

- (a) The applicant had engaged in scandalously inappropriate behaviour in the theatre.
 - (b) The applicant had engaged in inappropriate behaviour of a sexual nature in the theatre.
5. Further and in the alternative to paragraph 4, above, by reason of extrinsic facts, the first matter complained of was defamatory of the applicant and carried the following defamatory meanings (or meanings not different in substance):

Particulars of meaning

- (a) The applicant had committed sexual assault in the theatre.
- (b) The applicant had engaged in inappropriate behaviour of a sexual nature in the theatre.

Particulars of extrinsic facts

- (c) The applicant is a famous Australian Hollywood actor.
- (d) In the weeks preceding the publication of the first matter complained of, a number of famous actors and movie and television executives, including in Hollywood, had been portrayed in the media and on social media as sexual predators who had committed acts of sexual assault and/or sexual harassment.
- (e) In the weeks preceding the publication of the first matter complained of, famous Hollywood film producer Harvey Weinstein had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.
- (f) In the weeks preceding the publication of the first matter complained of, famous Hollywood actor Kevin Spacey had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.
- (g) In the days preceding the publication of the first matter complained of, Australian television personality Don Burke was portrayed by the media as being a sexual predator.
- (h) Each of the facts set out in (c) – (g) above were notorious facts.
- (i) Readers of the first matter complained of were aware of the facts set out in (c) – (g), above.

Second Matter complained of

- 6. On or about 30 November 2017 the first respondent and/or the second respondent published in the Australian Capital Territory and all of the States and Territories of Australia, the matter set forth in **Schedule B** hereto (the “**second matter complained of**”).

Particulars of publication

- (a) The second matter complained of was entitled “*KING LEER: World Exclusive Oscar-winner Rush denies ‘inappropriate behaviour’ during Sydney stage show*”.

- (b) The second matter complained of was published in the DT newspaper on pages 1, 4 and 5.
- (c) The sense and substance of the second matter complained of was republished, with the authority of the first and/or second respondents, on the Daily Telegraph tablet app, where it was read by subscribers to that app.
- (d) The sense and substance of the second matter complained of was republished, with the authority of each of the first and/or second respondents, on the DT website.
- (e) The DT website is a mass media website viewed by hundreds of thousands of readers per day.
- (f) The article comprising the sense and substance of the second matter complained of was downloaded by persons unknown to the applicant from the DT website in each State and Territory of Australia.
- (g) The sense and substance of the second matter complained of was published, with the authority of the first and/or second respondents, in other newspapers throughout Australia operated or controlled by companies related to the first respondent.
- (h) The sense and substance of the second matter complained of was published, with the authority of the first and/or second respondents, on other websites throughout Australia operated or controlled by companies related to the first respondent.
- (i) Each of the websites referred to in the preceding particular are mass media websites viewed by thousands of readers per day.
- (j) The sense and substance of the second matter complained of was downloaded by persons unknown to the applicant from each of the websites referred to in particular (h).
- (k) The sense and substance of the second matter complained of was published worldwide over the internet, to various persons unknown to the applicant, and such publication was the natural and probable consequence of the publication of the second matter complained of.
- (l) Particulars (c) to (k) above are relied upon as to damages only.

- (m) Further particulars of publication and republication of the second matter complained of will be provided after admissions, discovery, subpoenas and interrogatories.

- 7. In its natural and ordinary meaning, the second matter complained of was defamatory of the applicant and carried the following defamatory meanings (or meanings not different in substance):

Particulars of meaning

- (a) The applicant is a pervert.
 - (b) The applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of King Lear.
 - (c) The applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of King Lear.
 - (d) 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.
- 8. Further and in the alternative to paragraph 7, above, by reason of extrinsic facts, the second matter complained of was defamatory of the applicant and carried the following defamatory meanings (or meanings not different in substance):

Particulars of meaning

- (a) The applicant is a pervert.
- (b) The applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of King Lear.
- (c) The applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of King Lear.
- (d) 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.

Particulars of extrinsic facts

- (e) The applicant is a famous Australian Hollywood actor.

- (f) In the weeks preceding the publication of the second matter complained of, a number of famous actors and movie and television executives, including in Hollywood, had been portrayed in the media and on social media as sexual predators who had committed acts of sexual assault and/or sexual harassment.
- (g) In the weeks preceding the publication of the second matter complained of, famous Hollywood film producer Harvey Weinstein had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.
- (h) In the weeks preceding the publication of the second matter complained of, famous Hollywood actor Kevin Spacey had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.
- (i) In the days preceding the publication of the second matter complained of, Australian television personality Don Burke was portrayed by the media as being a sexual predator.
- (j) Each of the facts set out in (e) – (i) above were notorious facts.
- (k) Readers of the second matter complained of were aware of the facts set out in (e) – (i), above.

Third Matter complained of

- 9. On or about 1 December 2017 the first respondent and/or the second respondent published in the Australian Capital Territory and all of the States and Territories of Australia, the matter set forth in **Schedule C** hereto (the “**third matter complained of**”).

Particulars of publication

- (a) The third matter complained of was entitled “*WE’RE WITH YOU: Theatre cast back accuser as Rush denies ‘touching’*”.
- (b) The third matter complained of was published in the DT newspaper on pages 1, 4 and 5.
- (c) The sense and substance of the third matter complained of was republished, with the authority of the first and/or second respondents, on the Daily Telegraph tablet app.
- (d) The sense and substance of the third matter complained of was republished, with the authority of each of the first and/or second respondents, on the DT website.

- (e) The DT website is a mass media website viewed by hundreds of thousands of readers per day.
 - (f) The article comprising the sense and substance of the third matter complained of was downloaded by persons unknown to the applicant from the DT website in each State and Territory of Australia.
 - (g) The sense and substance of the third matter complained of was published, with the authority of the first and/or second respondents, in other newspapers throughout Australia operated or controlled by companies related to the first respondent.
 - (h) The sense and substance of the third matter complained of was published, with the authority of the first and/or second respondents, on other websites throughout Australia operated or controlled by companies related to the first respondent.
 - (i) Each of the websites referred to in the preceding particular are mass media websites viewed by thousands of readers per day.
 - (j) The sense and substance of the third matter complained of was downloaded by persons unknown to the applicant from each of the websites referred to in particular (h).
 - (k) The sense and substance of the third matter complained of was published worldwide over the internet, to various persons unknown to the applicant, and such publication was the natural and probable consequence of the publication of the third matter complained of.
 - (l) Particulars (c) to (k) above are relied upon as to damages only.
 - (m) Further particulars of publication and republication of the third matter complained of will be provided after admissions, discovery, subpoenas and interrogatories.
10. In its natural and ordinary meaning, the third matter complained of was defamatory of the applicant and carried the following defamatory meanings (or meanings not different in substance):

Particulars of meaning

- (a) The applicant had committed sexual assault while working on the Sydney Theatre Company's production of King Lear.

- (b) The applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of King Lear.
 - (c) The applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of King Lear.
 - (d) The applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of King Lear.
 - (e) The applicant is a pervert.
 - (f) 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.
 - (g) The applicant had falsely denied that the Sydney Theatre Company had told him the identity of the person who had made a complaint against him.
11. Further and in the alternative to paragraph 10, above, by reason of extrinsic facts, the third matter complained of was defamatory of the applicant and carried the following defamatory meanings (or meanings not different in substance):

Particulars of meaning

- (a) The applicant had committed sexual assault while working on the Sydney Theatre Company's production of King Lear.
- (b) The applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of King Lear.
- (c) The applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of King Lear.
- (d) The applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of King Lear.
- (e) The applicant is a pervert.
- (f) 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.

Particulars of extrinsic facts

- (g) The applicant is a famous Australian Hollywood actor.
- (h) In the weeks preceding the publication of the third matter complained of, a number of famous actors and movie and television executives, including in Hollywood, had been portrayed in the media and on social media as sexual predators who had committed acts of sexual assault and/or sexual harassment.
- (i) In the weeks preceding the publication of the third matter complained of, famous Hollywood film producer Harvey Weinstein had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.
- (j) In the weeks preceding the publication of the third matter complained of, famous Hollywood actor Kevin Spacey had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.
- (k) In the days preceding the publication of the third matter complained of, Australian television personality Don Burke was portrayed by the media as being a sexual predator.
- (l) Each of the facts set out in (g) – (k) above were notorious facts.
- (m) Readers of the third matter complained of were aware of the facts set out in (g) – (k), above.

Damages

- 12. By reason of the publication by the respondents of the first, second, and third matters complained of, and by reason of further republications of those matters, the applicant has been brought into hatred, ridicule and contempt and has been gravely injured in his character and reputation as an actor and has suffered hurt and embarrassment and has suffered and will continue to suffer loss and damage.

Particulars of aggravated damages

The applicant's hurt and harm occasioned by reason of the publication of the matters complained of were aggravated by his knowledge of the following matters:

- a. The conduct of the respondents in failing to verify the accuracy of the allegations before publishing the matters complained of;

- b. The conduct of the respondents in ridiculing the applicant to ensure substantial damage to his reputation by very prominently labelling him "King Leer" on the front page of the DT newspaper;
- c. The conduct of the respondents in ridiculing the applicant to ensure substantial damage to his reputation by asserting that he had engaged in "Bard behaviour" on page 4 of the DT newspaper;
- d. The conduct of the respondents in publishing the content of an email from HWL Ebsworth on behalf of the applicant to the respondents marked "NOT FOR PUBLICATION" in the matters complained of;
- e. The conduct of the second respondent in "Tweeting", via his Twitter account, the front page of the DT newspaper on 30 November 2017;
- f. The conduct of servants and/or agents of the first respondent in "Tweeting", via their Twitter accounts, the matters complained of on 30 November 2017 and 1 December 2017;
- g. The conduct of the first respondent in including the allegations about the applicant made in the second matter complained of, alongside an article about allegations concerning alleged sexual predator and television personality Don Burke so as to falsely and unfairly associate the allegations against the applicant with the allegations against Mr Burke;
- h. The conduct of the respondents in referring to Harvey Weinstein and Don Burke in connection with the allegations against the applicant in the second matter complained of;
- i. The conduct of the respondents in referring to Harvey Weinstein and Kevin Spacey in connection with the allegations against the applicant in the third matter complained of;
- j. The further publications by the respondents repeating the allegations about the applicant complained of above on 3, 4, 5 and 7 December 2017;
- k. Further particulars of aggravated damages will be provided as and when they arise.

Particulars of special damages

- i. The applicant will suffer economic loss by reason of the publication of the matters complained of.
- m. The applicant's reputation as an actor has been irreparably harmed such that he is likely to be shunned by employers in future.
- n. On 1 December 2017 the applicant was asked to stand aside as President of the Australian Academy of Cinema and Television Arts as a result of the publications of the matters complained of and the applicant acceded to that request given the circumstances.
- o. Further particulars of special damages will be provided.

Date: 8 December 2017



Signed by Nicholas Pullen

Lawyer for Applicant

This pleading was prepared by Sue Chrysanthou, Barrister and settled by Richard McHugh SC.

Certificate of lawyer

I, Nicholas Pullen, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 8 December 2017



Signed by Nicholas Pullen
Lawyer for the Applicant

"A"

The Daily Telegraph

WORLD EXCLUSIVE

GEOFFREY RUSH IN SCANDAL CLAIMS

**THEATRE COMPANY CONFIRMS
'INAPPROPRIATE BEHAVIOUR'**

13

"AI"



14

The Daily Telegraph

\$1.60 // THURSDAY, NOVEMBER 30, 2017

SCOOP

SHORTEN ASIO CALL FOR SAM

KYLIE LOUSSOURAU

BILL Shorten was so concerned by reports of Sam Dastyari's dealings with a billionaire Chinese donor he called ASIO's top officials to determine if the embattled senator was a national security concern.

The Daily Telegraph understands the Labor leader this week called the domestic spy agency after hearing allegations Mr Dastyari warned the property developer he was under surveillance.

Mr Shorten was advised he did not pose a security risk. **SEE FULL REPORT PAGE 6**

SCOOP

GAME ON TO SPY ON KIDS

BRUCE McDONNELL

TEACHERS will be able to spy on students by using a new program to keep tabs on what pupils are up to on their classroom laptops.

The colour-coding program throws up a "red flag" on the teacher's laptop when a student goes "off-task" on their computer. There are also other colours in the system, like green to show they are on-task and orange if they're searching Google or sending an email.

Six Sydney schools are already testing the software. **SEE FULL REPORT PAGE 3**

SCOOP

TRASH TALK ON CAN PLAN

ANNA CALDWELL

HUNDREDS of vending machines ordered by the state government for its "shambolic" cash for cans scheme breach standards for disabled access, it can be revealed.

It is the latest blow for the recycling plan which is due to cause prices for drinks in bottles and cans to rise from tomorrow, as senior government MPs seethe about its "botched" rollout.

A case of beer or a box of soft-drink cans will increase by up to \$4.80 from tomorrow. **SEE CONTINUED PAGE 4**



KING LEAR

WORLD EXCLUSIVE

Oscar-winner Rush denies 'inappropriate behaviour' during Sydney stage show

JONATHAN MORAN

1 OSCAR winning Australian actor Geoffrey Rush has been accused of "inappropriate behaviour" during Sydney Theatre Company's recent production of *King Lear*.

2 However, Rush — through his lawyer — last night vigorously

denied the claims. The Sydney Theatre Company told The Daily Telegraph 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," it said. "The Company

continues to work with the complainant to minimise the risk of future instances of the alleged behaviour occurring in its workplace."

3 Mr Rush's lawyers said he 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," a statement from HWL Ebsworth Lawyers said.

4 "If such a statement has been issued by the STC it is both irresponsible and highly damaging." **SEE FULL REPORTS PAGES 4-5**

Oscar-winner Geoffrey Rush denies complaint made

STAR'S BARD BEHAVIOUR



ADAM MORGAN

OSCAR-winning Australian actor Geoffrey Rush has been accused of "inappropriate behaviour" during the Sydney Theatre Company's recent production of *King Lear*.

But the star vigorously denies the allegations and says the company has never told him of any allegations of wrong doing.

The Daily Telegraph can today reveal that one of the country's most successful actors was the subject of a complaint during the production of *King Lear*.

It is understood the allegations of inappropriate behaviour occurred over several months. The

local production of the classic William Shake-

speare play ran from November 2015 to January 2016 at the Roslyn Packer Theatre.

There were also several months of rehearsals.

"Sydney Theatre Company received a complaint alleging that Mr Geoffrey Rush had engaged in inappropriate behaviour," a spokeswoman said to The Daily Telegraph.

"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."

In a strongly worded legal letter, lawyers for Rush at HWL Edwards last night said he had never been involved in any "inappropriate behaviour" and that his "regard, actions and treatment of all the peo-

ple he has worked with has been impeccable beyond reproach.

"Mr Rush has not been approached by the Sydney Theatre Company and the alleged complainant nor any representative of either of them concerning the matter you have raised," the letter states.

"Further, he has not been informed by them of the nature of the complaint and what it involves."

The letter from the legal firm's partner Nicholas Pullen goes on to say that Rush has not been involved with the Sydney Theatre Company or its representatives for a period of more than 22 months.

"In the circumstances, if each a statement has been issued by the STC it is both irresponsible and highly damaging to say the least."

"Your understanding of what has occurred is, with the greatest respect, simply flawed and unfounded."



Government's recycling scheme is a big load of rubbish

FROM PAGE 1

with families expected to recoup the money by collecting refunds for recycling the bottles.

But despite the government promising to roll out 800 reverse vending machines across the state, last night there were set to be only 236 recycling points in operation when the program begins tomorrow, made up of

vending machines and over-the-counter arrangements.

Based on the government's map, more than 10 electorates across the state had no way to claim recycling refunds. Must-win seats for the government in regional NSW were missing collection points, including Orange, which the nationals spectacularly lost to the Shoot-

ers party in the 2016 by-election.

The Daily Telegraph can reveal that those vending machines that do exist don't meet national standards for disabled access. The chutes (pictured right) are 1470mm high — above the 900-1100mm required for public access. Physical Disabilities Council CEO Serena Owens said it was "crazy

the government hasn't considered legal access requirements".

A spokesman for the scheme's operator — Tomra Cleanaway — said the height was "within reach of an adult seated in a wheelchair".

One senior government member described the scheme as "ahambolic", saying it was embarrassing to botch some-

thing so innocuous as a recycling scheme, and that it would hurt the government in regional seats that could determine the next election.

Small businesses in electorates on the northern border are preparing to lose revenue to shops in Queensland which does not have a container collection surcharge.



TELEGRAPH.COM.AU

54-55

in Sydney Theatre Shakespeare production

1 Sydney Theatre Company received a complaint alleging that Mr Geoffrey Rush had engaged in inappropriate behaviour

STC spokeswoman



3 Clockwise from left: Rush and his 1996 Oscar; in Twelfth Night; receiving the Order of Australia with Governor-General Peter Cosgrove; in STC's King Lear; on location at Sydney Harbour on Tuesday; and (below left) as Elmer in TV series Gormley. Main picture: Matrix Media Group

2 It does not warrant comment except that it is false and untrue

Lawyer for Rush
Nicholas Pullen



Service to counsel affected Nine staff

CHANNEL Nine has opened an independent counselling service following allegations this week of sexual assault by former TV personality Don Burke as the network's boss Hugh Marks addresses staff for the first time, saying "we cannot rewrite history".

A new phone line was set up yesterday to allow people to report instances of past behaviour they would like addressed.

"Former Nine employees with complaints can provide their personal contact details and HR will follow up directly on a strictly confidential basis," Nine said in an email to staff.

The counselling will be provided at no cost to them, Nine said, and will support the person to "work through any issues that relate to their time" at Nine.

Mr Marks, meanwhile, told staff that allegations of harassment and misconduct by Burke was "appalling", vowing to deal with misconduct, harassment, discrimination and bullying issues "effectively".

Burke returned to Nine's A Current Affair, this week where he admitted to behaving like a bullying tyrant, and having "a number of affairs", but cannot remember "exact things I did 20 years ago".

He has been described as a "sexual predator" and "psychotic bully" during the 17-year run of Burke's Backyard. Speaking to ACA host Tracy Grimshaw, he claimed to be a victim of a "witch hunt" ignited by the Harvey Weinstein scandal.



Don Burke being interviewed on ACA.

KIDS AWAKE TO FAKE NEWS

OLDER children are becoming increasingly savvy about fake news on social media.

More than half of youngsters aged 12 to 15 use Facebook and Twitter to access news online — often clicking on stories that have been recommended by "friends" in their network or by users they "follow". But even though they like to access news in this way,

they are extremely wary about which articles they can trust.

The majority of those in this age group who read news on social media make an effort to check if it is true. Some 86 per cent make "at least one practical attempt" to check the veracity of an article.

For example, they might double check it with mainstream news sources.



Mount Agung in action.

Bali tourist relief as airport reopens

BALI'S airport reopened late yesterday and flights resumed as the amount of volcanic ash from the erupting Mt Agung volcano decreased.

After three days of closure, a decision was made late yesterday for the airport to open.

The decision brought relief to the 150,000 tourists stranded in Bali as a result of the volcano,

which began erupting last week. Yesterday almost 58,000 passengers, on 430 flights, had faced cancellations.

Authorities said while the volcanic ash plume was still reaching 1500-2000m, it had decreased compared to the previous day.

The Volcanology and Geological Hazards Mitigation Cen-

tre chief, Kasbani, said everyone living inside the exclusion zone 8-10km from the crater had been told to leave.

An eruption on Tuesday, which hurled volcanic ash more than 4000m into the air had been the biggest so far, prompting warnings that a large-scale eruption was just hours away. But that has not yet happened.

"C" The Daily Telegraph

DAILYTELEGRAPH.COM.AU

\$1.60 // FRIDAY, DECEMBER 1, 2017

WE'RE FOR SYDNEY

UNSCRIPTED DRAMA: THE OSCAR STAR SCANDAL

I was in the show. I believe (her)

SIT actor Meyne Wyatt

WE'RE WITH YOU

Theatre cast back accuser as Rush denies 'touching'

DONATHAN MARRAS

TWO Sydney Theatre Company actors yesterday spoke out in support of the actress who has accused Oscar winner Geoffrey Rush of touching her inappropriately during the stage production of *King Lear*.

Rush — one of Australia's biggest stars — was yesterday continuing to vehemently deny the claims.

Meyne Raoul Wyatt, who also appeared in *King Lear*, said he believed the allegations. "I believe the person who has come forward. It's time for Sydney Theatre Company and the industry in Australia and worldwide as a whole to make a stand," Wyatt said.

And Brandon McClelland, who has

worked alongside the actress, urged others to believe the complaints. "It wasn't a misunderstanding," he said.

Two SITC sources said the company stood by her claims. Both said the company wouldn't work with Rush again. Despite denials, Rush was told who made the claims in a phone call with executive director Patrick McIntyre weeks ago. Mr McIntyre last night said the SITC had "reviewed policies about inappropriate behaviour".

• FULL REPORT PAGE 5



SCOOP

THE BANK BUST

SEAN RYAN
& KYLAR LOUSSEAN

FORMER premier Mike Baird played a key role in convincing the Turnbull government to agree to a royal commission into the

big banks. As Mr Baird and his new boss NAB chair Ken Henry got the banks inside, Treasurer Scott Morrison also had a call with Reserve Bank governor Philip Lowe that reversed his position

► FULL REPORT PAGE 9

REVEALED

TOP KIDS GO BUSH

ANNA CALDWELL

HIGH-achieving students will be given free university degrees and a \$7500-a-year payment in exchange for spending three years teaching in the NSW bush.

Sixty free degrees will be offered from next year as part of a radical push to get better teachers in rural areas as the government fights to maintain a political grip on crucial country electorates

► FULL REPORT PAGE 3

REVEALED

WHAT A SHOCKER

ANNA CALDWELL

ONE of the state's power fairs has sparked uproar after it was revealed he has pocketed a whopping \$117,000 pay rise as rocketing bills leave families struggling

to keep the lights on. Essential Energy chief executive John Cleland has taken home \$882,076 even as his own company described its patchy service reliability as "unfavourable"

► FULL REPORT PAGE 7

04 STAGE DRAMA



The Old Vic Theatre on The Cut in London.

HR overhaul to lift curtain on bad deeds

EXCLUSIVE
JONATHAN MORGAN

1 THE Sydney Theatre Company has revised its HR policies in a bid to ensure it maintains a safe environment for staff.

2 Executive director of the STC Patrick McIntyre (below) said it was important actors feel safe to speak up and believes maintenance of confidentiality to be key.

3 "We have 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," Mr McIntyre said.

4 Mr McIntyre's comments come after the STC confirmed it had received a complaint by a staff member over allegations of "inappropriate behaviour" by Oscar winner Geoffrey Rush. Rush vehemently denies any wrongdoing.

5 Mr McIntyre stressed that he and the executive team at the theatre company have a duty of care to ensure all staff feel safe and respected in the workplace.

6 "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," he said. More broadly, Mr McIntyre suggested it is a wideranging issue for the industry to address in the wake of the Harvey Weinstein scandal.

"Many still view that speaking up comes with adverse repercussions," he explained.

"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."

The HR overhaul follows preliminary findings of an Actors Equity survey aimed at theatre actors which found that 40 per cent of respondents claimed they had directly experienced sexual harassment, bullying or misconduct.

Oscar winner Kevin Spacey became embroiled in the ongoing controversy rocking the entertainment industry with numerous victims coming forward — including 20 complaints from his time as artistic director at London's Old Vic Theatre between 2004 and 2015.

A law firm's investigation into allegations about Spacey stated "Despite having the appropriate escalation processes in place, it was claimed that those affected felt unable to raise concerns and that Spacey operated without sufficient accountability."



Meyne Raoul Wyatt

3 hrs • Wednesday • 12

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!!!



Rush denies claim of 'inappropriate behaviour'
GEOFFREY Rush strongly denies a claim of "inappropriate behaviour".

15 comments

Like

Comment

Meyne Raoul Wyatt

MEYNE WYATT

13 Nominated for 2014 Logie for Most Outstanding Newcomer for Redfern Now

14 Appeared on Neighbours from 2014 to 2016 as Nate Kinski and became the first Indigenous actor to be part of the main cast since the soapie began

15 Appeared in STC production of King Lear alongside Rush from 2015 to 2016



Brandon McClelland
It wasn't a misunderstanding. It wasn't a joke.

BRANDON MCCLELLAND

16 Appeared in 2014 television miniseries ANGAC Girls as Pat Dooly

17 He also played Robert Donnelly in Love Child from 2014-2015

18 Appeared in Sydney Theatre Company productions such as A Midsummer Night's Dream in 2016



Sydney Theatre Company actors support

EXCLUSIVE
JONATHAN MORGAN

1 TWO actors who work with the Sydney Theatre Company yesterday publicly threw their support behind the actress who has accused Oscar-winner Geoffrey Rush of touching her inappropriately during the stage production of King Lear.

20 It comes as Rush — one of the country's most successful actors — was yesterday continuing to vehemently deny claims he inappropriately

touched a cast member of the local production of the classic William Shakespeare play.

21 Rising young actor Meyne Raoul Wyatt, who appeared in King Lear, said he believed his castmate's version of events.

22 "I was in the show," Wyatt, who has also starred in Neighbours and Redfern Now, wrote on Facebook yesterday after The Daily Telegraph broke the story.

23 "I believe (the person who) 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!!!"

24 And Brandon McClelland, who has worked alongside the woman at the centre of the alleged complaint and is in the company's current production of Three Sisters, urged others on Twitter to believe the actress.

25 "It wasn't a misunderstanding. It wasn't a joke," he posted.

26 McClelland's tweet was

also reported by several other Sydney theatre actors as the story dominated social media yesterday.

27 The STC production of King Lear ran from November 2015 to January 2016.

28 The 66-year-old acting legend yesterday said he "immediately phoned and spoke to senior management" at the STC when he became aware of rumours there was a complaint.

29 But he said the STC refused to give him any details.

30 "They refused to illumi-

Statement for acting veteran blasts STC 'smear'

31 MANAGEMENT for Oscar-winning actor Geoffrey Rush issued a comprehensive statement yesterday denying allegations of "inappropriate behaviour" during the 66-year-old veteran actor's time with the Sydney Theatre Company's production of King Lear.

32 The statement, following The Daily Telegraph's exclusive report yesterday, took aim at the Sydney Theatre Company, alleging that it

had "chosen to smear his name and unjustifiably damage his reputation". It also claimed that "His treatment of fellow colleagues and everyone he has worked with is always conducted with respect and the utmost propriety."

33 "The allegation made against Mr Rush comes from a statement provided by the Sydney Theatre Company," it reads.

35 The widely released document

says it is understood that the STC's own statement concerns a complaint made to it more than 21 months ago.

36 "To date, Mr Rush or any of his representatives have not received any representations from the STC or the complainant."

37 "In other words, there has been no provision of any details, circumstances, allegations or events that can be meaningfully responded to."

38 It goes on to quote Mr Rush:

"The moment I became aware of rumours of a complaint I immediately phoned and spoke to senior management at the Sydney Theatre Company asking for clarification about the details of the statement."

39 "They refused to illuminate me with the details."

40 The statement then says Mr Rush can only reiterate that he denies being involved in any "inappropriate behaviour" whatsoever.



Geoffrey Rush in King Lear rehearsal.

DEFIANCE

STATEMENT FROM GEOFFREY RUSH

"The moment I became aware of rumours of a complaint I immediately phoned and spoke to senior management at the Sydney Theatre Company asking for clarification about the details of the statement. 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."

STC STATEMENT

Sydney Theatre Company was asked by a News Corp 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.

Geoffrey Rush in the lead up to the Sydney Theatre Company's production of *King Lear* in late 2015.

complainant's claims against megastar Rush

- 3 "ate me," he said through a statement.
- 4 "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."
- 5 "However, no response was forthcoming."
- 6 Rush's lawyer Nicholas Pullen said it was a "great disappointment" that the STC had "chosen to smear his name and unjustifiably damage his reputation."
- 7 "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," he said.
- 8 The actor's lawyer, a partner to legal firm HWL Ebsworth, said Rush "abhorred any form of maltreatment of any person."
- 9 "Until there is the decency

afforded to Mr Rush of what the 'inappropriate behaviour' actually is then there is nothing more that can be said at this stage," Mr Pullen said.

Two sources who spoke to The Daily Telegraph yesterday said Rush was made aware who made the claims in a conversation with executive director Patrick McIntyre three weeks ago.

The sources said they believed the woman's claims. And they said the STC would not be working with

Rush again. That's despite the veteran actor having worked with the company both acting and directing productions such as *Uncle Vanya*, *Oleanna*, *The Importance Of Being Ernest* and *The Government Inspector*.

A new statement from the STC yesterday said that it had responded "truthfully" after being approached by The Daily Telegraph earlier this week.

It also clarified the anonymous nature of the alleged complainant, who had "re-

quested the matter be dealt with confidentially, and did not want Mr Rush sidelined."

"STC complied, acting in the interest of the complainant's health and welfare," Mr McIntyre last night said. The STC had "reviewed policies and procedures" including "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."

Daily Telegraph



How we broke the story yesterday.

THEATRE'S FIRM STATE OF PLAY

- 16 THE Sydney Theatre Company yesterday confirmed it responded "truthfully" when asked if it had received a complaint alleging inappropriate behaviour by leading Australian actor Geoffrey Rush.
- 17 In an updated statement, the STC said 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."
- 18 It also clarified the alleged complainant had "requested the matter be dealt with confidentially, and did not want Mr Rush notified or involved" in any inquiry.
- 19 "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"



Rush in *Pirates of the Caribbean*.

Execs' exile for star

- 20 EXECUTIVES at the Sydney Theatre Company yesterday came forward in support of the woman at the heart of the Geoffrey Rush scandal, saying they wholeheartedly believe her claims.
- 21 They also said due to the seriousness of the allegations, the award-winning theatre company would not work with the *Pirates of the Caribbean* star again. "There is no chance," the source told The Daily Telegraph. "How could we work with him again? That question doesn't even need an answer."
- 22 The executive added "Another actor backed what she said... we've taken this very seriously."
- 23 The source also defended not naming the woman, saying "It is not our story to tell."
- 24 A high-profile actor, who did not want to be named, came forward to support the woman.

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/02/2018 9:21:24 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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: 1/02/2018 9:21:26 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.



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 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 do 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 do 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.
18. In or about early January 2016, in the final week of the Production, the Applicant touched the Complainant in a manner that made the Complainant feel uncomfortable.
19. The touch referred to in the preceding particular was not necessary for the purpose of the performance of the Production.
20. The Complainant confronted the Applicant and asked the Applicant to stop the conduct referred to in paragraph 18 above.
21. Notwithstanding the conversation referred to in paragraph 20, the Applicant repeated the conduct referred to in paragraph 18 above on a number of occasions during the final week of the Production.
22. On around 9 January 2016, the Applicant and the Complainant, amongst others, attended an after party for the Production at Walsh Bay Kitchen restaurant.
23. During the after party the Applicant entered the female bathroom and stood outside a cubicle that was occupied by the Complainant.
24. The conduct referred to in the preceding paragraphs was inappropriate in a workplace.
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.
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 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;
 - (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;
- 36.7 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, 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 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;
- (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 Brendan McClelland had published a Tweet which stated "It wasn't a misunderstanding. It wasn't a joke";
- (m) that Brendan McClelland had worked alongside the Complainant;
- (n) that Brendan McClelland was at the time working on 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 to be true;

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;

36.11 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;

36.13 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: 1 February 2018



Signed by Robert James Todd
Lawyer for the Respondents

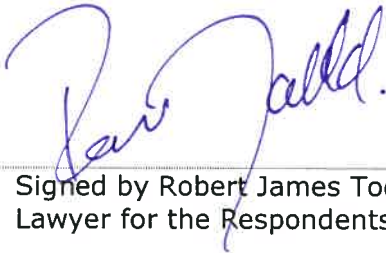
This pleading was prepared by Robert James Todd and Nicholas James Perkins, lawyers, and settled by Tom Blackburn SC and Lyndelle Barnett of counsel.

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: 1 February 2018



Signed by Robert James Todd
Lawyer for the Respondents

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NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 19/02/2018 8:00:02 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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 13 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);

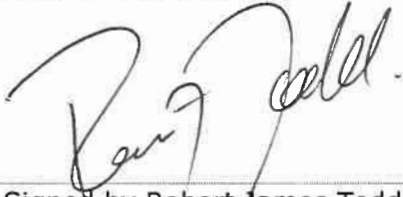
- (c) a statement made by the Applicant the previous day in relation to the allegations referred to in the article (Schedule C, page 4, paragraphs 28-30 and page 5, paragraphs 1 and 3-5);
- (d) a statement made by the Applicant's solicitor on behalf of the Applicant in relation to the allegations referred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

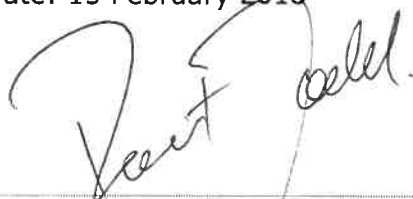
This pleading was prepared by Robert James Todd and Nicholas James Perkins, lawyers, and settled by Tom Blackburn SC and Lyndelle Barnett of counsel.

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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NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 28/03/2018 4:37:41 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Reply - Form 34 - Rule 16.33
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: 28/03/2018 4:37:47 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.



Form 34
Rule 16.33

REPLY

NSD2179/2017

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

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED

First Respondent

JONATHON MORAN

Second Respondent

The Applicant makes the following assertions:

1. Save and except insofar as it contains admissions, the Applicant joins issue with the Amended Defence filed on 20 February 2018 (the "**Defence**").
2. In answer to paragraph 13(b) of the Defence and the particulars appearing in paragraphs 29 to 36.15, the Applicant says that the Respondents were actuated by malice within the meaning of s.30(4) of the *Defamation Act* 2005 and at common law, in that they published the matters complained of predominantly for the improper motive of harming the Applicant.

Particulars

- (a) The Respondents had no evidence, at the time of publication of the matters complained of, that the Applicant had engaged in any misconduct of a sexual nature during the production of King Lear.
- (b) The Respondents had not received, at the time of publication of the matters complained of, any information from any source who had direct knowledge of any misconduct on the part of the Applicant of a sexual nature during the production of King Lear.

- (c) Prior to the publication of the first and second matters complained of, the Respondents had no information that the Applicant had actually engaged in inappropriate conduct, only that it had been alleged that he had done so.
- (d) The Respondents did not speak to the Complainant prior to publishing the matters complained of in order to check the accuracy of the allegations of sexual misconduct that they intended to make against the Applicant.
- (e) The Respondents allege, in paragraph 29 of the Defence, that the public interest in the matters complained of was as a result of "*widespread reporting*" of "*allegations of sexual misconduct, bullying and harassment in the entertainment industry*" and they then name a number of celebrities accused of misconduct of a sexual nature and allege that the matters complained of were published in that background context.
- (f) The Respondents directly accused the Applicant of misconduct of a sexual nature by calling him "*King Leer*" on the front page on 30 November 2017 and by making imputations 4(b), 5(a), 5(b), 7(a), 7(b), 7(c), 8(a), 8(b), 8(c), 10(a), 10(b), 10(c), 10(e), 11(a), 11(b), 11(c) and 11(e) pleaded in the Statement of Claim.
- (g) Despite the statements made in Court on behalf of the Respondents on 8 February 2018 (that "*the articles did not make any allegation that Mr Rush had engaged in inappropriate behaviour of a sexual nature*" and, further, that "[the articles] *don't make any allegation of sexual impropriety*"), the First Respondent nonetheless reported the Court proceedings in *The Australian* on 8 February 2018 under the headline "*Geoffrey Rush secures interim order to gag The Daily Telegraph's evidence*", as follows: "*Mr Rush sued Nationwide News, publisher of The Daily Telegraph, in December after it published a story detailing an investigation into the actor by the Sydney Theatre Company over alleged sexual misconduct...*".

- (h) The assertions in Court, referred to at paragraph (2)(g), above, that the allegations against the Applicant in the matters complained of were not of a sexual nature, were false.
- (i) The Respondents engaged in a campaign against the Applicant in which they have repeatedly made allegations of misconduct of a sexual nature - namely:
 - (i) First and second matters complained of published on 30 November 2017;
 - (ii) Third matter complained of published on 1 December 2017;
 - (iii) Article in the *Sunday Telegraph* published on 3 December 2017, entitled "*Rush quits arts academy*", in which it was alleged that:
 - (A) The accusations against the Applicant were said to be "*accusations of repeatedly inappropriately touching a cast member during The Sydney Theatre Company's stage production of King Lear, which ran from November 2015 to January 2016*"; and
 - (B) "*It is understood the alleged incidents at times occurred in full view of the audience in the Roslyn Packer Theatre*";
 - (iv) Article in the *Daily Telegraph* published on 4 December 2017, entitled "*Ugly Open Secret Is Centre Stage*", in which the Applicant is named, and a photograph of the Applicant is published, alongside comments made by actor Yael Stone in relation to the #metoo movement, including the following comments: "*The scale of this unspoken culture, and the abuse of power manifested in sexual aggression, shouldn't really come as a surprise...Now we are discovering that this culture also exists in Australia, the truth is hitting home, and it hurts*";
 - (v) Article published on the *Daily Telegraph* website on 5 December 2017, authored by Karlie Rutherford and Kris Crane, entitled

"AACTA Awards: Stars of stage and screen urge industry to tackle cancer of sexual harassment", in which:

- (A) A prominent photograph of the Applicant was published immediately above the following words: *"This year's event has been overshadowed by a series of sexual harassment and bullying allegations levelled at some of entertainment's biggest stars following Hollywood's earth-shaking Harvey Weinstein scandal"*;
 - (B) A paragraph referring to the Applicant having been *"accused of 'inappropriate behaviour' towards a female co-star"* was published immediately above the following words: *"TV presenter Don Burke is also facing allegations he denies and dozens of other well-known figures are expected to be accused of misconduct"*;
 - (C) The article concluded with the following words: *"A poll released last month by WIFT revealed 58 per cent of respondents have experienced sexual harassment in the workplace"*;
- (vi) Article in the *Daily Telegraph* published on 5 December 2017, authored by Karlie Rutherford and Kris Crane, entitled *"Stars of stage and screen urge industry to tackle cancer of harassment"*, which is in the same terms, or substantially the same terms, as the article referred to at paragraph 2(i)(v), above;
 - (vii) Article in the *Daily Telegraph* published on 5 December 2017, authored by Jack Houghton, entitled *"Rush 'just playful: Director"*, which appears immediately above another article entitled *"Spacey was sex suspect"*;
 - (viii) Article in the *Daily Telegraph* published on 5 December 2017, authored by Alison Stephenson and Kris Crane, entitled *"Brave women win praise at glam awards"*, which:

- (A) Commences with the following words: *"Women speaking out against abuse and harassment in the entertainment industry were last night hailed as 'pioneers', while two more big names revealed they had also been victims";*
- (B) Refers to the Applicant in the same paragraph as Don Burke, as follows: *"The industry is reeling after allegations against former AACTA president Geoffrey Rush, who stood down after being accused of 'inappropriate behaviour' towards a female co-star during a production of King Lear - a claim he strongly denies. And TV presenter Don Burke is facing multiple allegations, which he also denies";*
- (ix) Article in *The Australian* published on 9 December 2017, authored by Rosemary Neill, entitled *"Celluloid Ceiling"*, which includes the following words: *"Now, however, the tsunami of sexual harassment, assault and inappropriate behaviour allegations is engulfing some of the arts and screen industry's most powerful men, including Australia's Don Burke and Geoffrey Rush, who have both firmly denied the claims of misconduct";*
- (x) Article in *The Australian* published on 8 February 2018, authored by Dana McCauley, entitled *"Geoffrey Rush secures interim order to gag The Daily Telegraph's evidence"*, which includes the following words: *"Mr Rush sued Nationwide News, publisher of The Daily Telegraph, in December after it published a story detailing an investigation into the actor by the Sydney Theatre Company over alleged sexual misconduct...";*
- (xi) Article in the *Daily Telegraph* in hardcopy (on the front page and on pages 6 and 7) and online published on 20 February 2018, entitled *"STOP DOING IT"*, which purported to be a Court report of the Applicant's strike out application that was heard on 19 February 2018 but was misleading and sensational and reported allegations in the Amended Defence as though they were fact;

- (xii) Article in *The Australian* in hardcopy (on the front page and on page 2) and online published on 20 February 2018, entitled "*Actress at heart of case against Rush revealed*", which purported to be a Court report of the Applicant's strike out application that was heard on 19 February 2018 but was misleading and sensational and reported allegations in the Amended Defence as though they were fact;
- (xiii) Article in *The Courier Mail* in hardcopy (on page 9) and online published on 20 February 2018, entitled "'STOP DOING IT' - Actress tells King Lear to 'f---off' in toilet, court told", which purported to be a Court report of the Applicant's strike out application that was heard on 19 February 2018 but was misleading and sensational and reported allegations in the Amended Defence as though they were fact; and
- (xiv) Article in *The Herald Sun* in hardcopy (on page 5) and online published on 20 February 2018, entitled "*Court hears that actress repeatedly asked Geoffrey Rush to...STOP DOING IT*", which purported to be a Court report of the Applicant's strike out application that was heard on 19 February 2018 but was misleading and sensational and reported allegations in the Amended Defence as though they were fact.
- (xv) Article in *The Australian* published on 19 March 2018, authored by Stephen Brook, entitled "*The Diary*", which includes the following words:

[T]he Telegraph's amended defence documents, which were at one point suppressed, include allegations Rush inappropriately touched Eryn Jean Norvill while they were on stage in a Sydney Theatre Company production of King Lear. Rush strenuously denies the allegations. The newspaper's particulars of qualified privilege claim Norvill complained to the STC that Rush 'had touched her genitals during the production of King Lear without her

consent'. Rush denies this claim and the actor said it had not been raised with him by the complaint or the STC.

- (j) The First Respondent published the matters complained of despite an email on or about 29 November 2017 from the Deputy Editor of the *Herald Sun*, a newspaper owned by its related entity and which shares content with the First Respondent, that warned against publication of the matters complained of, in the following terms:

IMPORTANT NOTICE FOR ALL STAFF

Do not retweet or post any articles regarding GEOFFREY RUSH.

- (k) The First Respondent also published the matters complained of despite a text message on or about 29 November 2017 from a *Herald Sun* staffer, which warned that publication of the matters complained of would be "*highly libellous*", and which was in the following terms:

...please under no circumstances retweet/share/like/report any stories about Geoffrey Rush on social media etc until further notice. The Tele are running with a yarn which is highly libellous.

- (l) The first time that the Respondents approached the Applicant for comment, in relation to the first and second matters complained of, was by an email from the Second Respondent at 5:06pm on 29 November 2017 to the Applicant's agent, the evening before the publication of the first and second matters complained of, and in that approach the Respondents asserted that the investigation was "*part of a broader investigation into a number of high profile people in the entertainment industry in the wake of the Don Burke scandal, and previously the Harvey Weinstein allegations.*"

- (m) The Respondents did not put to the Applicant, prior to the publication of the first and second matters complained of, that they intended to refer to him as "*King Leer*", or as a person who had engaged in "*Bard behaviour*", or that they intended to publish the first and second matters complained of which made the imputations pleaded in paragraphs 4, 5, 7 and 8 of the Statement of Claim despite being in a position to read the

entire article, including the headline, to a representative of the Sydney Theatre Company prior to publication.

- (n) The Respondents published, in the matters complained of, the content of an email from the solicitor for the Applicant, Nicholas Pullen, dated 29 November 2017, which was marked "*NOT FOR PUBLICATION*".
- (o) The first time that the Respondents approached the Applicant for a comment about the third matter complained of was at 6:20pm on 30 November 2017 by an email from the Second Respondent to the Applicant's agent, the evening before the third matter complained of was published on the front page.
- (p) The First Respondent has maintained the republication of the second and third matters complained of on its websites, despite the filing of its Defence on 1 February 2018 and despite serving an Amended Defence on 15 February 2018 in which it did not allege that any of the imputations of sexual misconduct were substantially true.
- (q) The First Respondent has maintained the accuracy generally of the content of the second and third matters complained of in an article in the *Daily Telegraph* published on 9 December 2017, authored by Matthew Benns, entitled "*Hurt actor takes action*", in which it is stated:

The Daily Telegraph stands by its reporting of the complaint made against Rush during his last stint at the STC for the production of King Lear.

Editor Christopher Dore said the newspaper would defend its accurate reporting in court.

'The Daily Telegraph accurately reported the Sydney Theatre Company received a complaint alleging that Mr Geoffrey Rush had engaged in appropriate behaviour', Mr Dore said. 'We will defend our position in court'.

- (r) The First Respondent has continued to maintain that its conduct, in publishing the first, second and third matters complained of, was reasonable, including by:
 - (i) On 9 December 2017, making the comments referred to at paragraph (2)(q), above;
 - (ii) On 1 February 2018, filing a Defence which included, at paragraph 36, an assertion that "[t]he Respondents' conduct in publishing the matters complained of was reasonable in the circumstances";
 - (iii) On 15 February 2018, serving an Amended Defence (which was subsequently filed on 20 February 2018) which repeated paragraph 36 of the previous iteration of the Defence (as referred to at paragraph (2)(r)(ii), above);
 - (iv) On 20 February 2018, issuing a statement from Chris Dore, Editor, which included that *"The Daily Telegraph considers that its conduct in publishing the articles...was reasonable"*.
- (s) Even after the decision of Justice Wigney, handed down on 20 March 2018, the Respondents have continued to repeat the allegations which were struck out by Justice Wigney, namely:
 - (i) An article published online on *"news.com.au"*, on 20 March 2018, entitled *"Daily Telegraph's defamation defence removed in Geoffrey Rush case"*, in which it was stated, among other things:
 - (A) That the matters complained of alleged that the Applicant *"behaved inappropriately to a colleague during a Sydney Theatre Company production of King Lear in 2015"*;

- (B) That the Respondents' Defence "*alleges Rush touched co-star Eryn Jean Norvill in a way that made her feel uncomfortable on five separate occasions during the final week of the production*" - with the use of the present tense "*alleges*" implying that the allegation had survived the Applicant's strike-out applications and was still included as part of the Respondents' Defence;
 - (C) That "*Rush is also accused of following his co-star into the women's toilet and standing outside her cubicle until she told him to 'f*** off' at a party to celebrate the end of the production*" - with the use of the present tense "*is...accused*" implying that the allegation had survived the Applicant's strike-out applications and was still included as part of the Respondents' Defence; and
 - (D) That "*The Telegraph can no longer seek to prove it substantially true that Rush engaged in scandalously inappropriate behaviour*".
- (ii) An article published on page 12 of *The Daily Telegraph*, on 21 March 2018, entitled "*Rush case to head for trial*", in which it was stated, among other things, that: "*The Telegraph was seeking to prove that Mr Rush, 66, touched his co-star Eryn Jean Norvill in an inappropriate manner while he carried her on stage as she simulated the lifeless body of King Lear's daughter Cordelia*".
 - (iii) An article published in *The Australian*, on 21 March 2018, entitled "*Rush defamation case: truth defence rejected*", in which it was stated, among other things:
 - (A) That the Respondents' Defence "*claimed the 'inappropriate' touching occurred during the production's final five nights, when Rush carried her lifeless body across the stage*"; and

- (B) That the Respondents' Defence *"also claimed that at a closing-night cast party, Rush entered the women's toilets and 'stood outside a cubicle' occupied by Norvill. The actress told him to 'f..k off', the document stated, and he left"*.

Date: 28 March 2018



Signed by Nicholas Pullen
Solicitor for the Applicant

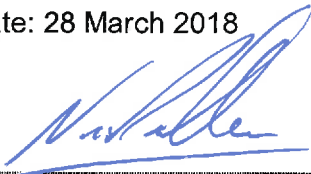
This pleading was prepared by Sue Chrysanthou and settled by Richard McHugh SC.

Certificate of lawyer

I Nicholas Pullen certify to the Court that, in relation to the Reply filed on behalf of the Applicant, 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: 28 March 2018



Signed by Nicholas Pullen
Lawyer for the Applicant

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 23/04/2018 3:23:30 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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: 24/04/2018 2:03:47 PM AEST

Registrar

Important Information

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

The 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.



Further 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 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 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 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.~~
 [Struck out by order of the Court on 20 March 2018]

(b) Qualified privilege – section 30 of the *Defamation Act*

- (i) Each of the matters complained of were published on an occasion of qualified privilege pursuant to section 30 of the *Defamation Act*.

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

Background context to the publication of the matters complained of

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.

Subjects of the matters complained of

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 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).

Interest and apparent interest - section 30(1)(a)

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.

Publication in the course of giving information of the Subjects - section 30(1)(b)

35. The matters complained of were published to recipients of the matters complained of in the course of giving them information on the Subjects.

Reasonableness - section 30(1)(c)

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;

Section 30(3)(a)

- 36.2 the matters complained of related to the Subjects;

Section 30(3)(b)

- 36.3 the matters complained of related to the alleged public activities of the Applicant whilst performing in the theatre;

Section 30(3)(e)

36.4 it was in the public interest in the circumstances for the matters published to be published expeditiously;

Section 30(3)(f)

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;

Information and sources - section 30(3)(g))

36.6 prior to publishing the first and second matters complained of, the Respondents had the following information relevant to the subject matter of the matters complained of:

- (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;
- (f1) that contained in the response from the Applicant's lawyers, HWL Ebsworth;

- (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;
- (h) background information in relation to the Applicant comprising:
- (i) 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;
 - (ii) the Applicant was nominated an Oscar:
 - (A) in 1998 for in the Best Supporting Actor category for his role in Shakespeare in Love;
 - (B) in 2000 for in the Best Actor category for his role in Quills;
 - (C) in 2011 for in the Best Actor category for his role in The King's Speech;
 - (iii) 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;
 - (iv) the Applicant was 66 years old and a married father of two;
 - (v) the Applicant is a Melbourne resident;
 - (vi) the Applicant was the President of the Australian Academy of Cinema Television and Arts;
 - (vii) the Applicant was expected to attend the annual AACTA Awards at The Star Event Centre the following week;
 - (viii) 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;
 - (i) that the local production of King Lear ran from November 2015 to January 2016 at the Roslyn Packer Theatre, and there were several months of rehearsals;

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

- (a) As to the information set out in sub-paragraph 36.6(a), actress Sarah Monahan;
- (b) As to the information set out in sub-paragraphs 36.6(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 36.6(c), a confidential source connected with the Sydney Theatre Company (**Confidential Source 1**);
- (d) As to the information set out in sub-paragraphs 36.6(f), f(1) and (g), the Applicant, through his solicitor Nicholas Pullen of HWL Ebsworth;
- (e) As to the information set out in sub-paragraphs 36.6(h), (i), (v) and (vi), the general and background knowledge of the Second Respondent as a journalist reporting on the entertainment industry;
- (f) As to the information set out in sub-paragraphs 36.6(h)(vii), the general and background knowledge of the Second Respondent as he was scheduled to host an event at the AACTA Awards;
- (f) As to the information set out in sub-paragraphs 36.6(h)(ii), (iii) and (iv), searches conducted by the Second Respondent of the First Respondent's news archive service, CHP, and searches conducted by the Second Respondent of the Internet including other major news websites;
- (g) As to the information set out in sub-paragraph 36.6(h)(viii), Katherine Stevenson of the Sydney Theatre Company and searches of the Internet conducted by the Second Respondent;
- (h) As to the information set out in sub-paragraph 36.6(i), the information page relating to the Production that was at the time available on the website of the Sydney Theatre Company.

36.6B the information set out in sub-paragraphs 36.6(a1) to (i) was included in the second matter complained of.

36.6C the information set out in sub-paragraph 36.6(a) was not included in the second matter complained of.

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

- (a) that set out in paragraph 36.6 ~~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 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 McClelland had published a Tweet which stated "It wasn't a misunderstanding. It wasn't a joke";
- (m) that Brandon McClelland had worked alongside the Complainant;
- (n) that Brandon McClelland was at the time working on the Sydney Theatre Company's production of The Three Sisters;
- (o) that the Applicant had been told by Mr McIntyre the identity of the Complainant;
- (p) that the STC stood by the Complainant's claims;
- (q) the background information about Meyne Wyatt in paragraphs 13 to 15 of Schedule C;
- (r) the background information about Brandon McClelland in paragraphs 16 to 18 of Schedule C;
- (s) that Brandon McClelland's tweet was reposted by several other Sydney actors;
- (t) the statement from the Applicant's management referred to in paragraphs 31 to 41 of Schedule C;
- (u) the statements made by Patrick McIntyre in paragraphs 1 to 8 of the second page of Schedule C;
- (v) the preliminary findings of an Actors Equity survey referred to in paragraph 9 of the second page of Schedule C;
- (w) the matters relating to Kevin Spacey in paragraphs 10 and 11 of the second page of Schedule C;
- (x) a statement issued by the STC on 30 November 2017 which contained the information set out at paragraphs 13, 14 and 15 of the third page of Schedule C;
- (y) that executives at the STC said that they wholeheartedly believed the claims of the Complainant and one of them said the words set out at paragraphs 21 to 23 of the third page of Schedule C;
- (z) that a high-profile actor came forward to support the complainant.

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

- (a) As to the information set out in sub-paragraphs 36.7(b), (c), (d), (f), and (i), (p) and (y), a confidential source connected with the Sydney Theatre Company (**Confidential Source 2**);
- (b) As to the information set out in sub-paragraphs 36.7(c), (h) and (i), (o), (p), (u), (x) and (y), ~~a confidential source connected with the Sydney Theatre Company (Confidential Source 3) executive director, Patrick McIntyre;~~
- (c) As to the information set out in sub-paragraph 36.7(c) and (p), Confidential Source 12;
- (d) As to the information set out in sub-paragraphs 36.7(e) and (f), a confidential source connected with the Sydney Theatre Company (**Confidential Source 34**);
- (e) As to the information set out in sub-paragraphs 36.7(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 36.7(j) and (z), the Facebook page of Meyne Wyatt;
- (h) As to the information set out in sub-paragraph 36.7(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 36.7(l) and (s), the Twitter feed of Brandon McClelland and others reposting his tweets;
- (j) As to the information set out in sub-paragraphs 36.7(m) and (n), information available on the internet in relation to the Sydney Theatre Company's production of The Three Sisters;
- (k) As to the information set out in sub-paragraphs 36.7(q) and (r) the information that was available on the internet through searches conducted by the Second Respondent;

- (l) As to the information set out in sub-paragraph 36.7(t), the Applicant, through his agent Ann-Churchill-Brown of Shanahan Management;
- (m) As to the information set out in sub-paragraph 36.7(v), searches conducted of the First Respondent's news archive service, CHP, and searches conducted by the Second Respondent of the Internet including other major news websites;
- (n) As to the information set out in sub-paragraph (w), the background knowledge of the Second Respondent, searches conducted by the Second Respondent of the First Respondent's news archive service, CHP, and searches conducted by the Second Respondent of the Internet including other major news websites;

36.7B The information set out in sub-paragraphs 36.7(a), (c), (f) and (h) to (z) was included in the third matter complained of.

36.7C The information set out in sub-paragraph 36.7(b), (d), (e), (e1) and (g) was not included in the third matter complained of.

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;

Belief in truth and accuracy of the publication - (section 30(3)(j))

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;~~

Steps taken to verify the information in the matters complained of - section 30(3)(i)

36.10A prior to publishing the second matter complained the Second Respondent read the content of the second matter 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;

Section 30(3)(d)

36.11A the Respondents were reasonably satisfied as to the fairness of the language and the manner in which the matters complained of were composed; [moved from 36.10]

36.11B the Respondents made clear in each matter complained of that the allegations referred to in each matter complained of were unproven; [moved from 36.15]

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;

Contact with the Applicant and publishing his side of the story - section 30(3)(h)

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 (b) to (c) above comprised.

Date: 23rd April 2018



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: 23rd April 2018



Signed by Robert James Todd
Lawyer for the Respondents

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22 May 2018

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Dear Sir,

**Geoffrey Roy Rush v Nationwide News Pty Ltd & Anor
Federal Court of Australia Proceedings: NSD2179/2017**

1. We refer to our client's claim for "special damages" at paragraphs 12(l) to (o) of the Statement of Claim.
2. We refer also to paragraph 23 of our letter of 16 January 2018, in which we wrote:

We will write to you separately about our client's claim for special damages. We are not in a position to provide those particulars at this time.

3. We now provide further and better particulars in that regard.
4. The Applicant has over the last several decades, as one of Australia's most prominent and well-respected actors, received a substantial income from his appearances in films, television shows, and theatre. That income has been significantly reduced - and, the Applicant fears, will continue indefinitely to be reduced - as a result of the publication of the matters complained of.
5. As a result of the publication of the matters complained of, the Applicant has suffered:
 - (a) anxiety, embarrassment, hurt, and the other "*tremendous emotional and social hardship*" set out in the affidavit of Nicholas Pullen sworn on 9 April 2018;
 - (b) ongoing injury to his reputation, including his reputation as an actor in Australia and worldwide;
 - (c) a loss in his earning capacity;
 - (d) a general loss of business and custom.

Adelaide
Brisbane
Canberra
Darwin
Hobart
Melbourne
Norwest
Perth
Sydney

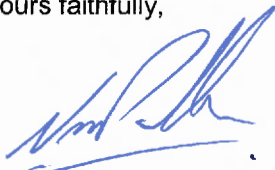
6. As a direct result of the conduct of the Respondents, he has not done any work since publication of the matters complained of.
7. The publication of the matters complained of has therefore inflicted significant (and ongoing) economic loss on the Applicant.
8. For example, the Applicant had (prior to publication of the matters complained of) been offered work doing a voice-over in an Australian documentary, for which he was to be paid approximately \$30,000.00. That offer was revoked in April 2018. The explanation provided on behalf of the film-makers included:

Our distributors for the film contacted us the other day and say that they think that Geoffrey situation, while unresolved, is currently an issue for them. Its very troubling...All news is global as we know and it has come to our distributors' attention and they have reacted.

[sic]

9. Our client intends, in support of his claim for special damages, to serve an expert report from a forensic accountant. We expect it to be served prior to 4.00pm on 15 June 2018, pursuant to the orders made by Justice Wigney on 20 April 2018 in relation to evidence.
10. We anticipate that the documents upon which that report will be based will be provided to your clients in response to category 1 of your clients' categories of discovery. The verified list of documents will be served in accordance with the Court orders on 25 May 2018. If more material becomes available going to the issue of damages, we will provide ongoing discovery as and when that material comes to light.

Yours faithfully,



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NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 3/07/2018 10:51:42 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Reply - Form 34 - Rule 16.33
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, which appears to read "Warwick Soden".

Dated: 3/07/2018 10:51:46 AM AEST

Registrar

Important Information

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

The 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.



Form 34
Rule 16.33

AMENDED REPLY

NSD2179/2017

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

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED

First Respondent

JONATHON MORAN

Second Respondent

The Applicant makes the following assertions:

1. Save and except insofar as it contains admissions, the Applicant joins issue with the Further Amended Defence filed on ~~20 February~~ 23 April 2018 (the "**Defence**").
2. In answer to paragraph 13(b) of the Defence and the particulars appearing in paragraphs 29 to ~~36.14~~ 36.15, the Applicant says that the Respondents were actuated by malice within the meaning of s.30(4) of the *Defamation Act* 2005 and at common law, in that they published the matters complained of predominantly for the improper motive of harming the Applicant.

Particulars

- (a) The Respondents had no evidence, at the time of publication of the matters complained of, that the Applicant had engaged in any misconduct of a sexual nature during the production of *King Lear*.
- (b) The Respondents had not received, at the time of publication of the matters complained of, any information from any source who had direct

knowledge of any misconduct on the part of the Applicant of a sexual nature during the production of *King Lear*.

- (c) Prior to the publication of the first and second matters complained of, the Respondents had no information that the Applicant had actually engaged in inappropriate conduct, only that it had been alleged that he had done so.
- (d) The Respondents did not speak to the Complainant prior to publishing the matters complained of in order to check the accuracy of the allegations of sexual misconduct that they intended to make against the Applicant.
- (e) The Respondents allege, in paragraph 29 of the Defence, that the public interest in the matters complained of was as a result of “*widespread reporting*” of “*allegations of sexual misconduct, bullying and harassment in the entertainment industry*” and they then name a number of celebrities accused of misconduct of a sexual nature and allege that the matters complained of were published in that background context.
- (f) The Respondents directly accused the Applicant of misconduct of a sexual nature by calling him “*King Leer*” on the front page on 30 November 2017 and by making imputations 4(b), 5(a), 5(b), 7(a), 7(b), 7(c), 8(a), 8(b), 8(c), 10(a), 10(b), 10(c), 10(e), 11(a), 11(b), 11(c) and 11(e) pleaded in the Statement of Claim.
- (g) Despite the statements made in Court on behalf of the Respondents on 8 February 2018 (that “*the articles did not make any allegation that Mr Rush had engaged in inappropriate behaviour of a sexual nature*” and, further, that “[the articles] *don’t make any allegation of sexual impropriety*”), the First Respondent nonetheless reported the Court proceedings in *The Australian* on 8 February 2018 under the headline “*Geoffrey Rush secures interim order to gag The Daily Telegraph’s evidence*”, as follows: “*Mr Rush sued Nationwide News, publisher of The Daily Telegraph, in December after it published a story detailing an investigation into the actor by the Sydney Theatre Company over alleged sexual misconduct...*”.

- (h) The assertions in Court, referred to at paragraph (2)(g), above, that the allegations against the Applicant in the matters complained of were not of a sexual nature, were false.
- (i) The Respondents engaged in a campaign against the Applicant in which they have repeatedly made allegations of misconduct of a sexual nature - namely:
 - (i) First and second matters complained of published on 30 November 2017;
 - (ii) Third matter complained of published on 1 December 2017;
 - (iii) Article in the *Sunday Telegraph* published on 3 December 2017, entitled "*Rush quits arts academy*", in which it was alleged that:
 - (A) The accusations against the Applicant were said to be "*accusations of repeatedly inappropriately touching a cast member during The Sydney Theatre Company's stage production of King Lear, which ran from November 2015 to January 2016*"; and
 - (B) "*It is understood the alleged incidents at times occurred in full view of the audience in the Roslyn Packer Theatre*";
 - (iv) Article in the *Daily Telegraph* published on 4 December 2017, entitled "*Ugly Open Secret Is Centre Stage*", in which the Applicant is named, and a photograph of the Applicant is published, alongside comments made by actor Yael Stone in relation to the #metoo movement, including the following comments: "*The scale of this unspoken culture, and the abuse of power manifested in sexual aggression, shouldn't really come as a surprise...Now we are discovering that this culture also exists in Australia, the truth is hitting home, and it hurts*";
 - (v) Article published on the *Daily Telegraph* website on 5 December 2017, authored by Karlie Rutherford and Kris Crane, entitled

"AACTA Awards: Stars of stage and screen urge industry to tackle cancer of sexual harassment", in which:

- (A) A prominent photograph of the Applicant was published immediately above the following words: *"This year's event has been overshadowed by a series of sexual harassment and bullying allegations levelled at some of entertainment's biggest stars following Hollywood's earth-shaking Harvey Weinstein scandal"*;
 - (B) A paragraph referring to the Applicant having been *"accused of 'inappropriate behaviour' towards a female co-star"* was published immediately above the following words: *"TV presenter Don Burke is also facing allegations he denies and dozens of other well-known figures are expected to be accused of misconduct"*;
 - (C) The article concluded with the following words: *"A poll released last month by WIFT revealed 58 per cent of respondents have experienced sexual harassment in the workplace"*;
- (vi) Article in the *Daily Telegraph* published on 5 December 2017, authored by Karlie Rutherford and Kris Crane, entitled *"Stars of stage and screen urge industry to tackle cancer of harassment"*, which is in the same terms, or substantially the same terms, as the article referred to at paragraph 2(i)(v), above;
 - (vii) Article in the *Daily Telegraph* published on 5 December 2017, authored by Jack Houghton, entitled *"Rush 'just playful: Director"*, which appears immediately above another article entitled *"Spacey was sex suspect"*;
 - (viii) Article in the *Daily Telegraph* published on 5 December 2017, authored by Alison Stephenson and Kris Crane, entitled *"Brave women win praise at glam awards"*, which:

- (A) Commences with the following words: *"Women speaking out against abuse and harassment in the entertainment industry were last night hailed as 'pioneers', while two more big names revealed they had also been victims";*
- (B) Refers to the Applicant in the same paragraph as Don Burke, as follows: *"The industry is reeling after allegations against former AACTA president Geoffrey Rush, who stood down after being accused of 'inappropriate behaviour' towards a female co-star during a production of King Lear - a claim he strongly denies. And TV presenter Don Burke is facing multiple allegations, which he also denies";*
- (ix) Article in *The Australian* published on 9 December 2017, authored by Rosemary Neill, entitled *"Celluloid Ceiling"*, which includes the following words: *"Now, however, the tsunami of sexual harassment, assault and inappropriate behaviour allegations is engulfing some of the arts and screen industry's most powerful men, including Australia's Don Burke and Geoffrey Rush, who have both firmly denied the claims of misconduct";*
- (x) Article in *The Australian* published on 8 February 2018, authored by Dana McCauley, entitled *"Geoffrey Rush secures interim order to gag The Daily Telegraph's evidence"*, which includes the following words: *"Mr Rush sued Nationwide News, publisher of The Daily Telegraph, in December after it published a story detailing an investigation into the actor by the Sydney Theatre Company over alleged sexual misconduct...";*
- (xi) Article in the *Daily Telegraph* in hardcopy (on the front page and on pages 6 and 7) and online published on 20 February 2018, entitled *"STOP DOING IT"*, which purported to be a Court report of the Applicant's strike out application that was heard on 19 February 2018 but was misleading and sensational and reported allegations in the Amended Defence as though they were fact;

- (xii) Article in *The Australian* in hardcopy (on the front page and on page 2) and online published on 20 February 2018, entitled "*Actress at heart of case against Rush revealed*", which purported to be a Court report of the Applicant's strike out application that was heard on 19 February 2018 but was misleading and sensational and reported allegations in the Amended Defence as though they were fact;
- (xiii) Article in *The Courier Mail* in hardcopy (on page 9) and online published on 20 February 2018, entitled "'STOP DOING IT' - Actress tells King Lear to 'f---off' in toilet, court told", which purported to be a Court report of the Applicant's strike out application that was heard on 19 February 2018 but was misleading and sensational and reported allegations in the Amended Defence as though they were fact; and
- (xiv) Article in *The Herald Sun* in hardcopy (on page 5) and online published on 20 February 2018, entitled "*Court hears that actress repeatedly asked Geoffrey Rush to...STOP DOING IT*", which purported to be a Court report of the Applicant's strike out application that was heard on 19 February 2018 but was misleading and sensational and reported allegations in the Amended Defence as though they were fact.
- (xv) Article in *The Australian* published on 19 March 2018, authored by Stephen Brook, entitled "*The Diary*", which includes the following words:

[T]he Telegraph's amended defence documents, which were at one point suppressed, include allegations Rush inappropriately touched Eryn Jean Norvill while they were on stage in a Sydney Theatre Company production of King Lear. Rush strenuously denies the allegations. The newspaper's particulars of qualified privilege claim Norvill complained to the STC that Rush 'had touched her genitals during the production of King Lear without her

consent'. Rush denies this claim and the actor said it had not been raised with him by the complaint or the STC.

- (j) The First Respondent published the matters complained of despite an email on or about 29 November 2017 from the Deputy Editor of the *Herald Sun*, a newspaper owned by its related entity and which shares content with the First Respondent, that warned against publication of the matters complained of, in the following terms:

IMPORTANT NOTICE FOR ALL STAFF

Do not retweet or post any articles regarding GEOFFREY RUSH.

- (k) The First Respondent also published the matters complained of despite a text message on or about 29 November 2017 from a *Herald Sun* staffer, which warned that publication of the matters complained of would be "*highly libellous*", and which was in the following terms:

...please under no circumstances retweet/share/like/report any stories about Geoffrey Rush on social media etc until further notice. The Tele are running with a yarn which is highly libellous.

- (l) The first time that the Respondents approached the Applicant for comment, in relation to the first and second matters complained of, was by an email from the Second Respondent at 5:06pm on 29 November 2017 to the Applicant's agent, the evening before the publication of the first and second matters complained of, and in that approach the Respondents asserted that the investigation was "*part of a broader investigation into a number of high profile people in the entertainment industry in the wake of the Don Burke scandal, and previously the Harvey Weinstein allegations.*"

- (m) The Respondents did not put to the Applicant, prior to the publication of the first and second matters complained of, that they intended to refer to him as "*King Leer*", or as a person who had engaged in "*Bard behaviour*", or that they intended to publish the first and second matters complained of which made the imputations pleaded in paragraphs 4, 5, 7 and 8 of the Statement of Claim despite being in a position to read the

entire article, including the headline, to a representative of the Sydney Theatre Company prior to publication.

- (n) The Respondents published, in the matters complained of, the content of an email from the solicitor for the Applicant, Nicholas Pullen, dated 29 November 2017, which was marked "*NOT FOR PUBLICATION*".
- (o) The first time that the Respondents approached the Applicant for a comment about the third matter complained of was at 6:20pm on 30 November 2017 by an email from the Second Respondent to the Applicant's agent, the evening before the third matter complained of was published on the front page.
- (p) The First Respondent has maintained the republication of the second and third matters complained of on its websites, despite the filing of its Defence on 1 February 2018 and despite serving an Amended Defence on 15 February 2018 in which it did not allege that any of the imputations of sexual misconduct were substantially true.
- (q) The First Respondent has maintained the accuracy generally of the content of the second and third matters complained of in an article in the *Daily Telegraph* published on 9 December 2017, authored by Matthew Benns, entitled "*Hurt actor takes action*", in which it is stated:

The Daily Telegraph stands by its reporting of the complaint made against Rush during his last stint at the STC for the production of King Lear.

Editor Christopher Dore said the newspaper would defend its accurate reporting in court.

'The Daily Telegraph accurately reported the Sydney Theatre Company received a complaint alleging that Mr Geoffrey Rush had engaged in appropriate behaviour', Mr Dore said. 'We will defend our position in court'.

- (r) The First Respondent has continued to maintain that its conduct, in publishing the first, second and third matters complained of, was reasonable, including by:
 - (i) On 9 December 2017, making the comments referred to at paragraph (2)(q), above;
 - (ii) On 1 February 2018, filing a Defence which included, at paragraph 36, an assertion that "[t]he Respondents' conduct in publishing the matters complained of was reasonable in the circumstances";
 - (iii) On 15 February 2018, serving an Amended Defence (which was subsequently filed on 20 February 2018) which repeated paragraph 36 of the previous iteration of the Defence (as referred to at paragraph (2)(r)(ii), above);
 - (iv) On 20 February 2018, issuing a statement from Chris Dore, Editor, which included that *"The Daily Telegraph considers that its conduct in publishing the articles...was reasonable"*.
- (s) Even after the decision of Justice Wigney, handed down on 20 March 2018, the Respondents have continued to repeat the allegations which were struck out by Justice Wigney, namely:
 - (i) An article published online on *"news.com.au"*, on 20 March 2018, entitled *"Daily Telegraph's defamation defence removed in Geoffrey Rush case"*, in which it was stated, among other things:
 - (A) That the matters complained of alleged that the Applicant *"behaved inappropriately to a colleague during a Sydney Theatre Company production of King Lear in 2015"*;

- (B) That the Respondents' Defence "*alleges Rush touched co-star Eryn Jean Norvill in a way that made her feel uncomfortable on five separate occasions during the final week of the production*" - with the use of the present tense "*alleges*" implying that the allegation had survived the Applicant's strike-out applications and was still included as part of the Respondents' Defence;
 - (C) That "*Rush is also accused of following his co-star into the women's toilet and standing outside her cubicle until she told him to 'f*** off' at a party to celebrate the end of the production*" - with the use of the present tense "*is...accused*" implying that the allegation had survived the Applicant's strike-out applications and was still included as part of the Respondents' Defence; and
 - (D) That "*The Telegraph can no longer seek to prove it substantially true that Rush engaged in scandalously inappropriate behaviour*".
- (ii) An article published on page 12 of *The Daily Telegraph*, on 21 March 2018, entitled "*Rush case to head for trial*", in which it was stated, among other things, that: "*The Telegraph was seeking to prove that Mr Rush, 66, touched his co-star Eryn Jean Norvill in an inappropriate manner while he carried her on stage as she simulated the lifeless body of King Lear's daughter Cordelia*".
 - (iii) An article published in *The Australian*, on 21 March 2018, entitled "*Rush defamation case: truth defence rejected*", in which it was stated, among other things:
 - (A) That the Respondents' Defence "*claimed the 'inappropriate' touching occurred during the production's final five nights, when Rush carried her lifeless body across the stage*"; and

- (B) That the Respondents' Defence *"also claimed that at a closing-night cast party, Rush entered the women's toilets and 'stood outside a cubicle' occupied by Norvill. The actress told him to 'f..k off', the document stated, and he left".*
- (t) On 29 November 2017, prior to the publication of the matters complained of, the Respondents were put on notice by the Sydney Theatre Company (STC) that the alleged complainant was distressed and extremely fragile and that the STC took the view that it was the complainant's story to tell and that she should have the right to tell it at a time of her choosing and on her own terms. Notwithstanding that, the Respondents still published the matters complained of on 30 November 2017 and 1 December 2017, because they were motivated to harm the Applicant rather than to support the alleged complainant.
- (u) On 30 November 2017, prior to the publication of the third matter complained of, the Respondents received from the STC a further written statement in which it stated the complaint was made to the STC, not by the STC, and was not a conclusion of impropriety. Notwithstanding that, the Respondents elected not to publish that part of the statement, and instead included in the third matter complained of an allegation that "Two STC sources said the company stood by her claims".
- (v) By 30 November 2017, prior to the publication of the third matter complained of, the Respondents were aware that Brandon McClelland's tweet was not directly related to the Applicant and that Mr McClelland was not able to comment on the alleged complaint made to the STC because he did not have any intimate or first-hand knowledge regarding the production of *King Lear*. Notwithstanding that, the Respondents quoted from Mr McClelland's tweet in the third matter complained of and misrepresented that he was publicly expressing his support of the allegations made against the Applicant.
- (w) The Respondents redacted the Facebook post of Meyne Wyatt in the third matter complained of and misrepresented it to be a comment about the allegations against the Applicant when it was more likely a generic

comment about the entertainment industry worldwide. The Respondents then published the Facebook post and Mr Wyatt's photograph on the front page of the third matter complained of, representing that he was personally taking a stand against the Applicant, in circumstances where the Respondents did not even speak to Mr Wyatt before doing so.

Date: 27 June 2018



Signed by Nicholas Pullen
Solicitor for the Applicant

This pleading was prepared by Nicholas Pullen and Jeremy Marel, Solicitors, and Sue Chrysanthou, Barrister.

Certificate of lawyer

I Nicholas Pullen certify to the Court that, in relation to the Amended Reply filed on behalf of the Applicant, 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: 27 June 2018



Signed by Nicholas Pullen
Lawyer for the Applicant

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/08/2018 2:37:52 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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: 10/08/2018 10:15:52 AM AEST

Registrar

Important Information

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

The 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.

SECOND FURTHER AMENDED DEFENCE



Second Further Amended Defence to Statement of Claim

Filed pursuant to leave granted by Wigney J on 9 August 2018

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 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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[Form approved 01/08/2011]

- (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 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 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), 4(b), 5(a), 5(b), 7(a), 7(b), 7(c), 7(d), 8(a), 8(b), 8(c), 8(d), 10(a), 10(b), 10(c), 10(d), 10(e), 10(f), 11(a), 11(b), 11(c), 11(d), 11(e) and 11(f) of the Statement of Claim are substantially true.

~~(b) Qualified privilege – section 30 of the Defamation Act~~

- (i) ~~Each of the matters complained of were published on an occasion of qualified privilege pursuant to section 30 of the Defamation Act.~~

PARTICULARS

A. PARTICULARS OF TRUTH

14. The Applicant is and was at all material times a famous Oscar-winning actor (with multiple Oscar nominations), including in Hollywood productions, and widely regarded as an acting legend. In around October 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**). The role of King Lear's daughter, Cordelia, in the Production was played by Eryn Jean Norvill (the **Complainant**).

15. In around the third week of rehearsals for the Production, from about 26 to 30 October 2015, the Applicant and the Complainant were rehearsing the final scene of the play, in which Cordelia is dead and King Lear is grieving over her dead body. During rehearsals, the Applicant crouched down next to the Complainant acting as a father grieving the loss of his daughter's life. This scene is not blocked out (which means that there was no choreography mandated for the scene). Prior to this occasion when rehearsing this scene the Applicant had usually surveyed the Complainant's (as Cordelia's) dead body and then touched her in the scene on the face and arm reflective of a grieving father standing over his beloved and dead daughter. On this occasion the Complainant was lying on the floor on her back and she had her eyes closed when she heard people watching the rehearsal (which included members of the cast and the Sydney Theatre Company's direction team) laughing. When the Complainant opened her eyes she saw the Applicant hovering his hands over her torso and pretending to caress or stroke her upper torso. The Applicant then made groping gestures in the air with two cupped hands, which gestures were intended to simulate and did in fact simulate him groping and fondling the Complainant's breasts. In so conducting himself, the Applicant:
 - 15.1 intended to mock the Complainant for his own amusement and that of others and did in fact so mock her;

 - 15.2 intended to depict himself as engaging in the sexual molestation of the Complainant whilst she was lying prostrate and therefore vulnerable and did in fact so depict himself;

 - 15.3 intended to depict the Applicant as a sexual object and did in fact so depict her;

- 15.4 intended to project to members of the cast and to the Sydney Theatre Company's direction team that that depiction was a matter of humour and did in fact project that to them;
- 15.5 knew that, upon discovering the way in which he had conducted himself, the Complainant would be uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;
- 15.6 engaged in conduct of a kind in which only a pervert would engage;
- 15.7 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

- 16. During the rehearsal period (from about 12 October 2015 to 23 November 2015), the Applicant regularly made comments or jokes about the Complainant or her body which contained sexual innuendo. This conduct often occurred in the presence of members of the cast and crew. In so conducting himself, the Applicant:
 - 16.1 intended to mock the Complainant for his own amusement and that of others and did in fact so mock her;
 - 16.2 intended to depict the Applicant as a sexual object and did in fact so depict her;
 - 16.3 intended to project to members of the cast and to the Sydney Theatre Company's direction team that that depiction was a matter of humour and did in fact project that to them;
 - 16.4 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;
 - 16.5 engaged in conduct of a kind in which only a pervert would engage.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in

that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

17. During rehearsal period the Applicant regularly (every few days) make lewd gestures in the Complainant's direction. On a number of occasions this comprised the Applicant looking at the Complainant, sticking his tongue out and licking his lips and using his hands to grope the air like he was fondling the Complainant's hips or breasts. In so conducting himself, the Applicant:
 - 17.1 intended to mock the Complainant for his own amusement and that of others and did in fact so mock her;
 - 17.2 intended to depict himself as engaging in the sexual molestation of the Complainant and did in fact so depict himself;
 - 17.3 intended to depict the Applicant as a sexual object and did in fact so depict her;
 - 17.4 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality and in fact made her feel overwhelmed;
 - 17.5 engaged in conduct of a kind in which only a pervert would engage;
 - 17.6 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

18. 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. The phrase "stage-door Johnny" refers to a man who frequents a theatre for the purpose of courting an actress or chorus girl. In so conducting himself, the Applicant:
 - 18.1 intended to depict the Applicant as a sexual object rather than as a serious actress skilled in her craft and did in fact so depict her;

- 18.2 knew that such conduct would make the Complainant feel uncomfortable, embarrassed and compromised and his conduct did in fact make the Complainant feel uncomfortable, embarrassed and compromised.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

19. In or around the period from 24 to 27 November 2015, during the performances in front of an audience before opening night (called previews), the Applicant and the Complainant were on stage acting the scene in which King Lear grieves over the body of his dead daughter, Cordelia. During that scene whilst playing dead on stage, the Applicant departed from the way in which the scene had previously been performed, in that the Applicant did not touch the Complainant's hand and face as had been repeatedly rehearsed but rather the Applicant moved his hand so that it traced down the Complainant's torso and across the side of her right breast. In so conducting himself, the Applicant:

- 19.1 acted without the consent of the Complainant and knew that to be so;
- 19.2 knew that, with an audience present, the Complainant could not practicably do anything to prevent him engaging in such conduct;
- 19.3 intended to treat the Applicant as a sexual object and did in fact so treat her;
- 19.4 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;
- 19.5 knew that his conduct amounted to a violation of the Complainant's bodily integrity and sexual autonomy, as was the fact;
- 19.6 engaged in conduct of a kind in which only a pervert would engage;
- 19.7 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

20. During a cast meeting on the evening following the preview performance referred to in the preceding paragraph the director of the Production, Neil Armfield, gave the Applicant a 'note' (being an oral direction as to how a scene was to be performed), in substance that the Applicant should make the scene where he is grieving over Cordelia's dead body more "paternal" as it was becoming creepy and unclear. Mr Armfield further directed the Applicant not to stroke the Complainant's body but to place his hand lightly on the side of her face and arm instead.
21. Commencing from the time the Production started in the theatre during the technical production and preview weeks, the Complainant was required to stand on a chair backstage in the wings so that the Applicant could pick her up and carry her onto the stage playing the dead body of Cordelia in the last scene of the play. The action for the lift was mechanical and involved the Complainant standing on the chair with the Applicant standing beside her and waiting for their cue (Edgar's line '*Haste thee, for thy life!*'). Once the cue was heard the practice was that the Complainant would put her right arm around the Applicant's neck, the Applicant would hold both of his arms out in front of his body and the Complainant would sit in the Applicant's arms. The practice was that, while the Complainant was waiting in the wings, the Applicant would stand next to her and wait until the cue was heard.
22. On one occasion in or around the period between 14 and 26 December 2015, during the final weeks of the Production, the Complainant was standing on the chair in the prompt side wings (backstage and in the dark) ready to be carried by the Applicant on to stage for the final scene. The Applicant was standing next to her. Approximately one minute before the cue the Applicant placed his hand on the Complainant's lower back above her shirt. The Applicant then moved his hand from above her shirt to under her shirt and moved his hand along the waistline of the Complainant's jeans brushing across the skin of the Complainant's lower back. The Applicant's touch on the Complainant's skin was light in pressure, slow and (it is to be inferred from the nature of the conduct alleged above) deliberate and lasted for about 20 to 30 seconds. When the cue was given the Applicant stopped touching the Complainant's lower back, squeezed her hand and went into the mechanical action for the lift. In so conducting himself, the Applicant:
- 22.1 knew that, given that the two actors were about to go on stage and that sound readily carries in a theatre and that anything said by the Complainant might be overheard by the audience, the Complainant could not practicably do anything to prevent him engaging in such conduct;
- 22.2 intended to treat the Applicant as a sexual object and did in fact so treat her;

- 22.3 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;
- 22.4 knew that his conduct amounted to a violation of the Complainant's bodily integrity and sexual autonomy, as was the fact;
- 22.5 engaged in conduct of a kind in which only a pervert would engage;
- 22.6 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

- 23. On one occasion in or around the period from 4 to 9 January 2016 during the last week of performance of the Production, the Complainant was standing on a chair waiting to be carried on stage for the same scene as that referred to immediately above. The Applicant started to touch her lower back again on top of her shirt, gently rubbing his fingers over the Complainant's lower back from right to left. In so conducting himself, the Applicant:

- 23.1 intended to treat the Applicant as a sexual object and did in fact so treat her;
- 23.2 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;
- 23.3 knew that his conduct amounted to a violation of the Complainant's bodily integrity and sexual autonomy, as was the fact;
- 23.4 engaged in conduct of a kind in which only a pervert would engage;
- 23.5 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

24. On 10 June 2016 the Applicant sent a text message to the Complainant in which he stated that he thinks of her "more than is socially appropriate".
25. The conduct referred to in paragraphs 15 to 19 and 22 to 24 above was inappropriate, and scandalously so, in a workplace, namely the Sydney Theatre Company.
26. 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.
27. Following the complaint, the Sydney Theatre Company decided that it would never work with the Applicant again.
28. The Respondents rely upon the following particulars in support of the substantial truth of the following imputations:
 - 28.1 As to 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*"): particulars 14 to 23 and 25 to 27 above.
 - 28.2 As to the imputation set out in sub-paragraphs 4(b) and 5(b) of the Statement of Claim ("*the applicant had behaved in inappropriate behaviour of a sexual nature in the theatre*"): particulars 14 to 23 and 25 to 27 above.
 - 28.3 As to the imputation set out in sub-paragraph 5(a) of the Statement of Claim ("*the applicant had committed sexual assault in the theatre*"): particulars 14, 19 and 20 above.
 - 28.4 As to the imputation set out in sub-paragraphs 7(a), 8(a), 10(e) and 11(e) of the Statement of Claim ("*the applicant is a pervert*"): particulars 14 to 24 and 26 to 27 above.
 - 28.5 As to the imputation set out in sub-paragraphs 7(b), 8(b), 10(b) and 11(b) of the Statement of Claim ("*the applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of King Lear*"): particulars 14 to 23 and 26 to 27 above.
 - 28.6 As to the imputation set out in sub-paragraphs 7(c), 8(c), 10(c) and 11(c) of the Statement of Claim ("*the applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of King Lear*"): particulars 14 to 23 and 25 to 27 above.

- 28.7 As to 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"): particulars 14 to 23 and 25 to 27 above.
- 28.8 As to the imputation set out in sub-paragraphs 10(a) and 11(a) of the Statement of Claim ("the applicant had committed sexual assault while working on the Sydney Theatre Company's production of King Lear"): particulars 14, 19 and 20 above.
- 28.9 As to 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"): particulars 14, 19 to 23 and 25 to 27 above.
- 28.10 As to 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"): particulars 14, 19 to 23 and 25 to 27 above.

PARTICULARS OF QUALIFIED PRIVILEGE

Background context to the publication of the matters complained of

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.

Subjects of the matters complained of

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 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);

Interest and apparent interest—section 30(1)(a)

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.

Publication in the course of giving information of the Subjects—section 30(1)(b)

35.—The matters complained of were published to recipients of the matters complained of in the course of giving them information on the Subjects.

Reasonableness—section 30(1)(c)

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;

Section 30(3)(a)

36.2—the matters complained of related to the Subjects;

Section 30(3)(b)

36.3—the matters complained of related to the alleged public activities of the Applicant whilst performing in the theatre;

Section 30(3)(c)

~~36.4—it was in the public interest in the circumstances for the matters published to be published expeditiously;~~

~~Section 30(3)(f)~~

~~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;~~

~~Information and sources—section 30(3)(g)~~

~~36.6—prior to publishing the first and second matters complained of, the Respondents had the following information relevant to the subject matter of the matters complained of:~~

- ~~(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;~~
- ~~(f1)—that contained in the response from the Applicant's lawyers, HWL Ebsworth;~~
- ~~(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;

(h) ~~background information in relation to the Applicant comprising:~~

(i) ~~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;~~

(ii) ~~the Applicant was nominated an Oscar:~~

(A) ~~in 1998 for in the Best Supporting Actor category for his role in Shakespeare in Love;~~

(B) ~~in 2000 for in the Best Actor category for his role in Quills;~~

(C) ~~in 2011 for in the Best Actor category for his role in The King's Speech;~~

(iii) ~~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;~~

(iv) ~~the Applicant was 66 years old and a married father of two;~~

(v) ~~the Applicant is a Melbourne resident;~~

(vi) ~~the Applicant was the President of the Australian Academy of Cinema Television and Arts;~~

(vii) ~~the Applicant was expected to attend the annual AACTA Awards at The Star Event Centre the following week;~~

(viii) ~~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;~~

(i) ~~that the local production of King Lear ran from November 2015 to January 2016 at the Roslyn Packer Theatre, and there were several months of rehearsals;~~

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

- (a) — ~~As to the information set out in sub-paragraph 36.6(a), actress Sarah Monahan;~~
- (b) — ~~As to the information set out in sub-paragraphs 36.6(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 36.6(c), a confidential source connected with the Sydney Theatre Company (**Confidential Source 1**);~~
- (d) — ~~As to the information set out in sub-paragraphs 36.6(f), f(1) and (g), the Applicant, through his solicitor Nicholas Pullen of HWL Ebsworth;~~
- (e) — ~~As to the information set out in sub-paragraphs 36.6(h), (i), (v) and (vi), the general and background knowledge of the Second Respondent as a journalist reporting on the entertainment industry;~~
- (f) — ~~As to the information set out in sub-paragraphs 36.6(h)(vii), the general and background knowledge of the Second Respondent as he was scheduled to host an event at the AACTA Awards;~~
- (f) — ~~As to the information set out in sub-paragraphs 36.6(h)(ii), (iii) and (iv), searches conducted by the Second Respondent of the First Respondent's news archive service, CHP, and searches conducted by the Second Respondent of the Internet including other major news websites;~~
- (g) — ~~As to the information set out in sub-paragraph 36.6(h)(viii), Katherine Stevenson of the Sydney Theatre Company and searches of the Internet conducted by the Second Respondent;~~
- (h) — ~~As to the information set out in sub-paragraph 36.6(i), the information page relating to the Production that was at the time available on the website of the Sydney Theatre Company.~~

~~36.6B the information set out in sub-paragraphs 36.6(a1) to (i) was included in the second matter complained of.~~

~~36.6C the information set out in sub-paragraph 36.6(a) was not included in the second matter complained of.~~

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

- (a)—that set out in paragraph 36.6;
- (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 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 McClelland had published a Tweet which stated "It wasn't a misunderstanding. It wasn't a joke";~~
- (m) — ~~that Brandon McClelland had worked alongside the Complainant;~~
- (n) — ~~that Brandon McClelland was at the time working on the Sydney Theatre Company's production of The Three Sisters;~~
- (o) — ~~that the Applicant had been told by Mr McIntyre the identity of the Complainant;~~
- (p) — ~~that the Sydney Theatre Company STC stood by the Complainant's claims;~~
- (q) — ~~the background information about Meyne Wyatt in paragraphs 13 to 15 of Schedule C;~~
- (r) — ~~the background information about Brandon McClelland in paragraphs 16 to 18 of Schedule C;~~
- (s) — ~~that Brandon McClelland's tweet was reposted by several other Sydney actors;~~
- (t) — ~~the statement from the Applicant's management referred to in paragraphs 31 to 41 of Schedule C;~~
- (u) — ~~the statements made by Patrick McIntyre in paragraphs 1 to 8 of the second page of Schedule C;~~
- (v) — ~~the preliminary findings of an Actors Equity survey referred to in paragraph 9 of the second page of Schedule C;~~
- (w) — ~~the matters relating to Kevin Spacey in paragraphs 10 and 11 of the second page of Schedule C;~~
- (x) — ~~a statement issued by the Sydney Theatre Company STC on 30 November 2017 which contained the information set out at paragraphs 13, 14 and 15 of the third page of Schedule C;~~
- (y) — ~~that executives at the Sydney Theatre Company STC said that they wholeheartedly believed the claims of the Complainant and one of them said the words set out at paragraphs 21 to 23 of the third page of Schedule C;~~
- (z) — ~~that a high profile actor came forward to support the complainant.~~

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

- ~~(a) — As to the information set out in sub-paragraphs 36.7(b), (c), (d), (f), (i), (p) and (y), a confidential source connected with the Sydney Theatre Company (**Confidential Source 2**);~~
- ~~(b) — As to the information set out in sub-paragraphs 36.7(c), (h) (i), (o), (p), (u), (x) and (y), Sydney Theatre Company executive director, Patrick McIntyre;~~
- ~~(c) — As to the information set out in sub-paragraph 36.7(c) and (p), Confidential Source 1;~~
- ~~(d) — As to the information set out in sub-paragraphs 36.7(e) and (f), a confidential source connected with the Sydney Theatre Company (**Confidential Source 3**);~~
- ~~(e) — As to the information set out in sub-paragraphs 36.7(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;~~
- ~~(g) — As to the information set out in sub-paragraph 36.7(j) and (z), the Facebook page of Meyne Wyatt;~~
- ~~(h) — As to the information set out in sub-paragraph 36.7(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 36.7(l) and (s), the Twitter feed of Brandon McClelland and others reposting his tweets;~~
- ~~(j) — As to the information set out in sub-paragraphs 36.7(m) and (n), information available on the internet in relation to the Sydney Theatre Company's production of The Three Sisters;~~
- ~~(k) — As to the information set out in sub-paragraphs 36.7(q) and (r) the information that was available on the internet through searches conducted by the Second Respondent;~~
- ~~(l) — As to the information set out in sub-paragraph 36.7(t), the Applicant, through his agent Ann Churchill Brown of Shanahan Management;~~
- ~~(m) — As to the information set out in sub-paragraph 36.7(v), searches conducted of the First Respondent's news archive service, CHP, and~~

~~searches conducted by the Second Respondent of the Internet including other major news websites;~~

~~(n) — As to the information set out in sub-paragraph (w), the background knowledge of the Second Respondent, searches conducted by the Second Respondent of the First Respondent's news archive service, CHP, and searches conducted by the Second Respondent of the Internet including other major news websites;~~

~~36.7B The information set out in sub-paragraphs 36.7(a), (c), (f) and (h) to (z) was included in the third matter complained of.~~

~~36.7C The information set out in sub-paragraph 36.7(b), (d), (e), (e1) and (g) was not included in the third matter complained of.~~

~~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;~~

~~*Belief in truth and accuracy of the publication — (section 30(3)(j))*~~

~~36.9 — the Respondents believed what it published to be true;~~

~~*Steps taken to verify the information in the matters complained of — section 30(3)(i)*~~

~~36.10A prior to publishing the second matter complained the Second Respondent read the content of the second matter 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;~~

~~*Section 30(3)(d)*~~

~~36.11A the Respondents were reasonably satisfied as to the fairness of the language and the manner in which the matters complained of were composed;~~

~~36.11B the Respondents made clear in each matter complained of that the allegations referred to in each matter complained of were unproven; [moved from 36.15]~~

~~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;~~

~~*Contact with the Applicant and publishing his side of the story — section 30(3)(h)*~~

~~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:~~

- (f) — ~~that the Applicant "denies 'touching'" (Schedule C, page 1, sub-headline);~~
- (g) — ~~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);~~

~~(h) — 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);~~

~~(i) — 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);~~

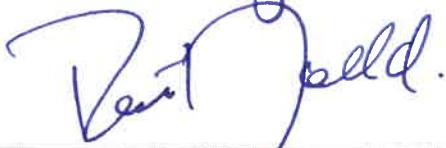
~~(j) — a statement made by the Applicant's management on behalf of the Applicant in relation to the allegations referred to in the article (Schedule C, page 4, paragraphs 31-41);~~

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), 4(b), 5(a), 5(b), 7(a), 7(b), 7(c), 7(d), 8(a), 8(b), 8(c), 8(d), 10(a), 10(b), 10(c), 10(d), 10(e), 10(f), 11(a), 11(b), 11(c), 11(d), 11(e) 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 (b) to (c) above comprised.

Date: 9th August 2018

Handwritten signature in blue ink, appearing to read 'Robert Todd'.


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: 9th August 2018


Signed by Robert James Todd
Lawyer for the Respondents

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[Form approved 01/08/2011]

FEDERAL COURT OF AUSTRALIA

Rush v Nationwide News Pty Limited (No 4) [2018] FCA 1558

File number: NSD 2179 of 2017

Judge: **WIGNEY J**

Date of judgment: 10 October 2018

Catchwords: **PRACTICE AND PROCEDURE** – application for leave to lead evidence at the trial – application opposed – where no reasonable or adequate explanation for delay – where evidence sought to be relied on related to a “collateral” issue – where other party would suffer prejudice if leave was granted – where questions about admissibility of evidence – application refused

Legislation: *Evidence Act 1995* (Cth), ss 59, 64, 101A, 102, 106, Parts 3.2, 3.7
Federal Court of Australia Act 1976 (Cth), ss 37M, 37N, 47A

Cases cited: *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No. 3)* (2009) 181 FCR 152
Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (2015) 231 FCR 531
Rush v Nationwide News Pty Ltd [2018] FCA 357
Rush v Nationwide News Pty Ltd (No 2) [2018] FCA 550

Date of hearing: 8 October 2018

Registry: New South Wales

Division: General Division

National Practice Area: Other Federal Jurisdiction

Category: Catchwords

Number of paragraphs: 58

Counsel for the Applicant: Ms S Chrysanthou

Solicitor for the Applicant: HWL Ebsworth Lawyers

Counsel for the Respondents: Ms L Barnett

Solicitor for the
Respondents: Ashurst Australia

ORDERS

NSD 2179 of 2017

BETWEEN: **GEOFFREY ROY RUSH**
Applicant

AND: **NATIONWIDE NEWS PTY LIMITED**
First Respondent

JONATHON MORAN
Second Respondent

JUDGE: **WIGNEY J**

DATE OF ORDER: **10 OCTOBER 2018**

THE COURT ORDERS THAT:

1. The respondents' application for leave to adduce evidence from Mr Colin Moody be refused.
2. The costs of that application be costs in the cause.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from transcript)

WIGNEY J:

- 1 The trial of Mr Geoffrey **Rush**'s defamation action against **Nationwide** News Pty Ltd and Mr Jonathon **Moran** is listed to commence on 22 October 2018. At a case management hearing on 8 October 2018, Nationwide and Mr Moran applied for leave to lead evidence at the trial from Mr Colin **Moody**. Leave to lead that evidence was required because, on 9 August 2018, orders were made requiring Nationwide and Mr Moran to serve any further outlines of evidence in support of their defence of justification by 20 August 2018. Mr Rush was ordered to file outlines of the evidence relied on by him by 21 September 2018. It was also ordered that the parties may not, without leave, rely on evidence not served in accordance with that timetable. Mr Moody's outline of evidence was not served until 4 October 2018.
- 2 Mr Rush opposed the application for leave to lead evidence from Mr Moody. He argued that he would be prejudiced by the late service of the outline of evidence of Mr Moody. He also submitted that Mr Moody's evidence, as anticipated, was likely to be inadmissible and, in any event, related to a collateral issue, and was, at its very highest, of little or no probative value.
- 3 The question for determination is whether Nationwide and Mr Moran should be allowed to adduce evidence from Mr Moody, despite their non-compliance with the Court's orders and the likely or potential prejudice to Mr Rush.

BACKGROUND

- 4 It is necessary to put this application by Nationwide and Mr Moran in context.
- 5 The undeniably unsatisfactory conduct of this litigation in its early stages by Nationwide and Mr Moran is exposed in, and is manifestly apparent from, two prior judgments of the Court: *Rush v Nationwide News Pty Ltd* [2018] FCA 357 and *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550. Following delivery of the second of those judgments on 20 April 2018, Nationwide and Mr Moran were ordered to file a second further amended defence in accordance with the first of the judgments. That defence was not to include the previously pleaded defence of justification, which had been struck out. The parties were also ordered to file and serve outlines of evidence on the issues on which they bore the onus by 15 June

2018, and to file outlines of evidence in reply by 29 June 2018. The matter was set down for hearing to commence on 3 September 2018.

6 Further procedural orders were made on 15 June and 2 July 2018. It is unnecessary, for present purposes, to consider the terms of those orders.

7 On 31 July 2018, however, everything changed. Nationwide and Mr Moran filed an interlocutory application seeking leave to amend their defence again, this time to include a new defence of justification. This significant development came about because the actress who was said to have made the complaint against Mr Rush that formed the basis of the impugned publication was now willing to give evidence in Nationwide and Mr Moran's defence. The actress, Ms Eryn **Norvill**, had previously declined to assist or cooperate with Nationwide and Mr Moran.

8 The evidence adduced by Nationwide and Mr Moran in support of the amendment application included an outline of the evidence, or anticipated evidence, of Ms Norvill. The evidence of the deponent of the affidavit which annexed Ms Norvill's outline of evidence made it clear that the content or terms of Ms Norvill's outline of evidence had been the subject of discussion between Ms Norvill's solicitor and Nationwide and Mr Moran's legal advisors for at least a week before the filing of the application to amend. The proposed amended defence of Nationwide and Mr Moran included particulars of the new justification defence which, not surprisingly, corresponded with the anticipated evidence of Ms Norvill. It will be necessary to say something more about Ms Norvill's outline of evidence and the further amended defence in due course.

9 Mr Rush initially opposed the application to amend. That was perhaps understandable given the history of the matter and the prejudice Mr Rush would undoubtedly have suffered if the amendment was permitted and as a consequence it was necessary to vacate the trial. Ultimately, however, Mr Rush indicated that he would not oppose the amendment application, so long as the commencement of the trial was able to be deferred to 22 October 2018. That date was suitable to counsel for the parties and was able to be accommodated by the Court. It was in that context that the amendment was permitted and the relevant orders concerning the service of further outlines of evidence were made. The order that the parties were not permitted to lead evidence not served in accordance with the timetable without leave was made by consent. The making of that order was no doubt an important consideration in Mr Rush's decision not to oppose the amendment.

- 10 Two further points should be made about the basis upon, or context in which, the orders concerning service of the further evidence were made.
- 11 First, at the hearing on 9 August 2018 at which the orders were made, when considering the appropriate procedural orders that should be made to ensure that the trial could commence on 22 October 2018, there was an exchange between the Court and senior counsel for Nationwide and Mr Moran about the nature of the further evidence to be relied on by Nationwide and Mr Moran and the time within which they would be able to serve it. Mr Rush wanted Nationwide and Mr Moran to serve their further evidence sooner than Nationwide and Mr Moran had initially proposed. Senior counsel for Nationwide and Mr Moran indicated that: “any further lay evidence will be in the nature of corroborating what Ms Norvill says about the conduct of Mr Rush towards her”. It was also noted that Mr Rush’s legal team had not been told the names of those prospective corroborating witnesses. It was made clear by the Court that Mr Rush’s legal advisors should be told the names of the proposed witnesses within a short space of time so they would be able to begin to marshal their response to that evidence as soon as possible.
- 12 Second, Mr Rush’s counsel made it abundantly clear that the new trial date had been arrived at with some difficulty having regard to the limited availability of the parties’ counsel. Perhaps more significantly, Mr Rush’s counsel made it abundantly clear that the timetable for the service of the further evidence was necessarily tight so as to ensure that Mr Rush’s legal team had sufficient time to marshal their evidence and prepare their response to the evidence served by Nationwide and Mr Moran. In that regard, the following exchange occurred:

MS CHRYSANTHOU: - - - that the date’s been arrived at. And, in those circumstances – Mr McClintock, in particular, who’s been brought into this matter because Mr McHugh wasn’t available for the September period – can only prepare for the 22 October date. He is in court from mid-September until mid-October. So he has accepted that he can appear on the 22 October date on the basis that he will do the bulk of his deliberation in early September, at this time when this trial was originally supposed to - - -

HIS HONOUR: And this is why you say you need the proofs of evidence by that time, at the very latest.

MS CHRYSANTHOU: Yes. Well, we need the proofs of evidence before that time, because, by the time Mr McClintock sits down to prepare, we will need to have our evidence marshalled as well. And, at this point, without even being told the names of these illusive witnesses – who may not even exist – we can’t carry out our own inquiries about those persons. We can’t issue subpoenas to those persons for any documents they may have. It holds up the process in a way that causes substantial unfairness to our side, because, in September and October, we’re preparing to cross-examine. We’re preparing our court books. We’re preparing for trial. We shouldn’t

be forced into a position where, a few weeks before the trial, we're still running around having to marshal our truth evidence.

13 Those observations were prescient.

14 Before considering the submissions advanced by Nationwide and Mr Moran in support of their application for leave, it is necessary to say something more about Nationwide and Mr Moran's justification defence and Mr Moody's outline of evidence. As will be seen, there could be little doubt that Mr Moody's evidence could accurately be characterised as evidence which was directed at corroborating parts of Ms Norvill's evidence. As was noted earlier, at the hearing on 9 August 2018, senior counsel for Nationwide and Mr Moran foreshadowed that the outlines of evidence that Nationwide and Mr Moran would serve by 20 August 2018 would include outlines from corroborating witnesses.

15 The second amended defence filed by Nationwide and Mr Moran relevantly includes the following particulars of the justification defence (at [19]-[20]):

In or around the period from 24 to 27 November 2015, during the performances in front of an audience before opening night (called previews), the Applicant and the Complainant were on stage acting the scene in which King Lear grieves over the body of his dead daughter, Cordelia. During that scene whilst playing dead on stage, the Applicant departed from the way in which the scene had previously been performed, in that the Applicant did not touch the Complainant's hand and face as had been repeatedly rehearsed but rather the Applicant moved his hand so that it traced down the Complainant's torso and across the side of her right breast.

...

During a cast meeting on the evening following the preview performance referred to in the preceding paragraph the director of the Production, Neil Armfield, gave the Applicant a 'note' (being an oral direction as to how a scene was to be performed), in substance that the Applicant should make the scene where he is grieving over Cordelia's dead body more "paternal" as it was becoming creepy and unclear. Mr Armfield further directed the Applicant not to stroke the Complainant's body but to place his hand lightly on the side of her face and arm instead.

16 Ms Norvill's outline of evidence (at [25] and [28]) includes the following statement which appears to relate to those particulars:

In or around the period from 24 to 27 November 2015, during the performances in front of an audience before opening night (called previews, which are performances that occur before opening night where the show is still being refined by the director), Mr Rush and I were on stage again acting the scene in which King Lear grieves over the body of his dead daughter, Cordelia. During that scene whilst playing dead on stage, Mr Rush's hand did not touch my hand and face as we had repeatedly rehearsed but instead traced down my torso and across the side of my right breast. This was the first time he had touched my breasts and at the time I had no doubt he had done so deliberately. Mr Rush had never engaged in this type of touching during any prior rehearsal, the touching in this scene had only been on my face or arm.

During the previews, from about 24 to 27 November 2015, the director Neil Armfield gave the cast notes on several different occasions. The cast notes were given to us before preview performances in a cast meeting held in the Ruth Cracknell Room. The whole cast would be present. During one of these sessions a note was given to Mr Rush by Mr Armfield asking Mr Rush to make the touch of my body during the final scene when I was lying on the stage more ‘paternal’ as it (meaning the way he was touching me in the previous night’s preview performance) was becoming ‘creepy’ and ‘unclear’. Mr Armfield instructed Mr Rush not to stroke my body but to place his hand lightly on the side of my face and arm instead. Mr Rush did not acknowledge that there was a problem with his touching. Mr Armfield’s note made me feel that Mr Armfield was also aware of the inappropriateness of Mr Rush’s behaviour. However, Mr Armfield never said anything to me about it. **I do not believe that Mr Armfield will confirm my account of this event because of his close relationship with Mr Rush.**

(Emphasis added.)

- 17 It should be emphasised in this context that this is an outline of the anticipated evidence of Ms Norvill. Her actual evidence will be what she says under oath or affirmation at trial.
- 18 The following important points should be made concerning the particulars in the second further amended defence and the evidence that it is anticipated that Ms Norvill will give in relation to them.
- 19 First, the critical fact in issue is whether, as Ms Norvill claims, during one of the preview performances, Mr Rush traced down Ms Norvill’s torso and across the side of her right breast. The particular (and associated evidence) concerning Mr Armfield’s oral “note” is not directly relevant to Nationwide and Mr Moran’s justification defence. It is not a particular which directly relates to any conduct of Mr Rush. The statement allegedly made by Mr Armfield after the preview performance is, at its highest, a hearsay statement by Mr Armfield which may suggest that he had seen Mr Rush do something – it is unclear precisely what – during the relevant part of the performance which Mr Armfield apparently thought was “creepy” and “unclear”. That might be capable of providing some circumstantial support for Ms Norvill’s account of what Mr Rush did during the performance, though to a certain extent it is a collateral issue.
- 20 Second, and perhaps more importantly, it was clearly known by Nationwide and Mr Moran and their legal advisors from at least 31 July 2018, the date that Ms Norvill’s outline of evidence was finalised, if not before, that Mr Armfield may not corroborate Ms Norvill’s account of this incident or event. That is because Ms Norvill, perhaps unusually, said as much in her outline of evidence.

- 21 Third, it is difficult to avoid the inference or conclusion that, from as early as 31 July 2018, Nationwide and Mr Moran and their legal advisors must have been alive to the need or desirability of securing evidence which corroborated Ms Norvill's account of this incident or event, including Mr Armfield's "note" on the day following the preview performance. That is clear, not only from the statements made by senior counsel for Nationwide and Mr Moran at the hearing on 9 August 2018, but also from the content of Ms Norvill's outline of evidence. It must have been anticipated that Mr Armfield, who was said to be a friend of Mr Rush, may well give evidence in Mr Rush's case and dispute Ms Norvill's account. Despite this, it would appear that no outlines of evidence addressing that issue was served by Nationwide and Mr Moran by the Court-ordered deadline of 20 August 2018.
- 22 Mr Moody's evidence would appear to be intended to fill that lacuna. As will be seen, however, no reasonable or adequate explanation has been given for why that outline was not served by 20 August 2018.
- 23 It would appear from the evidence led in support of the application for leave that as was, or should have been, anticipated, Mr Rush did serve an outline of evidence of Mr Armfield. That outline of evidence was not tendered on this application. Nationwide and Mr Moran submitted, however, that the substance of Mr Armfield's evidence, as contained in his outline of evidence, is that he did not say what Ms Norvill alleges that he said by way of oral "note". It may also be inferred that his evidence is likely to be that he did not see Mr Rush do what Ms Norvill alleges he did during the preview performance, which is the more important issue.
- 24 In his outline of evidence that has now been served, Mr Moody says that he played the Duke of Cornwall in the **Sydney Theatre Company** Limited's production of King Lear. Mr Moody refers to Mr Armfield's practice of giving verbal "notes" to the cast on the day after each preview performance of King Lear. Mr Moody makes it clear that, if something did occur between Mr Rush and Ms Norvill during the relevant scene where Mr Rush, playing King Lear, carries Ms Norvill, playing Cordelia, on stage, he did not, and was not in any position to, see it. That is because, at that particular time in the play, he was looking out at the audience, not at Mr Rush and Ms Norvill.
- 25 It is, however, anticipated that Mr Moody will, if leave is granted, give the following evidence relating to one of the preview performances and the "note" session with Mr Armfield the following day. In his outline of evidence, Mr Moody says (at [8]-[9]):

During the second or third preview, I recall that at the end of this scene, Mr Rush took an individual bow but started clowning which received a huge laugh from the audience. I remember it clearly as this was a departure from the pre-rehearsed way of bowing, which Mr Rush had followed during the first preview.

The next day, I attended the sit down notes session with Mr Armfield, Mr Rush and the rest of the cast. Mr Armfield said words to the following effect, which were directed to Mr Rush:

“I don’t think your clowning is right and it undermines the production”.

“I felt that when you were over the dead body of Cordelia, what you were doing was unclear and bordering on creepy”.

26 It is clear that Mr Moody’s anticipated evidence is potentially capable of corroborating some of Ms Norvill’s anticipated evidence about what Mr Armfield said at the “notes” session. As already indicated, subject to potential issues arising concerning the admissibility of Mr Moody’s anticipated evidence, his evidence might constitute hearsay evidence that Mr Armfield saw Mr Rush do something during the part of the performance which appeared to him to be “unclear” and “bordering on creepy”.

27 It is also proposed to adduce evidence from Mr Moody which is said to relate to the question whether, at some stage after Ms Norvill apparently made her complaint to the Sydney Theatre Company concerning Mr Rush, the Sydney Theatre Company changed its workplace policies or procedures relating to harassment or bullying. Mr Moody’s anticipated evidence in that regard is as follows (at [10]-[13]):

I have worked on two further productions with the STC since *King Lear*, the most recent being *The Resistable Rise of Arturo Ui*, which ran from about March to May 2018. I have observed a noticeable difference in the way in which the STC is now informing actors of its policies on harassment and bullying, and health and wellbeing, when compared to my work for them on *King Lear*.

On the first day of rehearsals for *The Resistable Rise of Arturo Ui*, the stage manager did a house keeping speech and members of the cast received a little pack containing information about parking, about the doctor – that was pretty standard with earlier productions. I did not keep a copy of the pack given to me. What was new however, was a speech regarding workplace bullying and health and wellbeing which was given by a lady who described her role at the STC as liaison between actors and management. During the first week of rehearsals for *The Resistable Rise of Arturo Ui*, a psychologist came to visit the cast over the lunch hour and ran through a list of options about how to deal with issues as and when, or if, they develop. The cast was told that actors can access a psychologist if they needed help and we were given information about coping mechanisms and the contacts we could reach out to.

The ability for actors to see a psychologist might have been available previously but this was never pointed out to me during my work on *King Lear*.

A second aspect of the stage manager’s speech that was new was the emphasis on the STC’s policy on harassment in the workplace which was read out in full. While

policies such as these have previously been mentioned in passing, there was a much more detailed speech about harassment and bullying in the workplace and about actors feeling intimidated and bullied by other actors or directors.

28 Nationwide and Mr Moran did not adduce any evidence which directly sought to explain why Mr Moody's outline of evidence was not served in accordance with the Court-ordered timetable. The evidence in that regard, at its very highest, was that Mr Moody's outline of evidence was served under cover of a letter from Nationwide and Mr Moran's solicitors which stated:

We note that Mr Moody's evidence is responsive to matters set out in the outlines of evidence served by your client on 21 September 2018 and as such we do not consider there to be any prejudice to your client in our clients relying on Mr Moody's evidence.

29 When close consideration is given to the background and context previously referred to, the claim that Mr Moody's evidence was merely "responsive" is not correct and is, in any event, no explanation at all. It is certainly not a reasonable or adequate explanation.

30 As the previous discussion has highlighted, Nationwide and Mr Moran and their legal advisors clearly envisaged by as early as 9 August 2018 that they would be serving evidence that corroborated, or purported to corroborate, Ms Norvill's anticipated evidence. They were ordered to serve that evidence by 20 August 2018. Nationwide, Mr Moran and their legal advisors knew full well that Ms Norvill's anticipated evidence included evidence about Mr Armfield's oral "note" after one of the preview performances. They knew, or at least must have anticipated, that there was likely to be an issue concerning Ms Norvill's evidence concerning what Mr Armfeld said in that "note". They did not need to await the service of Mr Rush's outlines of evidence, including the outline of Mr Armfield's evidence, to work that out. The claim that Mr Moody's evidence was merely responsive to Mr Armfield's evidence was, when considered in that context, incorrect and somewhat misleading. It certainly provided no reasonable or adequate explanation for the late service.

31 No explanation whatsoever has been given in relation to the late service of Mr Moody's evidence relating to his observations concerning the Sydney Theatre Company's policies.

32 As has already been noted, Mr Rush opposed leave being granted to Nationwide and Mr Moran to rely on Mr Moody's evidence on the basis that he would be prejudiced. Consistent with the submissions made at the hearing on 9 August 2018, counsel for Mr Rush argued that when Mr Rush's legal team received Nationwide and Mr Moran's outlines of evidence on 20 August 2018, they made forensic or tactical decisions about who to call in Mr Rush's case.

Given that Ms Norvill was effectively the only witness who referred to Mr Armfield's oral "note", they decided to call only Mr Armfield, and presumably Mr Rush, to give evidence about that issue. They made inquiries and could have called other witnesses, but decided not to do so. It was argued that they should not now be required to revisit that issue this close to the trial. Indeed, it was submitted, in effect, that, given the other preparatory work that they needed to do before trial, they would not be able to do so. It should perhaps be noted in this context that there were as many as 20 people who may have witnessed or heard the alleged briefing given by Mr Armfield.

33 The contention that Mr Rush would be prejudiced if leave was granted to adduce the evidence of Mr Moody must be accepted. That is particularly so, having regard to the background and context to the fixing of the trial date and the making of the relevant orders concerning the service of evidence, and the submissions that were advanced on Mr Rush's behalf at the hearing on 9 August 2018.

34 Nothing was put on behalf of Nationwide and Mr Moran which was capable of casting any doubt whatsoever on Mr Rush's assertion that he would be prejudiced if leave was granted to adduce Mr Moody's evidence. Of course, one way of dealing with the prejudice that Mr Rush would suffer if leave to lead Mr Moody's evidence was granted would be to further adjourn the trial. Neither party suggested that adjourning the trial was a viable or acceptable way to deal with the issue. Given the history of the matter, that is not surprising. A further adjournment of the trial would plainly be grossly unfair to Mr Rush in all the circumstances.

35 Mr Rush also contended that Mr Moody's evidence concerning Mr Armfield's oral "note" was inadmissible. The argument in that regard was that the alleged oral "note" was not a proper particular of Nationwide and Mr Moran's justification defence. It did not directly involve any conduct by Mr Rush. The oral "note", so it was submitted, was at best a "collateral" issue. Perhaps more significantly, Mr Rush submitted that Mr Moody's anticipated evidence would be inadmissible pursuant to s 102 of the *Evidence Act 1995* (Cth), which provides that credibility evidence about a witness is not admissible. Credibility evidence is defined in s 101A of the Evidence Act as comprising, in general terms, evidence that is relevant only because it affects the assessment of the credibility of a witness. Mr Rush submitted that Mr Moody's evidence was relevant only to Mr Armfield's credit. While that submission was not fully developed, the contention appeared to be that the evidence could

only be relevant because it was capable of undermining Mr Armfield's evidence that he gave no such oral "note" as alleged by Ms Norvill.

36 The question whether Mr Moody's evidence concerning the oral note is admissible or inadmissible is not easy to resolve. It involves consideration of not only the complex provisions of Part 3.2 of the Evidence Act concerning hearsay evidence, but also the equally complex provisions of Part 3.7 of the Evidence Act relating to credibility evidence.

37 As has already been noted, the relevant fact in issue is not whether Mr Armfield gave the alleged oral "note". The relevant fact in issue is whether Mr Rush touched Ms Norvill as alleged by her. The statement allegedly made by Mr Armfield at the briefing after the preview performance could only be relevant to that issue if it could rationally affect the assessment of the probability of that incident occurring. Mr Moody's evidence of what Mr Armfield said could only be relevant in that regard if Mr Armfield's statement was capable of being viewed as an assertion that Mr Armfield saw Mr Rush touch Ms Norvill as alleged. If it was capable of being viewed in that way, however, it would be excluded as hearsay by reason of s 59 of the Evidence Act, unless it fell within one of the exceptions to the hearsay rule.

38 The only relevant exception to the hearsay rule that would appear to potentially apply to the circumstances is the exception in s 64(3) of the Evidence Act, which provides as follows:

- (3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
 - (a) that person; or
 - (b) a person who saw, heard or otherwise perceived the representation being made.

39 If Mr Moody's evidence concerning the statement made by Mr Armfield fell within the exception to the hearsay rule in s 64(3) and, therefore, was relevant and admissible, it arguably would not be credibility evidence for the purposes of s 102. That is because it arguably would not be evidence that was only relevant to Mr Armfield's credibility. If, however, it was not admissible as relevant hearsay evidence, there would appear to be some merit in Mr Rush's submission that the evidence would be *prima facie* inadmissible pursuant to s 102.

40 There are, however, also exceptions to the credibility rule. One exception that might be relevant is the exception in s 106 of the Evidence Act, which provides as follows:

- (1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:
 - (a) in cross-examination of the witness:
 - (i) the substance of the evidence was put to the witness; and
 - (ii) the witness denied, or did not admit or agree to, the substance of the evidence; and
 - (b) the court gives leave to adduce the evidence.
- (2) Leave under paragraph (1)(b) is not required if the evidence tends to prove that the witness:
 - (a) is biased or has a motive for being untruthful; or
 - (b) has been convicted of an offence, including an offence against the law of a foreign country; or
 - (c) has made a prior inconsistent statement; or
 - (d) is, or was, unable to be aware of matters to which his or her evidence relates; or
 - (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

41 It would appear, therefore, that if Mr Moody's evidence about what Mr Armfield said is not admissible under one of the exceptions to the hearsay rule, and is therefore prima facie excluded as credibility evidence under s 102, it may nevertheless be admitted pursuant to s 106 if Mr Armfield is cross-examined about it and denies it.

42 Fascinating as those evidentiary issues may be, it is neither possible nor desirable to resolve them at this stage of the proceedings and in the context of this leave application. The evidence at this stage is only proposed or anticipated evidence and, more significantly, the Court does not have before it all of the proposed evidence that may bear on the admissibility of the anticipated evidence of Mr Moody. Mr Armfield's outline of evidence, for example, is not before the Court.

43 Those evidentiary issues were also not the subject of any detailed argument. Counsel for Nationwide and Mr Moran barely touched on the basis upon which the anticipated evidence of Mr Moody was admissible. Counsel for Mr Rush referred only to s 102 of the Evidence

Act. Neither counsel referred to the possible application of the hearsay rule or any exceptions to it.

44 What can be said, however, is that the issue of what may or may not have been said by Mr Armfield at one of his oral “notes” sessions after one of the preview performances is essentially a collateral issue. It is certainly not a critical or important issue, having regard to the nature of the factual and legal issues to be resolved at the proceeding. On that basis, Mr Moody’s evidence on the topic could hardly be said to be an important, let alone critical, piece of evidence in Nationwide and Mr Moran’s defence. Counsel for Nationwide and Mr Moran effectively conceded as much. That is a factor which must be weighed in the balance in determining whether leave should be granted to adduce Mr Moody’s evidence in all the circumstances.

45 It should perhaps also be noted in this context that the other topic addressed in Mr Moody’s evidence relating to the change in the Sydney Theatre Company’s policies or procedures is, on one view, an even more collateral issue when it comes to Nationwide and Mr Moran’s defence. At most, a change in the Sydney Theatre Company’s policies may be indirectly relevant to the truth or otherwise of one of the pleaded imputations which involves the assertion that the Sydney Theatre Company would no longer work with Mr Rush. Even if the evidence is indirectly relevant to that issue, Nationwide and Mr Moran are, in any event, calling witnesses from the Sydney Theatre Company to give direct evidence concerning its policies concerning harassment and, presumably, any relevant changes to them.

46 Two final considerations relevant to the grant of leave should also be noted.

47 First, if leave were to be granted, it would only be fair and reasonable in the circumstances to then give leave to Mr Rush to file further evidence in response to it. That is because, as has already been explained, Mr Moody’s evidence should undoubtedly have been served on 20 August 2018. It was potential corroborative evidence and was not merely responsive, as contended by Nationwide and Mr Moody’s solicitors.

48 Putting aside for the moment Mr Rush’s contention that, in the circumstances, it would not be fair or, indeed, not possible, for him to respond to the evidence at this late stage, the other difficulty is that allowing Mr Rush to adduce further evidence in response is now likely to unnecessarily complicate and possibly even imperil the orderly conduct of the trial. It would potentially involve calling further witnesses, possibly out of order, concerning an issue which

is, at best, collateral in circumstances where the trial is presently listed for only 14 days. That is scarcely a desirable outcome.

49 Second, if leave were granted to allow Nationwide and Mr Moran to call Mr Moody, it would also be necessary for the Court to make an order pursuant to s 47A of the *Federal Court of Australia Act 1976* (Cth) that Mr Moran's testimony be given by video link, apparently from Ireland. That was made clear by counsel for Nationwide and Mr Moran, as well as in the letter from Nationwide and Mr Moran's solicitors which served Mr Moran's outline of evidence. The letter indicated that: "Mr Moody is currently based overseas caring for his mother". Nationwide and Mr Moran did not, however, adduce any direct evidence in support of their application that Mr Moran be permitted to give evidence by video link.

50 The Court's discretion to order that evidence be given by video link is "a broad one with the determining consideration being the interest of justice": *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 231 FCR 531 at [16]. It is nevertheless necessary for a party who is asking the Court to exercise the discretion to make out its case for the making of such an order, particularly if it is opposed by the other party: *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No. 3)* (2009) 181 FCR 152 at [78]. That is particularly the case where the evidence is contested, the witness is to be cross-examined and questions of credit, credibility and reliability are involved: see *Campaign Master* at [63].

51 Nationwide and Mr Moran have not made out a case, let alone a compelling or persuasive one, for an order that Mr Moran's evidence be given by video link. Such an order is opposed by Mr Rush, whose counsel made it clear that Mr Moran's evidence would be contested, he would be cross-examined and questions of credit were likely to be involved. In those circumstances, the fact that Mr Moody was "based overseas" is not, without more, a persuasive or compelling consideration. The fact that Mr Moody is caring for his mother may have been a persuasive consideration, had some evidence been adduced concerning that fact. That evidence could have addressed, for example, why Mr Moody's mother needed caring for and why appropriate arrangements could not be made for her care if Mr Moody was required to travel to Australia for a short period to give evidence. No evidence concerning those types of matters was adduced.

52 It is, ultimately, unnecessary to finally determine whether an order under s 47A should be made for the taking of Mr Moody's evidence by video link. The more significant point for

present purposes is that, if such an order was made, it would undoubtedly add to the prejudice suffered by Mr Rush arising from the leading of Mr Moody's evidence. It would make the task of cross-examining Mr Moody and challenging his credibility or the reliability of his evidence all the more difficult. It would also increase the case management burdens in what already appears to be likely to be a complex trial, both in terms of issues and logistics.

53 In considering whether leave should be granted to adduce evidence from Mr Moody, it is necessary to have regard to the overarching purpose of the civil practice and procedure provisions in the Court as expounded in ss 37M and 37N of the Federal Court Act. The overarching purpose is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. The overarching purpose includes, amongst other things, modern case management objectives or considerations such as the efficient use of judicial resources, the efficient disposal of the Court's overall case load, the disposal of proceedings in a timely manner, and the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

54 Perhaps most importantly, however, the overarching objective includes, fairly obviously, the just determination of disputes according to law. The just determination of a dispute obviously requires close consideration to be given to the fairness to all the parties of the exercise of the Court's procedural powers and discretions. The ultimate consideration and objective is, of course, the interests of justice.

55 Having regard to the Court's overarching purpose and the interests of justice generally, Nationwide and Mr Moran's application for leave to adduce Mr Moody's evidence must be refused. In reaching that conclusion, which was not an easy one to reach, close consideration has been given to the history of the proceedings; Nationwide and Mr Moran's conduct of the proceedings to date; the absence of any reasonable or adequate explanation by Nationwide and Mr Moran for their failure to comply with the order to file outlines of their evidence by 20 August 2018; the importance of the evidence proposed to be adduced by Mr Moody, having regard to the real issues – factual and legal – in dispute in this case; the fact that there are, in any event, real issues concerning the admissibility of that evidence that would need to be considered and resolved at trial if leave were granted; the fact that Mr Moody's evidence would have to be given by video link in circumstances where he would be cross-examined and issues of credit would likely arise; and, perhaps most significantly, the prejudice that Mr Rush would suffer if leave was granted at this late stage.

56 In relation to the last mentioned consideration, it should be reiterated that, on 9 August 2018, when leave was given to Nationwide and Mr Moran to file a second further amended defence in circumstances where the trial was necessarily rescheduled, it was clearly emphasised to Nationwide and Mr Moran, by both Mr Rush's counsel and the Court, that Mr Rush would most likely be prejudiced by the late service of any outlines of evidence. That is exactly what has occurred. In those circumstances, Nationwide and Mr Moran could hardly be surprised by the outcome of this application, particularly in the absence of them leading any reasonable or adequate explanation for the late service of the evidence.

57 The application for leave to adduce evidence from Mr Moody is accordingly refused.

58 The argument in relation to this issue largely occurred at a case management hearing in which a large number of other issues were addressed. It is appropriate, in those circumstances, for the costs of this application to be costs in the cause.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 16 October 2018



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD2179/2017

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED and another named in the schedule

Respondent

ORDER

JUDGE: JUSTICE WIGNEY

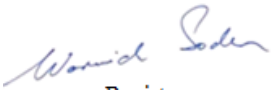
DATE OF ORDER: 10 October 2018

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. The respondents' application for leave to adduce evidence from Mr Colin Moody be refused.
2. The costs of that application be costs in the cause.

Date that entry is stamped: 10 October 2018


Registrar



Schedule

No: NSD2179/2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Interested Person AUSTRALIAN FILM INSTITUTE LIMITED

Interested Person SYDNEY THEATRE COMPANY LIMITED

Second Respondent JONATHON MORAN

FEDERAL COURT OF AUSTRALIA

Rush v Nationwide News Pty Limited (No 5) [2018] FCA 1622

File number: NSD 2179 of 2017

Judge: **WIGNEY J**

Date of judgment: 29 October 2018

Catchwords: **EVIDENCE** – expert opinion evidence – application that expert opinion evidence be ruled inadmissible – application for an order that evidence be excluded pursuant to s 135 *Evidence Act 1995* (Cth) – where claimed that expert witnesses not capable of being independent or impartial – where evidence otherwise admissible pursuant to s 79 of the *Evidence Act 1995* (Cth) – whether independence is a precondition of competence for an expert witness – whether Expert Witness Practice Note and Harmonised Expert Witness Code of Conduct are mere “admonitions”, “precepts or ideals”, rather than legal requirements – where no demonstrated non-compliance with Part 23 *Federal Court Rules 2011* (Cth) or the Expert Witness Practice Note or the Code – where evidence not unfairly prejudicial – applications refused

Legislation: *Evidence Act 1995* (Cth), ss 76, 79, 135
Federal Court Rules 2011 (Cth), rr 23.11, 23.13

Cases cited: *Ananda Marga Pracaraka Samagha Ltd v Tomar (No 4)* (2012) 202 FCR 564; [2012] FCA 385
Australian Securities and Investments Commission v Rich (2005) 190 FLR 242; [2005] NSWSC 149
Australian Securities and Investments Commission v Rich (2005) 218 ALR 764; [2005] NSWCA 152
FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat [2003] VSCA 33
Fortson Pty Ltd v Commonwealth Bank of Australia (2008) 100 SASR 162; [2008] SASC 49
Guy v Crown Melbourne Limited [2017] FCA 1104
Lake Macquarie City Council v Australian Native Landscapes Pty Ltd [2015] NSWLEC 92
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305
National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyd’s

Rep 68

Rush v Nationwide News Pty Ltd [2018] FCA 357

Rush v Nationwide News Pty Ltd (No 2) [2018] FCA 550

SmithKline Beecham (Australia) Pty Ltd v Chipman (2003)
131 FCR 500

Sydney South West Area Health Service v Stamoulis [2009]
NSWCA 153

Date of hearing:	26 October 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Other Federal Jurisdiction
Category:	Catchwords
Number of paragraphs:	54
Counsel for the Applicant:	B McClintock SC with S Chrysanthou
Solicitor for the Applicant:	HWL Ebsworth Lawyers
Counsel for the Respondents:	T Blackburn SC with L Barnett
Solicitor for the Respondents:	Ashurst Australia

ORDERS

NSD 2179 of 2017

BETWEEN: **GEOFFREY ROY RUSH**
Applicant

AND: **NATIONWIDE NEWS PTY LIMITED**
First Respondent

JONATHON MORAN
Second Respondent

JUDGE: **WIGNEY J**

DATE OF ORDER: **29 OCTOBER 2018**

THE COURT ORDERS THAT:

1. The respondents' application that the opinion evidence of Mr Frederic Schepisi and Mr Frederick Specktor be ruled inadmissible, or alternatively for an order that the evidence of Mr Schepisi and Mr Specktor be excluded pursuant to s 135 of the *Evidence Act 1995* (Cth), be refused.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WIGNEY J:

- 1 Mr Geoffrey **Rush** has sued **Nationwide** News and Mr Jonathon **Moran** for defamation. The background to this action is outlined in previous judgments of the Court: see *Rush v Nationwide News Pty Ltd* [2018] FCA 357 and *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550.
- 2 On the fifth day of the trial, Mr Rush called Mr Frederic **Schepisi** to give evidence in his case. There were two aspects to Mr Schepisi's evidence. The first aspect was evidence concerning Mr Rush's reputation. That evidence was to be given *viva voce*, though an outline of the expected evidence had been served. The second aspect was expert opinion evidence concerning various issues relevant to the financial losses that Mr Rush would incur by reason of the alleged defamatory publications. Mr Schepisi's opinion evidence, which was to be adduced by way of the tender of a written report, was, to a large extent, responsive to expert opinion evidence that Nationwide and Mr Moran intend to adduce from a Beverly Hills-based entertainment attorney, Mr Richard **Marks**.
- 3 Nationwide and Mr Moran objected to the tender of Mr Schepisi's expert report.
- 4 Mr Rush also intends to call evidence from his Los Angeles-based agent, Mr Frederick **Specktor**. Like Mr Schepisi's evidence, the evidence intended to be adduced from Mr Specktor includes evidence concerning Mr Rush's reputation and expert evidence, again in the form of an expert report, containing Mr Specktor's opinions regarding matters relevant to Mr Rush's future economic loss.
- 5 Nationwide and Mr Moran also objected to the tender of Mr Specktor's expert report.
- 6 After hearing argument concerning the admissibility of the expert reports, I decided to admit the expert opinion evidence of both Mr Schepisi and Mr Specktor. These are my reasons for arriving at that decision.
- 7 Nationwide and Mr Moran advanced three reasons for why the opinion evidence of Mr Schepisi and Mr Specktor was either inadmissible or should be excluded.
- 8 The first reason was based on the assertion that both Mr Schepisi and Mr Specktor were not independent and were "necessarily incapable of being impartial".

9 The second reason was based on the assertion that each of Mr Schepisi and Mr Specktor had obtained information relevant to the formation of their respective opinions in the course of their relationship with Mr Rush which was “not part of the identified body of information to which the expert is authorised to have regard in preparing the report”.

10 The third reason was that the evidence was unfairly prejudicial and ought to be excluded pursuant to s 135 of the *Evidence Act 1995* (Cth).

The independence ground

11 Nationwide and Mr Moran alleged that Mr Schepisi and Mr Specktor were not independent because both knew Mr Rush well and had a close relationship with him. That was said to be apparent from, amongst other things, the fact that they were both giving evidence concerning Mr Rush’s reputation. While the outlines of the reputation evidence to be given by Mr Schepisi and Mr Specktor were not before the Court for the purposes of this application, it was common ground that Mr Schepisi had known Mr Rush for 12 years socially and professionally and that they had worked and spent a lot of time together. It was also common ground that Mr Specktor was Mr Rush’s agent and had represented him for over 20 years.

12 It should be noted, in this context, that Nationwide and Mr Moran did not seek to cross-examine either Mr Schepisi or Mr Specktor, in a *voir dire*, about their ability to give impartial and objective opinions about matters within their area of specialised knowledge, despite their relationships with Mr Rush.

13 The argument advanced by Nationwide and Mr Moran based on the alleged lack of independence of Mr Schepisi and Mr Specktor relied entirely on certain provisions in Part 23 of the *Federal Court Rules 2011* (Cth) and the Court’s Practice Note concerning expert evidence (**GPN-EXPT**).

14 Rule 23.11 of the Rules provides that a party may call an expert to give expert evidence at trial only if the party has delivered an expert report that complies with r 23.13.

15 Rule 23.13(1)(h) of the Rules provides that an expert report must comply with GPN-EXPT.

16 Clause 2.2 of GPN-EXPT provides that the purpose of the use of expert evidence in proceedings is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience).

- 17 Clause 3.3(b) of GPN-EXPT provides that a witness retained as an expert should be provided with all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 18 Clause 4.1 of GPN-EXPT provides that the role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise.
- 19 Clause 4.4 of GPN-EXPT provides that every witness must read and agree to be bound by the Harmonised Expert Witness **Code of Conduct**.
- 20 Clause 2 of the Code of Conduct provides that an expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.
- 21 Nationwide and Mr Moran relied on the decision of Mortimer J in *Guy v Crown Melbourne Limited* [2017] FCA 1104 where her Honour, after analysing the relevant provisions of Part 23 of the Rules, GPN-EXPT and the Code of Conduct said (at [50]):

In my opinion this means, at a minimum, that there must be substantial, at least purportedly substantial, compliance with Part 23, or a capacity substantially to comply with Part 23, by both a party and that party's proposed witness, including a preparedness and capacity to acknowledge the necessity for an expert witness to be independent in the sense set out in the authorities, the Practice Note and the Harmonised Code.

- 22 Mortimer J found that there had been "no attempt to comply with Part 23 in the first place" (at [52]) and (at [55]) "no compliance at all" with Part 23 of the Rules by the expert in question. Her Honour also found that, in the particular and fairly unique circumstances of the case, and given what the expert had deposed, there was no question that the expert was "an advocate for the cause" of the party who proposed to call him (at [51] and [56]). Nor was there "any reason to believe [the expert] would even consider attempting to proffer the declarations of independence required, or the acknowledgements of the need for independence" (at [56]). In those circumstances, her Honour refused to waive compliance with Part 23 of the Rules and refused to admit the evidence. Her Honour concluded (at [58]):

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

Evidence Act. That is why substantial compliance (at least purported), or the capacity substantially to comply, with Part 23 must be, in this Court at least, a precondition to admissibility of evidence within s 79(1) of the *Evidence Act*.

23 Nationwide and Mr Moran submitted, in effect, that the same reasoning applied to the expert evidence of Mr Schepisi and Mr Spektor.

24 I disagree with that submission for a number of reasons.

25 First, the submission appears to be premised on the contention that Mr Schepisi and Mr Spektor failed to comply with Part 23 of the Rules. There was and is, however, no demonstrated or demonstrable non-compliance with Part 23 of the Rules on the part of either Mr Schepisi or Mr Spektor.

26 The alleged non-compliance was said to be a failure to comply with r 23.13(1)(h) of the Rules and cll 2.2 and 4.1 of GPN-EXPT, the content of which was summarised earlier. There is, however, no basis at this stage to conclude that Mr Schepisi and Mr Spektor will not be able to give the Court the “benefit of the objective and impartial assessment of an issue” from their area of specialised knowledge (cl 2.2 of GPN-EXPT), or that they will not be able to fulfil the role of providing “relevant and impartial evidence” in their area of expertise (cl 4.1 of GPN-EXPT). Nor is there any basis for the contention that Mr Schepisi and Mr Spektor are, or will be, advocates for Mr Rush’s cause.

27 The fact that both Mr Schepisi and Mr Spektor have known Mr Rush for many years, are on close terms with him and, in Mr Spektor’s case, have an ongoing relationship of principal and agent, does not necessarily mean that they cannot give impartial and objective evidence concerning the matters referred to in their reports. Nor does the fact that Mr Schepisi and Mr Spektor will be giving reputation evidence in relation to Mr Rush. It certainly does not mean that Mr Schepisi and Mr Spektor are, or will be, advocates for Mr Rush’s cause when giving their expert opinion evidence.

28 Unlike the expert witness in *Guy v Crown*, both Mr Schepisi and Mr Spektor stated that they had read and understood GPN-EXPT and agreed to comply with it. There is no basis to disbelieve their statements to that effect. Nor is there any basis to conclude that, despite acknowledging the need to give impartial and objective opinions about the matters within their area of specialised knowledge, they will act as advocates for Mr Rush, will express opinions simply designed to assist him, or, worse still, will mislead the Court. Nationwide and Mr Moran did not cross-examine Mr Schepisi or Mr Spektor on the *voir dire* and put to

them that they were, in fact, unwilling or incapable of being objective or independent. Nothing in the reports prepared by Mr Schepisi or Mr Specktor provides any basis for the conclusion that the opinions that they express therein are not impartial or objective opinions.

29 Second, and in any event, the admissibility of expert opinion evidence is governed by the Evidence Act, not by the Rules, or GPN-EXPT, or the Code of Conduct.

30 Section 76 of the Evidence Act sets out a general rule (“the opinion rule”) which excludes the admission of opinion evidence to prove the existence of a fact in issue. Section 76(1) provides as follows:

Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

31 Section 79 of the Evidence Act creates an exception to the opinion rule in the case of expert witnesses. Section 79(1) provides as follows:

If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

32 It can readily be seen that the exception to the opinion rule in s 79 of the Evidence Act applies if two preconditions are fulfilled or established: first, the witness has specialised knowledge derived from training, study, or experience; and, second, the opinion expressed by the witness is wholly or substantially based on that specialised knowledge. Nothing in s 79 imposes an additional condition that the witness be independent or that his or her opinion is demonstrably objective or impartial.

33 Nationwide and Mr Moran did not contend that the opinion evidence failed to meet or satisfy the two preconditions in s 79 of the Evidence Act. Rather, they contended that the references to objectivity and impartiality in GPN-EXPT, and the requirement in the Code of Conduct that an expert witness not be an advocate for the party calling him or her, effectively create an additional precondition or requirement for the admissibility of expert opinion evidence. That contention, however, is wrong.

34 The relevant statements of the duties and responsibilities of expert witnesses that are contained in GPN-EXPT and the Code of Conduct may be traced back to the judgment of Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd’s Rep 68 at 81-82; see *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 at [79]. Those statements, however, are

“admonitions to those who would give expert evidence” or “precepts or ideals towards which expert witnesses should strive” or “moral exhortations”; they are not principles of the laws of evidence, or exclusionary rules, or legal requirements: *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33 at [15], [17] (Ormiston JA, with whom Chernov and Eames JJA agreed); *Australian Securities and Investments Commission v Rich* (2005) 190 FLR 242; [2005] NSWSC 149 at [254]; *Fortson Pty Ltd v Commonwealth Bank of Australia* (2008) 100 SASR 162; [2008] SASC 49 at [114] (Debelle J, with whom Doyle CJ and Bleby J agreed); *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153 at [200]-[208] (Ipp JA, with whom Beazley and Giles JJA relevantly agreed); *SmithKline Beecham (Australia) Pty Ltd v Chipman* (2003) 131 FCR 500 at [32]-[37]; *Ananda Marga Pracaraka Samagha Ltd v Tomar (No 4)* (2012) 202 FCR 564; [2012] FCA 385 at [35]-[54]; *Lake Macquarie City Council v Australian Native Landscapes Pty Ltd* [2015] NSWLEC 92 at [9]-[15].

- 35 The relevant principle established by those and other authorities was neatly summarised by Dodds-Streeton J in *Ananda Marga* in the following terms (at [35]):

In my opinion, relevant authority establishes that while (as reflected by the Federal Court Practice Note and like curial protocols) objectivity and independence are sought of expert witnesses, such qualities are not preconditions of competence, even in the case of expert witnesses. The sanction for failure to fulfil the obligations imposed by relevant authority and curial protocols is not the exclusion of the expert’s evidence, but rather, the significant risk that it will fail to persuade.

- 36 In other words, an actual or perceived lack of independence, impartiality or objectivity of an expert witness goes to weight, not admissibility.
- 37 It follows that opinion evidence which otherwise complies with s 79 of the Evidence Act is not excluded because the expert is a party to the proceedings, or has a material interest in the proceedings, or is an employee of one of the parties: see *Stamoulis* at [211]-[219] and the cases there cited.
- 38 It must also follow that the opinion evidence of Mr Schepisi and Mr Specktor is not inadmissible merely because they have both been on close terms with Mr Rush for many years, or, in Mr Specktor’s case, because he has some commercial arrangement with Mr Rush, or by reason of any perception of partiality or lack of objectivity that might arise from their connections with Mr Rush. Those are matters which may well factor into the assessment of the weight to be given to their opinion evidence. They are not, however, grounds for exclusion of the evidence.

- 39 Third, the heavy reliance placed by Nationwide and Mr Moran on the judgment of Mortimer J in *Guy v Crown* was misplaced. In *Guy v Crown*, Mortimer J referred to the judgment of Dodds-Streeton J in *Ananda Marga*. Her Honour did not say that Dodds-Streeton J's statement of principle at [35] of that judgment (cited and extracted earlier) was wrong. Rather, her Honour distinguished *Ananda Marga* on the basis that Dodds-Streeton J was not dealing with a case where there had been no compliance at all with Part 23 of the Rules: see *Guy v Crown* at [53]-[55]. The compliance with Part 23 in *Ananda Marga* was said to be that the expert had acknowledged the need for independence: see *Guy v Crown* at [53]. That is also the case here, as both Mr Schepisi and Mr Specktor have stated that they had read and understood GPN-EXPT and agree to comply with it.
- 40 Like *Ananda Marga*, this case is clearly distinguishable from the circumstances considered by Mortimer J in *Guy v Crown*, where the expert candidly disclosed that he was an advocate for the cause of the party calling him and made no attempt to comply with Part 23: see *Ananda Marga* at [23] and [51].
- 41 Lest there be any doubt about it, however, to the extent that there is any inconsistency between *Ananda Marga* and *Guy v Crown* in relation to the matters of principle, I would follow *Ananda Marga*, which is entirely consistent with the long line of authority referred to earlier. The qualities of objectivity and independence on the part of an expert witness, as referred to in GPN-EXPT and the Code of Conduct, are not preconditions of competence. Rather, they are matters that may go to weight. That is not to say that Mortimer J was wrong to exclude the opinion evidence in the case before her Honour. The nature of the opinion evidence and the circumstances of the expert in *Guy v Crown* were exceptional. It is perhaps not difficult to imagine cases where the proposed expert is so fundamentally biased or conflicted that his or her opinion evidence should be excluded. But the exclusion in such cases would generally be either because the bias of the expert meant that the preconditions in s 79 were not met, or by operation of provisions such as s 135 of the Evidence Act, not by operation of the Rules, or GPN-EXPT or the Code of Conduct.
- 42 Fourth, it is accordingly unnecessary to consider whether non-compliance with Part 23, or r 23.11 can be waived, or should be waived in the particular circumstances of this case: cf *Guy v Crown* at [58]. Here, there has been no demonstrated non-compliance with r 23.11, or any other rule in Part 23, let alone a complete failure to comply, or even purport to comply, as was the case in *Guy v Crown*. Nor has it been demonstrated that Mr Schepisi and

Mr Specktor do not have the capacity to comply with r 23.11, or any other rule in Part 23, merely because of their friendship and association with Mr Rush over the years.

43 I should emphasise that if, as events transpire, the opinion evidence of either Mr Schepisi or Mr Specktor is ultimately shown to lack objectivity or impartiality, or if either Mr Schepisi or Mr Specktor are shown to be mere advocates for Mr Rush in relation to the opinions that they have expressed, that would most likely lead me to give little or no weight to those opinions. Whether that turns out to be the case, however, remains to be seen.

Unidentified body of information ground

44 The basis for this ground of exclusion was that both Mr Schepisi and Mr Specktor state in their reports that their evidence was based, not only on their specialised knowledge of the acting and entertainment industry, but also their personal knowledge of Mr Rush. Nationwide and Mr Moran contended that Mr Schepisi's and Mr Specktor's reports did not set out the facts arising from their personal knowledge of Mr Rush which they relied on in forming their opinions and the reports. The reports therefore do not comply with r 23.11(1)(e) of the Rules. They also argued that the information obtained by Mr Schepisi and Mr Specktor in the course of their relationship with Mr Rush was not part of the "identified body of information" that they were "authorised to have regard to" in preparing their reports. That argument was based on the following statement by Austin J in *Rich* (at [348]):

One additional factor especially pertinent in the present case is that expert opinion evidence might be excluded if the expert, in the course of his or her prior relationship with the party who has retained him or her, has obtained information relevant to the formation of his or her expert opinion, which is not part of the identified body of information to which the expert is authorised to have regard in preparing the report. Here the problem is not lack of independence per se, but the fact that, in the course of acting in relationship with a party to the litigation in a non-independent way, the expert may have obtained information which is not appropriate or permissible to be used as a factual basis for expert opinions.

45 The arguments based on r 23.11(1)(e) of the Rules and *Rich* have no merit for a number of reasons.

46 First, both Mr Schepisi and Mr Specktor have set out their personal knowledge of Mr Rush in their outlines of evidence relating to Mr Rush's reputation. More significantly, in their expert reports, both Mr Schepisi and Mr Specktor have set out exactly how they have used information gleaned from their personal knowledge of Mr Rush in forming their opinions. It is sufficient to give one example in relation to each witness.

- 47 Mr Schepisi was asked whether he agreed with Mr Marks’ opinion that “[a]s a general rule ... actors’ roles and remuneration over the course of their career are speculative, uncertain, and unpredictable especially because they are dependent on offers from third parties which ebb, flow and/or dry up based upon the producers’ perceptions of the actor and the marketplace”. Mr Schepisi’s response in his report is that, while that proposition may be generally true, he does not think it applies to Mr Rush. That is because Mr Rush “enjoys a special position as an elite actor” and that for actors in that special category “... age is no impediment to getting work”. It can be seen that Mr Schepisi’s opinion is based in part on his personal knowledge of Mr Rush’s skills and reputation as an actor, though equally it could be said that Mr Schepisi’s specialised knowledge of the acting and entertainment industry plainly includes personal knowledge of Mr Rush. In any event, the facts upon which Mr Schepisi has expressed his opinion are clearly set out.
- 48 Mr Specktor was also asked to respond to Mr Marks’ opinions concerning various matters. One of those matters was Mr Marks’ opinion that there tend to be more roles for younger actors than older actors. Mr Specktor’s response in his report is that Mr Marks’ generalisation to that effect does not apply to a “pedigree actor” like Mr Rush and that, but for the publications the subject of these proceedings, “Mr Rush would have continued to act, and would have continued to earn similar income, for at least another 10 years”. It is, again, abundantly clear how Mr Specktor has used his personal knowledge of Mr Rush in forming his opinions.
- 49 There is accordingly no basis for the contention that the reports of Mr Schepisi and Mr Specktor do not comply with r 23.11(e) of the Rules.
- 50 As for Nationwide and Mr Moran’s reliance on *Rich*, the facts, circumstances, and nature of the expert opinion evidence considered in *Rich* are fundamentally different to the facts, circumstances, and nature of the expert opinions of Mr Schepisi and Mr Specktor. The observation made by Austin J in *Rich* at [348] cannot simply be transposed and applied, without analysis or close consideration, to the facts, circumstances, and opinion evidence under consideration in this case. In any event, for the reasons already given, there is simply no basis for the assertion that the personal knowledge that both Mr Schepisi and Mr Specktor have of Mr Rush is “not part of the identified body of information” that they are authorised to have regard to in preparing their reports.

51 Finally, it should be noted that Austin J's decision to exclude the expert opinion evidence in *Rich* was reversed on appeal: *Australian Securities and Investments Commission v Rich* (2005) 218 ALR 764; [2005] NSWCA 152. The Court of Appeal found that Austin J's approach and reasons for excluding the report were erroneous. It is, therefore necessary to approach some of Austin J's statements of principle with some considerable caution. The reliance placed on what some of what Austin J said in *Rich* was accordingly misplaced.

Exclusion under s 135 of the Evidence Act

52 Nationwide and Mr Moran simply asserted that the opinion evidence of Mr Schepisi and Mr Specktor was unfairly prejudicial and should be excluded under s 135 of the Evidence Act. They did not expressly identify how or why it was unfairly prejudicial, though it can perhaps be assumed or inferred that the unfair prejudice somehow arose as a result of the fact that, so Nationwide and Mr Moran asserted, Mr Schepisi and Mr Specktor lacked independence and had personal knowledge of Mr Rush. Exactly why those considerations resulted in the evidence being unfairly prejudicial, however, remained unclear. It was not addressed in either the written or oral submissions advanced by Nationwide and Mr Moran. Nor was any attention given to the probative value of the evidence or the balancing exercise that is required when applying s 135 of the Evidence Act.

53 For the reasons already effectively given, the opinion evidence of Mr Schepisi and Mr Specktor was not unfairly prejudicial simply because they knew and had longstanding relationships with Mr Rush. Nor was the opinion evidence unfairly prejudicial because Mr Schepisi and Mr Specktor used their personal knowledge of Mr Rush in forming some of their opinions, particularly as they identified that knowledge and its use in their reports. In any event, even if the evidence was in some way unfairly prejudicial, Nationwide and Mr Moran did not even attempt to demonstrate how or why that prejudice "substantially outweighed" the probative value of the evidence.

Conclusion

54 Because there was no substance or merit in any of the arguments advanced by Nationwide and Mr Moran, I decided to admit the evidence. As I have already said, the weight that will be given to the opinions expressed by Mr Schepisi and Mr Specktor is entirely another matter. That cannot be determined until they have been cross-examined, as they both will be, and after all the evidence is before the Court, including the evidence of Mr Marks.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 29 October 2018



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD2179/2017

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED and another named in the schedule

Respondents

ORDER

JUDGE: JUSTICE WIGNEY

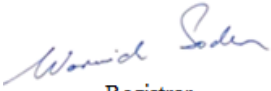
DATE OF ORDER: 29 October 2018

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. The respondents' application that the opinion evidence of Mr Frederic Schepisi and Mr Frederick Specktor be ruled inadmissible, or alternatively for an order that the evidence of Mr Schepisi and Mr Specktor be excluded pursuant to s 135 of the *Evidence Act 1995* (Cth), be refused.

Date that entry is stamped:


Registrar



Schedule

No: NSD2179/2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Respondent JONATHON MORAN

Tab 14 Redacted - Public File

FEDERAL COURT OF AUSTRALIA

Rush v Nationwide News Pty Ltd (No 6) [2018] FCA 1851

File number: NSD 2179 of 2017

Judge: **WIGNEY J**

Date of judgment: 6 November 2018

Catchwords: **PRACTICE AND PROCEDURE** – application for leave to further amend defence – inclusion of new particulars of truth as part of defence of justification – new allegations concerning applicant’s conduct by prospective witness – where amendments of considerable potential importance to defence – where reasonable explanation for delay – where amendment application made at late stage in trial – where applicant would suffer prejudice as a result of amendments – application dismissed

PRACTICE AND PROCEDURE – application pursuant to s 37AF *Federal Court Act 1976* (Cth) – application for suppression and non-publication orders – where interim orders made pursuant to s 37AI *Federal Court Act 1976* (Cth) – where publication of matters the subject of suppression or non-publication order would destroy, or frustrate or undermine, the purpose for which defamation proceedings are brought – where prejudice suffered by applicant if matters were published in connection with proceedings transcends mere embarrassment – whether circumstances amounted to the bringing of improper pressure to bear on applicant or constituted contempt of court or abuse of process – insufficient evidence to support a finding of abuse of process or contempt of court – interim suppression and non-publication orders continued until further order

EVIDENCE – admissibility of file note of discussions between applicant’s legal representatives, prospective witness’s legal representatives and Registrar of the Court – whether file note covered by privilege in s 131 *Evidence Act 1995* (Cth) – whether file note excluded by s 53B *Federal Court Act 1976* (Cth) – whether discussions were part of a mediation – whether file note fell within exception in s 131(2)(k) *Evidence Act 1995* (Cth) – file note admitted on the *voir dire* – file note ultimately excluded from evidence

Legislation:	<i>Defamation Act 2005</i> (NSW), ss 25, 29, 30 <i>Evidence Act 1995</i> (Cth), ss 11, 131 <i>Federal Court of Australia Act 1976</i> (Cth), ss 37AA, 37AE, 37AF, 37AG, 37AI, 37M, 37N, 53B
Cases cited:	<i>Allen v John Fairfax & Sons Ltd</i> (unreported, Supreme Court of New South Wales, Hunt J, 2 December 1988) <i>Anderson v Mirror Newspapers Ltd & Anor (No 2)</i> (1986) 5 NSWLR 735 <i>Ange v Fairfax Media Publications Pty Ltd</i> [2010] NSWSC 645 <i>Aon Risk Services Australia Ltd v Australian National University</i> (2009) 239 CLR 175 <i>A v Commissioner of Taxation</i> [2016] FCA 1307 <i>Channel Seven Adelaide Pty Ltd v Manock</i> (2010) 273 LSJS 70 <i>Doe v Dowling</i> [2017] NSWSC 1793 <i>Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim</i> (2012) 83 NSWLR 52 <i>Habib v Nationwide News Pty Ltd</i> (2010) 76 NSWLR 299 <i>Hogan v Australian Crime Commission</i> (2010) 240 CLR 651 <i>In the Matter of Petrolink Pty Ltd; Smith v Boné</i> [2014] FCA 1024 <i>Nationwide News Pty Ltd v Rush</i> [2018] FCAFC 70 <i>Maisel v Financial Times Ltd (No 1)</i> (1915) 112 LT 953 <i>Rush v Nationwide News Pty Ltd</i> [2018] FCA 357 <i>Rush v Nationwide News Pty Ltd (No 2)</i> [2018] FCA 550 <i>Rush v Nationwide News Pty Ltd (No 4)</i> [2018] FCA 1558 <i>R v Kwok</i> (2006) 64 NSWLR 335 <i>Versace v Monte</i> [2001] FCA 1565 <i>W v M</i> [2009] NSWSC 1084
Date of hearing:	2 November 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Other Federal Jurisdiction
Category:	Catchwords
Number of paragraphs:	159

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ORDERS

NSD 2179 of 2017

BETWEEN: **GEOFFREY ROY RUSH**
Applicant

AND: **NATIONWIDE NEWS PTY LTD**
First Respondent

JONATHON MORAN
Second Respondent

JUDGE: **WIGNEY J**

DATE OF ORDER: **6 NOVEMBER 2018**

THE COURT ORDERS THAT:

1. The respondents' interlocutory application filed in Court on 30 October 2018 is dismissed with costs.
2. The interim suppression and non-publication orders made on 30 October 2018 be continued until further order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from transcript)

WIGNEY J:

- 1 The trial of Mr Geoffrey **Rush**'s defamation action against **Nationwide** News Pty Ltd and Mr Jonathon **Moran** commenced on 22 October 2018. It was allocated 14 hearing days. On 30 October 2018, the seventh day of the trial, Nationwide and Mr Moran applied for, and were granted, leave to file in Court an interlocutory application seeking, amongst other things, an order that they be granted leave to file a third further amended defence. The proposed amendments to the existing defence are, on just about any view, substantial and significant. They include the insertion of entirely new particulars of truth of some of the pleaded imputations as part of Nationwide and Mr Moran's defence of justification pursuant to s 25 of the *Defamation Act 2005* (NSW). Those particulars raise a series of entirely new allegations concerning Mr Rush's conduct by a prospective new witness. That prospective witness will be referred to throughout these reasons as "**witness X**".
- 2 The reason for that pseudonym is that, as soon as Nationwide and Mr Moran sought leave to file the interlocutory application in Court, Mr Rush applied for non-publication and suppression orders pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) in respect of witness X's identity and the nature of the allegations made by her. Interim non-publication and suppression orders were made pursuant to s 37AI of the Federal Court Act until a determination of the substantive application under s 37AF.
- 3 As will be seen, witness X and the new allegations which form the basis of the proposed new particulars of truth have nothing to do with Mr Rush's conduct during the Sydney Theatre Company's production of *King Lear* in late 2015 and early 2016. It was Mr Rush's conduct during the production of *King Lear* which was the main, if not sole, focus of the articles which Mr Rush contends were defamatory of him. Mr Rush was first advised of the new allegations, the new witness and the application to amend the existing defence on the evening of Sunday, 28 October 2018. It will be necessary to say something more in due course concerning the chain of events that apparently led to the filing of the interlocutory application in Court on 30 October 2018.
- 4 As events transpired, the amendment application was not able to be heard until the afternoon of Friday, 2 November 2018, the tenth day of the trial. The reason that the application was not

able to be dealt with until that day was that Mr Rush's counsel were not immediately able to deal with it when it was filed on 30 October 2018. There was a good reason for that. While copies of the interlocutory application and supporting affidavit were apparently served at some time during the evening of Sunday, 28 October 2018, two important witnesses were to be called in Mr Rush's case on 29 October 2018. Perhaps more significantly, the main witness to be called by Nationwide and Mr Moran, Ms Eryn Jean **Norvill**, was due to be called to give evidence on 30 October 2018. It was reasonable for Mr Rush's counsel to focus on preparing for the cross-examination of Ms Norvill.

5 Once Ms Norvill was called, it would have been inappropriate to interrupt her evidence, particularly during cross-examination, to hear the interlocutory application. It was also not possible to hear the application immediately after Ms Norvill's evidence was completed late on the afternoon of 31 October 2018. That was because other witnesses had to be called on 1 and 2 November 2018 due to issues with their availability. The end result was that, by the time the amendment application by Nationwide and Mr Moran was heard, together with Mr Rush's application for non-publication and suppression orders, the evidence of the parties in relation to the substantive defamation action, as presently pleaded, was almost complete. The only remaining witnesses were two expert accounting witnesses whose evidence related to the calculation of any economic loss suffered by Mr Rush should his claim in defamation be found to be made out. It was agreed that the evidence of those two witnesses would be heard on Monday, 5 November 2018, again on the basis that they were effectively only available then.

6 The hearing of Nationwide and Mr Moran's amendment application and Mr Rush's application for non-publication and suppression orders concluded at about 5.00 pm on 2 November 2018. Judgment was reserved. In light of the fact that the expert accounting witnesses were to be called on 5 November 2018, it was indicated that judgment would be handed down on 6 November 2018.

7 The evidence of the expert accounting witnesses has now been heard. It follows that the amendment application by Nationwide and Mr Moran is to be decided at a point when, but for the amendment application, the case would be all but complete. All that would remain would be final submissions. If the amendment is allowed, however, it will be necessary to adjourn the matter part-heard. That was effectively conceded by Nationwide and Mr Moran. That is because witness X would not be available to give evidence during this, the final, week that has

been set aside for the trial. Indeed, it was suggested that witness X would not be able to give evidence, other than perhaps by video link, before the end of February 2019. In any event, given that Mr Rush and his legal team were not even notified of the amendment application and the allegations made by witness X until 28 October 2018, it could scarcely be expected that they would have been in a position to respond to the allegations immediately. As will be seen, if the amendment application is allowed, the earliest date that the trial could continue would be April 2019.

8 The difficult question that now needs to be resolved is whether, in all the circumstances, Nationwide and Mr Moran should be permitted to amend their defence to raise the new particulars of truth based on the evidence of witness X. Resolving that issue depends on balancing a number of relevant considerations, many of which pull in different directions. On the one hand, regard must be had to the lateness of the application and the delay and prejudice that Mr Rush will almost inevitably suffer if the amendment is allowed and the matter is adjourned part-heard to a date no earlier than April 2019. On the other hand, consideration must be given to the apparent importance of the new allegations and the evidence of witness X to Nationwide and Mr Moran's defence.

9 Before the competing considerations are considered and weighed in the balance, it is unfortunately necessary to say something more about the nature and course of the proceeding to date. That is necessary so as to put the amendment application in its proper context.

MR RUSH'S CASE

10 The nature of Mr Rush's defamation case is discussed at length in two earlier judgments of the Court: *Rush v Nationwide News Pty Ltd* [2018] FCA 357 (***Rush No 1***) and *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550 (***Rush No 2***). It is unfortunately necessary to refer again to some of the detail contained in those judgments, even though it involves some repetition. That is because one of the relevant considerations in determining whether the amendment should be allowed is the importance of the proposed amendment, and the evidence relating to it, to Nationwide and Mr Moran's defence to Mr Rush's claims. That involves close consideration of the nature of the matters complained of, the pleaded imputations, and Nationwide and Mr Moran's defence.

11 Mr Rush's claim has remained consistent since the day it was filed. There have been no amendment applications by him. He claims that he was defamed by Nationwide and Mr Moran in three publications, each of which he contends contained numerous defamatory imputations.

- 12 The **first matter complained of** was a billboard or poster which was allegedly displayed outside newsagencies throughout Australia on 30 November 2017. The billboard advertised a story or article that appeared in the Daily **Telegraph** that day. It contained the words: “World Exclusive Geoffrey Rush in Scandal Claims” and “Theatre Company Confirms ‘Inappropriate Behaviour’”. Mr Rush claimed that this publication conveyed the following two defamatory meanings or imputations:
- (a) The applicant [Mr Rush] had engaged in scandalously inappropriate behaviour in the theatre.
 - (b) The applicant had engaged in inappropriate behaviour of a sexual nature in the theatre.
- 13 Mr Rush also alleged that, by reason of certain “extrinsic facts”, the billboard conveyed two further defamatory imputations, being:
- (a) The applicant had committed sexual assault in the theatre.
 - (b) The applicant had engaged in inappropriate behaviour of a sexual nature in the theatre.
- 14 The alleged extrinsic facts, in summary, were that, in the weeks preceding the publication, a number of famous actors and movie and television producers and personalities had been portrayed in the media and on social media as sexual predators who had committed acts of sexual assault and/or sexual harassment. Those actors, producers or personalities included a famous Hollywood film producer, Harvey Weinstein; a famous Hollywood actor, Kevin Spacey; and an Australian television personality, Don Burke.
- 15 The **second matter complained of** was a series of articles published in the Telegraph on 30 November 2017. Those articles appeared on the front page and on pages 4 and 5. Those articles, or the substance of them, were also published on the Telegraph’s website and tablet app.
- 16 In short terms, the front page of the edition of the Telegraph published on that day contained a large head and shoulders photograph of Mr Rush made up in the character of King Lear. That photograph appeared above a large headline “King Leer” and the words “World Exclusive Oscar-winner Rush denies ‘inappropriate behaviour’ during Sydney stage show”. The article on the first page stated, amongst other things, that Mr Rush had been accused of “inappropriate

behaviour” during the Sydney Theatre Company’s recent production of King Lear. It noted that Mr Rush vigorously denied the claims.

- 17 The main article on pages 4 and 5 appeared under the large headline “Star’s Bard Behaviour”. The main article on pages 4 and 5 itself stated, amongst other things, that:

The Daily Telegraph can today reveal that one of the country’s most successful actors was the subject of a complaint during the production of King Lear. It is understood the allegations of inappropriate behaviour occurred over several months. The local production of the classic William Shakespeare play ran from November 2015 to January 2016 at the Roslyn Packer Theatre.

- 18 The article noted that Mr Rush denied the claims and quoted extensively from a letter written by Mr Rush’s lawyer to that effect.

- 19 Mr Rush alleged that the second matter complained of conveyed the following defamatory imputations:

- (a) The applicant is a pervert.
- (b) The applicant behaved as a sexual predator while working on the Sydney Theatre Company’s production of King Lear.
- (c) The applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company’s production of King Lear.
- (d) 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.

- 20 Mr Rush also alleged, in the alternative, that the second matter complained of conveyed those four defamatory imputations by reason of the same extrinsic facts referred to earlier in the context of the billboard.

- 21 It is perhaps worth emphasising at this stage that the focus of the article or articles in the Telegraph on 30 November 2017 was Mr Rush’s behaviour during the production of King Lear. No allegations were made about his behaviour on other occasions. That is perhaps reflected in the fact that three of the four imputations refer specifically to Mr Rush’s behaviour during the production of King Lear. The other alleged imputation – that Mr Rush was a pervert – involves a more general charge. So too do the alleged imputations carried by the first matter complained of. As will be seen, the proposed new particulars, and the evidence of witness X, can, at their very highest, only go towards establishing the substantial truth of the general charges. They

cannot provide the basis of a justification defence to any of the imputations that relate specifically to Mr Rush's behaviour during King Lear.

22 The **third matter complained of** was a series of articles published in the Telegraph on 1 December 2017. Those articles appeared on the front page and on pages 4 and 5. Those articles, or the substance of them, were also published on the Telegraph's website and tablet app.

23 The front page of that edition of the Telegraph contained the words "Unscripted Drama: the Oscar Star Scandal" and the large headline "We're With You" and "Theatre cast back accuser as Rush denies 'touching'". The first few paragraphs of the article stated:

Two Sydney Theatre Company actors yesterday spoke out in support of the actress who has accused Oscar winner Geoffrey Rush of touching her inappropriately during the stage production of King Lear.

Rush - one of Australia's biggest stars - was yesterday continuing to vehemently deny the claims.

Meyne Raoul Wyatt, who also appeared in King Lear, said he believed the allegations. "I believe (the person who) has come forward. It's time for Sydney Theatre Company and the industry in Australia and worldwide as a whole to make a stand," Wyatt said.

24 The front page article also stated:

Two STC sources said the company stood by her claims. Both said the company wouldn't work with Rush again. Despite denials, Rush was told who made the claims in a phone call with executive director Patrick McIntyre weeks ago. Mr McIntyre last night said the STC had "reviewed policies" is about "inappropriate behaviour".

25 Another article on page 4 quoted a "tweet" by another actor, Mr Brandon McClelland, who was said to have worked alongside the woman at the centre of the alleged complaint. That tweet stated: "It wasn't a misunderstanding. It wasn't a joke". That tweet was said to have been "reposted" by several other Sydney theatre actors.

26 Mr Rush alleged that the third matter complained of conveyed the following defamatory imputations:

- (a) The applicant had committed sexual assault while working on the Sydney Theatre Company's production of King Lear.
- (b) The applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of King Lear.
- (c) The applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of King Lear.

- (d) The applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of King Lear.
- (e) The applicant is a pervert.
- (f) 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.
- (g) The applicant had falsely denied that the Sydney Theatre Company had told him the identity of the person who had made a complaint against him.

27 Mr Rush also alleged, in the alternative, that the third publication conveyed the same six defamatory imputations referred to in paragraphs (a) to (f) above, by reason of the extrinsic facts referred to earlier.

28 As can be seen, five of the imputations alleged to be carried by the third matter complained of relate to Mr Rush's behaviour during King Lear. It is not suggested that the proposed new particulars can provide any defence to those imputations. One of the other imputations is again the general charge that Mr Rush is a pervert. The other imputation, that Mr Rush falsely denied that the Sydney Theatre Company had told him the identity of the person who made the complaint against him, is no longer the subject of any justification defence by Nationwide and Mr Moran. It follows that the proposed new particulars, and the evidence of witness X, are not relevant to it.

NATIONWIDE AND MR MORAN'S DEFENCE

29 Nationwide and Mr Moran's defence to Mr Rush's claim has been, to say the very least, a moveable feast. Even putting the present amendment application to one side, the settling of Nationwide and Mr Moran's final defence to the action has been fraught with difficulties. That has inevitably already led to delays and prejudice to Mr Rush.

30 Both Nationwide and Mr Moran denied that the relevant publications, in their natural and ordinary meanings or otherwise, were reasonably capable of conveying, or in fact conveyed, any of the imputations that Mr Rush alleged that they conveyed. They also denied that Mr Rush had been brought into hatred, ridicule, or contempt, or had been gravely injured in his character or reputation, or had suffered hurt or embarrassment as a result of the publications. It is unnecessary to say anything further concerning those aspects of the defence. Suffice it to say

that the proposed new particulars, and the evidence of witness X, can have no bearing on the success or otherwise of them.

31 Nationwide and Mr Moran also relied on the defence of justification under s 25 of the Defamation Act. In the first two iterations of their defence, they only contended that four of the alleged imputations were substantially true. The four imputations that they claimed to be substantially true were:

- (a) The applicant had engaged in scandalously inappropriate behaviour in the theatre.
- (b) 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.
- (c) The applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of King Lear.
- (d) 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.

32 Two things should be noted: first, three of the imputations that were initially claimed to be substantially true related specifically to Mr Rush's conduct during the production of King Lear; and second, it was not initially contended by Nationwide and Mr Moran that the general imputation that Mr Rush was a pervert was substantially true. That has now changed.

33 The particulars of truth included in Nationwide and Mr Moran's initial defence are also worthy of note. They related entirely to Mr Rush's conduct during or immediately after the production of King Lear. Perhaps more significantly, while they were, for the most part, expressed in very general, vague, and at times ambiguous, terms, they were also in part materially inconsistent with the particulars of truth now relied on by Nationwide and Mr Moran. They also did not include many of the allegations now relied on.

34 The main allegation was that, at a performance of King Lear on or about 5 January 2016, Mr Rush touched the actress, now known to be Ms Norvill, in a manner that made her feel uncomfortable. That touch was alleged to have occurred during the final scene in which Mr Rush, playing King Lear, walked onto the stage carrying Cordelia, played by Ms Norvill. The suggestion appeared to be that the alleged touch occurred while Mr Rush was carrying

Ms Norvill, not at the time that Ms Norvill was lying on the stage. It was also claimed that, following the performance, Ms Norvill said “stop doing it”. The particulars also included an allegation that, at an after party on 9 January 2016, Mr Rush followed Ms Norvill into the female bathrooms in the foyer of the theatre and Ms Norvill told him to “fuck off”. That particular is no longer pursued.

35 Needless to say, Nationwide and Mr Moran’s justification defence, in its initial iteration, was struck out on the application of Mr Rush on the basis that the particulars of truth were deficient and defective: *Rush No 1* at [55]-[108].

36 It should also be noted that Nationwide and Mr Moran also initially relied on the defence of qualified privilege pursuant to s 30 of the Defamation Act. It is unnecessary to consider the details of that defence, save for making two points.

37 First, as will be seen, the initial pursuit of the defence of qualified privilege led to further delay. Some of the particulars of the defence relied on by Nationwide and Mr Moran were struck out. That decision was the subject of an unsuccessful application by Nationwide and Mr Moran for leave to appeal: *Nationwide News Pty Ltd v Rush* [2018] FCAFC 70 (*Nationwide v Rush*). Nationwide and Mr Moran then sought to reintroduce the particulars on another basis. That application, along with the application for leave to file a cross-claim against the Sydney Theatre Company, was also unsuccessful: *Rush No 2* at [31]-[73].

38 Second, for a significant period of time, including at the time that the matter was set down for trial, the defence of qualified privilege was the only substantive defence relied on by Nationwide and Mr Moran. Ultimately, however, they withdrew that defence. The circumstances in which that defence was withdrawn are considered later.

39 Nationwide and Mr Moran’s substantive defence to Mr Rush’s claim now hinges entirely on a defence of justification. The circumstances in which Nationwide and Mr Moran were permitted to re-introduce and re-plead the defence are considered later in the context of the delay and prejudice that has been occasioned by Nationwide and Mr Moran’s amendments to their defence. It is, in the meantime, necessary to outline the defence of justification as presently pleaded. That is because, as has already been noted, the proposed amendment to the defence would, if permitted, significantly supplement the particulars of truth relating to at least some of the alleged imputations.

40 The defence of justification, as currently pleaded by Nationwide and Mr Moran, is entirely based, as it was initially, on allegations concerning Mr Rush's conduct and behaviour during the production of King Lear, including the rehearsals. The allegations, as particularised, relate entirely to Mr Rush's behaviour towards Ms Norvill. Nationwide and Mr Moran contend that that the allegations, if made out, would prove the substantial truth of all but one of the imputations pleaded by Mr Rush. The one imputation that is not the subject of the justification defence is the imputation that Mr Rush had falsely denied that the Sydney Theatre Company had told him the identity of the person who had made a complaint against him.

41 The particulars of truth that have been pleaded by Nationwide and Mr Moran involve, broadly speaking, seven or perhaps eight key allegations or incidents.

42 The first key allegation is that, on one occasion when Mr Rush and Ms Norvill were rehearsing the final scene of the play, in which Cordelia is dead and King Lear is grieving over her dead body, Ms Norvill saw Mr Rush "hovering his hands over her torso and pretending to caress or stroke her upper torso" and then make "groping gestures in the air with two cupped hands, which gestures were intended to simulate and did in fact simulate him groping and fondling [Ms Norvill's] breasts": second further amended defence (**SFAD**) [15]. This incident was said to have occurred in front of other members of the cast and perhaps crew.

43 The second key allegation is that, during the rehearsal period, Mr Rush "regularly made comments or jokes about [Ms Norvill] or her body which contained sexual innuendo": SFAD [16]. That conduct was said to have occurred in the presence of members of the cast and crew.

44 The third allegation again relates to conduct during the rehearsal period. It is alleged that Mr Rush would "regularly (every few days) make lewd gestures in [Ms Norvill's] direction" and that "[o]n a number of occasions this comprised [Mr Rush] looking at [Ms Norvill], sticking his tongue out and licking his lips and using his hands to grope the air like he was fondling [Ms Norvill's] hips or breasts": SFAD [17].

45 The fourth allegation is that, during an interview with a journalist, Mr Rush described having a "stage-door Johnny crush" on Ms Norvill: SFAD [18].

46 The fifth allegation is perhaps the most serious allegation. It is alleged that, during a preview performance of the play, Mr Rush departed from the way that the last scene had previously been performed in that he "did not touch [Ms Norvill's] hand and face as had been repeatedly rehearsed but rather [he] moved his hand so that it traced down [Ms Norvill's] torso and across

the side of her right breast”: SFAD [19]. The following day, the director of the play, Mr Neil **Armfield**, gave Mr Rush an oral “note”, apparently in the presence of other cast members, in which he said that Mr Rush should make his performance in the last scene more “paternal” as it was becoming “creepy and unclear”. Mr Armfield also directed Mr Rush not to stroke Ms Norvill’s body: SFAD [20].

47 The sixth allegation concerns an incident that was said to have occurred during a performance which occurred in the period between 14 and 26 December 2015. The final scene of the play involved Mr Rush carrying Ms Norvill onto the stage in his arms. Ms Norvill stood on a chair in the prompt side wings so as to facilitate Mr Rush lifting her into his arms before carrying her onto the stage. It is alleged that, in a performance during the period referred to earlier, before lifting Ms Norvill from the chair, Mr Rush placed his hand on Ms Norvill’s lower back above her shirt. He then moved his hand under her shirt and along the waistline of Ms Norvill’s jeans, brushing across the skin of her lower back. The movement is alleged to have been light in pressure, slow, and deliberate, and to have lasted 20 to 30 seconds: SFAD [21]-[22].

48 The seventh allegation again concerns an incident that occurred immediately prior to Mr Rush lifting Ms Norvill from the chair before carrying her on stage for the final scene. The incident is said to have occurred during a performance in the period 4 to 9 January 2016. On this occasion, Mr Rush is alleged to have started to touch Ms Norvill’s lower back on top of her shirt. He then gently rubbed his fingers over Ms Norvill’s lower back from left to right: SFAD [23].

49 The eighth allegation is that, on 10 June 2016, Mr Rush sent a text message to Ms Norvill in which he said that he thought about her “more than is socially appropriate”: SFAD [24].

50 Nationwide and Moran claim that Mr Rush’s actions as described were intentional and constituted scandalously inappropriate conduct in a workplace: SFAD [25]. They contend that Ms Norvill made a complaint to the Sydney Theatre Company in April 2016 and that, following the complaint, the Sydney Theatre Company decided that it would never work with Mr Rush again: SFAD [27].

51 As has already been noted, the main change that would be made to Nationwide and Mr Moran’s defence by the proposed amendment involves the addition of new particulars of facts and circumstances that Nationwide and Mr Moran contend would, if established, prove the substantial truth of some, but not all, of the pleaded imputations. The general nature of those

new particulars will be outlined shortly. The important point to emphasise at this stage is that, unlike the existing particulars and allegations, the new particulars do not involve Mr Rush's behaviour during the production of King Lear, do not involve Ms Norvill, and do not involve the Sydney Theatre Company. They involve incidents or events that are alleged to have occurred many years before 2016.

52 Before addressing the proposed amendments in some little more detail, it is necessary to say something more about the chronology of the proceedings to date. That is again necessary to put the amendment application in its proper context.

CHRONOLOGY OF THE PROCEEDINGS TO DATE

53 Mr Rush filed his originating application and statement of claim almost a year ago, on 8 December 2017. The matter was listed for a first case management hearing on 8 February 2018.

54 Nationwide and Mr Moran filed a defence on 1 February 2018. The next day, Mr Rush filed an interlocutory application which sought, amongst other things, orders striking out parts of the defence, including the justification defence and parts of the defence of qualified privilege. The interlocutory application was made returnable at the first case management hearing on 8 February 2018.

55 At the first case management hearing on 8 February 2018, senior counsel who then appeared for Mr Rush moved on the interlocutory application. Counsel who appeared for Nationwide and Mr Moran opposed the interlocutory application being heard that day. Counsel for Nationwide and Mr Moran also sought a direction in relation to the filing of an amended defence. Ultimately, Nationwide and Mr Moran prevailed: Mr Rush's interlocutory application was listed for hearing on 19 February 2018 and Nationwide and Mr Moran were directed to serve an amended defence, and provide a copy to the Court, on or before 15 February 2018. The important point to emphasise about the first case management hearing is that Mr Rush, through his counsel, emphasised his wish to have the earliest possible hearing date. It was on that basis that he sought to have the interlocutory application resolved at the earliest opportunity.

56 Nationwide and Mr Moran provided an amended defence on 14 February 2018 as directed and the interlocutory application was heard on 19 February 2018.

- 57 On 20 March 2018, judgment was delivered in relation to Mr Rush's interlocutory application: *Rush No 1*. Amongst other things, orders were made striking out Nationwide and Mr Moran's justification defence and parts of their qualified privilege defence. A subpoena that had been issued to the Sydney Theatre Company on the application of Nationwide and Mr Moran was also set aside.
- 58 When judgment was handed down, counsel for Mr Rush immediately provided short minutes of order for the future progress of the matter. Counsel emphasised that Mr Rush sought the earliest available hearing date. It was indicated that the matter could be heard in August 2018. Counsel for Nationwide and Mr Moran opposed the timetable that had been proposed by Mr Rush and opposed the making of an order fixing the matter for trial. The main reason for that opposition was that Nationwide and Mr Moran wanted time to consider applying for leave to appeal from the interlocutory judgment. Nationwide and Mr Moran again prevailed. The matter was not listed for trial, but was instead listed for a further case management hearing on 27 March 2018.
- 59 At the further case management hearing on 27 March 2018, senior counsel for Nationwide and Mr Moran advised that an application for leave to appeal would be filed. The consequence of that was said to be that it "would be pointless ... to proceed to embark on a course of interlocutory procedures like discovery and statements and interrogatories" until that leave application was heard and disposed of. Senior counsel for Nationwide and Mr Moran also sought an order concerning the filing of a cross claim against the Sydney Theatre Company. Counsel for Mr Rush opposed the course proposed by Nationwide and Mr Moran and, once again, emphasised that Mr Rush was entitled to the earliest available date so as to be able to vindicate his reputation. Orders were eventually made which required Nationwide and Mr Moran to file an application for leave to file a further amended defence and cross-claim and an application for leave to appeal by 3 April 2018. The matter was listed for a further case management hearing on 9 April 2018.
- 60 At the case management hearing on 9 April 2018, counsel for Mr Rush advised the Court that Mr Rush did not oppose the filing of the further amended defence which had been served by Nationwide and Mr Moran, though he would oppose the filing of a cross-claim against the Sydney Theatre Company. Senior counsel then appearing for Nationwide and Mr Moran indicated, however, that they were still considering making some further changes to the proposed further amended defence concerning mitigation of damage. The application

involving the filing of a cross-claim against the Sydney Theatre Company was set down for hearing on 13 April 2018. That hearing date was subsequently changed to 16 April 2018.

61 As had occurred at every previous case management hearing, counsel for Mr Rush pressed for an early hearing date. This time, however, an affidavit was filed in support of the application for an early hearing date. That affidavit included evidence that Mr Rush was suffering ongoing hurt and damage as a result of the impugned publications and ongoing reports of the proceedings. The deponent of the affidavit said, on the basis of information provided by Mr Rush, that Mr Rush was virtually housebound, that he suffered from lack of sleep and anxiety, and that he had retreated from and lacked the necessary motivation to conduct normal activities in the theatre and film industries. The affidavit also referred to and annexed numerous reports of the proceedings by newspapers in Australia and overseas.

62 On 11 April 2018, Nationwide and Mr Moran served a second proposed further amended defence which differed in material respects from the version served earlier. Those differences had not been foreshadowed at the earlier case management hearing. Mr Rush advised that he opposed the filing of that version of the further amended defence.

63 The interlocutory application filed by Nationwide and Mr Moran for orders relating to the second proposed further amended defence and proposed cross-claim against the Sydney Theatre Company was heard on 16 April 2018. Judgment dismissing the interlocutory application was delivered on 20 April 2018: *Rush No 2*.

64 As had occurred immediately after the handing down of judgment in *Rush No 1*, upon the handing down of judgment in *Rush No 2*, counsel for Mr Rush immediately pressed for the matter to be set down for hearing on the earliest available date. While senior counsel who appeared for Nationwide and Mr Moran on that day initially expressed some faint opposition to the course proposed by Mr Rush, ultimately orders were made fixing the matter for trial to commence on 3 September 2018. Orders were also made in relation to the service of outlines of evidence and various other interlocutory steps.

65 Nationwide and Mr Moran's application for leave to appeal from *Rush No 1* was heard by the Full Court on 27 April 2018. It was dismissed with costs: *Nationwide v Rush*.

66 The important point to emphasise at this point in the chronology is that, at every stage of the proceeding, Mr Rush, through his counsel, had pressed for an early hearing of his claim. Nationwide and Mr Moran, on the other hand, had frustrated and impeded Mr Rush's attempt

to have his claim heard. They filed a defence which raised defences which were not properly particularised. They not only unsuccessfully sought leave to appeal from the judgment striking out parts of their defence of qualified privilege, but they also unsuccessfully sought to reintroduce the struck-out paragraphs on a different basis. In *Rush v Nationwide News Pty Ltd (No 4)* [2018] FCA 1558 (***Rush No 4***), I described Nationwide and Mr Moran's conduct of the litigation up to this point as being unsatisfactory. If anything, that was an understatement.

67 Eventually, however, Mr Rush was able to secure a trial date in early September 2018.

68 On 31 July 2018, that all changed. The sequence of events that commenced on 31 July 2018 is described in detail in *Rush No. 4*. In summary, Nationwide and Mr Moran filed yet another application to amend their defence. The reason for the amendment application was that Ms Norvill, who had until this point declined to co-operate with Nationwide and Mr Moran's defence, had agreed to give evidence. The amended defence contained almost entirely new particulars of truth. Those particulars, which were described earlier, were based on the anticipated evidence of Ms Norvill. Mr Rush initially opposed the amendment application, but ultimately withdrew that opposition on the condition that the commencement of the trial was able to be deferred to 22 October 2018, a date that was suitable to the parties and the Court.

69 Ultimately, orders were made on 9 August 2018 which had the effect of vacating the existing trial date, fixing the trial for hearing to commence on 22 October 2018, and providing for all further interlocutory steps necessary to ensure that the trial could commence on 22 October 2018. As was explained in *Rush No. 4*, the orders that were made on 9 August 2018 included an order that Nationwide and Mr Moran could not further amend their defence without leave of the Court and that the parties could not rely on any evidence not served in accordance with the timetable. In the case of Nationwide and Mr Moran, that meant that they were not permitted to rely on any evidence served after 20 August 2018 without leave.

70 It should also be noted, in this context, that Mr Rush's counsel said the following in relation to Mr Rush's reasons for withdrawing his opposition to the amendment application and the delay of the trial:

Yes, and I should say the only reason we're consenting to this adjournment, even though the delay is intolerable to Mr Rush, is because, frankly, it's in his interest for these allegations to be dealt with as a matter of finality, in full. He's ready to come to court, and he wants them to be determined. And that's the reason why the application is not opposed.

71 The important point to emphasise is that, even putting the unsatisfactory conduct of the proceedings prior to 31 July 2018 to one side, the trial of Mr Rush's application has already been adjourned once to accommodate a significant amendment of Nationwide and Mr Moran's defence. If the present amendment application was allowed, it would be the fourth amendment of Nationwide and Mr Moran's defence.

THE PROPOSED AMENDMENT AND THE EXPLANATION FOR IT

72 Nationwide and Mr Moran's explanation for the current amendment application is contained in an affidavit sworn by Mr Marlia **Saunders**, a solicitor employed by Nationwide. That affidavit also annexes the proposed third further amended defence and a document which is said to be a statement of witness X. For reasons that will become apparent, witness X's identity will not be exposed in these reasons. Nor will the detail of witness X's statement or the detail of the new particulars contained in the proposed third further amended defence. It is sufficient to note the following.

73 Witness X is someone who worked with or alongside Mr Rush some years ago, well before the production of *King Lear* which has, to date, been the focus of these proceedings. Ms Saunders' evidence was that, in or about December 2017, a journalist employed by Nationwide attempted to contact witness X to see if she would speak about her experience working with or alongside Mr Rush. That attempt was unsuccessful. A further attempt was made in writing in February 2018. A representative of witness X advised that she did not wish to speak with Nationwide and Mr Moran's legal representatives and did not want to be contacted again. Despite the request that witness X not be contacted again, further attempts were made to speak with witness X in July, September and October 2018. Those further attempts met with either no response, or a negative response.

74 On 26 October 2018, however, a solicitor acting for witness X contacted Nationwide and Mr Moran's lawyers and indicated that witness X may be prepared to give evidence at the hearing. Exactly how that came about is unclear. It can be noted, however, that the solicitor who acted for witness X also acted for Ms Norvill. It was that solicitor who first contacted Nationwide and Mr Moran's lawyers about Ms Norvill's willingness to give evidence. It was that contact which eventually gave rise to the 31 July 2018 amendment application.

75 As already indicated, Ms Saunders' affidavit annexes a document said to be a statement of witness X. It is unsigned and bears the date 28 October 2018. It is unclear from Ms Saunders' affidavit who prepared that statement and in what circumstances it was prepared. While it

bears the date 28 October 2018, it is unclear when it was first prepared or finalised, or exactly when it was provided to Nationwide and Mr Moran's lawyers.

76 The statement records, amongst other things, that after reading numerous media reports about evidence given in the trial, witness X retained a solicitor to provide her with legal advice about the dispute between Nationwide and Mr Moran, and Mr Rush. It is stated, in effect, that for various reasons that are explained in the statement, witness X would be extremely reluctant to attend Court to give evidence in person prior to the end of February 2019. The statement includes a request that witness X be permitted to give evidence by video link from overseas, though it is unclear exactly when that could be done, or whether it could be done before the end of February 2019.

77 As for the expected evidence of witness X, as recorded in the statement, the statement refers to a number of incidents that occurred during and after the period of time that witness X worked with or alongside Mr Rush. I have closely considered the contents of the statement of witness X in its entirety. As has already been indicated, however, it is not intended to delve into the detail of those alleged incidents in these reasons. It is sufficient to note that the incidents are all said to have occurred during the season of a particular theatre production, though some of the incidents occurred in social settings outside the theatre and one occurred in a professional setting outside the theatre. Some of the incidents involve electronic messages. The incidents that occurred in the theatre setting did not occur during any performance or rehearsal. The incidents could broadly be said to be sexual in nature.

78 The proposed third further amended defence distils those incidents into 8 particulars (proposed paragraphs 27D to 27L; paragraphs 27A to 27C contain background to those particulars). Those particulars are then said to support the substantial truth of the following imputations:

- (a) The applicant had engaged in scandalously inappropriate behaviour in the theatre (see paragraph 28.1 of the proposed third further amended defence).
- (b) The applicant had behaved in inappropriate behaviour of a sexual nature in the theatre (see paragraph 28.2 of the proposed third further amended defence).
- (c) The applicant is a pervert (see paragraph 28.4 of the proposed third further amended defence).

79 These are said to be the "general charges" that do not involve Mr Rush's behaviour or conduct during the production of King Lear. As has already been noted, there is no suggestion, and nor

could there be, that the particulars based on the expected evidence of witness X could support the substantial truth of any of the other pleaded imputations.

80 In all the circumstances, and having regard to the contents of the statement of witness X, it is appropriate to approach this amendment application on the basis that the evidence of witness X, as recorded in the statement, would, if fully accepted, be capable of supporting the substantial truth of the general imputations that Mr Rush had engaged in scandalously inappropriate behaviour in the theatre, and had engaged in inappropriate behaviour of a sexual nature in the theatre. It is perhaps questionable whether the evidence, if accepted, would necessarily establish the general imputation that Mr Rush is a pervert. The word “pervert” is heavily value-laden. Much would depend on the precise context and circumstances in which the incidents occurred, if indeed they are found to have occurred. Nevertheless, for the purposes of considering this application, it should be accepted that the evidence is at least potentially capable of supporting the substantial truth of that imputation. The application should also be approached on the basis that, if the evidence of witness X did establish the substantial truth of any of those three imputations, that would be relevant to the mitigation of damages should Mr Rush’s claim based on the other imputations be made out (see paragraph 29 of the proposed third further amended defence).

RELEVANT PRINCIPLES

81 The relevant principles to apply when considering an amendment application such as this are well settled. They were outlined in *Rush No 2* at [25] to [30]. It is unnecessary to rehearse what was said about the principles in that judgment. Suffice it to say that it is those principles that are to apply in resolving the present dispute and dilemma. Both parties accepted that that was so.

82 The difficulty is in the application of those principles to the unique and somewhat extraordinary circumstances of this case.

EVIDENCE RELIED IN SUPPORT OF AND IN OPPOSITION TO THE APPLICATION

83 Nationwide and Mr Moran relied primarily on the affidavit evidence of Ms Saunders. That evidence has already been referred to. Ms Saunders swore another affidavit, though it contained evidence that related primarily to Mr Rush’s application for suppression and non-publication orders.

- 84 Mr Rush relied on affidavit evidence from his solicitor Mr Nicholas **Pullen**. Mr Pullen first became aware, in a very general sense, of witness X during a communication he had with witness X's solicitor late in the evening on 26 October 2018. That communication also involved a Registrar of this Court and was said to have occurred in the context of an ongoing mediation. That is despite the fact that neither Nationwide or Mr Moran, nor their solicitors or counsel, were a party to the discussions. In any event, Nationwide and Mr Moran objected to the admissibility of the evidence of the communication on the basis that it occurred in the context of the mediation and was therefore excluded by either or both of s 131 of the *Evidence Act 1995* (Cth) or s 53B of the Federal Court Act. That issue is referred to later in the context of Mr Rush's application for suppression and non-publication orders. The evidence of the communication on the evening of 26 October 2018 ultimately has no relevance to, or bearing on, the amendment application.
- 85 Mr Pullen's evidence was that he received an email at 6.28 pm on Sunday, 28 October 2018, which attached Nationwide and Mr Moran's interlocutory application and the supporting affidavit of Ms Saunders. Mr Pullen contacted Mr Rush by telephone the following day. He noted that Mr Rush was, perhaps not surprisingly, "shocked and upset". That was the first time that Mr Rush and his lawyers had seen the statement of witness X.
- 86 Over the weekend of 27 and 28 October 2018, Mr Rush's legal team were busy preparing to call evidence from Ms Judith **Davis** and Ms Robyn **Nevin** and preparing to cross-examine Nationwide and Mr Moran's witnesses, in particular Ms Norvill. As was noted earlier, Ms Davis and Ms Nevin were called to give evidence on Monday, 29 October 2018. A joint application was made to adjourn the proceedings for a short period after the conclusion of the evidence of Ms Nevin. It would appear that there were discussions between the parties and witness X's solicitor during that time. Nationwide and Mr Moran moved on the interlocutory application on the morning of 30 October 2018, though the hearing of the application was deferred as Mr Rush's legal team were not prepared to deal with it. Ms Norvill was then called to give evidence.
- 87 Mr Pullen's evidence was that Mr Rush and his legal team had not, at the time he swore his affidavit on 30 October 2018, had an opportunity to make proper enquiries in relation to the allegations made in witness X's statement. If Mr Rush was compelled to meet and respond to that statement and the allegations contained therein, he would be required to make enquiries of certain individuals referred to in the statement and to issue a subpoena to produce documents.

Mr Pullen noted in that regard that the statement of witness X annexed certain documents, including selected or “selective” diary extracts and incomplete or one-sided communications between witness X and Mr Rush.

88 Mr Pullen’s evidence, which was unchallenged, was that it would not be possible for Mr Rush and his legal team to pursue those enquiries prior to the conclusion of the time allocated for the hearing of the matter. The last day allocated for the hearing of the matter was and is 8 November 2018. Mr Pullen noted that Mr Rush would oppose witness X giving evidence by video link.

89 Mr Pullen referred to and annexed media articles published by Nationwide during the hearing.

90 Mr Pullen also gave the following unchallenged evidence concerning his observations of Mr Rush and his wife during the course of these proceedings:

My observation of the Applicant and his wife, during the course of these proceedings since December 2017, but particularly since the commencement of the hearing, is that they have been under tremendous stress.

My observation was that they were both particularly anxious during the days before they gave evidence - given the amount of attention the hearing has been receiving in the media in Australia and overseas, and given their evidence was to be highly emotional and personal. My observation was that the process of giving evidence took a great emotional and physical toll on them.

91 It should be noted that, by this time, numerous witnesses had been called in Mr Rush’s case and had given effectively unchallenged evidence concerning the profound effect that the impugned publications had had on Mr Rush’s health and wellbeing.

SHOULD LEAVE TO AMEND BE GRANTED?

92 In very general terms, the main factors that must be considered and weighed up in the particular circumstances of this case are: *first*, the nature of the proposed amendment and its importance to Nationwide and Mr Moran’s case; *second*, the extent of any delay in applying for leave to amend and the adequacy of Nationwide and Mr Moran’s explanation for it; *third*, the prejudice to Mr Rush that will be caused by the amendment, including any prejudice that may be inferred or presumed in the circumstances; *fourth*, whether any prejudice to Mr Rush can be adequately remedied by a costs order or otherwise; and *fifth*, modern case management considerations, including the potential detriment to other litigants and the Court and the potential loss in public confidence in the legal system.

The nature and importance of the proposed amendments

- 93 The nature of the proposed amendments has already been discussed. It may be accepted that the amendments are of considerable potential importance to Nationwide and Mr Moran's case.
- 94 In *Maisel v Financial Times Ltd (No 1)* (1915) 112 LT 953 at 955; 84 LJKB 2145 at 2147, the House of Lords held that, where an imputation alleging a general charge was conveyed, the defendant was entitled to give particulars demonstrating why that was true by reference to a wide variety of matters and was not confined to the facts in the article: see also *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299 at [314]; *Anderson v Mirror Newspapers Ltd & Anor (No 2)* (1986) 5 NSWLR 735 at 737A-C; *Allen v John Fairfax & Sons Ltd* (unreported, Supreme Court of New South Wales, Hunt J, 2 December 1988) at 9; *Ange v Fairfax Media Publications Pty Ltd* [2010] NSWSC 645 at [38]-[41].
- 95 It may readily be accepted that the amendments incorporating the new particulars of truth and the expected evidence of witness X are, if accepted, capable of proving the substantial truth of three of the "general charges" or imputations pleaded by Mr Rush and referred to earlier.
- 96 If it does turn out to be the case that those general charges are proved to be substantially true, it does not follow that Nationwide and Mr Moran's justification defence will necessarily succeed on the strength of the evidence of witness X alone. That is because, to succeed in a defence of truth, Nationwide and Mr Moran must prove the truth of all of the carried defamatory imputations in relation to the relevant matters complained of. Proof of the truth of less than all of the carried imputations does not bear upon the question of liability.
- 97 It may be accepted, however, that if the three general imputations are proved to be substantially true, but Nationwide and Mr Moran are found liable in respect of the other pleaded imputations, the substantial truth of the three general imputations is likely to mitigate Mr Rush's damages, potentially significantly.
- 98 The potential importance of the proposed amendments in Nationwide and Mr Moran's case is a consideration which weighs significantly towards the grant of leave to amend.
- 99 I should also note in this context that, in the course of oral submissions, senior counsel for Nationwide and Mr Moran floated the suggestion that the evidence of witness X might also constitute tendency evidence that might support Ms Norvill's evidence. That argument was not developed. In those circumstances it suffices to say that the question whether the evidence of witness X might constitute some form of tendency evidence raises difficult and complex

issues. It is by no means certain that the evidence would satisfy the requirements in the Evidence Act in relation to tendency evidence.

The extent of the delay and the explanation for it

100 There are two aspects to this consideration. The first is the lateness of the application. The second is the explanation for the lateness of the application and any relevant delay.

101 The application to amend has unquestionably been made at an extremely late stage of the trial. As has already been explained in some detail, Nationwide and Mr Moran moved on their application to amend at a time when the major part of Mr Rush's case had been concluded. Mr Rush had given evidence and been cross-examined over some three days. All of the witnesses who were to be called by Mr Rush to rebut Nationwide and Mr Moran's justification defence had also already been called. All that remained of Mr Rush's case was the calling of some general reputation witnesses and some expert evidence relating to Mr Rush's economic loss claim.

102 The lateness of the application to amend is a very weighty consideration. It is considered in more detail in the context of the prejudice to Mr Rush arising from the proposed amendment. It suffices to note at this stage that the lateness of the application weighs heavily against the grant of leave to amend in the particular circumstances of this case.

103 There is, however, an explanation for the lateness of the application. As Ms Saunders' evidence demonstrates, attempts had been made to contact witness X from about December 2017. Those attempts were unsuccessful. Further attempts were made during 2018. They were equally unsuccessful. It would appear that witness X only decided to engage with Nationwide and Mr Moran after she had seen some media reports of evidence during the trial and then retained a solicitor. That solicitor happened to be Ms Norvill's solicitor, though it could scarcely be accepted that that was a pure coincidence.

104 Once witness X, through her solicitor, made contact with Nationwide and Mr Moran's legal team, they moved very swiftly to make the amendment application. There was no delay in that respect.

105 In all the circumstances, it may be accepted that Nationwide and Mr Moran have explained the lateness of the amendment application. There was no delay in making the application once witness X advised of her willingness to give evidence. Those are matters that weigh in favour of the grant of leave.

Prejudice to Mr Rush

- 106 Nationwide and Mr Moran accepted that the almost inevitable result of the amendment application, if successful, would be that the trial would have to be adjourned part-heard to a future date. It was effectively accepted that Mr Rush and his legal team would not, and could not, be ready to deal with the evidence of witness X within the time set aside for the hearing. In any event, it was not entirely clear whether witness X would have been able to give evidence during the time set aside for the hearing. Based on what was in her statement, she would not have been able to appear in person and Mr Rush, perhaps not unreasonably, opposed her giving evidence via video link. Even if that application was granted over Mr Rush's objection, it is difficult to see how that could be arranged in the limited time, particularly since arrangements have already been made for other witnesses to be called during the week commencing 29 October 2018.
- 107 At the time the amendment application was made, I indicated to the parties that, if the trial was adjourned part-heard as a result of the amendment, because of pre-existing hearing obligations, I would not be in a position to hear the balance of the trial until April 2019 at the very earliest. There would, therefore, be a delay of at least six months before the further hearing.
- 108 The likely effect of a delay of that sort on Mr Rush, and the prejudice to him that will almost inevitably result from it, will be considered shortly. Contrary to the submissions advanced by Nationwide and Mr Moran, however, delay is not the only prejudice to Mr Rush. It is almost inevitable that, having already given evidence over three days, Mr Rush would have to be recalled to give evidence and then endure further cross-examination in relation to the allegations made by witness X. There is also at least the potential that other witnesses who have already been called by Mr Rush will have to be recalled.
- 109 Two further points concerning the nature of the proposed amendments should be emphasised in this context. First, the new allegations are quite separate and distinct from the subject matter of the matters complained of and quite separate and distinct from the allegations that have consumed the first weeks of the hearing of this matter. Those allegations concerned Mr Rush's conduct and behaviour towards Ms Norvill during the Sydney Theatre Company's production of King Lear. The new allegations concern Mr Rush's conduct and behaviour towards a different person, witness X, in a different setting and at a different time. Second, the new allegations concern events that occurred many years ago. If the amendments are allowed, and the hearing is adjourned to permit Nationwide and Mr Moran to adduce evidence concerning

the new allegations, the result will effectively be that there will be a separate trial of what are said to be new allegations, but which are in fact very old allegations. The separate trial would occur, at best, almost six months after the main trial.

110 The bifurcation of Mr Rush's evidence, and indeed the bifurcation of the hearing of his case generally, which would result from the amendment would not be merely unfortunate or regrettable. There is always the potential for prejudice and additional costs where a trial is adjourned part-heard. In the circumstances here, however, the prejudice is manifest and palpable.

111 As the earlier detailed discussion of the history and chronology of the proceedings plainly reveals, Mr Rush commenced these proceedings promptly. He has also, at each opportunity, sought to pursue his claim without delay. He has at all times emphasised that he seeks public vindication at a time when the alleged defamatory publications are still relatively fresh in the minds of the public. His efforts in that regard, however, have for the most part been frustrated and impeded by Nationwide and Mr Moran's conduct of their defence.

112 At various stages during the interlocutory battles, Mr Rush adduced evidence concerning the deleterious effect that the publications had, and were continuing to have, on him and his family. For the most part, that evidence was unchallenged. In any event, it was largely confirmed by the evidence that has been given by various witness called in his case. For the most part, that evidence, or the key parts of it, went unchallenged.

113 Mr Pullen's evidence, specifically in the context of this application, was that he observed that both Mr Rush and his wife had been under tremendous stress during the proceedings since December 2017, that they were particularly stressed during the days before they gave evidence, and that the process of giving evidence took a great emotional and physical toll on them. That evidence was not challenged. It may reasonably be inferred that Mr Rush and his wife will continue to suffer considerable stress and anxiety during any period during which the trial is adjourned by reason of the amendment. The process of having to give evidence and be cross-examined again will almost inevitably take a great emotional and physical toll on Mr Rush.

114 There is no question that, in considering an amendment application, the Court is entitled to weigh in the balance the strain that litigation imposes upon litigants: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [100]-[101]. The nature

of this litigation alone would support the inference that it has been a strain upon Mr Rush. The evidence of Mr Pullen compels the conclusion that the strain has been significant.

115 Delay, including delay caused by an amendment application, is a particularly significant consideration in the context of defamation proceedings. That is because a principal purpose of defamation proceedings is public vindication. The longer that vindication is delayed, the greater the risk that the purpose of the proceedings may be undermined. In *Channel Seven Adelaide Pty Ltd v Manock* (2010) 273 LSJS 70, Bleby J (with whom White J agreed) said (at [60]):

... Those matters were even more significant in a case of an action for defamation involving a claim of serious harm to the plaintiff's professional reputation which, if attacked in the manner alleged, required early resolution and, if appropriate, early vindication. These were all matters which French CJ regarded "as both relevant and mandatory considerations in the exercise of the discretion conferred by the rules" by which the amendment of pleadings may be permitted.

116 Those observations are particularly apposite to the circumstances of this case. Mr Rush is a public figure and the evidence adduced in his case indicates that the matters complained of received worldwide attention. These proceedings have also been the subject of considerable attention. Mr Rush has made it plain from the very first case management hearing that he sought an early hearing date so that his reputation could be vindicated.

117 These are very weighty considerations in the particular circumstances of this case.

Costs

118 Nationwide and Mr Moran accepted, as they were effectively required to do, that if the amendments are allowed, they must pay Mr Rush's costs thrown away as a result of the amendments. There could, however, be little doubt that, in the particular circumstances of this case, a costs order would not fully ameliorate the prejudice that would be suffered by Mr Rush if the trial is further delayed as a result of the amendments. That is a consideration which weighs heavily against allowing the amendments.

Video link evidence

119 It appears to be implicit in Nationwide and Mr Moran's application that, if the amendments are permitted, witness X will only be willing or able to give evidence by video link. That course is opposed by Mr Rush.

120 As was explained in *Rush No 4* at [50], the Court's discretion to order that evidence be given by video link is a broad one with the determining consideration being the interests of justice. It is nevertheless necessary for a party who is asking the Court to exercise the discretion to make out its case for the making of such an order, particularly if it is opposed by the other party. That is particularly the case where the evidence is contested, the witness is to be cross-examined, and questions of credit, credibility, and reliability are involved.

121 While the statement of witness X gives various reasons why she may not be willing or able to give evidence in the trial other than by video link, in all the circumstances, I am 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 by video link. The very nature of witness X's evidence, and the fact that the reliability and credibility of her account may be called into question, would suggest that Mr Rush would be significantly prejudiced should witness X be permitted to give evidence by video link. It would undoubtedly make the task of cross-examination more difficult and onerous. If witness X remains outside the jurisdiction, it may also not be possible for Mr Rush to subpoena her to produce documents that might be relevant to her evidence.

122 It is ultimately unnecessary to reach a concluded view in relation to whether witness X should be permitted to give her evidence by video link. The fact that the Nationwide and Mr Moran's evidentiary case in relation to the new particulars may have to involve video link evidence is nonetheless a relevant, though not particularly significant, consideration.

Case management considerations and public confidence in the administration of justice

123 Efficient judicial administration and the avoidance of delay are relevant considerations as a matter of principle. The discretion to grant leave to amend is to be exercised in accordance with the overarching purpose set out in s 37M of the Federal Court Act. The overarching purpose includes the facilitation of the just resolution of disputes as quickly, inexpensively, and efficiently as possible; the disposal of proceedings in a timely manner; and the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

124 Section 37N of the Federal Court Act provides that the parties to a civil proceeding must conduct the proceeding in a way consistent with the overarching purpose. Without unnecessarily labouring the point, the history of this litigation to date plainly shows that

Nationwide and Mr Moran have not always conducted the proceeding in a way consistent with the overarching purpose.

125 It also cannot be forgotten that, each time a trial date is vacated, or adjourned part-heard because of an amendment to the pleadings, the hopes or expectations of other litigants for an early trial date will be frustrated. Equally, the public's confidence in the administration of justice and the efficient use of judicial resources is also undermined by delays caused by amendments and other interlocutory disputes. In the present case, if the amendments are permitted, the trial will have to be adjourned part-heard to a date next year for a further hearing that may take up to a week, or perhaps more. As has already been explained, that adjourned hearing will relate to new allegations that were not directly the subject of the matters complained of and are relevant to only some of the general imputations and the mitigation of damage. That is hardly consistent with the overarching purpose.

126 It should be noted in this context that Nationwide and Mr Moran pointed out that the public will now know that they have applied to lead evidence which goes to the truth of some of the imputations alleged by Mr Rush. In those circumstances, they submitted that public confidence in the judicial system would be undermined if the amendments are not permitted. There is perhaps some merit in that submission, though it must be balanced against the public expectations concerning efficient and effective judicial administration and the avoidance of delay.

Weighing up the competing considerations

127 The weighing up of the competing considerations in this case is by no means an easy exercise.

128 As has already been noted, it may be accepted that the amendments and the evidence of witness X are important to Nationwide and Mr Moran's case. The new particulars, and witness X's expected evidence in support of them, are at least capable, if accepted, of establishing the substantial truth of the three general imputations alleged by Mr Rush. While that alone would not be sufficient to make out Nationwide and Mr Moran's defence of justification, it would at least be capable of bearing, perhaps significantly, on the mitigation of damages. While the amendment application has been made very late in the trial, Nationwide and Mr Moran have provided an explanation for that lateness. Once they were advised that witness X would be willing to give evidence, they moved without delay.

129 Ultimately, however, the history of the litigation, the lateness of the amendment application, the delay which will be caused by the amendment, the resultant bifurcation of the trial, and the egregious prejudice that would inevitably be suffered by Mr Rush if the amendment application was allowed and witness X was permitted to give evidence, are considerations which, in my view, individually and cumulatively well outweigh everything else. In all the circumstances, and weighing up all the factors and considerations, the amendment should not be permitted and the trial should proceed to final submissions and conclude this week.

NON-PUBLICATION ORDERS

130 As has already been noted, when senior counsel for Nationwide and Mr Moran initially moved on the interlocutory application to amend their defence and rely on the evidence of witness X, Mr Rush applied for suppression and non-publication orders pursuant to s 37AF of the Federal Court Act. That application was made orally. It was said that those orders were necessary to prevent prejudice to the proper administration of justice. Interim orders were made pursuant to s 37AI of the Federal Court Act pending the determination of the substantive application under s 37AF.

131 It was accepted that, if the amendment was permitted, no suppression or non-publication order could or should be made. Mr Rush's application was premised on the Court refusing the amendment application.

132 Section 37AF(1)(b)(iv) of the Federal Court Act relevantly provides that the Court may, by making a suppression or non-publication order on grounds permitted by Part VAA, prohibit or restrict the publication or other disclosure of information that relates to a proceeding before the Court and is "information lodged with or filed in the Court". A suppression order is defined in s 37AA as an order that prohibits or restricts the disclosure of information (by publication or otherwise) and a non-publication order is defined as meaning an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).

133 Section 37AG of the Federal Court Act specifies the grounds upon which the Court may make a suppression or non-publication order. The only ground that was said to be relevant to Mr Rush's application was that the order "is necessary to prevent prejudice to the proper administration of justice": s 37AG(1)(a). Importantly, s 37AE provides that, in deciding whether to make a suppression or non-publication order, the Court must take into account that

a primary objective of the administration of justice is to safeguard the public interest in open justice.

134 The relevant principles to apply when the Court is asked to make suppression or non-publication orders, particularly in the context of defamation proceedings, were considered in *Rush No 1* at [186]-[193]. It is unnecessary to rehearse what was said there, or to refer again to the authorities cited. The critical points relevant to the present application are as follows.

135 First, suppression or non-publication orders should only be made in exceptional circumstances. That is both because the operative word in s 37AG(1)(a) is “necessary” and because the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The paramount consideration is the need to do justice; publication can only be avoided where necessity compels departure from the open justice principle.

136 Second, embarrassment is not itself a ground for making an order under s 37AG(1), except in the specific circumstance referred to in s 37AG(1)(d). That circumstance is not applicable to the facts of this case. Parties generally have to accept that embarrassment and damage to their reputation can be inherent in any litigation. It is the price of open justice.

137 In *Rush No 1*, I declined to make suppression and non-publication orders in respect of parts of the amended defence that had or would be struck out. As will be seen, however, the circumstances that now exist are significantly different and distinguishable from those considered in *Rush No 1*.

138 The critical question is whether the making of a suppression or non-publication order is “necessary to prevent prejudice to the proper administration of justice”. The word “necessary” in that context is a “strong word”: *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [30]. It is nevertheless not to be given an unduly narrow construction: *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [8], citing Hodson JA in *R v Kwok* (2006) 64 NSWLR 335 at [13]. The question whether an order is necessary will depend on the particular circumstances of the case. Once the court is satisfied that an order is necessary, it would be an error not to make it: *Hogan* at [33].

139 Mr Rush contended that a suppression or non-publication order in respect of the proposed third further amended defence, including the identity of witness X and the precise nature of her allegations, was necessary to prevent prejudice to the proper administration of justice because

publication of those matters would effectively destroy, or at least frustrate or undermine, the very purpose for which he brought these proceedings: the protection and vindication of his reputation.

140 In that regard, Mr Rush pointed to the following matters: first, the amendment application has been, or will be, refused and Nationwide and Mr Moran have not been, or will not be, granted leave to rely on the evidence of witness X; second, it follows that the allegations made by, and the expected evidence of, witness X will never be tested or resolved in the context of these proceedings; third, the publication of the allegations would substantially damage his reputation; fourth, if media organisations or others were able to publish the allegations and identity of witness X in the context of the amendment application, they would be able to do so under the effective protection of s 29 of the Defamation Act, which provides a defence of fair report of proceedings; and fifth, Mr Rush would as a result be left in the unenviable position of having his reputation substantially adversely affected by allegations which were never permitted to be raised in the proceedings, could never be the subject of testing or judgment in these proceedings, and in respect of which he could take no action.

141 A similar argument was considered by Tamberlin J in *Versace v Monte* [2001] FCA 1565. In making non-publication orders, his Honour said (at [9]):

If the book is made a public exhibit, then the purpose of preventing dissemination of the challenged material will be frustrated because the relevant parts might be published under the privilege which attaches to reports of court proceedings. In order to prevent this undesirable consequence, prior to a final determination of this matter, in my view, it is appropriate having regard to the highly integrated nature of the book for the confidentiality order to include the whole book.

142 In *Doe v Dowling* [2017] NSWSC 1793, McCallum J considered whether non-publication and pseudonym orders should be made in the context of a case where a defendant irrationally maintained a right to publish an indefensible defamation. Her Honour ultimately accepted the submission that the case was in the category of cases where non-publication orders were necessary to prevent the very purpose of the proceeding being undermined or rendered futile. Her Honour concluded (at [69]) that “[w]ithout the protection of such orders, the whole object of the cause of action they invoke would be defeated by the fact of their invoking it”.

143 The circumstances of this case are undoubtedly different to the circumstances in *Versace* and *Doe v Dowling*. Indeed the circumstances of this case are unique and somewhat exceptional. The prejudice that would be suffered by Mr Rush should the media, or others, be permitted to publish the precise details of the proposed amendment and the identity of witness X under the

protection of s 29 of the Defamation Act transcends mere embarrassment. Mr Rush's reputation would undoubtedly be further damaged by media reports of allegations that will never be considered, tested, or ruled upon in this proceeding. He would effectively have no recourse in respect of those reports. That would undermine and frustrate the very purpose for which he brought these proceedings.

144 The circumstances are different to those considered in *Rush No 1*. There, the relevant allegations were contained in a defence that had been filed and, but for suppression or non-publication orders, would otherwise have been open for public inspection. It was also made clear in the judgment in *Rush No 1* that the allegations in the defence had been struck out on the basis that the particulars were manifestly defective and deficient. In that respect, they had effectively been tested and dealt with. And as already noted, the nature and potential impact of the allegations made by witness X transcend mere embarrassment.

145 The circumstances of this case are also substantially different from cases where untested allegations in a pleading are publicised in circumstances where they will ultimately be tested and ruled upon in the proceeding. In *A v Commissioner of Taxation* [2016] FCA 1307, Perram J made non-publication orders in respect of allegations that would not be tested in the proceedings. While the circumstances of that case were undoubtedly different, they were, in some respects, analogous to the circumstances of this case. His Honour concluded (at [13]):

But in a case such as the present this will not occur. If limits are not placed on the extent to which this proceeding may be publicised, then the allegations against the applicant will be placed in the public domain. But this will occur in circumstances where the applicant will have had no opportunity to respond, because the correctness of the Commissioner's views will not be a matter calling for resolution in the present proceeding. Furthermore, the revelation of the dispute is likely to cause commercial damage to the group.

146 On the other side of the coin, I do not consider that the principle of open justice will in any way be undermined by the making of carefully crafted non-publication orders in this matter. The amendment application was able to be heard in open court without referring to the identity of witness X or the precise nature of her evidence and allegations. These reasons also fully explain the reason why the amendment application, and the application for leave to adduce evidence from witness X, have been refused, again without exposing the identity of witness X or the detail of her allegations. Justice has been done and seen to be done in open court and there is no risk to public confidence in the administration of justice. The media are able to report on the outcome of the applications and scrutinise and even criticise them if they choose to do so.

147 Mr Rush also contended that suppression or non-publication orders were necessary on another basis. He contended that the circumstances in which the amendment application, based on allegations made by witness X, came to be made amounted to the bringing of improper pressure to bear on Mr Rush, and potentially constituted a contempt of court or abuse of process. It was submitted that bringing improper pressure to bear on a litigant may provide a basis for suppression orders so as to prevent prejudice to the litigant and to further the more general interests of justice. Mr Rush relied, in that regard, on the judgment of Brereton J in *W v M* [2009] NSWSC 1084 at [20]-[22].

148 As was noted earlier, Mr Rush's case concerning improper pressure depends, to a large extent, on the nature and content of communications that occurred during a discussion on the evening of Friday, 26 October 2018. The parties to that discussion included Mr Rush's solicitor and counsel, witness X's solicitor and a Registrar of the Court. It was common ground that the Registrar had been involved in the ongoing mediation of these proceedings. Mr Rush's solicitor made a file note of the discussions. Nationwide and Mr Moran objected to the tender of that file note on the basis that it was covered by the privilege in s 131 of the Evidence Act and was in any event excluded by s 53B of the Federal Court Act.

149 Mr Rush submitted that the file note was admissible on a number of bases. First, he submitted that, while the discussion initially was said to have been part of the mediation, it is clear from the communications that occurred that they did not relate to the settlement of this proceeding and were not, therefore, part of the mediation. It was also pointed out that, if this was a mediation, it was a very strange mediation given that Nationwide and Mr Moran were not represented during the discussions. Indeed, there was no evidence that they or their lawyers even knew that the discussion was occurring. It was submitted, therefore, that s 53B of the Federal Court Act did not apply. Second, it was submitted that the note was not excluded by s 131 because it fell within the exception in s 131(2)(k) ("... the communication was made ... in furtherance of a deliberate abuse of a power"). Third, it was submitted that s 11 of the Evidence Act provides, in any event, that the power of a court to control the conduct of a proceeding, in particular, the power of a court with respect to abuse of process, is not affected by the Evidence Act unless that Act provides otherwise expressly or by necessary intendment.

150 I admitted the file note on the *voir dire* in accordance with the procedure referred to in *In the Matter of Petrolink Pty Ltd; Smith v Boné* [2014] FCA 1024 at [31]-[33].

- 151 An allegation of abuse of power, or abuse of process, or contempt of court is, self-evidently, a very serious allegation. It is also important to emphasise that, so far as I understand it, Mr Rush's case was that it was witness X, through her solicitor, who was bringing improper pressure to bear on him. It was therefore witness X, through her solicitor, who was alleged to have committed an abuse of power, or been involved in an abuse of process or contempt of court. It was not suggested that Nationwide or Mr Moran, or their solicitors or counsel, were involved in any such abuse of power or process. Perhaps even more significantly, it was not suggested that the Registrar acted improperly in any way. Any suggestion of that was expressly disavowed by senior counsel for Mr Rush.
- 152 The discussion which occurred on the evening of 26 October 2018 was, in some respects, rather unusual. While the presence of the Registrar, and the statement made by the Registrar at the commencement of the discussion, indicated that it was part of the mediation process, Nationwide and Mr Moran were not represented during the discussions. The discussions did not appear to directly relate to the potential resolution of this proceeding. Rather, they appeared to concern the resolution of a case that witness X might perhaps commence, based on her allegations, though witness X's solicitor undoubtedly made some statements concerning the future course of these proceedings. Some of those statements, at least at first blush, are somewhat troubling and could provide some support for Mr Rush's contention that improper pressure was being exerted upon him.
- 153 Nevertheless, I am ultimately not satisfied that the file note, considered in context, provides sufficient evidence to support a finding of abuse of process, or abuse of power, or contempt of court by witness X, her solicitor, or anyone else. In those circumstances, the file note is excluded from evidence. The balance of the evidence is also insufficient to establish any abuse of process, abuse of power, or contempt.
- 154 It should also perhaps be noted in this context that Mr Rush criticised senior counsel for Nationwide and Mr Moran for announcing witness X's name immediately when he moved on the interlocutory application. Mr Rush also criticised Nationwide for publishing witness X's name despite the suppression and non-publication orders that had, by that time, been made. Both of those matters are highly regrettable. I do not consider, however, that they bear significantly on the issue whether suppression or non-publication orders should be made. Nationwide and Mr Moran adduced evidence explaining how it came to publish witness X's name despite the non-publication orders.

155 Putting all these collateral issues to one side, there could be little doubt that the potential revelation of witness X and her allegations at this late stage of the trial placed Mr Rush under considerable pressure. That is because the revelation of the allegations has the capacity to undermine, if not destroy, Mr Rush's very purpose in bringing these proceedings. In that regard, it is related to, or is an incident of, the basis for making the non-publication orders which has already been discussed. I do not consider that it alone or independently would provide a basis for the making of non-publication or suppression orders.

156 In all the circumstances, non-publication orders should be made in relation to the identity of witness X and the detail of her allegations that provided the basis for Nationwide and Mr Moran's amendment application. As was indicated in the course of the application, it will be necessary to carefully craft the terms of the relevant non-publication order. The order should be drafted in such a way as to make it clear that it only prevents publication of that information in the context of these proceedings and the amendment application in particular. If witness X wishes to make her allegations public, either through the media or otherwise, independently of these proceedings, she should be free to do so. The media should also be free to publish those allegations, again otherwise than in the context of these proceedings, should witness X choose to independently disclose them.

157 I propose at this stage to simply continue the existing interim orders until the form of the final orders can be considered. I would urge the parties, including the intervening parties, to confer, and endeavour to agree, on a form of order which would reflect these reasons. If that cannot be done, I will hear further submissions in relation to the form of the order.

DISPOSITION AND ORDERS

158 The respondents' interlocutory application dated 28 October 2018 and filed in Court should be dismissed with costs.

159 The interim suppression and non-publication orders made on 30 October 2018 should be continued until further order. The intention of that order is to allow further submissions to be made concerning the terms of the final non-publication order.

I certify that the preceding one
hundred and fifty-nine (159)
numbered paragraphs are a true copy

of the Reasons for Judgment herein of
the Honourable Justice Wigney.

A handwritten signature in black ink, consisting of a stylized 'C' followed by a star-like shape.

Associate:

Dated: 26 November 2018



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD2179/2017

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED and another named in the schedule

Respondent

ORDER

JUDGE: JUSTICE WIGNEY


DATE OF ORDER: 6 November 2018

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. The respondents' interlocutory application filed in Court on 28 October 2018 is dismissed with costs.
2. The interim suppression and non-publication orders made on 28 October 2018 be continued until further order.

Date that entry is stamped: 6 November 2018


Registrar



Schedule

No: NSD2179/2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Respondent JONATHON MORAN

FEDERAL COURT OF AUSTRALIA

Rush v Nationwide News Pty Ltd (No 7) [2019] FCA 496

File number: NSD 2179 of 2017

Judge: **WIGNEY J**

Date of judgment: 11 April 2019

Catchwords: **DEFAMATION** – where numerous defamatory imputations alleged – consideration of whether the alleged imputations were conveyed by the publications – consideration of principles of “ordinary reasonable person” and “natural and ordinary” meaning – consideration of whether publications conveyed guilt – consideration of whether publications contained statements as an “antidote” to the “bane” of the defamatory statements – consideration of whether alleged extrinsic facts were matters of general knowledge or notoriety – where defence of justification pleaded by respondents pursuant to s 25 of the *Defamation Act 2005* (NSW) – consideration of whether on balance of probabilities the words and “defamatory sting” conveyed by publications were substantially true – where onus of proving pleaded imputations were conveyed by the publications was discharged – where defence of justification failed

Held: application granted – certain defamatory imputations conveyed by the publication – defence of justification not successful

DAMAGES – where applicant sought general compensatory damages for non-economic loss – where applicant sought aggravated damages – assessment of general or compensatory damages – consideration of appropriate and rational relationship between harm sustained by applicant from the publications and the amount of damages – where applicant sought special damages for past economic loss and future economic loss as a result of defamatory publications – consideration of what applicant’s future income would have been but for the defamatory publications – consideration of expert evidence – quantification of damages

Legislation: *Defamation Act 2005* (NSW) ss 4, 8, 25, 29, 30, 34, 35, 35(1), 35(2) and 36
Evidence Act 1995 (Cth) ss 44, 69, 102, 135 and 140

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Andrews v John Fairfax & Sons Ltd [1980] 2 NSWLR 225
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Barrow v Bolt [2013] VSC 226
Baturina v Times Newspapers Ltd [2011] EWCA Civ 308; 1 WLR 1526
Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154
Belbin v Lower Murray Urban and Rural Water Corporation [2012] VSC 535
Briginshaw v Briginshaw (1938) 60 CLR 336
Bristow v Adams [2012] NSWCA 166
Broome v Cassell & Co Ltd [1972] AC 1027
Carolan v Fairfax Media Publications Pty Ltd (No 6) [2016] NSWSC 1091
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44
Chakravarti v Advertiser Newspapers Limited (1998) 193 CLR 519
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Coyne v Citizen Finance Limited (1990 – 1991) 172 CLR 211
Crampton v Nugawela (1996) 41 NSWLR 176
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Duffy v Google Inc (No 2) [2015] SASC 206
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Fink v Fink (1946) 74 CLR 127

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Fox v Boulter [2013] EWHC 1435 (QB)
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R v Uhrig (unreported, New South Wales Court of Criminal Appeal, 24 October 1996)
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Slatyer v The Daily Telegraph Newspaper Co Ltd (1908) 6 CLR 1
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Waterhouse v Broadcasting Station 2GB Pty Ltd (1985) 1 NSWLR 58
Wilson v Bauer Media Pty Ltd [2017] VSC 521
Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485

Date of hearing: 22, 23, 24, 25, 26, 29, 30, 31 October 2018 and 1, 2, 5, 6, 7, 8 and 9 November 2018

Registry: New South Wales

Division:	General Division
National Practice Area:	Other Federal Jurisdiction
Category:	Catchwords
Number of paragraphs:	927
Counsel for the Applicant:	Mr B R McClintock SC with Ms S T Chrysanthou [Mr K Smark SC on 31 October 2018 and 2 November 2018]
Solicitor for the Applicant:	HWL Ebsworth Lawyers
Counsel for the Respondents:	Mr T D Blackburn SC with Ms L Barnett
Solicitor for the Respondents:	Ashurst Australia

ORDERS

NSD 2179 of 2017

BETWEEN: **GEOFFREY ROY RUSH**
Applicant

AND: **NATIONWIDE NEWS PTY LIMITED**
First Respondent

JONATHON MORAN
Second Respondent

JUDGE: **WIGNEY J**

DATE OF ORDER: **11 APRIL 2019**

THE COURT ORDERS THAT:

1. Verdict and judgment be entered for the applicant.
2. The respondents pay the applicant damages for non-economic loss, including aggravated damages, assessed at \$850,000.
3. The assessment of special damages for economic loss suffered by the applicant be reserved for further consideration.
4. The matter be listed for a Case Management Hearing at 9.30 am on 10 May 2019 for the purpose of making procedural orders for the determination of all outstanding issues, including the assessment of special damages for economic loss, injunctive relief, costs and interest.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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WIGNEY J:

O, you are men of stones!
Had I your tongues and eyes, I'd use them so
That heaven's vault should crack. She's gone for ever.
I know when one is dead and when one lives;
She's dead as earth. Lend me a looking-glass;
If that her breath will mist or stain the stone,
Why then she lives.

- 1 So howls a distraught and apparently deranged King Lear as he carries the lifeless body of his youngest daughter, Cordelia, across the stage and then gently lays her on the ground. He then cradles her.

A plague upon you, murderers, traitors all!
I might have saved her; now she's gone for ever.
Cordelia, Cordelia, stay a little. Ha!
What is't though sayest? Her voice was ever soft,
Gentle and low, an excellent thing in woman.
I killed the slave that was a-hanging thee.

- 2 In the Sydney Theatre Company (STC) production of this famous Shakespearian tragedy, performed at the Roslyn Packer Theatre in Sydney in late 2015 and early 2016, King Lear was played by one of Australia's most celebrated actors, Mr Geoffrey Rush. Cordelia was played by an emerging star of the stage, Ms Eryn Jean Norvill. By all accounts, this production of *King Lear* was well received, as were the performances by Mr Rush and Ms Norvill. The STC hailed Mr Rush's return to the STC in its production as one of the highlights of its 2015 season.

- 3 Well over a year later, however, in the midst of the "Harvey Weinstein scandal" and the worldwide explosion of the phenomenon which later became known as the #MeToo movement, Sydney's *The Daily Telegraph* newspaper published what was said to be a "world exclusive" story concerning the behaviour of Mr Rush during the STC production. That story ran on 30 November 2017. It was heralded by a billboard or poster that screamed "GEOFFREY RUSH IN SCANDAL CLAIMS" and "THEATRE COMPANY CONFIRMS 'INAPPROPRIATE BEHAVIOUR'".

- 4 The front page of the 30 November 2017 edition of the *Telegraph* reproduced the striking, if not somewhat haunting, STC promotional portrait of Mr Rush, made up as the deranged Lear, above the headline “KING LEER”; no doubt an intentional pun. The accompanying story, under another pun-laden headline, “STAR’S BARD BEHAVIOUR”, stated, amongst other things, that Mr Rush had been accused of, but had denied, engaging in “inappropriate behaviour” during the STC’s production of *King Lear*.
- 5 The following day’s edition of the *Telegraph* doubled-down on the story. Under the prominent headline “WE’RE WITH YOU”, the front page story claimed that two STC actors had “spoke[n] out in support of the actress who has accused Oscar winner Geoffrey Rush of touching her inappropriately during the stage production of *King Lear*”. While the accompanying articles again noted Mr Rush’s denial of the accusation, one of the other STC actors was quoted as saying, “I was in the show. I believe (her)” and the other was quoted as saying, “[i]t wasn’t a misunderstanding. It wasn’t a joke”. The articles characterised Mr Rush’s denials as “acts of defiance”. Unnamed sources were said to have told the *Telegraph* that they “believed the woman’s claims” and that the STC would not work with Mr Rush again.
- 6 The *Telegraph* articles on both days also appeared, directly or indirectly, to link the accusations that were said to have been made against Mr Rush to other cases where prominent movie executives, actors and “show business” personalities, both overseas and in Australia, had been accused of sexual harassment or misconduct. The 30 November 2017 articles were positioned alongside an article concerning allegations that a former “TV personality”, Mr Don Burke, had been accused of being, amongst other things, a “sexual predator”. One of the 1 December 2017 articles alluded to what was, by that time, the notorious “Harvey Weinstein scandal” and the almost equally notorious accusations of sexual misconduct that had been made against the actor, Mr Kevin Spacey.
- 7 Mr Rush sued the *Telegraph*’s publisher, **Nationwide** News Pty Limited, and the main author of the stories, Mr Jonathon **Moran**. Mr Rush alleges that the publications conveyed a number of defamatory imputations, including, in summary, that: he had engaged in scandalously inappropriate behaviour in the theatre; he had engaged in inappropriate behaviour of a sexual nature in the theatre; he had committed sexual assault in the theatre; he was a pervert; and he had behaved as a sexual predator and had inappropriately touched an actor while working on the STC’s production of *King Lear*. Mr Rush claims that the articles

published by Nationwide and Mr Moran had brought him into “hatred, ridicule and contempt”, that he has been “gravely injured in his character and reputation as an actor” and that he has “suffered hurt and embarrassment and ha[d] suffered and will continue to suffer loss and damage”. He claims damages, including aggravated damages and special damages for economic loss running into the millions of dollars.

8 Nationwide and Mr Moran defended the proceeding. They allege that the publications did not convey the alleged imputations. They also claim that, in any event, all but one of the imputations that Mr Rush claims were conveyed by their publications were substantially true. In their defence, they maintained that Mr Rush had in fact engaged in scandalously inappropriate behaviour of a sexual nature in the theatre, that he had in fact committed sexual assault in the theatre, that he was in fact a pervert, that he had in fact behaved as a sexual predator and that he had inappropriately touched an actor while working on the STC’s production of *King Lear*. Their contentions were based on claims that Mr Rush had, during the production of *King Lear*, amongst other things, made lewd gestures and acted in a sexually inappropriate and predatory manner towards Ms Norvill, that he had intentionally touched one of Ms Norvill’s breasts during one of the preview performances, and that he had touched Ms Norvill’s lower back as he was about to carry her on stage during the final scene in the play.

9 Nationwide and Mr Moran also claim that, even if Mr Rush was defamed, he is not entitled to aggravated damages or any damages in respect of economic loss.

10 The issues raised by this case are relatively easy to identify. They are not, however, so easy to resolve.

11 The first issue is whether the poster and the articles published on 30 November and 1 December 2017 conveyed the imputations that Mr Rush alleges they did. If none of the alleged imputations were conveyed, Mr Rush’s case must fail and judgment would have to be entered for Nationwide and Mr Moran.

12 As is so often the case in defamation matters involving the media, the poster and the relevant articles for the most part did not expressly or literally state the defamatory meanings that Mr Rush contends they in fact conveyed. For example, the articles did not, in terms, state that Mr Rush was a “pervert” or had behaved as a “sexual predator”. The issue is whether the articles nevertheless would have conveyed those meanings to the ordinary reasonable reader.

Would the ordinary reasonable reader in the circumstances have “read between the lines” and concluded that the articles read as a whole were implying or imputing those very meanings?

- 13 The second issue only arises if it is found that the poster and articles conveyed one or more of the alleged imputations. The issue, in those circumstances, is whether the imputations found to have been conveyed were substantially true as contended by Nationwide and Mr Moran. Importantly, Nationwide and Mr Moran bore the onus of proving the substantial truth of the imputations that were conveyed. To resolve this issue, it is necessary to carefully and dispassionately consider and assess the often conflicting evidence adduced by Nationwide and Mr Moran, on the one hand, and Mr Rush, on the other, concerning Mr Rush’s behaviour towards Ms Norvill during the STC’s production of *King Lear*. Did, for example, Mr Rush do anything, or act in any way, so as to justify the assertion that he was a “pervert”, or had engaged in “inappropriate behaviour of a sexual nature”, or had inappropriately touched Ms Norvill during the production of *King Lear*?
- 14 The third issue concerns the loss and damage that Mr Rush claims he has suffered by reason of the defamatory publications. This issue, of course, only arises if it is found that one or more of the imputations was conveyed and Nationwide and Mr Moran cannot demonstrate that they were substantially true.
- 15 The issue of damages involves three elements. The first element concerns the assessment of the appropriate amount of money to compensate Mr Rush for the personal distress and hurt caused to him by the publication of the defamatory imputations and to vindicate his reputation. The second element involves determining whether Mr Rush is entitled to aggravated compensatory damages arising from any improper or unjustifiable conduct by Nationwide and Mr Moran, including in their conduct of this proceeding, which increased the subjective hurt suffered by Mr Rush. The third, and perhaps most difficult, element involves determining whether Mr Rush suffered a financial or economic loss by reason of the defamatory publications and, if so, determining what that loss was or is.
- 16 The trial commenced on 22 October 2018 and concluded on 9 November 2018.
- 17 Mr Rush gave evidence. He also called a number of witnesses in support of his case. In response to Nationwide and Mr Moran’s truth defence, he called evidence from the director of the STC’s production of *King Lear*, Mr Neil Armfield AO and two actors who performed in the play: Ms Robyn Nevin AM and Ms Helen Buday. Mr Armfield, Ms Nevin and Ms

Buday gave evidence about Mr Rush's reputation, as did a number of other witnesses called in Mr Rush's case: his wife, Ms Jane Menelaus, Mr Trevor Smith, Ms Robyn Kershaw, Ms Margaret O'Bryan, Mr Simon Phillips, Mr John Gaden AO and Ms Judith Davis. He adduced expert opinion evidence relating to his economic loss claim from three witnesses who were highly experienced in the movie and entertainment industry: Mr Fred Schepisi AO, Mr Fred Spektor and Ms Robyn Russell. He also adduced evidence relating to the quantification of his economic loss claim from a forensic accountant, Mr Michael Potter.

18 Nationwide and Mr Moran's principal witness in support of their truth defence was Ms Norvill. They also adduced evidence on that issue from another actor who appeared in *King Lear*, Mr Mark Winter. Finally, they tendered expert opinion evidence in response to Mr Rush's claim for economic loss. That evidence came from Mr Richard Marks, an entertainment attorney, and Mr Tony Samuel, a forensic accountant.

19 Before addressing the three key issues which have just been highlighted, it is necessary to identify the relevant publications and the imputations that Mr Rush contends were conveyed by them.

THE DEFAMATORY MATTERS COMPLAINED OF

20 Section 8 of the *Defamation Act 2005* (NSW) provides that a person has a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than one defamatory imputation about the person is carried by the "matter". As has already been noted, Mr Rush's claim concerns three publications, or "matters complained of", each of which he contends contained numerous defamatory imputations.

The first matter complained of – The poster

21 The first matter complained of was a poster which was distributed for display outside newsagencies throughout New South Wales and the Australian Capital Territory on 30 November 2017. The poster advertised a story which appeared in the *Telegraph* that day. It contained the words: "World Exclusive Geoffrey Rush in Scandal Claims" and "Theatre Company Confirms 'Inappropriate Behaviour'".

22 The poster is reproduced in Schedule 1 to these reasons.

The second matter complained of – The 30 November 2017 articles

- 23 The second matter complained of was a series of articles published in the *Telegraph* on 30 November 2017. Those articles appeared on the front page and pages four and five of the *Telegraph*. The substance of the articles was also published on the *Telegraph*'s website and tablet "app".
- 24 The front page of the *Telegraph* published on 30 November contained a large head and shoulders photograph of Mr Rush apparently made up in the character of King Lear. The photograph appeared above a large headline: "KING LEER", and the smaller headline: "WORLD EXCLUSIVE Oscar-winner Rush denies 'inappropriate behaviour' during Sydney stage show".
- 25 The text of the article on the front page of the *Telegraph* on 30 November 2017 was as follows:
- OSCAR winning Australian actor Geoffrey Rush has been accused of "inappropriate behaviour" during Sydney Theatre Company's recent production of King Lear.
- However, Rush – through his lawyers – last night vigorously denied the claims. The Sydney Theatre Company told The Daily Telegraph 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," it said. "The Company continues to work with the complainant to minimise the risk of future instances of the alleged behaviour occurring in its workplace."
- Mr Rush's lawyers said he 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," a statement from HWL Ebsworth Lawyers said.
- "If such a statement has been issued by the STC it is both irresponsible and highly damaging."
- 26 The story concerning Mr Rush occupied almost all of the front page. Three shorter unrelated stories appeared down the left-hand side of the page.
- 27 The front page of the *Telegraph* on 30 November 2017 is reproduced in Schedule 2 to these reasons.
- 28 The articles concerning Mr Rush continued on pages four and five of the newspaper. Pages four and five faced each other so as to form a two page spread devoted to the story.
- 29 Page four contained a large headline: "STAR'S BARD BEHAVIOUR", below a smaller headline continuing across both pages stating: "Oscar-winner Geoffrey Rush denies complaint made in Sydney Theatre Shakespeare production". Below the headline was a large

photograph of Mr Rush when he received his Academy Award and smaller photographs of Mr Rush in character in *Twelfth Night* and as Einstein in the television series, *Genius*, as well as a photograph of Mr Rush shaking hands with Governor-General Peter Cosgrove when he received his Order of Australia.

30 The text of the article on page four was as follows:

OSCAR-winning Australian actor Geoffrey Rush has been accused of “inappropriate behaviour” during the Sydney Theatre Company’s recent production of *King Lear*.

But the star vigorously denies the allegations and says the company has never told him of any allegations of wrong doing.

The Daily Telegraph can today reveal that one of the country’s most successful actors was the subject of a complaint during the production of *King Lear*.

It is understood the allegations of inappropriate behaviour occurred over several months. The local production of the classic William Shakespeare play ran from November 2015 to January 2016 at the Roslyn Packer Theatre.

There were also several months of rehearsals.

“Sydney Theatre Company received a complaint alleging that Mr Geoffrey Rush had engaged in inappropriate behaviour,” a spokeswoman said to The Daily Telegraph.

“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.”

In a strongly worded legal letter, lawyers for Rush at HWL Ebsworth last night said he had never been involved in any “inappropriate behaviour” and that his “regard, actions and treatment of all the people he has worked with has been impeccable beyond reproach.

“Mr Rush has not been approached by the Sydney Theatre Company and the alleged complainant nor any representative of either of them concerning the matter you have raised,” the letter states.

“Further, he has not been informed by them of the nature of the complaint and what it involves.”

The letter from the legal firm’s partner Nicholas Pullen goes on to say that Rush has not been involved with the Sydney Theatre Company or its representatives for a period of more than 22 months.

“In the circumstances, if such a statement has been issued by the STC it is both irresponsible and highly damaging to say the least.

“Your ‘understanding’ of what has occurred is, with the greatest respect, simply fishing and unfounded.

31 The article concerning Mr Rush occupied almost all of page four save for a short article at the foot of the page concerning the New South Wales government's recycling scheme.

32 Page four of the *Telegraph* on 30 November 2017 is reproduced in Schedule 3 to these reasons.

33 Page five contained another large photograph of Mr Rush and a smaller photograph showing Mr Rush in character as *King Lear*. At the top of the page, in larger typescript than was used in the body of the article, statements made by an "STC spokeswoman" and "[l]awyer for Rush, Nicholas Pullen" were quoted. The STC spokeswoman is recorded as having said: "Sydney Theatre Company received a complaint alleging that Mr Geoffrey Rush had engaged in inappropriate behaviour". Mr Rush's lawyer is recorded as having said: "It does not warrant comment except that it is false and untrue".

34 The text of the article on page five was as follows:

"It does not warrant comment except that it is false and untrue."

Rush has worked with the STC 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*.

Rush won the Academy Award for Best Actor in 1996 for his role as David Helfgott in the movie *Shine* and was nominated for the best supporting actor role two years later for *Shakespeare in Love*.

His other Oscar nominations include best actor in 2000 film *Quills* and for *The King's Speech* in 2011 in the same category.

He has found fame for becoming one of the few people to have won acting's "Triple Crown" – the Academy Award, the Primetime Emmy Award and the Tony Award.

The 66-year-old married father-of-two and Melbourne resident is also the president of the Australian Academy of Cinema Television and Arts and is expected to attend the annual AACTA Awards at The Star Event Centre next week.

35 The article concerning Mr Rush occupied most, but not all, of page five. The layout of page five was such that the article concerning Mr Rush appeared in a box. Two smaller articles appeared outside the box. Importantly, however, another article appeared inside the same box as the article concerning Mr Rush. That article concerned allegations of sexual assault that had been levelled at the former "TV personality", Mr Don Burke. The text of that article, which appeared under the small headline, "Service to counsel affected Nine staff", was as follows:

CHANNEL Nine has opened an independent counselling service following allegations this week of sexual assault by former TV personality Don Burke as the

network's boss Hugh Marks addresses staff for the first time, saying "we cannot rewrite history".

A new phone line was set up yesterday to allow people to report instances of past behaviour they would like addressed.

"Former Nine employees with complaints can provide their personal contact details and HR will follow up directly on a strictly confidential basis," Nine said in an email to staff.

The counselling will be provided at no cost to them, Nine said, and will support the person to "work through any issues that relate to their time" at Nine.

Mr Marks, meanwhile, told staff that allegations of harassment and misconduct by Burke was "appalling", vowing to deal with misconduct, harassment, discrimination and bullying issues "effectively".

Burke returned to Nine's A Current Affair, this week where he admitted to behaving like a bullying tyrant, and having "a number of affairs", but cannot remember "exact things I did 20 years ago".

He has been described as a "sexual predator" and "psychotic bully" during the 17-year run of Burke's Backyard. Speaking to ACA host Tracy Grimshaw, he claimed to be a victim of a "witch hunt" ignited by the Harvey Weinstein scandal.

36 As will be seen, Mr Rush contends that, in considering the imputations that were conveyed by the 30 November 2017 articles, it is relevant to have regard to the positioning and content of the article concerning Mr Burke.

37 Page five of the *Telegraph* on 30 November 2017 is reproduced in Schedule 4 to these reasons.

The third matter complained of – The 1 December 2017 articles

38 The third matter complained of is a series of articles, published in the *Telegraph* on 1 December 2017. Those articles appeared on the front page and pages four and five. The articles were also substantially published on the *Telegraph's* website and tablet app.

39 The front page of the *Telegraph* on 1 December 2017 contained a banner headline: "UNSCRIPTED DRAMA: THE OSCAR STAR SCANDAL", above a very large headline: "WE'RE WITH YOU", and a smaller headline: "Theatre cast back accuser as Rush denies 'touching'". The front page also included a large photograph of the actor, Mr Meyne Wyatt, alongside the words, apparently attributed to Mr Wyatt: "I was in the show. I believe (her)".

40 The text of the article on the front page was as follows:

TWO Sydney Theatre Company actors yesterday spoke out in support of the actress who has accused Oscar winner Geoffrey Rush of touching her inappropriately during the stage production of *King Lear*.

Rush – one of Australia’s biggest stars – was yesterday continuing to vehemently deny the claims.

Meyne Raoul Wyatt, who also appeared in *King Lear*, said he believed the allegations. “I believe (the person who) has come forward. It’s time for Sydney Theatre Company and the Industry in Australia and worldwide as a whole to make a stand,” Wyatt said.

And Brandon McClelland, who has worked alongside the actress, urged others to believe the complaints. “It wasn’t a misunderstanding,” he said.

Two STC sources said the company stood by her claims. Both said the company wouldn’t work with Rush again. Despite denials, Rush was told who made the claims in a phone call with executive director Patrick McIntyre weeks ago. Mr McIntyre last night said the STC had “reviewed policies” about “inappropriate behaviour”.

41 The story concerning Mr Rush occupied almost all of the front page. Three smaller unrelated stories appear at the very foot of the page.

42 The front page of the *Telegraph* on 1 December 2017 is reproduced in Schedule 5 to these reasons.

43 Pages four and five of the *Telegraph* on 1 December 2017, which again appeared as a double page spread, contained a series of articles all of which related, in one way or another, to the allegations made against Mr Rush. Spread across the top of both pages was a large headline: “ACTS OF DEFIANCE”. Appearing under that headline were extracts from social media “posts” by Mr Wyatt and another actor, Mr Brandon McClelland. Mr Wyatt and Mr McClelland were pictured alongside short descriptions of their acting careers.

44 Mr Wyatt’s post, as portrayed in the articles, was:

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!!!

45 Two lines of Mr Wyatt’s post were blacked-out or redacted.

46 Mr McClelland’s post or “tweet”, as reproduced in the articles, was:

It wasn’t a misunderstanding. It wasn’t a joke.

47 The article which accompanied the social media posts of Mr Wyatt and Mr McClelland appeared under the headline: “Sydney Theatre Company actors support complainant’s claims against megastar Rush”. The text of that article was as follows:

TWO actors who work with the Sydney Theatre Company yesterday publicly threw their support behind the actress who has accused Oscar-winner Geoffrey Rush of touching her inappropriately during the stage production of *King Lear*.

It comes as Rush – one of the country’s most successful actors – was yesterday continuing to vehemently deny claims he inappropriately touched a cast member of the local production of the classic William Shakespeare play.

Rising young actor Meyne Raoul Wyatt, who appeared in King Lear, said he believed his castmate’s version of events.

“I was in the show,” Wyatt, who has also starred in Neighbours and Redfern Now, wrote on Facebook yesterday after The Daily Telegraph broke the story.

“I believe (the person who) 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!!!”

And Brandon McClelland, who has worked alongside the woman at the centre of the alleged complaint and is in the company’s current production of Three Sisters, urged others on Twitter to believe the actress.

“It wasn’t a misunderstanding. It wasn’t a joke,” he posted.

McClelland’s tweet was also reposted by several other Sydney theatre actors as the story dominated social media yesterday.

The STC production of King Lear ran from November 2015 to January 2016.

The 66-year-old acting legend yesterday said he “immediately phoned and spoke to senior management” at the STC when he became aware of rumours there was a complaint.

But he said the STC refused to give him any details.

“They refused to illuminate me,” he said through a statement.

“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.”

Rush’s lawyer Nicholas Pullen said it was a “great disappointment” that the STC 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,” he said.

The actor’s lawyer, a partner in legal firm HWL Ebsworth, said Rush “abhorred any form of maltreatment of any person”.

“Until there is the decency afforded to Mr Rush of what the ‘inappropriate behaviour’ actually is then there is nothing more that can be said at this stage.” Mr Pullen said.

Two sources who spoke to The Daily Telegraph yesterday said Rush was made aware who made the claims in a conversation with executive director Patrick McIntyre three weeks ago.

The sources said they believed the woman’s claims.

And they said the STC would not be working with Rush again. That’s despite the

veteran actor having worked with the company both acting and directing productions such as Uncle Vanya, Oleanna, The Importance Of Being Ernest and The Government Inspector.

A new statement from the STC yesterday said it had responded “truthfully” after being approached by The Daily Telegraph earlier this week.

It also clarified the anonymous nature of the alleged complainant, who had “requested the matter be dealt with confidentially, and did not want Mr Rush notified”.

“STC complied, acting in the interest of the complainant’s health and welfare.” Mr McIntyre last night said the STC had “reviewed policies and procedures” including “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”.

48 Extracts from statements made by Mr Rush and the STC also appeared under the “ACTS OF DEFIANCE” headline. The extract from Mr Rush’s statement was as follows:

The moment I became aware of rumours of a complaint I immediately phoned and spoke to senior management at the Sydney Theatre Company asking for clarification about the details of the statement. 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.

49 The extract from the STC’s statement was as follows:

Sydney Theatre Company was asked by a News Corp 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.

50 On the left-hand side of page four, a separate article appeared under the headline: “HR overhaul to lift curtain on bad deeds”. The text of that article was as follows:

THE Sydney Theatre Company has revised its HR policies in a bid to ensure it maintains a safe environment for staff.

Executive director of the STC Patrick McIntyre (below) said it was important actors feel safe to speak up and believes maintenance of confidentiality to be key.

“We have 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,” Mr McIntyre said.

Mr McIntyre’s comments come after the STC confirmed it had received a complaint by a staff member over allegations of “inappropriate behaviour” by Oscar winner Geoffrey Rush. Rush vehemently denies any wrongdoing.

Mr McIntyre stressed that he and the executive team at the theatre company have a duty of care to ensure all staff feel safe and respected in the workplace.

“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,” he said. More broadly, Mr McIntyre suggested it is a wideranging issue for the industry to address in the wake of the Harvey Weinstein scandal.

“Many still view that speaking up comes with adverse repercussions,” he explained.

“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.”

The HR overhaul follows preliminary findings of an Actors Equity survey aimed at theatre actors which found that 40 per cent of respondents claimed they had directly experienced sexual harassment, bullying or misconduct.

Oscar winner Kevin Spacey became embroiled in the ongoing controversy rocking the entertainment industry with numerous victims coming forward – including 20 complaints from his time as artistic director at London’s Old Vic Theatre between 2004 and 2015.

A law firm’s investigation into allegations about Spacey stated: “Despite having the appropriate escalation processes in place, it was claimed that those affected felt unable to raise concerns and that Spacey operated without sufficient accountability.”

51 A photograph of the Old Vic Theatre in London appeared above the article. That photograph was obviously included because the article referred to complaints having been made against Mr Spacey arising from his time as artistic director at that theatre.

52 The following article appeared at the foot of page four under the headline: “Statement for acting veteran blasts STC ‘smear’”:

MANAGEMENT for Oscar-winning actor Geoffrey Rush issued a comprehensive statement yesterday denying allegations of “inappropriate behaviour” during the 66-year-old veteran actor’s time with the Sydney Theatre Company’s production of King Lear.

The statement, following The Daily Telegraph’s exclusive report yesterday, took aim at the Sydney Theatre Company, alleging that it had “chosen to smear his name and unjustifiably damage his reputation”.

It also claimed that: “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,” it reads.

The widely released document says it is understood that the STC’s own statement concerns a complaint made to it more than 21 months ago.

“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.”

It goes on to quote Mr Rush:

“The moment I became aware of rumours of a complaint I immediately phoned and spoke to senior management at the Sydney Theatre Company asking for clarification about the details of the statement.

“They refused to illuminate me with the details.”

The statement then says Mr Rush can only reiterate that he denies being involved in any “inappropriate behaviour” whatsoever.

- 53 Two smaller articles relating to Mr Rush also appeared at the foot of page five. The first of those articles, which appeared under the headline: “THEATRE’S FIRM STATE OF PLAY”, was in the following terms:

THE Sydney Theatre Company yesterday confirmed it responded “truthfully” when asked if it had received a complaint alleging inappropriate behaviour by leading Australian actor Geoffrey Rush.

In an updated statement, the STC said 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.”

It also clarified the alleged complainant had “requested the matter be dealt with confidentially, and did not want Mr Rush notified or involved” in any inquiry.

“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.”

- 54 The other article, which appeared under the headline: “Execs’ exile for star”, and alongside a photograph of Mr Rush in character in the film, *Pirates of the Caribbean*, was in the following terms:

EXECUTIVES at the Sydney Theatre Company yesterday came forward in support of the woman at the heart of the Geoffrey Rush scandal, saying they wholeheartedly believe her claims.

They also said due to the seriousness of the allegations, the award-winning theatre company would not work with the *Pirates of the Caribbean* star again. “There is no chance,” the source told The Daily Telegraph. “How could we work with him again? That question doesn’t even need an answer.”

The executive added: “Another actor backed what she said ... we’ve taken this very seriously.”

The source also defended not naming the woman, saying: “It is not our story to tell.”

A high-profile actor, who did not want to be named, came forward to support the woman.

- 55 Pages four and five of the *Telegraph* on 1 December 2017 are reproduced in Schedules 6 and 7.

THE ALLEGED DEFAMATORY IMPUTATIONS

56 As has already been noted, Mr Rush alleges that each of the three matters complained of carried a number of different defamatory imputations.

Imputations allegedly conveyed by the poster

57 Mr Rush claims that the poster conveyed the following two defamatory meanings or imputations:

- (a) Mr Rush had engaged in scandalously inappropriate behaviour in the theatre.
- (b) Mr Rush had engaged in inappropriate behaviour of a sexual nature in the theatre.

58 Mr Rush also alleges that, by reason of certain “extrinsic facts”, the poster conveyed two further defamatory imputations, being:

- (a) Mr Rush had committed sexual assault in the theatre.
- (b) Mr Rush had engaged in inappropriate behaviour of a sexual nature in the theatre.

59 The particulars of the alleged extrinsic facts pleaded by Mr Rush are as follows:

- (a) Mr Rush is a famous Australian Hollywood actor.
- (b) In the weeks preceding the publication of the first matter complained of, a number of famous actors and movie and television executives, including in Hollywood, had been portrayed in the media and on social media as sexual predators who had committed acts of sexual assault and/or sexual harassment.
- (c) In the weeks preceding the publication of the first matter complained of, famous Hollywood film producer Harvey Weinstein had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.
- (d) In the weeks preceding the publication of the first matter complained of, famous Hollywood actor Kevin Spacey had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.
- (e) In the days preceding the publication of the first matter complained of, Australian television personality Don Burke was portrayed by the media as being a sexual predator.
- (f) Each of the facts set out in (a)-(e) above were notorious facts.
- (g) Readers of the first matter complained of were aware of the facts set out in (a)-(e).

60 Nationwide and Mr Moran deny that the poster conveyed any of the alleged imputations, either in its natural and ordinary meaning, or with the aid of the alleged extrinsic facts or otherwise.

Imputations allegedly conveyed by the 30 November 2017 articles

61 Mr Rush alleges that the 30 November 2017 articles conveyed the following defamatory imputations:

- (a) Mr Rush is a pervert.
- (b) Mr Rush behaved as a sexual predator while working on the STC's production of *King Lear*.
- (c) Mr Rush engaged in inappropriate behaviour of a sexual nature while working on the STC's production of *King Lear*.
- (d) Mr Rush, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the STC's production of *King Lear*.

62 Mr Rush also alleges, in the alternative, that the 30 November 2017 articles conveyed those four defamatory imputations by reason of the same extrinsic facts referred to earlier in the context of the poster.

63 Nationwide and Mr Moran deny that the 30 November 2017 articles conveyed any of the alleged imputations, either in their natural and ordinary meaning, or with the aid of the alleged extrinsic facts or otherwise.

Imputations allegedly conveyed by the 1 December 2017 articles

64 Mr Rush alleges that the 1 December 2017 articles conveyed the following defamatory imputations:

- (a) Mr Rush had committed sexual assault while working on the STC's production of *King Lear*.
- (b) Mr Rush behaved as a sexual predator while working on the STC's production of *King Lear*.
- (c) Mr Rush engaged in inappropriate behaviour of a sexual nature while working on the STC's production of *King Lear*.
- (d) Mr Rush, an acting legend, had inappropriately touched an actress while working on the STC's production of *King Lear*.

(e) Mr Rush is a pervert.

(f) Mr Rush's conduct in inappropriately touching an actress during *King Lear* was so serious that the STC would never work with him again.

(g) Mr Rush had falsely denied that the STC had told him the identity of the person who had made a complaint against him.

65 Mr Rush also alleges, in the alternative, that the 1 December 2017 articles conveyed those seven defamatory imputations by reason of the extrinsic facts referred to earlier.

66 Nationwide and Mr Moran deny that the 1 December 2017 articles conveyed any of the alleged imputations, either in their natural and ordinary meaning, or with the aid of the alleged extrinsic facts or otherwise.

ISSUE ONE: WERE THE IMPUTATIONS CONVEYED BY THE MATTERS COMPLAINED OF?

67 Nationwide and Mr Moran ultimately conceded that if the relevant publications conveyed the imputations alleged by Mr Rush, they were defamatory of him. That concession was properly made. Plainly the imputations, if conveyed, would have tended to lower Mr Rush's reputation in the opinion of right thinking members of the community: cf. *Slatyer v The Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1 at 7; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 638-639.

68 The critical question is whether the imputations were conveyed as alleged by Mr Rush.

69 The publications did not directly or literally state that Mr Rush had engaged in scandalously inappropriate behaviour in the theatre; that he had engaged in inappropriate behaviour of a sexual nature in the theatre; that he had committed sexual assault in the theatre; that he was a pervert; or that he had behaved as a sexual predator and had inappropriately touched an actress while working on the STC's production of *King Lear*. But did the publications nonetheless convey some or all of those meanings to the ordinary reasonable reader? Would the ordinary reasonable reader have "read between the lines" and understood that those meanings were implied or imputed by the publications?

Relevant principles

70 The principles to be applied in determining whether a publication conveyed defamatory imputations are well settled and were not significantly in issue in this proceeding. The lead

authorities and the principles established by them were summarised by Hunt CJ at CL (with whom Mason P and Handley JA agreed) in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164-165, and were more recently considered in this Court by White J in *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at [63]-[73]; see also *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [14]-[27]. The basic principles were also recently considered by the High Court in *Trkulja v Google LLC* (2018) 356 ALR 178 at [30]-[32] in the context of an appeal from the summary dismissal of a defamation action.

71 It is, for the most part, unnecessary to discuss or even cite all the well-known authorities. The basic principles relevant to this case may be summarised as follows.

The “ordinary reasonable person” and the “natural and ordinary” meaning

72 First, the applicant, here Mr Rush, bears the onus of proving, on the balance of probabilities, that the alleged defamatory meanings or imputations were conveyed by the publication in question.

73 Second, the question of whether the defamatory meanings were in fact conveyed is a question of fact.

74 Third, the relevant question is whether the publication would have conveyed the alleged meanings to an ordinary reasonable person. Where, as here, the publications are in writing, the question is what the words used would have conveyed to the ordinary reasonable reader. The Court is required to put itself in the shoes of, or assume the role of, the ordinary reasonable reader. The question is not a question of construction of the words used in the article in the legal sense.

75 Fourth, in this context the authorities ascribe the ordinary reasonable reader with certain character traits, qualities or characteristics. The ordinary reasonable reader is variously said to be of fair to average intelligence, experience and education. The ordinary reasonable reader is also taken to be fair-minded and neither perverse, morbid nor suspicious of mind, nor “avid for scandal”. Of course, as the High Court pointed out in *Trkulja* at [31], ordinary men and women in fact have different temperaments, outlooks, degrees of education and life experience, so the exercise is really one of “attempting to envisage a mean or midpoint of temperaments and abilities and on that basis to decide the most damaging meaning”.

- 76 Fifth, the meaning that the words would convey to the ordinary reasonable reader is often called “the natural and ordinary meaning” of the words. In some cases, the natural and ordinary meaning of the words may be obvious from the direct or literal meaning of the words themselves. More often than not, however, the question turns on what implications or imputations the ordinary reasonable reader would understand were conveyed by the words.
- 77 Sixth, in determining what implications or imputations the ordinary reasonable reader would understand or draw from the words, the authorities suggest that the ordinary reasonable reader should generally be taken to approach or consider a publication in a particular way or ways. The ordinary reasonable reader is, for example, said not to be a lawyer who examines the publication overzealously, but rather someone who views the publication casually and is prone to a degree of “loose thinking”. The ordinary reasonable reader also apparently does not live in an “ivory tower” but can and does “read between the lines” in light of their general knowledge and experience of worldly affairs. While they do not search for hidden meanings or adopt strained or forced interpretations, they nevertheless draw implications, especially derogatory implications, more freely than a lawyer would. While they read the entire publication and consider the context as a whole, they take into account emphasis that may be given by conspicuous headlines or captions.
- 78 Seventh, the mode or manner of publication can be a relevant matter in determining what was conveyed to the ordinary reasonable reader. The ordinary reasonable reader of a book, for example, is likely to read it with more care than he or she would read an article in a newspaper, particularly if that article is sensational. The ordinary reasonable reader of such an article is more prone to engage in loose thinking. That is all the more so where the words which are published are imprecise, ambiguous, loose, fanciful or unusual.
- 79 Eighth, as already adverted to, each alleged defamatory imputation has to be considered in the context of the entire publication. It does not follow, however, that each part of the publication must be given equal significance. A headline, for example, may give the reader a predisposition about what follows and may therefore assume particular importance: *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657 at [187]; (2003) 201 ALR 77 at [187]; [2003] HCA 50 at [187] (Callinan J; Gleeson CJ agreeing at [1]; Heydon J agreeing at [219]; see too McHugh J at [26]). Equally, contrary statements in an article will not necessarily or automatically negate the effect of other defamatory statements contained in the article: *Rivkin* at [26] (per McHugh J) and the cases there cited.

80 Ninth, the meaning that an ordinary reasonable reader would attribute to a publication, or the impression that the reader forms, may be influenced by the overall tone or tenor of the article in question. The article may, for example, be tinged with, or even pregnant with, insinuation or suggestion. It may also implicitly invite the reader to adopt a suspicious approach. As Gleeson CJ observed in *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 at 137:

It is a feature of certain forms of defamation that one can read or hear matter published concerning a person and be left with the powerful impression that the person is a scoundrel, but find it very difficult to discern exactly what it is that the person is said or suggested to have done wrong.

81 Tenth, the natural and ordinary meaning of words may be either the literal meaning, or an implied or inferred or an indirect meaning based on the general knowledge of the ordinary reasonable reader: *Jones v Skelton* [1963] 1 WLR 1362 at 1370; [1963] 3 All ER 952 at 958F. General knowledge, in this context, includes ““matters of universal notoriety” – that is to say, matters which any intelligent viewer or reader may be expected to know”: *Fox v Boulter* [2013] EWHC 1435 (QB) at [16] (citing Lord Mansfield CJ in *R v Horne* [1775-1802] All ER Rep 390 at 393E). Evidence is not admissible to prove the general knowledge of the ordinary reasonable reader: *Reader’s Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506-507.

82 Eleventh, the determination of what an ordinary reasonable reader would read into or imply from the words complained of is often a matter of impression.

83 Twelfth, while a publication may in some cases be reasonably capable of bearing more than one meaning, the tribunal of fact, whether it be a jury or a judge sitting alone, must ultimately determine whether the alleged defamatory meaning was in fact the single natural and ordinary meaning of the words complained of: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 173-175; *Ten Group Pty Ltd v Cornes* (2012) 114 SASR 46 at [34], [47]-[50]; *Hockey* at [73].

84 Thirteenth, in determining the meaning in fact conveyed by the publication, the intention of the publisher is irrelevant: *Lee v Wilson and MacKinnon* (1934) 51 CLR 276 at 288 (per Dixon J); *Baturina v Times Newspapers Ltd* [2011] EWCA Civ 308; 1 WLR 1526 at [24].

85 Fourteenth, the manner in which the publication was actually understood is also irrelevant in determining what meaning was conveyed to the ordinary reasonable reader: *Hough v London Express Newspaper, Ltd* [1940] 2 KB 507 at 515; [1940] 3 All ER 31 at 35; *Toomey v John*

Fairfax & Sons Ltd (1985) 1 NSWLR 291 at 301-302. The question is to be determined on the basis of the natural and ordinary meaning of the publication alone.

Investigation, suspicion and guilt

86 A mere statement that a person is being investigated by the police or prosecution agencies, or that a person is suspected of committing a crime, does not necessarily impute guilt. It may convey no more than that there are reasonable grounds to suspect that the person is guilty, or that there are reasonable grounds for investigating whether the person is guilty: ***Lewis v Daily Telegraph Ltd*** [1964] AC 234 at 267-268 (per Lord Morris of Borth-y-Gest); *Chase v News Group Newspapers Ltd* [2002] All ER (D) 20 (Dec); EWCA Civ 1772; [2003] EMLR 218; *Flood v Times Newspapers Ltd* [2012] 2 AC 273 at [8]; 4 All ER 913 at [8]; *Sands v South Australia* (2015) 122 SASR 195 at [237]-[240]. The question in such a case is which of the possible meanings was in fact conveyed to the ordinary reasonable reader in all the circumstances. Much will depend on the context, the words used and the information conveyed by the publication considered as a whole.

87 In that context, in *Lewis v Daily Telegraph*, Lord Devlin said (at 285):

It is not, therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded.

88 Similarly, in *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 (the facts of which, unlike *Lewis v Daily Telegraph*, somewhat ironically concerned a publication about a fire), Gleeson CJ, McHugh, Gummow and Heydon JJ said (at [12]):

A *mere* statement that a person is under investigation, or that a person has been charged, may not be enough to impute guilt. If, however, it is accompanied by an account of the suspicious circumstances that have aroused the interest of the authorities, and that points towards a likelihood of guilt, then the position may be otherwise.

(Emphasis in original. Footnote omitted.)

89 There is no reason to suppose that those principles do not equally apply where the relevant publication concerns a complaint which has been made to, or is being investigated by, a person or body other than the police or the prosecution service.

“Bane and antidote”

90 There may be cases where the relevant publication includes not only defamatory statements (the “bane”), but also contrary statements or conclusions (the “antidote”). The applicable principle in such a case is that if “[i]n one part of [the] publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together”: *Chalmers v Payne* (1835) 2 Cr M & R 156 at 159; (1835) 150 ER 67 at 68; *Ahmed v John Fairfax Publications Pty Ltd* [2006] NSWCA 6 at [16].

91 The question whether defamatory meanings conveyed by statements made in a publication have been removed by other statements in the publication – whether the antidote has overcome the bane – is a question of fact which again must be approached from the perspective of the ordinary reasonable reader. In that context, it must also be noted that the “bane and antidote theory reflects the fundamental proposition [that] the “reader is entitled to give some parts of the article more weight than other parts””: *Corby v Allen & Unwin Pty Ltd* [2014] NSWCA 227 at [146], citing *Rivkin* at [50] (per McHugh J). It follows that contrary statements or conclusions in a publication will not necessary remove or undo the defamatory meanings otherwise conveyed.

“True innuendo” and extrinsic facts

92 As was noted earlier, Mr Rush contends that, if the alleged imputations did not arise from the natural and ordinary meaning of the words used in the publications, they nevertheless arose in circumstances where the words would have been read in conjunction with certain extrinsic facts. In *World Hosts*, Mason and Jacobs JJ said (at 641):

When read in conjunction with extrinsic facts, words may, in the law of defamation, have some special or secondary meaning additional to, or different from, their natural and ordinary meaning. This special or secondary meaning is not one which the words, viewed in isolation, are capable of sustaining. It is one which a reader acquainted with the extrinsic facts will ascribe to the matter complained of by reason of his knowledge of those facts because he will understand the words in the light of those facts.

93 Cases where the alleged defamatory imputations are alleged to have been conveyed having regard to the existence of extrinsic facts are said to involve a plea of “true innuendo”. In

Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460, French CJ, Gummow, Kiefel and Bell JJ described a plea of true innuendo in the following terms (at [51]):

When a true innuendo is pleaded evidence may be given of special facts, known to those to whom the matter was published, such as would lead a reasonable person knowing those facts to conclude that the words have another, defamatory, meaning. The essential requirement of the plea is that the matter is not one within the general knowledge of the hypothetical referees.

(Footnotes omitted.)

- 94 As was made clear in *Chesterton*, an essential requirement of the plea of true innuendo is that the alleged extrinsic or special facts are not within the general knowledge of those to whom the matter was published. The reason for that requirement is, as has already been noted, matters of general knowledge can in any event be considered in determining whether the alleged imputations were conveyed by the natural and ordinary meaning of the words used in the publication. This was explained by Lord Morris of Borth-y-Gest in *Jones v Skelton* at 1370-1371:

The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words. See *Lewis v Daily Telegraph Ltd*. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

- 95 As also noted earlier, matters of general knowledge are usually “matters of universal notoriety” or “matters which any intelligent viewer or reader may be expected to know”: *Fox v Boulter* at [16]. Evidence is not admissible to prove the general knowledge of the ordinary reasonable reader: *Reader’s Digest* at 506. Evidence is, however, admissible to prove special or extrinsic facts.
- 96 Given Mr Rush’s alternative plea of true innuendo, it is necessary, before considering whether the alleged imputations were conveyed, to briefly address whether the alleged extrinsic facts pleaded by Mr Rush were matters of general knowledge or notoriety, or whether they were facts that it was necessary for Mr Rush to prove.

Were the alleged extrinsic facts generally known or notorious?

- 97 The approach taken by the parties to this issue was not entirely helpful.

- 98 Mr Rush's pleading was somewhat schizophrenic in relation to the way it dealt with the alleged extrinsic facts. That is because the pleading alleged that the so-called extrinsic facts were notorious. As has just been made clear, however, if the facts were notorious, they cannot be extrinsic or special facts for the purposes of a plea of true innuendo.
- 99 Ultimately, however, the submissions advanced on behalf of Mr Rush made it clear that their primary case was that the alleged imputations were conveyed by the natural and ordinary meaning of the publications. In that context, Mr Rush submitted that the alleged extrinsic facts were notorious facts and matters of general knowledge and that regard could accordingly be had to those facts in determining whether the imputations were so conveyed.
- 100 Mr Rush's true innuendo case was pleaded in the alternative. He contended that if the Court did not find that the alleged extrinsic facts were matters of common knowledge, he was entitled to prove, and had proved, that they were nevertheless facts which were known to ordinary readers of the *Telegraph*. In that regard, Mr Rush tendered two lever-arch folders containing copies of numerous articles, including many published in the *Telegraph*, which he contended showed that in the weeks preceding the publication of the poster and the 30 November and 1 December 2017 articles, numerous actors and movie and television executives, including Harvey Weinstein, Kevin Spacey and Don Burke, had been portrayed by the media as being sexual predators who had committed acts of sexual assault or sexual harassment. He contended that those extrinsic facts were "special", in the sense that that they would lead ordinary reasonable readers who knew them to conclude that the words used in the relevant *Telegraph* publications concerning Mr Rush conveyed the alleged defamatory imputations, even though they may not have been conveyed by the natural and ordinary meaning of the words used in the publications.
- 101 The position taken by Nationwide and Mr Moran in relation to the alleged extrinsic facts was even less helpful. They did not admit the alleged extrinsic facts, either in their defence or in response to a Notice to Admit Facts served on them by Mr Rush. They did not, however, object to the tender of the two lever-arch folders containing copies of the media articles. More significantly, they did not submit that the articles included in the lever-arch folders did not prove the alleged extrinsic facts. The response given by Nationwide and Mr Moran's senior counsel, when pressed on that issue in the course of oral submissions, could best be described as noncommittal; it was not conceded that the articles proved the facts, though

equally it was not said that they did not. No specific submissions were advanced concerning the content of the articles in the folders. Virtually nothing was said about them.

102 It was almost conceded, somewhat begrudgingly, that it may have been general knowledge that Mr Rush was a “famous Australian Hollywood actor”, though even that apparent concession was hedged by a quibble about the meaning of “Australian Hollywood actor”. It may be noted, in that context, that Mr Rush was repeatedly referred to as an “Oscar winning Australian actor” in the relevant *Telegraph* publications.

103 The question whether the pleaded extrinsic facts were or were not notorious, or within the general knowledge of the ordinary reasonable reader is, in a sense, rather academic or arcane. If they were, they can be considered in determining whether the natural and ordinary meaning of the words used in the impugned publications conveyed the alleged imputations to the ordinary reasonable reader. If they were not notorious, they can, if proved to be facts known, or likely to be known, to ordinary reasonable readers of the *Telegraph*, be considered in determining whether the impugned publications conveyed the imputations to those readers, even if they were not conveyed by the natural and ordinary meaning of the words used.

104 Nonetheless, it is necessary to make findings in relation to this issue.

105 In my view, the substance or effect of the pleaded extrinsic facts could be described as having been notorious or matters of general knowledge at the relevant time. It is, in those circumstances, unnecessary for Mr Rush to have recourse to the true innuendo plea.

106 In my view, it may be readily accepted that, by the date of the allegedly defamatory publications, it was generally known by most people who engaged in any way with the print or broadcast media, as well as social media, that in the months preceding the publications serious allegations of sexual harassment or sexual misconduct had been made against a number of prominent actors and movie and television executives. The allegations which had been made against Mr Weinstein were perhaps most notorious, though allegations that had been made against Mr Spacey had also been widely reported. In Australia, it was also widely known that allegations of bullying and harassment, including of a sexual nature, had been made against Mr Burke. The exposure of the claims and allegations against such persons eventually became known collectively as the #MeToo movement, particularly on social media, which had provided a popular public platform for the discussion and exposure of such allegations, particularly in the entertainment industry. Hence the hashtag.

107 It may also be readily accepted that, at the time of the publications, it was widely and generally known, to the point of being notorious, that the famous actors and movie and television actors who had been exposed as having allegedly engaged in such conduct were frequently portrayed in the media, and on social media, as sexual predators who had committed acts or sexual assault and sexual harassment. That was despite the fact that, in many cases, only allegations of such conduct had been made. It was in my view common knowledge throughout much of the world at the time that, as part of the growing public discourse that became the #MeToo movement, Harvey Weinstein and Kevin Spacey were regularly portrayed in the media, and on social media, as sexual predators. The same could be said about Don Burke, at least in Australia.

108 It should be noted, in this context, that Nationwide and Mr Moran initially appeared to accept that the existence of the #MeToo movement, and the underlying allegations of sexual misconduct that were the subject of it, were matters of universal notoriety or general knowledge at the time of the publication of the articles in question. In their Second Further Amended Defence, Nationwide and Mr Moran pleaded the following “background context” to the publications as part of their then pleaded defence of qualified privilege:

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

29.1 There have 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 include 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 & Art 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.

109 Nationwide and Mr Moran ultimately abandoned their defence of qualified privilege and their defence was amended accordingly by striking those paragraphs out. Those paragraphs in the superseded pleading cannot, in those circumstances, be taken to be a concession or admission by Nationwide and Mr Moran that the facts referred to in them were matters of notoriety or

general knowledge. That said, they would appear to be a fair reflection of what were, in fact, matters of general knowledge at the relevant time.

110 In any event, even if I am wrong in finding that the pleaded extrinsic facts were matters of notoriety and general knowledge at the time of the publications, I am nevertheless satisfied that the ordinary reader of the *Telegraph* would have been aware of the extrinsic facts and would have read the relevant publications in the context of that knowledge. As already noted, Nationwide and Mr Moran did not object to the tender of the two lever-arch folders which contained copies of many media articles which had, for the most part, been published in October and November 2017. Many, if not most, of those articles in fact portrayed Harvey Weinstein, Kevin Spacey and a number of other actors and movie and television executives as sexual predators who had committed acts of sexual assault and/or sexual harassment. Many of the articles also portrayed Don Burke as a sexual predator who had committed acts of sexual assault and/or sexual harassment.

111 It is unnecessary to discuss this evidence in any great detail, particularly given the absence of any meaningful submissions from Nationwide and Mr Moran on this issue. It is perhaps sufficient to give some pertinent examples.

- The front page of the *Telegraph* on 20 October 2017 included a “scoop” by Mr Moran which reported that “[v]eteran TV journalist Tracey Spicer claims she has uncovered up to 40 ‘household’ names’ guilty of sexual harassment and assault while working in the nation’s media industry.” Ms Spicer was also reported to have “vowed” in the “wake of the Harvey Weinstein scandal in the US” to “name and shame those in the industry she claims have perpetrated indecent acts on colleagues”.
- The 12 October 2017 edition of the *Telegraph* contained an article under the heading “Gropes of Wrath” which reported that Harvey Weinstein had been accused of raping three women “as a string of stars also alleged he had harassed or assaulted them during decades of **predatory behaviour**” (emphasis added).
- The 31 October 2017 edition of the *Telegraph* contained an article about Harvey Weinstein which reported that “[m]ore than 70 high-profile women, including actors Ashley Judd, Daryl Hannah and Gwyneth Paltrow” had “come forward with horrifying stories about the disgraced Weinstein’s behaviour”. Some of the women were said to have “accused him of serious misconduct, ranging from harassment to sexual assault and rape”. On the same page (and in the same formatted box) a

prominent article reported that Kevin Spacey had been accused of making drunken sexual advances to a 14 year old boy, actor Anthony Rapp, at his Manhattan apartment. It was reported that the allegations were “the latest in a string of high-profile sex scandal[s] to dog Hollywood in recent weeks”.

- The digital edition of the *Herald Sun* on 31 October 2017 included an opinion piece which opined that “Kevin Spacey should be treated exactly the same as serial **predator** Harvey Weinstein” (emphasis added). The article referred to Kevin Spacey’s “predatory sexual advances”.
- An opinion piece in the *Telegraph* on 1 November 2017 said that “[j]ust as we were coming to terms with the extent of Harvey Weinstein’s **predatory behaviour** with the list of women allegedly assaulted growing to more than 80, the industry has again been rocked by allegations of sexual misconduct, this time against a child, by much loved and respected Hollywood A-lister, Kevin Spacey” (emphasis added). The piece continued: “[i]n the past, stories about prominent figures were often suppressed but times are changing and the famous and powerful are being named and shamed. That is empowering for genuine victims but it can be terrifying for innocent people who are falsely accused”.
- An online edition of *The Sydney Morning Herald* on 3 November 2017 referred to a production assistant describing Kevin Spacey’s behaviour on set as “predatory”. Mr Spacey’s behaviour was said to have included “non-consensual touching” and “crude comments”.
- The 3 November 2017 edition of the *Telegraph* contained a series of articles, grouped together in a box, all of which dealt with allegations of sexual misconduct by Hollywood actors. One article referred to Dustin Hoffman being “caught up in the Hollywood sex scandal” because he had been accused of “groping a teenager”. Another article reported that Kevin Spacey was facing more accusations of “preying on young men and teenagers” and “grooming and sexual harassment”. The main article on the page, under the headline “YOU ARE A DIRTY RATNER”, reported that “Hollywood’s widening sleaze crisis has now snared director Brett Ratner after six women accused him of sexual misconduct”. The article stated that “Ratner is the latest Hollywood heavyweight to be accused of sexual misconduct following the scandals engulfing Harvey Weinstein, James Toback and Kevin Spacey”.

- The 18 November 2017 edition of the *Telegraph* included a prominent article by Mr Moran which reported that Mr John Jarratt, the “star of one of Australia’s most harrowing horror films has been accused of sexual assault in the wake of the Harvey Weinstein scandal that has engulfed Hollywood”. The article again referred to Tracey Spicer’s investigation and to the fact that the “scandal” surrounding Mr Weinstein had “swiftly spread throughout the industry, leading to allegations against other US personalities, most notably Kevin Spacey and stand-up comedian Louis CK”.
- A prominent article in the *Telegraph* on 27 November 2017 reported that Don Burke had declared “I’m no Harvey Weinstein” after sexual harassment allegations had been made against him. The article referred to a joint ABC/Fairfax investigation which alleged that Don Burke was a “psychotic bully”, a “misogynist” and a “**sexual predator**” who had sexually harassed and bullied a number of female employees (emphasis added). Mr Burke was said to have linked the attacks on him to the “media outrage” that followed the “outing of the powerful boss Harvey Weinstein as a sexual abuser and harasser”.
- The edition of the *Telegraph* which was published on 28 November 2017 (only a few days before the publication of the articles the subject of this proceeding) contained a front page article about the “Grubby TV gardener”, Don Burke. The article reported that Mr Burke had denied he was a “**sexual predator** and put down accusations of misconduct from several women as nothing more than a ‘social media witch hunt’.”
- Page eight of the *Telegraph* on the same day contained a prominent story which appeared under a headline which employed a pun that perhaps only a die-hard AC/DC fan would have detected (and which would probably have made Bon Scott and Malcolm Young turn in their graves): “DIRTY DEEDS: DON BURKE CREEP”. The article reported that Don Burke was facing “multiple accusations he used his star power to harass and bully women for years”. It was reported that Mr Burke had said that “in light of the recent domino effect of the Harvey Weinstein saga” his accusers had seen this as a chance to “nail him”.
- The digital edition of the *Telegraph* on the same day also reported that Don Burke had “denied being a **sexual predator** and a bully” (emphasis added). He claimed to be “a victim of a “witch hunt” ignited by the Harvey Weinstein sexual harassment scandal”.

113 I am satisfied on the balance of probabilities that, even if the substance and effect of the pleaded extrinsic facts were not notorious or matters of general knowledge, Mr Rush was entitled to rely on the extrinsic facts in support of his alternative true innuendo plea.

Imputations conveyed by the poster

114 The imputations allegedly conveyed by the poster were that Mr Rush had engaged in scandalously inappropriate behaviour in the theatre and that he had engaged in inappropriate behaviour of a sexual nature in the theatre. Those imputations were alleged to have been conveyed by the natural and ordinary meaning of the words used in the poster, or alternatively by the extrinsic facts. Mr Rush also alleged that, by reason of the extrinsic facts, the poster also conveyed the imputation that Mr Rush had committed sexual assault in the theatre.

Mr Rush had engaged in scandalously inappropriate behaviour in the theatre

115 While denied on the pleadings, Nationwide and Mr Moran ultimately accepted that this imputation would have been conveyed to the ordinary reasonable reader. That concession was hardly surprising given the words used in or on the poster.

Mr Rush had engaged in inappropriate behaviour of a sexual nature in the theatre

116 The additional element in this imputation is that the “inappropriate behaviour” was “of a sexual nature”. The difficulty for Mr Rush is that the poster does not refer to the nature of the inappropriate behaviour, other than that it was sufficient to amount to a “scandal”. The word “sexual” is not used.

117 Mr Rush submitted that the ordinary reasonable reader would infer or conclude that the “inappropriate behaviour” referenced in the poster was of a sexual nature from the use of the word “scandal”. He contended, in effect, that scandals are almost invariably of a sexual nature. He referred, in that context, to the so-called Profumo affair; a “scandal” which played out in the early 1960s in Britain and involved a sexual relationship between the then Secretary of State for War, Mr John Profumo, and a 19-year-old would-be model.

118 There are at least two difficulties with that argument. First, the Profumo affair or scandal would perhaps only be a notorious fact or a matter of general knowledge amongst persons of a particular vintage (no offence to Mr Rush’s senior counsel is intended) and background. Second, and more fundamentally, not all scandals necessarily involve sexual affairs or behaviour, even if scandals which involve British politicians often do. A scandal is generally

considered to be something which involves disgraceful or discreditable actions or circumstances. It is possible to think of many events or occurrences over the years which have been described as scandals, but which do not involve any conduct of a sexual nature. Nationwide and Mr Moran referred to the Watergate scandal in that regard. Closer to home, to give but two examples, the allegations concerning the Australian Wheat Board's sale of wheat to Iraq in the mid-2000s was described by many as the "oil-for-food scandal"; and the various corruption allegations levelled against former New South Wales politicians, Mr Eddie Obeid and Mr Ian Macdonald, were also generally described as scandals.

119 Mr Rush also submitted that the expression "inappropriate behaviour" is consistent only with some form of sexual misconduct. It is difficult to accept such a broad submission. Much will depend on the context in which the expression is used. Even in a workplace setting, inappropriate behaviour may include conduct which has no sexual component, such as bullying.

120 It is true, as submitted by Mr Rush and discussed earlier, that the natural and ordinary meaning of the words used in the poster must be considered in the context of what was generally known at the time about the #MeToo movement and the allegations of sexual misconduct that had been levelled against a number of well-known figures in the entertainment industry. Even in that context, however, on balance it is doubtful that the words used in or on the poster would have conveyed to the ordinary reasonable reader that Mr Rush had engaged in inappropriate behaviour of a sexual nature.

121 Mr Rush was, of course, a well-known actor. It does not necessarily follow, however, that the ordinary reasonable reader would, without more, necessarily have connected the assertion of "inappropriate behaviour" with the #MeToo movement and, as a result, inferred or concluded that the inappropriate behaviour was sexual in nature. As discussed earlier, the ordinary reasonable reader is taken to be fair-minded and not perverse, morbid nor suspicious of mind or avid for scandal. In those circumstances, the ordinary reasonable reader may have suspected that Mr Rush's inappropriate behaviour might have been of a sexual nature, but would have been likely to have reserved judgment as to the type of inappropriate conduct allegedly engaged in by Mr Rush until he or she read or learnt more.

122 It follows that I am not persuaded that the poster, in its natural and ordinary meaning, conveyed to the ordinary reasonable reader the imputation that Mr Rush had engaged in inappropriate behaviour of a sexual nature in the theatre.

123 Nor am I persuaded, on balance, that the poster would have conveyed that imputation to the ordinary reasonable reader in light of the reader's knowledge of the extrinsic facts relied on by Mr Rush. The reader's knowledge that other famous actors and movie and television executives had, in very recent times, been portrayed by the media as sexual predators would not necessarily have led the reader to infer or conclude that assertions of inappropriate behaviour engaged in by Mr Rush involved inappropriate behaviour of a sexual nature. The poster did not, either directly or indirectly, portray Mr Rush in such terms, or otherwise connect him to the #MeToo movement and the portrayal of the men exposed by it. While the ordinary reasonable reader may well have suspected that the inappropriate behaviour was of a sexual nature by reason of their knowledge of the extrinsic facts, they would again most likely have reserved their judgment in relation to that issue until they learnt more from reading the article itself.

124 In all the circumstances, I am not positively persuaded that the poster conveyed to the ordinary reasonable reader that Mr Rush had engaged in inappropriate behaviour of a sexual nature in the theatre.

Mr Rush had committed sexual assault in the theatre

125 I have reached the same conclusion in relation to this alleged imputation for essentially the same reasons. I am not satisfied on the balance of probabilities that the poster conveyed the imputation that Mr Rush had committed sexual assault, either in its natural and ordinary meaning, or by reason of knowledge of the extrinsic facts.

Imputations conveyed by the 30 November 2017 articles

126 Mr Rush claimed that the 30 November 2017 articles conveyed four defamatory imputations, either by the natural and ordinary meaning of the words used in them, or by reason of the words read together with the extrinsic facts.

Mr Rush is a pervert

127 The *Telegraph* articles published on 30 November 2017 did not, in terms, state that Mr Rush was or is a pervert. Indeed, the content of the articles, putting aside headlines, photographs and other contextual considerations, is essentially limited to the assertion that Mr Rush had been accused of "inappropriate behaviour" during the STC's production of *King Lear*, that the STC had "received a complaint alleging that [Mr Rush] had engaged in inappropriate

behaviour” and that Mr Rush “vigorously denie[d] the allegations” and said that the STC had never told him of any allegations of “wrongdoing”.

128 The factual content of the article, however, must be considered in light of what was, on any view, the striking photograph and headline on the front page, and the main headline to the story on page four. The almost full page photograph on the front page was of Mr Rush wearing a crown or garland of flowers or weeds on his head. His face and hair appear stark and pale white as a result of the application of make-up and his facial expression is one of concern or perhaps even anguish or bewilderment. While it is a head and shoulders photograph, Mr Rush does not appear to be wearing any clothes. The large headline “KING LEER” is emblazoned below the photograph.

129 The combined impact of the photograph and headline is startling, if not, somewhat unsettling. The effect of the pun on the name of the play is to clearly label Mr Rush as someone who leered; who looked at certain people in a sly or lascivious way. When combined with the prominent statement that Mr Rush had denied “inappropriate behaviour” during a Sydney stage show, the clear impression conveyed was that the “inappropriate behaviour” was sexual in nature; that Mr Rush had acted towards the complainant in a lecherous, lewd or licentious manner.

130 The impact of the photograph and headline also left little room for doubt that what the article was saying was that, despite his denials, Mr Rush had in fact engaged in that conduct. It was not simply saying that a complaint had been made against Mr Rush, but that Mr Rush denied it. The clear impression conveyed, in all the circumstances, was that Mr Rush had actually engaged in the conduct the subject of the complaint.

131 The impression conveyed by the photograph and headline on the front page was amplified by at least two features of the article on pages four and five.

132 The first feature of the article on those pages was the prominent headline: “STAR’S BARD BEHAVIOUR”; a pun referencing the fact that Shakespeare is frequently referred to as “The Bard”. The clear impression from this prominent headline was again that, despite his denial, Mr Rush had in fact engaged in bad behaviour; that he had done what had been alleged. The headline did not say: “star’s alleged bard [bad] behaviour”.

133 The second relevant feature of the article on pages four and five relates to the layout. The article concerning Mr Rush, including various photographs and quotes, was presented inside

a box. Also positioned inside that box, unlike the other articles on the page, was a story concerning Don Burke. That story concerned allegations of sexual assault that had been made against Mr Burke that week. The alleged sexual assault or assaults had occurred during the time that Mr Burke was the presenter of a television show, *Burke's Backyard*, which was aired on Channel Nine. The victim or victims appeared to be "Nine staff"; persons who worked with or for Mr Burke on *Burke's Backyard*. In that context, the article referred to Don Burke being described as, amongst other things, a "sexual predator". Mr Burke, on the other hand, was recorded as having claimed that he was "a victim of a "witch hunt" ignited by the Harvey Weinstein scandal"; an obvious reference to the growing #MeToo movement.

134 The placement of the article concerning Don Burke in the same box as the article concerning Mr Rush suggested that there was some link between the two cases. The obvious link was that Mr Rush's "inappropriate behaviour" was sexual in nature and was in some way connected to the allegations that had been made against Don Burke, as well as the #MeToo movement and the "Harvey Weinstein scandal".

135 In all the circumstances, the overall impression conveyed to the ordinary reasonable reader by the 30 November 2017 *Telegraph* article, considered as a whole, including the headlines, photographs, layout and context, was that Mr Rush was a pervert.

136 Nationwide and Mr Moran submitted that the imputation that Mr Rush is a pervert "is a tortured meaning". They contended that a "pervert" is someone who, by contemporary standards, is a "sexual deviant"; for example, a "Peeping Tom" or someone who engages in sexual behaviour that would be regarded as not just offensive, but also disgusting and bizarre. In Nationwide and Mr Moran's submission, it would strain the ordinary everyday use of language to describe a person who engages in sexual harassment as a "pervert".

137 I disagree.

138 It may be true that dictionary definitions of the word "pervert" tend to involve some form of sexual abnormality or deviance. The *Macquarie Dictionary* (Seventh edition, 2017), for example, defines a pervert as including "someone who practises sexual perversion" and "a person whose sexual behaviour is regarded as deviant and unacceptable" and defines "perversion" as including "unnatural or abnormal condition of the sexual instincts". Likewise, the *Shorter Oxford English Dictionary* (Fifth edition, 2002) definition of pervert

includes a “perverted person” or “sexually perverted person” and defines “perversion” as including “preference for an abnormal form of sexual activity; sexual deviance”.

139 The difficulty for Nationwide and Mr Moran is that, even accepting those definitions of the word “pervert”, the article as a whole conveyed the impression that Mr Rush was someone who acted in a sexually abnormal or deviant way. That is because it conveyed that he engaged in inappropriate or bad behaviour during STC’s production of *King Lear* which involved leering, or slyly looking at the complainant in a lecherous, lewd or licentious manner. That is more than just offensive and objectionable. Having regard to Mr Rush’s age and standing, it would also be considered by most ordinary reasonable people as sexually abnormal or deviant. It should also be noted, in this context, that the impression conveyed by the positioning of the article concerning Don Burke suggested that Mr Rush’s “inappropriate behaviour” was in some way comparable to that of Don Burke, who had been described as a “sexual predator”. That again suggested some form of sexual abnormality or deviancy.

140 In any event, contrary to the submissions advanced by Nationwide and Mr Moran, in my view the common or everyday meaning of “pervert” is somewhat broader than the rather narrow dictionary definitions. For example, the ordinary reasonable reader would be likely to consider that a person, particularly an older man, who leers at younger women or men in a lecherous, lewd or licentious manner, particularly in a workplace setting, would rightly be called a “pervert”. Indeed, in Australia at least, a man who engages in such behaviour is often called a “perv”, which is a colloquial or shortened form of the word “pervert”. The Macquarie Dictionary defines the colloquial expression “perv” (or “perve”) as a “sexual pervert” and the expression to “have a perv (perve)” as “to look at something, with or as if with lustful appreciation” or “to look lustfully”. The impression conveyed by the article was, at the very least, that Mr Rush was a “perv” or pervert in that sense.

141 Two final points should be made.

142 The first point is that, to the extent that Nationwide and Mr Moran submitted that the “bane”, the imputation that Mr Rush was a pervert, was somehow negated by the “antidote”, being the repeated statement that Mr Rush had denied the allegation of “inappropriate behaviour”, that submission is rejected for the reasons effectively already given. While the 30 November 2017 articles must be read as a whole, the ordinary reasonable reader of those articles would in my view have given particular weight to the prominent headline and photograph on the front page. Indeed, the likely effect of the headline “KING LEER” and the striking

photograph of Mr Rush was that the ordinary reader's mind would have been poisoned from the outset. The headline and the photograph clearly implied or imputed guilt. Their effect would have been to entirely undermine, if not swamp, the reports of Mr Rush's denials. In all the circumstances, the ordinary reasonable reader's response to Mr Rush's reported denials was likely to be to the effect of: "well, he would deny the claims, wouldn't he". The same could perhaps be said about the effect of the placement of the article concerning Don Burke on page five.

143 The second point concerns the effect of the extrinsic facts.

144 The clear impression conveyed by the articles, that Mr Rush is a pervert, was likely to be amplified or exacerbated in circumstances where the ordinary reasonable reader at the time of the publication would have read the articles in the context of the recent public exposure of the sexual misconduct of Harvey Weinstein, Kevin Spacey, Don Burke and other famous actors and movie and television executives. As discussed earlier, whether the then recent media portrayal of such persons as sexual predators was a matter of general knowledge, or a proven extrinsic fact, is essentially immaterial. Either way, the features of the article which have been highlighted, would, in that context, have more likely conveyed the impression that Mr Rush was simply another famous and powerful figure in the entertainment industry who was guilty of inappropriate behaviour of a sexual nature. He was another sexual predator. That is particularly the case given the juxtaposition of the article concerning Mr Burke, which indirectly referenced the #MeToo movement by referring to the "Harvey Weinstein scandal". The ordinary reasonable reader's knowledge of the extrinsic facts was likely to intensify or amplify the impression or implication otherwise conveyed by the article that Mr Rush is a pervert.

145 It should be noted in this context that Nationwide and Mr Moran submitted that a publication cannot be said to have conveyed an imputation "merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff": cf. *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 301. That may readily be accepted. The question whether the relevant imputation was conveyed here is accordingly not to be approached on the basis that the general knowledge of the #MeToo movement likely to have been possessed by the ordinary reasonable reader, or their knowledge of the particular extrinsic facts, would have been likely to excite some general belief or prejudice about sexual harassment in the entertainment industry. Rather, it is to be

approached by asking whether the ordinary reasonable reader who possessed that knowledge would conclude, or more readily conclude, that the article was implying or otherwise conveying that Mr Rush is a pervert in light of their possession of such knowledge. For the reasons already given, the answer to that question is “yes”.

146 In any event, for the reasons already given, it is unnecessary to have regard to any general knowledge of the #MeToo movement, or the extrinsic facts. The clear impression conveyed by the articles, even without those considerations, is that Mr Rush is a pervert.

Mr Rush behaved as a sexual predator while working on the STC’s production of King Lear

147 The same considerations which support the conclusion that the 30 November 2017 articles conveyed that Mr Rush is a pervert also support the conclusion that the article conveyed that Mr Rush had behaved as a sexual predator.

148 The articles again do not expressly or explicitly say that Mr Rush behaved as a sexual predator. That, however, is the clear impression conveyed by the article considered as a whole, particularly having regard to the headlines, the main photograph and the juxtaposition of the article concerning Mr Burke. In relation to the last mentioned feature of the article, it is to be noted that the article concerned specifically referred to Don Burke as someone who had been described as a “sexual predator”.

149 Nationwide and Mr Moran submitted that this imputation is a “strained and forced meaning” and that at its highest the articles convey that a complaint was made that Mr Rush had engaged in inappropriate behaviour towards one person over several months. I do not agree. For the reasons already given I have found that the 30 November 2017 articles, considered as a whole, conveyed that Mr Rush was a pervert. They also conveyed that he had engaged in inappropriate behaviour of a sexual nature while working on the production of *King Lear* for the reasons given in relation to the next imputation. The implication was that the inappropriate behaviour was directed at someone else who was involved in the production, most likely one of the other actors.

150 The ordinary reasonable reader is likely to consider a man to be a “sexual predator” if that man preys upon another person for sex or sexual gratification, particularly in a workplace setting and particularly if the man is in a position of power or dominance in that workplace. That is effectively how the article portrayed Mr Rush. For all the reasons given earlier in the

context of the imputation that Mr Rush is a pervert, the headlines, the main photograph and the positioning of the article concerning Mr Burke conveyed the overall impression that Mr Rush had engaged in inappropriate behaviour which involved, at least, leering, or slyly looking at someone he worked with in the production of *King Lear* in a lecherous, lewd or licentious manner. It therefore also conveyed that Mr Rush had behaved as a sexual predator; that he had preyed upon one of his colleagues for his sexual gratification. The placement and juxtaposition of the story concerning Don Burke on page five, which referred to the fact that Mr Burke had been described as a “sexual predator” by those who had worked with him, effectively completed the picture.

151 As was the case with the imputation that Mr Rush was a pervert, the imputation that Mr Rush had behaved as a “sexual predator” would only have been amplified or intensified by the ordinary reasonable reader’s knowledge of the extrinsic facts. Knowledge of those facts, whether as matters of notoriety and general knowledge, or as proven extrinsic facts, would have been likely to cause the ordinary reasonable reader to more readily read the articles, considered as a whole, as implying or imputing that Mr Rush was a “sexual predator” much like Don Burke and the many famous actors and television and film executives who had been exposed as part of the #MeToo movement.

152 Finally, for the same reasons as those given earlier in the context of the imputation that Mr Rush was a pervert, the imputation that Mr Rush had behaved as a “sexual predator” was not negated by the statements in the article that Mr Rush had denied the allegations and the complaint. The ordinary reasonable reader would have given the reporting of those denials little, if any, weight in the face of the striking photograph and headline on the front page, the headline on page four, and the positioning of the article concerning Mr Burke within the box on page five.

153 I am, in all the circumstances, persuaded that the 30 November 2017 *Telegraph* articles conveyed the imputation that Mr Rush behaved as a sexual predator while working on the STC’s production of *King Lear*.

Mr Rush engaged in inappropriate behaviour of a sexual nature while working on the STC’s production of King Lear

154 Not much more need be said concerning this imputation.

155 The 30 November 2017 articles clearly conveyed, in terms, that it had been alleged that Mr Rush had engaged in “inappropriate behaviour”. For the reasons already given, the headline and photograph on the front page alone conveyed the clear impression that the “inappropriate behaviour” was of a sexual nature. Mr Rush was portrayed or pilloried as “King Leer”: a man who had acted in a lecherous, lewd or licentious manner during the STC’s production of *King Lear*. The headline on page four left little doubt that Mr Rush had engaged in “bard [bad] behaviour”. The overall impression was that the bad behaviour was sexual in nature.

156 The only submission advanced by Nationwide and Mr Moran in relation to this imputation was that the articles contained many denials by or on behalf of Mr Rush. In their submission, the article simply conveyed that a complaint had been made against Mr Rush and that Mr Rush had strenuously denied that complaint.

157 That submission has no merit for the reasons already given. The combined effect of the headline and photograph on the front page and the headline on page four was to undermine and overwhelm the references to Mr Rush denying the allegation or complaint. The overall impression conveyed was that Mr Rush was, to use the vernacular, guilty as charged.

158 Considered as a whole, the 30 November 2017 articles clearly conveyed to the ordinary reasonable reader that Mr Rush had engaged in inappropriate behaviour of a sexual nature while working on the STC’s production of *King Lear*.

159 It is, in these circumstances, strictly unnecessary to address Mr Rush’s case based on the extrinsic facts. I should nevertheless make it plain that, once it is accepted that the ordinary reasonable reader was aware of the extrinsic facts, either as matters of notoriety or proven extrinsic facts, it is even more likely that the reader would conclude that the articles were implying or imputing that Mr Rush had in fact engaged in inappropriate behaviour of a sexual nature while working on the STC’s production of *King Lear*.

Mr Rush, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the STC’s production of King Lear

160 The same conclusion follows in relation to the fourth and final imputation said to have been conveyed by the 30 November 2017 articles.

161 For the reasons already given in the context of the first three imputations, the 30 November 2017 articles clearly conveyed that Mr Rush, a famous actor, had engaged in inappropriate behaviour against another person over several months while working on the STC’s

production of *King Lear*. While the text of the article stated only that an allegation had been made that Mr Rush had engaged in such conduct, and that Mr Rush had denied that allegation, the overall impression conveyed by the articles was that, despite his denials, Mr Rush had in fact engaged in the alleged inappropriate behaviour. The combined impact of the headline and photograph on the front page, together with the headline on page four, would, so far as the ordinary reasonable reader was concerned, have been to overwhelm the references to the complaint, allegation and denial. The articles also stated that the STC was continuing “to work with the complainant to minimise the risk of future instances of the alleged behaviour occurring in its workplace”. Read in context, that statement would clearly have conveyed to the ordinary reasonable reader that, so far as the STC was concerned, the behaviour had in fact been engaged in. The overall impression conveyed was that there was no question that Mr Rush had engaged in the conduct as alleged.

Imputations conveyed by the 1 December 2017 articles

162 Mr Rush claimed that the articles published in the *Telegraph* on 1 December 2017 conveyed seven imputations, either by the natural and ordinary meaning of the words used, or by reason of the words read together with the extrinsic facts. Some of the alleged imputations are the same, or similar to, those that have been found to have been conveyed by the 30 November 2017 articles.

163 The 1 December 2017 articles added a number of significant new factual elements to the story published in the *Telegraph* the previous day.

164 First, it reported that the accusation levelled against Mr Rush was that he had “inappropriately touched” the complainant during the stage production of *King Lear*. The allegation had previously been said to have involved only “inappropriate behaviour”. There had been no reference to inappropriate touching in the articles published on 30 November 2017.

165 Second, while the complainant’s name was not revealed, it was revealed that the complainant was an actress and was therefore female.

166 Third, the articles reported that two STC actors had publicly supported the actress or her claims. One of them, Mr Wyatt, was reported to have posted on Facebook that he believed the actress. The other, Mr McClelland, was reported as having “posted” or “tweeted” on Twitter, somewhat cryptically, that “[i]t wasn’t a misunderstanding. It wasn’t a joke”. Read

in the context of the article, the “it” appeared to be the complaint or the allegation against Mr Rush.

167 Fourth, it was reported that two unnamed sources had told the *Telegraph* or Mr Moran that Mr Rush had been made aware of who made the claims in a conversation with the executive director of the STC three weeks prior to the article, that they “believed the woman’s claims” and that “the STC would not be working with [Mr] Rush again”. STC executives were also said to have come forward in support of the complainant. The executives were reported as having said that they “wholeheartedly believe her claims” and confirmed that, “due to the seriousness of the allegations”, the STC would not work with Mr Rush again.

168 Fifth, it was reported that the STC had revised its “HR” [Human Resources] policies” to ensure a “safe environment for staff” and that this was an issue to address “in the wake of the Harvey Weinstein scandal”. Reference was also made to complaints which had been made against Mr Spacey which were part of the “ongoing controversy rocking the entertainment industry”, a plain reference to the #MeToo movement. The article also reported, in that context, that an Actors Equity survey of theatre actors had found that 40 per cent of “respondents” to the survey had “directly experienced sexual harassment, bullying or misconduct”.

Mr Rush had committed sexual assault while working on the STC’s production of King Lear

169 As has just been noted, the new elements introduced by the 1 December 2017 articles included that the complainant was an actress, that the complaint involved Mr Rush inappropriately touching the actress and that the allegation was sufficiently serious that the STC would never work with Mr Rush again and had revised its human resources policies. The allegations against Mr Rush were also again linked to the #MeToo movement by reason of the reference to the “Harvey Weinstein scandal” - the “ongoing controversy rocking the entertainment industry” - and the allegations that had been made against Mr Spacey.

170 Even putting to one side that the articles which appeared on 1 December 2017 were clearly a follow-up to the previous day’s “KING LEER” article and all that it conveyed, the overall impression conveyed by the 1 December 2017 articles was that the allegation against Mr Rush was that he had inappropriately touched an actress during the stage production in a way which was both sexual and sufficiently serious to warrant the STC resolving never to work with Mr Rush again and to review its human resources policies to ensure a “safe

environment” for its staff. The ordinary reasonable reader would have taken that to amount to an imputation that Mr Rush had committed sexual assault while working on the STC’s production of *King Lear*.

171 Nationwide and Mr Moran effectively conceded that the 1 December 2017 articles conveyed that the allegations against Mr Rush were sexual in nature, or involved sexual impropriety. They submitted, however, that this would not have led the ordinary reasonable reader to conclude that the touching amounted to sexual assault. They also submitted that the articles conveyed only that Mr Rush was alleged to have inappropriately touched the actress, not that he had in fact done so. They pointed, in that context, to the fact that the articles reproduced Mr Rush’s vehement denial, both directly and through his lawyers, that he had engaged in any such conduct.

172 I reject both those submissions.

173 The ordinary reasonable reader is not taken to be a lawyer and would therefore not necessarily be aware, in precise terms, of what conduct constituted “sexual assault” in the legal sense, or what conduct constituted “an offence of sexual assault”. The ordinary reasonable reader would, however, be likely to understand or believe that a man who had inappropriately touched another person in a serious and sexually inappropriate manner had committed sexual assault in a more general sense. The overall impression conveyed by the articles was that Mr Rush had engaged in such conduct.

174 As for the submission that the articles reported only that it was alleged or claimed that Mr Rush had engaged in such conduct and that he vehemently denied that allegation or claim, the difficulty for Nationwide and Mr Moran is that a number of features of the articles completely undermine Mr Rush’s denials and completely overwhelm the fact that the articles purport to report only that a complaint or allegation had been made. Those features include the following.

175 First, the overwhelming tenor of the articles, or most of them, was that, despite Mr Rush’s denial, the actress’s accusations had been backed by the “Theatre cast” and STC “executives”. The prominent front page headline was “WE’RE WITH YOU” and “Theatre cast back accuser as Rush denies ‘touching’”. A prominent photo of Mr Wyatt appeared alongside a statement attributed to him: “I was in the show. I believe (her)”. Thus, Mr Rush’s

reported denial was immediately preceded and undermined by the assertion that the cast had backed the actress's version of events. Mr Rush was on his own.

176 Second, the major headline above the main article on pages four and five was "ACTS OF DEFIANCE". The smaller headline was "Sydney Theatre Company actors support complainant's claims against megastar Rush". The article itself repeated the assertion that Mr Wyatt "believed his castmate's version of events" and that, Mr McClelland had supposedly similarly "urged others on Twitter to believe the actress" because "[i]t [the allegation] wasn't a misunderstanding" and "[i]t wasn't a joke". The impression conveyed was that those actors knew the details of the allegation and had effectively confirmed that the inappropriate touching had in fact occurred.

177 The articles also referred to two other unnamed sources who had said that they believed the actress's claims. They also referred to the fact that the STC had issued a statement saying that it had responded "truthfully" when approached by the *Telegraph*. It was also asserted that the STC had resolved never to work with Mr Rush again. That implied that, the STC not only believed the actress, but having considered the matter, had accepted her version of events. A separate and smaller article also reported that STC executives "wholeheartedly" believed the actress's claims.

178 In this context, the ordinary reasonable reader would have taken the major headline to have meant that Mr Rush's denials were "defiant" because they were made in the face of the fact that pretty much everyone else supported the actress and believed or accepted her claims. In this way, Mr Rush's denials were completely undermined and were portrayed as being somewhat unreasonable or ridiculous, if not, disingenuous. They were certainly overwhelmed by the overall impression that, whatever Mr Rush may have said, the actress should be believed.

179 In all the circumstances, I am positively persuaded that the 1 December 2017 articles conveyed to the ordinary reasonable reader the imputation that Mr Rush had committed sexual assault while working on the STC's production of *King Lear*.

180 It is, in the circumstances, unnecessary to consider in any detail Mr Rush's alternative case based on the extrinsic facts. It is sufficient to note again that Mr Rush's case that this imputation was conveyed is even stronger in light of the extrinsic facts for the reasons given earlier.

Mr Rush behaved as a sexual predator while working on the STC's production of King Lear

181 For the reasons given earlier, this imputation was conveyed by the 30 November 2017 articles. It was also conveyed by the 1 December 2017 articles for essentially the same reasons.

182 As was noted earlier in the context of the 30 November 2017 articles, the ordinary reasonable reader would be likely to consider that a man who preys upon another person in the workplace for sexual gratification is a “sexual predator”, particularly if the man is in a position of power or dominance in that workplace. That is effectively how the 1 December 2017 articles portrayed Mr Rush and the conduct that he was said to have engaged in.

183 As has already been noted, the overall impression conveyed by the 1 December 2017 articles was that Mr Rush had inappropriately touched an actress during the production of *King Lear* in a way which was both sexual and sufficiently serious to warrant the STC resolving never to work with Mr Rush again and to review its human resources policies to ensure a “safe environment” for its staff. The ordinary reasonable reader would have taken this to mean that Mr Rush behaved as a sexual predator; he used his position or stature to prey upon a fellow actor for his own sexual gratification. Why else would the STC have resolved never to work with Mr Rush again? Why else would it have been necessary for the STC to resolve its policies to ensure a safe environment for its staff? As one of the articles quoted an STC executive to have said: “[t]hat question doesn’t even need an answer”.

184 Nationwide and Mr Moran conceded that the 1 December 2017 articles conveyed that it was alleged that Mr Rush had engaged in sexual misconduct in the workplace. They submitted, however, that this was a “non-specific” allegation and that sexual misconduct in the workplace does not amount to sexual predation. They also submitted that there was nothing in the article to suggest that Mr Rush had used his power, influence or authority when engaging in the alleged sexual misconduct.

185 I do not agree.

186 While it may perhaps be accepted that not all sexual misconduct in the workplace constitutes sexual predation, the published details of Mr Rush’s alleged sexual misconduct during the production of *King Lear* were sufficient to suggest sexual predation. The allegation was not entirely “non-specific”. The allegation was that Mr Rush inappropriately touched an actress during the production in a way which was both sexual and serious; sufficiently serious,

according to the articles, to cause the STC to resolve never to work with Mr Rush again and to change its human resources policies so as to protect the health and welfare of its actors and employees. The implication was that the STC had to change its human resources policies to protect its staff against sexual predators in light of Mr Rush's actions.

187 The articles also make it tolerably clear that Mr Rush's actions involved a power imbalance. The ordinary reasonable reader may be taken to know that Mr Rush is one of Australia's most lauded and prominent actors. Even if that could not be said to be a matter of general knowledge, the articles repeatedly refer to Mr Rush as an "Oscar-winner", as "one of Australia's biggest stars", as "one of the country's most successful actors" and describe him as a "megastar". It is difficult to imagine that the ordinary reasonable reader would not have appreciated that the complainant actress was unlikely to have had the same stature or authority in the production as Mr Rush.

188 Nationwide and Mr Moran again relied on the fact that the articles referred only to an allegation or complaint and included multiple references to Mr Rush's vehement denials of the allegation. For the reasons already given, however, the overall impression conveyed by the articles was that Mr Rush had in fact engaged in the alleged conduct despite his denials.

189 In all the circumstances, I am positively persuaded that the 1 December 2017 articles conveyed to the ordinary reasonable reader the imputation that Mr Rush behaved as a sexual predator while working on the STC's production of *King Lear*.

190 In light of this finding, it is again unnecessary to consider Mr Rush's alternative case based on the extrinsic facts. Suffice it to say that the case that this imputation was conveyed is even stronger in light of the extrinsic facts.

Mr Rush engaged in inappropriate behaviour of a sexual nature while working on the STC's production of King Lear

191 It is unnecessary to say anything further concerning this imputation. For the reasons already given, the 1 December 2017 articles conveyed to the ordinary reasonable reader that Mr Rush had committed sexual assault and had behaved as a sexual predator while working on the STC's production of *King Lear*. If the articles conveyed those imputations, it is self-evident they also conveyed that Mr Rush had engaged in inappropriate behaviour of a sexual nature while working on the STC's production of *King Lear*. Both sexual assault and sexual predation constitute inappropriate behaviour of a sexual nature.

192 The only submission advanced by Nationwide and Mr Moran in relation to this imputation was that the articles conveyed nothing more than “claim and counter-claim”; meaning that it referred only to an allegation which had been denied by Mr Rush. That submission is rejected for the reasons given in relation to the imputations concerning sexual assault and sexual predation.

193 I find that the 1 December 2017 articles conveyed to the ordinary reasonable reader the imputation that Mr Rush engaged in inappropriate behaviour of a sexual nature while working on the STC’s production of *King Lear*.

Mr Rush, an acting legend, had inappropriately touched an actress while working on the STC’s production of King Lear

194 The same can be said about this imputation. The 1 December 2017 articles expressly stated that it had been alleged that Mr Rush had inappropriately touched an actress while working on the STC’s production of *King Lear*. The only issue is whether the articles went further and conveyed to the ordinary reasonable reader that, despite his denials, Mr Rush had in fact engaged in that conduct. For the reasons already given in the context of the other imputations, that issue is resolved in favour of Mr Rush. The overall impression conveyed by the articles was that Mr Rush had in fact engaged in such conduct.

Mr Rush is a pervert

195 I have already concluded that the 30 November 2017 articles conveyed the imputation that Mr Rush is a pervert. So too did the 1 December 2017 articles.

196 As has already been explained, the 1 December 2017 articles conveyed to the ordinary reasonable reader that Mr Rush had committed sexual assault, had behaved as a sexual predator, had engaged in inappropriate behaviour of a sexual nature and had inappropriately touched an actress while working on the STC’s production of *King Lear*. The ordinary reasonable reader was likely to consider that a person who engaged in such conduct was a pervert.

197 For the reasons given in the context of the 30 November 2017 articles, I doubt that the ordinary reasonable reader would give the word “pervert” the narrow meaning suggested by Nationwide and Mr Moran: that a person is only a pervert if they are a sexual deviant, or they engage in sexual conduct which is bizarre, unnatural or abnormal. Rather, the ordinary

reasonable reader is likely to consider that a person who acts in a lecherous, lewd or licentious manner towards another person might rightly be considered to be a pervert.

198 Perhaps more pertinently, the ordinary reasonable reader is in any event likely to consider that a man who inappropriately touches another person, man or woman, in a way that is both sexual and serious, could rightly be regarded as a pervert, particularly if that conduct occurred in a workplace setting, and particularly where the man was in a position of authority or stature in that workplace. Would not most right thinking people believe that a man who uses his authority or stature in the workplace to obtain sexual gratification by inappropriately touching a non-consenting co-worker is a person who engages in abnormal sexual conduct? It is doubtful that too many people would quibble with the media portrayal of Harvey Weinstein as a pervert.

199 That is effectively how Mr Rush is portrayed in the 1 December 2017 articles.

200 Even if the word “pervert” was to be given the narrow meaning suggested by Nationwide and Mr Moran, the 1 December 2017 articles nevertheless conveyed that Mr Rush was a pervert in that sense. The ordinary reasonable reader would be likely to consider that a senior male actor who committed sexual assault, or behaved as a sexual predator, or engaged in inappropriate behaviour of a sexual nature, or inappropriately touched an actress, in the course of a major theatre production, had engaged in sexual conduct which was bizarre, unnatural or abnormal.

201 In all the circumstances, I am satisfied that the 1 December 2017 articles conveyed to the ordinary reasonable reader that Mr Rush is a pervert.

Mr Rush’s conduct in inappropriately touching an actress during King Lear was so serious that the STC would never work with him again

202 Nationwide and Mr Moran conceded that the 1 December 2017 articles conveyed that the STC had decided never to work with Mr Rush again due to the seriousness of the allegations. In their submission, the articles did not convey, as Mr Rush alleged, that his conduct in inappropriately touching the actress was so serious that the STC would not work with him again.

203 The distinction relied on by Nationwide and Mr Moran is a fine and nuanced one. I am not persuaded that it is a distinction that the ordinary reasonable reader, who is taken to be a

person who is prone to a degree of loose-thinking and who is not likely to closely parse and analyse the language used, would have been likely to appreciate or be concerned about.

204 In support of this distinction, Nationwide and Mr Moran relied on the fact that the relevant parts of the articles referred to the seriousness of the “allegations” as being the reasons for the STC’s decision, as opposed to the seriousness of the “conduct”. For the reasons already given, while the articles employed the language of allegation or complaint, the overall impression conveyed was that Mr Rush had in fact engaged in the relevant conduct. That conduct was inappropriately touching the actress. In those circumstances, the ordinary reasonable reader was likely to have understood that what the article was saying was that the STC had decided not to work with Mr Rush because of the seriousness of Mr Rush’s conduct.

205 The impression conveyed by the articles was that the STC had decided not to work with Mr Rush not only because of the seriousness of the claims or allegations, but because the STC believed the actress’s claims or allegations. The statement that the STC had said that it would not work with Mr Rush again was made three times. On each occasion, the statement was immediately preceded by the statement that the unnamed “sources” or STC “executives” “stood by” the actress’s claims, or believed, or “wholeheartedly believe[d]” the actress. One of the unnamed STC executives was reported to have said: “[a]nother actor backed what she said ... we’ve taken this very seriously”. Thus, the articles effectively represented that the STC had made the decision because it accepted the actress’s version of events.

206 Equally, the articles conveyed that the STC had decided not to work with Mr Rush again because of the seriousness of the conduct. The STC executives were reported as having said “[t]here is no chance” and “[h]ow could we work with him again? That question doesn’t even need an answer”. The effect or impact of those statements was two-fold. First, they conveyed that the STC had accepted that the conduct had occurred. Second, they conveyed that the STC considered that the conduct was so serious that it could not possibly work with Mr Rush again. Thus, they were statements not only about STC’s reasons for not working with Mr Rush again, but also statements about the seriousness of the conduct.

207 In all the circumstances, I am positively persuaded that the 1 December 2017 articles conveyed the imputation that Mr Rush’s conduct in inappropriately touching an actress during *King Lear* was so serious that the STC would never work with him again.

Mr Rush had falsely denied that the STC had told him the identity of the person who had made a complaint against him

208 The 1 December 2017 articles clearly reproduce the statement issued by Mr Rush and his lawyer to the effect that he had not been provided with any details of the claims or allegations made by the actress, and had not even been told who had made the complaint. On two occasions, however, it was said that the STC had in fact told Mr Rush the name of the complainant. Did that imply that Mr Rush had “falsely denied” that the STC had told him the identity of the complainant?

209 Nationwide and Mr Moran submitted that the answer to that question was “no”. That was because, in their submission, the articles did not convey that the STC had told Mr Rush the name of the complainant. Rather, they simply stated that it was alleged that the STC had told Mr Rush the name of the complainant.

210 That submission is rejected.

211 The clearest and most prominent statement on this topic is in the front page article. There it is stated:

Two STC sources said the company stood by her [the actress’s] claims. Both said the company wouldn’t work with Rush again. *Despite denials, Rush was told who made the claims* in a phone call with executive director Patrick McIntyre weeks ago. Mr McIntyre last night said the STC had “reviewed policies” about “inappropriate behaviour”.

(Emphasis added.)

212 It can be observed that the statement that Mr Rush had been told who made the claims is put in emphatic and unqualified terms. The statement is not in this instance attributed to the two unnamed STC sources. Indeed, read in the context of what follows, it would appear that Mr McIntyre, the Executive Director of the STC, was the source of the statement. The two sources appear to have said only that they believed the actress’s claims and that the STC would not work with Mr Rush again. In any event, it is not said that the STC “claimed”, or “alleged”, that it had told Mr Rush. It is simply said that, despite his denials, “Rush was told”.

213 It is true that, in the article on page five, it is said that two sources had said that Mr Rush was made aware of who made the claims in a conversation with Mr McIntyre. But even there, the statement is not one of mere counter-claim or allegation.

214 Read in the context of the 1 December 2017 articles as a whole, the statement on the front page that Mr Rush had been told the name of the complainant conveys the clear impression that Mr Rush's denial was false. That is particularly apparent from the use of the words "[d]espite denials" which precede the statement, and the emphatic nature of the statement that Mr Rush "was told". It also flows from the overwhelming emphasis and impression conveyed by the articles, which, as discussed earlier, portrayed Mr Rush's denials as "acts of defiance" in the face of overwhelming support for the actress and her version of events.

215 On balance, I am persuaded that, considered as a whole, the 1 December 2017 articles conveyed the imputation that Mr Rush had falsely denied that the STC had told him the identity of the person who had made a complaint against him.

Summary of findings in relation to the alleged imputations

216 I have made the following findings.

217 The poster conveyed the imputation that Mr Rush had engaged in scandalously inappropriate behaviour in the theatre. I am not, however, satisfied that it conveyed the imputation that Mr Rush had engaged in inappropriate behaviour of a sexual nature in the theatre, or that he had committed sexual assault in the theatre.

218 The 30 November 2017 articles conveyed the following imputations: *first*, that Mr Rush is a pervert; *second*, that Mr Rush behaved as a sexual predator while working on the STC's production of *King Lear*; *third*, that Mr Rush engaged in inappropriate behaviour of a sexual nature while working on the STC's production of *King Lear*; and *fourth*, that Mr Rush, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the STC's production of *King Lear*.

219 The 1 December 2017 articles conveyed the following imputations: *first*, Mr Rush had committed sexual assault while working on the STC's production of *King Lear*; *second*, Mr Rush behaved as a sexual predator while working on the STC's production of *King Lear*; *third*, Mr Rush engaged in inappropriate behaviour of a sexual nature while working on the STC's production of *King Lear*; *fourth*, Mr Rush had inappropriately touched an actress while working on the STC's production of *King Lear*; *fifth*, Mr Rush is a pervert; *sixth*, Mr Rush's conduct in inappropriately touching an actress during *King Lear* was so serious that the STC would never work with him again; and *seventh*, Mr Rush had falsely denied that the STC had told him the identity of the person who had made a complaint against him.

ISSUE TWO: WERE THE IMPUTATIONS SUBSTANTIALLY TRUE?

220 Having found that all but two of the alleged imputations were conveyed by the matters complained of, it is necessary to consider and determine the defence of justification pleaded by Nationwide and Mr Moran in respect of those imputations which had been conveyed.

Relevant provisions and principles

221 Section 25 of the Defamation Act provides as follows:

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

222 Section 4 of the Defamation Act provides that “substantially true” means true in substance or not materially different from the truth.

223 The test for determining whether an imputation is substantially true is well established. In *Howden v “Truth” & “Sportsman” Ltd* (1937) 58 CLR 416, Dixon J stated (at 420-421):

The defence depends upon the substantial truth of the defamatory meaning conveyed by a libel. Every material part of the imputations upon the plaintiff contained in the words complained of must be true; otherwise the justification fails as an answer to the action.

224 This was applied in the statutory context in *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [274] and *Cross v Queensland Newspapers Pty Limited* [2008] NSWCA 80 at [71]. In *Popovic*, it was said (at [274]) that to make out the defence, “the publisher must not only prove the truth of the words complained of in their literal meaning but also the truth of the defamatory sting”. The “defamatory sting” is the meaning or meanings found to have been conveyed by the publication.

225 Nationwide and Mr Moran contend that all but two of the imputations or defamatory “stings” that have been found to have been conveyed were substantially true. The two that they did not ultimately seek to justify were: that Mr Rush’s conduct in inappropriately touching an actress during *King Lear* was so serious that the STC would never work with him again [imputation 10(f)]; and that Mr Rush had falsely denied that the STC had told him the identity of the person who made a complaint against him [imputation 10(g)]. Both those imputations were conveyed by the 1 December 2017 articles.

226 Nationwide and Mr Moran bear the onus of proving that the balance of the imputations conveyed by the matters complained of were substantially true. The standard of proof is the

balance of probabilities, even where the matter to be proved involves criminal conduct or fraud: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992)110 ALR 449 at 449-450. In *Neat*, however, the majority (Mason CJ, Brennan, Deane and Gaudron JJ) went on to say as follows (at 450):

On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

(Footnotes omitted.)

227 Their Honours then referred to the following well-known observations of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (at 362):

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ...

228 Those observations are now reflected in s 140 of the *Evidence Act 1995* (Cth), which provides that in deciding whether it is satisfied that the case of a party has been proved on the balance of probabilities, the Court may take into account the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the matters alleged.

229 There could be little doubt that the allegations that Nationwide and Mr Moran levelled against Mr Rush in their truth defence are grave allegations. That is a factor which must be borne in mind when considering whether Nationwide and Mr Moran have discharged the onus of proving, on the balance of probabilities, that the imputations were substantially true.

The particulars of truth pleaded by Nationwide and Mr Moran

230 The defence of justification ultimately pleaded by Nationwide and Mr Moran is almost entirely based on allegations concerning Mr Rush’s conduct and behaviour during the production of *King Lear*, including the rehearsals. They also rely on a text message that Mr Rush sent to Ms Norvill some months after the end of the production. The allegations as particularised related entirely to Mr Rush’s behaviour towards Ms Norvill. Nationwide and

Mr Moran contended that the allegations, if made out, would prove the substantial truth of the imputations pleaded by Mr Rush, other than the two imputations referred to earlier: imputations 10(f) and 10(g).

231 The particulars of truth that have been pleaded by Nationwide and Mr Moran involve, broadly speaking, eight key allegations.

232 The first key allegation is that, on one occasion when Mr Rush and Ms Norvill were rehearsing the final scene of the play, in which Cordelia is dead and King Lear is grieving over her dead body, Ms Norvill saw Mr Rush “hovering his hands over her torso and pretending to caress or stroke her upper torso” and then make “groping gestures in the air with two cupped hands, which gestures were intended to simulate and did in fact simulate him groping and fondling [Ms Norvill’s] breasts”. This incident was said to have occurred in front of other members of the cast and perhaps crew.

233 The second key allegation is that, during the rehearsal period, Mr Rush “regularly made comments or jokes about [Ms Norvill] or her body which contained sexual innuendo”. That conduct was also said to have often occurred in the presence of members of the cast and crew.

234 The third allegation again related to Mr Rush’s conduct during the rehearsal period. It is alleged that Mr Rush would “regularly (every few days) make lewd gestures in [Ms Norvill’s] direction” and that “[o]n a number of occasions this comprised [Mr Rush] looking at [Ms Norvill], sticking his tongue out and licking his lips and using his hands to grope the air like he was fondling [Ms Norvill’s] hips or breasts”.

235 The fourth allegation is that, during an interview with a journalist, Mr Rush described having a “stage-door Johnny crush” on Ms Norvill.

236 The fifth allegation is, on one view at least, perhaps the most serious allegation. It is alleged that, during a preview performance of the play, Mr Rush departed from the way that the last scene had previously been performed in that he “did not touch [Ms Norvill’s] hand and face as had been repeatedly rehearsed but rather [he] moved his hand so that it traced down [Ms Norvill’s] torso and across the side of her right breast”. The following day, the director of the play, Mr Armfield, allegedly gave Mr Rush an oral “note”, apparently in the presence of other cast members, in which he said that Mr Rush should make his performance in the last scene more “paternal” as it was becoming “creepy and unclear”. Mr Armfield was also said

to have directed Mr Rush not to stroke Ms Norvill's body but to place his hand lightly on the side of her face and arm instead.

237 The sixth allegation concerned an incident which was said to have occurred during a performance which occurred at some time between 14 and 26 December 2015. The final scene of the play involved Mr Rush carrying Ms Norvill onto the stage in his arms. Immediately before that occurred, Ms Norvill stood on a chair backstage in the prompt side wings so as to facilitate Mr Rush lifting her into his arms before carrying her onto the stage. It is alleged that in a performance during this period, before lifting Ms Norvill from the chair, Mr Rush placed his hand on Ms Norvill's lower back over her shirt. He then moved his hand under her shirt and along the waistline of Ms Norvill's jeans, brushing across the skin of her lower back. The movement is alleged to have been "light in pressure, slow and ... deliberate", and to have lasted for about 20 to 30 seconds.

238 The seventh allegation again concerned an incident that occurred immediately prior to Mr Rush lifting Ms Norvill from the chair before carrying her on stage for the final scene. The incident is said to have occurred during a performance in the period 4 to 9 January 2016. On this occasion, Mr Rush is alleged to have started to touch Ms Norvill's lower back on top of her shirt. He then gently rubbed his fingers over Ms Norvill's lower back from right to left.

239 The eighth allegation is that on 10 June 2016 Mr Rush sent a text message to Ms Norvill in which he said that he thought about her "more than is socially appropriate".

240 Nationwide and Mr Moran claimed that Mr Rush's actions as alleged were intentional and constituted scandalously inappropriate conduct in a workplace. They contended that Ms Norvill made a complaint to the STC in or about April 2016 and that, following the complaint, the STC decided that it would never work with Mr Rush again.

241 Nationwide and Mr Moran did not seek to amend those particulars. Late in the trial, they applied to amend their defence to include additional particulars which involved entirely new allegations by someone other than Ms Norvill about events that occurred at a different time and in a different context. That application was refused: *Rush v Nationwide News Pty Ltd (No 6)* [2018] FCA 1851.

Uncontroversial background facts

242 Before considering the evidence that was adduced by the parties in relation to the alleged incidents or events that provide the basis of Nationwide and Mr Moran's truth defence, it would be useful to set the scene, as it were, by identifying some mostly uncontentious or uncontroversial background facts and providing a broad chronology of the important events. Some of the events referred to in the chronology were the subject of contentious evidence which will be referred to in more detail later in the context of the alleged incidents.

Mr Rush

243 Mr Rush was born in 1951 in Toowoomba, Queensland and grew up in Brisbane. He completed Year 12 in 1968. He then attended the University of Queensland and completed a Bachelor of Arts degree in 1971. He started acting seriously while at university and took part in many productions. His wife, Ms Jane Menelaus, is a theatre and film actress. Mr Rush and Ms Menelaus were married in 1988 and they have two (now adult) children.

244 Mr Rush's background in film, television and theatre is extensive. It hardly needs repeating here. He has received many awards, accolades and nominations. Most notably, in 1996, he received an Academy Award for Best Actor for his performance in the film, *Shine*. Mr Rush was also nominated for an Academy Award for his roles in *Shakespeare in Love* (1998), *Quills* (2000) and in *The King's Speech* (2010). He has also won three British Academy Film Awards, two Golden Globe Awards, four Screen Actors Guild Awards, and three AFI Awards. In 2012, Mr Rush was named Australian of the Year for services to the arts and community, and on Australia Day in 2014, he was awarded a Companion of the Order of Australia for eminent service to the arts as a theatre performer, motion picture actor, role model and mentor for aspiring artists, and through support for, and promoting of, the Australian Arts Industry. He was and is renowned worldwide as a talented actor and contributor to the arts.

Ms Norvill

245 Ms Norvill is an accomplished actor. At the time of the trial she was 34 years old. She graduated from the Victorian College of the Arts with a Bachelor of Fine Arts (Theatre) in 2006 and has since performed in various major theatre productions throughout Australia and won several awards. At the time she performed in *King Lear*, she was a highly regarded and respected theatre actor. Ms Norvill had also acted in some film and television productions.

Pre-King Lear contact between Mr Rush and Ms Norvill

246 Mr Rush did not recall precisely when he met Ms Norvill, though he recalled seeing her in about February 2008 when she was performing in a Chekhov play called *Platonov: Recut* in Melbourne. Mr Rush attended a performance of that play along with Mr Armfield.

247 After February 2008, Ms Norvill and Mr Rush saw each other from time to time and communicated with each other via various messaging services. Mr Rush saw Ms Norvill playing Ophelia in *Hamlet* at the Melbourne Theatre Company (MTC) in 2011 or 2012, and later playing Roxanne in *Cyrano de Bergerac*. Later still, Mr Rush saw Ms Norvill perform in a production of *The Government Inspector*. He subsequently discovered that, like him, Ms Norvill had studied with Mr Philippe Gaulier.

248 In about early June 2014, Ms Norvill asked Mr Rush to provide her with a reference. He had been asked by others to provide similar references many times in the past and happily did so for Ms Norvill. The reference he provided was extremely positive. Ms Norvill expressed gratitude for it.

249 Mr Rush recalled being invited to and attending Ms Norvill's birthday party in 2014.

250 It would appear that Mr Rush and Ms Norvill got on well and were on familiar terms. That is reflected in the nature of the text messages they exchanged during 2014. Those texts are playful, humorous and somewhat cryptic in content. They employ homophones for their respective names. More will be said about those text messages later.

King Lear

251 Mr Rush and Mr Armfield discussed doing a production of *King Lear* as early as 2009. It was not until 2014, however, that concrete steps were taken in that regard. In 2014, Mr Rush was approached by the then artistic director of the STC, Mr Andrew Upton. Mr Upton told Mr Rush that he wanted the STC to do a production of *King Lear* with Mr Rush and Mr Armfield. Mr Rush and Mr Armfield then did a "read through" of the play at Mr Armfield's house and started to approach others.

252 Promotional photographs for the production were taken in mid-2014 and a brochure for the STC's 2015 season, which included *King Lear*, was released in the second half of 2014. In March 2015, Mr Rush signed a "deal memo" and, in October 2015, he signed a contract with the STC in relation to him playing the part of King Lear in the production.

253 Mr Rush began preparing for playing the role of King Lear in early 2015. That preparation included reading through the script with the key “creative team” and then learning the script. That took many months. During that period, Mr Rush was involved in the shooting of the film, *Pirates of the Caribbean*, in Queensland.

Cast and crew

254 The STC’s production of *King Lear* employed 14 actors. Those actors were cast during 2015.

255 As has already been noted, the play was directed by the well-known and celebrated Australian theatre director Mr Neil Armfield. Mr Armfield was a close colleague and friend of Mr Rush

256 Mr Rush played the lead role as King Lear.

257 The role of Cordelia, one of King Lear’s three daughters, was played by Ms Norvill. Ms Norvill was cast in that role by Mr Armfield in June 2015 after a number of other names had been discussed. Mr Armfield sought and obtained the views of a number of people before selecting Ms Norvill.

258 Ms Norvill was called as a witness by Nationwide and Mr Moran. It would be fair to say that she was the key witness in Nationwide and Mr Moran’s truth defence.

259 The role of Goneril, the eldest of King Lear’s daughters, was played by Ms Helen Buday. Ms Buday is a well-known Australian actor, having played, perhaps most notably, the role of Savannah Nix in the film, *Mad Max Beyond Thunderdome*. She has appeared in over 40 theatre productions, 15 of which were STC productions. Ms Buday was called as a witness by Mr Rush.

260 The role of Regan, another of King Lear’s daughters, was played by Ms Helen Thomson.

261 The role of the “Fool” was played by the celebrated Australian actor, Ms Robyn Nevin AM, who has had a career in the entertainment industry for almost 60 years. In that time she has appeared in a substantial number of theatre productions, as well as on television and in films. As has already been noted, Ms Nevin was called as a witness by Mr Rush.

262 The well-known Australian actor Mr Max Cullen played the role of the Earl of Gloucester. The Duke of Albany was played by Mr Alan Dukes, the Duke of Burgundy was played by Mr

Nick Masters, the Duke of Cornwall was played by Mr Colin Moody and the Earl of Kent was played by Mr Jacek Koman. None of those actors was called to give evidence in this proceeding.

263 The role of Edgar, the Earl of Gloucester's legitimate son, was played by Mr Mark Leonard Winter. Mr Winter was called as a witness by Nationwide and Mr Moran.

264 The role of Edmund, the main antagonist in the play and illegitimate son of the Earl of Gloucester, was played by Mr Wyatt. It will be recalled that Mr Wyatt featured prominently in the *Telegraph* articles of 1 December 2017. The impression given by those articles was that, having been in the "show", he was in some position to support the, at that time unnamed, actress who had made the complaint. He was not called as a witness.

265 The role of Oswald was played by Mr Wade Briggs. Mr Eugene Gilfedder played the Knight and messenger. There were two musicians in the cast. They were played by Mr Simon Barker and Mr Phillip Slater. None of those performers was called as a witness.

266 Aside from the cast there were, of course, a large number of other people involved in the production. As has already been noted, Mr Armfield was the director. It is worth mentioning some of the other key members of the production and technical teams, if only because it might reasonably be expected that some of them would or might have been witness to some of the alleged incidents which provided the basis for Nationwide and Mr Moran's truth defence. The assistant director was Mr Lucas Jervies. The production manager was Mr Chris Mercer. The stage manager was Ms Georgia Gilbert. Ms Gilbert was assisted by a deputy and two assistant stage managers; Mr Todd Eichorn, Ms Roxzan Bowes and Ms Katie Hankin respectively. There were also set, lighting and costume and sound designers, composers, a voice and text coach, wardrobe, wig and make-up staff, mechanists, an electrician, and sound and microphone operators.

267 In all, about 45 people were directly involved in some way or another in the production. There may have been more, including administrative staff. No member of the production or technical team was called as witnesses in the proceeding.

Rehearsals

268 Rehearsals began on 12 October 2015. They concluded on 21 November 2015.

269 The final scene, Act V Scene III, was first rehearsed on 30 October 2015. The full cast was required to be present for the rehearsal of that scene. Mr Armfield, of course, was also present. It was likely that Ms Gilbert and her team were also present. There was also a technical rehearsal of that scene that was choreographed in order to allow Ms Norvill, as Cordelia, to be safely carried and then lowered onto the stage by Mr Rush, as King Lear.

Previews

270 There were four preview performances of the play. They were performed between 24 and 27 November 2015. There was a full audience for each preview. They were sold-out. The previews were considered to be a vital part of preparing for the play.

271 Mr Armfield produced notes in respect of the preview performances. Those notes were emailed to the cast by the stage manager. Mr Armfield then spoke to those notes at meetings he had with the cast, usually the following day. The stage manager, Ms Gilbert, and the deputy stage manager, Mr Eichorn, also produced performance reports which contained pertinent observations which she made of each performance.

Media and publicity

272 On 17 November 2015 Mr Rush attended an interview conducted by a journalist with *The Sydney Morning Herald*. He was accompanied by Ms Buday, Ms Thomson, and Ms Norvill. The obvious purpose of their attendance at the interview was to promote the play. It was conducted on the premises of the STC. The journalist wrote a story based on the interview which was published in *The Sydney Morning Herald* on 19 November 2015.

273 As has already been noted, Nationwide and Mr Moran's particulars of their truth defence included a statement that Mr Rush was reported to have made during this interview. That statement was that he had a "stage door Johnny crush" on Ms Norvill. It is, however, necessary to consider that statement in the context of *The Sydney Morning Herald* article as a whole. The opening paragraphs of the article are as follows:

Posing for pictures, Geoffrey Rush doesn't seem to be taking the role of King Lear too seriously. Not today. "Do I have that regal stud-muffin quality coming through?" he asks the photographer.

He casts an approving eye over his three stage daughters. "I hand-picked them," he cackles. "I couldn't be more thrilled. The chemical balance feels right."

Taking a break from his recurring part in *Pirates of the Caribbean*, Rush is "embracing his sexagenarianism" in preparation to play the title role in Shakespeare's *King Lear*, one of the most demanding roles in classical theatre. Helen

Buday, Helen Thomson and Eryn Jean Norvill are Lear's daughters, Goneril, Regan and Cordelia.

Rush and director Neil Armfield talked a great deal about creating a sense of family before embarking on rehearsals for the Sydney Theatre Company's production, Rush says. To create an intimate feel, they cast actors Rush had known for years and had worked with previously.

"Helen [Buday] and I go way back," Rush says. "We were in *The Importance of Being Earnest* back in the day [in 1988]. But even before that I spent time as a teacher at NIDA doing clowning and there was this amazing young woman in first year. Helen actually taught me how to trip."

Rush and Helen Thomson go back a way, too. "Helen played a hooker in a production of a minor Jacobean comedy I was in called *The Dutch Courtesan* [in 1993]," Rush says.

This production marks the first time Rush has worked with Norvill, however. "I saw EJ play *Ophelia* in *Hamlet* for the MTC [Melbourne Theatre Company] and I developed an immediate stage-door Johnny crush," he confesses. "But you won't print that, will you?"

274 The article later deals with, amongst other things, the mood of the rehearsals, which by this time had almost concluded. It included the following:

Despite the heaviness of the material, the atmosphere in the rehearsal room has been very light, says Thomson. "I was talking to [incoming STC artistic director] Jonathan Church and he was saying that in UK there has been a run of Lears that have been quite intellectual and that's just not Geoffrey."

Rush laughs. "I'm a low comedian! Wearing a crown! Rehearsal is a playpen for me to do cheap jokes."

Working with Rush for the first time, Norvill is appreciating that playfulness. "I love Geoffrey's ebullience and that's really something because this play looks into some deep dark holes in humanity," she says. "Sometimes fear can get into a rehearsal room and rot it. Nervousness, formality, all that bullshit. But Neil and Geoffrey work from moment to moment and we're all on the same journey together."

275 This was one of a number of interviews that Mr Rush participated in so as to promote the play.

276 In late November or early December 2015, Ms Norvill was interviewed by a journalist at the *Telegraph*. The article which resulted from the interview was published in the *Telegraph* on 3 December 2015. By this time, the rehearsals of *King Lear* had ended and the previews had been performed.

277 The opening paragraph of the *Telegraph* article made it clear that one of the main themes of the story was what it was like for Ms Norvill to work with Mr Rush. The article began by saying that Ms Norvill had "open[ed] up about playing Shakespearean women and working

opposite Oscar-winner Rush in the Sydney Theatre Company's King Lear". Later in the report, Ms Norvill is reported as having said:

Working opposite Oscar-winner Geoffrey Rush, who is "always flipping the coin to see what's underneath" is exciting, Ms Norvill said

"Geoffrey is just forever playful. He's so generous, he's very cheeky which is perfect for me. I feel very privileged to work with him and proud to be his 'favourite daughter'" she joked.

Performances

278 The opening night for the play, which was performed at the Roslyn Packer Theatre in Walsh Bay, Sydney, was 28 November 2015.

279 The performance time for the play was about three hours. There was an intermission at the end of Act III, Scene VII. Mr Rush, as King Lear, was on stage himself for about 2 hours of the performance time. Mr Rush and Ms Norvill were in four scenes together, including, relevantly, the final scene, Act V Scene III. It was, by all accounts, a demanding play for most of the actors involved.

280 There were generally eight shows per week. On some days, there was a matinee as well as an evening show. There was no performance on Christmas day. The audience for each show was about 960 people.

281 One of the performances was filmed by the STC. A recording of that performance was tendered. A portion of the recording of Act V Scene III was played in Court.

282 The final performance was on 9 January 2016.

283 There was an "after party" attended by the cast and crew on the evening of 9 January 2016. Both Mr Rush and Ms Norvill attended that party.

284 In a media release dated 10 May 2016, the STC noted that one of the highlights of its 2015 season was "the return of Geoffrey Rush to the STC, tackling one of the great roles of the canon, Lear, in a bold production by director Neil Armfield".

Complaint

285 Ms Norvill did not complain to anyone about Mr Rush's behaviour at any time throughout the period of the rehearsals, preview performances and performances of the play. As will be seen, Ms Norvill's evidence was that she did have some conversations during the production with Ms Nevin and Mr Armfield in which she referred to sexual harassment, or being upset.

The evidence concerning those conversations is contentious and will be considered later. Suffice it to note at this stage that, even on Ms Norvill's account of those conversations, she did not directly refer to Mr Rush during those conversations.

286 On 5 April 2016 Ms Norvill met with Ms Annelies Crowe at a pub in Annandale, Sydney. Ms Crowe was the Company Manager of the STC. The meeting was at Ms Norvill's request. During the meeting Ms Norvill told Ms Crowe about Mr Rush's behaviour towards her during *King Lear*. On 6 April 2016, Ms Crowe sent an email to Mr McIntyre and Ms Rachael Azzopardi about what had transpired during her discussions with Ms Norvill. Mr McIntyre was the Executive Director of the STC and Ms Azzopardi was the Director, Programming and Artistic Operations at the STC. Ms Crowe was not called to give evidence. Nor were Mr McIntyre or Ms Azzopardi. The contents of Ms Crowe's email, and Ms Norvill's evidence concerning her discussions with Ms Crowe at the meeting, will be considered later. It suffices at this stage to note that the significance of this evidence is that it bears on the consistency or inconsistency of the account that Ms Norvill has given about Mr Rush's behaviour over time.

287 Shortly after the meeting on 5 April 2016, Ms Norvill and her agent, Ms Lisa Mann, met with Ms Azzopardi and Ms Serena Hill, the Casting Director at the STC, at another bar. Nobody who attended that meeting made a contemporaneous record or note of the discussions. An email Ms Hill sent to Mr McIntyre over eighteen months later noted that Ms Norvill had said that she did not want to make a "formal complaint" and that the meeting was "off the record". Ms Mann and Ms Hill were not called to give evidence.

288 In about June 2016, Ms Norvill had a conversation with Ms Nevin. They were both performing in the play *All My Sons* at the time. There was a conflict between the evidence of Ms Norvill and Ms Nevin about the terms of this conversation. That evidence, and the potential significance of it, is discussed later.

Mr Rush's knowledge of the complaint

289 The STC did not tell Mr Rush that any complaint, formal or otherwise, had been made about his conduct during the rehearsals and performances of *King Lear*. Nor was he ever told that the STC would never work with him again, if any such decision had in fact been made, or the reasons for any such decision.

290 Mr Rush was first notified that a complaint was said to have been made about his allegedly “inappropriate behaviour” when an email was sent to his agent, Ms Ann Churchill-Brown, by a journalist from *The Australian* newspaper on 10 November 2017. The journalist asked Mr Rush’s agent to provide answers to questions relating to three issues.

291 The first issue concerned an award that “AACTA” (the Australian Academy of Cinema and Television Arts) had conferred on Harvey Weinstein in 2013. The main question relating to that issue was why the award had not been withdrawn in spite of the scandal engulfing Mr Weinstein since early October 2017. Mr Rush was the President of AACTA.

292 The second issue related to posters for the MTC’s 2018 season. Those posters, which featured Mr Rush, had been defaced to suggest that Mr Rush was a sexual predator.

293 The third issue was said to concern “the STC’s confirmation to *The Australian* that a complaint of ‘inappropriate behaviour’ against [Mr Rush] was made to the company”. The questions posed in relation to that issue included when that “inappropriate behaviour” occurred, what it entailed, how the complaint was resolved, and whether Mr Rush regretted that the incident occurred.

294 After becoming aware that a complaint about him had apparently been made, Mr Rush telephoned Mr McIntyre. Mr Rush asked Mr McIntyre to give him the details of the complaint of inappropriate behaviour that had been made about him. Mr McIntyre refused on the basis that the complainant had requested anonymity and the STC was respecting her privacy.

295 In answer to the third issue and the questions posed by it, Mr Rush provided the following response to *The Australian*, through his agent:

I have been informed that a statement was made against me to a Company manager, about a play I was performing in, regarding alleged behaviour towards a fellow employee. The revelation has astonished me. For my part, there were never any conceivable grounds for this perplexing statement.

296 As for the Harvey Weinstein award issue, Mr Rush provided the following response:

With regard to the AACTAs: 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.

297 Shortly after he was contacted by the journalist, Mr Rush had a telephone conversation with Mr Damian Trehwella, who was the Chief Executive Officer of the Australian Film Institute

(AFI) and AACTA. As noted, Mr Rush was the President of AACTA. Some days after that conversation, Mr Trewhella sent an email to the AFI Board which contained the following note about his conversation with Mr Rush:

Early Friday evening GR rang me to give heads up that he'd been contacted by media for a response to the HW award situation outlined above. I said thanks and mentioned that we'd responded also. In some general chat that followed we both discussed our general frustration with the current state of media/society (not an unusual chat thread) where items such as the HW award issue is made into a "story" in this way. In passing and in circumstances of confidence he mentioned, by way of example, on his side he'd been baited on some issue involving him which in his view was bullshit and a symptom of current climate. The only issue he could think of was when he was LEAR at STC involving a scene (in front of 900 people) in which he carried his dead daughter. He said it was a difficult scene and whilst he thought the carry position was right for all, there was allegedly some discomfort.

298 Mr Rush was cross-examined about his conversation with Mr Trewhella. His evidence in that regard, and the significance of it, is considered in detail later. Mr Trewhella was not called as a witness.

Other contact or communications between Mr Rush and Ms Norvill

299 On 13 November 2015 Ms Norvill attended the opening night of the play, *Orlando*, with Mr Rush and his daughter. Mr Winter also attended. She had dinner with Mr Rush before the performance and shared an Uber ride with him. This was towards the end of the rehearsal period.

300 Mr Rush attended a Christmas party held at Ms Norvill's parents' home on Christmas day. The circumstances in which he came to attend that party, including whether Ms Norvill invited Mr Rush to attend or not, were to some extent contentious.

301 On 6 January 2016, Mr Rush received an email from a playwright which contained positive observations concerning the performances of Mr Rush and Ms Norvill and the depicted relationship between King Lear and Cordelia. Mr Rush forwarded that email to Ms Norvill early in the morning of 7 January 2016. Mr Rush addressed his email to "darling Eedge" and signed off "xo Daaad". Ms Norvill replied:

That was wonderful.

Thanks for sending it through Dearest Daddy DeGush.

xoxo

302 This email was sent after virtually all of the incidents between Mr Rush and Ms Norvill that provided the basis for the truth defence put forward by Nationwide and Mr Moran had

allegedly occurred. Ms Norvill's evidence about her email is discussed in detail later. Suffice it to say at this stage that there was evidence that throughout the production, Ms Norvill jokingly referred to Mr Rush as "Dad" (elongated to "Daaad") because he was playing her father in the play. Ms Norvill's employment of the homophone "Daddy DeGush" for Mr Rush's name appeared to be a continuation of the game or joke between Mr Rush and Ms Norvill which involved using homophones for their respective names. That game had been a particular feature of the text messages between Mr Rush and Ms Norvill throughout 2014.

303 As already noted, in mid-2016, both Ms Nevin and Ms Norvill performed in the play, *All My Sons*. The opening night was on or shortly before 10 June 2016. On 10 June 2016, Mr Rush sent a text message to Ms Norvill. A line from that text message comprises a particular of "inappropriate behaviour" advanced by Nationwide and Mr Moran in support of their truth defence. It is, however, appropriate for that line to be read in the context of the text message as a whole. The line relied on by Nationwide and Mr Moran is highlighted in the following reproduction of the text message:

.... beloved Aryan Schöne Müllerin (yes a complicated and obtuse jeu de mots, of course) - basically it's a spectacular near-homophone praising you as a delicious mysterious daughter of the Miller! - apologies for missing your opening last night (I sent a scrappy hasty message through Mrs Nevin) but I was thinking of you (**as I do more than is socially appropriate** 🤪) - how is your Big Wheel turning? ... how do months fly so quickly by? Fatigued by Lear (many levels) I flew to the UK, underprepped but champing, to play Giacometti - and have just seen a Vimeo finecut which has allayed my worst fears of not honouring the man's curious idiosyncrasies - many chunky sessions of meticulous ADR happen next week.

I feel certain you will be hand in glove with Miller's world. He's a classicist that still provides the toughest and most interesting challenges for a contemporary experience I hope you're hApPy and still find time to dance with Xmas-style abandon



xo Gregarious Raunch 🗨️💬

(Emphasis added.)

304 Ms Norvill did not reply to the text.

Some observations concerning witness demeanour and credibility

305 As has already been noted, Nationwide and Mr Moran called evidence from Ms Norvill and Mr Winter in support of their truth defence. Mr Winter's evidence was of fairly narrow compass. Mr Rush's evidence addressed the allegations which formed the basis of the truth

defence. Mr Rush also called evidence from Mr Armfield, Ms Buday and Ms Nevin which addressed those allegations.

306 There were conflicts between the evidence of Ms Norvill and Mr Winter, on the one hand, and Mr Rush, Mr Armfield, Ms Buday and Ms Nevin on the other. Those conflicts, for the most part, have to be resolved.

307 Witness demeanour is one consideration which may assist a judge to resolve conflicting evidence. Sometimes the demeanour of a witness while giving evidence about contentious issues may provide insight into whether the evidence given by the witness is either honest and reliable, or dishonest or unreliable. Signs that may indicate dishonesty or unreliability include evasiveness, nervousness, an apparent unwillingness on the part of the witness to make appropriate or obvious concessions and even, in some circumstances, overconfidence.

308 Even where a witness displays such traits when giving evidence, however, some caution must generally be exercised. That is because a witness may, for example, appear nervous or evasive for reasons that have nothing whatsoever to do with the honesty or reliability of their evidence. Other witnesses may be able to give evidence in an appropriately confident and direct manner and yet their evidence may be found to have been unreliable or, worse still, dishonest. Witness reliability is not always a reliable signpost. Indeed, judges have often cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability based solely or mainly on the appearance of witnesses. Scientific research has also cast doubt on the ability of judges to tell truth from falsehood accurately on the basis of such appearances: see *Fox v Percy* (2003) 214 CLR 118 at [30]-[31] and the cases there cited.

309 Aside from demeanour, there are other factors or considerations which may assist a judge in determining the credibility of a witness and the reliability of his or her evidence. Those considerations include: whether the witness has previously given an account of the events in question and, if so, whether that previous account is consistent or inconsistent with the evidence given by the witness; the plausibility and apparent logic of the events described by the witness; and the consistency of the account of the events described as compared with other objectively established events. Such considerations often turn out to be a much surer guide to the reliability of the evidence given by a witness about disputed events. As Atkin LJ observed in *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 Ll L Rep 140 at 152; cited in *Fox v Percy* at [30]:

... I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.

310 This is a case where such considerations, as opposed to witness demeanour, provide the main key to the resolution of the conflicts in the evidence.

311 Before addressing the evidence relating to the disputed events – the eight allegations particularised in Nationwide and Mr Moran’s truth defence – it is helpful to make some general observations about the credibility of the witnesses who gave evidence concerning the allegations, and the reliability of the evidence given by them in relation to the disputed events. The issues touched on in this general discussion will be addressed in more detail in the context of the consideration of the evidence concerning each of the allegations.

Mr Rush

312 Mr Rush was, for the most part, an impressive witness. Nothing in his demeanour suggested that he was doing anything other than giving an accurate and honest account of the relevant events and circumstances. The only potential issue in relation to the reliability of his evidence was that, on occasion, he tended to give very long-winded and wordy answers which did not directly answer the question. On balance, however, I do not consider that this reflected adversely on his credibility or the reliability of his evidence. That is because he did not appear to be giving the long-winded answers to avoid answering the question. Rather, he presented as a highly articulate and analytical person who was, by his very nature, prone to giving such complex and wordy responses. Also, when closely analysed, most of his long-winded answers related to the theatre and the play in question, those being matters about which he was clearly passionate. His answer to questions directed to the disputed events were, for the most part, more concise and responsive.

313 Mr Rush was, not surprisingly, cross-examined at considerable length by senior counsel for Nationwide and Mr Moran, including in relation to his evidence about the allegations that formed the basis of Nationwide and Mr Moran’s truth defence. Ultimately, however, Nationwide and Mr Moran pointed to only two parts of Mr Rush’s evidence which, in their submission, indicated that his evidence was unreliable.

314 The first part of Mr Rush’s evidence highlighted by Nationwide and Mr Moran related to his evidence about the text message he sent to Ms Norvill on 10 June 2016. The substance of the submission advanced on behalf of Nationwide and Mr Moran was that part of Mr Rush’s

explanation of what he was intending to convey in the text message bore no resemblance to the unambiguous terms of the text message. Mr Rush's explanation for the text was that, in the context of having missed seeing the opening night of the play that Ms Norvill was then performing in, he was intending to convey that he had not forgotten about Ms Norvill.

315 The 10 June 2016 message, and Mr Rush's evidence concerning it, is discussed in detail later. Suffice it to say at this point that I reject the contention that Mr Rush's evidence concerning that text bore adversely on his credibility as a witness. Indeed, as will be seen, ultimately I accept Mr Rush's evidence that the text message was in part an apology to Ms Norvill for not attending the opening night and in part a "catch-up" because he had not been in contact for some time. It was in that respect, or in that context, that Mr Rush explained that the text was his way of saying, albeit in playful and rather cryptic terms, that he had not forgotten about Ms Norvill. I should also note, in this context, that for the reasons given in detail later, I reject the rather sinister interpretation of the text that Nationwide and Mr Moran advance.

316 The second part of Mr Rush's evidence that was criticised by Nationwide and Mr Moran concerned his evidence about his conversation with Mr Trewhella shortly before 14 November 2017. As noted earlier, an email that Mr Trewhella sent to the AFI Board on 14 November 2017 noted, amongst other things, that Mr Rush had told Mr Trewhella about being "baited" about an issue involving his conduct during *King Lear*. Mr Trewhella recorded in his email that Mr Rush had said, in that context, that the only thing that he could think of was that, during the difficult scene where he carried his dead daughter, there may have been "some discomfort". Mr Rush's evidence concerning his discussions with Mr Trewhella in that regard included that he said, or might have said, that Ms Norvill might have been fearful that he might have dropped her. Nationwide and Mr Moran submitted that Mr Rush's evidence about that part of his discussion with Mr Trewhella was "ludicrous".

317 Mr Rush's evidence concerning his discussion with Mr Trewhella is discussed in detail later. It may be accepted that some of Mr Rush's evidence on that topic was less than impressive. Indeed, as will be seen, I do not accept some of Mr Rush's evidence about what he may have said to Mr Trewhella. On balance, however, I do not consider that Mr Rush's evidence about this one issue was such that it cast doubt on the reliability of Mr Rush's evidence as a whole, as was effectively submitted by Nationwide and Mr Moran.

318 The honesty and reliability of much of Mr Rush's evidence was not directly challenged in cross-examination. The specific allegations that formed the basis of Nationwide and

Mr Moran's truth defence were put to Mr Rush, often in fairly forceful terms. As will be seen, Mr Rush denied them. It was not, however, directly put to him in cross-examination that he was lying, or that any particular aspect of his evidence concerning the events in question was false.

319 On the whole, I consider that Mr Rush was a credible witness who gave honest and reliable evidence about the critical events in question. His evidence about those events is addressed in detail later.

Mr Armfield

320 Mr Armfield was an impressive witness. There was no issue about his credibility as a witness or the reliability of his evidence generally. Nationwide and Mr Moran did not suggest that any of his evidence should not be accepted. Despite his obviously close friendship with Mr Rush, I consider that he gave forthright, honest and reliable evidence about the facts and circumstances relevant to the allegations. Nationwide and Mr Moran did not submit otherwise.

Ms Buday

321 Ms Buday was, in some respects at least, a unique, if not, rather unusual witness. To give one example, on more than one occasion, she sang her answer to a question. She was also a difficult witness at times. She was occasionally needlessly disrespectful to senior counsel for Nationwide and Mr Moran. It was plain that she was contemptuous towards Nationwide and Mr Moran because they had published the articles in question. It was equally obvious that she was a long-standing friend and colleague of Mr Rush. As will be seen, she gave compelling evidence about Mr Rush's reputation. It may be accepted that Buday's evidence in relation to the disputed events must be approached in that context.

322 Despite the features of her evidence just referred to, however, Ms Buday gave clear, direct and forceful answers to the questions that were put to her in relation to the events and circumstances in question. I can see no reason why her evidence should not be accepted as being reliable. Nationwide and Mr Moran ultimately did not advance any submissions in relation to Ms Buday's credibility as a witness, or put forward any reasons why any of her evidence should not be regarded as reliable. It certainly was not suggested that she was not telling the truth about her observations about the rehearsals and the interaction between Mr Rush and Ms Norvill.

Ms Nevin

323 Like Mr Armfield, Ms Nevin was an impressive witness. While Ms Nevin was cross-examined at some length about one particular issue, ultimately Ms Nevin's credibility, and the reliability of her evidence generally, was not challenged by Nationwide and Mr Moran.

324 The issue which was the subject of much cross-examination concerned the circumstances in which Ms Nevin sent a text message to Ms Norvill on the afternoon of 1 December 2017, the day that the 1 December 2017 articles were published. The text message was undoubtedly kind and supportive. Ms Nevin was plainly concerned about Ms Norvill's wellbeing in light of the publications. The issue which was the focus of the cross-examination was how Ms Nevin knew that Ms Norvill was the complainant given that she had not been named in the *Telegraph* articles. As will be seen, the suggestion appeared to be that Ms Nevin knew that Ms Norvill was the complainant as a result of a conversation she had had with Ms Norvill in mid-2016. Ms Nevin agreed that she had had a conversation with Ms Norvill in mid-2016 about her unhappiness during *King Lear*, but denied that Ms Norvill had told her that Mr Rush had sexually harassed her during *King Lear*.

325 The evidence of both Ms Norvill and Ms Nevin in relation to this disputed conversation will be considered in more detail later, as will Ms Nevin's evidence about how she came to know that Ms Norvill was the complainant. Suffices it to note at this stage that I accept Ms Nevin's evidence about the disputed conversation. As for Ms Nevin's evidence as to how she became aware that Ms Norvill was the complainant, Ms Nevin frankly admitted that she could not recall how she became aware of that fact and that she had difficulty recalling the precise chronology of events. In all the circumstances I consider that Ms Nevin's frankness and candour in relation to that issue was to her credit.

326 On the whole, I do not consider that Ms Nevin's evidence about her text message, or her evidence about how she came to know that Ms Norvill was the complainant, reflected adversely on her credibility as a witness, or the reliability of her evidence generally. Nationwide and Mr Moran did not submit otherwise. My assessment was that Ms Nevin was a frank, forthright and honest witness, and that her evidence was reliable.

Ms Norvill

327 I should make it clear at the outset that, in assessing Ms Norvill's credibility as a witness and the reliability of her evidence, I have had regard to the somewhat difficult and unusual

position she was in when she gave her evidence. When she first raised her concerns about Mr Rush's behaviour with Ms Crowe in April 2016, Ms Norvill made it clear that she did not want to make a formal complaint. It appears that she did not want to speak publicly about her experiences. Nor could she have expected that she might have to give evidence about her experiences one day. Even when the STC issued a statement in November 2017 as a result of Nationwide and Mr Moran's inquiries, Ms Norvill requested that her identity be withheld. She was not a party to this proceeding and had no vested interest in its outcome. Nor was she a particularly willing participant in it. She was essentially dragged into the spotlight because of the actions of Nationwide and Mr Moran.

328 In assessing Ms Norvill's evidence, I am also mindful that people who make allegations relating to sexual assault or sexual harassment are often in a particularly vulnerable position and can experience unique and difficult challenges when giving evidence. Giving evidence in public about often highly personal and sensitive issues can often be difficult and stressful. The stress involved in giving evidence about such matters is often exacerbated by the process of cross-examination. Often the events the witness is required to remember are themselves distressing and painful, or occurred during a traumatic period of the witness's life. Often the witness is required to give evidence some considerable time after the events in question. That sometimes means that the witness's recollection can at times appear vague and uncertain. The absence of corroboration is also a common feature of cases involving sexual harassment. Sexual harassment is often surreptitious and does not occur in public. Many of these considerations apply to Ms Norvill's circumstances. I have taken them into account in assessing Ms Norvill's evidence.

329 Despite the somewhat difficult nature of her circumstances, Ms Norvill generally presented as an intelligent, articulate and confident witness who was endeavouring to give an honest recollection of the events in question. For the most part, she gave direct and responsive answers to questions, including during cross-examination. She did not appear to be either nervous, uncertain or evasive.

330 Putting Ms Norvill's demeanour to one side, however, there are a number of aspects to the evidence which raise significant issues about her credibility as a witness and the reliability of the evidence she gave concerning the disputed events. Those issues generally relate to the consistency or inconsistency of her version or account of the relevant events over time, and the consistency or inconsistency of her evidence with more contemporaneous statements or

objective indications of the nature of her relationship with Mr Rush at the relevant time. There were also some indications in Ms Norvill's evidence that she was a witness who was, at times, prone to embellishment or exaggeration.

331 For the most part it is preferable to deal with the specific issues with Ms Norvill's evidence when dealing with her evidence concerning the specific incidents or events that provide the basis for Nationwide and Mr Moran's truth defence. It is, however, useful to provide a short summary or overview of the issues. They include the following.

332 First, Ms Norvill's evidence concerning Mr Rush's conduct, particularly during the rehearsals, was generally inconsistent with the contemporaneous statements that Ms Norvill made to journalists about what it was like to work alongside Mr Rush in *King Lear*. Ms Norvill's explanation for the statements she made to the journalists is considered in detail later. It need only be observed at this stage that the explanation was not particularly persuasive.

333 Second, Ms Norvill's evidence about Mr Rush's conduct was inconsistent in important respects with the account which she appears to have given to Ms Crowe on 5 April 2016, only a few months after the conclusion of the performances of *King Lear*. This particular issue is discussed in detail later. In short, Ms Norvill disputed that she told Ms Crowe some of the things which are recorded in Ms Crowe's email dated 6 April 2016 concerning their meeting. For their part, Nationwide and Mr Moran submitted that, for various reasons which will be referred to later, Ms Crowe's email could not be said to be an accurate or reliable account of what Ms Norvill said during the meeting. As will be seen, that submission is rejected, though it is accepted that Ms Crowe's email provided only an outline or summary of what Ms Norvill had told her. The difficulty for Ms Norvill is that the version of events that she appears to have given Ms Crowe in April 2016 was different in important respects to the version she gave in her evidence.

334 Third, on 13 August 2018, Ms Norvill signed a statement for the purpose of providing an outline of the evidence which she would give in this proceeding. Ms Norvill's evidence was that she wrote that statement, that it went through several drafts over the weeks before she signed it, that she wanted it to be accurate and complete, that she read it carefully before she signed it, and that it was true. It is also apparent that, at the time the statement was written and signed, Ms Norvill was represented by a solicitor who had assisted her in the preparation of the statement.

- 335 Significantly, however, Ms Norvill’s evidence included descriptions of Mr Rush’s conduct which went beyond the outline which was included in her statement. There were also some inconsistencies apparent between Ms Norvill’s statement and her evidence. Most of the differences and inconsistencies are discussed later in the context of the specific allegations. In summary, the differences or inconsistencies include: whether Mr Rush used the words “scrumptious” and “yummy”; whether Mr Rush’s behaviour included making hourglass shapes with his hands, licking his lips, bulging his eyes, growling and sticking his tongue out during rehearsals; whether Mr Rush made lewd gestures and comments to Ms Buday and Ms Thomson; whether the entire rehearsal room was, or that she believed that it was, somehow complicit in, or enabled the behaviour of Mr Rush as described by her; whether she had a conversation with Ms Nevin in Ms Nevin’s dressing room during the production of *All My Sons*, in which she told Ms Nevin that she had been sexually harassed by Mr Rush during *King Lear*; and whether Mr Rush stood very close to her during the bows at the end of *King Lear*, such that another actor took it upon himself to stand between them. For the most part, these were incidents or circumstances which were not outlined in Ms Norvill’s statement, but which featured, in some instances prominently, in her evidence.
- 336 Ms Norvill sought to explain why her statement did not include some of the incidents or circumstances which she had referred to during her evidence. Her evidence in that regard was that, after she signed her statement she thought about “things” more often and that, as a result, she “remembered things that [she] hadn’t before”. That could perhaps amount to a reasonable explanation if the additional “things” were relatively few in number and relevantly minor in importance or significance. The problem, however, is that the additional “things” were not few in number and were not of minor significance.
- 337 Fourth, it is difficult to reconcile Ms Norvill’s evidence concerning Mr Rush’s behaviour during the rehearsals and performances with three relatively contemporaneous events or incidents. The first was that one night after rehearsals Ms Norvill attended the performance of another play, *Orlando*, along with Mr Winter, Mr Rush and Mr Rush’s daughter. She also went out to dinner with Mr Rush and Mr Winter before the play and shared an Uber with him. This occurred towards the end of the rehearsals. It is difficult to imagine why she would do that if Mr Rush had acted as reprehensibly during the rehearsals as she described in her evidence. Second, while Ms Norvill initially denied doing so, she ultimately conceded that she invited Mr Rush to a Christmas party at her parents’ house in 2015. She claimed that she did so somewhat reluctantly and only because she did not want to make him uncomfortable.

Nevertheless, by that time the rehearsals had concluded and the performances were well under way. Third, only two days before the very last performance, Ms Norvill addressed her reply to Mr Rush's email to "Dearest Daddy DeGush" and signed off "xoxo", denoting hugs and kisses. It is again difficult to imagine why she would have written to Mr Rush in those terms if he had behaved as she described in her evidence.

338 In her evidence, Ms Norvill sought to explain those events or incidents and reconcile them with her descriptions of Mr Rush's behaviour and the way she said it made her feel towards him. Her explanations were not particularly persuasive.

339 Each of those issues or features of Ms Norvill's evidence gives cause for doubting or questioning the reliability and credibility of her evidence. Ultimately, however, the most telling circumstance against the acceptance of much of Ms Norvill's evidence is that it is simply not corroborated or supported by the balance of the evidence. Indeed, for the most part, Ms Norvill's evidence was specifically contradicted by evidence given by the other relevant witnesses, in particular, Ms Nevin, Ms Buday and Mr Armfield. Even Mr Winter's evidence, when closely analysed, provided little support for Ms Norvill's version of events. The absence of corroboration and the inconsistencies between Ms Norvill's evidence and the evidence given by other witnesses will become apparent during the detailed consideration of the evidence which follows. This feature of the evidence, considered as a whole, provides the most compelling reason to doubt Ms Norvill's credibility and the reliability of her evidence generally.

340 I should finally note, in relation to the credibility and reliability of Ms Norvill's evidence, that Nationwide and Mr Moran submitted that her evidence should be accepted because it had not been shown that she had any motive to lie. She was, it was submitted, not a party to the proceeding and need not have come forward to give evidence in Nationwide and Mr Moran's defence. Nationwide and Mr Moran relied heavily on the fact that it was not put to Ms Norvill in the course of her cross-examination that she had a motive to lie.

341 It may readily be accepted that a motive to lie is a very relevant factor in judging a witness's credit: *R v Uhrig* (unreported, New South Wales Court of Criminal Appeal, 24 October 1996) at 16-17; referred to in *Palmer v The Queen* (1998) 193 CLR 1 at [6]. It does not necessarily follow, however, that the fact that Mr Rush was unable to suggest a reason why Ms Norvill might lie is a relevant consideration in assessing her credibility as a witness: *Palmer* at [7].

Mr Rush was not necessarily in a position to see into Ms Norvill's mind: cf. *R v SAB* (2008) 20 VR 55 at [27].

342 In any event, the issue concerning Ms Norvill's credibility as a witness, and the reliability of her evidence, is not simply a matter of determining whether or not she has told lies, or has a motive to lie. An otherwise honest witness may give unreliable evidence for all manner of reasons. The witness's memory of the event may be poor or defective. The witness's memory of an event may also become distorted or polluted over time because of other intervening events or circumstances. The witness might, in such circumstances, convince himself or herself that something occurred, and genuinely believe that it did, even though it did not.

343 In all the circumstances I do not think that it is possible to reduce the factual issues and inconsistent evidence in this case to the simple question of whether or not Ms Norvill is a liar, or has told lies. The issue is not as black and white as that. Life is not that simple.

344 Moreover, as has already been noted, many of the disputed allegations do not simply involve Ms Norvill's word against Mr Rush's word. Many of the allegations were, on Ms Norvill's version of events, witnessed by others, including Mr Armfield, Ms Nevin and Ms Buday. Yet, as will be seen, her version of events was not supported by, and in most respects was disputed by, those witnesses.

Mr Winter

345 Mr Winter's evidence was fairly limited. It related to only two of the relevant allegations: first, the allegation that Mr Rush performed a lewd act on one occasion during one of the rehearsals of Act V Scene III of the play; and second, the allegation that Mr Rush touched Ms Norvill's breast during the performance of that scene in one of the early performances of the play.

346 Mr Winter's evidence in relation to those alleged events is addressed in detail below. In summary, the following features of that evidence are worth noting. First, Mr Winter essentially accepted that his recollection of those events was vague. Second, Mr Winter's description of those events, for the most part, was not entirely consistent with Ms Norvill's evidence. Third, the rather matter-of-fact way in which Mr Winter gave his evidence of those incidents, and the inconsistency between Mr Winter's description of the incident and his

otherwise positive views about how Mr Rush “led the company”, cast some considerable doubt on the reliability of Mr Winter’s evidence generally.

Ms Norvill’s meeting with Ms Crowe in April 2016

347 It is convenient at this point to consider the evidence relating to Ms Norvill’s meeting with Ms Crowe on 5 April 2016. As discussed earlier, this issue is relevant to the assessment of Ms Norvill’s credibility as a witness and the reliability of her evidence generally.

348 There is no dispute that Ms Norvill met with Ms Crowe at a bar in Annandale on 5 April 2016. The meeting was called at Ms Norvill’s request. During the meeting, Ms Norvill told Ms Crowe about Mr Rush’s conduct towards her during the production of *King Lear*. The following day, at 2.48 pm, Ms Crowe sent an email to Mr McIntyre and Ms Azzopardi which reported on the meeting and provided an “outline” of what, according to Ms Crowe, Ms Norvill had told her about Mr Rush’s behaviour. This is plainly an important document because it contains, or at least purports to contain, a summary of the first account of Mr Rush’s behaviour given by Ms Norvill to another person. Indeed, it contains the only contemporaneous documentary record of any complaint made by Ms Norvill to the STC about Mr Rush’s behaviour. The contents of the email should accordingly be set out in full:

I’m writing because I have requested a meeting with both of you, and I’d like Serena to come too, on Monday morning to discuss a very sensitive matter.

The matter involves Eryn Jean Norvill and Geoffrey Rush. EJ asked me to meet her yesterday where she revealed that she was sexually harassed on multiple occasions by Geoffrey Rush during rehearsals and the season of *King Lear*.

This is the outline of what she told me;

In the beginning, she had heard rumours about Geoffrey’s behaviour in the past but believed she had a platonic, intellectual relationship with him, and didn’t feel the need to steer clear of him.

When rehearsals began, it started out with mild commentary of her in the room, suggestive comments and flirting. She used a few different strategies in the beginning, laughing it off, ignoring him, and trying to dissuade him. Once she felt uncomfortable, she directly said to him that his behaviour and comments were making her feel uncomfortable and she would like him to stop, which he didn’t. As they went into the theatre, things progressively got worse to where she felt quite afraid when she was backstage. Other members of the cast would have seen him touching her back stage, but didn’t do anything. At it’s worse, when he had to carry her on as a dead body, he would grope her as he picked her up, and when she was lying on the stage ‘dead’, he would grope her with the hand that was upstage of the audience. At the closing night party at Walsh Bay Kitchen, she went into the bathroom and when she turned around Geoffrey was in there standing behind her. At this point EJ broke down, fell to the floor and told him to leave, he said nothing and left. This was the first time she saw some recognition in his face that he realised he

had crossed a line.

I saw EJ about 5 minutes after this occurred on closing night, and could tell she was very upset. I asked her if she wanted to talk, and she said not tonight but soon. Knowing Geoffrey's reputation I'm afraid I'd assumed he may have been the cause but didn't want to push her at the time. I also knew she was going through some personal troubles at the same time, so thought it could have been unrelated. On the following Monday, I emailed EJ to check in with her, she still said she wasn't ready to talk about it, but would come back to me if she changed her mind, and so I gave her the information of our staff counsellors and encouraged her to access the service if she felt the need. She told me last night she did use a few sessions with a counsellor there and it was somewhat helpful.

Most, if not all of the cast and crew would have witnessed this happening in rehearsals and in the theatre. But most concerning, EJ directly approached each of the 3 other females in the cast to get their advice, and they each brushed it off. She approached a few of the younger males in the cast but they said they didn't know what she should do. She then approached Neil in her dressing room one evening and told her she was having difficulties with Geoffrey and was concerned about his behaviour, and Neil said he would talk to him, but the harassment continued. She did not approach Georgia Gilbert directly because she felt Georgia was already working two shows and didn't want to burden her further.

I discussed all of the above with Serena this morning, and as I said, we'd both like to meet with you on Monday to speak further. I also spoke to Francisca (without naming names) to check whether I had an obligation as an employee to do anything specific with the above information, and she encouraged me to write to you both immediately. Francisca also said she would like HR included on the initial meeting so they are across the situation, but I'm not sure if initially it would be better to keep it to the four of us?

I'm sorry I've had to send this via email, but I thought it important you have this information as soon as possible.

349 A number of important points should be made in relation to this email and its contents.

350 First, Ms Crowe, as STC's Company Manager, was in a senior and responsible position.

351 Second, the subject matter of this email was plainly a very serious matter. Ms Crowe was providing a report of serious allegations of sexual harassment being made against a very senior and well-known actor during the rehearsals and performance of an STC play. Ms Crowe referred to this as a "very sensitive matter" and noted, in concluding, that she thought it was important that Mr McIntyre and Ms Azzopardi had the information as soon as possible. It was a matter which Ms Crowe plainly considered to be significant enough to report to the Executive Director and the Director, Programming and Artistic Operations of the STC and significant enough to warrant arranging a meeting with those senior officers.

- 352 Third, in all the circumstances, it might reasonably be inferred that Ms Crowe would have ensured that her account of what she was told by Ms Norvill was as accurate as possible. Nothing in the email itself indicated anything to the contrary.
- 353 Fourth, it would appear that the meeting between Ms Norvill and Ms Crowe was instigated by Ms Norvill. Ms Crowe recorded that “EJ [Ms Norvill] asked me to meet her yesterday”. There is no suggestion in the email itself that the meeting was a purely social occasion. It may reasonably be inferred that Ms Norvill arranged the meeting for the very purpose of reporting her allegations of sexual harassment concerning Mr Rush to Ms Crowe. It may also be inferred that, in those circumstances, Ms Norvill would have taken some care to ensure that she gave Ms Crowe an accurate account of what she said had occurred in that regard. Perhaps more significantly, it may be inferred that Ms Crowe would have taken some care to listen to and understand what Ms Norvill told her.
- 354 Fifth, despite purporting to be only an outline of what Ms Norvill told Ms Crowe, the email contains a fairly detailed account of what Ms Norvill told Ms Crowe. Importantly, it would appear that, Ms Norvill gave Ms Crowe not only an account of what she said Mr Rush had done during the rehearsals and performances, but also an account of what other members of the cast and crew would have seen, and an account of what some members of the cast did when she approached them about Mr Rush’s actions.
- 355 Sixth, and most critically, the version of events that Ms Norvill gave Ms Crowe, at least as recorded in the email, is inconsistent in many material respects with the evidence that Ms Norvill gave in these proceedings. Before summarising those inconsistencies, however, it is important to say something about the admissibility of the email and Ms Norvill’s evidence concerning the contents of the email and her discussions with Ms Crowe.
- 356 Nationwide and Mr Moran initially foreshadowed that they might call Ms Crowe as a witness in their case. They served a document purporting to be an outline of her evidence. They also sought and obtained leave to issue a subpoena to Ms Crowe. When senior counsel for Nationwide and Mr Moran opened their case, he indicated that they might call Ms Crowe, but that depended on how the evidence unfolded. Ms Crowe’s email was also included in the Court Book prepared by the parties which included the documents which the parties intended to tender. Somewhat ironically, as events transpired, an outline of objections prepared by one of the parties indicated that Nationwide and Mr Moran intended to tender Ms Crowe’s email

and that Mr Rush objected to it on the basis that it was hearsay and its admission was contrary to the “credibility rule” in s 102 of the Evidence Act.

357 Ms Norvill did not refer to her meeting with Ms Crowe in her evidence-in-chief. In cross-examination, she agreed that she met Ms Crowe on 5 April 2016 and that the meeting was held at her request. She said that the meeting took place at a pub in Annandale. She said that what she told Ms Crowe during that meeting was the truth. When cross-examined about what she told Ms Crowe, however, Ms Norvill denied telling Ms Crowe much of what is recorded in the email, at least in the terms in which it is recorded.

358 At that point, senior counsel for Mr Rush endeavoured to cross-examine Ms Norvill about the contents of the email in accordance with the procedure in s 44 of the Evidence Act. That endeavour was not entirely successful or fruitful. Senior counsel for Mr Rush then tendered the email. Senior counsel for Nationwide and Mr Moran objected on the basis that it was hearsay evidence and also, albeit somewhat belatedly, contended that the Court should exclude the email in the exercise of its general discretion under s 135 of the Evidence Act on the basis that its probative value was substantially outweighed by the danger that it might be unfairly prejudicial. He submitted, in that regard, that the evidence could not be tested. He did not develop that submission. It was, in any event, a curious submission given that it was entirely open to Nationwide and Mr Moran to call Ms Crowe if there was, indeed, any need to test the evidence. They need only have called on the subpoena.

359 As for the hearsay objection, there was two fundamental difficulties with that objection. The first was that it did not appear that Mr Rush was tendering the document to prove the truth of any statement made in it. On the contrary, he was tendering it to simply prove that Ms Norvill made the statements recorded in it. Second, in any event it was open to infer from the content and nature of the document itself that it was a business record for the purposes of s 69 of the Evidence Act. There was no dispute that the STC was a business for the purposes of that section. As already noted, the email itself was from one senior officer or employee of the STC to two other senior officers which contained a record of allegations of sexual harassment which were said to have occurred in the course of one of the STC’s productions. In those circumstances there could be little doubt that it formed part of the records of the STC and contained “previous representations” made or recorded in the course of, or for the purposes of, that business. The previous representations were that Ms Norvill had told Ms Crowe various things about what had occurred during the STC production. It could also be

inferred that the previous representations were made by a person, Ms Crowe, who might reasonably be supposed to have had personal knowledge of the “asserted fact”, or on the basis of information supplied by a person, Ms Norvill, who might reasonably be supposed to have had personal knowledge of the asserted fact.

360 Ms Crowe’s email was accordingly admitted into evidence. Ms Norvill was then cross-examined about whether or not she told Ms Crowe what the email recorded that she had told Ms Crowe. The effect of Ms Norvill’s evidence was that she did not say many of the things in the email, or at least that what Ms Crowe recorded in the email was not an accurate record of what she believed she had told her.

361 In re-examination, Ms Norvill said that she and Ms Crowe “drank a lot” that night and that Ms Crowe did not take any notes. In final submissions, it was submitted by Nationwide and Mr Moran that the email “does not reliably establish any statement actually made by Ms Norvill” during the meeting on 5 April 2016.

362 That submission is rejected.

363 It may, of course, be accepted that the email was not, and does not purport to be, a transcript or verbatim and complete record of everything that Ms Norvill said that evening. It purports only to be an “outline” of what was said in relation to the allegations of sexual harassment. Aside from Ms Norvill’s evidence, however, there is no sound basis to find that the outline was inaccurate in material respects, or was otherwise an unreliable record of what was said.

364 It was never expressly submitted that Ms Crowe was so inebriated that her recollection, the following day, of what Ms Norvill had said was unreliable. That, did however, appear to be the implication in the submission made by Nationwide and Mr Moran based on the slim piece of evidence elicited from Ms Norvill in re-examination. If that was the basis of the submission, it is rejected. I am not prepared to infer, simply from Ms Norvill’s somewhat belated evidence that she and Ms Crowe “drank a lot” and that Ms Crowe was so inebriated that her email contained an inaccurate or unreliable account of what Ms Norvill told her. That is so particularly in the absence of any evidence from Ms Crowe. Nor am I prepared to infer that the email was inaccurate or unreliable because Ms Crowe did not take notes.

365 As has already been noted, the subject matter of the discussion between Ms Norvill and Ms Crowe on the evening of 5 April 2016 was self-evidently important and serious. I infer that, given Ms Crowe’s position and responsibilities, and the nature of the information that

was being conveyed to her, Ms Crowe would have paid careful attention to what Ms Norvill was saying and made a mental note. That is so even if Ms Crowe was not making written notes and even if she and Ms Norvill were drinking.

366 Ms Crowe prepared her email within 24 hours of the meeting. It was self-evidently an important email. It was sent to senior officers of the STC in relation to serious allegations. I infer, in all the circumstances, that Ms Crowe would have been careful to ensure that it was as accurate as possible and that, if she had any doubts whatsoever as to the accuracy or reliability of her “outline”, whether by reason of her having been drinking, or because she did not have written notes, she would have advised her colleagues accordingly.

367 As for Ms Norvill’s evidence about what she in fact said to Ms Crowe, I am not satisfied that she gave a credible, accurate or reliable account of that conversation.

368 The contents of Ms Crowe’s email raised a number of significant issues about the reliability and credibility of Ms Norvill’s evidence. That is because, even accepting that Ms Crowe’s “outline” was not, and did not purport to be, a verbatim account of exactly what Ms Norvill said, the general account that Ms Norvill appeared to have given Ms Crowe, within a few months of the close of the production, was inconsistent in important respects with the account Ms Norvill gave in her evidence. Those inconsistencies may be summarised as follows.

369 First, the account that Ms Norvill gave of Mr Rush’s behaviour towards her during the rehearsals is not nearly as serious as the account given by her in her evidence. The account given to Ms Crowe was that Mr Rush’s sexual harassment began in the rehearsals, but that the conduct in the rehearsals involved “mild commentary of her in the room, suggestive comments and flirting”. As will be seen, Ms Norvill’s evidence was that Mr Rush’s behaviour during the rehearsals was far more serious than that description would suggest. It included repeated lewd groping and fondling gestures and sexual innuendo.

370 Second, the account Ms Norvill gave Ms Crowe included that Ms Norvill had initially tried to dissuade Mr Rush and that, once she felt uncomfortable, as a result of his behaviour, she “directly said to him [Mr Rush] that his behaviour and comments were making her feel uncomfortable and she would like him to stop, which he didn’t”. As will be seen, Ms Norvill’s evidence was that she did not, directly or otherwise, tell Mr Rush that his behaviour and comments were making her feel uncomfortable and that she would like him to stop. Her evidence was that she did, during one incident towards the very end of the performances,

say “[p]lease stop that” to Mr Rush when he touched her back. On that occasion, Mr Rush did stop touching her back. That was, however, on Ms Norvill’s own account, the only occasion she ever said anything to Mr Rush about his behaviour.

371 Third, Ms Norvill told Ms Crowe that, once the performances began, other members of the cast would have seen Mr Rush touching her backstage, but did not do anything. As will be seen, the only instances of touching backstage that Ms Norvill referred to in her evidence involved Mr Rush touching her hands and back immediately before he carried her onto the stage in the final scene. She did not suggest that anyone else saw, or would have seen, those particular incidents of touching.

372 Fourth, Ms Norvill told Ms Crowe that Mr Rush “grope[d]” her when he picked her up to carry her onto the stage in the final scene. As has just been noted, Ms Norvill’s evidence was that Mr Rush touched her hand and back just before he picked her up. That is somewhat inconsistent with the allegation that he groped her when he picked her up.

373 Fifth, the version of events that Ms Norvill described to Ms Crowe included an incident at the closing night party. That incident involved Mr Rush following her into the bathroom, prompting her to break down, fall to the floor and telling Mr Rush to leave. Ms Norvill apparently told Ms Crowe that this was the first time that she saw some recognition in Mr Rush’s face that he realised he had “crossed a line”. Ms Norvill’s evidence did not include any evidence about any such incident. When cross-examined about this apparent inconsistency, Ms Norvill said that she did not believe that Mr Rush followed her into the bathroom or that she told him to leave. She said that she did not believe that she told Ms Crowe that he had. It should be noted in this context, however, that Mr Winter’s evidence was that Ms Norvill told him that Mr Rush had followed her into the bathroom.

374 Sixth, Ms Norvill told Ms Crowe that she “directly approached each of the 3 other females in the cast to get their advice, and they each brushed it off”. The three female cast members were Ms Nevin, Ms Buday and Ms Thomson. In her evidence, Ms Norvill said that she approached Ms Nevin. That evidence is discussed in detail later. It suffices at this point to note that, even on Ms Norvill’s account, the conversation she had with Ms Nevin could hardly be said to be a direct approach. Nor could Ms Nevin’s response be said to be a brush-off. As for Ms Buday, in her evidence, Ms Norvill did not say that she approached Ms Buday in relation to Mr Rush’s behaviour. Finally, Ms Norvill did say in her evidence that she had a conversation with Ms Thomson about Mr Rush’s behaviour, though even on Ms Norvill’s

account, what she said to Ms Thomson was, at best, equivocal or ambiguous. She did not say that Mr Rush had sexually harassed her. Ms Thomson was not called to give evidence.

375 Seventh, Ms Norvill told Ms Crowe that she “approached a few of the younger males in the cast but they said they didn’t know what she should do”. Ms Norvill’s evidence was that she approached Mr Masters and Mr Winter, but they did not know what to do. Mr Masters did not give evidence. Mr Winter, in his evidence, did not refer to being approached by Ms Norvill about Mr Rush’s behaviour or telling Ms Norvill that he did not know what she should do about it.

376 Eighth, Ms Norvill told Ms Crowe that she approached Mr Armfield and told him that she was having difficulties with Mr Rush and that Mr Armfield said that he would talk to him. Ms Norvill gave evidence in relation to a discussion that she said she had had with Mr Armfield, however her evidence of that conversation differed from the one she apparently described to Ms Crowe. This is discussed in more detail later.

377 I accept that Ms Crowe’s email account of what Ms Norvill told her was not, and does not purport to be, a verbatim transcript or record of precisely what Ms Norvill said to Ms Crowe. In those circumstances, a few fairly minor inconsistencies could perhaps be disregarded or given little weight. However, the inconsistencies between the version of events Ms Norvill gave Ms Crowe, as recounted in the email, and the version of events Ms Norvill gave in her evidence are numerous and cannot be described as minor or insignificant. At the very least, they cast some doubt on the reliability and credibility of Ms Norvill’s evidence.

378 A final point should be made concerning Ms Crowe’s email. Despite objecting to the tender of the email and submitting that it contained an unreliable account of what Ms Norvill told Ms Crowe, and despite refraining from calling Ms Crowe while having subpoenaed her to give evidence, Nationwide and Mr Moran sought to make mileage of something said by Ms Crowe in the email. That was Ms Crowe’s statement that, “[k]nowing Geoffrey’s reputation”, she had assumed that Mr Rush was the cause of Ms Norvill’s apparent distress at the party on closing night.

379 The difficulty for Nationwide and Mr Moran is that they did not call Ms Crowe to give evidence about what, if anything, she knew about Mr Rush’s reputation, or what she meant by that comment in her email. It should equally be noted that Mr Rush called fairly extensive evidence of his good reputation. That evidence went essentially unchallenged. Nationwide

and Mr Moran did not call any evidence to suggest that Mr Rush had a bad reputation in any relevant respect. In those circumstances, Ms Crowe's aside about Mr Rush's reputation should be given little, if any, weight in determining any of the facts in issue in this proceeding.

Allegation one: Groping and fondling gestures during a rehearsal

380 The essence of this allegation was that, on one occasion when Mr Rush and Ms Norvill were rehearsing the final scene of the play, in which Cordelia is dead and King Lear is grieving over her dead body, Mr Rush hovered his hands over Ms Norvill's torso and pretended to caress or stroke her upper torso. Mr Rush also made groping gestures in the air with two cupped hands which simulated him groping and fondling Ms Norvill's breasts. This incident was said to have occurred in front of other members of the cast and perhaps crew.

Ms Norvill's evidence

381 Ms Norvill's evidence-in-chief concerning this alleged incident was as follows:

Yes. Now, do you recall to mind during that rehearsal period – and I'm suggesting to you about the third week of rehearsals – do you recall to mind something that happened that was different from what had gone before in the course of that scene?--- Yes.

All right. Could you tell the court what happened?---I was lying on my back on the floor, and I remember Geoffrey had stopped talking. He was delivering a monologue, grieving over the – the death of Cordelia and he had stopped talking. I don't remember whether he was looking for a line or whether Neil was giving him a note. I had my eyes closed and I remember hearing, like, titters of laughter, murmuring responses around the – around the rehearsal room. And I – I opened my eyes and Geoffrey was kneeling over me and he had both of his hands above my torso, and he was stroking – gesturing, stroking up and down my torso and gesturing - groping or cupping above my breasts, and he was looking up to the front of the room and kind of raising his eyebrows and bulging his eyes and smiling and licking his lips.

All right. And did – do you recall whether Mr Armfield said something at that point?--Yes.

What did he say?---I heard Neil say "Geoffrey, stop that".

And what was the tone? What was Mr Armfield's tone? By that I mean was it amused, was it not amused? What was the tone of - -?---It was reprimanding and angry. He – he sounded angry.

And when you opened your eyes and saw what Mr Rush was doing, how did that make you feel?---I felt shocked. I guess I was confused. I mean, to Geoffrey – I considered Geoffrey a friend. I felt belittled and embarrassed and was, I guess, ashamed.

After Mr Armfield said what he said, what did Mr Rush do?---He stopped.

382 This incident was said to have occurred during one of the rehearsals of the last scene of the play. The rehearsal schedule shows that the full cast was required to be present during the rehearsals of the last scene. That meant that it was likely that all 14 members of the cast would have witnessed this alleged incident. On Ms Norvill's own account, Mr Armfield was also present and witnessed the incident. Indeed, according to Ms Norvill, Mr Armfield reacted angrily to it and sternly reprimanded Mr Rush. It is also likely that the stage manager, Ms Gilbert, and her deputy and assistants would have been present.

383 On Ms Norvill's account, Mr Rush's actions were obviously inappropriate. They involved groping or cupping gestures above Ms Norvill's breasts coupled with lewd facial gestures. It is difficult to imagine that any member of the cast or crew could have seen this conduct as humorous, let alone acceptable behaviour on the part of Mr Rush. It is difficult to see how any of the cast or crew who witnessed it could readily forget it, or disregard it as simply Mr Rush clowning about.

384 Ms Norvill's evidence was that she did not speak with Ms Gilbert, the stage manager, about Mr Rush's behaviour. That was because she believed that Ms Gilbert was "sick" and "overloaded" because she was working on two shows. Nor did Ms Norvill speak with Ms Crowe at the time, because she (Ms Norvill) "didn't know how to access the pathways ... of support". Ms Norvill said that she did not speak with Ms Azzopardi because she did not find Ms Azzopardi very approachable.

Mr Winter's evidence

385 Mr Winter was the only witness whose evidence was capable of corroborating Ms Norvill's account of this incident. His evidence was as follows:

Do you remember an incident happening in the rehearsal period involving that scene?

.....

THE WITNESS: Do I remember an incident - - -

MR BLACKBURN: Yes?--- - - - in the rehearsal of that scene?

Yes?---I'm not sure whether I would – there's two things I remember about the rehearsal of that scene. I'm not sure whether I would describe either as incidents, in my opinion. They were things that occurred. The first being that there was in a rehearsal day where Geoffrey was doing a bit of a skit over EJ when she was lying on the floor of the stage. I was talking to somebody at the time. This is probably the vaguest of my recollections. The skit – it was, like, a Three Stooges-y type bit, if you will. I can't describe for you the whole thing, but it was sort of a sequence of quick

jokes, and then there was like a “ngya” at the end, like - -

Well - - -?---Making, like, a – a – a jokey gesture at the end.

Right. What was the gesture?---Well, that was the gesture, I guess, a – a boob-squeezing gesture.

Where was Mr Rush standing when he did it?---Well, they were in the positions that they were in for those final moments of the play. Should I talk about the other – did you want to talk about that more or - - -

Have you given all your recollection about the incident that you just described?---That’s pretty much all I can remember. I know that people laughed. As I say, I was talking to somebody at the time, so I sort of tuned into it late. But that –that’s about all I can say about that.

386 A number of points can be made about Mr Winter’s evidence concerning this incident.

387 First, Mr Winter himself described his recollection as the “vaguest of [his] recollections”.

388 Second, Mr Winter said nothing about this incident in his written outline of evidence which was prepared and served prior to the trial. He gave no satisfactory or persuasive explanation for how his recollection of this alleged incident came to be omitted from his statement.

389 Third, and related to the second point, it would appear that Mr Winter’s recollection of the incident was a very belated recollection. The first time Mr Winter told anyone about his recollection of this incident was apparently during a conference he attended on the eve of the trial with Nationwide and Mr Moran’s lawyers. That conference was also attended by Ms Norvill’s lawyers. It appears that Mr Winter’s recollection of the event was prompted by someone else who was present at the conference. Mr Winter’s evidence in that regard was as follows:

I see, and you had a conversation with them on Sunday night, that is, 28 October?---I don’t even know what day it is at the minute. Is it – was that last Sunday?

That was last Sunday?---Yes. As I was due to appear on the Monday. So I travelled up on the Sunday night.

And that’s when you said for the first time to anyone this incident about the Three Stooges, isn’t it?---No. I said it was raised that there was some clowning, and I said, “Yeah. There was that thing that happened,” but that’s all I can really say about it.

390 Fourth, the incident as described by Mr Winter was not entirely consistent with, and was certainly not nearly as serious as, the event as described by Ms Norvill. The event described by Mr Winter was more a “Three Stooges” style “skit” or joke. It did not involve Mr Rush “bulging his eyes” or “licking his lips”. And, while Mr Winter described a single “jokey” gesture which mimicked “boob-squeezing”, that description was inconsistent with, and

considerably less serious than, Ms Norvill's version, which involved Mr Rush "gesturing, stroking up and down [Ms Norvill's] torso" and "groping or cupping above [her] breasts".

391 Fifth, Mr Winter apparently did not think much of the incident at the time. His evidence in that regard was:

And, of course, you thought nothing of it at the time, did you?---Well, no. It didn't happen to me. It was just something happening.

392 That is perhaps consistent with his characterisation of the incident as being like a "Three Stooges" style "skit". If the incident that he recalled witnessing was indeed the one described by Ms Norvill, it would be surprising that he would not have thought more of it at the time.

393 Sixth, if Mr Winter had in fact witnessed the event as described by Ms Norvill, it is difficult to see how he could not have thought that it was an entirely inappropriate way for a senior actor to behave. Yet his evidence was that he believed that Mr Rush was an "exemplary company leader" who had "led the company well" and had taken on the role of company leader "with great enthusiasm". He apparently thought so highly of Mr Rush that after the performances of *King Lear* had ended, he asked Mr Rush for a reference. It is difficult to see how Mr Winter could have held those views about Mr Rush if he had witnessed the incident as described by Ms Norvill.

Mr Rush's evidence

394 Mr Rush emphatically denied engaging in any of the conduct during rehearsals as described by Ms Norvill. He went so far as to say that the proposition that he engaged in such conduct was "preposterous". His evidence, in that regard, was that the relationship between King Lear and Cordelia in the play contributed an "enormous spine" to the play and was "vital to the emotional landscape" of the play. The effect of his evidence was that the proposition that he had engaged in the conduct described by Ms Norvill was "preposterous" because it would have destroyed his relationship with Ms Norvill and therefore destroyed the dramatic relationship between King Lear and Cordelia.

395 Mr Rush's evidence was also that, not only did Ms Norvill never complain or express any concerns to him about his behaviour during rehearsals or during the play, but that he had no inkling that their relationship was other than congenial, or that he was in any way making Ms Norvill feel uncomfortable. His evidence in that regard was as follows:

Right. Now, at this point had Ms Norvill raised any concerns with you concerning

anything you had done in relation to her?---I had no inkling I – my antennae is pretty good. I’m probably – I was probably, through rehearsals and performance – I lived Lear on a daily basis of that’s the goal of my day. But I’m pretty aware of moodscapes within a group of people, and I never detected that I was making her, as I hear now – was making her feel uncomfortable or that I was ruffling feathers or no one came up and said, “I think you’re getting on Eryn Jean’s nerves or something – nothing remotely at all. It felt – congenial and colligation are the only words I can express that with.

396 Nothing said by Mr Rush in cross-examination cast any doubt on his denial that he engaged in any behaviour during rehearsals of the sort described by Ms Norvill.

Mr Armfield’s evidence

397 Mr Armfield was present during the entirety of the rehearsals. It is difficult to imagine that, as the director of the play, he would have done anything other than closely scrutinise and oversee the rehearsals. He denied seeing any of the conduct described by Ms Norvill. His evidence was that he did not see Mr Rush hovering his hands above Ms Norvill’s torso and pretending to caress or stroke her upper torso, making groping gestures in the air with two cupped hands as if to simulate groping or fondling her breasts, sticking his tongue out and licking his lips, or using his hands to grope the air like he was fondling Ms Norvill’s hips or breasts. His evidence was that, if he had witnessed any such conduct, he would have said “[w]hat are you doing? Stop”, but that he never had cause to do that. Mr Armfield also gave evidence that he did not ever hear Mr Rush make jokes, comments or sexual innuendo about Ms Norvill’s body.

398 Nothing that arose in the cross-examination cast any doubt on the reliability of Mr Armfield’s evidence that he saw none of the conduct described by Ms Norvill occur.

Ms Buday’s evidence

399 Ms Buday was present during the rehearsals of the final scene. The clear effect of Ms Buday’s evidence, both in chief and during cross-examination, was that she did not recall Mr Rush ever make a joke about Ms Norvill’s body, or make lewd gestures in her direction, or stick his tongue out and lick his lips and use his hands to grope the air like he was fondling Ms Norvill’s hips or breasts. Her evidence was that, if she had seen any of those things occur, she would have done something because she was an “elder” in the theatre and knew “what it is [like] to be a young actress, a younger player, and especially at [the] Sydney Theatre Company, especially with high-status older actors”. Ms Buday also denied hearing

nervous and restrained laughter from those standing around during any such incident during rehearsals, and denied that she ever heard Mr Armfield say “Geoffrey, stop that”.

400 There is no reason to doubt Ms Buday’s evidence about those matters. None was suggested by Nationwide and Mr Moran.

Ms Nevin’s evidence

401 Ms Nevin’s evidence was that, as she perceived it, Mr Rush got on with all the cast and crew, including Ms Norvill, and that she never noticed anything out of the ordinary in relation to Mr Rush’s relationship with Ms Norvill. Her evidence in that regard was as follows:

And did you observe at all how Mr Rush got along with the other cast and crew members?---He got on as he – as I’ve perceived him, or was getting on with people. He’s generally – Geoffrey’s demeanour in the rehearsal room is always very positive, cheerful, uplifting unlike my own. And in that way he is a very successful leader of a company because I’ve – I’ve now experienced that in Figaro, Drowsy Chaperone and Leer. He was really leading the company in those three productions. And his – his buoyancy and sense of optimism and just general cheerfulness and enthusiasm for the work because he’s so steeply – deeply steeped in – in – in being an actor. That’s who he is, and he brings all of that enthusiasm. But it’s not just that; he also brings research. He’s obsessed with his work and, so, every project that he embarks on he researches very thoroughly with extraordinary enthusiasm, and he brings that all to the rehearsal room. So his demeanour is always in my experience cheerful and positive and funny. He’s a very cheerful kind of jolly person.

To your observation - - -?---He’s witty.

Sorry. To your observation did you see him interacting with Ms Norvill?---I would have done because he was interacting with everybody in the room, so yes.

And do you recall how he was getting along with her during the rehearsals?---Well, I would have – I would have observed his relationship with Ms Norvill as the same – similar to his relationship with me and everybody else; jovial, friendly, enthusiastic, cheerful.

So did you notice anything out of the ordinary in relation to his relationship with Ms Norvill?---I didn’t. No.

402 That aspect of Ms Nevin’s evidence was not challenged in cross-examination.

403 Ms Nevin was sure that she was present during the rehearsals of the final scene. She did not recall seeing Mr Rush do any of the things described by Ms Norvill in her evidence, including hovering his hands over Ms Norvill’s torso as she was lying on the floor, or pretending to caress or stroke her upper torso, or making groping gestures in the air with two cupped hands as if to simulate groping or fondling Ms Norvill’s breasts or hips. Ms Nevin made it clear that, if she had witnessed any such conduct, she would have done something. Her evidence as to what she would have done was as follows:

What would you have done?---I would have spoken to – to Neil directly, and I would think also to Georgia Gilbert who’s the stage manager who’s was highly regarded, very efficient, and I would trust her, and I – I would also talk to Neil. I wouldn’t probably have gone to management of Sydney Theatre Company at that time. I think it could have been dealt with in the room.

404 This evidence was not challenged in cross-examination. It was not put to Ms Nevin that she had witnessed any of the events described by Ms Norvill in her evidence, but did nothing about it. It certainly was not put to her that her evidence that she recalled none of those events was untruthful.

Other aspects of Ms Norvill’s evidence about the rehearsals

405 It is, in this context, necessary to consider three other parts or aspects of Ms Norvill’s evidence that bear on the first allegation. The first concerns an allegation made by Ms Norvill to the effect that, everyone in the rehearsal room was “complicit” in, or even “enabled”, Mr Rush’s conduct. The second concerns Ms Norvill’s evidence that Mr Rush made sexual comments and gestures towards other female members of the cast, including Ms Buday, Ms Thomson, the stage manager, Ms Gilbert, and the assistant stage managers, Ms Bowes and Ms Hankin. The third concerns Ms Norvill’s evidence that she had conversations with Ms Nevin, Ms Thomson and Mr Armfield during which she referred, directly or indirectly, to Mr Rush’s behaviour.

Ms Norvill’s evidence that everyone in the rehearsal room was “complicit”

406 Ms Norvill’s evidence was to the effect that she did not complain or speak to Mr Rush about his behaviour in the rehearsal room. In the course of explaining why that was so, Ms Norvill gave the following evidence:

Well, could you tell the [C]ourt what the reasons were, please, and take your time?--- I was at the bottom of the rung in terms of the hierarchy and Geoffrey was definitely at the top. That was in play. I have to be honest and say that his power was intimidating and his person. I wanted to be a part of his world and we were also playing father and daughter. I felt that if I was to speak or reprimand the behaviour I might jeopardise – I would jeopardise that relationship, the tenderness, the closeness, the love that is needed in those two roles. **Everyone else didn’t seem to have a problem about it, you know, so I was looking at a room that was complicit.** My director didn’t seem to have a problem with it, so I felt quashed, in terms of my ability to find allies. And, again, Geoffrey was – I wanted him to be my mentor. But I – I was able to try to make a joke out of it, I’d say, “Dad. Oh Dad, don’t. Dad”, reminding him that I was playing his daughter and it really wasn’t appropriate to be belittling me like that and it wasn’t funny.

(Emphasis added.)

407 Ms Norvill also claimed that Mr Rush’s behaviour in the rehearsal room was “normalised”.

408 In cross-examination, Ms Norvill confirmed that the criticism implicit in the allegation that the cast and crew were “complicit” specifically included Ms Nevin. Indeed, she went so far as to say that Ms Nevin “enabled” Mr Rush’s conduct, “as did everyone in that room”. That, presumably, included, amongst others, Ms Buday and Mr Armfield. Her evidence in that regard included the following:

What do you mean by “enabled that behaviour”?---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.

Do you mean everyone in the room was bullying and harassing?---No, I don’t mean that, but - - -

Well, what specifically do you mean, then?---There are bullies, and sexual predators, and sexual harassment happens in my workplace, and it happens often; and it happened in that room, to me; and, I believe, people knew about it, but didn’t know what to say. They didn’t know what to do; they were frightened. And there was a level of hierarchy that kept that fear and silence in place.

But – and that included Ms Nevin, did it?---Yes, it did.

You don’t suggest she was frightened, do you? She’s a very senior, accomplished actor?---No, I imagine she wouldn’t have been frightened.

409 On one view of it, this evidence was tantamount to an allegation that Ms Nevin, Ms Buday and Mr Armfield, who by the time Ms Norvill gave this evidence had given their evidence and been cross-examined, had lied when they gave their evidence under oath or affirmation. At the very least, Ms Norvill appeared to be saying that she believed that Ms Nevin, Ms Buday and Mr Armfield knew about the behaviour of Mr Rush during rehearsals that she had described in her evidence, but chose to do nothing about it. That appeared to be one of the bases of her belief that they were “complicit”.

410 As has already been noted, both Ms Buday and Mr Armfield denied that they saw or heard Mr Rush do any of the things in the rehearsal room that Ms Norvill claimed he did. Ms Nevin’s evidence was that she did not recall any of those things occurring. All three witnesses also all said that, if they had seen Mr Rush do anything of that nature, they would have taken some action, or done something about it. It was not put to them in cross-examination that their evidence in that regard was false, or that they were being untruthful when they said that they did not see or hear Mr Rush engage in any of the alleged conduct. Nor was it put to them that, having seen Mr Rush engage in the alleged conduct, they did nothing about it because they did not know what to say, or were frightened of Mr Rush, or frightened of taking any action against him. It was not put to them that they were subject to, or perhaps were part of, “a level of hierarchy that kept that fear and silence in place”. It was

certainly not put to them that they, in any way, or in any sense, “enabled” or were “complicit” in any untoward behaviour of Mr Rush during the rehearsals.

411 To the extent that Ms Norvill’s evidence suggested that Ms Nevin, Ms Buday or Mr Armfield “enabled”, or were “complicit” in, or remained silent and did nothing about any inappropriate behaviour of a sexual kind by Mr Rush, or any conduct that could be characterised as sexual harassment, I should make it clear that I reject that evidence and suggestion. Equally, if Ms Norvill was saying, or intending to say, no more than that she *believed* that Ms Nevin, Ms Buday or Mr Armfield “enabled”, or were “complicit” in, any such conduct by Mr Rush, I find, on the evidence as a whole, that there was and is no reasonable basis for any such belief. That is so for a number of reasons.

412 First, for the detailed reasons given elsewhere in this judgment, I do not accept that Mr Rush engaged in the conduct alleged by Ms Norvill. I am not satisfied, on the balance of probabilities, that Mr Rush engaged in any such conduct.

413 Second, I accept the evidence of Ms Nevin, Ms Buday and Mr Armfield that they did not witness any such behaviour by Mr Rush, or in Ms Nevin’s case, that she did not recall witnessing any such behaviour. The alleged conduct was such that, if it had occurred, it is unlikely that Ms Nevin, Ms Buday or Mr Armfield were likely to have missed seeing it, or forgotten about it. I also accept their evidence that, had they seen or heard Mr Rush engage in any such conduct, they would have taken some action in relation to it. Not only was their evidence in that regard not challenged in any way in cross-examination, but no persuasive submission was advanced which suggested any reason or basis for disbelieving the evidence of these witnesses.

414 The only submission that was made by Nationwide and Mr Moran in relation to the evidence of Ms Nevin, Ms Buday and Mr Armfield in this regard was that it is necessary to consider their evidence in context. The context was said to include Ms Norvill’s evidence, in respect of Ms Nevin, that “[w]e’re from different generations; maybe we have different ideas about what is culturally appropriate in a workplace”. The suggestion appeared to be that Ms Nevin, Ms Buday and Mr Armfield witnessed the alleged behaviour of Mr Rush, but did not appreciate that it was culturally inappropriate because of their age.

415 That submission is rejected. There is simply no basis for it. No such suggestion was put to Ms Nevin, Ms Buday or Mr Armfield in cross-examination. Even putting that to one side,

each of them was a highly-qualified, experienced, accomplished and well-respected, if not revered, figure in theatre circles. No question was raised about their character or integrity. Nor could it have been. When regard is had to the nature of the conduct that Ms Norvill alleged that Mr Rush had engaged in during rehearsals, the suggestion that, by reason of their age or otherwise, any of them may not have considered the conduct to be culturally inappropriate is untenable. It appears to have amounted to little more than speculation.

416 Third, the apparent suggestion by Ms Norvill that Ms Nevin, Ms Buday and Mr Armfield would not have known what to do in the face of the alleged behaviour, or were for some reason frightened to do anything about it, is equally difficult to accept. In the case of Ms Nevin and Ms Buday, even putting their impeccable character and integrity to one side, both of them gave every impression of being an independent, strong-willed woman who was not to be reckoned with. It may be noted that, when pressed, Ms Norvill almost immediately resiled from the suggestion that Ms Nevin would have been frightened by Mr Rush, or frightened to do anything about any inappropriate conduct by him. As for Mr Armfield, he had worked with Mr Rush for many years. Mr Rush described him as his “artistic brother”. They were obviously close. The suggestion that Mr Armfield might have been frightened of Mr Rush, or otherwise unable or unwilling to confront him if he had engaged in the sort of behaviour described by Ms Norvill, is fanciful.

417 It was not put to Ms Nevin, Ms Buday or Mr Armfield in cross-examination that any aspect of their evidence was not entirely frank or honest because of their long-standing association or friendship with Mr Rush. Nor was any such submission advanced.

418 Fourth, no other witness supported Ms Norvill’s evidence that everyone in the rehearsal room was “complicit” in Mr Rush’s alleged conduct, or that Mr Rush’s conduct was in any way “normalised”, or “enabled” by the silence, unwillingness, or inability of those in the rehearsal room to do anything. Mr Winter, did not give any evidence that could be said to have corroborated Ms Norvill’s evidence in that regard. He was in the rehearsal room. He did not suggest that he was frightened of Mr Rush, or frightened to do anything about his conduct. Nor did Mr Winter say that he did not know, or would not have known, what to do in the face of such conduct. It could not be suggested that he was from a “different generation” and therefore may have had a different idea of what was, and what was not, “culturally appropriate in a workplace”. He is only a year older than Ms Norvill. Mr Winter’s evidence

was that he considered that Mr Rush was an “exemplary company leader” who had “led the company well”.

419 Ms Norvill’s apparent willingness to cast such aspersions on Ms Nevin, Ms Buday and Mr Armfield, even if she did not intend to do so, did not reflect well on her credibility and reliability as a witness. It displayed a propensity to exaggerate and embellish.

Ms Norvill’s evidence that Mr Rush directed sexual remarks and gestures to other female members of the cast and crew

420 The same can be said in relation to Ms Norvill’s evidence to the effect that Mr Rush directed sexual or sexist remarks and gestures to other female members of the cast and crew.

421 In her evidence, Ms Norvill said that Mr Rush made sexual or sexist remarks to Ms Gilbert and directed sexual or sexist gestures “at some of the younger ASMs [assistant stage managers] and ... Helen Thomson and Helen Buday”. She alleged that such behaviour was “regular and became normalised in our rehearsal room”. Such conduct was, according to Ms Norvill, met with a “chorus of, “Geoffrey, stop that””.

422 Ms Norvill gave the following evidence in relation to Ms Buday:

Can I just ask you, Ms Buday – Ms Norvill – I do apologise – as you sit there now, what do you remember seeing Mr Rush do to Ms Buday when you’re talking about gestures. What exactly do you recall him doing, firstly?---Geoffrey would often do the eye – eye bulging and the lip – the lips – the licking of the lips, and the hand gestures.

Similar to the ones that you described that he did to you earlier in the day- -?---Yes, that’s right.

- - - in your evidence today. And what do you recall of Ms Buday’s response when you saw that happen? What did she do?---“Geoffrey, that’s disgusting.” “Geoffrey, don’t do that.” “Oh, Geoffrey, stop it.”

423 Ms Norvill agreed that she did not include any of those claims in the statement that she signed for the purposes of these proceedings.

424 Ms Buday’s evidence was that Mr Rush never made lewd gestures towards her body, and “[d]idn’t do it to anyone, that I saw, at all”. That evidence was not challenged in cross-examination. Likewise, Ms Nevin’s evidence was that Mr Rush never made comments to her about her body, and never made lewd gestures towards her throughout the rehearsals. That evidence was not challenged.

425 Ms Gilbert was not called to give evidence. Mr Armfield's evidence was that he did not see Mr Rush make any such gestures towards Ms Gilbert and that he thought that "Georgia Gilbert would have slapped Geoffrey on the face had such a thing happened".

426 Ms Norvill's evidence was that Mr Rush made similar lewd gestures towards Ms Thomson. She also claimed that, presumably following such occurrences, Ms Thomson would hit Mr Rush and say "don't" or "Geoffrey, stop that". Indeed, she said that Mr Rush's behaviour was such that there was frequently a chorus of "stop that" and "don'ts" directed at Mr Rush during the rehearsals. Ms Thomson was not called to give evidence. Ms Norvill did not include those claims in her witness statement. No other witness supported Ms Norvill's version of events in relation to Ms Thomson or the chorus of "stop that" or "don'ts".

427 Mr Winter's evidence provided no support for Ms Norvill's evidence in relation to Mr Rush's alleged gestures towards the other female members of the cast and crew. He was not asked a single question in his evidence-in-chief about his observations concerning Mr Rush's behaviour towards female members of the cast or crew other than Ms Norvill.

428 In all the circumstances, I reject Ms Norvill's evidence that Mr Rush made any sexual or sexist remarks to, or directed any lewd gestures at, either Ms Nevin, Ms Buday, Ms Thomson, Ms Gilbert or indeed any of the other female members of the cast and crew. Ms Norvill's willingness to make such allegations in her evidence, apparently for the first time, did not reflect well on her credibility as a witness or the reliability of her evidence generally.

Ms Norvill's evidence concerning conversations she had with Ms Thomson, Ms Nevin and Mr Armfield

429 In the course of her evidence, Ms Norvill suggested that she had conversations with Ms Thomson, Ms Nevin and Mr Armfield in relation to Mr Rush's behaviour. Her version of events was disputed by, or was at least inconsistent with, the evidence of Ms Nevin and Mr Armfield. Ms Thomson was not called to give evidence.

Conversation with Ms Thomson

430 Ms Norvill's evidence was that, during the technical production week, which commenced on about 16 November 2015, she had a conversation with Ms Thomson. During that conversation, Ms Norvill said to Ms Thomson: "how do you cope with Geoffrey's behaviour?" According to Ms Norvill, Ms Thomson replied: "just ignore it and laugh it off".

431 As has already been noted, Ms Thomson was not called to give evidence. The terms of the conversation, on Ms Norvill's account, were also somewhat unclear. Ms Norvill did not specify to Ms Thomson what aspect of Mr Rush's behaviour she was adverting to. Perhaps more significantly, this evidence must also be considered in light of the fact that no other witness supported or corroborated Ms Norvill's evidence concerning Mr Rush's alleged behaviour towards Ms Thomson. Indeed, the balance of the evidence was, for the most part, entirely inconsistent with it.

Conversations with Ms Nevin

432 Ms Norvill gave evidence that she had a conversation with Ms Nevin, during the course of the production of *King Lear*, during which she referred to sexual harassment. That conversation was said to have occurred at about the same time as Ms Norvill claimed she had the conversation with Ms Thomson which has just been referred to. Ms Norvill's evidence was as follows:

And then do you remember having a conversation with Robyn Nevin about the same time?---Yes, I do.

And she played The Fool of course in the production?---Yes, she did.

This time, do you remember where that conversation was?---Yes. I remember being in Robyn's dressing room and she was wearing her sparkly, tight sequinned dress – her Marilyn Monroe dress, and her wig - - -

...

- - - at the stage where you were in Ms Nevin's dressing room. She was wearing her tight, sparkly Marilyn Monroe dress - - -?--- Marilyn Monroe, yes.

Yes?---And I – I asked her, "how – have you ever experienced, you know, unwanted attention", or words to the effect of unwanted advances or sexual harassment, and she said, "no, I can't help you with that. That has never happened to me".

And, incidentally, was that before the show or after the show or do you remember when it was?---Well, it must have been before, because that's her first outfit.

433 Ms Norvill did not refer to this conversation with Ms Nevin in her witness statement. Her evidence was that she did not include this in her statement because she did not refer to Mr Rush in her conversation with Ms Nevin.

434 Ms Nevin denied having any conversation with Ms Norvill during the course of the rehearsals or performances of *King Lear* in which Ms Norvill referred to sexual harassment.

435 It is perhaps unnecessary to make any finding in relation to this conversation. Even on Ms Norvill's account, she did not refer to Mr Rush during the conversation. Nevertheless,

given some of Ms Norvill's other evidence concerning Ms Nevin, I should indicate that I am inclined to accept Ms Nevin's evidence that no such conversation occurred. I am not, on balance, satisfied that it did. On Ms Norvill's version of the conversation, she appeared to be seeking some advice or support from Ms Nevin and Ms Nevin's response was unsupportive and unhelpful, if not unkind. That appears to be inconsistent with Ms Norvill's evidence, when pressed in cross-examination, that Ms Nevin had always been kind to her. I find it implausible, in all the circumstances, that Ms Nevin would have said "I can't help you with that" in response to what appeared to be Ms Norvill's attempt to raise the issue of sexual harassment with her.

436 Ms Norvill also gave evidence about a conversation she said that she had with Ms Nevin when the two of them were acting together in another STC production, *All My Sons*, in about mid-2016. That play was performed in the same theatre in which *King Lear* had been performed. Ms Norvill's evidence was that, before one of the performances, she was in Ms Nevin's dressing room and they had a conversation about the atmosphere or experience of *King Lear*. Ms Norvill's evidence of what was said was as follows:

HIS HONOUR: Perhaps you just tell us what your best recollection is of the conversation you had at that point.

MR BLACKBURN: Yes?---Okay. I told Robyn that I had been harassed by Geoffrey during the show and that I thought it was sexual harassment.

And what did Ms Nevin say to you?---Ms Nevin said to me, "I didn't think Geoffrey was doing that anymore. Poor Jane".

437 Ms Nevin denied, in a fairly emphatic manner, that a conversation in those terms occurred. Ms Nevin gave evidence of two conversations she had with Ms Norvill during the production of *All My Sons*. One of those conversations concerned Ms Norvill's concerns about one of her colleagues or friends. Ms Nevin's evidence in relation to that conversation was as follows:

You had a conversation with Ms Norvill in the course of that production. You did have a conversation with her about the topic of sexual harassment, didn't you?---Ms Norvill was in a state of high distress in relation to a sexual harassment issue in a production, I think maybe within the same timeframe as *All My Sons* also produced by the Sydney Theatre Company, and she was very concerned about that. I asked if she wanted me to do anything about it. She said, "No".

Well, the production that she was upset about was *Lear*, was it not?---No, no, no. She specifically – a friend of hers had a very distressing experience of sexual harassment in a production on at the same time or around the same time as we were doing *All My Sons*, and she was very concerned for the young actress in that production who had left the production and the cause of the problem had remained with it. And I said

to her at that point, “Do you want me to speak to anybody about it”, and she said, “No”, that they had some form of follow-up that they were embarking on themselves, some form of self-help group, I understand.

438 Ms Nevin also gave evidence about another conversation with Ms Norvill which concerned Ms Norvill’s general unhappiness during *King Lear*. She denied, however, that Ms Norvill referred to sexual harassment or inappropriate behaviour during that conversation. Her evidence about that conversation was as follows.

But you see, what I’m putting to you, Ms Nevin, is that in the course of the production of *All My Sons*, you had a conversation with Norvill on the subject of sexual harassment?---No.

All right?---There was no mention of sexual harassment.

Well, the evidence you’ve just given is that there was evidence of - - -?---Not – no – not. I beg your pardon. There was no – no suggestion of sexual harassment in the conversation with Ms Norvill when she was tearful. In the subsequent conversation when we were backstage waiting to go on the dark whispering, she told me about this unfortunate experience with her friend. That was sexual harassment.

All right. And so, let’s go to the first conversation when she was tearful?---Yes.

That was a conversation about sexual harassment; I put to you?---No. I just said that was not about sexual harassment. She was tearful. I said, “What’s the matter”. She said, and I’m paraphrasing, “Being back here reminds me of the stuff,” – trouble with Geoffrey or the problem or the something which I took to be the difficulties she was having with Cordelia, and she had great struggles. She was very unhappy in the role. And I also was reminded of my unhappiness during *Lear*, so I kind of understood what she meant as far as that’s all I understood. I didn’t leap to the conclusion it was sexual harassment.

But she said to you, didn’t she, that the problem was one of – she may not have used the word sexual harassment but - - -?---No. She certainly didn’t. There was no mention - - -

- - - inappropriate behaviour?---No. She didn’t say inappropriate behaviour.

But she indicated to you that it was a sexually inappropriate behaviour that---?---No. She didn’t indicate to me. There was no sense of sexual - - -

No. No. Can you please let me finish my question?---I beg your pardon.

Thank you. She indicated to you, didn’t she, that it was inappropriate behaviour of a sexual kind that she was upset about?---She most definitely did not suggest that to me. You’re putting words into my mouth. I beg your pardon for raising my voice, but that is – it is just appalling that you would put those words in my mouth. I just told you specifically I couldn’t quote precisely, but there was absolutely no – illusion or reference made to sexual – anything sexual.

You said a moment ago that she made a reference to unwanted attention. Sorry. Was that what she indicated, unwanted attention?---No. Absolutely not.

So she was in tears; is that right?---Yes.

And she said she had had a bad time or was it something of that kind?---She didn’t

say she had a bad time. She said, “This reminds me of the difficulty or the problems or – with Lear”.

And - - -?---It could have been anything.

And what, do you say you didn’t ask her about that, what she meant?---Well, I would have, but somebody came into the room who was unknown to both of us with a wig or something, and I didn’t continue the conversation because I assumed, perhaps, incorrectly, but I assumed she wouldn’t want to reveal her distress in front of a member of staff who we didn’t know.

Well - - -?---And I obviously didn’t – I just said, well, you know, “I will see you later”. So it wasn’t something that I felt that I needed to get to the bottom of.

You understood, I put it to you, from what she was saying to you that she had received inappropriate or unwanted attention from Mr Rush in the course of Lear?--- Absolutely not. She did not infer that at all in any way.

439 As can be seen from this extract from Ms Nevin’s evidence, her denial that a conversation of the sort described by Ms Norvill occurred was clear and emphatic. Ms Nevin also denied that she said, during that conversation, “I thought Geoffrey had stopped doing that. Poor Jane”.

440 It is difficult to resolve the conflict in the evidence of Ms Norvill and Ms Nevin concerning the terms of this conversation. The issue is complicated by the fact that Ms Norvill was not cross-examined specifically about her version of the conversation with Ms Nevin. Plainly Ms Norvill and Ms Nevin had a conversation during which Ms Norvill was upset and referred to her unhappy experience during *King Lear*. But did Ms Norvill refer to sexual harassment, inappropriate behaviour or unwanted attention on the part of Mr Rush?

441 Nationwide and Mr Moran submitted that Ms Norvill’s version of the conversation should be accepted. They contended that Ms Norvill’s evidence concerning the conversation was supported by the evidence concerning a text message that Ms Nevin sent to Ms Norvill at the time of the publication of the first of the *Telegraph* stories concerning Mr Rush. It will be recalled, of course, that the story did not name the complainant. Ms Nevin’s text message, which was sent at 4.31pm on 1 December 2017, was in the following terms:

Oh dear girl are you ok? i was contacted today by channel 9, I was in rehearsal with no iPhone. Fortunate. I told my agent no comment. But it’s nasty. I hope you’ll be protected. I’m sure you will be. If you need anything just ask. xxx

442 It is readily apparent that, by the time of this text message, Ms Nevin knew that Ms Norvill was the complainant. It does not necessarily follow, however, that Ms Nevin’s awareness came about as a result of her conversation with Ms Norvill during the production of *All My Sons*, as Nationwide and Mr Moran’s submission effectively implied. Ms Nevin frankly admitted in her evidence that she was unable to recall or explain how she was aware that Ms

Norvill was the complainant at that time. She denied, however, that her knowledge came about as a result of her conversation with Ms Norvill during *All My Sons*.

443 One possible explanation is that Ms Nevin learnt that Ms Norvill was the complainant from Ms Menelaus on the day prior to the first publication. It appears that Mr Rush and Ms Menelaus were aware that Ms Norvill was the complainant by the afternoon or evening before the first publication. That is because in an email sent at 5.06 pm on 29 November 2017, Mr Moran advised Mr Rush's agent, Ms Ann Churchill-Brown, that it was his understanding that Ms Norvill "claims Mr Rush touched her inappropriately on a number of occasions". Mr Rush's evidence was that Ms Churchill-Brown told him about Mr Moran's email within minutes of her receipt of it. Ms Menelaus' evidence was that she was with Mr Rush at that time. They plainly discussed the contents of the email. Ms Menelaus' evidence was that she knew the identity of the complainant on the day before the article "through the letter that was sent to Anne Churchill-Brown". Ms Nevin's evidence, although fairly vague, was that she thought that she and Ms Menelaus had been in contact via text or email before the first publication. If that was the case, it is likely that Ms Menelaus would have told Ms Nevin that Ms Norvill was the likely complainant.

444 It is ultimately unnecessary to decide precisely how Ms Nevin became aware that Ms Norvill was the complainant by the time of the publication. Indeed, the evidence was such that it was not possible to make any clear finding in that regard. I am not persuaded that because Ms Nevin knew by 1 December 2017 that Ms Norvill was the complainant referred to in the *Telegraph* articles it is more probable than not that Ms Norvill had previously told Ms Nevin that she had been sexually harassed by Mr Rush. Put another way, I do not consider that Ms Nevin's knowledge by 1 December 2017 that Ms Norvill was the complainant provides strong support for Ms Norvill's evidence of her conversation with Ms Nevin in mid-2016, or suggests that Ms Nevin's account of the conversation is unreliable and should not be accepted.

445 While the issue is not easy to resolve, on balance, and having regard to the evidence as a whole, I prefer Ms Nevin's evidence to Ms Norvill's evidence when it comes to the conversation they had during the production of *All My Sons*. On the one hand, I found Ms Nevin's evidence concerning that conversation to be clear and emphatic. On the other hand, I found Ms Norvill's evidence concerning her conversations with Ms Nevin to be somewhat unreliable for essentially two reasons.

446 First, and perhaps more significantly, Ms Norvill's evidence concerning Ms Nevin was rather inconsistent. On the one hand, she appeared to assert, or expressed a belief, that Ms Nevin, enabled or was complicit in Mr Rush's inappropriate behaviour because she was aware of it but did nothing about it. On the other hand, she maintained that Ms Nevin was always kind to her. It is difficult to see how those two propositions can sit comfortably together.

447 Second, Ms Norvill's version of the conversation during *All My Sons* also appears to be somewhat improbable in light of Ms Nevin's evidence generally. According to Ms Norvill, Ms Nevin said "I didn't think Geoffrey was doing that anymore". That implies that she somehow knew or believed that Mr Rush had sexually harassed other people in the past; that is, prior to the allegations made by Ms Norvill. It was, however, never put to Ms Nevin in cross-examination that she in fact knew or believed that Mr Rush had sexually harassed anyone in the past. Indeed, the evidence that Ms Nevin gave concerning Mr Rush's reputation, which will be discussed in more detail later, suggested that she had no such knowledge or belief. It is difficult to accept that Ms Nevin could have given the evidence she gave about Mr Rush's reputation if she had any such knowledge or belief. In those circumstances it is difficult to accept that Ms Nevin would have said the words attributed to her by Ms Norvill. It should also be added that there was no evidence to suggest that Mr Rush had in fact ever sexually harassed anyone in the past. Nor was that proposition put to Mr Rush in cross-examination.

448 I am conscious that Ms Norvill's evidence concerning her conversation with Ms Nevin during *All My Sons* was not directly challenged in cross-examination. I do not suggest that she was being untruthful about her conversation with Ms Nevin. On balance, however, and having regard to the findings that I have made in relation to the reliability of the evidence given by Ms Norvill and Ms Nevin generally, I prefer the evidence of Ms Nevin concerning the terms of the conversation they had during *All My Sons*. I do not consider that Ms Norvill's evidence concerning that conversation was reliable.

449 I should finally note that Ms Nevin was questioned in cross-examination about why, at the time she sent her text message to Ms Norvill, she was not angry with Ms Norvill for making allegations against her good friend, Mr Rush. Ms Nevin's evidence was that her primary concern at the time was Ms Norvill's welfare, because she knew that Ms Norvill would be in a terrible state as a result of the public revelation of her complaint. She was not angry with Ms Norvill, she was angry with the STC. She strenuously maintained that she had not seen

anything that would justify Ms Norvill's complaint. I accept Ms Nevin's evidence in that regard.

Conversation with Mr Armfield

450 Mr Armfield's evidence was that Ms Norvill had never reported anything to him concerning Mr Rush or his behaviour. He said that the only personal issue that Ms Norvill had reported to him concerned the fact that a friend of hers was visiting the show. His evidence was:

Did she ever report any personal issue to you?---I remember she had a friend coming in to – to see the show that she was very anxious about in – who had – a friend who was coming out from America she was – had invited to see the show and that she wasn't sure if it was – when she came out if she wanted her to come and – and see it.

But nothing to do with Mr Rush?---Nothing to do with Mr Rush, no.

451 Ms Norvill did not have any recollection of having a conversation with Mr Armfield about her friend. Her evidence in that regard was:

MR McCLINTOCK: You had a friend visiting from the United States, didn't you?--My girlfriend was visiting me, yes.

Yes. I don't want to be intrusive or anything like that, but there were problems, weren't there?---I beg your pardon?

There were problems in the relationship?---When my girlfriend came over, it was halfway through the run and I wasn't in a very good place. I wasn't available to her communicatively or emotionally and our relationship started to break down. Yes.

And – but you raised your concern about her coming to the play with Mr Armfield, didn't you?---I don't remember that conversation.

452 Ms Norvill's evidence was, in effect, that she did not feel that she could raise the problems she was having with Mr Rush with Mr Armfield because Mr Armfield and Mr Rush had been friends for 30 years and she believed that Mr Armfield would always defend Mr Rush. She also said that she believed that Mr Armfield was aware of Mr Rush's behaviour because of the "note" that Mr Armfield gave Mr Rush after one of the preview performances. The evidence in relation to that note is considered later. Suffice it to say at this stage that, Ms Norvill's account of that note was not supported by the evidence of any other witness, including Mr Armfield.

453 In any event, Ms Norvill gave evidence about a conversation she said she had with Mr Armfield which she assumed concerned Mr Rush. Her evidence in that regard was:

HIS HONOUR: Can I just ask you, Ms Norvill – sorry for interrupting, Mr McClintock – you just said earlier that you weren't in a very good place. Is that – do you recall giving that evidence?---Yes.

Now, that was something that could possibly have impeded you giving a proper performance in your role as Cordelia, wouldn't it?---Absolutely not. I'm a professional and I deal in emotions.

I see?---So if I'm having a difficulty at home or in my life, I'm able to step into the theatre and put that aside. I'm focused. I'm present. I'm very driven and I love my job. That has always come first in life, so no, it wouldn't have affected my ability to be present and a part of my – there.

The reason I ask you the question is whether that was something you thought – if you weren't in a good place, it was something you thought that you would raise with Mr Armfield?---If I wasn't in a good place?

Yes?---Yes, yes, I remember having – I remember Neil being in my dressing room and saying that I wasn't in a good place. He asked; I said I wasn't in a good place. My assumption was that he was speaking about Geoffrey because he had given the note to Geoffrey. That was what I thought the conversation was about.

454 The following points may be made about this evidence.

455 First, despite apparently assuming that this conversation concerned Mr Rush, Ms Norvill did not include an account of this conversation in her witness statement. Nor did she refer to it during her evidence-in-chief.

456 Second, and more significantly, Ms Norvill did not say what she said to Mr Armfield when he raised the issue of her not being in a “good place” with her. If this conversation occurred, and if Ms Norvill was not, in fact, in a “good place” as a result of any behaviour by Mr Rush, it appears rather strange that she apparently did not, at this point at least, open up to Mr Armfield, about the effect that Mr Rush's behaviour was having on her, despite the fact that she knew that Mr Armfield and Mr Rush were good friends. Ms Norvill also knew that Mr Armfield was a well-respected director and a consummate professional. She might reasonably have expected that he would want to know if one of the actors in the play was not in a “good place” because she was being sexually harassed, if indeed that was the case.

Other evidence

457 As has already been noted, Ms Norvill's evidence concerning the first allegation suggested that the alleged incident was witnessed by the entire cast and some members of the crew. Aside from Ms Norvill and Mr Winter, however, Nationwide and Mr Moran did not call any other members of the cast or crew to give evidence concerning the incident.

458 The only other evidence worth noting in the context of this alleged incident is the evidence of what Ms Norvill told Ms Crowe about Mr Rush's behaviour during their meeting on 5 April 2016. Ms Norvill does not appear to have referred specifically to this allegation during her

meeting with Ms Crowe. All she appears to have said to Ms Crowe about Mr Rush's behaviour during the rehearsals was that, when rehearsals began, "it [Mr Rush's behaviour] started out with mild commentary of her [Ms Norvill] in the room, suggestive comments and flirting". That description is hardly consistent with Ms Norvill's description of this particular incident in her evidence.

Findings

459 I am not satisfied, on the balance of probabilities, that this alleged incident occurred during rehearsals. I am not satisfied that the evidence of Ms Norvill and Mr Winter in respect of this incident was credible or reliable. I accept the evidence Mr Rush, Mr Armfield, Ms Nevin and Ms Buday that the incident as described by Ms Norvill did not occur.

460 My reasons for so finding are numerous.

461 First, the preponderance and weight of the evidence suggests that the incident did not occur. Mr Rush, Mr Armfield and Ms Buday, either directly or implicitly, denied seeing any such incident occur. Ms Nevin did not recall seeing any such incident and made it plain that if she had, she would have recalled it. Even putting Mr Rush's denial to one side for the moment, there is absolutely no reason to doubt the evidence of Mr Armfield, Ms Nevin and Ms Buday. Their evidence in relation to this incident was scarcely challenged in cross-examination, if it was challenged at all. No persuasive submission was advanced for why their evidence should not be accepted.

462 Second, Mr Winter's evidence provided no real corroboration of Ms Norvill's account of this incident. The "jokey" and, to his mind, fairly insignificant incident that he said that he recalled was of a quite different nature and character to the incident described by Ms Norvill. In any event, for the reasons that have already been touched on, I am not satisfied that Mr Winter's evidence concerning this incident was either credible or reliable. He described his recollection as vague. He did not refer to this incident in his outline of evidence. His recollection appears to have been prompted as a result of what was said in a conference shortly before he gave evidence. That conference occurred almost three years after the incident in question. Mr Winter plainly did not think much of the incident at the time. He did not say that he spoke with Ms Norvill about it. It does not appear to have affected his positive attitude towards Mr Rush. It is difficult to see how that could be the case if the incident as described by Ms Norvill had in fact occurred.

463 Third, and significantly, I have considerable doubts about the reliability of Ms Norvill's evidence concerning this incident, and considerable doubts and concerns about the reliability of Ms Norvill's evidence, and her credibility as a witness, generally. On the whole, she revealed herself to be a witness who was prone to exaggeration and embellishment. The clearest example of this was her evidence that the other members of the cast, and the crew generally, were complicit in, or enabled, Mr Rush's behaviour as described by her. For the reasons already given, I reject that evidence. Another example is Ms Norvill's evidence that Mr Rush engaged in similar lewd and inappropriate behaviour towards other female members of the cast, including Ms Buday, and female members of the crew, including Ms Gilbert. As I have already made plain, I also reject that evidence.

464 Fourth, Ms Norvill's evidence concerning this incident was inconsistent with, or at least not supported by, the documentary evidence recording more contemporaneous statements made by her concerning Mr Rush and his behaviour, including during rehearsals. She told a journalist in mid-November 2015 that she appreciated Mr Rush's playfulness and loved his ebullience. She told another journalist in late November or early December 2015 that working with Mr Rush was exciting, that he was generous and cheeky, which was "perfect" for her, and that she felt privileged to work with him.

465 The statements that Ms Norvill made to journalists at the time of the rehearsals in *King Lear* are discussed in more detail later. It is difficult to imagine that she could have said any of those things if the incident described by her had in fact occurred. Even the description of Mr Rush's behaviour that she appears to have given to Ms Crowe in April 2016 is not consistent with the serious description of this incident which she gave in her evidence.

466 The evidence as a whole does suggest that Mr Rush was at times ebullient, enthusiastic and playful during the rehearsals. It appears that at times he joked around. He admitted as much when he told the journalist, in mid-November 2015, that rehearsal was a "playpen" for him to do "cheap jokes". The evidence as a whole, however, suggests that Mr Rush's playfulness and ebullience during rehearsals was appreciated and seen by the cast and crew as a positive thing. The evidence as a whole does not support the allegation, and Ms Norvill's evidence, that Mr Rush's jokes or playfulness was directed at Ms Norvill, or was of a lewd, sexual or sexist nature, or could be characterised as amounting to sexual harassment as Ms Norvill effectively asserted. Indeed, the evidence as a whole is quite to the contrary.

Allegations two and three: Sexual innuendo and lewd gestures during the rehearsals

467 It is convenient to deal with the second and third allegations together. Both involved general allegations of inappropriate behaviour of a sexual nature by Mr Rush towards Ms Norvill during the rehearsal period. As has already been noted, the rehearsal period ran from about 12 October to 21 or 23 November 2015.

468 The essence of the second allegation is that, during the rehearsal period, Mr Rush regularly made comments or jokes about Ms Norvill or her body which contained sexual innuendo. Those comments were said to have been made in the presence of at least some members of the cast and crew.

469 The essence of the third allegation is that every few days during the rehearsal period Mr Rush made lewd gestures in Ms Norvill's direction. On a number of occasions, this comprised Mr Rush looking at Ms Norvill, sticking his tongue out and licking his lips, and using his hands to grope the air like he was fondling Ms Norvill's hips or breasts.

Ms Norvill's evidence

470 The rehearsal period ran from 12 October to 21 or 23 November 2015. The effect of Ms Norvill's evidence was that Mr Rush made sexist remarks and lewd gestures to her virtually daily throughout the rehearsal period. Indeed, as discussed in the context of the first allegation, the effect of Ms Norvill's evidence was that he made similar remarks and gestures to other members of the female cast and crew throughout that period.

471 Ms Norvill's evidence concerning this conduct included the following:

All right. Now, in the rehearsal period I want to ask you some questions about some things that happened in the rehearsal period. If you could just turn your mind to that. First of all, do you recall did Mr Rush make some gestures in your direction, or towards you?---Yes, he did.

Could you tell the court what they were?---I started noticing that Geoffrey would make these sexual, kind of, gestures toward my body when I would come into work, or when – you know, when he would greet me in the start of the day he would, you know, kind of comment on my body with – he would, like, curve the shape of my hips and - -

Just pausing there, Ms Norvill. The witness is making hourglass shapes with her hand?---Mmm.

Is that - - ?---That's right. And kind of groped the air.

Now, just pausing there. "Groped the air." Could you just tell the court what you actually observed him doing when you're talking about groping the air?---He would look at me and he would smile and cup his two hands like – and he would usually,

you know, lick his lips and raise his eyebrows, bulge out his eyes. Sometimes he would, like, growl. I remember him calling me yummy.

All right. Do you remember some other words that he used apart from yummy?---Scrumptious.

Just going back to the moment where you said he would cup his hands. First of all, how – when he did that at what level were his hands?---His level was – his hands were level to his chest.

And what about what level to you?---Level to my chest.

All right. And when you say “cupped his hands”, were his hands facing outward, or inward, or – from your perspective I mean?---From my perspective - - -

Yes?--- - - - his hands were facing outward.

Towards you?---That’s right.

Right. Yes. And level with any particular part of your body?---They were level with my breasts.

472 Ms Norvill described how those comments and gestures made her feel as follows:

All right. Perhaps I should ask this question: the – what you described – the descriptions, the hand movements, the facial movements, the occasional growling – how did that make you feel?---Compromised. And pressured. And, again, I have to say, confused. Because I – I just didn’t really understand why Geoffrey would make fun of my body, or a comment on my body, if he was my friend and respected me as a colleague.

473 Ms Norvill claimed that the gestures or comments occurred on a daily basis. As was noted in the context of the first allegation, Ms Norvill also claimed that Mr Rush made similar gestures or comments to other female members of the cast and crew.

474 Ms Norvill claimed that some of the sexual innuendo related to the fact that she played the character of the daughter of Mr Rush’s character in the play. Her evidence in that regard was:

.... You, of course, played his daughter in the play?---Yes, I did.

Yes. Did – was that the subject of any remarks or – that you recall?---Yes, there was an ongoing kind of – yes, there was ongoing commentary around the fact that I was his daughter and, I guess, coupled with the sexual innuendo, it was strange.

HIS HONOUR: Well, what do you mean by “sexual innuendo”? Are you referring to what you had said earlier about the sorts of things you had seen him do and say? --
- Yes, that’s right. The – the sexual kind of gesturing and - - -

Mr Winter’s evidence

475 Mr Winter’s evidence concerning the rehearsal period was strictly limited to the specific incident which was the subject of the first allegation. It was considered earlier in that

context. His evidence otherwise provided no support for or corroboration of Ms Norvill's broader account of Mr Rush's conduct throughout the rehearsal period. Indeed, he was not asked any questions during his evidence-in-chief about Mr Rush's general behaviour during rehearsals.

476 Mr Winter's evidence was also, at least in some respects, inconsistent with Ms Norvill's account. It is, in all the circumstances, almost impossible to see how Mr Winter could have considered that Mr Rush had been an "exemplary company leader" who had "led the company well" had he been witness to the sort of daily conduct described by Ms Norvill.

Mr Rush's evidence

477 Mr Rush denied making comments about Ms Norvill's body, or using sexual innuendo, or making lewd gestures, or any of the other specific behaviour or gestures that Ms Norvill referred to in her evidence.

478 Nationwide and Mr Moran placed heavy reliance on the fact that Mr Rush did not deny that he might have used the words "scrumptious" or "yummy" when speaking to Ms Norvill during the rehearsal period. His evidence in that regard was as follows:

And also at that time in the rehearsal period you made very frequent comments, didn't you, about how Ms Norvill looked or what was she wearing?---Not to my knowledge, no.

You said things to her like, "You're looking very scrumptious today"?---I don't recall saying that, but I might have said that. I was in a – always in a very chirpy mood because I approached the rehearsals with a great deal of openness and energy. Sometimes you have icebreakers with people that you don't know particularly well.

479 It is important to emphasise, however, that it was subsequently put to Mr Rush that he had used the words "scrumptious" and "yummy" contemporaneously with the lewd gestures that Ms Norvill had referred to in her evidence. Mr Rush denied making any such lewd gestures. He also specifically denied using the words "scrumptious" and "yummy" while making any such gestures.

480 That is significant. It may be accepted that in some contexts, and in some circumstances, it may be inappropriate for a man to refer to a woman's appearance in a workplace setting as "scrumptious" or "yummy". However context is everything. I do not accept that it is invariably or necessarily inappropriate, let alone "scandalously inappropriate" to use such words in a workplace setting when talking to a woman. Nor do I accept that it would necessarily constitute "inappropriate behaviour of a sexual nature". Had Mr Rush used those

words while making any of the gestures referred to by Ms Norvill in her evidence, it would undoubtedly have been “scandalously inappropriate” and would clearly have constituted “inappropriate behaviour of a sexual nature”. Mr Rush denied, however, using the words in that context.

481 Another contextual consideration is that, while Mr Rush was obviously older than Ms Norvill, and was a far more experienced actor, Ms Norvill was in her early thirties at the time of *King Lear* and had been a professional actor for about 10 years. Mr Rush and Ms Norvill had known each other for many years and had, for the most part, been on close and friendly terms. They had in the past communicated in quite personal and familiar terms. That can be seen in particular in their exchange of text messages throughout 2014. More will be said about those text messages later. It suffices at this stage to note that, in the course of those text messages, as part of a game involving the use of homophones for their respective names, Ms Norvill had referred to Mr Rush as, amongst other things, “Jet Lee Thrust”, “God of Generic Lust”, “GR BANG BANG”, “Giddy McHeadRush”, “Jersey Cream Filled Puff” and “Galapagos Lusty Thrust”. She referred to herself as “Meringue Jam Novelty” and “Ear and Jam Novelty”. Mr Rush, on the other hand, had referred to Ms Norvill as, amongst other things, “Ear and Jam Novelty”, “Erogenous Navel” and “Error Ginger Nutella”.

482 Ms Norvill did not suggest that there was anything inappropriate about the terms of those text messages. Indeed, quite the contrary. Her evidence in relation to those parts of the text messages was as follows:

As a matter of curiosity, you wouldn’t have found it offensive if he called you goddess of generic lust, would you?---I don’t think that these messages were sexual, if that’s what you’re implying.

You don’t think there’s something about – I’m not suggesting anything at this stage, Ms Norvill, but you don’t think there’s – you say there’s nothing sexual about “generic lust”?---It was a play on words between two friends.

HIS HONOUR: What about “Gently [Jet Lee] Thrust”?---A rocket ship.

MR McCLINTOCK: “Thrust” doesn’t occur to you to have a slight sexual overtone, Ms Norvill?---I don’t think the messages were inappropriate.

I’m not suggesting they’re inappropriate, Ms Norvill. I’m asking you whether you think “thrust” had – or a better – had a slight sexual overtone?---“Gently [Jet Lee] Thrust” was to do with a rocket ship. “God of generic lust”, sure, that could have been sexually flirtatious. Somebody could have - - -

They’re plainly sexually flirtatious, aren’t they, Ms Norvill?---There’s nothing wrong with that.

483 Ms Norvill eventually conceded that some of the references in the text messages – including her reference to Mr Rush as “Galapagos Lusty Thrust” could be perceived as “sexually – intellectually flirtatious”.

484 It should be emphasised that nobody suggested that the 2014 text messages between Ms Norvill and Mr Rush were in any way inappropriate or worthy of criticism. The point was, and is, that they provided important context, particularly in relation to the eighth allegation. They also provide some context in relation to the allegation that Mr Rush referred to Ms Norvill as “scrumptious” or “yummy”. If Mr Rush did in fact ever use the words when describing Ms Norvill, that must be considered in the context of the apparent nature of their relationship and the way they had spoken and referred to each other in the past. It would perhaps be fair to say that those words appear rather quaintly old-fashioned and harmless when compared with some of the language employed by Ms Norvill when communicating with Mr Rush, including “God of Generic Lust” and “Galapagos Lusty Thrust”, which would appear to employ an element of sexual innuendo, albeit in an apparently playful and humorous way.

485 Finally, it should be noted that Ms Norvill did not say anything in her witness statement about Mr Rush using the word “scrumptious” or “yummy”. Indeed, she said that she did not recall anything specific that Mr Rush said during the rehearsals. This appears to have been one of the things that Ms Norvill recalled after her statement was prepared. It nevertheless does tend to suggest that even Ms Norvill did not think that Mr Rush’s use of those word, if indeed he did use them, was particularly significant.

Mr Armfield’s evidence

486 As was noted in the context of the first allegation, Mr Armfield denied that he ever saw or heard Mr Rush engage during rehearsals in any of the behaviour described by Ms Norvill in her evidence. He denied ever seeing Mr Rush hover his hands over Ms Norvill’s torso and pretend to caress or stroke her upper torso, denied ever seeing Mr Rush make groping gestures in the air with two cupped hands as if to simulate groping or fondling Ms Norvill’s breasts, and denied ever hearing Mr Rush make jokes or comments about Ms Norvill’s body, or make comments using sexual innuendo in relation to Ms Norvill.

487 As for the use of the words “scrumptious” or “yummy”, or commenting on the way Ms Norvill looked, Mr Armfield’s evidence was:

What you did observe, though, didn't you, Mr Armfield, was Mr Rush commenting on the way Ms Norvill looked?---Never.

He said – on a number of occasions, he used the word “scrumptious” to describe the way Ms Norvill looked, and I meant that to her face, in front of her?---I never witnessed that.

And he said that she looked yummy on a number of occasions?---I have heard the word “yummy” used in a rehearsal room by Patrick White about John Gaden. I I didn't hear Geoffrey describe Eryn Jean as yummy.

488 Nationwide and Mr Moran did not advance any reason for why Mr Armfield's evidence about this issue should not be accepted.

Ms Buday's evidence

489 As discussed earlier in the context of the first allegation, Ms Buday denied witnessing Mr Rush do any of the things during rehearsals that Ms Norvill described in her evidence, including making lewd gestures in her direction or towards Ms Norvill's body, or make jokes about Ms Norvill's body, or comment about the way she was dressed. She also said that she did not hear Mr Rush describe Ms Norvill, in her presence, as looking “scrumptious”, or hear Mr Rush describe Ms Norvill as looking “yummy”.

490 Again, Nationwide and Mr Moran did not advance any, or any persuasive, reason why Ms Buday's evidence should not be accepted.

Ms Nevin's evidence

491 Aspects of Ms Nevin's evidence concerning Mr Rush's conduct or behaviour during the rehearsals have already been discussed in the context of the first allegation. Her evidence also included the following:

Now, do you recall at any time in the rehearsals seeing Mr Rush – or first of all hearing Mr Rush make comments about Ms Norvill's body?---No.

Do you recall Mr Rush calling her scrumptious?---No.

Or yummy?---No.

And do you recall him ever sticking his tongue out at her?---No.

Do you recall him growling at her?---No.

Do you recall him using his hands towards Ms Norvill and making an hourglass - - - ?---No.

- - - gesture towards her figure?---No.

Do you ever recall other members of the cast or crew telling Mr Rush to stop it?--- Stop what? No. No.

Now, during the rehearsal period did Mr Rush ever make comments to you about your body?---No. Mr Rush has never made any comments to me about my body.

Did he ever make lewd gestures towards you throughout rehearsals?---No.

Or gestures you would consider to be lewd?---No.

Now, just thinking back about the things I've just asked you about the - - -?---I'm sure, though,

Mr Rush has told me in the past that I looked attractive or pleasing or something, I'm sure, because he's – he's very generous in his enthusiasm towards people.

And did you find that offensive at the time?---No. I've never found him offensive.

492 Ms Nevin's evidence about those matters was not challenged at all in cross-examination. Ms Nevin's evidence concerning these allegations was couched in terms of whether she recollected any of the alleged events occurring. It is, however, difficult to imagine that Ms Nevin would have forgotten any about such behaviour on the part of Mr Rush if she had in fact witnessed it.

493 Nothing that was raised in Ms Nevin's cross-examination cast any doubt on the reliability of her evidence concerning Mr Rush's behaviour during rehearsals.

Other evidence – Media interviews and statements

494 It is relevant, in the context of these allegations, to consider some of the statements made by Ms Norvill during the media interviews shortly prior to the commencement of the performances. More will be said about those interviews in the context of the fourth allegation concerning Mr Rush's statement that he had a "stage-door Johnny crush" on Ms Norvill. In the present context, however, it may be noted that in *The Sydney Morning Herald* article published on 19 November 2015, Ms Norvill was quoted as having said amongst other things, that she appreciated Mr Rush's "playfulness" during rehearsals and:

Sometimes fear can get into a rehearsal room and rot it. Nervousness, formality, all that bullshit. But Neil and Geoffrey work from moment to moment and we are all on the same journey together.

495 It was also reported that Ms Thomson had said, no doubt in Ms Norvill's presence, that the atmosphere in the rehearsal room had been "very light".

496 By the time of that interview, the rehearsals were well underway. The statements made by Ms Norvill appear to be entirely inconsistent with her evidence about what went on in the rehearsal room. Ms Norvill gave some explanation for this inconsistency in her evidence.

She claimed that the statements that she made to the interviewer about Mr Rush and the rehearsals were untrue and gave the following explanation for why she made them:

You said that to the journalist, didn't you?---Yes, I'm reported to have said that.

Yes. No one put a gun to your head and made you say that, did they?---The reporter was there to – to get people into the show. I wasn't going to criticise Geoffrey, I wasn't going to criticise the rehearsal room, and you know what, I was probably hoping that that was true. I – I wanted Geoffrey to – sorry.

....

Was that true?---Neil and Geoffrey would work from moment to moment; I guess that's true. We were on the same journey together – I guess that's not true.

Why did you tell those untruths to the Herald, Ms Norvill?---It was a difficult position to be – being interviewed and have it being photographed with two other women that, you know, were actually having probably a good time and I wasn't. What was I supposed to say? How would the journalist – that – “oh and by the way, I don't know if Geoffrey has the right intentions towards me. I don't find his jokes that funny, actually; they make me feel small as a human”. What was I supposed to do?

497 It could be accepted that, if the events that Ms Norvill referred to in her evidence did in fact occur in the rehearsal room, she could not be reasonably expected to have told a journalist about that behaviour in the course of a promotional interview, particularly one conducted together with Mr Rush. That does not, however, entirely explain why Ms Norvill made such positive statements about both Mr Rush and the rehearsals.

498 That was also not the only occasion where Ms Norvill was reported to have said positive things about her experiences working with and alongside Mr Rush in *King Lear*. As was noted earlier, Ms Norvill also gave an interview to a *Telegraph* journalist on or shortly before 3 December 2015. By that time, the rehearsals had concluded and the performances of the play had begun. Ms Norvill was reported as having said, during that interview, that working with Mr Rush was “exciting” and:

“Geoffrey is just forever playful. He's so generous, he's very cheeky which is perfect for me. I feel very privileged to work with him and proud to be his ‘favourite daughter’,” she joked.

499 Ms Norvill agreed that she would have said what she was quoted as having said. She gave the following evidence about the apparent inconsistency between what she told the journalist about working with Mr Rush and what she claimed in her evidence to be her actual experiences:

You see, there's no suggestion there of any fear or discomfort on your part about working with Mr Rush, is there, Ms Norvill?---I'm not talking with a friend; I'm

talking with a journalist. And it's also a part of my job to speak about my colleagues with respect. I would not disrespect him in that forum. I wouldn't do that. So yes, I understand why I would have praised Geoffrey. And, you know, I probably wanted to believe that, as well. He – he was cheeky. But that cheekiness damaged me.

500 It is again difficult to accept that this is a reasonable or persuasive explanation for telling what, on Ms Norvill's subsequent version of events, was, at the very least, a misleading impression of what she actually felt at the time about working with Mr Rush. While it may be accepted that it was part of Ms Norvill's job to give promotional interviews, that in no sense obliged her to make misleadingly positive statements about Mr Rush as she effectively claimed.

501 In all the circumstances, Ms Norvill's contemporaneous statements to the media about her positive experience working with Mr Rush during the rehearsal period, and the rather unsatisfactory explanation given by Ms Norvill in relation to them, count against the reliability and credibility of Ms Norvill's evidence concerning the rehearsals.

Findings

502 I am not satisfied, on the balance of probabilities, that Mr Rush behaved during rehearsals in the way Ms Norvill described in her evidence. I am not satisfied that Ms Norvill's evidence concerning Mr Rush's behaviour towards her and others during the rehearsal period was credible or reliable. I am not satisfied that Mr Rush used sexual innuendo or sexist language, or made lewd or otherwise inappropriate gestures to Ms Norvill or any female members of the cast or crew during rehearsals. I accept the evidence of Mr Rush, Mr Armfield, Ms Nevin and Ms Buday that the behaviour as described by Ms Norvill did not occur.

503 My reasons for so-finding are essentially the same as the reasons given earlier in relation to the first allegation about the specific lewd conduct that Mr Rush was alleged to have engaged in during the rehearsal period. The following points bear repeating.

504 First, Ms Norvill's evidence concerning Mr Rush's allegedly sexist and inappropriate behaviour during the rehearsal period was entirely uncorroborated. Not even Mr Winter supported Ms Norvill's broader evidence concerning Mr Rush's behaviour during rehearsals. His evidence was directed at the single alleged incident which was the subject of the first allegation. As discussed earlier, he did not even appear to think that that incident was particularly significant.

505 As has already been noted, Mr Winter was not asked a single question about Mr Rush's behaviour generally during the rehearsals when he gave his evidence-in-chief. It can, in those circumstances, be inferred that Mr Winter's evidence would not have assisted Nationwide and Mr Moran in relation to those allegations. Indeed, it may be inferred that Nationwide and Mr Moran did not ask Mr Winter any questions about those allegations because they feared that it would have exposed facts unfavourable to their case: *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418; *Mastronardo v Commonwealth Bank of Australia Ltd* [2018] NSWCA 136 at [49]; *Puels v Exelerate Funding Pty Ltd* (2005) 214 ALR 616 at [38].

506 Second, the preponderance and weight of the evidence as a whole was firmly against acceptance of these allegations. It may be accepted that Ms Norvill did not suggest that all of the Mr Rush's behaviour that she described was witnessed by others. Nevertheless, the general effect of her evidence was that Mr Rush's lewd, sexist and inappropriate language and gestures were seen by at least some other members of the cast and crew. It was largely on that basis that she asserted that the other members of the cast and crew were complicit in or enabled Mr Rush's behaviour, or that his conduct became normalised. Ms Norvill also specifically asserted that Mr Rush directed lewd comments and gestures towards other female members of the cast and crew. Not a single witness gave any evidence which corroborated Ms Norvill's evidence in that regard.

507 Ms Norvill's evidence concerning Mr Rush's behaviour towards her and other female members of the cast and crew was not only uncorroborated; it was also directly and emphatically contradicted by the evidence of not only Mr Rush, but also Ms Nevin, Ms Buday and Mr Armfield. Ms Buday and Mr Armfield denied ever seeing Mr Rush engage in any such conduct and Ms Nevin did not recall ever seeing such conduct in circumstances where she plainly would have so recalled seeing it if it had in fact occurred. The credibility of Ms Nevin, Ms Buday and Mr Armfield and the reliability of their evidence about these allegations went effectively unchallenged in cross-examination. No persuasive reasons were given for why they should not be believed, or their evidence about these allegations should not be accepted. It was suggested that they might simply not have seen, or might have missed, some of the conduct described by Ms Norvill. Given the nature, character and frequency of the behaviour described by Ms Norvill, that possibility was highly unlikely.

508 Third, Ms Norvill's evidence about Mr Rush's behaviour during the rehearsals was inconsistent with, or at least not supported by, the evidence concerning her more contemporaneous statements about working with Mr Rush and Mr Rush's behaviour during rehearsals. I do not accept Ms Norvill's explanations for her prior inconsistent statements about Mr Rush to the journalists. It may be accepted that she was obliged to give promotional interviews. It might also be accepted that it would not be reasonable to expect her to make negative statements to the journalists, or to use the interviews as a forum to advance allegations against Mr Rush. It does not follow, however, that she was obliged to make positive statements about working with Mr Rush, let alone the highly complimentary ones that she did in fact make.

509 Fourth, for the reasons already given, the impression I gained about Ms Norvill was that she was a witness who was prone to exaggeration and embellishment. I do not accept that she was an entirely credible witness, or that the evidence she gave about Mr Rush's conduct was reliable. I consider that the evidence Ms Norvill gave concerning Mr Rush's behaviour during the rehearsals was exaggerated and unreliable. I also consider that her evidence about other members of the cast and crew being complicit in, or enabling, Mr Rush's allegedly inappropriate conduct towards her and other female members of the cast or crew was unreliable and must be rejected.

510 Finally, I should perhaps add that I accept Ms Norvill's evidence that Mr Rush used the word "scrumptious" at some stage during the rehearsals, particularly in light of the fact that Mr Rush agreed that he "might have" said something like "you're looking scrumptious today" to Ms Norvill. I reject, however, that Mr Rush used that word in a lewd or offensive way. I also reject the suggestion that Mr Rush used that word while making lewd or offensive gestures towards Ms Norvill. If that was the import of Ms Norvill's evidence, it is rejected for the reasons I have already given for rejecting her evidence that Mr Rush engaged in any such lewd, offensive or sexist behaviour during rehearsals.

511 I accept Mr Rush's evidence that, if he did use the word "scrumptious" when speaking with Ms Norvill, he did so because he generally approaches rehearsals in a "chirpy" and energetic way. The effect of his evidence was that if he said the word "scrumptious" he would have intended the comment to be a positive affirmation during the rehearsal period, not in any way offensive or negative. While in some circumstances the use of the word "scrumptious" to describe someone's appearance may be considered to be sexist or offensive, much depends

on the context, including the nature of the relationship between the people involved and the particular circumstances in which the word was used. I have rejected that Mr Rush used the word “scrumptious” in the context or circumstances alleged by Nationwide and Mr Moran, or in the circumstances and context described by Ms Norvill in her evidence.

512 If Mr Rush did use the word “scrumptious” in the context and circumstances he described in his evidence, I do not consider that it constituted “scandalously inappropriate behaviour”, let alone “scandalously inappropriate behaviour of a sexual nature”. Furthermore, if Mr Rush did use the word “scrumptious” in the context and circumstances he described, it would not make him a pervert or “sexual predator”, or justify any of the other imputations conveyed by Nationwide and Mr Moran’s publications.

Allegation four: “stage-door Johnny crush”

513 There was no dispute that, during the interview with *The Sydney Morning Herald* journalist in November 2015, Mr Rush said that he had a “stage-door Johnny crush” on Ms Norvill. That comment was quoted in the resulting newspaper article.

514 There are three issues that arise in relation to this allegation.

515 The first concerns Mr Rush’s state of mind when he made that remark. Nationwide and Mr Moran contend that in making this remark, Mr Rush intended to depict Ms Norvill as a “sexual object rather than as a serious actress” and that Mr Rush knew that his comment would make Ms Norvill “feel uncomfortable, embarrassed and compromised”.

516 The second issue concerns the nature of the statement and the effect that the statement had on Ms Norvill. Nationwide and Mr Moran contend that the statement in fact depicted Ms Norvill as a “sexual object” rather than a serious actress, and made Ms Norvill “feel uncomfortable, embarrassed and compromised”.

517 The third issue is whether, in light of the findings concerning Mr Rush’s state of mind and the effect that the statements had on Ms Norvill, it could and should be concluded that Mr Rush’s conduct in that regard constituted “scandalously inappropriate behaviour”, or “scandalously inappropriate behaviour of a sexual nature”, or made him a pervert or a sexual predator.

Ms Norvill’s evidence

518 Ms Norvill’s evidence concerning the interview included the following:

And do you recall something in particular that Mr Rush said in the course of that

interview?---Yes. I remember that he said that he “hand-picked us”, and I remember thinking that was a really strange thing to say considering that he was – we were being – it would definitely be reported on, we were being interviewed and that there were three incredibly talented and able actress, you know.

Was there something else that he said?---Yes. He – Geoffrey said that he had a stage-door Johnny crush on me.

And what did you think when he said that? I mean, how did you feel when he said that?---Humiliated, put on the spot, considering that we were, again, being interviewed in a professional context. It made me feel uncomfortable and disrespected.

Did you say anything about it in the course of that interview? Did you respond to that remark?---No because we were being interviewed, so if I was to reprimand him, or if I was to say, “well, that’s not really appropriate considering I’m playing your daughter in this play or considering that you’re my friend and your colleague”, you know, like no, I didn’t say anything because I was trying to be professional.

519 Ms Norvill’s evidence about this comment in cross-examination was as follows:

Go, if you would, to tab 116. You read that article yesterday, didn’t you, in the witness box?---Yes.

And I won’t ask you to read it again, but you would agree with me that Mr Rush says a series of complimentary things about you, Ms Buday and Ms Thomson as actors, doesn’t he?---Yes.

One of the complimentary things about you – I withdraw that. He also used, as we know, the – or made the statement, he had a “stage-door Johnny crush” on you, didn’t he?---Yes. He did.

You knew that that was nothing more than a light-hearted quip, didn’t you?---No. It made me feel uncomfortable.

I see. A discomfort that you did not express at the time, you say?---We were being interviewed by a journalist.

Nor, indeed, at any time, if your evidence yesterday is correct, Ms Norvill, during the course of the play that is, of course; that’s right, isn’t it?---I didn’t speak to Geoffrey during the course of the play, except to say, “Please stop that.”

Mr Rush’s evidence

520 Mr Rush gave the following evidence concerning the interview and the expression “stage-door Johnny crush”:

What do you say about that? It says:

“I developed an immediate stage-door Johnny crush”, he confesses, “but you won’t print that, will you?” –

Yes?---I knew I was using a very outmoded expression. It’s because I had talked about the number of things which aren’t mentioned in this article. But I wasn’t stalking her. I just happened to see her in a number of productions. It’s very hard to get irony into print, hence the tag:

...but you won't print that, will you?

"because I'm kind of pulling your leg, Alissa". It was not laugh-out-loud funny, but it was intended to be whimsical.

521 He gave the following more detailed explanation in the course of cross-examination:

There's just one more question I need to ask you, Mr Rush, and that is your – the use of the expression "stage-door Johnny" in the interview that you gave prior to the commencement - - -?---Yes.

- - - of Lear. Now, a stage-door Johnny is a kind of starstruck person with a crush on one of the performers in the show, isn't it? That's the meaning of the term?---I think it dates back to early 20th century – World War I era – something like that.

Yes?---That is, it's – that it's derivation.

Yes. The word you use in the interview was – or the phrase you used was "stage-door Johnny crush", wasn't it?---Yes. In an ironic delivery. That may not come across in print.

Well - - -?---But I did add the tag to the journalist to go, "But you won't print that, will you?" because I'm saying it – the frequency of the number of times I've mentioned in the interview, which she didn't complete – I had seen this young actress a number of times. "It almost feels like I've got a stage-door Johnny crush but don't print that, will you, because I haven't. It's just coincidence."

Yes. But you see, Mr Rush, you didn't say, "It almost feels like I had a stage-door Johnny crush on the actress," did you? You said, "I immediately developed a stage-door Johnny crush," when you saw her in *A Midsummer Night's Dream*, wasn't it?--
-Yes. It was in comparison to the virtues I had extolled about Ms Buday and Ms Thomson – its intention to make Ms Norvill feel good about being part of this company – of this triumvirate of interesting women that this play demands. It was flip.

What you said was:

I saw EJ play Ophelia in *Hamlet* for the MTC and I developed an immediate stage-door Johnny crush –

and then you followed that up with:

But you won't print that - - -

?---I was a fan.

Yes. Well, what you said was "an immediate stage-door Johnny crush"?---I did. That's what - - -

Yes?---That's what's in print. Yes.

Yes. And that's what you - - -?---The implication being I liked her work. I thought she was good in the classical repertoire.

You also thought she was very attractive, didn't you, I take it?---No. That wasn't the implication.

522 The effect of Mr Rush's evidence was that, consistent with the general tone and tenor of the interview as a whole, he intended the comment to be humorous and complimentary of

Ms Norvill. He did not intend to offend her, or convey in any way that he was in fact “star struck”, let alone sexually attracted to Ms Norvill.

Other evidence

523 Mr Armfield’s evidence was that he recalled that Mr Rush, Ms Buday, Ms Thomson and Ms Norvill returned from the interview in “high spirits”. Ms Buday’s evidence was that she did not observe Ms Norvill to be in any discomfort either during or after the interview. It is readily apparent that Ms Buday did not consider that anything said by Mr Rush during the interview was in any way offensive or inappropriate. Neither Ms Buday nor Mr Armfield were cross-examined about the interview.

Findings

524 Nationwide and Mr Moran made virtually no submissions concerning this allegation. It can be dealt with shortly.

525 It is readily apparent from the nature and content of the article itself that the statement made by Mr Rush during the interview with *The Sydney Morning Herald* journalist in November 2015 about having a “stage-door Johnny crush” on Ms Norvill was intended by him to be a light-hearted and humorous way of praising Ms Norvill. The tone and tenor of most of the article, and most of the statements attributed to Mr Rush, was one of humour. Could it seriously be suggested that Mr Rush was being serious when he referred to having a “regal stud-muffin quality”, or when he said that he “hand-picked” the three actors who played his daughters? It should be noted that the journalist observed that Mr Rush cackled when he made the latter statement.

526 I accept Mr Rush’s evidence that he used that “outmoded” expression “stage-door Johnny crush” with a sense of irony, that when he made that remark he was or was intending to be “flip” or humorous, and that he was intending to compliment Ms Norvill and to convey that he liked her work. It may perhaps have been a poorly selected and regrettable expression to use to praise Ms Norvill, however I reject the contention that Mr Rush was intending to depict Ms Norvill as a “sexual object rather than as a serious skilled actress” or that he intended to make Ms Norvill feel uncomfortable, embarrassed and compromised.

527 I also reject Ms Norvill’s evidence that she felt humiliated, uncomfortable and disrespected when Mr Rush made this statement. Her evidence in that regard was essentially uncorroborated by and inconsistent with the evidence as a whole. As noted earlier, Mr

Armfield observed that everyone returned from the interview in high spirits. Ms Buday did not see or consider any discomfort on Ms Norvill's part during or after the interview. In the very same interview Ms Norvill described working with Mr Rush in positive terms; that she appreciated his playfulness and loved his ebullience. Would she have said those things if she was feeling humiliated, uncomfortable or disrespected as a result of what Mr Rush had said? It would appear from the article that Mr Rush's "stage-door Johnny crush" remark was made towards the beginning of the interview. Ms Norvill also never subsequently complained to anyone about the interview or anything Mr Rush said during it. Indeed, she gave a later interview to a different journalist in which she made equally positive remarks about what it was like working with Mr Rush.

528 It should also perhaps be added that the expression "stage-door Johnny crush" appears positively quaint and tame when compared with some of the language used by Mr Rush and Ms Norvill during their email text message exchanges during 2014. During those exchanges Ms Norvill referred to Mr Rush as "Jet Lee Thrust", "God of Generic Lust", "GR BANG BANG" and "Giddy McHeadRush" and referred to herself as "Meringue Jam Novelty" and "Ear and Jam Novelty". Perhaps more significantly Mr Rush referred to Ms Norvill as "nourishing delicious Ovaltine Oval", "Erogenous Navel (ooh!)" and "Aero Ginger Nutella". As for the last-mentioned name, Mr Rush said in the text that it was "more your [Ms Norvill's] exotic blend of textures, taste and tang ... I really look fwd [forward] to another serving of curious charm tonite". Ms Norvill did not suggest that she felt humiliated, uncomfortable or disrespected by any of those exchanges. Indeed, she said that she saw nothing wrong with them. Some might think, however, that having regard to the previous exchanges between the pair, it was somewhat disingenuous of Ms Norvill to suggest that she felt humiliated, uncomfortable or disrespected by the "stage-door Johnny crush" joke made by Mr Rush, even though, unlike the earlier exchanges, that joke was made in a more professional or work-related setting.

529 There is no merit in Nationwide and Mr Moran's contention that, in making this statement to the journalist, Mr Rush engaged in "scandalously inappropriate behaviour", or "scandalously inappropriate behaviour of a sexual nature". That contention is rejected. It almost self-evidently follows that I reject any contention that Mr Rush was a pervert or a sexual predator because he made this statement to the journalist, or that the statement was capable of proving the substantial truth of any of the imputations conveyed by the relevant publications.

Allegation five: Stroking or brushing Ms Norvill's breast

530 The essence of this allegation was that, during the final scene, Act V Scene III, in one of the preview performances of the play, while Ms Norvill was lying on the stage, Mr Rush moved his hand so that it traced down Ms Norvill's torso and across the side of her right breast.

531 This was perhaps the most serious allegation against Mr Rush.

Ms Norvill's evidence

532 Ms Norvill's evidence concerning this incident was as follows:

Yes. Now, up until the preview week I want you to think back and think about act 5, scene 3, the point where you've been brought onto the stage and your dead body has been placed down on the floor of the stage?---Okay.

And Mr Rush is beside you at that point?---Yes.

Yes. Up until preview week, I want you to tell the court – and take your time – what motions Mr Rush made with his hands with regard to you up until preview week, and take your time describing it?---I remember the – the choreography, I guess, or the gestures, the touching that Geoffrey would do in rehearsal was he would use his left hand to touch the right side of my face. Sometimes he top – he touched the top of my head and – and my shoulder but it was mainly my face, and then he would use his right hand to go down touch – touch stroke down my arm, sometimes grab, and then he would hold my hand, and sometimes he would lift me up and – and, like, hug me, I guess, cradle me. That was what the touch was.

All right. And when you say sometimes he would lift you up, was that something that started happening at a particular point?---Yes, it started happened in – in front of audiences. I don't believe – it may have happened once or twice in rehearsal, but I mainly remember the touch being on the face and on the right side of my arm and on my hand.

Thank you. And when you say lift you up, which part of your body are you referring to?---My – my upper torso, my – he would pick me up and kind of hug me.

All right. And when he picked you up, what did he – how did he do that? Put his hands behind your back or something? How did he do it?---Yes, his hands would be on my back.

Right. Now, the hand motions that you've described were the – I think it was the left hand on the face and the right hand stroking down your arm and then holding your hand?---That's right.

Yes, those motions you've just described a few minutes ago?---Yes.

Did that change in some way one night during the preview period?---Yes, it did.

All right. Now, could you tell the court what happened?---I remember Geoffrey placed his – I had my eyes closed, Geoffrey placed his hand on my – my face, and then his other hand touched under my armpit or just near my armpit and stroked down my - across my right side of my right breast and onto my hip.

You've made some hand motions there. How far up – you describe this very well –

you said the right side of your right breast?---That's right.

Yes. Exactly where was his hand in relation to your right breast?---He had maybe three or four fingers and it was halfway up my breast.

All right?---Didn't touch my nipple, I don't think, but I remember - - -

Well, the witness indicated, I think, the palm of her hand probably – we just do this so the transcript can record it, you understand, Ms Neville [Norvill]. The witness indicated the palm of her hand on the side of her breast and her fingers at least over part of the top breast?---That's right.

533 According to Ms Norvill, this occurred while Mr Rush was delivering a monologue. The motion lasted for about “eight or ten seconds” and Mr Rush's hand was on her breast for “[t]wo, three, four seconds”. The touch was “slow and light and pressured”. Her evidence was that the action was such that she thought it was deliberate: “it didn't feel like an accident”.

534 Ms Norvill agreed that Mr Rush's touch of her breast may have been seen by the audience, but not necessarily. Her evidence in that regard was:

Second, if he had done that, at least four and probably more members of the cast must have seen it?---They may have seen it, yes.

I'm sorry?---They may have seen it, yes.

Indeed, the audience would have seen it if it lasted for as long as you said, which I think was 10 seconds, something like that. I'm sorry, two, three, four seconds, you actually said.

MR BLACKBURN: No - - -

MR McCLINTOCK: - - - the audience would have seen it, wouldn't they?

MR BLACKBURN: - - - she said eight seconds.

MR McCLINTOCK: Or eight seconds. If it had lasted eight seconds, as Mr Blackburn suggests you said, the audience would have seen it, wouldn't they?---No, not necessarily. I was laying on the ground. I said it was on the right side of my torso, which was upstage. The audience probably wasn't even watching me. I'm a dead body on the ground. They're looking at the man delivering a speech, him emoting on stage.

And he's emoting over your body, isn't he, and he's touching it?---Yes, he is.

They must have seen you. This is a scene, Ms Norvill, of a father grieving over his daughter?---Exactly.

535 Ms Norvill's evidence was that, at the time Mr Rush touched her, she was lying on her back a few metres from the front of the stage. The front row of the audience would have been a metre back from the “lip” of the stage. Ms Norvill also agreed that Mr Koman, playing the Earl of Kent, and Mr Winter, as Edgar, were standing close to where she was lying on the

stage. Mr Koman was about a metre from her looking down at her. Ms Norvill agreed that if they were looking directly at “the action” they would have been able to see Mr Rush’s touch.

536 It is clear that Ms Norvill’s evidence was that Mr Armfield saw Mr Rush touch her breast. Mr Armfield was sitting in the body of the theatre with the audience during the preview performances. As for why Mr Armfield saw the touch, but other people in the audience would not necessarily have seen it, Ms Norvill gave the following evidence:

You said also that Mr Armfield saw it, didn’t you?---I believe that he did, yes, because he gave me the note.

You see, Mr Armfield was in the audience during the previews, wasn’t he?---I believe that he was.

If he saw it, the audience must have seen it, Ms Norvill; that’s correct, isn’t it?---No, not necessarily. Neil is looking at every actor on the stage. He would be scanning, looking for things, looking for body movements. The audience, I imagine, will be staring straight at Geoffrey Rush delivering the speech of his life. So, no – no.

537 In any event, as for the oral “note” Mr Armfield gave to Mr Rush at the meeting following this performance, Ms Norvill’s evidence was that Mr Armfield told Mr Rush that his touch in the final scene had “become unclear and creepy and that he should make it more paternal and – and just go back to touching me [Ms Norvill] on the face and the arm”.

538 Ms Norvill did not recollect whether Mr Rush responded in any way.

Mr Winter’s evidence

539 Mr Winter’s evidence was that, one night “towards the beginning” of the performances of the play, he saw something different occur during Act V Scene III. His evidence was:

And what did you see on this occasion?---On that occasion I saw Geoffrey’s hand cupping around the bottom of EJs breast, which was something that I hadn’t seen before on stage and it – I – I definitely - - -

....

HIS HONOUR: Is there anything else that you saw that you – in terms of what you actually saw, as opposed to what you were thinking at the time?---No, that was the action.

Yes?---His hand on her breast.

Yes.

MR BLACKBURN: Could you describe with a bit more precision whereabouts on the breast the hand was?---The nipple was not covered. It was sort of more of a cupped position. I – it’s a little bit tricky to describe, I guess. But I would say the sort of side and under. So not like a squeeze, if – if you will. Not like that. It wasn’t like that.

....

Will you?---I would say the gesture was – so the – the nipple was not covered and it was sort of around the – the bottom of the breast, side and bottom of the breast.

And you had your hand – you had your right hand against - - -?---Left.

It was the left?---That's – that's my recollection of it.

So Mr Rush's left hand; is that - - -?---No, my – the picture in my mind - - -

Yes?--- - - - is that it was his right hand on her left breast; that's my memory of it.

540 Mr Winter was initially unable to give an estimate of how long Mr Rush's hand was in the position he described, though he subsequently gave an estimate based on the number of "thoughts" he had at the time. His evidence in that regard was as follows:

HIS HONOUR: Well, just confine yourself to describing how long an estimate of time in seconds presumably?---Well, I guess I had about four or five thoughts, so that must – I would equate, you know, a thought, a second, second and a-half. So I would say around – I can't be specific, but I would say above five.

Seconds?---Seconds.

Yes?---And that's equating that with thoughts.

So - - -?---Yes.

- - - four or five thoughts, a second per thought, that's the - - -?---I'm just saying that – I mean, you have to - - -

I'm not making fun of it, I'm just understanding your - - -?---No, no, it's just I was on – on stage at the time obviously.

Yes?---I was not watching the clock.

541 Mr Winter made it clear in his evidence that his recollection was that he saw Mr Rush's right hand in a "cupped" position on Ms Norvill's left breast. In cross-examination, Mr Winter agreed that this touch on Ms Norvill's breast lasted for two, three or five seconds. At the time this occurred, Ms Norvill was lying on the stage with her left side facing the audience. It may be recalled that the performances, including the preview performances, were essentially sold out, so there would have been an audience of about 960 people on the night in question. Nevertheless, Mr Winter appeared to be unwilling to accept that Mr Rush's actions would most likely have been seen by at least some members of the audience. His evidence in that regard was as follows:

Yes. You would expect, wouldn't you, if Mr Rush had done what you describe, that at least some of that audience would see it, wouldn't you?---I'm not sure that they would have, no.

I see.

HIS HONOUR: Well, Mr Winter, if Mr Rush had done what you've described, his right arm must have come right across Ms Norvill's body?---Yes. It was in the laying down sort of process there and it – it – it – you know, the lip of the stage. I think it is possible that they would not have caught that.

Sorry, just so I understand that answer, your recollection is this occurred in the course of laying Ms Norvill down on the stage?---After that.

After it?---After she has been laid down.

I see?---Yes.

....

Now, just to be absolutely clear about it, it would have been something that the audience, or at least some members of the audience, must have seen, Mr Winter? --- Well, his hands were going up her whole side of her body.

Mr Rush's evidence

542 Before referring to Mr Rush's evidence concerning this allegation, it is relevant, so as to provide some context, to refer to Mr Rush's evidence concerning Act V Scene III generally.

543 Mr Rush's evidence was that the "death entry" for Act V Scene III was the "biggest challenge of the whole production" and could "make or break a performance any night" and that "there was no way of coming in under par on that level of raw primal grief". Prior to performing it, Mr Rush would go to his dressing room and "sit very quietly and begin a process of going into as neutral a mental space as [he] could, working from that, the profundity of the depth of that empty world". His walk to the back of the theatre, before his entrance onto stage, became a "kind of walking meditation", during which he was "shedding [his] mind" because he wanted the "howl" when he entered the stage "to burst out of [him] without any expectation".

544 In his evidence, Mr Rush explained in some detail the technical process of lifting Ms Norvill and carrying her on stage and then laying her on the stage floor. He described how there might be slight variations between each performance in relation to exactly how Ms Norvill was placed on the floor:

And Ms Norvill was extremely good at playing a very credible dead. But there would be slight variations some nights as to whether her head lolled a little to the left or a little to the right or whether, particularly here, we would lay her on her back, but sometimes her left arm might be away from the body or might be closer to the body. But, generally, you could overlap an image from each production and you fairly close without it looking robot-like.

545 Mr Rush described his mental preparation for the scene where he gives the monologue looking grief-stricken over the body of his daughter, Cordelia, in the following terms:

When you're playing that grieving father, Mr Rush, on stage at those points, what were you thinking about?---Despite Ms Norvill being a very good dead person, I had worked with Neil on two other productions – one was *Diary of a Madman* and one was *Hamlet* – that contained similar end moments to the play of complete shattering, overwhelming grief. In *Diary of a Madman* it was the Madman was incarcerated in an asylum thinking he was King Ferdinand VIII, but couldn't work out why he was being tortured with cold water. And the last scene flashes up and he's screaming in agony and then makes his way forward to his upturned table. It's a remnant of where he used to write his diary. And Gogol takes him on a mental journey across Russian to find his mother to help him from when he was a child and Neil said, "You need to make that personal journey to your own mother in Toowoomba." Similarly with the death of *Hamlet*, when *Hamlet* died, "now cracks a noble heart", it was Horatio absolutely imploding emotionally. Eight times a week that's a very big ask and it's not a scene that you want to fake.

What about *Lear*?---For this scene I always imagined that it was my own real-life daughter.

Take your time, Mr Rush?---And that she had been hit by a bus and on the street near where we live in Camberwell and I knew she was gone. I carried her to the footpath and every night I would reinvent that scene in my mind because she's in her early to and she was my daughter and I needed that – I needed that trigger.

546 Mr Rush denied ever deliberately tracing two or three of his fingers across the side of Ms Norvill's right breast in an eight-second motion. It is important to set out the entirety of the detailed evidence he gave in answer to the proposition that he did just that:

In one of those days during the previews, your hand didn't touch her arm and face as you had done before, but I want to suggest, first of all, you touched the right side of her face with your left hand holding it still there for a couple of seconds?---Yes.

And then with your right hand you traced down the side of her torso with two or three fingers and across the side of her right breast?---That's not specifically an accurate description. I always touched her face because the – the – the use of her hair for the – the feather was pretty much there from the get-go because we had to discuss do you want it to be an a – an a – a delusional feather, and I look at the idea of her hair being – that it is delusion that he's thinking I have a feather. He's in a pretty mentally shattered state at this point. Neil and I had had a discussion at some point based on the notion of my own daughter. He said, "What – what do you think would happen. And I said, "Well, I don't know how to do this," but there's a point somewhere in the script she will come no more that I wanted to feel the silhouette or the halo of her torso from her face to her shoulders down her arms that this is no longer alive. And we're not even at the end of the scene where it goes deeper, and he goes, "Never – all of these people are never, never, never, never, never going to be coming – be alive". And it – it's his own fault. He has brought on the hubris that he is responsible for the way he led his life, his kinship and let things get run out of control. So in that moment, depending on whether Ms Norvill's arm fell away from the body, I caressed down, but it wasn't at breast level. It was down torso level with the image of a silhouette, a halo around an empty, lifeless vessel.

Thank you. Now, let me be very specific, though, about what I'm putting to you. The touch with your right hand began at just below shoulder level – I'm just talking about the height or level here, if you like. I'm putting to you that the touch began just below shoulder level and in a continuous motion – and I will say in a moment where the fingers went, but in a continuous motion, the motion ended about eight

seconds later a bit below the breast, and that's the first proposition I'm putting to you. The second proposition I'm putting to you is that the fingers of your right hand in that eight-second motion from below the shoulder to a bit below the breast deliberately traced across the side of Ms Norvill's right breast, not, as you've said, on the side of the body but deliberately across the side of the right breast?---No. That was – if – did a thumb accidentally touch the lower part of her chest? Possibly. I wasn't monitoring this with detachment. The image was – it – it – it was the arm on this side that often, being lowered – when you're dead, you don't readjust because that means you're alive. Sometimes her arm would fall out that way, but mostly she fell with her arms pretty much next to her body like a catafalque, and that was the – the – the silhouette – the very outline if I was drawing her with a pencil. It was not a – it was not a deliberate attempt to run my hands across her breasts at any moment.

....

Mr Rush, the proposition I put to you that you moved your two or three fingers of your hand down slowly in an eight-second motion down the side of her right breast, are you saying in the very detailed answer that you've given that that could have happened?---By the way you're describing it, Mr Blackburn, you're – you are actually going down across your own male areole. That is not the area and not the image that I was working towards. It was the – it was the outline – the extremity of corpse.

Well, I certainly didn't - - -?---So I'm saying, no, there was – there was no touching of breast.

I'm certainly not suggesting - - -?---Did a finger graze the lower part? Possibly.

Yes. I'm certainly not suggesting, Mr Rush, that you put your hand or moved your fingers over the top of Ms Norvill's right breast. What I'm suggesting to you is that you moved your fingers down the side of her right breast?---It was the interior of my palms wanting to feel the loss of her soul.

Well, thank you, but my question is: could that have happened? Could you have moved two or three of your fingers down the side of her right breast?---No. That couldn't have happened. There would have been no deliberation in such a movement at that point – in that moment of the play.

547 In summary, Mr Rush appeared to accept that there was a possibility that while performing this scene, one of his fingers may have touched or grazed the lower part of Ms Norvill's chest, but he denied moving two or three of his fingers down the side of Ms Norvill's right breast. His evidence was that that could not possibly have happened. He denied deliberately touching Ms Norvill on the breast.

548 As for the suggestion that Mr Armfield gave him an oral note after one of the preview performances to the effect that Mr Rush's performance of the scene had become "unclear and creepy" and that he should make it more "paternal", Mr Rush gave the following evidence:

You mentioned Mr Armfield's direction there. Did he ever say – give you a direction that you should be more paternal because that scene was becoming creepy and unclear?---I don't recall the words creepy. They seem unfamiliar in Mr Armfield's mouth in front of a company that he would address a principal actor with a slightly

pejorative word. Paternal, if he did say it, I don't recall that specifically. But he knew from what I said earlier about making that journey to my mother when I was 8 in *Diary of a Madman*. He said, "You know what to do. This is all about Angelica." That would possibly be the inference of his subtext.

Did Mr Armfield ever complain that you did anything inappropriate in relation to Ms Norvill on stage either during rehearsal or performance or any time?---No, not at all. But he was very pick or pernickety about don't do incidental – don't ever, like, pat her with grief because it – on that – in that void it doesn't look strong. It looks petty. You know, he would say, "I would much rather have movements between tableaux of touching her shoulder and her shin. But to keep minimalizing it and keep an undercurrent of strength broken only by the rhythm of her dead body being embraced.

Mr Rush's evidence concerning Mr Trewhella's email

549 It is relevant, in the context of this allegation, to consider Mr Rush's evidence concerning his conversation with Mr Trewhella shortly before 14 November 2017. As was noted earlier, Nationwide and Mr Moran submitted that parts of Mr Rush's evidence concerning his conversation with Mr Trewhella cast doubt on Mr Rush's credibility and the reliability of his evidence as a whole.

550 The relevant part of Mr Trewhella's email was extracted earlier. In summary, Mr Trewhella stated that he had been telephoned by Mr Rush "early Friday evening", which, by reference to the date of the email, would have been Friday, 10 November 2017. Mr Trewhella recorded in his email that Mr Rush had said that he had telephoned to give Mr Trewhella a "heads up" that he had been contacted by the media for a response to the "HW award situation". That was a reference to the fact that AACTA had decided to give Harvey Weinstein an award in 2013 and that, despite the fact that Mr Weinstein never travelled to Australia to accept the award, the media were querying why, in light of the then recent scandal involving Mr Weinstein, the award had not been revoked or rescinded.

551 Mr Trewhella also recorded that, "in passing", Mr Rush had also told him that he, Mr Rush, had been "baited" on an "issue involving him which in his view was bullshit". Mr Trewhella stated that, in that context, Mr Rush had said that the only "issue" he could think of was the scene in *King Lear* where he carried his "dead daughter". Mr Trewhella recorded that Mr Rush said that that was a difficult scene and "whilst he thought the carry position was right for all, there was allegedly some discomfort".

552 Mr Rush was cross-examined at some length about Mr Trewhella's email and the terms of his discussion with Mr Trewhella. He ultimately agreed that he had a telephone conversation with Mr Trewhella on or around Friday, 10 November 2017, though he was not sure exactly

when that conversation occurred. He said that the conversation occurred “at the end of a very frantic day”. There could be little doubt that Mr Rush’s telephone call to Mr Trehwella was prompted by the email his agent had received from the journalist from *The Australian* earlier on 10 November 2017. Mr Rush did not dispute that.

553 As for the terms of his conversation with Mr Trehwella, Mr Rush agreed that, in the context of his discussion with Mr Trehwella concerning the media’s treatment of the Harvey Weinstein award issue, he had said something to the effect that, “by way of example”, he had been “baited” in relation to an issue involving him. He gave the following evidence in relation to this part of the conversation.

You did say that to Mr Trehwella, didn’t you?---Well, the only issue – this is his reporting – the only issue I could think of in talking to Damian, “The only thing I can think of, Damian, is possibly this event that’s likely to be in the paper tomorrow.” And I wanted him to know, should it be published and talked about that the board would have to make a response or they would be phoned or they would have press at their door or whatever. I was honourably in my ambassadorial role as president alerting him to what the media were up to.

554 Mr Rush was pressed about the statement in the email which suggested that he had told Mr Trehwella that the only thing that he could think of, in terms of the “issue” that had been raised about his conduct, was that there was “allegedly some discomfort” in the scene in *King Lear* where he carried his dead daughter. His evidence in relation to that statement included the following:

Well, someone had made an allegation to you, I take it, that there had been some discomfort suffered by Ms Norvill in the course of this scene?---No, that is not true. I think that is Damien in this rather administrative kind of speak relaying the broader gist of my conversation. I look at that – I would never had said it was a difficult scene. I might have said, I don’t know, Damien, whether you know the play very well, but it’s a scene of great emotional complexity. It’s the Everest that everyone not saying it was an awkward scene or it was a troublesome scene.

.....

I was speculating, again, that the only person I made contact with in the whole play – I’m assuming this could be – I can’t define it yet, because that only really happened with any definition when Mr Moran’s articles – emails came through to me on Wednesday 29 November. Up until then, we were thinking, well, this could be – it was very conditional tense.

Well ---?---

There was allegedly some discomfort.

Maybe I said – **I don’t know what it is, it could be a question of she felt unsafe because I’m old and I might drop her**, or – I’ve got ---

(Emphasis added.)

555 As for whether he in fact said that “there was allegedly some discomfort”, Mr Rush gave the following evidence:

That’s his version. My version was, probably – exactly what I said. “You know how old” – Damien and I have a very cosy, and easy and – he’s a big country boy, but he’s a very smart administrator. I could easily say to him, “You know how old I am, Damien. My back is not so good. But I knew I would never drop her. Maybe – maybe holding someone here, makes them feel very vulnerable that they could dropped”. And it’s another speculation that that could have led to a complaint. I don’t know.

Did you say a minute ago that you wouldn’t have said or you didn’t say it was a difficult scene? Was that the effect of your evidence? I may have got you wrong?--- No, that – this is Damien reporting to a - - -

Yes?--- - - - group of board members.

Yes?---My connection with him would have been, “I don’t know how well you know Lear, Damien, but it was one of the big scenes. It was, you know, emotional. It was, for me, one of deep engagement, but it seems as though there was something to warrant a complaint about carrying her onstage” which, ultimately, and that – even long after The Daily Telegraph printed that, I was always astonished that the fact checkers never found out, they always referenced inappropriate behaviour went on while carrying her onstage.

Now, Mr Rush, just to be clear about what I’m putting to you so that there’s no mistake about it, I have asked you questions about those words:

...there was, allegedly, some discomfort –

The proposition I’m putting to you is that you did say words to that effect to Mr Trewhella:

...there was, allegedly, some discomfort - - -

?---I – I wouldn’t have said it as – as business-like as that. I would say, perhaps, it was an issue of discomfort, or an issue of fear or – or something not being right for the actor, without fully knowing yet - - -

And the second – I’m sorry?--- - - - what those alleged accusations turned out to be.

556 While Mr Rush’s answers were long-winded and not easy to follow, ultimately, he appeared to be taking issue with the proposition that he would have used the words “allegedly some discomfort”. He was saying that those were Mr Trewhella’s words, not his. The basis of that evidence appeared to be that Mr Rush did not speak in such a “business-like” way.

557 Perhaps more significantly, Mr Rush denied that he said those words to Mr Trewhella because he was conscious that he had caused some kind of discomfort to Ms Norvill. His evidence in that regard was:

The second proposition I am putting to you is that you said words to that effect because you were conscious that you had caused some kind of discomfort - - -?---No.

- - - to Ms Norvill?---No.

And those words indicated a consciousness, on your part, that you had, in some way, disturbed her?---But this was – these were all speculative analyses by me and my wife about where is all this coming from. We were trying to narrow it down, and hitting brick walls.

558 Nationwide and Mr Moran submitted that Mr Rush's evidence concerning his conversation with Mr Trewhella indicated that Mr Rush's evidence was generally unreliable. They contended that Mr Rush's attempt to suggest (in the passage highlighted in the extract above) that he may have told Mr Trewhella that Ms Norvill experienced discomfort because she felt unsafe because he was old and may drop her was ludicrous. In Nationwide and Mr Moran's submission, by the time he was having this discussion with Mr Trewhella, he knew that the allegation that had been made about him concerned some sort of sexual impropriety. That was why he raised this issue in the context of the Harvey Weinstein award issue. Nationwide and Mr Moran submitted that, in those circumstances, Mr Rush's apparent suggestion that he might have told Mr Trewhella that the allegation may have related to Ms Norvill fearing that he was going to drop her was disingenuous.

559 There is some force in Nationwide and Mr Moran's criticism of this part of Mr Rush's evidence. It was not impressive. He appeared to be taking issue with Mr Trewhella's summary of their conversation and speculating about what he may have said to Mr Trewhella and what he may have intended to convey. He did not appear to have any actual recollection of the words he said to Mr Trewhella.

560 I accept that Mr Trewhella's account of what Mr Rush told him was likely to be an accurate summary. In that regard, Mr Trewhella's email was in many respects similar to Ms Crowe's email. Mr Trewhella was reporting a serious issue to the AACTA board. While it may be accepted that Mr Trewhella's summary of his conversation was not intended to be a transcript or verbatim account of exactly what Mr Rush had said, there is no reason to suppose that it was not an accurate summary. Had Mr Rush in fact said that the alleged discomfort related to a fear on the part of Ms Norvill that Mr Rush might drop her, that is something that Mr Trewhella would most likely have recorded. I accordingly do not accept Mr Rush's evidence in relation to what he said to Mr Trewhella in that regard.

561 What, however, flows from that finding? The first and most important point is that I do not accept that Mr Rush's unimpressive evidence about parts of his conversation with Mr Trewhella casts down on the reliability of his evidence as a whole.

562 The terms of Mr Rush's conversation with Mr Trewhella was undoubtedly a potentially important issue. It is tolerably clear that, by the time of that conversation, Mr Rush had, at the very least, surmised that Ms Norvill was the complainant. He also appeared to have formed a view about the possible nature of the complaint. The conversation which Mr Rush had with Mr Trewhella accordingly raised legitimate questions as to how Mr Rush had arrived at that position. The precise terms of the conversation itself, however, was somewhat of a side-issue. The more important issue was exactly how and why Mr Rush had surmised that the complaint related to the scene in which he carried Ms Norvill onto the stage and whether, as Nationwide and Mr Moran contended, that revealed some sort of consciousness by Mr Rush that he had in fact caused discomfort to Ms Norvill.

563 In his evidence, Mr Rush made it fairly clear that after he become aware, through his agent, that the STC had said that it had received a complaint that he had engaged in "inappropriate behaviour", he and Ms Menelaus attempted to work out exactly what the complaint may have involved, beyond the general description of "inappropriate behaviour", and who may have made it. It should be noted that, at this point in time, the STC had not given Mr Rush, or anyone else for that matter, any details of the complaint or the complainant. Mr Rush's evidence was that he was essentially speculating about the nature of the complaint and the identity of the complainant because he had been provided with no information about those matters. Ultimately, that speculation led him to believe that the "most likely scenario" was that the complaint related to the scene where he carried Ms Norvill onto the stage because Ms Norvill was the only person with whom he made physical contact in the entire play.

564 On the whole, I do not consider that Mr Rush's evidence about how he came to surmise that the most likely scenario was that the complaint related to the carrying scene was implausible, improbable or otherwise unreliable. Perhaps more importantly, I do not accept that his evidence in that regard revealed a consciousness on his part that he had in fact caused some kind of discomfort to Ms Norvill in the process of carrying her onto the stage. Mr Rush denied that proposition when it was put to him.

565 What is rather curious about this aspect of the case advanced by Nationwide and Mr Moran is that, as events transpired, Ms Norvill's complaint did not in fact relate to anything that occurred while Mr Rush carried her onto the stage, at least on the account given by Ms Norvill in her evidence. Rather, it related to the touching of her back before she was picked

up and carried onto the stage, and the touching of her breast while she was on the stage. Thus, Mr Rush's speculation as to the nature of the complaint turned out to be incorrect.

566 In all the circumstances, I am not persuaded that Mr Rush's evidence concerning Mr Trewhella's email, considered as a whole, undermined his credibility or the reliability of his evidence generally. Nor did it reveal any consciousness of guilt, as it were, in relation to the actual allegations made by Ms Norvill.

Mr Armfield's evidence

567 Mr Armfield's evidence in relation to this allegation was as follows:

Could I ask you this: did you ever see Mr Rush brush Ms – brush the side of Ms Norvill's breast with a hand?---Not as a – yes, like, to ask someone to pick up someone's torso and – and hold it against – against his head, as – as I asked Geoffrey to do, I would have thought might easily mean – like, I suspect it would be impossible to – to do it without – without your hand – without his hand touching her breast. I certainly never saw any gratuitous action outside the – the action of what was necessary for – for – for – for his manipulation of her body in that scene.

568 It would appear that what Mr Armfield was saying was that the dramatic nature of the scene, and the inevitable contact between Mr Rush and Ms Norvill that it required, meant that Mr Rush's hand might have inadvertently touched Ms Norvill's breast, but that he never saw any "gratuitous" action by Mr Rush outside of what was necessary to perform the scene. Mr Armfield also said in evidence that he had watched the previews "like a hawk".

569 Mr Armfield said that he had no memory of saying to Mr Rush that his touching of Ms Norvill was becoming "creepy" or "unclear", and did not remember saying that Mr Rush should make the touch more "paternal". When pressed in cross-examination that it was likely that he used the word "paternal" during one of the oral notes given during the preview period, Mr Armfield gave the following evidence:

What I'm suggesting to you is, first of all – we will take this by stages – at some point, it's likely, isn't it, because of the lifting the torso of a two year old it's probable that you suggested to him or gave him a note that he should be more paternal in that – at that moment?---Had I – had I been making a criticism I would not have – I – I would not have made that suggestion in a – in – in the – the public notes forum. But I – we were always seeking for – we were always seeking for the most paternal image, the most – the most telling image of paternal love.

570 Ultimately, Mr Armfield disagreed with the proposition that he used the word "paternal" at any time during the preview period.

571 He gave similar evidence when pressed about whether he had ever given a note to Mr Rush about his performance of the scene becoming “unclear and creepy”:

Just coming back to the preview period, you were concerned, weren't you, that there was something – during that period, you were concerned that there was something developing in the way that Mr Rush made contact with Ms Norvill in that final scene when she was lying on the stage. You were concerned during the preview period, weren't you, that something had developed and the – the motions that he was – that he was using with his hands were becoming unclear in some way?---No – no, not at all.

And, indeed, creepy?---Not at all.

And you gave Mr Rush a note to that effect, didn't you, that the motions that he was using were becoming creepy and – unclear and creepy?---I've already said that I have no memory of such a note.

Well, you have no memory of it, but can I suggest to you that that doesn't mean that you didn't – you might have given it?---I would have thought it would – I – such a significant thing, I believe I would remember, had I said it.

....

I want to ask you this question: if you thought that Mr Rush's movements in that scene were in fact becoming creepy, you would have said it, wouldn't you?---Yes. I would have said it to him, yes.

And by that you mean – I take it you're saying, what, not in front of the cast?---Yes. That's right. I would imagine so, yes.

572 Ultimately, Mr Armfield denied saying to Mr Rush that his movements were becoming “unclear and creepy” because he could not imagine using the word “creepy”.

Ms Buday's evidence

573 Ms Buday's evidence was that she did not hear Mr Armfield use the words “creepy and unclear” at any time when speaking with Mr Rush about Act V Scene III and did not recall Mr Armfield saying, during one of the “note sessions”, that Mr Rush should “make it more paternal”, or that Mr Rush was being “creepy and unclear”, or anything like that. Ms Buday was not cross-examined about her evidence in that regard.

Ms Nevin's evidence

574 Ms Nevin's evidence was that she did not ever hear Mr Armfield give Mr Rush a note to the effect that he was being “creepy and unclear” in the final scene, or a note that he needed to be more “paternal”. Ms Nevin was not cross-examined in relation to her evidence on that topic.

Other evidence

575 The written notes made by Mr Armfield during the preview performances were in evidence. None of them referred to Mr Rush's performance of Act V Scene III being creepy or unclear. None of them included any suggestion that Mr Rush's performance should be more paternal.

Findings

576 I am not satisfied, on the balance of probabilities, that Mr Rush intentionally touched Ms Norvill's breast, in the manner described by either Ms Norvill or Mr Winter in their evidence, during a preview performance of Act V Scene III. I am not satisfied that the evidence of Ms Norvill and Mr Winter in respect of this incident was credible or reliable. I accept the evidence given by Mr Rush that he never intentionally touched Ms Norvill's breast. I also accept the evidence of Mr Armfield, Ms Nevin and Ms Buday that they did not see any such incident occur. I accept Mr Armfield's evidence that he did not give Mr Rush an oral "note" in which he described Mr Rush's performance of Act V Scene III in one of the preview performances as "creepy and unclear".

577 There are numerous reasons why I have arrived at these findings.

578 First, I consider the allegation and Ms Norvill's evidence concerning it to be somewhat implausible and improbable. Mr Rush was a dedicated actor and consummate professional. The STC's production of *King Lear*, under the direction of Mr Rush's long-term friend and artistic colleague, Mr Armfield, was a serious and significant artistic endeavour for Mr Rush. It was a challenging play, and Mr Rush spent many months preparing for it. He saw Act V Scene III as proving the biggest challenge in the play. It was a scene which could "make or break" the performance. He gave compelling evidence about how he would mentally prepare himself for that scene. He and Ms Norvill, as the grieving Lear and the dead Cordelia respectively, were the focus and centre of attention for the audience during the scene. Aside from Mr Rush, several members of the cast were standing nearby on stage and were apparently observing Mr Rush's actions during the scene. The preview performance in which the alleged breast-touching was said to have occurred was attended by over 900 patrons in a theatre in which many patrons would undoubtedly have had a "birds-eye view" of the stage.

579 The suggestion that Mr Rush would intentionally stroke or cup Ms Norvill's breast during this scene in a preview performance is highly implausible. It is inconsistent with Mr Rush's dedication and professionalism as an actor. It is entirely at odds with the unchallenged

evidence he gave about how he mentally prepared himself for the scene, which included meditating and emptying his mind and then imagining that Cordelia was his real life daughter who had been hit by a bus. How could Mr Rush maintain the focus and state of mind which he considered necessary to properly perform this difficult scene, and yet engage in such a base and crude action as intentionally stroking Ms Norvill's breast? How is the act of intentionally stroking Ms Norvill's breast compatible with the obvious need for Mr Rush to maintain a close professional rapport and relationship with Ms Norvill throughout the play? How could Mr Rush maintain the necessary dramatic relationship between Lear and Cordelia if he engaged in such behaviour? As Mr Rush himself asked rhetorically during his evidence, when describing the allegations as "preposterous": "what would that achieve in my relationship with, not only the actress, but my daughter Cordelia, in the play?"

580 And what would the audience think? Contrary to the evidence of both Ms Norvill and Mr Winter, it is abundantly clear that if Mr Rush did what Ms Norvill and Mr Winter claimed he did, it most likely would have been seen by many members of the audience. That is readily apparent from the evidence concerning the position that Mr Rush and Ms Norvill occupied on the stage during the relevant part of the scene and the positioning of their respective bodies at the point when the touching was alleged to have occurred. They were only a few metres away from the closest patrons. Many others would undoubtedly had an even better view from above. Mr Rush and Ms Norvill were the focus and centre of attention in this extremely dramatic scene. All eyes were on them. Mr Armfield, who was in the audience was, on Ms Norvill's account at least, able to see what had supposedly happened.

581 In any event, it would have been obvious to anyone who gave it even a moment's thought that there would have been an inherent risk that some members of the audience would have seen Mr Rush stroking or cupping Ms Norvill's breast, if in fact he had done so. The effect, one might imagine, would be wholly destructive of the scene. Was it even remotely plausible that Mr Rush, as the consummate professional, would have taken such a risk for such a fleeting moment of supposed sexual gratification?

582 Second, despite the very public occasion during which this incident was said to have occurred, aside from Mr Winter and Ms Norvill herself, there was no evidence that anyone else saw it occur. More will be said about the evidence of Ms Norvill and Mr Winter in a moment. The point, for present purposes, is that there was no evidence that any other member of the cast or crew, or any member of the audience, saw this incident occur.

583 Third, and critically, there could be little doubt that if this incident occurred, as described by either Ms Norvill or Mr Winter, it would almost certainly have been seen by Mr Armfield. He watched the preview performances “like a hawk”. He prepared notes during the performances so he could discuss and provide feedback and comments to the cast and crew the following day. A review of his notes, which were in evidence, reveals many extremely precise and minute observations about aspects of the various performances, together with Mr Armfield’s comments and suggestions concerning them. One of the notes in relation to Act V Scene III records, in relation to Mr Rush: “pull at collar of shirt”. Another records “I still think you [Mr Rush] should try pressing your face against EJ’s [Ms Norvill’s] looking towards prison” and that Mr Rush was “too far downstage lowering Cordelia to floor”. There could be little doubt that if Mr Armfield had seen Mr Rush do anything untoward, he would have recorded it in his notes and raised it with Mr Rush. Like Mr Rush, Mr Armfield was the consummate professional.

584 None of Mr Armfield’s notes refer to Mr Rush touching Ms Norvill’s breast, or touching it in a way which was “creepy and unclear”. None of them record that Mr Rush’s touch during the critical scene should be more “paternal”. Mr Armfield denied ever giving Mr Rush any such note and denied seeing “any gratuitous action outside the – the action of what was necessary for ... his manipulation of her body in that scene”. Ms Buday and Ms Nevin did not hear Mr Armfield ever give a note or direction to Mr Rush to the effect that his actions during the scene were creepy and unclear, or that he needed to be more paternal, as claimed by Ms Norvill.

585 There was also evidence which indicated that the stage manager, Ms Gilbert, also carefully watched the preview performances. She prepared performance reports which included notes about the performances. The reports were not limited to technical matters, but included audience reaction, actors missing lines and the intensity of the acting in certain parts of the performances. None of the reports refer to any untoward actions by Mr Rush during Act V Scene III in the preview performances, or anything “creepy and unclear”. Ms Gilbert was not called as a witness.

586 Fourth, Mr Winter’s evidence provided no real corroboration of Ms Norvill’s evidence in relation to the alleged breast-touching. That is because his description of the incident differed from Ms Norvill’s in many important respects. In her evidence, Ms Norvill described Mr Rush’s hand stroking down the right side of her right breast. She said that three

or four of Mr Rush's fingers were halfway up her breast for about two to four seconds. The touch was "slow and light and pressured". In contrast, Mr Winter's description included Mr Rush "cupping" his hand around the "side and bottom" of Ms Norvill's left breast for about four or five seconds. He did not initially describe any stroking action similar to that described by Ms Norvill, though when pressed about whether Mr Rush's actions would have been seen by the audience, Mr Winter somewhat inconsistently said: "[w]ell his hands were going up her whole side of her body".

587 The main issue with Mr Winter's version, however, is that on Ms Norvill's account, the stroking occurred on her right side, not her left side. The fact that Ms Norvill described the stroking of her right breast, whereas Mr Winter described the action as involving the cupping Ms Norvill's left breast, is by no means trivial or insignificant difference. Having regard to the position of Ms Norvill's body when this was supposed to have occurred, the action described by Mr Winter would have required Mr Rush to effectively reach over Ms Norvill's body and touch her left breast, which was downstage or closest to the audience. It would have involved a fundamentally different action which would have been even more obvious to the audience.

588 Fifth, even putting the inconsistencies between Mr Winter's and Ms Norvill's accounts to one side, I am not in any event persuaded that Mr Winter's account was at all reliable. Mr Winter's description of the event was given in an almost matter of fact manner. He said he would not describe what he saw as an "incident". Rather it was a "strange thing that occurred" or something "that happened and then we moved on". It does not appear that he discussed that "thing" with Ms Norvill at the time, or reported it to management or anyone else. It did not seem to adversely affect his attitude towards Mr Rush, as he still approached Mr Rush for a reference after the performances of *King Lear* had concluded. He also apparently continued to consider that Mr Rush was an "exemplary company leader".

589 Sixth, for the reasons already given, I have considerable doubts about the reliability and credibility of Ms Norvill and her evidence. That includes her evidence about this incident. That is particularly the case in relation to her evidence concerning Mr Armfield's oral note to Mr Rush and her claim that Mr Armfield told Mr Rush that the way he performed the scene during the relevant preview performance was creepy and unclear. As has already been noted, that evidence was unsupported by any other witness, including Mr Winter, and was for all intents and purposes denied and contradicted by Mr Armfield. I accept Mr Armfield's

evidence that he was unlikely to, and did not, give any such note to Mr Rush at one of the meetings attended by all the cast as Ms Norvill said he did. Furthermore, if Ms Norvill's account of Mr Armfield's note was to be believed, it is difficult to understand why Ms Norvill would not then have been emboldened to speak with Mr Armfield, or Ms Gilbert, or Ms Nevin or even Mr Rush about Mr Rush's behaviour.

590 Seventh, Ms Norvill's evidence about this incident seems completely at odds with the tone of the email she sent to Mr Rush on 7 January 2016. The contents of that email were detailed earlier in these reasons. Ms Norvill addressed the email to "Dearest Daddy deGush" and signed off with "xoxo", clearly denoting hugs and kisses. Ms Norvill's evidence was that she replied to Mr Rush's email in these terms because she was "just trying to keep it normal" so as not to cause any upset that might impinge on the final performances of the play. I reject that evidence. Ms Norvill could have kept it normal without referring to Mr Rush in the playful and fond terms that she had employed in the past. She could have kept it normal without signing-off with hugs and kisses. I am unable to reconcile the tone and tenor of this email with the events that Ms Norvill claims had occurred by this time.

591 Eighth, the critical consideration in relation to this allegation is whether Mr Rush's actions were deliberate. It appeared to be accepted by Mr Armfield, and indeed even Mr Rush, that given the dramatic nature of Act V Scene III, and the physical contact between Mr Rush, as Lear, and Ms Norvill, as Cordelia, that was necessarily involved, it was distinctly possible that Mr Rush might have inadvertently brushed or touched Ms Norvill's breast. It is difficult to see how an inadvertent and unintentional touch during this difficult and complex scene could possibly be characterised as scandalously inappropriate, let alone scandalously inappropriate behaviour of a sexual nature. Nor could any inadvertent touching possibly justify an imputation that Mr Rush was a pervert, or a sexual predator, or someone who had committed sexual assault.

592 There was no direct evidence that Mr Rush touched Ms Norvill's breast intentionally or deliberately. In the absence of an admission, proof that a person acted intentionally is more often than not a matter of inference from circumstantial evidence. Mr Rush certainly did not admit that he intentionally touched Ms Norvill's breast. In those circumstances Nationwide and Mr Moran's case that the touch was intentional was necessarily circumstantial or inferential. The only circumstantial evidence was the nature of the touching and how it occurred. Ms Norvill was in no real position to assert that the touching was intentional,

though she did say, in her evidence, that she believed that the touching was deliberate because “it didn’t feel like an accident”.

593 For the reasons essentially already given, I do not accept that the evidence given by Ms Norvill and Mr Winter concerning Mr Rush’s actions was reliable or credible. I accept that it cannot be excluded that Mr Rush might have brushed or touched Ms Norvill’s breast during Act V Scene III in one of the preview performances of the play. I am not, however, satisfied that if that did occur, it was intentional or deliberate on the part of Mr Rush. I do not consider that any such inference is available from the evidence considered as a whole. I accept Mr Rush’s evidence that he never intentionally or deliberately touched Ms Norvill’s breast during any of the performances.

Allegation six: Touching and brushing Ms Norvill’s lower back

594 This incident was alleged to have occurred during the final scene in a performance which occurred in the period between 14 and 26 December 2015. The essence of the allegation was that immediately before Ms Norvill was carried by Mr Rush onto the stage, and while she was standing on a chair offstage waiting to be picked up, Mr Rush placed his hand on Ms Norvill’s lower back over her shirt. He then moved his hand under her shirt and along the waistline of Ms Norvill’s jeans, brushing across the skin of her lower back. The movement is alleged to have been “light in pressure, slow and ... deliberate”, and to have lasted for about 20 to 30 seconds.

Ms Norvill’s evidence

595 Ms Norvill’s evidence in relation to this allegation was as follows:

All right. And what happened on that occasion?---I remember Geoffrey arrived at the chair and he placed his left hand on my lower back above my shirt and he moved his hand from right to left, as in rubbing or stroking my back. His hand then moved from above my shirt to below my shirt and I remember feeling his fingers touch my skin and he - - -

Well, just pausing you there, you said below your shirt, where did his hand go when it moved below your shirt?---It went to – up to the line of my jeans where my jeans and my skin meet.

Yes, underneath your shirt?---Underneath, yes.

Yes, yes. Sorry. Please go on. And then you said you remember him – his hand on your back?---His fingers.

His fingers, yes, yes?---His fingers kind of traced – traced the line where my jeans and my skin – lower – my lower back, I guess, across from – from left to right very softly and lightly.

So you said fingers traced across from left to right, how many fingers, do you recall?--I think it was three – two/three.

And you said it was at the point where the jeans met your, what, the skin – the bare skin of your back?---Yes.

Yes?---My jeans were, I think they were low risers, so it was my sacrum I guess.

Yes. And how long did the movement of his fingers on the waistline of – on the – “waistline” is probably not the right word, but I will call it that – how long did it take for his fingers to move from left to right along the waistline of your jeans and on your skin?---About – about 10 seconds.

Was the touch on your skin light in pressure or heavy in pressure or what?---It was – it was light. It was soft, light, light in touch.

Was it a steady movement across the waistline of your jeans or - - -?---Yes, it was.

Now, just going back slightly, the first thing you described was the hand on your back above the shirt?---Yes.

And you described, I think, a – was it a circular motion or a stroking motion or what at that point?---No, it – it was an – like a back and forth rubbing - - -

Yes?--- - - - from right to left like a – I don’t know, like, “I’m here”. A comforting kind of touch.

And how long did that part of it last – I mean, doing the best you can?---10 seconds, I – about 10 seconds.

And then you said that the hand moved down and under the flap of the shirt; is that right?---Yes, that’s right.

And the fingers moved up to your bare skin?---Yes, that’s right.

Yes. Okay. And was that meant to be one continuous motion that the hand went down and then under the shirt and then up to your skin?---Yes, I imagine it was.

When you received the cue what happened?---He – Geoffrey squeezed my hand. He took his hand out of my shirt and he squeezed my hand, and we went into the mechanic of the – of the lift. And I remember that because it was in juxtaposition to what had just happened; this “I’m with you” squeeze, and I – I remember the squeeze very vividly.

596 It is important to note that the effect of Ms Norvill’s evidence appeared to be that Mr Rush’s initial touching of her back was, as far as she perceived it, intended to be a “comforting” gesture; a gesture to let Ms Norvill know that he was there and ready to take her into his arms and carry her onstage. The implication appeared to be that she did not consider that part of the touch to be inappropriate. Rather, the action only became inappropriate when Mr Rush’s hand moved under her shirt. While Ms Norvill did not say so in terms, the clear implication from her evidence was that, at least so far as she perceived it, Mr Rush’s actions in moving his hand under her shirt was not only intentional, but was done for his sexual gratification.

597 Ms Norvill did not say anything to Mr Rush about this incident. While this incident occurred before Christmas and the performances still had some time to run, one of the reasons given by Ms Norvill for not saying anything about this incident was that the “run” had almost finished. Ms Norvill’s evidence was that she decided to “preference the show, and its health and wellbeing” before her own health and wellbeing and decided to “just buck up and get through”.

Mr Rush’s evidence

598 As already noted, Mr Rush gave detailed evidence about his mental preparation in the moments before he performed Act V Scene III. He considered that scene to be the biggest challenge of the whole production and could make or break a performance. There was, in his evidence, “no way of coming in under par on that level of raw primal grief”. To put the particular allegation of back-touching in context and perspective, it is important to consider Mr Rush’s evidence in this regard in more detail. While Mr Rush’s evidence concerning his preparation for and state of mind immediately preceding this scene was very lengthy, it is important to consider it in full so as to appreciate its force and impact.

And how did you – I’m going to ask you two questions, essentially. How did you physically – how did you mentally prepare yourself for that entrance? What did you do and what did you think about to get yourself in the frame of mind that you’ve described, that you’ve just mentioned?---It could vary slightly. I would always check whether it was first or not, but I always checked what was happening on the big plasma screen and normally it was around the time of Regan’s vomiting or exiting leading up to where Goneril is going – this is a page and a half where the sisters and their relationship with Edmund completely disintegrate and come into the foreground. I would then go to my room, sit very quietly and begin a process of going into as neutral a mental space as I could, working from that, the profundity of the depth of that empty world. And when the queue came, which was normally a queue for standby full company for the entrance of the dead, I would make my way out into the corridor, but avoid heading towards the side of the stage. I went through the carpark or the dock door at the rear of the theatre so that I could enter through the door that led to the stage, upstage, behind the white wall and just take my own private solo path, pretty much in the semigloom, and I would arrive down on the prompt side approximately – this settled, I mean, probably in the first previews. I might have been there much earlier than I needed to be and I didn’t want to be treading water, but it really refined itself down to I wasn’t working from a stopwatch, but I had familiarity that when Nick Masters, playing The Gentleman, comes on with the announcement that Goneril has stabbed herself at the chest, when Mark Leonard Winter is talking about the death of his father. I knew by the soundscape how to measure the rhythm of my walk around towards where I would meet and be there to just see Robyn Nevin go on who wiped across the foreground of the stage as The Fool and everyone is placed in a position of the dead.

So to be clear about it, what you’re saying is you got to the point at which you came on?---Yes.

At the time, Ms Nevin was walking across the stage - - -?---Yes.

- - - as The Fool?---Yes.

As a dead Fool, in fact?---Yes.

Yes. Yes. How long before you – if you can give me an estimate, I know it's probably difficult, but how many seconds before you actually went on, carrying Cordelia - - -?---From arrival at that point?

.....

I just want to know how long you think you were – I know it's a little bit - - -?---Yes. Right. Okay. I would say 30/40 seconds.

.....

All right. Well, now, you indicated that Ms Norvill stood on a structure of some sort and then – so you didn't actually physically have to lift her. Now, I want to ask you this: in the moments when you were waiting offstage ready to take Ms Norvill in your arms to carry her on, out of the – up till the moment you made the first howl, what were you thinking about, Mr Rush? What was in your mind?---There was a graph – George Ogilvie, who I had mentioned yesterday, when I had worked with him many, many years ago – he was a very spiritual man. And he would, even with actors, take warm-ups where he would say, "Well, let's do a walking meditation just to get the temperature of the room into focus". And this was back in '81. From the moment I left the dressing room and went through the terribly unattractive landscape of the dock-door area of the back of the Roslyn Packer Theatre into the gloom of the white wall behind, that, for me, became a kind of walking meditation that I hoped would reach a focus and put me into, I can only describe it as an alert state of neutrality, because there was a technical moment, but that had been so carefully choreographed in rehearsal that it became second nature - - -

What was the technical moment?---The actual placing of Ms Norvill or her stepping into my embrace with her locking her arm around my shoulder. Because that moment of pure inner-stillness, I knew I had ramp it up, instantly, into the first howl and be ready for that.

But tell us what you were thinking about. How did you get yourself in the mood to do that?

What went through your mind?---It was more shedding, rather than trying to place things in my mind. It was shedding my mind, because I wanted that howl to burst out of myself without any expectation. It's the game actors play with themselves: you go on and do a play eight times a week, and you pretend every night that you've never done or said it before, and yet the audiences that come think that they're seeing the only production, and we're hoping that we've always held onto that liveliness and freshness.

599 Mr Rush's evidence in this regard was not challenged at all in cross-examination. In summary, in the moments before the scene, Mr Rush would work on emptying or shedding his mind so as to get into the "zone" – an "alert state of neutrality" and "moment of pure inner-stillness" – and prepare himself not only for the difficult technical act of carrying Ms Norvill onto the stage, but also to prepare for ramping himself up so that the first "howl" would burst out of him. The allegation is that, in these very moments, the 30 or 40 seconds

that Mr Rush stood in the place from where he was to pick up and carry Ms Norvill onto stage, he rubbed Ms Norvill's back under her shirt, apparently for his own sexual gratification.

600 Mr Rush denied that allegation. He denied that, while waiting offstage immediately before Act V Scene III, he ever touched or stroked Ms Norvill's lower back, or moved his hand under her shirt and brushed his fingers across her lower back. His evidence was:

Now, I want to ask you about something else, Mr Rush. At any time when you were waiting offstage to go on with Ms Norvill did you ever place your hand on her lower back, above her – on the outside of her – the shirt she was wearing?---No.

Did you ever move your hand from above the shirt to under her shift?---No, I did not do that.

Did you brush your fingers across the skin of her lower back?---No, I did not.

Did you – was there any other – well, did you ever touch her on the lower back, outside her shirt, gently – or rubbing your fingers over her lower back?---No, I did not.

601 In cross-examination, it was put to Mr Rush that he had, amongst other things, moved his hand inside Ms Norvill's shirt and, in a motion which lasted 20 seconds or so, moved his fingers along the waistline of Ms Norvill's jeans from right to left. Mr Rush denied that he had done that. It was then put to Mr Rush that, had he had engaged in that conduct, there would have been no "innocent explanation" for it. While the expression "innocent explanation" was not expanded on, the question appeared to be directed at whether Mr Rush could have touched Ms Norvill's back in this manner accidentally, or for reasons strictly associated with the lifting action which was to follow. Mr Rush's evidence in that regard included as follows:

Now, Mr Rush, if you had done that, can I suggest to you there would be no innocent explanation for it, would there?---If.

Yes. If?---There would be no innocent explanation for it unless it was a rapport between actors who had decided, if this contact of feeling the – not the coldness – because by what Shakespeare tells us, the hanging and the death of Cordelia and Lear killing whoever the thug was that Edmund had sent to make that happen - - -

But - - -?---She would be freshly dead but that was not the case of what I needed for that moment in the play.

....

Yes. You sort of, I think, suggested that, unless it was consensual, there would be no innocent explanation for it. I think that was the effect of the answer you gave?---Yes. It's not an area of spontaneity that I would have remotely entered into unless it had been established as a shared motivation for preparation for that scene.

602 The general gist or effect of Mr Rush's evidence appeared to be that he had not discussed or agreed with Ms Norvill that he could or should touch her back in the manner described for any purposes related to the performance. He would not have touched Ms Norvill's back in the manner described spontaneously; that is, without having discussed it with Ms Norvill first. He may also be taken to have agreed with the proposition that he could not have accidentally touched Ms Norvill's back in the particular manner that had been put to him, and that therefore there could be no innocent explanation for any such action. It does not, however, follow that he agreed that he could not have touched Ms Norvill's back in any way at all immediately before, or in the course of, lifting and carrying her onto the stage.

Other evidence

603 The particulars of this alleged incident which were provided by Nationwide and Mr Moran referred only to Mr Rush touching Ms Norvill's back. In the course of giving her evidence, however, Ms Norvill also referred to Mr Rush touching her fingers while they were waiting offstage immediately before Act V Scene III. Her evidence in that regard was as follows:

And in the rehearsal period, did he – before the – before the actual cue when he held out his arms and – for you to sit into his arms, in the rehearsal period, did he ever touch you while he was – while you were standing on the chair?---No.

Did that change in the rehearsal period? Sorry, in the – I'm so sorry, I withdraw that.

Did that change in the previews?---Yes, it did.

All right. In what way did it change?---Geoffrey would arrive and he would sometimes place his left hand on my lower back. I thought it was a way for him to signal that he was there or ready.

Because you had your eyes closed?---Yes.

Okay. Did something else change? Did he start to do – we're still in the preview period – did he start to do something else – make some – another motion?---Yes.

And what was that?---Geoffrey started to take his left hand and lightly, like, brush his fingers across my fingers and he started – he would trace on my palm with his fingers.

When you say trace on his palm with your fingers, how many fingers are we talking about, do you recall?---All of them – three, four.

And on your palm, what sort of motion was it? Was it circular? Was it back and forth?---It was circular.

Right. Thank you.

HIS HONOUR: Sorry, you said this changed – did this happen once or more than once?---More than once.

Yes, how many times?---During the whole run?

Yes. I think at the – sorry, I should have said at the moment you’ve just spoken about it changing in the previews, but it continued after the previews, did it?---Yes, it did.

And roughly how many times do you think this occurred?---Eight.

Yes?---Eight times roughly, to the best of my memory.

MR BLACKBURN: Thank you. And apart from the circular motion on the palm of your hand, you said before that he would touch the fingers of your hand as well?---Yes,

like - - -

Yes, could you describe what he actually did?---It would be like a – like a brushing, like a – like lightly brushing or part – his fingers over the tops of my fingers like a fondling, a - - -

Fondling what, your fingers?---Yes.

So I think you said brushing his fingers lightly over the tops of your fingers; was that one of the things that happened?---Yes.

And then fondling your fingers?---Yes.

And those gestures, how long – the touch on your fingers, how long did they last, seconds I mean?---10 seconds, you know, 10 maybe 20 seconds.

And how often did that happen?---During previews?

Yes, altogether?---Yes, I – you know, I – I think about eight, 10 times maybe, but, you know, more than a few.

All right. And were these gestures that you’ve described always together, that is, the circling the palm and playing with the fingers, did that all happen at the same time – I’m sorry, I will withdraw that. Did the two gestures always happen together?---Yes, as I remember it they – they did. Yes.

All right. On your palm was the touch heavy or was it light?---It was light.

And on your fingers was the touch heavy or light?---It was light.

Was it part of a handhold or not?---No.

604 As already noted, Nationwide and Mr Moran did not include any allegation that Mr Rush touched Ms Norvill’s hands or fingers in its particulars of truth. While no objection was taken to Ms Norvill’s evidence concerning these alleged incidents, it should in fairness be noted that senior counsel for Mr Rush did object to Mr Rush being questioned about them in cross-examination on the basis that it was outside the particulars and Ms Norvill’s witness statement did not refer to the incidents in question. The cross-examination was nonetheless permitted.

605 Mr Rush denied engaging in this conduct.

606 Nationwide and Mr Moran did not apply to amend their pleading or particulars of truth to include these incidents, though in their final submissions they appeared to contend that if found to have occurred, they constituted inappropriate behaviour.

607 It is, however, by no means apparent that Ms Norvill herself considered that Mr Rush's actions in touching her hands or fingers was inappropriate behaviour. As already noted, she did not include this allegation in her witness statement. As to whether she had ever said anything about this allegation before, she gave the following evidence:

You see, Ms Norvill, you knew that – I withdraw it – I withdraw that. You see, Ms Norvill, you never said before yesterday that during the previews Mr Rush rubbed your palm, touched your fingers, fondled your hands. I think you actually said it happened eight to 10 times on one occasion. You had never said that before yesterday, had you?---I had.

I see?---I didn't know whether it should be included, because it's difficult to define whether that action is crossing boundaries. But, actually, I thought it was important to say, because I realised that that touch wasn't professional and it allowed for the touch that was in appropriate to happen. That's why I included it. I thought it was – the context was important.

Not sufficiently important to put it in the statement that you signed and told us yesterday was complete?---Well, I had it in the statement in an earlier draft.

608 What Ms Norvill appeared to be saying was that she did not really consider that Mr Rush's actions in touching her hands or fingers was necessarily inappropriate or had necessarily crossed the "boundaries". Rather, she thought that it was "unprofessional" because it "allowed for the touch that was in appropriate [sic] to happen". The inappropriate touch that Ms Norvill appeared to be referring to there was Mr Rush's touching of her back as she had described. That was why, at least according to Ms Norvill, this allegation was removed from her statement.

Findings

609 This incident or allegation is different in an important respect from most of the other incidents or allegations. The difference is that, subject to one qualification to which reference will be made later, this incident was unlikely to have been seen or witnessed by anyone else. On that basis, on one view of it at least, it largely comes down to a question of Ms Norvill's word against Mr Rush's word. That is not to say, however, that broader questions of credit and reliability may not play a significant part in resolving the conflict between the evidence of Ms Norvill and Mr Rush.

610 On balance, I am not persuaded that Mr Rush intentionally touched and rubbed Ms Norvill's back in the manner described by her. I do not accept that Ms Norvill's evidence about this incident was entirely reliable or credible. I accept that it is possible and plausible that Mr Rush might have touched Ms Norvill's back immediately before he picked her up to carry her on stage for the scene. If that happened, however, I am not persuaded, on the evidence as a whole, that Mr Rush put his hand under Ms Norvill's shirt. Nor am I persuaded that Mr Rush intended to touch Ms Norvill's back for his sexual or personal gratification.

611 The following considerations have led me to these conclusions.

612 The first consideration concerns the plausibility of Ms Norvill's evidence about this incident. As has already been noted, Mr Rush was a man dedicated to his craft. He was the consummate professional. Mr Rush's lengthy evidence concerning his preparation for Act V Scene III, and his mental state in the 30 or 40 seconds before carrying Ms Norvill on stage, was extracted earlier. The point, in short, is whether it is plausible that, having worked to get himself into the "zone" before this critical scene, Mr Rush would engage in a gratuitous act of rubbing Ms Norvill's back under her shirt, apparently for his sexual gratification. How is that compatible with Mr Rush's recognition of the critical nature of the scene and the fact that "there was no way of coming in under par on that level of raw primal grief" which he had to convey? How is it compatible with Mr Rush's unchallenged evidence that he went through a process of emptying his mind so as to put himself into a "neutral but alert state of mind" so the first "howl" would burst out of him as he carried Ms Norvill onto the stage?

613 It would appear that Ms Norvill appreciated the state of mind that Mr Rush was in during the moments before he picked her up and carried her onto the stage. When asked why she did not "swat" Mr Rush's hand away when he was, on her version of events, touching her hand or fingers, Ms Norvill gave the following evidence:

Is there a reason for that?---We were on stage. I hadn't -- the audience was right there. I was worried about making noise. I also didn't want to disturb Geoffrey as he was about to go on stage and deliver one of the iconic speeches in the play. It was a huge task for him. It - - -

614 In all the circumstances, I consider this allegation against Mr Rush implausible.

615 It was submitted on behalf of Mr Rush that there was another peculiarity about this alleged incident. The submission was that it was effectively a one-off. Ms Norvill did not suggest that Mr Rush's action in touching her back under her shirt before carrying her onto stage was a regular occurrence. On her version of events, Mr Rush touched her on the back again in a

performance some weeks later, but she told him to “stop it” and he did so. Even if that evidence is accepted, and it is inferred that Mr Rush might have intended, on that second occasion, to again touch Ms Norvill’s back under her shirt, that would mean that Mr Rush engaged in such conduct in two performances out of somewhere in the order of 50, and in circumstances where those two incidents were, rather inexplicably, separated by weeks. It will be recalled also that Ms Norvill did not say that she spoke to Mr Rush or anyone else about Mr Rush’s actions on the first occasion. If her version of events is accepted, why then did he stop doing it, at least until the second occasion some weeks later.

616 I accept that it might seem a bit unusual that the two incidents which involved Mr Rush touching Ms Norvill’s back occurred some weeks apart. I do not, however, accept that it is accurate to describe this incident as a “one-off”, particularly when it is considered in the context of Ms Norvill’s evidence as a whole. Nor do I think that this provides any particularly compelling reason to find that this incident did not occur.

617 The second consideration which led me to arrive at the conclusions I have reached in relation to this incident concerns the reliability and credibility of Ms Norvill’s evidence, both generally and in relation to this particular incident.

618 It is unnecessary to repeat or reiterate what has already been said about Ms Norvill’s reliability and credibility generally.

619 As for the reliability of Ms Norvill’s evidence concerning this particular incident, it would appear that when Ms Norvill met Ms Crowe on 5 April 2016, she gave Ms Crowe a different description of the incidents involving Mr Rush touching her while they were both backstage. In her email, Ms Crowe recorded that Ms Norvill told her that “[o]ther members of the cast would have seen him [Mr Rush] touching her backstage, but didn’t do anything”. That is not consistent with Ms Norvill’s evidence. The only incidents involving Mr Rush touching her backstage that Ms Norvill referred to in her evidence were the two incidents involving Mr Rush touching her back. In her evidence, however, Ms Norvill did not suggest that any members of the cast would have seen these incidents, or that any members of the cast in fact saw these incidents but didn’t do anything. The overall effect of her evidence was that nobody else would have seen these incidents.

620 The account of the backstage touching that Ms Norvill gave Ms Crowe also appears to differ in material respects from her evidence. It does not appear that Ms Norvill told Ms Crowe that

Mr Rush touched her back before he picked her up. Rather, she told Ms Crowe that Mr Rush would “grope her as he picked her up”. Even accepting that Ms Crowe’s email purported to be only an “outline” of what Ms Norvill told her, this is nevertheless a different description of the alleged backstage touching.

621 Aside from what was said at the meeting between Ms Norvill and Ms Crowe on 5 April 2016, there is no evidence that Ms Norvill specifically complained to anyone at the STC about Mr Rush touching her back under her shirt. Nor did she specifically raise it with Mr Armfield, Ms Nevin, Ms Buday or even any of the younger members of the cast. Ms Norvill sought to explain this in her evidence. Her evidence was that she decided to “buck up and get through [it]” and that she told herself to “[p]retend it’s not happening” and “[y]ou’ve only got a couple more days”. In fact, Ms Norvill claimed that this incident occurred in a performance of the play which occurred before Christmas, so there was in fact a few more weeks of performances. On the whole I do not consider that Ms Norvill’s explanation for not having said anything to anyone about this incident was particularly persuasive.

622 The third consideration, which has already been adverted to, is that Ms Norvill’s evidence concerning this incident was entirely uncorroborated. The explanation for that is that on Ms Norvill’s account nobody else would or could have witnessed this incident. There is, however, one possible qualification to that proposition. That qualification is that there was some evidence to suggest that Mr Gilfedder, playing the messenger, was likely to be in the vicinity of the area where Mr Rush and Ms Norvill were located immediately before Mr Rush carried Ms Norvill onstage in Act V Scene III. The script of the play indicates that the messenger exits the stage shortly before Lear enters with Cordelia in his arms. The video of the play which was in evidence reveals that the messenger’s exit in this scene is about 15 to 20 seconds before Lear enters. The messenger enters the stage again a few minutes later. It is perhaps open to infer that, after exiting the stage, Mr Gilfedder may have waited offstage in the vicinity of Mr Rush and Ms Norvill, particularly as he was due to re-enter the stage shortly thereafter. Mr Gilfedder was not called to give evidence.

623 On balance, however, I do not consider that much, if anything, turns on the fact that Mr Gilfedder may have been nearby when this alleged incident occurred. Ms Norvill’s evidence was that Mr Gilfedder ran past them, presumably as he exited the stage, and she didn’t believe that anyone was nearby at the time of the incident. She also said that in any event she and Mr Rush were positioned in such a way that, even if someone had been there,

that person could not have seen what was going on because Mr Rush's body would have been "blocking the action". Mr Rush's evidence was that he was not conscious that Mr Gilfedder was backstage at this point in time, though that appears to have been in part because he, Mr Rush, was "in the zone" at that point in time.

624 In any event, the fact remains that Ms Norvill's account of this incident was uncorroborated. The evidence relied on by Nationwide and Mr Moran to discharge their burden of proof in relation to this incident was essentially limited to the evidence of Ms Norvill. In all the circumstances, and having regard to the evidence as a whole, I am not persuaded that Ms Norvill's account of this incident was credible or reliable. I prefer Mr Rush's evidence, including his denial that he engaged in the conduct described by Ms Norvill.

625 I accept that it is both possible and plausible that, in the 30 or 40 seconds before Mr Rush picked Ms Norvill up to carry her on stage, he may have touched her back in a way which, to use Ms Norvill's word, was "comforting"; a way of reassuring Ms Norvill that he was in position to pick her up and carry her on stage at the appropriate moment. What I do not accept, however, is that Mr Rush put his hand under Ms Norvill's shirt and rubbed the bare skin on her back as Ms Norvill described in her evidence. Nor am I persuaded, on the whole of the evidence, that Mr Rush touched Ms Norvill in a gratuitous, unnecessary or sexual way, or that he intended to touch Ms Norvill for his own sexual gratification.

626 I should finally add that I am also not persuaded that Mr Rush touched and rubbed Ms Norvill's fingers or hands in the manner she described in her evidence. My reasons for not accepting Ms Norvill's evidence in that regard are essentially the same as my reasons for not accepting her evidence about Mr Rush touching her back in the manner described.

627 To those reasons may be added the fact that Ms Norvill did not include any evidence about Mr Rush touching her fingers and hands in her witness statement. It is presumably for that reason that Nationwide and Mr Moran's particulars of truth did not include particulars of this allegation. Ms Norvill's explanation for not including evidence of these incidents in her statement was that she was not sure that they involved Mr Rush "crossing boundaries". It is difficult to accept that explanation given Ms Norvill's description in her evidence of Mr Rush's conduct in this regard. I reject Ms Norvill's evidence that Mr Rush's touching of her fingers or hands somehow "allowed" the conduct which she considered to be inappropriate, the incidents when Mr Rush touched her back, to occur.

628 I again accept that it is possible and plausible that Mr Rush may on occasion have made contact with Ms Norvill's hands or fingers in the short period before he picked her up and carried her on stage for Act V Scene III. If such contact was made, however, on balance I consider that the contact was either inadvertent, or was intended to be a reassuring or comforting gesture, not a gratuitous or sexual gesture. Such behaviour could not, in those circumstances, be considered to be inappropriate, let alone scandalously inappropriate, or scandalously inappropriate behaviour of a sexual nature.

629 In any event, Nationwide and Mr Moran did not seek leave to amend their particulars of truth to include the allegation that Mr Rush had touched Ms Norvill's hand and fingers, even after Ms Norvill gave evidence about those incidents.

Allegation seven: Further touching of Ms Norvill's back

630 The incident was said to have occurred during the final scene in a performance in the period 4 to 9 January 2016. On this occasion, again immediately before he carried Ms Norvill onto the stage, Mr Rush was alleged to have started to touch Ms Norvill's lower back on top of her shirt. He then gently rubbed his fingers over Ms Norvill's lower back from right to left.

Ms Norvill's evidence

631 Ms Norvill's evidence was that she believed this alleged incident occurred during the performance on 8 January 2016. Her evidence was:

Now, so something happened. Could you tell the court what it was?---Yes. Geoffrey arrived beside the chair ready for our cue to go on stage and he placed his left hand on my lower back again, kind of did the movement from right to left, and I - - -

Just pausing there, you said he placed his hand on your lower back. Was it above the shirt or below the shirt on this occasion?---It was above the shirt.

Yes. And you said movement from left to right, I think – sorry, did you say left to right? Right to left, I'm sorry?---Right to left, yes. That's right.

What was it that he actually did?---He placed his palm on my lower back, above my jeans but above my shirt, and kind of rubbed, I guess – rubbed my lower back.

You – witness described a back and forth motion with her hand.

HIS HONOUR: Yes.

MR BLACKBURN: Exactly whereabouts on the lower back was it? Was it on the line of your jeans or it was above that or where was it?---I would say it would be on the line of my jeans, in the small of my back.

And what happened when Mr Rush started doing that?---I whispered, "Please stop that".

And in what volume did you say, “please stop that”?---Very softly.

And what happened? Did he stop?---Yes, he did.

How long did that motion with his hand go on before you said, “please stop that”?---
A couple of seconds.

Did Mr Rush react in any other way?---No, he didn’t acknowledge that I had spoken.

But he stopped?---Yes.

632 Ms Norvill did not say anything to Mr Rush about this incident. She said that “[a]t the time I
felt that I had spoken and he had heard me”.

Mr Rush’s evidence

633 Mr Rush denied that this incident occurred.

Findings

634 On balance, I am not persuaded that Mr Rush intentionally touched Ms Norvill’s back on this
occasion in the manner described by her in her evidence. Nor do I accept that Ms Norvill
told Mr Rush to “please stop that”. In all the circumstances, I do not accept that Ms Norvill’s
evidence about this incident was entirely reliable or credible. I prefer Mr Rush’s evidence.

635 My reasons for arriving at these findings are essentially the same as my reasons concerning
the allegation that Mr Rush touched Ms Norvill’s back in similar circumstances in a pre-
Christmas performance of the play. I am not persuaded that the account of this incident given
by Ms Norvill was plausible, or that her evidence was reliable or credible. While I again
accept that it is possible and plausible that Mr Rush may have touched Ms Norvill’s back
shortly prior to picking her up and carrying her onto the stage, I am not persuaded that, if that
occurred, the touching was gratuitous, unnecessary or sexual in nature. Nor am I persuaded
that, if any such touching occurred, Mr Rush intended to touch Ms Norvill for his sexual
gratification.

Allegation eight: Texting think of you “more than is socially appropriate”

636 Like the “stage-door Johnny crush” allegation, there is no dispute that Mr Rush sent a text to
Ms Norvill in which he stated that he thought of her “more than is socially appropriate”. That
text message was sent on 10 June 2016, almost six months after the performances of *King
Lear* had concluded. The only question is whether, considered in context, the sending of this
message proved the substantial truth of any of the imputations conveyed by the publications.

637 Before considering the 10 June 2016 text message, it is necessary to say something about the text messages that were exchanged between Mr Rush and Ms Norvill throughout 2014. Those text messages put the 10 June 2016 text message into some sort of context.

The 2014 text messages

638 Ms Norvill's evidence was that from about early 2014 she began communicating electronically with Mr Rush via text message, Viber and WhatsApp. She did not retain any record of her Viber and WhatsApp messages because she had lost some of the mobile phones she owned in the past. She had, however, retained a record of the text messages she exchanged with Mr Rush during 2014. To appreciate the nature of the test messages it is necessary to set them out in full.

20 Apr 2014, 11:47 am

Ms Norvill: See you tonight Jet Lee Thrust x

Mr Rush: nourishing delicious Ovaltine Oval a drink afterwards
JERROBANG xo-xo Jittery Rouche

26 Apr 2014, 6:39 pm

Ms Norvill: Ahem God of Generic Lust. We are Supper-ing tomorrow night after the showy. If you're about. Yullis on crown about 7. Ear and Jam Novelty xx

26 Apr 2014, 7:46 pm

Mr Rush: ...dear Ear and Jam Novelty (that REALLY is the best – cos yr stage persona in GI is such a deliciously dippy bright food-colouring macaroon loon) ... I'm lunching in Patonga and then have a 2:45a.m. pickup for RA transformation makeup on Monday pre-dawn but I LOVE yr timely invite and shall swing by for a dram and an appetiser - (ain't you sweet - and thoughtful!) xo Grigorio Rucci (failed stocky alcoholic Italian tenor) ...

27 Apr 2014, 9:10 am

Mr Rush:actually I think we might get away with "Meringue Jam Novelty" - moniker confection perfection (wasn't up all night devising - woke and it popped into my head - I felt like a very minor poet but enjoyed the momentary creative pop! xReferee Gush

27 Apr 2014, 6:53 pm

Mr Rush: ...hey Erogenous Naval (ooh!) - you guys still doing Yullis circa 7? X Gee Ah!

Ms Norvill: Ah Geraldine Nuf Nuf. Yes we are but it's only Zahra and moi and a few stragglers. But come. We are out the back x

Mr Rush:schweet! (I can only stay briefly as I have a 2:45am pickup - the glamour of movies) xgeraldine nuf nuf (whom I think I should play quite soon)

Ms Norvill: do it GR BANG BANG

27 Apr 2014, 9:39 pm

Mr Rush: I remain enthralled - what a cool vibrant gathering 2nite glad yr into the Newman phenomenon - and the Classics stay intriguingly and randomly in touch c u round - I hope xo Gary Reez

28 Apr 2014, 9:35 am

Ms Norvill: Gary, 'Twas a delight to see the Gentle Riddler last night. Such very good company. I will stay in touch and as intriguing as an Eery Jaunty Novella. Thank you and the God of Ra for the meal. Very kind. See you very soon I hope xoxo Meringue Jam Novelty

28 Apr 2014, 2:32 pm

Mr Rush:Airy Ninja Novella! - you are so fascinatingly extraterrestrial - what a joy to have been in your orbit not GRAVITY – dazzling LEVITY! xo Adrenalin Rush

24 May 2014, 10:42 am

Ms Norvill: Giddy McHeadRush..! xx How's it? Myself and the team are on our last legs of the tour. Mildly entertaining but mostly offending the rural towns of Australia.

Genuinely Plushly.. I've made a plan to be in the US next year for a while and thought id ask you if your offer of A1 assistance was still a plausible and palatable one... JERROBANG.. JERROBANG. Let me know, BPAY aka Ellen DeJeanerous

10 June 2014, 2:24 pm

Mr Rush: ...Bear in mind Whoville! - my absolute pleasure, you talented edgy impy thesp - it just flowed glad you liked xx GRR!

28 Aug 2014, 3:37 pm

Ms Norvill: Gruff Gruff. It's my birthday. If you're in Sydney come celebrate it with me xx EJ

3 Sep 2014, 11:47 pm

Mr Rush: Error Ginger Nutella! - beyond delightful to surprisingly collide again tonight yr gonna rock in neo-Rostand - and T Williams wrote for amazing idiosyncratic actrines like you play, just play!! xo Giraffe-y Whoosh!

4 Sep 2014, 4:00 pm

Ms Norvill: Jersey Cream Filled Puff. So excellent to see you also. Can't wait to catch your Leary King. I was thinking last night I hope we get to work together soon. ebay xxx

Mr Rush: ditto on all those fronts! (am I cream-filled!?) I spent too much time today tweaking and improving yestereve's moniker - "Aero Ginger Nutella" is better - more your exotic blend of textures, taste and tang I really look fwd to another serving of curious charm tonite! x

5 Sep 2014, 1:21 am

Mr Rush:“Galapagos apace, you fiery-footed steed!” you ignite; you cut everything into little stars another civil night, gentle night, loving black-browed night the face of heaven so fine yr an unbalancing social treat - Loved colliding again - more whenever ... maybe weekend birthday - would love to toast! xo

6 Sep 2014, 5:55 pm

Ms Norvill: Galapagos Lusty Thrust. Please come celebrate my birthday. From 7pm. [*Address redacted.*]

Mr Rush: invested NormaJean Waybill! - is mid-later eve socially acceptable? thx for yr chunky and really pleasurable birthday offering! xo
G

Ms Norvill: Of course Double Jeopardy Shush Shush.

Come when you can x

12 Sep 2014, 2:10 pm

Ms Norvill: Gatsby de Bottlebrush.. It was lovely having you at my birthday celebrations. Hope filming is going well this week. I’m heading to the Children of the sun tonight. Hopefully see you there. I like our collisions it gives a glee to the usual foyer glum.

Talk soon,

Bear ‘n’ Grin x

639 As has already been noted, those text messages reveal that Mr Rush and Ms Norvill were on close and friendly terms throughout 2014. The text messages were playful, funny and included numerous intellectual and theatrical jokes and jests, not limited to the homophones they employed when referring to each other’s names. It is also difficult to deny that the text messages were mildly, though harmlessly, flirtatious and employed some sexual innuendo. Ms Norvill’s apparent unwillingness to acknowledge that the text messages were sexually flirtatious was difficult to understand, though she did eventually acknowledge that some of the language in the texts was “sexually flirtatious” and “intellectually flirtatious”. Importantly, her evidence in relation to that was: “there’s nothing wrong with that”.

640 It is important to consider the 10 June 2016 text message in that context.

The 10 June 2016 text message

641 The statement in the text message upon which Nationwide and Mr Moran rely should not be considered out of context or in isolation. The entire text message is extracted earlier in these reasons. It is set out again for convenience:

.... beloved Aryan Schöne Müllerin (yes a complicated and obtuse jeu de mots, of course) - basically it's a spectacular near-homophone praising you as a delicious mysterious daughter of the Miller! - apologies for missing your opening last night (I sent a scrappy hasty message through Mrs Nevin) but I was thinking of you (as I do more than is socially appropriate 🤗) - how is your Big Wheel turning? ... how do months fly so quickly by? Fatigued by Lear (many levels) I flew to the UK, underprepped but champing, to play Giacometti - and have just seen a Vimeo finecut which has allayed my worst fears of not honouring the man's curious idiosyncrasies - many chunky sessions of meticulous ADR happen next week.

I feel certain you will be hand in glove with Miller's world. He's a classicist that still provides the toughest and most interesting challenges for a contemporary experience I hope you're hApPy and still find time to dance with Xmas-style abandon



xo Gregarious Raunch 🗨️💬

(Emphasis added.)

Ms Norvill's evidence about the text

642 Ms Norvill did not suggest that she had any difficulty with the contents of the text message. She did not suggest that she was specifically troubled by Mr Rush's statement that he thought of her more than was "socially acceptable". Nor was she apparently troubled by the emoji. She did not say that she thought that Mr Rush was propositioning her, or "testing the waters", as was put to Mr Rush by senior counsel for Nationwide and Mr Moran. Ms Norvill's evidence was that, it was the fact that Mr Rush had sent her a text message that concerned her, not the contents of the text itself.

Mr Rush's evidence

643 Mr Rush was cross-examined at length about the text. His evidence about the statement "thinking of you (as I do more than is socially appropriate)" and the emoji included the following:

You had been thinking of her more than is socially appropriate for some time?---That – that is not correct in my mind. It's a throwaway line. It's actually a joke. I would say modestly in the style of Groucho Marx, because by the time I was writing this catch-up message, I realised it was very long and I said, "I'm sorry I missed your opening, but I haven't forgotten about you." If there had been a Groucho emoji, I would have punctuated with that to absolutely ensure that it was whimsy.

What you're saying there though is that you were thinking of her in a way that was socially inappropriate; that's what you're saying to her, isn't it?---It's not, actually. Socially inappropriate to me is a weasel word. I use it often in a playful way to say, "What are we allowed to do and what aren't we allowed to do," in any given context with many of my friends. And you will notice the dot, dot, dot, "But I was thinking of you. I haven't forgotten. I'm not being facetious."

644 Mr Rush denied that he was literally thinking of Ms Norvill more than was socially appropriate. The gist of his evidence was that he was joking.

645 As for the emoji, he did not accept senior counsel for Nationwide and Mr Moran's description of the emoji and effectively denied that it was somehow sexual in nature:

So you put in that little emoticon with its tongue hanging out there. What's he doing? Is he panting?---No. That was the looniest emoji I could find that sort of was yucca, yucca, yucca. I mean, I don't want to – if Fozzie Bear had been in there, I [sic] have put Fozzie Bear in.

....

Mr Rush, let's cut straight to the chase, shall we? When you said to her, "I was thinking of you, as I do more than is socially appropriate," with the emoji, that was away of telling her. You intended to tell her, didn't you, that you were very attracted to her?---That was not as – its intention at all. And I'm sure that her on the receiving end would have found it amusing.

646 Mr Rush denied that, in sending the text which included the statement and emoji which were the focus of much of the questioning, he was "throwing out an invitation" or "testing the water".

Ms Buday's evidence

647 Ms Buday was the only other witness who was questioned about the text message. The premise for the questions that were put to her about the text message by senior counsel for Nationwide and Mr Moran was that the text message was inconsistent with Ms Buday's evidence that Mr Rush was a good mentor for younger actors. In any event, it was abundantly clear from Ms Buday's evidence that she saw nothing sinister or improper in the text message. Indeed, she considered it to be "charming". She rejected the suggestion that it was indicative of bad mentoring.

Findings

648 I reject the submissions advanced by Nationwide and Mr Moran in relation to this text message. In particular, I reject the submission that the statement "I was thinking of you (as I do more than is socially appropriate)", considered either with or without the emoji, was an "invitation", or that Mr Rush was "putting it out there". An invitation to do what? Putting what out there? By this point in time, Mr Rush had known Ms Norvill for some time. The 2014 text messages between them suggested that, at least at that point in time, they were on close and familiar terms. It may be inferred from the previous text messages, which were in some respects far more flirtatious than this one, that if Mr Rush had wanted to ask Ms Norvill

out for coffee, or a drink, or dinner, he would have done so. There was no evidence that he ever did. There was, of course, evidence that Mr Rush and Ms Norvill had socialised together in 2014, though they were invariably group events. It will also be recalled that Mr Rush and Ms Norvill had gone out to dinner and attended a play together in November 2015, though on that occasion Mr Winter was also there and Mr Rush's daughter accompanied him to the play.

649 Mr Rush's innocent explanation for the text should be accepted. Read fairly and in context, Mr Rush was apologising for missing Ms Norvill's opening night, telling Ms Norvill that he had not forgotten her and explaining why he hadn't been in contact, and asking Ms Norvill how she was going. The text was plainly cryptic, playful, and humorous and contained some highly complimentary and perhaps even flirtatious remarks. In that regard, however, it was no different to the texts that the pair had exchanged throughout 2014. Ms Norvill saw nothing wrong with those texts. Subject to one contextual qualification, which I will address shortly, it is difficult to see why this text should be read or construed any differently. I should add that I also do not accept that the emoji with the tongue poking out, about which there was considerable evidence, discussion and debate, involved any inappropriate sexual innuendo, particularly when considered in the context of the text message as a whole. I also accept Mr Rush's evidence concerning his intentions in employing that emoji.

650 It may be accepted that the June 2016 text must also be construed in the context of the relationship between Mr Rush and Ms Norvill as at June 2016. By this point in time, as far as Ms Norvill was concerned, the nature of her relationship with Mr Rush had changed. It is readily apparent that Ms Norvill's experience during the performances of *King Lear* had not been positive. Something at some stage appears to have upset and unsettled her and, by the time she received the June 2016 text, she had met with Ms Crowe and made allegations of sexual harassment against Mr Rush. It is, in those circumstances, not difficult to see why Ms Norvill was unsettled by the fact that Mr Rush had sent her the text in June 2016.

651 Importantly, however, nobody had told Mr Rush about Ms Norvill's allegations. Ms Norvill herself had said nothing to Mr Rush about her concern about his behaviour at any time during the rehearsals or the performances of *King Lear*, or any subsequent time. The STC had not told Mr Rush that Ms Norvill had made allegations against him, let alone given him an opportunity to respond to them. Indeed, it is readily apparent that Mr Rush was oblivious to the fact that Ms Norvill was in any way upset with him, or that their relationship had

changed. That was the effect of Mr Rush's evidence. It is also consistent with the terms of the text itself, which appears to continue in exactly the same vein as the 2014 texts.

652 It may equally be readily accepted that, had Mr Rush engaged in any of the behaviour during the rehearsals and performances of *King Lear* that was described by Ms Norvill in her evidence, the 10 June 2016 text would take on an entirely different and more sinister complexion. For the detailed reasons I have already given, however, I am not satisfied on the balance of probabilities that Mr Rush engaged in that behaviour.

653 Returning to the text itself, no doubt the views of reasonable people may differ as to whether it is appropriate for a senior male actor in his 60s to be writing to a female actor in her 30s, albeit one who was experienced and accomplished, in such a flirtatious way. Some may think it inappropriate in whatever context. Many others may not. Ms Buday, who aside from Mr Rush and Ms Norvill, was the only other witness who was asked about the text message, plainly did not consider it to be inappropriate.

654 For my own part, I do not accept that, when considered in context, the text could properly be said to be inappropriate. I should add that the relevant context includes that, by the time Mr Rush sent the text, Mr Rush and Ms Norvill were no longer working on the same play together and Mr Rush could not be said to have been in any position of authority or influence over or in respect of Ms Norvill. They were simply two adult actors; albeit one being older and more experienced than the other.

655 In any event, the relevant question is not simply whether the text was or was not inappropriate. The question is whether the text is capable of proving the substantial truth of any of the pleaded imputations. Nationwide and Mr Moran alleged that the 10 June 2016 text went to proving the substantial truth of only one imputation, the imputation that Mr Rush was a pervert. That is explicable on the basis that the other imputations all relate to Mr Rush's behaviour while working on the STC's production of *King Lear*. The text was sent well after the time that Mr Rush and Ms Norvill had finished working on *King Lear*.

656 In all the circumstances I am not satisfied on the balance of probabilities that the 10 June 2016 text message that Mr Rush sent Ms Norvill proves the substantial truth of the imputation that Mr Rush is a pervert.

Summary of findings and conclusion in respect of the truth defence

657 I am not satisfied, on the balance of probabilities, that Mr Rush engaged in any of the conduct or behaviour particularised in paragraphs 15, 16, 17, 18, 19, 22 and 23 of the Second Further Amended Defence filed by Nationwide and Mr Moran. In summary, I am not satisfied on the balance of probabilities, that:

- (a) on one occasion during the rehearsals of Act V Scene III, Mr Rush hovered his hands over Ms Norvill's torso, pretended to caress or stroke her upper torso and made groping gestures in the air with two cupped hands which simulated him groping and fondling Ms Norvill's breasts;
- (b) during rehearsals Mr Rush regularly made comments or jokes about Ms Norvill or her body which contained sexual innuendo;
- (c) during rehearsals Mr Rush made lewd gestures in Ms Norvill's direction and on a number of occasions looked at Ms Norvill while sticking his tongue out and licking his lips and using his hands to grope the air like he was fondling Ms Norvill's hips or breasts;
- (d) during the performance of Act V Scene III in a preview performance of *King Lear*, Mr Rush did not touch Ms Norvill's hand and face as had repeatedly rehearsed, but rather moved his hand so that it traced down Ms Norvill's torso and across the side of her right breast;
- (e) during a performance of the play in mid to late December 2015, just before carrying Ms Norvill onto the stage for Act V Scene III, Mr Rush placed his hand on Ms Norvill's lower back above her shirt and moved his hand under her shirt and along the waistline of Ms Norvill's jeans, brushing across the skin of her lower back for about 20 to 30 seconds;
- (f) during a performance of the play between 4 and 9 January 2016, Mr Rush again touched Ms Norvill's back and rubbed his fingers along her lower back from right to left before carrying her onto stage for Act V Scene III.

658 I accept that Mr Rush described having a "stage-door Johnny crush" on Ms Norvill during an interview with a journalist. On balance, however, I find that Mr Rush's statement to the journalist was, and was intended to be, a light-hearted joke and a compliment to Ms Norvill. While some might consider it to have been a poor choice of words, I am not satisfied on the balance of probabilities that the statement comprised inappropriate behaviour in any relevant

sense. Nor am I satisfied on the balance of probabilities that the making of that statement: constituted scandalously inappropriate behaviour in the theatre; constituted inappropriate behaviour of a sexual nature in the theatre; meant that Mr Rush was a pervert; meant that Mr Rush had behaved as a sexual predator while working on the STC's production of *King Lear*; or meant that Mr Rush had engaged in inappropriate behaviour against another person over several months while working on the STC's production of *King Lear*.

659 I also accept that Mr Rush sent a text message to Ms Norvill on 10 June 2016 in which he said, amongst other things, that he thought about her "more than is socially appropriate". I am not, however, satisfied on the balance of probabilities that the sending of that text, or the making of any statement in it, or the inclusion of any emoji within it, constituted inappropriate behaviour in any relevant sense. Nor am I satisfied on the balance of probabilities that the making of that statement meant that Mr Rush was a pervert.

660 It follows that I am not satisfied that Nationwide and Mr Moran have proved, on the balance of probabilities, the substantial truth of any of the imputations that have been found to have been conveyed by the poster, the 30 November 2017 articles and the 1 December 2017 articles. Nationwide and Mr Moran's defence of justification pursuant to s 25 of the Defamation Act accordingly fails.

CONCLUSION IN RELATION TO LIABILITY

661 Mr Rush has discharged his onus of proving that all but two of the pleaded imputations were conveyed by the three matters complained of.

662 Nationwide and Mr Moran have failed to discharge their burden of proving the substantial truth of the imputations that have been found to have been conveyed by the matters complained of. Their defence of justification accordingly fails.

663 It follows that a verdict must be entered in Mr Rush's favour.

664 The remaining questions concern damages.

DAMAGES

665 Mr Rush claimed that, if the matters complained of were found to be defamatory, Nationwide and Mr Moran should be ordered to pay him general compensatory damages for non-economic loss, including aggravated damages. He also claimed that the defamatory

publications caused him economic loss and that accordingly Nationwide and Mr Moran should be ordered to pay him special damages in respect of that economic loss.

Compensatory damages

666 Once a publication is found to be defamatory, damage is presumed: *Bristow v Adams* [2012] NSWCA 166 at [20]-[31].

667 Section 34 of the Defamation Act provides that “[i]n determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the [applicant] and the amount of damages awarded”.

668 Past authorities shed some light on what might be considered to be the “appropriate and rational relationship” for the purposes of s 34 of the Defamation Act.

669 In *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60, a majority of the High Court noted that there are three purposes to be served by damages awarded for defamation: consolation for the personal distress and hurt caused to the applicant by the publication, reparation for the harm done to the applicant’s personal and (if relevant) business reputation, and vindication of the applicant’s reputation. The first two purposes are frequently considered together, whereas “[v]indication looks to the attitude of others to the [applicant]: 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.

670 The level of damages should reflect the fact that “the law should place a high value upon reputation and in particular upon the reputation of those whose work and life depend upon their honesty, integrity and judgment”: *Crampton v Nugawela* (1996) 41 NSWLR 176 at 195; referred to with approval in *John Fairfax Publications Pty Ltd v O’Shane (No 2)* [2005] NSWCA 291 at [3].

671 Section 35(1) of the Defamation Act in effect specifies a cap for non-economic loss. The prescribed cap for the purposes of s 35 of the Defamation Act is currently \$398,500: Gazette No 66, 29 June 2018, p 3970. The effect of s 35(1) of the Defamation Act is to create a cap or “cut-off” amount; it does not create a “range” or “scale”, with the amount of the cap reserved for the most serious cases of defamation: *Cripps v Vakras* [2014] VSC 279 at [599]-[609]; *Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091 at [125]-[127]; *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154.

672 Section 35(2) of the Defamation Act provides that the cap may be exceeded “if, and only if, the [C]ourt is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages”. When a court is satisfied that an award of aggravated damages is appropriate, the court is entitled to make an order for damages for non-economic loss that exceeds the statutory cap in respect of both pure compensatory damages and aggravated compensatory damages; in other words, when an award of aggravated damages is warranted, the statutory cap is inapplicable: *Wilson (No 2)* at [249]; *Pahuja v TCN Channel Nine Pty Ltd (No 3)* [2018] NSWSC 893 at [26]-[28]; *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 at [758]-[762]. However the “direction” under s 34 of the Defamation Act continues to apply and provides an “ever-present guide” even where an award of aggravated damages is appropriate and the Court should exercise its discretion to exceed the cap: *Wilson (No 2)* at [244].

673 Section 36 of the Defamation Act provides that in awarding damages for defamation, the Court is to “disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff”.

Mr Rush’s reputation prior to the publications

674 There was extensive and essentially unchallenged evidence of Mr Rush’s exemplary reputation prior to the relevant publications. Following is a short summary.

675 Mr Armfield has known Mr Rush since 1979. He has worked on many plays and a few films with Mr Rush. His evidence was that Mr Rush had the reputation of being “an internationally important actor” who “drove ... for depth and for originality” and was “utterly diligent, always playful and ... highly spirited”.

676 Ms Buday has known Mr Rush since 1981 and has worked alongside him in a number of theatre productions. Her evidence was that Mr Rush’s reputation in the theatre and amongst actors in Australia and overseas was “stellar”. She had heard Mr Rush being defined as “iconic”.

677 Ms Nevin met Mr Rush in 1980 and is friends with both him and Ms Menelaus. She has worked with Mr Rush on a number of theatre productions. Her evidence was that Mr Rush’s reputation amongst people in theatre, film and television who know him was as a

“significant”, “celebrated” and “much loved” actor, both in Australia and internationally, who is held “in very high esteem”.

678 Ms Menalaus, herself an accomplished actor, has known Mr Rush since 1984. Her evidence was that the people with whom she has worked in the theatre, and who know Mr Rush, have a “great love and affection and admiration for him”. He had a reputation as someone who “helps enormously in a role” and was “focused and driven”.

679 Mr Trevor Smith is an actor, performer and director. He has known Mr Rush since 1970. While he has lived in the United Kingdom for many years, he still considers Mr Rush to be his best friend and they see each other nearly every year. His evidence was that Mr Rush had a reputation amongst his and Mr Rush’s peers in the theatre community which was “the highest quality of such incredible respect ... he’s a wonderful actor – supreme actor, actually”.

680 Ms Robyn Kershaw is an Australian independent film and television producer and was formerly the General Manager of Belvoir Street Theatre and Head of Drama and Narrative Comedy for the Australian Broadcasting Corporation. She has known Mr Rush since 1989 and has worked with him on a number of occasions. She is a close personal friend of Mr Rush and his family. Her evidence included the following:

Now, just thinking about the people in the Australian theatre, film, television industries that you know who also know Mr Rush, prior to these articles in November and December last year, what did you understand Mr Rush’s reputation to be amongst those people?---A collaborator of extraordinary energy and with an amazing gift to give to many people, whether it’s the writer, the director, young actors on set, in the editing room after the film had been made. He actually has a – you know, quite a legendary reputation amongst my peers, and anybody who was fortunate enough to have Geoffrey’s interest in their work was actually incredibly lucky because they knew that they would get not just an actor playing this particular role. They knew that they would get this amazing collaborator because the way that Geoffrey actually works is that he infuses the story in every single cell of his DNA, and he intuitively then manages exactly how all of it needs to actually flow out. He has an exceptional understanding of actor-audience relationships. He – I – I experienced that personally working at Belvoir with him, and that has flowed on, to his film and TV work.

...

And prior to these articles at the end of last year, what was Mr Rush’s reputation amongst the people in film and television and theatre in LA?---As a man with a – a legendary reputation, a man who actually had achieved what so many actors dream accolades that were beyond just what was recognised in LA but all over the world, festival invitations all over the world, a body of work that actually is huge in terms of genre....

681 Ms Margaret O'Bryan is a university academic who has known Mr Rush since the early 2000s. She and her family have developed a close friendship with Mr Rush and his family as their sons went to the same school. They have common friends and acquaintances. Her evidence was that Mr Rush's reputation in the community in which they mixed was as a "good man" who was "absolutely committed to being the best father that he could be". He was a man of "gravitas and grace in equal proportion".

682 Mr Simon Phillips is a well-known Australian theatre director. He met Mr Rush in 1988 when he was Associate Director of the MTC and cast Mr Rush in a role. He has worked with Mr Rush on a number of occasions since that time and became friends with him. He knew people in the theatre community in Australia who also knew Mr Rush. His evidence was that Mr Rush was a "hugely admired and respected actor inside the profession" and that "his integrity as an actor would never have been in question ... under any circumstances".

683 Mr John Gaden AO is an actor and director who has worked for most of the major theatre companies in Australia and appeared in countless plays since 1966. He has known Mr Rush since 1982 and either acted with him, or directed him, in many plays. He gave the following evidence about Mr Rush's reputation amongst people in the theatre who both he and Mr Rush know:

- - - what was Mr Rush's reputation?---Extraordinarily high. Geoffrey – when Geoffrey is in a rehearsal room or on stage you see a man in his element. He – he brings such joy, such creativity, such meticulous attention to detail, such lightheartedness, and such focus into the rehearsal room. And he is absolutely renowned for that. A consummate theatre and film actor.

684 Ms Judith Davis is a celebrated Australian actor who has appeared in many films and plays. She has known Mr Rush for many years, having worked with him on a film in the early 1980s. Her evidence was that Mr Rush had a "very fine reputation" amongst people in the film, television and theatre industry and that he had a "tremendous record of achievement".

685 Mr Fred Schepisi AO is a film director, producer and screenwriter who has won many awards over his lengthy career. He has known Mr Rush socially and professionally for about 14 years and knows many people who know Mr Rush. His evidence was that Mr Rush's reputation in the circles in which he moved was as someone who was "extremely professional" and "extremely dedicated to the work that he does". He was known overseas for his professionalism, his talent and his "collaboration skills".

686 Mr Fred Specktor has been a talent agent in Los Angeles for about 60 years and has represented Mr Rush for over 20 years. His evidence was that Mr Rush's reputation amongst people who they both know and work with in the United States was "perfect" and that he had "never had any complaint of any kind about his professionalism in any manner whatsoever".

687 Despite the extensive evidence concerning Mr Rush's reputation in the theatre, film and television industries, as well as generally, Nationwide and Mr Moran submitted that there was very little evidence as to Mr Rush's reputation in the "relevant sector", which was said to be "his reputation for propriety with female actors".

688 That submission is rejected.

689 It may readily be accepted that, when evidence of good or bad character is given in a defamation action, it should be directed at that sector of the applicant's character which is relevant to the alleged defamatory imputations: *Plato Films Ltd v Speidel* [1961] AC 1090 at 1102, 1131, 1140. The example given by Denning LJ in *Speidel* to illustrate that principle was that "if the libel imputes theft, the relevant sector is [the plaintiff's] character for honesty, not his character as a motorist".

690 This principle must, however, be approached with a modicum of common sense. Questions of degree are involved. While Lord Denning's example is clear enough, it is not always possible to divide a person's life into neatly defined "sectors". Nor should a narrow or pedantic approach be taken to defining the sector of a person's life which was likely to be affected by the defamatory imputations.

691 It may readily be accepted here that, speaking entirely hypothetically, evidence relating to Mr Rush's reputation as a cook or gardener or golfer would not only have been inadmissible, but also completely unhelpful. I doubt, however, that it is accurate or appropriate to define the sector of Mr Rush's character which is relevant to the defamatory imputations in terms as narrow as his reputation for propriety with female actors. I consider that the relevant sector of Mr Rush's character, having regard to the nature of the defamatory imputations, is his reputation for how he conducts himself as an actor; his integrity and probity as an actor. While many of the imputations focus on behaviour of a sexual nature, there are some imputations which are broader than that. They include imputations that Mr Rush engaged in "scandalously inappropriate behaviour in the theatre" and had "engaged in inappropriate behaviour against another person" while working on the production of *King Lear*. Mr Rush's

reputation for honesty and integrity generally is also an issue raised by the defamatory publications because one of the imputations is that he lied about whether the STC had told him the identity of the complainant.

692 I accept that some of the character or reputation evidence drifted into a consideration of Mr Rush's skills as an actor. It is, however, rather artificial to think that there is necessarily some clear dividing line between an actor's skills and their probity and integrity as an actor. In any event, I give little weight to the reputational evidence insofar as it related solely to Mr Rush's acting skills.

693 The overall effect of the evidence in relation to Mr Rush's reputation for integrity and probity as an actor was that his reputation in that regard was untarnished. He was "hugely admired and respected" and "his integrity as an actor would never have been in question". He had been described as, amongst other things, "the consummate professional" and as having been "held in very high esteem" in the theatre, movie and television circles. That evidence went unchallenged. Even if the relevant sector of Mr Rush's reputation was as narrow as Nationwide and Mr Moran would have it, it is impossible to see how that evidence could have been given if Mr Rush's reputation for propriety with female actors was at all tarnished. An actor who behaved inappropriately towards female actors would not be "hugely admired and respected".

694 In any event, Nationwide and Mr Moran made no attempt to prove that Mr Rush's reputation in the sector which they considered relevant was in any sense tarnished.

Publication and republication

695 The poster and two *Telegraph* articles were widely distributed and published.

696 There was no dispute that 4,242 copies of the poster were distributed in New South Wales and the Australian Capital Territory. It may be inferred that they were displayed outside newsagencies and other outlets and were likely to have been seen by many people.

697 The sales, or estimated sales, of the 30 November 2017 edition of the *Telegraph* was 190,400 (178,595 in New South Wales; 52 in Victoria; 4,681 in Queensland and 7,072 in the Australian Capital Territory; 0 in South Australia, Tasmania, Western Australia and the Northern Territory). The readership, or estimated readership of the 30 November 2017 edition of the *Telegraph* was 933,000 (909,000 in New South Wales; 24,000 in the Australian Capital Territory; details for Victoria and Queensland not known; 0 in Tasmania, Western

Australia, South Australia and the Northern Territory). The “hits” or estimated “hits” received by the digital versions of the 30 November 2017 articles on the *Telegraph* website was 8,706. The vast majority of those hits originated from Australia.

698 The 30 November 2017 articles concerning Mr Rush were published in other newspapers with the implied authority of Nationwide. Those newspapers were the *Advertiser*, the *Courier Mail* and the *Gold Coast Bulletin*. The approximate readership of those newspapers was 984,000. There were also a small number of hits on the relevant articles on the websites associated with those newspapers.

699 The estimated sales of the 1 December 2017 edition of the *Telegraph* was 205,308 (192,344 in New South Wales; 78 in Victoria; 5,420 in Queensland and 7,466 in the Australian Capital Territory; 0 in South Australia, Tasmania, Western Australia and the Northern Territory). The estimated readership of the 1 December 2017 edition of the *Telegraph* was 933,000 (909,000 in New South Wales; 24,000 in the Australian Capital Territory; details for Victoria and Queensland not known; 0 in South Australia, Tasmania, Western Australia, South Australia and the Northern Territory). The “hits” or estimated “hits” received by the digital versions of the 1 December 2017 articles on the *Telegraph* website was 15,606. The vast majority of those hits originated from Australia.

700 The 1 December 2017 articles concerning Mr Rush were published in the *Advertiser*, the *Courier Mail* and the *Gold Coast Bulletin*. The approximate readership, of those newspapers was 984,000. There were also a small number of hits on the article on the websites associated with those newspapers.

701 There was evidence that some of the content of the 30 November and 1 December 2017 *Telegraph* articles was picked-up and published by different media organisations on various platforms throughout the world. The republication of the substance of the articles was undoubtably the natural and probable result of the initial publications: *Speight v Gosnay* (1891) 60 LJQB 231 at 232; *Sims v Wran* [1984] 1 NSWLR 317 at 320. That was so particularly given Mr Rush’s standing and status as an actor, the nature of the then emerging #MeToo movement and the sensational nature of the articles. Mr Schepisi’s evidence about the relevant articles was that “[y]ou would have [sic] to be dead not to have come across that”. Even Ms Davis, who said that she did not like gossiping and did not mix in theatrical circles, heard people talking about the articles. She recalled that those people said “his [Mr Rush’s] career is finished”.

Hurt and distress

702 There could be little doubt that Mr Rush was hurt and distressed by the relevant publications. Indeed, the overall impression given by the evidence adduced in relation to this issue was that he was devastated by them.

703 Mr Rush's evidence was that the effect on him when he saw and read the 30 November 2017 articles was "devastating". He "felt as if someone had poured lead into [his] head". He was "numb". The image of him on the front page had a particular impact. He felt that the use of the image in that context "polluted" or "dirtied" the original intention of the image. The headline "King Leer" made him feel "sick to [his] stomach". When he read the articles he was "distressed" and felt that he was in a "diabolical and vulnerable position".

704 His reaction was perhaps even more extreme when he saw the articles in the 1 December 2017 edition of the *Telegraph*. He described how his "blood kind of ran cold" and he "went to jelly". He was "distracted by the way the story was running off the rails" and "couldn't quite understand ... why the younger members of the cast were ganging up". He felt that he was being "demonised by untruths". He went into an "emotional spiral" and described how the articles were the start of the worst 11 months in his life. That 11 months was the period between the publication and the trial.

705 During the 11 months after the publication, Mr Rush's evidence was that he and Ms Menelaus had "barely left the house" and that, apart from some brief respites, they led a "hermit-like existence". He felt "trapped". Mr Rush was cross-examined extensively about this aspect of his evidence. The thrust of that cross-examination was that during the relevant 11 month period Mr Rush had travelled to the Adelaide Festival for four days, had attended an awards ceremony in the United States and had travelled, with Ms Menelaus, to Umbria and then London for a short period. The suggestion was that those trips were inconsistent with his evidence of being housebound. He was questioned in minute detail about his movements during those trips.

706 Mr Rush's evidence was that going to the Adelaide Festival with his son was a "tonic" to break the hermit-like existence he had been leading. He went to the awards ceremony in the United States under pressure from his agent because it was suggested to him that if he did not, it would be seen as an admission of guilt. As for Umbria, Mr Rush's evidence was that this was an attempt to escape and find solace. It was a trip taken shortly after the death of Ms Menelaus' mother.

707 I accept Mr Rush's evidence about those trips. I reject the contention that they were
inconsistent with Mr Rush's evidence that he otherwise led a reclusive or hermit-like
existence in Australia by reason of the publications. As will be seen, Mr Rush's evidence
about the reclusive existence he led after the publications was corroborated by a number of
other witnesses.

708 It was also quite obvious from Mr Rush's demeanour while he was giving evidence,
particularly in relation to the effect of the articles, that he had been deeply hurt and
traumatised by the articles. He presented as a man who, somewhat curiously given his craft,
was not always entirely comfortable or forthcoming when speaking publicly about his own
emotions. The devastating effect of the articles on him was nevertheless obvious.

709 Other witnesses also spoke of the devastating effect that the publications have had on Mr
Rush.

710 Ms Menelaus' evidence was that when Mr Rush became aware of the publication of the
30 November 2017 articles he was "[b]amboozled, lost, going around in circles" and in
"[t]otal and utter unbelievable shock". She recalled that when Mr Rush read the article, he
cried. Her evidence was:

And did he say anything to you about how he felt about it?---Yes. He said, "They've
just destroyed everything I've tried to do with this – with this role," and he wept. He
put his arm around me and wept.

711 Ms Menelaus described Mr Rush's demeanour since the publications in the following terms:

And how did his demeanour appear?---Well, in fact, I would say that, even though
things have got so much worse since this – and let me tell you, really worse – the
accusations that he had been accused of were appalling. This is like the tip of an
iceberg but the worst response, I think, was this very first one. It just kicked him in
the gut and I think it's – I don't think he has actually recovered from these first two
pictures.

What did you observe about him that made you think that?---He retrieved – he
retracted – mentally, he would go round and round and round in circles. He didn't
speak for a very long time that day – the very first day these two photographs came
out, he went very quiet, which is not like Geoffrey.

We've observed that in the last two days?---Yes. Yes. He was quite fetal at times on
the bed. He put his head in his hands. He couldn't sleep. He groaned every morning
when he – he said to me, "I dread going to bed and I dread waking up." Our days
have been – our days for 11 months have been appalling. Our 11 months, I would
say, were like Groundhog Day, except in Groundhog Day, it's the same day. With
this, it got worse and worse and worse and - - -

....

And over that period – you’ve told his Honour already how the last 11 months have been. Is there anything else that you wanted to tell his Honour that you’ve observed about Mr Rush over the last 11 months that you haven’t seen in him over the last 13 years?---Yes, I saw a man so altered and changed. His eyes sunk into his head. He retreated very much from – well, from the world. Although we tried to get him to go out – my son especially tried to get him to go out. We took – the family took him away after this second lot of articles came out. We wanted – my mother had died in the middle of that. And we wanted – he – the children were very worried that he was – and he was retreating into a sort of solo world. He would get up very late, he would not speak for a lot of the day. I was – we were losing him, and to a certain extent we have – he has altered. I don’t know that – it will take us a very, very long time to get over this, and I don’t think parts of this – we’ve – our approach to the world and people has changed, and I – I think Geoffrey will take a very – we will all take a very long time to get over it.

712 Ms Kershaw described how after the publications Mr Rush was “laden with grief” and that he “stopped laughing”. He appeared to be obsessed by the allegations to the point where his whole life appeared to be subsumed by the allegations. Ms Kershaw noted how Mr Rush had stopped talking about work, as he had done before the publications, and that “all of his body – everything – all of his DNA [appeared to be] subsumed by the grief that he is carrying, and the injustice...”. Ms Kershaw observed that Mr Rush had lived in a “very dark place” since the publications, that the “the effects of the publications on Mr Rush have been massive” and that she feared that he will never be able to recover from this period in his life.

713 Ms O’Bryan visited Mr Rush and Ms Menelaus a few days after the publications. She observed that they were both extremely agitated, that there was “almost nonstop crying” and that they were “not functioning very well”. Her evidence was that, since the publications, Mr Rush and Ms Menelaus have been “extremely socially isolated” and that it is “like they’re in house arrest”. She described the change in Mr Rush’s demeanour since the publications in the following terms:

What have you noticed?---Geoffrey has always been a very ebullient kind of person, he’s a very warm person, he’s a person who’s very engaged in conversation. Geoffrey is someone who will inquire after you and what you’re doing, and – you know, he has always been incredibly generous in sharing his knowledge. He has got this encyclopaedic knowledge of film, theatre, and classics, and the arts. And for me, going into teaching, he would be incredibly generous about saying, “What are you teaching? What are you– “ you know, we would have long discussions about Shakespeare in particular. In the last 11 months, the only thing that he has thought about has been this case. And there has been a sense in which he has expressed, many times, that this is the end of his life as he knows it. That he can’t see himself going back to acting, he – he has always believed that the audience is with him, and he says to me, “I can’t – “ you know, you make yourself vulnerable when you go on stage, and “I can’t make myself vulnerable if I think the audience is not with me, and I don’t know that they are anymore.” And I think that’s a loss to all of us.

714 Mr Schepisi's evidence was that, after the publications, it was hard to get in contact with Mr Rush because he and Ms Menelaus did not want to speak to anybody and found it difficult to leave the house. When he eventually went around to their house, he described Mr Rush as a "basket case". Mr Schepisi observed that since that time, despite the "good face" that Mr Rush was putting on, he could see that Mr Rush was "still entirely rattled and not – not actually being able to look forward to what life was going to hold for him".

715 Ms Nevin saw Mr Rush and Ms Menelaus shortly after the publications. She described how Mr Rush was in a "state of confusion". He was "going over it obsessively ... [h]e just didn't understand". She stayed with Mr Rush and Ms Menelaus in Umbria, Italy in mid-2018. She was hoping that would be a "time of peace and reparation for them, but that wasn't the case". She particularly empathised with Mr Rush because she had a "similar kind of deep connection" to her work as an actor and she observed that he appeared to be losing the sense of being able to act. That appeared to be obvious to her from her more recent contact with Mr Rush. Her evidence in that regard was as follows:

And have you seen him more recently? Have you observed how he is more recently?---I do beg your pardon. Yes. I saw Geoffrey recently in Melbourne, and he – I think he – he had moved to the next stage following on from the mid-year since that – he was losing his capacity to work. He actually said, "I'm grieving for the loss of" – this, by the way, is an actor's brain, because I observed Geoffrey doing this. I'm crying now, but at the time the actor observed him. He said, "I'm grieving for the loss of walking into" – I think I'm – I think it's a correct quote – "walking into a room and not being able to start." The word "start" carries such a wealth of meaning. It's a kind of deadening. He's talking about a kind of death, really.

716 Before considering and assessing the appropriate award of compensatory damages, it is necessary to consider Mr Rush's claim for aggravated damages.

Aggravated damages

717 Mr Rush particularised 23 "matters" which he contends would justify an award of aggravated damages. Those 23 matters are as follows:

1. The respondents' failure to apologise for publication of the matters complained of. This was improper in relation to imputation 10(g) because the respondents intended to convey that imputation to their readers but have never pleaded truth to it.
2. The respondents' failure to withdraw the truth defence to imputation 10(f) and apologise for pleading truth to that imputation. That was improper, at least since the respondents' decision not to call McIntyre at which time they must have known there would be no evidence capable of supporting it. The fact that the respondents continue to maintain this plea is also improper when it is wholly unsupported by evidence.

3. The unfair, sensational and extravagant method of publication evidenced, in particular, by the headlines which cannot be justified by any information in the possession of the respondents. Examples are “Scandal Claims”, “King Leer”, “Bard Behaviour”, “World Exclusive”.
4. The improper motives of the respondents, including, specifically, the second respondent. The motive was to boost sales and increase circulation by sensational articles concerning the #Metoo movement. This is evidenced by Ex A-38 and the juxtaposition of the article concerning Don Burke in the second matter complained of.
5. The dishonesty of the first respondent in relation to the first matter complained of. It knew that the STC had not confirmed inappropriate behaviour. The assertion that it had done so was a calculated falsehood to boost sales.
6. The calculated cruelty of the respondents in publishing the second matter complained of knowing that the STC had requested it not to, that Ms Norvill did not wish it to and Mr Rush had, through his solicitors, denied the allegations.
7. The publication of the contents of Mr Pullen’s letter when it had been marked “Not for Publication”.
8. The publication of the second matter complained of and its serious allegations of impropriety without having confirmed any detail with Ms Norvill. That was reckless and improper. Ex A-39, A-40 and A41.
9. Exhibit A-5. Mr Moran’s email:
 - (a) He only approached the applicant, indirectly through his agent, at 5.06pm the night before the publication of the first and second matters complained of.
 - (b) He said the story was “running in tomorrow’s” paper (ie it was going to be published regardless of what the applicant said).
 - (c) He wrote to the applicant, in relation to what he described as “an alleged incident of abuse”, stating that the investigation was part of a broader investigation in the wake of the Don Burke and Harvey Weinstein scandals.
 - (d) He did not suggest to the applicant that he was going to refer to the applicant as “King Leer”, or misappropriate the photograph of the applicant from *King Lear*, or that he was going to allege the applicant had engaged in “Bard behaviour”.
 - (e) He did not send the applicant the text of the first and second matters complained of.
10. The dishonesty of the respondents in relation to the third matter complained of, as follows:
 - (a) Brandon McClelland. The respondents knew, because Mr McClelland had told them (Ex A-45), that he knew nothing about events during *King Lear* but presented his words as if he did and as if he confirmed the complainant’s story from his personal knowledge; (see also heading to A-44).

- (b) The respondents redacted Mr McClelland's tweet and Facebook post (A42 and A43) to give a false impression of his views.
 - (c) The respondents presented Mr Wyatt's Facebook post as if it was in support of Ms Norvill whereas it was plainly generic. They also did so without speaking to Mr Wyatt.
 - (d) The respondents deliberately omitted the words set out in the third paragraph of Ex A-46 "*The STC has at all times been clear that this was an allegation made to (not by) STC and not a conclusion of impropriety*". That was done so as to give a deliberately false impression of the STC's position.
 - (e) The respondents fabricated the assertion that the STC would not work with the applicant again. There is no evidence to support the proposition that such a decision had been made and it is contradicted by the last paragraph of A-46.
 - (f) The dishonesty in these words, "*Despite denials, Rush was told who made the claims in a phone call with executive director Patrick McIntyre weeks ago*". The respondents knew this was false from Ex A-48 which directly informed Moran that the applicant had not been told. The omission of the content of this email from the third matter complained of was also dishonest.
11. Publication of the applicant's solicitors' letter in the third matter complained of despite the notation "Not for Publication".
 12. Failure to seek comment from the applicant in respect of the third matter complained of until 6.20pm on 30 November 2017.
 13. The content of Ex A-50. By asking the question whether he would like to "say sorry to the victim", the second respondent asserted that the applicant was actually guilty. That was improper behaviour. The second respondent had no basis for such an assertion. It was also an insult.
 14. The respondents improperly cast around for material having nothing to do with the allegations in the matter complained of in an attempt to smear and traduce the applicant (Ex A-53).
 15. The manner in which the first respondent reported the course of the proceedings – Ex A-54. This further added to the damage to the applicant's reputation and was improper because it was a biased attempt to smear the applicant and punish him for suing the respondents.
 16. The respondents' Defence of 1 February 2018. The respondents alleged at paragraphs 22 and 23, that during an after-party for the production on 9 January 2016, the applicant entered the female bathroom and stood outside a cubicle which was occupied by the complainant. The same allegation was raised in the respondents' Amended Defence of 20 February 2018 at paragraphs 23 and 23A.
 17. Those allegations were widely reported including by *The Daily Telegraph*.
 18. The respondents have made public comments that the matters complained of were accurate and reasonable.
 19. The respondents' conduct of the litigation, including:

- (a) The filing of plainly inadequate Defences in February 2018 – including particulars which are no longer pursued;
 - (b) The Interlocutory Applications of April 2018, seeking to file a Further Amended Defence and seeking to file a Cross-Claim against the STC;
 - (c) The application for leave to appeal, on a discretionary issue of practice and procedure, in relation to particulars which would never have made any difference to the ultimate outcome of the proceedings;
 - (d) The late abandonment of the defence of statutory qualified privilege, when it suited the respondents to do so in order to resurrect the previously struck out defence of justification;
 - (e) Refusing to admit any of the matters subject to the applicant's Notices to Admit: Tabs 19, 20, 28, 29, 31, 33, 34.
20. Publication of material on 30 October 2018 in breach of the Court's suppression order.
21. The respondents' cross-examination of the applicant, including suggesting he was not virtually housebound following the matters complained of and questioning the applicant's evidence that he had led "a hermit existence".
22. The falsity of the imputations.
23. By reason of these matters it will be inferred that the respondents were actuated by express malice in publication of the matters complained of and in the conduct of the litigation which increased the hurt and harm to the applicant.

718 Paragraph 20 of these particulars was subsequently withdrawn.

719 Regrettably the parties' submissions in relation to the issue of aggravated damages were truncated and ultimately not particularly helpful.

720 I do not propose to deal with each of the 23 particulars separately or individually. I will, instead, group them together and deal with some in a compendious fashion. Before doing so, it is helpful to set out some of the general principles in relation to aggravated damages.

General principles in relation to aggravated damages

721 Aggravated damages are a form of compensatory damages; they are not awarded to punish a respondent: *Hockey* at [446(f)].

722 Aggravated damages may be awarded where there is a lack of *bona fides* in the respondent's conduct, or where the conduct is improper or unjustifiable: *Triggell v Pheeney* (1951) 82 CLR 497 at 514. Conduct with those characteristics may be taken to increase or aggravate the harm the defamation caused or may reasonably be supposed to have caused: *Mirror*

Newspapers Ltd v Fitzpatrick [1984] 1 NSWLR 643 at 653B; *Hockey* at [446(g)]. Where conduct of a respondent which is improper, unjustifiable or lacking in *bona fides* is established, an increase to the applicant's sense of hurt may be presumed from all the evidence: *Wagner* at [743]. It is not necessary for the applicant to give evidence that the aggravating behaviour of the respondent "augmented his [or her] sense of hurt": *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 250; *Flegg v Hallett* [2015] QSC 167 at [232], [237].

723 Circumstances of aggravation can be found in the respondent's conduct from the commission of the tort up until the day of judgment: *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071; [1972] 1 All ER 801; *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 (statement of principle not disturbed on appeal in *Wilson (No 2)*).

724 The failure to publish a retraction or an apology may make an award of aggravated damages appropriate if it amounts to a continuing assertion of the defamatory imputations: *Carson* at 78; *Hockey* at [446(h)]; *Wilson* at [87]; *Wagner* at [744].

725 Aggravated damages may be appropriate where the defamatory matter is published in an extravagant, excessive or sensationalist manner: *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 79; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [34].

726 The respondent's aggravating conduct may be found in the circumstances of publication where the respondent increased the harm suffered by the applicant by recklessly inflicting damage on the applicant's reputation, or failing to investigate the defamatory allegations before publishing them: *Andrews* at 243-4; *Wilson* at [86].

727 The conduct of the litigation can in some circumstances justify aggravated damages, however mere persistence, even vigorous persistence, in a *bona fide* defence, in the absence of improper or unjustifiable conduct, cannot be used to aggravate compensatory damages: *Coyne v Citizen Finance Limited* (1990 – 1991) 172 CLR 211 at 237 (Toohey J, with whom Dawson and McHugh JJ agreed). The conduct of the respondent's counsel can provide a basis for aggravated damages, including where counsel puts to the applicant that he or she was lying to the court, or assertions were put to the applicant in cross-examination which were without support, or were gratuitous or calculated to insult: *Harbour Radio Pty Ltd v*

Tingle [2001] NSWCA 194; *Haertsch v TCN Channel Nine Pty Ltd* [2010] NSWSC 182 at [53].

The nature of the 30 November 2017 articles

728 Mr Rush contended that the defamatory imputations conveyed by the first and second matters complained of, the poster and the articles published by the *Telegraph* on 30 November 2017, were published in an extravagant, excessive and sensationalist manner (particular 2; see also particulars 4, 5, 6, 8).

729 I agree.

730 The nature and content of the 30 November 2017 articles was described in detail earlier in these reasons. The most striking feature of those articles is that, despite what appears to have been the relative paucity of actual objective information available to Nationwide and Mr Moran, the articles occupied almost the entire first page and a double page spread on pages four and five. The front page is particularly sensational and unfair. It deployed a head and shoulders photograph of Mr Rush taken for the purposes of promoting *King Lear*. He is made up as the “deranged” Lear, complete with stark white make-up and a garland of flowers or weeds. His expression is one of concern, anguish or bewilderment.

731 The photograph is a striking image. It occupies almost the entire front page, along with the very large headline: “KING LEER”. That pun clearly conveyed, and it may be inferred was clearly intended to convey, that Mr Rush had been involved in some sort of sexually inappropriate behaviour. It was, and it may readily be inferred was intended to be, a direct and full-frontal attack on Mr Rush’s reputation. That is so particularly given that this publication occurred in the midst of the emerging #MeToo movement.

732 It is difficult to see how the front page image could possibly be considered to be justifiable in light of the relative paucity of the information apparent from the content of the articles. It may readily be inferred from the content of the articles and from Mr Moran’s email to Ms Churchill-Brown on the eve of the publication that Mr Moran had little information beyond the STC’s confirmation that it had received a complaint that Mr Rush had engaged in inappropriate behaviour, and Mr Rush’s statement, through his solicitor, that he had never engaged in inappropriate behaviour and that the STC had not even told him about the complaint or provided him with any details about it. Yet the photograph and the headline clearly and spectacularly conveyed that Mr Rush was effectively guilty of that inappropriate

behaviour and that it was sexual in nature. I need only repeat here what I said earlier in that part of these reasons which deals with the question whether the alleged imputations were conveyed. The vice in the image and headline on the front page is that it effectively poisoned the reader's mind from the outset.

733 It should be noted, in this context, that Nationwide and Mr Moran did not ultimately seek to invoke the defence of qualified privilege in s 30 of the Defamation Act. Nor did Mr Moran, or anyone else from Nationwide who was involved in the relevant publications, give evidence.

734 The unjustifiable nature of the first matter complained of does not end with the front page. The double page spread on pages four and five was equally excessive and sensationalist. The pun in the prominent headline "STAR'S BARD BEHAVIOUR" again conveyed, and it may be inferred was intended to convey, guilt. Perhaps more significantly, the juxtaposition of the article about Don Burke, and its inclusion within the same "box" as the articles concerning Mr Rush, clearly linked, and it may be inferred was intended to link, the allegations against Mr Rush to the Don Burke story and the broader Harvey Weinstein scandal. That inference is bolstered by Mr Moran's email to Ms Churchill-Brown, which asserted that "[t]his is part of a broader investigation into a number of high profile people in the entertainment industry in the wake of the Don Burke scandal, and previously the Harvey Weinstein allegations".

735 Mr Rush submitted that it should be inferred that the motive of Nationwide and Mr Moran was to boost sales and increase circulation by way of sensationalist articles concerning the #MeToo movement.

736 I agree. That inference is supported not only by Mr Moran's email and the positioning of the article about Don Burke, but also by the extraordinarily sensationalist, excessive and unfair nature of the publication itself.

737 Finally, I accept Mr Rush's contention that the conduct of Nationwide and Mr Moran in publishing the 30 November 2017 articles was, in all the circumstances, unjustified and improper because they were reckless as to the truth or falsity of the defamatory imputations conveyed by the articles and had failed to make adequate inquiries before publication. It is open to infer that the information which Mr Moran had available to him as at 30 November 2017 comprised little more than the STC's confirmation that it had received a complaint of inappropriate behaviour by Mr Rush. He may also have had a confidential source at the STC

who had advised him of the identity of the complainant. What is significant, however, is that it is readily apparent that Mr Moran had not spoken to Ms Norvill and had not confirmed the details of the complaint with her. Indeed, it is readily apparent that Mr Moran knew that Ms Norvill did not want her identity revealed and had told the STC that she did not want to take the complaint any further. It may also be readily inferred that Mr Moran well-knew that the STC had not confirmed that the inappropriate behaviour had occurred. It had only confirmed that a complaint had been made.

738 In those circumstances, it was manifestly reckless to convey the defamatory imputations that were conveyed by the 30 November 2017 publications, particularly in the sensational and extravagant manner in which they were published. For the reasons detailed earlier, there could be little doubt that the front page of the publication that day clearly conveyed that Mr Rush was in effect guilty of the alleged inappropriate behaviour. Indeed, it conveyed that Mr Rush was a pervert. It may also be inferred that it was calculated to convey those very imputations, or at the very least that Mr Moran and Nationwide were reckless in that regard. They must also have known the damage that the publication of the 30 November 2017 articles, and the front page in particular, would inflict on Mr Rush's reputation.

739 This was, in all the circumstances, a recklessly irresponsible piece of journalism. It is difficult to avoid the conclusion that it was calculated to damage. Nationwide and Mr Moran's conduct in publishing the 30 November 2017 articles was in all the circumstances both improper and unjustifiable.

740 There could be little doubt that it is open to infer from the whole of the evidence that Mr Rush's hurt and injury was substantially increased by the extravagant and sensationalist nature of the second matter complained of. Indeed, that inference is inescapable. At the very least, the improper and unjustified features of the articles "may be supposed to have caused" an aggravation of the harm suffered by Mr Rush: *Fitzpatrick* at 653; *Hockey* at [447(g)]; *Wagner* at [743].

741 In any event, the evidence of Mr Rush and Ms Menelaus clearly established that to be the case. As noted earlier in the context of the evidence concerning hurt feelings generally, the evidence of both Mr Rush and Ms Menelaus was that Mr Rush was particularly hurt by the misappropriation and pollution of the promotional photograph of him made up as King Lear. Ms Menelaus' evidence was that when Mr Rush saw the photograph he said "[i]t's just unbelievably worse than you can imagine". He also said that he found the "branding font of

‘King Leer’ was very upsetting”. His evidence was that the headline made him feel “sick to [his] stomach”.

742 In all the circumstances, the improper and unjustified conduct of Nationwide and Mr Moran in publishing the 30 November 2017 articles caused, or may be supposed to have caused, an aggravation of the harm suffered by Mr Rush suffered. As such it warrants an award of aggravated damages.

The nature of the 1 December 2017 articles

743 Mr Rush contended that there were some features of the 1 December 2017 articles which, when considered alongside the information available to Nationwide and Mr Moran at the time of publication, supported an inference of dishonesty on their part (particular 10). Those features are identified in particular 10 of Mr Rush’s particulars of aggravated damages.

744 I would perhaps not go so far as to infer dishonesty. Nor is that necessary. I would, however, find that the features highlighted by Mr Rush support an inference that the conduct of Nationwide and Mr Moran in relation to the 1 December 2017 articles lacked *bona fides* and was in any event improper and unjustifiable. I would also find that those features of the articles increased or aggravated Mr Rush’s hurt, or at the very least may reasonably be taken to have done so.

745 As was discussed in detail earlier in the context of the imputations conveyed by the 1 December 2017 articles, the overwhelming tenor of those articles was that, despite Mr Rush’s denial, the complainant’s accusations had been backed by the “theatre cast” and STC “executives”. The prominent front page headline was “WE’RE WITH YOU” and “Theatre cast back accuser as Rush denies ‘touching’”. A prominent photo of Mr Wyatt appeared alongside a statement attributed to him: “I was in the show. I believe (her)”. Mr McClelland was reported to have similarly “urged others on Twitter to believe the actress” because “[i]t [the allegation] wasn’t a misunderstanding” and “wasn’t a joke”. The impression clearly conveyed was that these two actors knew the details of the allegation and had effectively confirmed that the alleged inappropriate touching had occurred.

746 That was a false impression and it may readily be inferred that Mr Moran knew it.

747 Mr McClelland’s tweet was:

Believe the women. This wasn’t just once. It wasn’t a misunderstanding. It wasn’t a joke.

748 Mr McClelland's reference to "women" (plural) suggests that his tweet was not directly related to the complaint concerning Mr Rush's behaviour in *King Lear*. There was only one complainant in relation to the *King Lear* allegations. It is also readily apparent that Mr Moran knew that Mr McClelland was not even involved in the production of *King Lear*. In any event, Mr Moran soon discovered that Mr McClelland's tweet did not specifically relate to the *King Lear* allegations.

749 On 30 November 2017 at 2.37 pm, Mr Moran sent a Facebook message to Mr McClelland in which he said:

hey mate, apologies for reaching out direct but not sure how else to get in touch. I wrote the Geoffrey Rush story today and am being slammed. I am trying to push forward regardless and saw your tweet. Would you talk to me off the record on background?

750 Mr McClelland replied:

My tweet was not directly related to any particular individual and I am not able to comment on the complaint filed at STC as I do not have intimate or first hand knowledge regarding that production. I'm sorry.

751 It is true that Mr McClelland's reply to Mr Moran's email is undated. I am nevertheless prepared to infer, in all the circumstances, and having regard in particular to the terms of Mr McClelland's reply, that the reply was sent promptly and most likely some time later in the day on 30 November 2017. In any event, it is tolerably clear from the terms of Mr McClelland's tweet, together with the fact that Mr McClelland was not himself involved in *King Lear*, which Mr Moran clearly knew, that Mr McClelland did not have firsthand knowledge of the nature of the *King Lear* complaint.

752 The article reproduced only part of Mr McClelland's tweet. It omitted the reference to "[b]elieve the women". In any event, the reference to Mr McClelland's tweet in the article, read in context, gave the false impression that his tweet was somehow specifically related to the allegations which had been made against Mr Rush, and that Mr McClelland had some knowledge relating to the production. The article specifically stated that Mr McClelland had urged others to "believe the actress".

753 It is readily apparent from Mr Moran's Facebook message that he was desperate to find some support for, or otherwise back up the story he had written the previous day. His or Nationwide's apparent decision to create a misleading impression of Mr McClelland's tweet

must be considered in that context. Even though Mr Moran appears to have been criticised in respect of the 30 November 2017 articles, he was determined to “push forward regardless”.

754 As for Mr Wyatt’s Facebook post, it too was clearly generic. In it, he 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 as a whole 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.

755 On the front page, Mr Wyatt’s post is reproduced, in prominent terms, as being:

I was in the show. I believe (her).

756 As for the STC, on the afternoon of 30 November 2017, Mr Moran was copied into an email which included an updated statement from the STC. That statement concluded with the following words:

STC has at all times been clear that this was an allegation made to (not by) STC and not a conclusion of impropriety.

757 Mr Moran did not include those words in his story the following day. It may be inferred that that was a conscious decision. In any event, the omission of that part of the STC’s statement conveyed a false impression of the position that had been taken by the STC, particularly having regard to the tenor of the article as a whole.

758 Finally, the 1 December 2017 articles included the statement: “[d]espite denials, Rush was told who made the claims in a phone call with the executive director Patrick McIntyre weeks ago”. It may be inferred that Mr Moran well knew that statement was false, or at least was reckless in that regard. The afternoon before the publication, Mr Moran had received an email from Ms Stevenson of the STC which stated:

A senior member of the STC management team spoke to Geoffrey Rush on or around the 9 or 10 of November. **This person did not pass on any specific information regarding the nature of the complaint to Mr Rush as they were maintaining the confidentiality of the complainant**, however Mr Rush was aware that a complaint had been made.

(Emphasis added)

759 Nationwide and Mr Moran have never sought to prove the truth of the imputation, found to have been conveyed by the 1 December 2017 articles, that Mr Rush had falsely denied that the STC had told him the identity of the person who had made a complaint against him.

760 The publication of the 1 December 2017 articles was again a piece of recklessly irresponsible journalism in all the circumstances. Nationwide and Mr Moran's intentions were clear. Having been criticised for the previous day's publications, they set about "bootstrapping" the story to include misleading statements of support for the complainant's allegations.

761 In all the circumstances, those features of the 1 December 2017 articles and Nationwide and Mr Moran's conduct in relation to them support a finding that they have acted in a way that was not *bona fide*, or was otherwise improper or unjustified.

762 Those features of the 1 December 2017 articles may also reasonably be supposed to have caused an increase or aggravation of the harm and hurt suffered by Mr Rush. In any event, that was the clear effect of the evidence of Mr Rush and Ms Menelaus. Ms Menelaus' evidence concerning Mr Rush's reaction to the 1 December 2017 articles was:

Were you with him when he saw that?---Yes. Yes.

And do you remember his reaction to that one?---Well, this is the one that made him cross because – for two reasons: (1) one boy wasn't in the play at all and the other thing that upset him was that, if these people were saying that they had heard about the story, why hadn't Geoffrey heard about it? Who had been telling these boys about this story? That's what he couldn't understand – and without having ever the chance to actually say himself that nothing happened. There was nothing.

763 Mr Rush's evidence was that when he saw the 1 December 2017 articles his "blood ran cold" and he felt "demonised by untruths". He was also plainly baffled by the references to Mr Wyatt and Mr McClelland. His evidence was that he knew Mr Wyatt and liked him, but noted that Lear and Edmund, played by him and Mr Wyatt respectively, "have absolutely next to zero contact in the play". As for "we're with you" and the reference to Mr McClelland, Mr Rush's reaction was "[w]ho the fuck is Brendon McClelland" and "why is he banging on as part of the theatre cast?" There could be little doubt that Mr Rush's hurt was exacerbated by the references to these two actors.

764 When shown Mr McClelland's text to Mr Moran about Mr McClelland's tweet and asked about the treatment of Mr McClelland in the 1 December 2017 articles, Mr Rush said that the treatment of Mr McClelland "seemed to serve their [Nationwide and Mr Moran's] purpose, to be able to feel as though there was a movement growing within the Lear company that was confirming the publications on 30 November". It is almost self-evident that it would have been upsetting for Mr Rush to see such a motive.

The course of the proceedings and the reporting thereof

- 765 I should make it plain at the outset that I do not consider that the conduct of senior counsel for Nationwide and Mr Moran at the trial was lacking in *bona fides*, or was otherwise improper or unjustifiable. In particular, I reject the contention (particular 21) that the cross-examination of Mr Rush was somehow improper or unjustified. The cross-examination was, perhaps understandably, lengthy and at times stern and vigorous, but it was not disrespectful or unnecessarily aggressive. Forceful advocacy, within appropriate limits, is not a matter of aggravation: *Tingle* at [26]. Perhaps more significantly, it was open, in all the circumstances, to test Mr Rush’s evidence that he was housebound and had led a hermit existence.
- 766 The conduct of the trial, however, stands in stark contrast to Nationwide and Mr Moran’s conduct of the proceedings as a whole (particulars 15, 16, 17, 19). Nationwide and Mr Moran’s conduct of the proceedings prior to the trial has been described at length in some of my earlier decisions: *Rush v Nationwide News Pty Ltd* [2018] FCA 357 (***Rush (No 1)***); *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550; *Rush v Nationwide News Pty Ltd (No 4)* [2018] FCA 1558. In the last of those cases I described the conduct of the litigation by Nationwide and Mr Moran up to that point as “undeniably unsatisfactory”. I remain of that view. I do not propose to repeat the background and chronology of events relating to the proceedings. The relevant chronology is set out at length in my earlier judgments and should be taken to be incorporated in this judgment. There is only one particular issue that I wish to focus on in the present context.
- 767 Nationwide and Mr Moran’s first amended defence to Mr Rush’s claim pleaded a truth defence. The particulars of the truth defence included a particular which alleged that Mr Rush “touched the complainant in a manner that made her feel uncomfortable”. That touch was said to have occurred during the final scene in one of the performances of the play when Mr Rush, as King Lear, walked onto the stage carrying Ms Norvill as she simulated the lifeless body of Cordelia. The touch was alleged to have been “not directed or scripted or by any person necessary for the purpose of the performance of the Production”. While the particulars were vague, the suggestion appeared to be that Mr Rush inappropriately touched Ms Norvill as he was carrying her. It was also alleged that after the performance, the complainant said to Mr Rush words to the effect “stop doing it”. The defence also included an allegation that at the after party on 9 January 2016, Mr Rush followed the complainant into the female bathroom and stood outside the cubicle occupied by the complainant until she told him to “fuck off”, at which point he left.

768 On 20 February 2018, the day after a temporary suppression or non-publication order in relation to the amended defence was lifted, the *Telegraph* featured a front page story which contained details of the defence. The front page contained a large photograph of Mr Rush and Ms Norvill during rehearsals of *King Lear* and the large headline “STOP DOING IT”. A smaller, though still prominent, headline stated: “Court hears allegations Rush touched actor five times & confronted her in female toilets”. While the headline and accompanying article suggested that the Court had “heard” those allegations, in fact they were simply lifted from the amended defence.

769 The rest, of course, is history. In *Rush (No 1)*, Nationwide and Mr Moran’s then pleaded truth defence was struck out. It was found, amongst other things, that the particulars of truth were defective and deficient in a number of respects. The specific allegations in the amended defence referred to earlier have never resurfaced. While some considerable time later Nationwide and Mr Moran were granted leave to file a further amended defence including particulars of a new truth defence, the allegations that Mr Rush had touched Ms Norvill as he carried her on stage, that Ms Norvill told Mr Rush to “stop doing it” after that occurred, and that Mr Rush followed Ms Norvill into the female toilets at the after party were not included in the further amended defence. It is now abundantly clear from the evidence given by Ms Norvill in this proceeding that they never occurred.

770 Nationwide and Mr Moran have never sought to explain exactly how they came to include these allegations in their initial truth defence. Nor has Nationwide ever apologised to Mr Rush for trumpeting those false allegations on the front page of the *Telegraph* on 20 February 2018. Mr Rush had no real recourse against Nationwide in relation to that publication because it was likely to be considered to be a fair report of proceedings of public concern within s 29 of the Defamation Act.

771 It would appear to be fairly clear from the events that have transpired since that time that Nationwide and Mr Moran included those allegations in the amended defence at a time when they had not spoken to Ms Norvill. It may be inferred that the allegations were made on the basis of the contents of Ms Crowe’s email dated 6 April 2016, or possibly a hearsay account of the contents of that email or the general nature of Ms Norvill’s complaint provided by someone else. In this proceeding, Nationwide and Mr Moran submitted, on the basis of evidence given by Ms Norvill in re-examination, that Ms Crowe’s email was unreliable because Ms Crowe had “drunk a lot” when she had met with Ms Norvill the previous night.

- 772 The obviously hearsay or second-hand account of the particulars of Ms Norvill’s complaint did not constrain Nationwide and Mr Moran from pleading those particulars in support of their initial truth defence. Nor did it constrain them from splashing them all over the front page of the *Telegraph* on 20 February 2018.
- 773 I am firmly of the view that the pleading of those allegations in the amended defence was unjustified. I am equally firmly of the view that the republication of those allegations on the front page of the *Telegraph* on 20 February 2018 was also improper and unjustifiable in all the circumstances.
- 774 In relation to the publication on 20 February 2018, Nationwide and Mr Moran relied on what was said by McClellan CJ at CL in *Habib v Nationwide News Pty Ltd* (2010) 78 NSWLR 619 at [38]-[41] about the admissibility of subsequent articles in relation to the assessment of damages in defamation proceedings. *Habib*, however, was a fundamentally different case to this case. The plaintiff in that case did not allege that the subsequent article was improper. Nor was the subsequent article put forward as a reason why an award of aggravated damages was appropriate. The relevant ratio of the case was that “[i]n the absence of any impropriety the fact that publicity is given to findings which are ultimately overturned cannot be reflected in the damages”: *Habib* at [41].
- 775 There could be little doubt that Mr Rush’s hurt and distress has been aggravated by the way in which Nationwide and Mr Moran have conducted their defence of this proceeding.
- 776 Mr Rush gave evidence to the effect that he had suffered as a result of the conduct of the litigation. He referred, for example, to the impact that the “wear and tear of the toing and froing with News Corp and [his] legal team” had had on him. He referred on a number of occasions to the fact that the 11 months during which the litigation was on foot were the worst 11 months of his life. He said that the litigation had been a “very long process” and that his identity, his sense of self and his career had “been under such pejorative media coverage, insinuations that imply that everything that has happened throughout the course of this year is seemingly reported as fact or sensational surprise”. Even in the absence of such evidence, I would in any event infer that the conduct of the proceedings by Nationwide and Mr Moran, the delays occasioned by that conduct and the pleading and reporting of allegations which turned out to be false would plainly have increased Mr Rush’s hurt.

777 I reject the contention that the aggravated hurt that has been suffered by Mr Rush by reason of Nationwide and Mr Moran’s conduct of the proceeding “is a normal incident of litigation”: cf. *Habib* at [41]. I accept that an applicant in a defamation proceeding is likely to have to endure some further hurt arising from the litigation process and the reporting that usually accompanies it. What Mr Rush has had to endure as a result of the unjustifiable conduct of Nationwide and Mr Moran in the initial stages of the proceeding goes well beyond the norm. I should also make it abundantly clear that in finding that Mr Rush is entitled to aggravated damages arising in part from Nationwide and Mr Moran’s conduct in publishing the article on 20 February 2018, I am **not** in effect awarding damages arising from that publication. Mr Rush has not sued Nationwide for defamation in relation to that publication and is not entitled to any damages arising from it. I am, rather, determining that the hurt and distress suffered by Mr Rush as a result of the defamatory publications in issue in this proceeding has been aggravated by the manner in which Nationwide and Mr Moran have conducted themselves during the course of this proceeding.

The falsity of the imputations

778 There are indications in some authorities that the falsity of the imputations may entitle the applicant to an award of aggravated compensatory damages: *Haertsch* at [43]; *Waterhouse* at 75; *Rigby v Associated Newspapers Ltd* [1969] 1 NSW 729 at 738. There could be little doubt that, from the whole of the evidence, Mr Rush was sharply aware of the falsity of the imputations.

779 Nevertheless, the authorities are not all one way on this issue: see *Flegg* at [243]-[245]; *Barrow v Bolt* [2013] VSC 226 at [12]-[14]. The parties did not favour the Court with any submissions in relation to this particular aspect of Mr Rush’s claim for aggravated damages. In the absence of submissions, and in light of the other findings I have made and the uncertainty surrounding whether this provides a proper basis for aggravated damages, I make no finding in relation to whether Mr Rush is entitled to aggravated damages by reason of his knowledge of the falsity of the imputations.

Imputations 10(g) and 10(f)

780 Mr Rush relied on the fact that Nationwide and Mr Moran had never apologised to him for conveying the imputation that he had “falsely denied that the STC had told him the identity of the person who had made a complaint against him” [imputation 10(g)]. That was despite the fact that this imputation had never been the subject of Nationwide and Mr Moran’s truth

defence. Likewise, Nationwide has never apologised to Mr Rush for conveying the imputation that his “conduct in inappropriately touching an actress during *King Lear* was so serious that the STC would never work with him again” [imputation 10(f)]. That was despite the fact that, while this imputation was the subject of Nationwide and Mr Moran’s truth defence, they ultimately led no evidence to prove its truth and made no attempt to justify it.

781 Mr Rush did not give any evidence to the effect that he was hurt by the fact that Nationwide and Mr Moran had not apologised to him in relation to those imputations. That is hardly surprising in relation to imputation 10(f) given that Mr Rush’s evidence had concluded by the time it became apparent that Nationwide and Mr Moran were not going to call Mr McIntyre and were not going to seek to justify that imputation. In any event, I would be prepared, in all the circumstances to infer that Mr Rush was hurt by the failure to apologise in respect of these imputations. Failing to apologise in these circumstances may also be considered to be unjustifiable. I would not, however, consider these to be significant matters in relation to aggravated damages in light of the other findings that have been made in that regard.

Other matters

782 I do not propose to deal with all the other matters in Mr Rush’s particulars of aggravating conduct in any great detail. It suffices to say that I do not consider that the publication of Mr Pullen’s letters (particulars 7 and 11) would have been particularly hurtful for Mr Rush, even though those letters were marked “[n]ot for publication”. Those letters contained Mr Rush’s emphatic denials of the allegations. Nor do I consider that the lateness of Mr Moran’s email to Ms Churchill-Brown on the eve of the publication of the 30 November 2017 articles, or the content of the email itself (particular 9), was itself a circumstance of aggravation. I doubt that the email could be said to be improper or unjustified, even though its lateness and contents plainly disturbed Mr Rush. The same could perhaps be said about the lateness of the request for comment in relation to the 1 December 2017 articles (particular 12). Mr Moran’s email to Ms Churchill-Brown was crude, insulting and perhaps misleading (particular 13), though in the scheme of things I do not consider it was likely to have caused Mr Rush any significant additional hurt. I also doubt that it was improper or unjustifiable for Nationwide to attempt to find general evidence in support of its truth defence (particular 14), though Mr Rush’s nausea at Nationwide’s “last minute snooping around” is perhaps understandable.

Conclusion in relation to aggravated damages

783 Having regard to the findings I have made in relation to a number of Mr Rush's claims of
aggravation, I am satisfied that Mr Rush is entitled to aggravated damages. The cap in s 35
of the Defamation Act accordingly does not apply.

Assessment of general or compensatory damages

784 The assessment of compensatory damages in a defamation case is not a scientific or
mathematical exercise. There is no single right answer.

785 At the time of the defamatory publications, Mr Rush unquestionably had a high and settled
reputation in the acting profession, not only in Australia but throughout the world.

786 The defamatory publications themselves were distributed widely, mainly in New South
Wales, but also in a number of other States and Territories. The relevant articles were also
undoubtedly widely read. They were, and were no doubt intended to be, sensational. The
story also spread like wildfire throughout the world. That was perhaps unsurprising given Mr
Rush's profile and standing in the acting profession throughout the world. It must also be
recalled that the publications occurred at a time when the "Harvey Weinstein scandal" was
explosive news. In all the circumstances some allowance should be made for the "grapevine
effect"; the tendency of the "poison" in the defamatory publications to "percolate through
underground passages and contaminate hidden springs" or to be "driven underground" only
later to emerge from their "lurking place": *Slipper v British Broadcasting Corporation* [1991]
QB 283 at 300; *Broome v Cassell* at 1071; *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001)
208 CLR 388 at [88]-[89]; *Ley v Hamilton* (1935) 153 LT 384 at 386; *Belbin v Lower
Murray Urban and Rural Water Corporation* [2012] VSC 535.

787 The relevant defamatory imputations in this case were unquestionably extremely serious.
That almost is self-evident and requires no elaboration.

788 There could equally be little doubt that the publications had the effect of destroying Mr
Rush's reputation. In *Crampton*, Mahoney ACJ said (at 193) that "in some cases, a person's
reputation is, in a relevant sense, his whole life". That observation plainly applies to Mr
Rush and his reputation as an actor of integrity. The award of damages must be sufficiently
high to vindicate Mr Rush's reputation.

789 The effect on Mr Rush was devastating. The hurt to his feelings is undeniable. The evidence
of the effect on Mr Rush, referred to in detail earlier, was compelling.

790 The hurt to Mr Rush was aggravated by the conduct of Nationwide and Mr Moran for the reasons I have explained.

791 Mr Rush has provided me with a schedule of cases which sets out awards of damages in some recent defamation cases. I do not consider that this schedule provides much assistance in the assessment of an appropriate award in this case. While I accept that the award in this case must generally be in keeping with awards of general damages in other defamation cases, ultimately each case must be decided on its own unique facts and circumstances. None of the cases included in the schedule are on par with this case. This case is unique.

792 Having regard to all the relevant circumstances, including the general purposes of compensatory damages for defamation, I consider that an appropriate award of compensatory damages is \$850,000.

Special damages for economic loss

793 A person who has been defamed is entitled to have damages for the monetary or financial loss caused by the defamatory publications; such damages are not at large but must be appropriately proved: *Andrews* at 257.

794 Mr Rush alleged, in his pleading, that he has suffered economic loss by reason of the defamatory publications. He claimed that his “reputation as an actor has been irreparably harmed such that he is likely to be shunned by employers in the future”. He subsequently provided further particulars of his claim for special damages or economic loss. Those particulars include the following:

The Applicant has over the last several decades, as one of Australia’s most prominent and well-respected actors, received a substantial income from his appearances in films, television shows, and theatre. That income has been significantly reduced – and, the Applicant fears, will continue indefinitely to be reduced – as a result of the publication of the matters complained of.

As a result of the publication of the matters complained of, the Applicant has suffered:

- (a) anxiety, embarrassment, hurt, and the other “tremendous emotional and social hardship” set out in the affidavit of Nicholas Pullen sworn on 9 April 2018;
- (b) ongoing injury to his reputation, including his reputation as an actor in Australia and worldwide;
- (c) a loss in his earning capacity;
- (d) a general loss of business and custom.

As a direct result of the conduct of the Respondents, he has not done any work since

publication of the matters complained of.

795 The affidavit of Mr Pullen which was referred to in the particulars gave the details of a
revocation of a job offer which involved Mr Rush doing a voice-over in an Australian
documentary for which he was to be paid \$30,000 as one example of Mr Rush's economic
loss.

796 Despite some apparent confusion or lack of clarity, Mr Rush's claim in this regard is properly
viewed as a claim for financial loss arising from a loss of earning capacity caused by the
defamatory publications. He claimed that he had no earning capacity after the defamatory
publications because the publications had a debilitating effect on his ability to act and
because his reputation had been so damaged that he was unlikely to be offered any acting
roles in the future. He claimed that that state of affairs was likely to continue into the future.

797 Nationwide and Mr Moran disputed Mr Rush's claim for damages for economic loss. They
submitted, in short, that the evidence did not sustain a finding that Mr Rush had suffered any
diminution of his earning capacity which had or would be productive of loss.

798 It is convenient to address the claim for damages for economic loss by separately considering
the evidence relating to past economic loss and future economic loss. That is so even though,
strictly speaking, both past and future economic loss ultimately concern, or arise from, a
claimed loss in earning capacity. The main reason for dealing with past and future economic
loss separately is that an issue arises about the effect that a judgment which vindicates
Mr Rush's reputation might have on his future earning capacity.

Past economic loss

799 Mr Rush's evidence was that he had not worked at all since the defamatory publications. He
had effectively not earned any money between the date of the publication and the trial, other
than an amount referable to a job performed prior to the publications. That evidence was not
seriously disputed by Nationwide and Mr Moran. Nationwide and Mr Moran submitted,
however, that the Court would not be satisfied, on the evidence, that they were responsible
for the fact that Mr Rush had not worked during the period between publication and trial.
They submitted, in effect, that the evidence did not support a finding that the defamatory
publications caused Mr Rush's period of unemployment.

800 Before that issue is addressed, it is necessary to resolve two pleading issues raised by
Nationwide and Mr Moran.

Pleading issues

801 The first pleading issue concerned whether Mr Rush's case for economic loss as pleaded encompassed a specific loss attributable to his withdrawal from the MTC production of the *Twelfth Night*. This issue was raised when Mr Rush gave evidence about his withdrawal from that play. Senior counsel for Nationwide and Mr Moran objected to Mr Rush's evidence about his reasons for withdrawing from the play on the basis that the evidence was not part of Mr Rush's claim for special damages. As a result of that objection, Mr Rush's evidence on that topic was admitted, at that stage, on the basis that it was limited to evidence of Mr Rush's hurt feelings. Mr Rush subsequently applied for that restriction to be removed on the basis that his withdrawal from the *Twelfth Night* had been fairly adverted to in his particulars.

802 In my view, Mr Rush did fairly put Nationwide and Mr Moran on notice that he relied on evidence relating to his withdrawal from the *Twelfth Night* in support of his economic loss claim. It is true that the particulars did not specifically refer to Mr Rush's withdrawal from the *Twelfth Night*. The particulars, including Mr Pullen's affidavit that was referred to in them, did make however make it clear that Mr Rush claimed that he had not done any work since the publications as a direct result of the publications. It should also be noted that Mr Rush included documents relating to the *Twelfth Night* in the bundle of documents which he proposed to tender at trial. That again put Nationwide and Mr Moran on notice that Mr Rush intended to adduce evidence at trial about his withdrawal from the *Twelfth Night*. Nationwide and Mr Moran appeared to appreciate that, because they served a subpoena to produce documents on the MTC.

803 Three further points should be made concerning the issue relating to Mr Rush's withdrawal from the *Twelfth Night*.

804 First, despite the limitation having been placed on Mr Rush's evidence-in-chief concerning his withdrawal from the *Twelfth Night*, Mr Rush was cross-examined at some length about his decision to withdraw. The questioning was clearly linked to Mr Rush's claim for economic loss. The general thrust of the questioning was that at the time Mr Potter was retained and instructed to assume that Mr Rush had been unable to work because of the defamatory publications, Mr Rush had not decided to withdraw from the *Twelfth Night*. It was put to Mr Rush that the assumption that Mr Potter had been asked to make was false for that reason. Mr Rush was also cross-examined about his email exchange with Mr Phillips

and another officer of the MTC about his potential withdrawal from the play. Nationwide and Mr Moran tendered that email in their case.

805 Second, the submissions advanced by Nationwide and Mr Moran appeared to be premised on the fact that Mr Rush made a specific and separate claim for lost wages as a result of his withdrawal from the *Twelfth Night*. Mr Rush's economic loss claim, however, is properly treated as a claim for diminution of earning capacity, not as a specific claim for lost wages, including the wages he lost as a result of withdrawing from the *Twelfth Night*: cf. *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 658; *O'Brien v McKean* (1968) 118 CLR 540 at 546; *Medlin v State Government Insurance Commission* (1994-1995) 182 CLR 1 at 5. In that regard, Mr Rush's evidence concerning his withdrawal from that play is properly treated as simply evidence of his inability to work.

806 Third, Mr Phillips of the MTC also gave evidence which touched on Mr Rush's withdrawal from the *Twelfth Night*. While objection was taken to some of Mr Phillips' evidence, the basis of that objection was not that the evidence went outside Mr Rush's pleaded case. No restriction or limitation was sought or imposed in relation to Mr Phillips' evidence concerning Mr Rush's withdrawal from the play.

807 In the circumstances, the temporary restriction that was placed on Mr Rush's evidence concerning his withdrawal from the *Twelfth Night* should be, and is, removed. In my view, contrary to the submission made by Nationwide and Mr Moran when the objection was taken, they were fairly on notice that Mr Rush would rely on the circumstances in which he withdrew from that play in support of his claim that he had been unable to work and had therefore suffered economic loss.

808 The second pleading issue is whether Mr Rush's pleaded claim included the claim that he was unable to work. This issue was raised for the first time in Nationwide and Mr Moran's final submissions. It may be disposed of shortly.

809 The particulars provided by Mr Rush fairly put Nationwide and Mr Moran on notice that, as part of his economic loss claim, he alleged that one of the reasons that he had lost his earning capacity and had not done any work since the publications was that he had suffered "anxiety, embarrassment, hurt and the other 'tremendous emotional and social hardship' set out in the affidavit of Nicholas Pullen sworn on 9 April 2018". Mr Pullen's affidavit stated, amongst other things, that since the publications Mr Rush was "virtually housebound" and that

“whenever in public [Mr Rush] is full of anxiety as he believes people are staring at him in a way that is very challenging, frightening and unnerving”. Perhaps more significantly, it states that due to the publications Mr Rush “has retreated from and lacks the necessary motivation to conduct his normal activities in the theatre and film industries”. I should note, in this regard, that Mr Pullen’s affidavit was admitted into evidence solely in relation to the pleading issue.

810 I should also note that it must have been apparent to Nationwide and Mr Moran that Mr Rush claimed that he was unable to work as a result of the publications at least by the time they received Mr Rush’s expert report in relation to damages. That report was prepared on the basis of assumptions which included the assumption that “[a]s a result of the matters complained of, Mr Rush has been unable to work since the publication”. In my view, Nationwide and Mr Moran were fairly put on notice that this was part of Mr Rush’s economic loss claim.

Main issues

811 Putting quantification to one side for the moment, the main issue is essentially one of causation. General principles of causation apply to defamation in the same way as they apply to other torts. The appropriate approach to causation is accordingly the approach in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; see *Duffy v Google Inc (No 2)* [2015] SASC 206 at [46]; ***Chakravarti v Advertiser Newspapers Limited*** (1998)193 CLR 519 at [177] (per Kirby J). The question is accordingly whether or not the defamatory publications were a cause of Mr Rush’s lost earning capacity productive of financial loss. It is not necessary to prove that the defamatory publications were *the cause*. It is sufficient to prove that the defamatory publications were *a cause* or materially contributed to that loss: *Selecta Homes and Building Co Pty Ltd v Advertiser-News Weekend Publishing Co Pty Ltd* (2001) 79 SASR 451 at [142]-[143]; *Haertsch* at [75]; *Chakravarti* at [177].

812 The main factual issue therefore concerns why Mr Rush has not worked since the publications. Were the defamatory publications a cause, or a material cause of that state of affairs?

Why has Mr Rush not worked?

813 Before addressing the evidence in respect of this issue, three general points should be made.

814 First, the evidence which directly related to why Mr Rush has not worked since the publications must be considered in the context of the effectively undisputed evidence that, prior to the publications, Mr Rush was an actor who was in demand and who had worked constantly and consistently over the years. There was evidence that he was “a star and steadily working” and that he “has worked very consistently for the last 40 years”. He was also a person who clearly loved and lived for his work. In the words of Ms Menelaus: “you cannot extract Geoffrey’s work from Geoffrey” and equally “you cannot divorce Geoffrey from his work”. He wanted to work for many years to come.

815 Second, there was also effectively undisputed evidence that the effect that the publications had on Mr Rush personally was devastating. That evidence was considered earlier in the context of general damages and hurt feelings. The evidence revealed, in summary, that Mr Rush was left devastated and distressed by the publications. He went into an emotional spiral and retreated mentally into a “solo world”. He was in a “very dark place”. He was consumed by grief, could not sleep and stopped laughing and talking about work. He lived a reclusive and hermit-like existence.

816 Third, there could be little doubt that the publications had a devastating effect of Mr Rush’s reputation as an actor, particularly in the context of the Harvey Weinstein scandal and the #MeToo movement. Ms Davis’ evidence, for example, was that she had heard people say that Mr Rush’s “career is finished”.

817 Fourth, the evidence that Mr Rush had not worked since the publications was not challenged.

818 Mr Phillips gave the following evidence about Mr Rush’s eventual decision to withdraw from the *Twelfth Night*:

And since then – since those articles, have you had occasion to discuss them with Mr Rush and how he feels about them?---Yes, of course.

And what has he said to you? How he feels?---Well, I’ve been through quite a long journey of discussions with regard to the articles. When the articles first came out Geoffrey was very hurt and very confused, because he couldn’t get any information as to what the actual nature of the accusations, if any, had been. So he spent some months – you know, some weeks in a state of anxiety and confusion about what actually was going on. And then, the more that things progressed and it went on, and the more things that came out in different articles, he became angrier and more distressed and eventually we obviously started to talk about the extent to which what was happening publicly would affect his ability to take part in the play.

And did he tell you how he felt about being able to perform?---Yes, he did. We discussed that a lot. He felt that – he felt, rightly I think - - -

MR BLACKBURN: Your Honour, I object to this.

....

HIS HONOUR: Yes. I will allow it.

MS CHRYSANTHOU: Sorry. Can you please – do you remember the question?--- Yes. Geoffrey’s anxiety about – about performing was that he felt that, you know, this is a – this play we were doing is a comedy. He felt very anxious that it would only – at the most extreme, it would only take one person to heckle him as a result of the contents of the articles for the entire – his entire confidence as a performer to deflate, and indeed for the – the – he was very, very concerned also for the morale of the rest of the actors in the production, that they would go on stage nightly with a sense of insecurity and uncertainty, and it is – you know, I need hardly point out that to perform requires a degree of self-confidence and certainty which, if you have every reason to be insecure on a nightly about what might transpire, he was very anxious about that side of things.

819 Mr Phillips also described how he had observed that Mr Rush had “lost confidence in his ability to perform” and “obsessed about ... what was being said about him publicly and his ability to ... focus on – on – performing had diminished to a point of no return”. His evidence was that Mr Rush had “talked about the fact that the inherent joy that he felt in performing has been beaten out of him”.

820 Ms Nevin’s evidence was that she had observed that Mr Rush was “losing the capacity to work” and, as an actor, was “grieving for the loss of ...walking into a room and not being able to start”. She described how this as a type of “death” given Mr Rush’s deep connection with his work.

821 Ms O’Bryan’s evidence was that her observation was that Mr Rush could not see himself going back into acting and had said to her: “you make yourself vulnerable when you go on stage and I can’t make myself vulnerable if I think the audience is not with me, and I don’t know that they are anymore”.

822 Ms Kershaw’s evidence was that Mr Rush did not, and was not able to, talk about work, as he had before, because “everything ... is subsumed by the grief he is carrying”.

823 The effect of Mr Specktor’s evidence was that the publications had damaged Mr Rush and his ability to work. In his evidence-in-chief, Mr Specktor said that the articles had been very destructive of Mr Rush “in terms of his psyche” and that he “he has had a very difficult time thinking about acting in anything”. His evidence was that since the articles, Mr Rush had “focused only on this and, really everything else has just fallen to one side”. Mr Specktor believed that it would be very difficult for Mr Rush “because of the way he creates his arts and his roles, to really feel that he can do it again, and he’s a perfectionist”.

824 Mr Specktor's evidence during cross-examination included the following:

So what you're assuming there, Mr Specktor, is that he would receive some offers but not at the same rate. That's the implication in that sentence, isn't it?---You can call it an implication. Okay? I wasn't quite looking at these things quite in the same way. We're sitting in a courtroom now, and you're asking certain things about what's here. I know what the facts are now. Okay? I really do. **I know that he is damaged as a human being.** Okay? Damaged as a human being because of this garbage that was in the newspaper. Okay? That much I know, and – and that's what concerns me. **That's what concerns me about his ability to work.** My job is to go get him jobs. Okay? That's what my job is, not to answer the telephone when somebody calls up.

Mr Specktor, the proposition I'm putting to you is this. Would you please attend to it. You believe that, if he's cleared, he will at least get some offers, but it might not be at the same rate as before for 12 months or more. That's what you're trying to say in - - -?---I – I – I believe there's some lag time to this, **but it's more important – his ability to work, even if he gets offers – this has damaged him.** Ask yourself the question if this was you that was in that newspaper.

(Emphasis added)

825 Mr Specktor evidence in cross-examination also included the following:

If Mr Rush is vindicated by winning this court case, Hollywood will forgive him quick-smart, won't it? It will - - -?---That's a question one – that one can't say yes or no. All I know is his reputation has been one thing, but his psyche has changed, and it's about his ability to work that concerns me and probably concerns him.

826 The clear tenor and common theme of this evidence is that Mr Rush had not only lost confidence in his ability to act, but was fearful of the audience reaction, particularly if he appeared on stage. He had also lost the desire or drive to act. It is in that context that the following evidence given by Ms Menelaus should be considered:

And has he told you how he feels about the prospect of acting again?---He doesn't wish to act again, and that's what I was trying to say to you before when I – you said I couldn't. But you can't divorce Geoffrey from his work. He's a strange creature. He is his work. You can't – so I've – I have watched him be destroyed, really, has been his whole reason for being.

827 Considered in the context of her evidence as a whole, it is clear that Ms Menelaus was not saying that Mr Rush did not “wish to act” because he wanted to do something else, or because he just wanted to be idle. She was saying that her observation was that Mr Rush had lost the love, desire and drive to work as a result of the publications. That is why she said that his “whole reason for being” had been destroyed.

828 Nationwide and Mr Moran submitted that, despite this body of evidence, Mr Rush did not himself expressly give evidence about why he had not worked since the publications. Indeed, he was not directly asked why he had not worked. In their submission, it should be inferred

that Mr Rush was not asked that question because the answer would not have assisted his case.

829 There is some considerable force in that submission. It may readily be accepted that it would be open to draw such an inference. It does not necessarily follow, however, that the inference should, let alone must, be drawn in all the circumstances.

830 While Mr Rush was not directly asked why he had not worked since the publication, he was specifically asked why he had withdrawn from the *Twelfth Night*. His evidence was as follows:

But tell us, first, when did you make a decision not to go ahead with *Twelfth Night*?--
-I pondered that while I was away in Italy, and we spent two and a-half weeks there and then a week and a-half in London. And I had pretty much made up my mind that the kind and mental and physical state that I was in, I would not be able to actually play this role to the best of my ability in this very adult, very dark – it's probably Shakespeare's greatest comedy where he can slam drama up against farce. And I met with Simon Phillips, who was on a some kind of fellowship event in Berlin, and he happened to be doing a workshop in London, and we met, and I said, "I'm seriously thinking – I just want to give you time to consider replacing me." Because that's – would be important on a professional level. But I said, "I'm thinking about – I may have to withdraw from the production, because I don't think I've got it in me."

....

You mentioned in one of your answers, the – I think you said the mental and physical state you were in. You were talking with reference to the point up to which you told Mr Phillips that you were withdrawing from *Twelfth Night*. Could you tell his Honour what was the mental and physical state you were in at that time?---I would say around March or April the degrees of sleeplessness and poor appetite and feeling hurt myself about the levels of distress it was creating in my son and daughter and my wife and some close friends, but I was weak. I was weakening. And I know the kind of stamina – this play is strong and is challenging in many ways, from the comedy spectrum as *Lear*. It's a three-hour play. And I know how to read my sense of self – my capabilities. And I had reached – I had hit a brick wall.

Did you have any concerns about how, for example, the audience might receive you?---For these articles?

No, as a result of the articles, but how the audience, say, at *Twelfth Night* might receive you?---I was worried that I wouldn't be in a funny frame of mind. This is a very clever complex farce. The nature of that photo was the last page of the brochure. The front page of the brochure was the other side of *Malvolio*, which is the dominant side. He's a very puritanical conservative killjoy, but he is deluded and tricked into thinking that his – the woman that is his superior is secretly in love with him, and his deluded enough to do the things that are written in this anonymous letter to him of how she would like him to appear. And he turns up as a kind of court Cassinova. And the comedy is rather black and farcical.

Looking at the article – I'm sorry, I think I cut you off. I didn't mean to interrupt you - - -?---No, I – it wasn't paranoia, but I thought my presence in the production would also spoil it, because of the stain that was building up over the last 11 months, and

ruin it for what already had been established as a very good cast. A lot of – Simon Phillips, the director’s extended family that he had worked with, Christie Whelan who I had worked with in *The Importance of being Earnest* and *Drowsy Chaperone*. And she was someone I was – had kind of mentored a bit. Richard Piper, who I had worked with 30 years ago and was a very close mate. Frank Woodley, who had never done Shakespeare but I think he’s a genius comedian, and I thought he was going to be a great person to collide with the idiot role of Sir Andrew Aguecheek. And I felt that my presence could be – could overwhelm the purity of the play.

831 As noted earlier, Mr Rush was cross-examined about his withdrawal from the *Twelfth Night* and was question, in particular, about an email exchange he had with Mr Phillips and another officer of the MTC in June 2018. This email exchange was before Mr Rush decided to withdraw from the production, though it broadly corroborates his evidence concerning the reasons for his withdrawal. On 9 June 2018, Mr Rush wrote that while he was confirmed to play Malvolio in the production, Mr Phillips knew that it was a “serious ‘Standby’ proposition” because, amongst other things, his “creative spirit, currently, [was] at a very low ebb” and he did not want his “legal profile to destroy any audiences’s [sic] connection to the play – with all the wrong reasons”.

832 It may readily be accepted that some of the reasons Mr Rush gave for withdrawing from the *Twelfth Night* may have been unique to that production, and perhaps unique to acting in the theatre generally. Nevertheless, Mr Rush’s evidence about his withdrawal from *Twelfth Night* plainly revealed his state of mind at the time in relation to acting generally. The absence of any direct evidence from Mr Rush as to why he did not work on any other productions, including film and television, must also be considered in light of the powerful evidence given by him about the devastating and debilitating effect that the articles had had on him generally. That evidence was considered in detail earlier.

833 Finally, it should be noted in this context that there was direct evidence of at least one offer that had been made to Mr Rush being withdrawn or cancelled because he had been associated with the #MeToo “situation”. That was an offer to do a voice-over for a documentary about the Great Barrier Reef. That offer or contract was cancelled in April 2018. The email to Mr Rush’s agent cancelling the offer or contract stated as follows:

Sorry we have been playing tag. Just missed you again so I’m writing to you.

Cutting straight to the chase. Our distributors for the film contacted us the other day and said that they think that Geoffrey situation, while unresolved, is currently an issue for them. Its very troubling. As you know I am mixed up in another #MeToo situation. Quite different cases in SO many ways. However, Geoffrey’s current situation has come to bite us too. Obviously, I knew but I was hoping to brazen it out. All news is global as we know and it has come to our distributors’ attention and they

have reacted.

I am very, very sorry.

Please call me.

834 This was the only evidence of a specific cancellation or withdrawal of an offer of work.

835 There was, however, a significant body of evidence from which it was open to infer that it was likely that as a result of the publications Mr Rush would receive considerably less offers of work than he had prior to the publications. That was because his reputation as an actor was considerably damaged by the publications. To make matters worse, the effect or likely effect of the publications was to connect him to the #MeToo movement and the taint of the Harvey Weinstein scandal.

836 This body of evidence is discussed in detail later in the context of future economic loss. The evidence was essentially in the form of expert evidence from Mr Specktor, Mr Schepsi and Ms Russell about, in general terms, Mr Rush's future work prospects. That evidence was largely responsive to expert evidence adduced by Nationwide and Mr Moran from Mr Marks. While the evidence of those witnesses was generally looking to the future, the underlying premise of the evidence of each of the witnesses was that Mr Rush's career had been damaged by the publications and the resulting connection with the #MeToo movement. For example, Ms Russell's evidence addressed what she believed was likely to happen if Mr Rush's reputation was vindicated by the judgment in this proceeding. Her evidence included:

I have never seen anything slam into the wall with as much speed and ferocity as the "#MeToo" movement. Unfortunately for Mr Rush, false claims or not, the movement, being in its infancy, has not refined its response or addressed behaviours in the gray areas. Perhaps it will evolve to such a place, but by then Mr Rush's career is likely to be irreparably damaged.

837 Nobody seriously questioned the underlying premise that Mr Rush's career and earning capacity had been damaged by the publications. The question was what would happen if his reputation was eventually vindicated by this proceeding. The general effect of the evidence of Mr Specktor, Mr Schepsi and Ms Russell was that the impact of the articles on Mr Rush's acting career was, and would continue to be, significant. Mr Marks ultimately appeared to accept that the articles and their republication would have had an impact, though he maintained that the impact would have been small or at the "lesser end of the spectrum".

838 In their submissions, Nationwide and Mr Moran pointed out that there was virtually no evidence about what, if any, offers had been made to Mr Rush during the period between

publication and trial. There was accordingly no evidence of any specific opportunities that were available but lost during the period as a result of the effect of the publications. Nationwide and Mr Moran pointed to evidence which tended to suggest that as at November 2017, Mr Rush had no specific offers or work in the pipeline. Mr Rush himself gave the following evidence:

All right. Now, I'm going to come back to what happened after the article, but can I just ask you this: as at November 2017 what were your intentions about your future as an actor; did you intend to keep working, Mr Rush?---Yes, I did. I think at that stage I probably was already in discussions for – no, I had shut Storm Boy. Sorry. No, after that I was waiting for the phone to ring.

839 Mr Rush then went on to give a rather long-winded explanation of his future work intentions the effect of which was that he wanted to continue to work until his mid to late 70s.

840 There is some force in Nationwide and Mr Moran's submission concerning the paucity of evidence relating to offers of work during the relevant period.

841 Mr Rush's Australian agent, Ms Churchill-Brown did not give evidence. Mr Rush's Hollywood agent, Mr Specktor, did give evidence, but he did not give evidence specifically about the receipt or non-receipt of offers of work during the period between the publications and trial. Indeed, there was a suggestion in his evidence that Mr Rush was not open to receive offers in the period between publication and trial. His evidence in that regard included the following:

And can we take it that what you're saying there is that he would receive offers if he's cleared by the court, but you think it might be at a lower rate?---Well, I can't answer that, because I'm not fielding any offers at the moment.

842 Nationwide and Mr Moran submitted that Mr Specktor's reference to "not fielding any offers" meant that he was not actively seeking offers for work on behalf of Mr Rush, or that he may have been receiving offers, but was saying that Mr Rush was unavailable. If that is right, in light of Mr Specktor's evidence, referred to earlier, that Mr Rush's "psyche" had changed, that Mr Rush had been "[d]amaged as a human being", and that he was concerned about Mr Rush's ability to work, it might readily be inferred that Mr Specktor was not "fielding any offers" because he knew that Mr Rush's mental state was such that he was unable to work. In other words, it strongly supports the inference that Mr Rush had not worked because both he and his agent believed that he was unable to work.

Findings

- 843 Having regard to the whole of the evidence, I am satisfied on the balance of probabilities that the defamatory publications were *a cause* of Mr Rush's loss of earning capacity and financial loss in the period between publication and trial. I am satisfied on the balance of probabilities that a material reason, if not the main reason, why Mr Rush stopped working was the impact that the publications had had on him and his state of mind. As a result of the publications and the effect they had on him mentally and physically, he was simply unable to muster the confidence, concentration, drive, enthusiasm and stamina to act. That is plainly the most rational, logical and reasonable inference in all the circumstances. Mr Rush's evidence was that he feared or lacked the confidence to be seen in public following the publications. How, in those circumstances, could he possibly be expected to have competently performed in front of an audience, or even a camera.
- 844 It is difficult to think of any other rational or logical hypothesis or inference which could explain why Mr Rush had stopped doing what he loved, and stopped earning any income after the publications. Nationwide and Mr Moran did not posit any other rational or reasonable hypothesis. They did not suggest, for example, that Mr Rush was simply malingering or taking a vacation in the period between the publications and trial.
- 845 Mr Rush was cross-examined at length about a trip he took to Italy with Ms Menelaus during this period. Mr Nevin visited them during this trip. Ms Menelaus and Ms Nevin were also questioned about this trip. I am satisfied, on balance, that this trip was part of an attempt by Mr Rush and Ms Menelaus to escape from the trauma and anxiety that the publications had caused him. Ms Nevin's evidence was that it was hoped that the trip would provide some respite for Mr Rush and Ms Menelaus and would be a "time of peace and reparation", though she added that that did not turn out to be the case. I do not accept that the evidence concerning the trip indicated that Mr Rush was able to work, but just chose to travel and enjoy himself. Nationwide and Mr Moran did not ultimately pursue any such suggestion. Much the same can be said for the evidence concerning Mr Rush's visit to the Adelaide Festival. It was never squarely put to Mr Rush that he had simply chosen not to work and was malingering.
- 846 Nationwide and Mr Moran also pointed to the evidence that Mr Rush was apparently "waiting for the phone to ring" in November 2017. They did not, however, go so far as to submit that Mr Rush would not have received any offers of work in late 2017 or throughout 2018 even if the 30 November and 1 December 2017 articles had not been published. I

would in any event readily infer, given the evidence concerning the high demand for, and heavy utilisation of, Mr Rush's services in the past, that it was highly unlikely that Mr Rush would simply have stopped receiving offers of work were it not for the publications.

847 I am also satisfied, on the balance of probabilities, that even putting Mr Rush's inability to work to one side, the defamatory articles were a cause of Mr Rush's lost earning capacity because the almost inevitable result of the publications was that Mr Rush would have received less offers of work because of the damage to his reputation. In other words, even if Mr Specktor was "fielding offers", there would nevertheless have been less offers of work in any event. The damage to Mr Rush's earning capacity in that respect is likely to continue for some period into the future. The evidentiary basis for this finding was the evidence of Mr Specktor, Mr Schepisi and Ms Russell which is discussed later in the context of future economic loss.

848 I should emphasise, in this context, that my finding that the defamatory publications were a cause of Mr Rush's inability to work is not simply based on the fact that Mr Rush did not work, and did not earn any income during the relevant period. I accept that mere proof that Mr Rush's "business" declined after the publications is not alone sufficient to prove that the resulting loss of income was caused by the publications: cf. *Andrews* at [112]-[113] (per Mahoney JA). Here, however, there was additional evidence which supported the inference that Mr Rush's work ceased because he was unable to work: he was debilitated by the effect of the publications. I also accept that much of that evidence comprised the fairly impressionist observations of others who were close to Mr Rush. That evidence was, however, compelling. I also accept that Mr Rush did not, himself, directly address his inability to work in his own evidence. For the reasons I have already given, however, I do not consider that that circumstance is determinative of the issue.

849 I should also finally add that, in the detailed written outline of closing submissions relied on by Mr Rush, an alternative claim of so-called "*Andrews* damages" was flagged. The submission was that the general decline in Mr Rush's business should be taken into account by the Court in increasing any award of general damages on the basis of the decision of the New South Wales Court of Appeal in *Andrews*. No oral submissions were advanced in relation to this issue. Nor did Nationwide and Mr Moran address it in their submissions. That is perhaps explicable on the basis that it was adverted to for the first time in Mr Rush's

written outline of closing submissions. It was not possible to glean this alternative claim from Mr Rush's pleading or particulars.

850 It is unnecessary to address this alternative claim in light of the findings I have made in relation to Mr Rush's claim for economic loss. I am also reluctant to embark on a detailed consideration of it in light of the paucity of the submissions that were made in relation to it. I should simply note that if I had found that the claim for special damages had not been made out, I would have been inclined to considerably increase the general damages awarded to Mr Rush to reflect the loss of his business in accordance with the decision in *Andrews*.

851 The next question concerns the quantification of that loss in respect of the period between publication and trial.

Quantification

852 Mr Rush relied on a report prepared by a forensic account, Mr Michael **Potter**, to quantify the loss flowing from his reduced earning capacity. Mr Potter created financial models, utilising the discounted cash flow methodology, to calculate Mr Rush's loss based on various assumptions. Relevantly for present purposes, those assumptions included:

- The defamatory publications have damaged Mr Rush'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.
- Mr Rush has been unable to work as a result of the defamatory publications and is unlikely to be able to work for some time in the future.

853 The starting point for Mr Potter was, in a sense, the calculation of the remuneration which Mr Rush had earned in the past. Mr Potter's calculation of Mr Rush's past income was subsequently scrutinised by a forensic accountant retained by Nationwide and Mr Moran, Mr Tony **Samuel**. Mr Potter and Mr Samuel in due course conferred about their respective reports and essentially agreed on most of the relevant financial calculations, including the calculation of Mr Rush's past income. As will be seen, however, they disagreed on certain issues relating to methodology, particularly in relation to the calculation of Mr Rush's future loss. For present purposes it suffices to note that Mr Potter and Mr Samuel essentially agreed that Mr Rush's average net income per annum over the 15 year period between 2003 and 2017 was \$1,435,960.

854 Mr Potter then employed four different methods to calculate average expected future earnings. Those four methods were:

- Method 1: Remuneration would have been received that is equivalent to a simple average of remuneration received from prior years;
- Method 2: Remuneration would have been received that is equivalent to remuneration received from prior years with US and UK earnings adjusted to forecasted exchange rates for each year to November 2027;
- Method 3: Remuneration relating to the franchise movies, known as “The Pirates of the Caribbean”, and salaries from the “Over There” entity are considered outliers and are excluded in the expected future earnings from 10 years of work to follow The Publications; and
- Method 4: Remuneration relating to the franchise movies, known as “The Pirates of the Caribbean”, and salaries from the “Over There” entity are considered outliers and are excluded in the expected future earnings from 10 years of work to follow The Publications with US and UK earnings adjusted to forecasted exchange rates for each year to November 2027.

(Footnote omitted.)

855 Nationwide and Mr Moran submitted that the income years when Mr Rush acted in the *Pirates of the Caribbean* movies were clearly “outliers”. There was no evidence to suggest that there will be any more movies in that franchise, or any evidence that, even putting the publications to one side, Mr Rush would have been offered a role in them. They submitted that Mr Potter’s first two methods should accordingly be disregarded. I tend to agree. In my opinion, Mr Potter’s method 4 is the appropriate and preferable method to employ as a starting point in calculating Mr Rush’s average expected earnings.

856 In accordance with his instructions, Mr Potter then calculated Mr Rush’s likely future loss between the date of the first two defamatory publications (30 November 2017) and the anticipated final date of the hearing (12 September 2018). The figure he arrived at, employing method 4, was \$1,108,337. After conferring with Mr Samuel, that figure was revised to \$1,116,417.

857 The only disagreement of substance between Mr Potter and Mr Samuels about this calculation was one which related to methodology. Mr Samuel’s view was that Mr Potter did not, but should have, made allowance in the calculation for certain risks, including that Mr Rush may become ill, or his work may have declined, or he may have worked at a different level of remuneration.

858 The question whether such risks should be taken into account in calculating Mr Rush's future economic loss are discussed later in the context of the quantification of Mr Rush's future economic loss. In my view, there is no basis for discounting the figures arrived at by Mr Potter for the purposes of calculating Mr Rush's past economic loss for the period between publication and judgment. As for Mr Rush's health, there was no evidence to suggest that Mr Rush was ill for any reason not associated with the publications during the period between publication and the hearing. As for other risks, including that Mr Rush's work may decline in the future, or that he may work at a different level of remuneration, for the reasons given later in the context of future economic loss, there is no basis for finding that Mr Rush's work load or level of remuneration was likely to reduce, at least within the next few years. There is accordingly no reason to discount the figure for the period between publication and trial to take such risks into account.

859 It will be necessary for someone to perform a new calculation, employing the same methodology as that used by Mr Potter to calculate a figure for the period between 30 November 2017 and 12 September 2018, for the period from 30 November 2017 to the date of judgment, 11 April 2019. It will also be necessary for someone to produce calculations for that period that are appropriately adjusted to take into considerations such as tax and the potential for the award of pre-judgment interest. I do not propose to do those calculations myself, even though it should be a fairly straightforward exercise. That is not only because the parties have indicated that it would be appropriate to deal with matters such as interest at a later date, but also because I will, in any event, be requiring the parties to provide further assistance and submissions in relation to the calculations for future economic loss.

860 It follows that I will not be making any orders in relation to the quantification of damages for economic loss until I have received further calculations and heard further submissions from the parties. I will say something more about that issue later.

Future economic loss

861 I have already found that the defamatory publications relevantly caused Mr Rush to suffer a loss of earning capacity which was productive of financial loss. He has been unable to work since the time of the publications. The publications were a cause, if not the main cause, of that state of affairs. I have also found that the publications damaged Mr Rush's earning capacity because the likely, if not inevitable, effect of the publications was that he would

receive less offers of work because of the damage to his reputation. I am satisfied on the balance of probabilities that that state of affairs is likely to continue for some time into the future.

862 The main issue in respect of future economic loss is one of quantification. In simple terms, the main issue that arises in that regard is for how long, and to what extent, Mr Rush's loss of earning capacity as a result of the publications will continue into the future. That issue hinges to a large extent on the effect that the vindication of Mr Rush's reputation will have on his earning capacity. Will Mr Rush be able to work again once this judgment is handed down? If so, when? And if so, when will the offers start to flow again and at what rate?

863 I should make it plain at the outset that I do not propose to make a final assessment of future economic loss in this judgment. As I foreshadowed in the course of final submissions, I propose to make a series of factual findings relevant to the assessment and then invite the parties to provide further calculations and make further submissions in light of those findings.

Relevant principles

864 The parties did not favour the Court with any real submissions about the appropriate principles to apply in assessing or quantifying future economic loss. There did not appear to be any major issue between the parties about issues of principle. The main issues between the parties were factual in nature. They included, in general terms: how long would it be before Mr Rush was able to work again; when would offers of work start flowing again; and whether, putting aside the impact of the defamatory publications and the damage to Mr Rush's reputation arising from them, Mr Rush's earning capacity was likely to have declined over the next ten years in any event by reason of his age and other circumstances. As will be seen, expert evidence was adduced in relation to those factual issues.

865 In the circumstances, I do not propose to provide any detailed exposition of the relevant principles in relation to the assessment or quantification of future economic loss. It suffices to say that I have been assisted, in addressing the complex issues involved in this exercise, by the judgment of Clarke JA, with whom Handley and Scheller JA agreed, in *Norris v Blake* (No 2) (1997) 41 NSWLR 49 and the cases referred to in it, in particular *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638. *Blake* was a case involving a catastrophic physical injury to a then aspiring young actor. The quantification of Mr Blake's future economic loss arising from his injury was a complicated exercise because it involved, amongst other things, the consideration of what might or might not happen to his career in the future. What was his

likely future career path? What was he likely to have earned in the future? Was he going to be a superstar?

866 The general approach endorsed in *Blake*, expressed in simple terms, was that if there was a real possibility or chance of a relevant event occurring in the future, for example Mr Blake becoming a superstar, the court was bound to take that chance or possibility into account in assessing damages. The court “assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability”: *Malec* at 643.

867 What is equally clear, however, is that “damages founded on hypothetical evaluations defy precise calculation” and the extent of the adjustment made because of the possibility of future events is at best “a matter of impression”: *Blake* at 67C referring to *Malec* at 640 and *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 499. In such circumstances “the hypothetical may be conjectured”: *Malec* at 643; *Tabet v Gett* (2010) 240 CLR 537 at [136] (per Kiefel J). The exercise may be difficult, but courts in such circumstances are nonetheless required “to do the best they can in estimating damages; mere difficulty in that regard is not permitted to render an award uncertain or impossible”: *Tabet v Gett* at [136] citing *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 citing *Fink v Fink* (1946) 74 CLR 127 at 143.

Summary of the key factual issues

868 The key factual issues that in my view need to be addressed in the assessment exercise are as follows.

869 First, it is necessary to determine the length of time during which the defamatory imputations will continue to have an adverse impact on Mr Rush’s earning capacity. Will he ever be able to work again? If so, when will he be able to start work again?

870 Second, if Mr Rush is able to begin working again at some stage in the future, when is he likely to receive offers of work and at what rate? The main factual issue here is whether Mr Rush’s reputation will continue to be tainted by the association with the #MeToo movement, even if his reputation is vindicated by this judgment. If so, for how long will that taint continue to adversely impact Mr Rush’s earning capacity and to what extent will his earning capacity be impacted by it?

871 Third, what was Mr Rush's income likely to have been in the future but for the effect of the publications? The starting point here would appear to be a consideration of Mr Rush's past income. But what adjustments should be made to that figure to take into account possible changes to his career that might have occurred irrespective of the damage caused by the defamatory publications? It should be noted here that Mr Rush did not suggest that his future economic loss should be assessed on the basis that he was likely to have earned more than he had in the past. The main question is accordingly whether, ignoring the effect of the publications, there was any chance that Mr Rush would in any event have received less income in the future than he had in the past.

872 The parties adduced expert evidence which addressed, to some extent at least, these questions. The difficulty, however, is that the answers to these questions involve looking into the uncertain future. There was also very little evidence to assist the Court in relation to some of the questions. It is nevertheless necessary to make findings about these issues doing the best that can be done with the limited evidence.

Will Mr Rush ever be able to work again and if so, when?

873 I have already found, on the balance of probabilities, that Mr Rush has not worked since the defamatory articles were published and that the defamatory articles were a cause of that state of affairs. Mr Rush was unable to work because of the devastating effect the articles had on him. There was also a significant likelihood that less offers were being made because of the taint associated with the #MeToo movement. The question is whether, once judgment has been handed down and Mr Rush's reputation had been vindicated, he will be able to recover from the effects of the publications and be able to accept offers of work, should any be made.

874 This is a particularly difficult issue to resolve. While there was a good deal of evidence about the impact that the publications had on Mr Rush, there was very little evidence about his capacity to recover from that impact should his reputation be vindicated. As has been seen, several of Mr Rush's friends or colleagues expressed views about this issue. Most of them were fairly pessimistic. Some expressed the view that they believed or feared that Mr Rush may never be able to work again. I doubt, however, that much, if any weight, can be given to those views for the purposes of this exercise.

875 Unlike the situation which might apply where a person suffers a physical injury, there is no medical or other evidence which might assist. It is really a matter of impression gleaned from the evidence concerning Mr Rush's attitude to acting and the impact that the

publications had on him. There is also an extent to which I must have regard to my assessment of Mr Rush's demeanour as he gave evidence.

876 Doing the very best I can on the very limited material before me, I consider that the prospect of Mr Rush never being able to work again as a result of the defamatory publications, even after the vindication of his reputation in these proceedings, is very remote. I consider that, all other things being equal, once his reputation is vindicated, he will eventually be able to engage in acting work again. On my assessment of the evidence as a whole, I consider that Mr Rush's love of acting and his dedication to his craft will eventually overcome the hurt he has suffered. It is also likely that he will eventually be able to recover his confidence and overcome the fears that have to an extent paralysed him since the publications. He will also no doubt receive the help and encouragement of his family, friends and colleagues in that endeavour.

877 In my view, Mr Rush's recovery is likely to occur within 12 months of this judgment. I cannot, of course, entirely exclude the chance or possibility that his recovery may take longer, though on all the evidence I consider that chance to be very remote.

When is Mr Rush likely to receive offers of work?

878 The expert witnesses called by the parties expressed divergent views in relation to this question.

879 Mr Marks, who was called by Nationwide and Mr Moran, expressed the view that "the publications will have no ongoing effect on Mr Rush's ability to obtain acting roles" if his reputation is vindicated in this proceeding. His evidence was that for "someone of Mr Rush's stature, the publications are likely to be a non-issue after a judgment".

880 Mr Schepisi's evidence was at the other end of the spectrum. His opinion was:

In my opinion, not even the most favourable possible outcome in court - that the allegations made against Mr. Rush are completely false - would return Mr. Rush to the position he was in prior to the articles being published. For the producers and distributors there is the fear the stigma will stick regardless. Even if Mr. Rush is cleared of all alleged misconduct, in the current environment, there might always be some doubt in the eyes of the public. They are likely to only remember the allegations because they find them far juicier than the verdict, and that is fuelled by social media and the internet constantly.

Furthermore, even with the most favourable outcome in court it is reasonable to assume there would be a delay of twelve to eighteen months before anyone would even start to think of considering Mr. Rush for film work of the level he has been used to.

881 While Mr Schepisi's view was that Mr Rush will never return to the position he was in prior to the publications, he did not say that he will never receive any offers again. He also expressed the view that there would likely be a delay of 12 to 18 months before Mr Rush received any offers.

882 Ms Russell's opinion was similar to, but slightly less emphatic than, Mr Schepisi's opinion. She expressed the view that even if Mr Rush is successful in this proceeding and it is found that the allegations made against him are false, "it is quite likely Mr Rush will not receive the same offers he was receiving prior to the publications". Ms Russell also added the following:

If he does start to receive offers again, following a judgment in his favour, there would still in my opinion be a lag period of at least 12 months, and possibly more, between the judgment and those offers. Directors and producers are not likely to want to take a risk by casting Mr. Rush while the allegations are still fresh in the minds of the public (even if those allegations are found to be false).

883 Thus, like Mr Schepisi, Ms Russell was of the view that Mr Rush is unlikely to ever receive the "same offers" as he did before, but she does not say that he will not receive any offers. Also like Mr Schepisi, Ms Russell considered that there would be a "lag" of at least 12 months before Mr Rush received any offers.

884 Finally, Mr Specktor expressed the following opinion:

Finally, I disagree with Mr Marks' opinion that, if Mr Rush is successful in this case, Hollywood would show support for him and he would begin to receive new work. I hope that is the case, but I do not think it will be in the immediate future. Often, in my experience, when an actor or celebrity is tainted by an allegation of impropriety then, regardless of whether or not the allegation is proven, there can be lingering doubts in the minds of the public. If that is the case for Geoffrey, which I think is likely, then it would be unlikely that Hollywood would publicly support him by giving him further work.

Even if Mr Rush's case is successful, and he is cleared by the Court, I think there would still be a lag of twelve months or more before he would receive offers for movies at the same rate as before the publication of the articles.

885 I do not propose to consider or discuss the cross-examination of these witnesses in relation to these opinions. It suffices to say that I consider that the views expressed by Mr Specktor were the most persuasive and realistic in all the circumstances. Mr Specktor did not resile from those views in the course of his oral evidence. Needless to say, as Mr Rush's long-term Hollywood agent, Mr Specktor was perhaps also best placed to form a considered view or impression on this issue. He was certainly more qualified than Mr Marks, who was essentially an entertainment attorney, albeit one who had been to some extent involved in "the process of 'who' to offer a role". Even Mr Marks appeared to concede that Mr Specktor

was better placed to express an opinion in relation to this issue. He said that he considered that Mr Spektor was “the gold standard, because he’s Geoffrey Rush’s agent and he’s [sic] a premier agent for decades”.

886 I was also not impressed or persuaded by much of Mr Marks’ reasoning, which included comparing Mr Rush’s circumstances to the fairly obviously different circumstances of Robert Downey Jr. His view that the publications were likely to be a “non-issue” after judgment was in all the circumstances quite unrealistic. Mr Marks himself appeared to resile from that opinion to a certain extent during cross-examination. He maintained that, once vindicated, Mr Rush would start getting offers straight away, however he ultimately appeared to agree with Mr Spektor and Ms Russell and concede that there would be some lag before the offers recovered to the level that they were before the publications. His evidence in that regard included the following:

You say:

It is likely that the publications will have no ongoing effect on Mr Rush’s ability to obtain acting roles.

Do you still adhere to that statement?---Again, not having the luxury of reading the other experts’ reports and rebutting them, I – I might have included more verbiage here, but I still believe that it only takes one offer and one job and one role and that, at some point, these publications won’t have an effect.

But you don’t think straightaway, do you?---I think straightaway that there will be offers. I agree with Robin Russell and Fred Spektor – and that, within some point, they will get back to the same level of offers, but, as I say, it only takes one juicy part to – to change everything.

Well, just assume for a moment Mr Rush wins. Even if he gets an offer the next day, that movie is not going to be made for some time, is it? They don’t get made instantly?---There is a lag time between offer, acceptance and cameras rolling. Sometimes it could be very short. Sometimes it could be long, but, again, I don’t know what level the offers have been since the publication through today, and I don’t know how they would, you know, immediately come back, but I think they would.

887 There is one other aspect of the expert evidence on this topic that I should note. During cross-examination, Ms Russell conceded that, at the time she was retained to provide a report, she was personally unaware of the relevant publications. She did not personally know whether what had happened to Mr Rush - “these newspaper articles in Sydney Australia” - was well known in the United States. She said she was not the “right person to ask because [she doesn’t] surf the net looking for this stuff”. It may be accepted that Ms Russell’s concession in that regard to some extent undermined the force of her opinion in relation to Mr Rush specifically. Her opinion appeared to be based primarily on her knowledge of the

impact of the #MeToo movement more generally. Mr Marks also gave evidence that he had not been aware of the publications; it had never come across his “radar”.

888 There was, however, a body of evidence which showed that the substance of the *Telegraph’s* publications had been republished extensively in the United States and the United Kingdom. In particular, Mr Rush tendered a bundle of articles which appeared in the following publications or websites in the days and weeks following the 30 November and 1 December 2017 publications: *Variety* (US); the *Hollywood Reporter*; *The Daily Mail* (UK); the *Huffington Post* (UK); People.com; *The Independent* (UK); *Boston 25 News*; NBC New York; Business Insider; Screen Rant; Fox news; *The Times*; *The Chicago*; the *Tribune*; USA Today; the *Telegraph* (UK); the *Guardian* (UK); the *Evening Standard*; the *Sun*; the *LA Times*; and various others. There was also evidence of publications in other countries. These articles or publications reported, amongst other things, that Mr Rush had been accused of “inappropriate behaviour”. Ms Russell’s evidence was that *Variety* and the *Hollywood Reporter* were “trade papers” in Hollywood which were read “religiously” and had been covering the #MeToo movement. Mr Marks also agreed that *Variety* and the *Hollywood Reporter* were trade papers in Hollywood. He was also asked about, and was aware of the nature of, many of the newspapers or websites included in the above list.

889 There could be little doubt that many well-known publications and websites in the United States and United Kingdom republished the story concerning Mr Rush. As I have already noted, the republication throughout the world of the initial publications was the natural and probable result of the initial publications, particularly given Mr Rush’s stature, the sensational nature of the articles and the nature of the #MeToo movement generally. I would readily infer that many people in the movie and entertainment industry in the United States and the United Kingdom would have been aware of the story concerning Mr Rush even if Ms Russell and Mr Marks were not. As noted earlier, Mr Specktor’s evidence was that “[y]ou would have [sic] to be dead not to have come across” the articles.

890 It should be noted, however, that the opinions expressed by each of the expert witnesses appeared to focus primarily on bigger budget movies, primarily Hollywood movies. Their opinions did not extend to offers of work on smaller budget movies, or movies by independent producers, including in Australia, or offers of work on television, or in respect of voice-overs, or work in the theatre, particularly in Australia. Mr Rush was involved, at various times and to varying degrees, in work in each of those areas. There is essentially no

expert opinion evidence in relation to the continuing effect that the publications may have in those areas.

891 Despite the deficiencies in the evidence, I must again do the best I can to arrive at findings in relation to this issue. The findings I have arrived at are as follows.

892 First, I accept the evidence of Mr Specktor, Mr Schepisi and Ms Russell that even if Mr Rush was able to work after his reputation is vindicated, there would be a lag of at least 12 months before Mr Rush received any offers for movies at the same rate as before the publication of the articles. It follows that Mr Rush is unlikely to receive any significant income in the first 12 months after the delivery of this judgment. I should perhaps also emphasise that this 12 month period would in any event coincide with the period during which, on my assessment of the evidence, Mr Rush would not be able to work in any event.

893 Second, while Mr Specktor's evidence was that there would be a lag of "at least" 12 months before he received offers for movies "at the same rate" as he did before, I find that when Mr Rush starts receiving offers after the initial 12 month lag, they will not immediately come in at the same rate as they did before the publications. Rather they will gradually increase. In my view, the most likely scenario is that in the period between 12 and 18 months after judgment, Mr Rush will receive offers at about 50% of the rate he did before the publications. In the period between 18 and 24 months after judgment, he will receive offers at about 75% of the rate he did before publication. In my view, it will only be two years after this judgment is delivered that the rate of offers, and Mr Rush's earning capacity, will return to the level that it was before the publications. In my view, this finding is not inconsistent with the opinion of Mr Specktor and is broadly consistent with the opinions of Mr Schepisi and Ms Russell. For the reasons already given, I do not accept the opinion of Mr Marks on this issue.

894 I appreciate that my assessment of Mr Rush's prospects going forward are more optimistic and positive than the views expressed by Mr Schepisi and Ms Russell, who considered that Mr Rush's capacity to earn income from movies will never return to what it was before the publications. In my view, however, Mr Rush's obvious skills as an actor, and the respect and admiration which he had in the industry prior to the publications will place him in good stead to fully recover his earning capacity over time.

895 As for offers in relation to theatre, television and independent movies, despite the absence of any expert evidence on this point, in my view the evidence as a whole supports the finding that offers of work in theatre, independent movies and television in Australia and perhaps elsewhere will also not begin to flow again until at least 12 months after judgment. The rate of offers will then gradually begin to recover in much the same way as the movie offers: at about 50% during the period between 12 and 18 months after judgment and at about 75% during the period between 18 and 24 months after judgment. The evidence that assists me in arriving at that finding includes the evidence concerning Mr Rush's standing and stature in the theatre and broader entertainment industry, particularly in Australia, and his close connections with significant and influential figures in that industry.

896 I should finally note that I accept that there is a chance or possibility that Mr Rush will receive at least some offers and some work within 12 months of this judgment. I doubt, however, that that work will be particularly large or significant. I also accept that there is a possibility that Mr Rush will not receive any particularly large or significant jobs within the period between 12 and 24 months after the judgment. For the purpose of the assessment of damages, I consider that those possibilities will essentially balance or cancel each other out.

What would Mr Rush's future income have been but for the publications?

897 The parties appeared to accept, in a general sense, that the relevant starting point for the calculation of future economic loss was the average income which Mr Rush had earned in past years. Aside from some fairly minor issues, the financial experts, Mr Potter and Mr Samuel, appeared to agree that Mr Rush's average net income over the period 2003 to 2017 was \$1,490,454. That is, however, no more than a starting point. The issue is what, if any, adjustments have to be made to that figure to take into account any changes to Mr Rush's career and income earning capacity which might occur in the future. There is also an issue concerning whether an adjustment should be made to take into account the vicissitudes of life.

898 Nationwide and Mr Moran relied on the evidence of Mr Marks as establishing that Mr Rush's income, or income earning capacity, into the future was likely to diminish essentially as a product of his age. Mr Marks' opinions, in summary, included the following.

899 First, "actors' roles and remuneration over the course of their career [sic] are speculative, uncertain and unpredictable".

900 Second, and perhaps more significantly, the number of roles offered to working actors decreases when they are perceived to be “old”. According to Mr Marks, “old” in Hollywood could be 60 years of age for men.

901 Third, age is a relevant factor in casting and, when there are roles for older characters, they are generally played by younger actors with make-up and prosthetics.

902 Fourth, a producer is more likely to hire a younger actor due to the cost of cast insurance for older actors.

903 Fifth, in general, the number and quality of roles and remuneration would be less for an actor between the ages of 67 and 77 than for an actor between the ages of 57 and 67 and further decreasing for an actor between the ages of 77 and 87.

904 Mr Schepisi, Mr Specktor and Ms Russell, for the most part disagreed with Mr Marks’ opinions in relation to these five matters. They expressed either contrary views, or expressed the view that Mr Marks’ generalisations do not apply in the case of Mr Rush. I do not propose to consider and discuss the rival views of the experts in relation to these issues in any detail. That is in part because of the factual findings I have made in relation to the other issues. If I had found, for example, that Mr Rush was unlikely to ever work again, or that he would not begin to receive any offers for many years, the sorts of issues considered by Mr Marks, if accepted, could be fairly significant. I have found, however, that Mr Rush will be able to work again within 12 months of the delivery of this judgment and that the offers that will flow to Mr Rush will return to their pre-publication level within two years. I seriously doubt that any of the considerations referred to by Mr Marks are likely to be of any significance in the two year period from the delivery of this judgment.

905 In any event, on the whole I prefer the evidence of Mr Schepisi, Mr Specktor and Ms Russell in respect of all of these issues. Even if I was persuaded that Mr Marks’ generalisations had any validity, I am not persuaded that they apply to Mr Rush. I consider that each of Mr Schepisi, Mr Specktor and Ms Russell are more directly qualified to express opinions in respect of these matters, and their reasons for rejecting Mr Marks’ generalisations, and their applicability to Mr Rush, are highly persuasive. The views of Mr Schepisi, Mr Specktor and Ms Russell also accord more generally with the evidence concerning Mr Rush’s career progression and trajectory. Far from being in decline, Mr Rush’s career appears to have flourished in recent years, even as he gets older. His income has also been fairly consistent

over the years, though higher in some years when he performed in “blockbuster” movies, such as the *Pirates of the Caribbean* franchise movies.

906 It follows that I am not persuaded that any adjustments should be made to the assessment of Mr Rush’s likely future income to take into account the opinions expressed by Mr Marks. Putting to one side the impact of the publications, I do not accept that Mr Rush’s income was likely to have declined over the next few years for the reasons given by Mr Marks, or for any other reason. I consider that, but for the publications, his average income for the next few years was likely to remain more or less the same, in real terms, as it had been for the fifteen years prior to the publications.

Other issues – The reports of Mr Potter and Mr Samuel

907 I have dealt with some of the issues in relation to the respective analyses of Mr Potter and Mr Samuel in my consideration of past economic earnings. It is necessary to say something more about some issues that arise in relation to the assessment or calculation of future economic loss.

908 Mr Potter was instructed to calculate Mr Rush’s future economic loss in at least four scenarios. Each of those scenarios involved an assumption that Mr Rush would not be able to work for another 12 months after the hearing – that is, until 12 September 2019. In the first scenario, Mr Potter was asked to assume, in effect, that Mr Rush would not be able to perform any work at all until 12 September 2019. In the second scenario, Mr Potter was asked to calculate Mr Rush’s likely future loss on the assumption that he would not be able to work until at least 12 September 2019 and that after that time “he is only offered and carries out 75% of his nominal past workload prior to publication of the matters complained of”. The third and fourth scenarios are similar to the second scenario, though they involve an assumption that Mr Rush is only offered and carries out 50% and 25% respectively of his “nominal past workload”. Mr Potter produced tables of calculations in respect of each of the four scenarios for the next 10 years.

909 The apparent intention of the assumptions that Mr Potter was asked to make was to produce calculations based on a potential finding that in the future Mr Rush will never be offered the same amount of work that he was offered before the publications. Rather, he will only be offered either 25%, 50% or 75% of the work he previously performed. It would appear from paragraph 2.25 of Mr Potter’s report, however, that he interpreted the instruction to involve him taking into account “the specific risk (also known as vicissitudes) of the claimed lost

revenues over the period of the loss arising”. As noted earlier, Mr Samuel was critical, in a professional sense, of Mr Potter’s calculations on the basis that he had not discounted his cash flows to take vicissitudes into account.

910 In his written outline of closing submissions, Mr Rush submitted that, while Mr Potter did not take into account “specific risks”, his analysis of the 25% to 75% of future earnings scenarios “adequately provides an outline to the Court of the complete range of possible outcomes for his future earnings, having regard to the associated possible future earnings scenarios, and the associated risks”. For their part, Nationwide and Mr Moran submitted that Mr Potter’s calculations based on the 25%, 50% and 75% scenarios should be disregarded because there is no evidence at all to support them.

911 I agree that Mr Potter’s calculations based on the four different scenarios are of very limited assistance to me in assessing Mr Rush’s future economic loss. That is not intended to be a criticism of Mr Potter. He only did what he was instructed to do. The point is that the different scenarios which formed the basis of Mr Potter’s calculations do not align with the factual findings that I have made about what is likely to occur into the future insofar as Mr Rush’s earning capacity is concerned. I have not found that Mr Rush’s earning capacity will be reduced by 25%, 50% or 75% over the next ten years.

912 Without restating all that I have already said on this topic, my findings may be summarised as follows.

913 First, following the delivery of my judgment in this matter, Mr Rush will continue to be unable to engage in any real acting work for the following 12 months. In any event, there will be a lag of at least 12 months following delivery of my judgment before Mr Rush will begin to receive any significant offers of work.

914 Second, in the six months following that period (the period 12 to 18 months after judgment), Mr Rush will begin to receive offers and will be able to accept them. He will, however, only earn about 50% of what he would otherwise have earned during that period because of the continuing impact of the publications.

915 Third, in the six months after that (the period 18 to 24 months after judgment), Mr Rush will receive and be able to accept more offers of work. That is, his income earning capacity will recover even more. He will, however, only earn about 75% of what he would otherwise have earned during that period because of the continuing impact of the publications.

916 Fourth, thereafter Mr Rush will likely receive offers at the same rate as he did prior to the publications. From that time (two years after judgment) Mr Rush's income will therefore return to what it was prior to the publications.

917 The future financial loss suffered by Mr Rush as a result of the damage to his earning capacity should be assessed on the basis of those findings, not on the basis of the four scenarios upon which Mr Potter based his calculations.

918 The only additional issue I should determine is the methodological debate between Mr Potter and Mr Samuel concerning vicissitudes. For the reasons already given, I would not factor into the assessment of the loss suffered by Mr Rush any discount for "vicissitudes" arising from the sorts of matters that were the subject of the competing opinions of Mr Marks, Mr Specktor, Mr Schepisi and Ms Russell. In short, I do not consider that there is any basis for concluding that, putting aside the effect of the defamatory publications, Mr Rush's earning capacity would have declined in the near future because of his age or any circumstances associated with it.

919 I am, however, persuaded, that a more general adjustment should be made to the assessment to take into account vicissitudes, such as health and other risks of life which are common to all, particularly for persons of Mr Rush's age. I also accept and take into account Mr Marks' opinion that acting is essentially a "fickle business". In all the circumstances, I am of the view that there should be some discount to take into account the possibility that some perhaps otherwise unforeseen incident or event may occur which would have an impact on Mr Rush's career and earning capacity. While it is a rather blunt and crude instrument, I would be inclined to apply a discount of 10% to take into account such vicissitudes. I appreciate that a discount of 10% for vicissitudes is less than the discount that is apparently customarily given in personal injuries cases. The circumstances here, however, involve only a period of 24 months going forward. I consider that a discount of 10% is sufficient to take into account considerations such as Mr Rush's general health and wellbeing during that relatively short period.

Quantification

920 What then, is to be done in relation to the assessment of Mr Rush's special damages? On one view of it, I could determine a figure for future economic loss having regard to the findings I have made using Mr Potter and Mr Samuel's calculation of Mr Rush's average income in

the past. That would require me to perform my own discounted cash flow analysis. I do not propose to do that.

921 I consider that a preferable and fairer course would be to allow the parties to jointly retain Mr Potter and Mr Samuel, or some other agreed expert or experts if they are not available, to calculate Mr Rush's future economic loss on the basis of the factual findings I have made. I would also most likely be assisted by further submissions if there is some disagreement between the experts, or the parties, about the calculation of the loss based on my findings. I should make it plain, however, that other than in fairly exceptional circumstances, I would not permit any further evidence to be led in relation to the assessment of damages other than in the form of a joint report of the forensic accountants. Nor would I be inviting the parties to revisit the factual findings I have made in this judgment.

CONCLUSION IN RELATION TO DAMAGES

922 Mr Rush is entitled to an award of \$850,000 in non-economic or general damages. That award includes aggravated damages.

923 Mr Rush has suffered economic loss arising from the damage to his earning capacity caused by the defamatory publications. While I have made factual findings to enable the quantification of that loss, before I make a final determination in that regard I will hear further from the parties in relation to the assessment of damages based on those findings. In particular, I propose to invite the parties to furnish a joint report from the forensic accountants quantifying the loss based on my factual findings. I will also invite the parties to make further submissions in relation to the quantification exercise. The matter will be listed for a further case management hearing for the purpose of making the necessary procedural orders for that to occur.

OTHER RELIEF

924 Mr Rush also sought an injunction permanently restraining Nationwide and Mr Moran from publishing the imputations found to have been carried by the publications, as well as any imputations that do not differ in substance from them. He also sought costs and interest pursuant to ss 51A and 52 of the *Federal Court of Australia Act 1976* (Cth). It was essentially agreed between the parties that the availability of injunctive relief and issues relating to costs and interest should be dealt with separately after this judgment has been delivered.

JUDGMENT AND ORDERS

- 925 Verdict and judgment should be entered for the applicant, Mr Rush.
- 926 Nationwide and Mr Moran should be ordered to pay general damages, including aggravated damages, to Mr Rush assessed in the sum of \$850,000.
- 927 The matter will be listed for a case management hearing on 10 May 2019 at 9.30 am for the purposes of making orders in relation to the filing of further evidence and submissions in respect of the assessment of damages for economic loss and further submissions in relation to injunctive relief, costs and interest.

I certify that the preceding nine hundred and twenty-seven (927) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 11 April 2019

SCHEDULE 1



SCHEDULE 2

The Daily Telegraph, Thursday, November 30, 2017, pages from 1 to 1

Page 1 of 1

The Daily Telegraph

WE'RE FOR SYDNEY

\$1.60 // THURSDAY, NOVEMBER 30, 2017

SCOOP

SHORTEN ASIO CALL FOR SAM

KYLAR LOUSSIAN

BILL Shorten was so concerned by reports of Sam Dastyari's dealings with a billionaire Chinese donor he called ASIO's top officials to determine if the embattled senator was a national security concern.

The Daily Telegraph understands the Labor leader this week called the domestic spy agency after hearing allegations Mr Dastyari warned the property developer he was under surveillance.

Mr Shorten was advised he did not pose a security risk.

FULL REPORT PAGE 6

SCOOP

GAME ON TO SPY ON KIDS

BRUCE MCDUGALL

TEACHERS will be able to spy on students by using a new program to keep tabs on what pupils are up to on their classroom laptops.

The colour-coding program throws up a "red flag" on the teacher's laptop when a student goes "off-task" on their computer. There are also other colours in the system, like green to show they are on-task and orange if they're searching Google or sending an email.

Six Sydney schools are already testing the software.

FULL REPORT PAGE 3

SCOOP

TRASH TALK ON CAN PLAN

ANNA CALDWELL

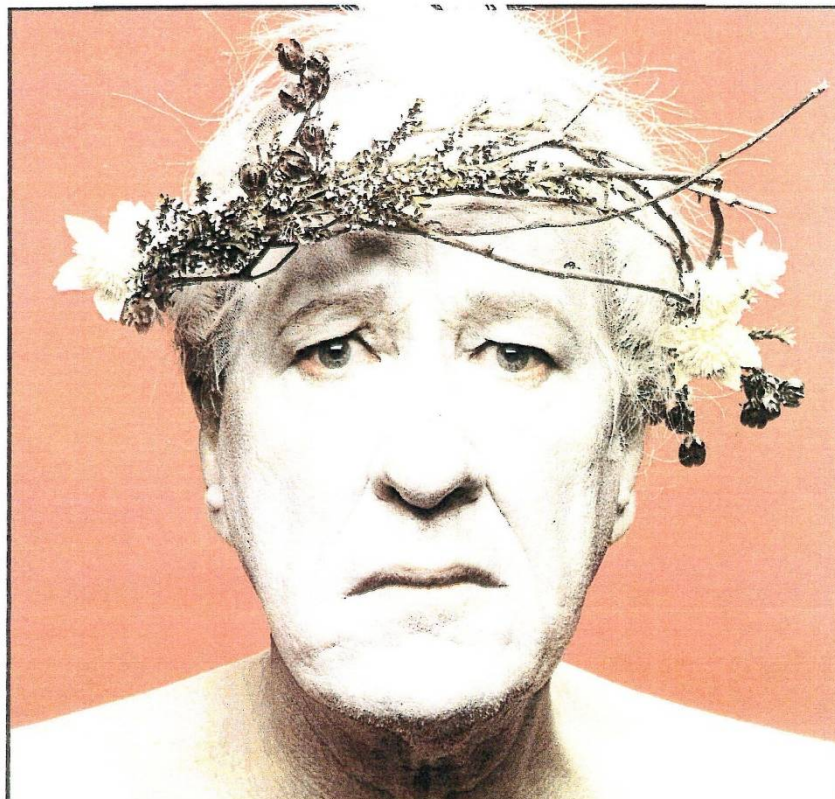
HUNDREDS of vending machines ordered by the state government for its "dumbolic" cash for cans scheme breach standards for disabled access, it can be revealed.

It is the latest blow for the recycling plan which is due to cause prices for drinks in bottles and cans to rise from tomorrow, as senior government MPs seethe about its "botched" rollout.

A case of beer or a box of soft-drink cans will increase by up to \$4.80 from tomorrow.

CONTINUED PAGE 4

V1 - TELEVISION



KING LEAR

WORLD EXCLUSIVE Oscar-winner Rush denies 'inappropriate behaviour' during Sydney stage show

JONATHAN MORAN

OSCAR winning Australian actor Geoffrey Rush has been accused of "inappropriate behaviour" during Sydney Theatre Company's recent production of King Lear.

However, Rush — through his lawyers — last night vigorously denied the claims. The Sydney Theatre Company told The Daily Telegraph 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, it said. "The Company continues to work with the complainant to minimise the risk of future instances of the alleged behaviour occurring in its workplace."

Mr Rush's lawyers said he 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," a statement from HWL Ebsworth Lawyers said.

"If such a statement has been issued by the STC it is both irresponsible and highly damaging."

FULL REPORTS PAGES 4 & 5

SCHEDULE 3

04

THURSDAY NOVEMBER 30 2017 DAILYTELEGRAPH.COM.AU

Oscar-winner Geoffrey Rush denies complaint made

STAR'S BARD BEHAVIOUR



EXCLUSIVE
JONATHAN MORAN

OSCAR-winning Australian actor Geoffrey Rush has been accused of "inappropriate behaviour" during the Sydney Theatre Company's recent production of *King Lear*.

But the star vigorously denies the allegations and says the company has never told him of any allegations of wrong doing.

The Daily Telegraph can today reveal that one of the country's most successful actors was the subject of a complaint during the production of *King Lear*.

It is understood the allegations of inappropriate behaviour occurred over several months. The local production of the classic William Shakespeare play ran from November 2015 to January 2016 at the Roslyn Packer Theatre.

There were also several months of rehearsals. "Sydney Theatre Company received a complaint alleging that Mr Geoffrey Rush had engaged in inappropriate behaviour," a spokeswoman said to The Daily Telegraph.

"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."

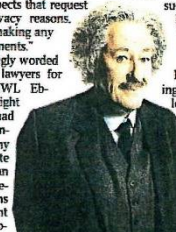
In a strongly worded legal letter, lawyers for Rush at HWL Ebsworth last night said he had never been involved in any "inappropriate behaviour" and that his "regard, actions and treatment of all the people he has worked with has been impeccable beyond reproach."

"Mr Rush has not been approached by the Sydney Theatre Company and the alleged complainant, nor any representative of either of them concerning the matter you have raised," the letter states. "Further, he has not been informed by them of the nature of the complaint and what it involves."

The letter from the legal firm's partner Nicholas Pullen goes on to say that Rush has not been involved with the Sydney Theatre Company or its representatives for a period of more than 22 months.

"In the circumstances, if such a statement has been issued by the STC it is both irresponsible and highly damaging to say the least."

"Your understanding of what has occurred is, with the greatest respect, simply fishing and unfounded."



Government's recycling scheme is a big load of rubbish

FROM PAGE 1

with families expected to recoup the money by collecting refunds for recycling the bottles.

But despite the government promising to roll out 800 reverse vending machines across the state, last night there were set to be only 236 recycling points in operation when the program begins tomorrow, made up of

vending machines and over-the-counter arrangements.

Based on the government's map, more than 10 electorates across the state had no way to claim recycling refunds. Must-win seats for the government in regional NSW were missing collection points, including Orange, which the nationals spectacularly lost to the Shoot-

ers party in the 2016 by-election.

The Daily Telegraph can reveal that those vending machines that do exist don't meet national standards for disabled access. The chutes (pictured right) are 1470mm high — above the 900-1100mm required for public access. Physical Disabilities Council CEO Serena Owens said it was "crazy

the government hasn't considered legal access requirements".

A spokesman for the scheme's operator — Tonra Cleanaway — said the height was "within reach of an adult seated in a wheelchair".

One senior government member described the scheme as "shambolic", saying it was embarrassing to botch some-

thing so innocuous as a recycling scheme, and that it would hurt the government in regional seats that could determine the next election.

Small businesses in electorates on the northern border are preparing to lose revenue to shops in Queensland which does not have a container collection surcharge.



TELE020219K - V1

SCHEDULE 4

DAILYTELEGRAPH.COM.AU THURSDAY NOVEMBER 30 2017

05

in Sydney Theatre Shakespeare production

“
Sydney Theatre Company received a complaint alleging that Mr Geoffrey Rush had engaged in inappropriate behaviour

STC spokeswoman

“
It does not warrant comment except that it is false and untrue

Lawyer for Rush
Nicholas Pullen



Clockwise from left: Rush and his 1996 Oscar; in Twelfth Night; receiving the Order of Australia with Governor-General Peter Cosgrove; in STC's King Lear; on location at Sydney Harbour on Tuesday; and (below left) as Einstein in TV series Genius. Main picture: Matrix Media Group

"It does not warrant comment except that it is false and untrue."

Rush has worked with the STC many times — both acting and directing productions like Uncle Vanya, Oleanna, The Importance of Being Earnest, You Can't Take It With You, King Lear and The Government Inspector.

Rush won the Academy Award for Best Actor in 1996 for his role as David Helfgott in the movie Shine and was nominated for the best supporting actor role two years later for Shakespeare in Love.

His other Oscar nominations include best actor in 2000 film Quills and for The King's Speech in 2011 in the same category.

He has found fame for becoming one of the few people to have won acting's "Triple Crown" — the Academy Award, the Primetime Emmy Award and the Tony Award.

The 66-year-old married father-of-two and Melbourne resident is also the president of the Australian Academy of Cinema Television and Arts and is expected to attend the annual AACTA Awards at The Star Event Centre next week.



Service to counsel affected Nine staff

CHANNEL Nine has opened an independent counselling service following allegations this week of sexual assault by former TV personality Don Burke as the network's boss Hugh Marks addresses staff for the first time, saying "we cannot rewrite history".

A new phone line was set up yesterday to allow people to report instances of past behaviour they would like addressed.

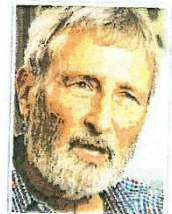
"Former Nine employees with complaints can provide their personal contact details and HR will follow up directly on a strictly confidential basis," Nine said in an email to staff.

The counselling will be provided at no cost to them, Nine said, and will support the person to "work through any issues that relate to their time" at Nine.

Mr Marks, meanwhile, told staff that allegations of harassment and misconduct by Burke was "appalling", vowing to deal with misconduct, harassment, discrimination and bullying issues "effectively".

Burke returned to Nine's A Current Affair, this week where he admitted to behaving like a bullying tyrant, and having "a number of affairs", but cannot remember "exact things I did 20 years ago".

He has been described as a "sexual predator" and "psychotic bully" during the 17-year run of Burke's Backyard. Speaking to ACA host Tracy Grimshaw, he claimed to be a victim of a "witch hunt" ignited by the Harvey Weinstein scandal.



Don Burke being interviewed on ACA.

KIDS AWAKE TO FAKE NEWS

OLDER children are becoming increasingly savvy about fake news on social media.

More than half of youngsters aged 12 to 15 use Facebook and Twitter to access news online — often clicking on stories that have been recommended by "friends" in their network or by users they "follow". But even though they like to access news in this way,

they are extremely wary about which articles they can trust.

The majority of those in this age group who read news on social media make an effort to check if it is true. Some 86 per cent make "at least one practical attempt" to check the veracity of an article.

For example, they might double check it with mainstream news sources.



Mount Agung in action.

Bali tourist relief as airport reopens

BALI'S airport reopened late yesterday and flights resumed as the amount of volcanic ash from the erupting Mt Agung volcano decreased.

After three days of closure, a decision was made late yesterday for the airport to open.

The decision brought relief to the 150,000 tourists stranded in Bali as a result of the volcano,

which began erupting last week. Yesterday almost 58,000 passengers, on 430 flights, had faced cancellations.

Authorities said while the volcanic ash plume was still reaching 1500-2000m, it had decreased compared to the previous day.

The Volcanology and Geological Hazards Mitigation Cen-

tre chief, Kasbani, said everyone living inside the exclusion zone 8-10km from the crater had been told to leave.

An eruption on Tuesday, which hurled volcanic ash more than 4000m into the air had been the biggest so far, prompting warnings that a large-scale eruption was just hours away. But that has not yet happened.

SCHEDULE 5

The Daily Telegraph

WE'RE FOR SYDNEY

DAILYTELEGRAPH.COM.AU \$1.60 // FRIDAY, DECEMBER 1, 2017

UNSCRIPTED DRAMA: THE OSCAR STAR SCANDAL

I was in
the show.
I believe
(her)
STC actor Meyne Wyatt

WE'RE WITH YOU

Theatre cast back accuser
as Rush denies 'touching'

JONATHAN MORAN

TWO Sydney Theatre Company actors yesterday spoke out in support of the actress who has accused Oscar winner Geoffrey Rush of touching her inappropriately during the stage production of *King Lear*.

Rush — one of Australia's biggest stars — was yesterday continuing to vehemently deny the claims.

Meyne Raoul Wyatt, who also appeared in *King Lear*, said he believed the allegations. "I believe (the person who) has come forward. It's time for Sydney Theatre Company and the industry in Australia and worldwide as a whole to make a stand," Wyatt said. And Brandon McClelland, who has

worked alongside the actress, urged others to believe the complaints. "It wasn't a misunderstanding," he said.

Two STC sources said the company stood by her claims. Both said the company wouldn't work with Rush again. Despite denials, Rush was told who made the claims in a phone call with executive director Patrick McIntyre weeks ago. Mr McIntyre last night said the STC had "reviewed policies" about "inappropriate behaviour".

FULL REPORTS P4-5



SCOOP

THE BANK BUST

SHARRI MARKSON
& KYLAR LOUSSIKIAN

FORMER premier Mike Baird played a key role in convincing the Turnbull government to agree to a royal commission into the

big banks. As Mr Baird and his new boss NAB chair Ken Henry got the banks onside, Treasurer Scott Morrison also had a call with Reserve Bank governor Philip Lowe that reversed his position.

FULL REPORTS PAGE 9

REVEALED

TOP KIDS GO BUSH

ANNA CALDWELL

HIGH-achieving students will be given free university degrees and a \$7500-a-year payment in exchange for spending three years teaching in the NSW bush.

Sixty free degrees will be offered from next year as part of a radical push to get better teachers in rural areas as the government fights to maintain a political grip on crucial country electorates.

FULL REPORT PAGE 7

REVEALED

WHAT A SHOCKER

ANNA CALDWELL

ONE of the state's power fat cats has sparked uproar after it was revealed he has pocketed a whopping \$117,000 pay rise as rocketing bills leave families struggling to keep the lights on.

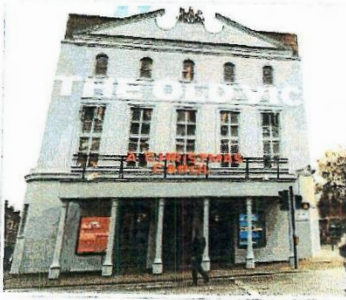
Essential Energy chief executive John Cleland has taken home \$882,076 even as his own company described its patchy service reliability as "unfavourable".

FULL REPORT PAGE 7

V1 - TEL20422129A

SCHEDULE 6

04 | STAGE DRAMA



The Old Vic Theatre on The Cut in London.

HR overhaul to lift curtain on bad deeds

EXCLUSIVE
JONATHAN MORAN

THE Sydney Theatre Company has revised its HR policies in a bid to ensure it maintains a safe environment for staff.

Executive director of the STC Patrick McIntyre (below) said it was important actors feel safe to speak up and believes maintenance of confidentiality to be key.

"We have 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," Mr McIntyre said.

Mr McIntyre's comments come after the STC confirmed it had received a complaint by a staff member over allegations of "inappropriate behaviour" by Oscar winner Geoffrey Rush. Rush vehemently denies any wrongdoing.

Mr McIntyre stressed that he and the executive team at the theatre company have a duty of care to ensure all staff feel safe and respected in the workplace.

"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," he said. More broadly, Mr McIntyre suggested it is a wideranging issue for the industry to address in the wake of the Harvey Weinstein scandal.

"Many still view that speaking up comes with adverse repercussions," he explained. "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."

The HR overhaul follows preliminary findings of an Actors Equity survey aimed at theatre actors which found that 40 per cent of respondents claimed they had directly experienced sexual harassment, bullying or misconduct.

Oscar winner Kevin Spacey became embroiled in the ongoing controversy rocking the entertainment industry with numerous victims coming forward — including 20 complaints from his time as artistic director at London's Old Vic Theatre between 2004 and 2015.

A law firm's investigation into allegations about Spacey stated: "Despite having the appropriate escalation processes in place, it was claimed that those affected felt unable to raise concerns and that Spacey operated without sufficient accountability."

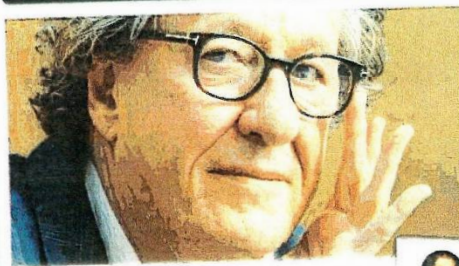


ACTS OF



Meyne Raoul Wyatt

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!!!



Rush denies claim of 'inappropriate behaviour'

MEYNE WYATT

» Nominated for 2014 Logie for Most Outstanding Newcomer for Redfern Now

» Appeared on Neighbours from 2014 to 2016 as Nate Kinski and became the first indigenous actor to be part of the main cast since the soapie began

» Appeared in STC production of King Lear alongside Rush from 2015 to 2016



Brandon McClelland

BRANDON MCCLELLAND

» Appeared in 2014 television miniseries ANZAC Girls as Pat Dooley

» Also played Robert Donnelly in Love Child from 2014-2015

» Appeared in Sydney Theatre Company productions such as A Midsummer Night's Dream in 2016



Sydney Theatre Company actors support

EXCLUSIVE
JONATHAN MORAN

TWO actors who work with the Sydney Theatre Company yesterday publicly threw their support behind the actress who has accused Oscar-winner Geoffrey Rush of touching her inappropriately during the stage production of King Lear.

It comes as Rush — one of the country's most successful actors — was yesterday continuing to vehemently deny claims he inappropriately

touched a cast member of the local production of the classic William Shakespeare play.

Rising young actor Meyne Raoul Wyatt, who appeared in King Lear, said he believed his castmate's version of events.

"I was in the show," Wyatt, who has also starred in Neighbours and Redfern Now, wrote on Facebook yesterday after The Daily Telegraph broke the story.

"I believe (the person who) 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!!!"

And Brandon McClelland, who has worked alongside the woman at the centre of the alleged complaint and is in the company's current production of Three Sisters, urged others on Twitter to believe the actress.

"It wasn't a misunderstanding. It wasn't a joke," he posted.

McClelland's tweet was

also reposted by several other Sydney theatre actors as the story dominated social media yesterday.

The STC production of King Lear ran from November 2015 to January 2016.

The 66-year-old acting legend yesterday said he "immediately phoned and spoke to senior management" at the STC when he became aware of rumours there was a complaint.

But he said the STC refused to give him any details. "They refused to illumi-

Statement for acting veteran blasts STC 'smear'

MANAGEMENT for Oscar-winning actor Geoffrey Rush issued a comprehensive statement yesterday denying allegations of "inappropriate behaviour" during the 66-year-old veteran actor's time with the Sydney Theatre Company's production of King Lear.

The statement, following The Daily Telegraph's exclusive report yesterday, took aim at the Sydney Theatre Company, alleging that it

had "chosen to smear his name and unjustifiably damage his reputation".

It also claimed that "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," it reads.

The widely released document

says it is understood that the STC's own statement concerns a complaint made to it more than 21 months ago.

"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."

It goes on to quote Mr Rush:

"The moment I became aware of rumours of a complaint I immediately phoned and spoke to senior management at the Sydney Theatre Company asking for clarification about the details of the statement. "They refused to illuminate me with the details."

The statement then says Mr Rush can only reiterate that he denies being involved in any "inappropriate behaviour" whatsoever.



Geoffrey Rush in King Lear rehearsals.

TELEGRAPH-PA - V2

SCHEDULE 7

TV'S UNWELCOME MATT
WORLD, PAGE 40

05

DEFIANCE

STATEMENT FROM GEOFFREY RUSH
“The moment I became aware of rumours of a complaint I immediately phoned and spoke to senior management at the Sydney Theatre Company asking for clarification about the details of the statement. 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.”

STC STATEMENT
Sydney Theatre Company was asked by a News Corp 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.

Geoffrey Rush in the lead-up to the Sydney Theatre Company's production of *King Lear* in late 2015.

complainant's claims against megastar Rush

name me," he said through a statement.

"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."

Rush's lawyer Nicholas Pullen said it was a "great disappointment" that the STC 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," he said.

The actor's lawyer, a partner in legal firm HWL Ebsworth, said Rush "abhorred any form of maltreatment of any person".

"Until there is the decency

afforded to Mr Rush of what the 'inappropriate behaviour' actually is then there is nothing more that can be said at this stage," Mr Pullen said.

Two sources who spoke to The Daily Telegraph yesterday said Rush was made aware who made the claims in a conversation with executive director Patrick McIntyre three weeks ago.

The sources said they believed the woman's claims. And they said the STC would not be working with

Rush again. That's despite the veteran actor having worked with the company both acting and directing productions such as *Uncle Vanya*, *Oleanna*, *The Importance Of Being Ernest* and *The Government Inspector*.

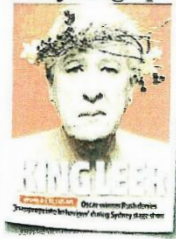
A new statement from the STC yesterday said that it had responded "truthfully" after being approached by The Daily Telegraph earlier this week.

It also clarified the anonymous nature of the alleged complainant, who had "re-

quested the matter be dealt with confidentially, and did not want Mr Rush notified".

"STC complied, acting in the interest of the complainant's health and welfare," Mr McIntyre last night said the STC had "reviewed policies and procedures" including "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".

Daily Telegraph



How we broke the story yesterday.

THEATRE'S FIRM STATE OF PLAY

THE Sydney Theatre Company yesterday confirmed it responded "truthfully" when asked if it had received a complaint alleging inappropriate behaviour by leading Australian actor Geoffrey Rush.

In an updated statement, the STC said 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."

It also clarified the alleged complainant had "requested the matter be dealt with confidentially, and did not want Mr Rush notified or involved" in any inquiry.

"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."



Rush in *Pirates of the Caribbean*.

Execs' exile for star

EXECUTIVES at the Sydney Theatre Company yesterday came forward in support of the woman at the heart of the Geoffrey Rush scandal, saying they wholeheartedly believe her claims.

They also said due to the seriousness of the allegations, the award-winning theatre company would not work with the *Pirates of the Caribbean* star again. "There is no chance," the source told The

Daily Telegraph. "How could we work with him again? That question doesn't even need an answer."

The executive added: "Another actor backed what she said...we've taken this very seriously."

The source also defended not naming the woman, saying: "It is not our story to tell."

A high-profile actor, who did not want to be named, came forward to support the woman.

V2 - TELEVISION



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD2179/2017

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED and another named in the schedule

Respondents

ORDER

JUDGE: JUSTICE WIGNEY


DATE OF ORDER: 11 April 2019

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. Verdict and judgment be entered for the applicant.
2. The respondents pay the applicant damages for non-economic loss, including aggravated damages, assessed at \$850,000.
3. The assessment of special damages for economic loss suffered by the applicant be reserved for further consideration.
4. The matter be listed for a Case Management Hearing at 9.30 am on 10 May 2019 for the purpose of making procedural orders for the determination of all outstanding issues, including the assessment of special damages for economic loss, injunctive relief, costs and interest.

Date that entry is stamped: 12 April 2019


Registrar



Schedule

No: NSD2179/2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Respondent JONATHON MORAN

Interlocutory application

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

To the Applicant

The Respondents apply for the interlocutory orders set out in this application.

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

Time and date for hearing: 10:15 am 23 May 2019

Place: Sydney

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

Date:

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

Filed on behalf of (name & role of party)	Nationwide News Pty Limited and Jonathon Moran, Respondents		
Prepared by (name of person/lawyer)	Robert James Todd		
Law firm (if applicable)	Ashurst Australia		
Tel	02 9253 6000	Fax	02 9258 6999
Email	robert.todd@ashurst.com		
Address for service	Level 9, 5 Martin Place, Sydney, NSW, 2000		
(include state and postcode)	DX 388 Sydney		

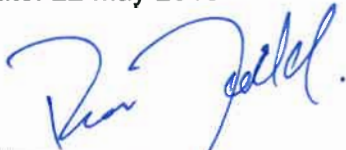
Interlocutory orders sought

1. His Honour Justice Wigney recuse himself from further determining the proceedings.

Service on the Applicant

It is intended to serve this application on the Applicant.

Date: 22 May 2019



Signed by Robert James Todd
Lawyer for the Respondents



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD2179/2017

GEOFFREY ROY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED and another named in the schedule

Respondents

ORDER

JUDGE: JUSTICE WIGNEY

DATE OF ORDER: 23 May 2019

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. The interlocutory application filed by the respondents dated 23 May 2019 seeking an order that his Honour Justice Wigney recuse himself from further determining the proceeding is dismissed.
2. The respondents are to pay the applicant special damages for economic loss, assessed at:
 - a. \$1,060,773.00 for past economic loss, including pre-judgment interest pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth); and
 - b. \$919,678.00 for future economic loss.
3. The Court notes that the parties' agreed assumption is that there is no income tax payable on the award referred to in Order 2 above.
4. On the basis of the undertakings given by the respondents through their counsel on a without admissions basis, and until further order, the respondents be restrained from publishing:
 - a. the first matter complained of;
 - b. the second matter complained of; and/or
 - c. the third matter complained of,(collectively, "**the matters complained of**"), or any matter to the same or substantially the same effect.



5. On the basis of the undertakings given by the respondents through their counsel on a without admissions basis, and until further order, the respondents be restrained from publishing the following imputations (and any imputations which do not differ in substance):
 - a. the applicant had engaged in scandalously inappropriate behaviour in the theatre, while working on the Sydney Theatre Company's production of *King Lear*;
 - b. the applicant behaved as a pervert while working on the Sydney Theatre Company's production of *King Lear*;
 - c. the applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of *King Lear*;
 - d. the applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of *King Lear*;
 - e. 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*;
 - f. the applicant had committed sexual assault while working on the Sydney Theatre Company's production of *King Lear*;
 - g. the applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of *King Lear*;
 - h. 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;
 - i. the applicant had falsely denied that the Sydney Theatre Company had told him the identity of the person who had made a complaint against him, except as contained in a fair report of these proceedings or any appeal from these proceedings.
6. The parties have liberty to apply on 3 days' notice, in the event that the parties' assumption referred to in Order 3 above is incorrect.



Date that entry is stamped: 23 May 2019

Warrick Soden
Registrar



Schedule

No: NSD2179/2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Respondent JONATHON MORAN

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/05/2019 4:25:12 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	NSD679/2019
File Title:	NATIONWIDE NEWS PTY LIMITED & ANOR v GEOFFREY ROY RUSH
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



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

Dated: 6/05/2019 1:05:05 PM AEST

Registrar

Important Information

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

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

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



Notice of appeal

No. _____ 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 named in the schedule

Appellants

Geoffrey Roy Rush

Respondent

To the Respondent

The Appellants appeal from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000

Date:

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

Filed on behalf of	Nationwide News Pty Ltd and Jonathan Moran, Appellants		
Prepared by	Robert Todd		
Law firm	Ashurst Australia		
Tel	(02) 9258 6000	Fax	(02) 9258 6999
Email	Robert.Todd@ashurst.com		
Address for service	Level 9, 5 Martin Place, Sydney NSW 2000 DX 388 Sydney		



The Appellants appeal from the whole of the following judgments of the Federal Court at Sydney:

1. Judgment given on 11 April 2019 (*Rush v Nationwide News Pty Limited (No 7)* [2019] FCA 496) (**Primary Judgment**);
2. Judgment given on 10 October 2018 (*Rush v Nationwide News Pty Limited (No 4)* [2018] FCA 1558) (**Judgment No 4**);
3. Judgment given on 29 October 2018 (*Rush v Nationwide News Pty Limited (No 5)* [2018] FCA 1622) (**Judgment No 5**);
4. Judgment given on 6 November 2018 (*Rush v Nationwide News Pty Limited (No 6)* [2018] FCA 1851) (**Judgment No 6**).

Grounds of appeal

1. The trial miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the following, taken as a whole:
 - (a) The manner in which the primary judge approached the issue of credit as between witnesses called by the Respondent and witnesses called by the Appellants.
 - (b) The primary judge's reliance on an email of Annelies Crowe, tendered by the Respondent as a business record, as a significant basis for his credit finding against Eryn Jean Norvill, in circumstances where the Respondent did not call Ms Crowe, although she was available and subject to subpoena.
 - (c) The primary judge's finding that Ms Norvill was an unreliable witness prone to exaggeration and lacking in credibility.
 - (d) The primary judge's finding at Primary Judgment [389] to the effect that Mark Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
 - (e) The primary judge's finding at Primary Judgment [416] which referred to Robyn Nevin and Helen Buday's "impeccable character and integrity", matters which are irrelevant to the issue of credit and in respect of which there was no evidence.
 - (f) The primary judge's statement at Primary Judgment [447] that there was no evidence to suggest that the Respondent had in fact sexually harassed



anyone in the past, and that that proposition was not put to the Respondent in cross-examination, in circumstances where the truth of this matter was not a matter in issue on the pleadings.

- (g) The primary judge's award of excessive general damages.
- (h) The primary judge's finding, at Primary Judgment [773], that the Appellants' pleading of allegations in the amended defence on the basis of the contents of Ms Crowe's email or a hearsay account of that email (see Primary Judgment [771]) was unjustified and warranted an award of aggravated damages, in circumstances where the primary judge relied upon that email as a significant basis for his credit finding against Ms Norvill.
- (i) 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 in circumstances where this had not been pleaded.
- (j) The award of special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where:
 - (i) the case was not pleaded this way and the Respondent himself gave no evidence to this effect; and
 - (ii) there was no evidence in support of the case as pleaded and advanced through the Respondent's expert evidence, namely that the Respondent had received no offers of work, such that the Respondent would have failed in his claim for special damages.
- (k) The primary judge's award of special damages for a period of two years after judgment (on a sliding scale) in circumstances where the expert evidence called on behalf of the Respondent by his agent, Fred Specktor, was that the Respondent would receive offers at the same rate in about 12 months.
- (l) The primary judge's award of excessive special damages which was not supported by the evidence.
- (m) The repeated references to the Appellants and the matters complained of by the primary judge, orally and in written judgments, in derogatory terms, and the manner in which those references were delivered.
- (n) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody.
- (o) The primary judge's decision in Judgment No 5 to admit as expert evidence opinions of two close associates of the Respondent.



- (p) The primary judge's decision in Judgment No 6 refusing the Appellants' leave to amend the defence and to rely upon the evidence of Witness X.
2. The primary judge's decision in Judgment No 4 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 3. The primary judge's decision in Judgment No 5 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 4. The primary judge's decision in Judgment No 6 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 5. The Respondents were denied procedural fairness by reason of:
 - (a) The primary judge's finding at Primary Judgment [389] to the effect that Mr Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
 - (b) The primary judge's finding at Primary Judgment [416] which referred to Ms Nevin and Ms Buday's "impeccable character and integrity", matters which are irrelevant to the issue of credit and in respect of which there was no evidence.
 - (c) The primary judge's statement at Primary Judgment [447] that there was no evidence to suggest that the Respondent had in fact sexually harassed anyone in the past, and that that proposition was not put to the Respondent in cross-examination, in circumstances where the truth of this matter was not a matter in issue on the pleadings.
 - (d) 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 in circumstances where this had not been pleaded.
 - (e) The award of special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where the case was not pleaded this way and the Respondent himself gave no evidence to this effect.
 - (f) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody.



6. The primary judge's decision in Judgment No 5 to admit as expert evidence opinions of two close associates of the Respondent.
7. The primary judge erred in finding that the imputation "the Applicant is a pervert" was conveyed by the second and third matters complained of.
8. The primary judge erred in finding that the Appellants had not established each of the imputations is substantially true.
9. The primary judge erred in finding that Ms Norvill was an unreliable witness prone to exaggeration and lacking in credibility.
10. The primary judge erred in relying on an email of Ms Crowe, tendered by the Respondent as a business record, as a significant basis for his credit finding against Ms Norvill, in circumstances where the Respondent did not call Ms Crowe, although she was available and subject to subpoena.
11. The primary judge erred in holding, at Primary Judgment [389], that Mr Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
12. The amount of general damages awarded was excessive.
13. The primary judge erred in finding, at Primary Judgment [773], that the Appellants' pleading of allegations in the amended defence on the basis of the contents of Ms Crowe's email or a hearsay account of that email (see Primary Judgment [771]) was unjustified and warranted an award of aggravated damages, in circumstances where the primary judge relied upon that email as a significant basis for his credit finding against Ms Norvill.
14. The primary judge erred in admitting into evidence the opinions of Fred Specktor and Fred Schepisi as expert evidence (Judgment No 5).
15. The primary judge erred in following the decision of *Wilson v Bauer Media* (2018) 361 ALR 642. The Appellants contend that that decision is plainly wrong and ought not be followed.
16. The primary judge erred in awarding special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where:
 - (a) the case was not pleaded this way and the Respondent himself gave no evidence to this effect; and
 - (b) there was no evidence in support of the case as pleaded and advanced through the Respondent's expert evidence, namely that the Respondent had



received no offers of work, such that the Respondent would have failed in his claim for special damages.

17. The primary judge erred in awarding special damages for a period of two years after judgment (on a sliding scale) in circumstances where the expert evidence called on behalf of the Respondent by his agent, Mr Specktor, was that the Respondent would receive offers at the same rate in about 12 months.
18. The award of special damages was excessive and not supported by the evidence.

Orders sought

1. Allow the appeal.
2. Set aside orders 1, 2 and 3 of the Court below entered on 11 April 2019, and any further orders made on 10 May 2019 in relation to special damages.
3. Enter judgment for the Appellants.
4. Alternatively to order 3:
 - (a) remit the proceedings to the Court for a re-trial before a different trial judge;
 - (b) set aside orders 1 and 2 entered on 10 October 2018;
 - (c) set aside order 1 made on 29 October 2018;
 - (d) set aside order 1 entered on 6 November 2018;
 - (e) remit the Appellants' applications determined in the following judgments for determination by a different judge:
 - (i) Judgment No 4;
 - (ii) Judgment No 5;
 - (iii) Judgment No 6.
5. Order the Respondent to pay the Appellants' costs of the appeal.
6. Order the Respondent to pay the Appellants' costs of the proceedings below.

Appellants' address

The Appellants' address for service is:

Place: Ashurst Australia, Level 9, 5 Martin Place, Sydney NSW 2000

Email: Robert.Todd@ashurst.com

The Appellants' address is 2 Holt Street Surry Hills NSW 2010



Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 1 MAY 2019
Robert Todd

Signed by Robert Todd
Lawyer for the Appellants

**Schedule**

No. of 2019

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

Appellants

Second Appellant: Jonathan Moran

Date:

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/06/2019 11:58:20 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	NSD679/2019
File Title:	NATIONWIDE NEWS PTY LIMITED & ANOR v GEOFFREY ROY RUSH
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Case Management Hearing
Time and date for hearing:	12/06/2019, 8:30 AM
Place:	Court Room 18A, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney; Court No. 1 Level 5, Roma Mitchell Commonwealth Law Courts Building Level 5, 3 Angas Street, Adelaide



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

Dated: 7/06/2019 12:21:23 PM AEST

Registrar

Important Information

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

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

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

AMENDED NOTICE OF APPEAL



Form 122
Rules 36.01(1)(b); 36.01(1)(c)

Amended Notice of appeal

No. **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 named in the schedule

Appellants

Geoffrey Roy Rush

Respondent

To the Respondent

The Appellants appeal from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000

Date:

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

Filed on behalf of	Nationwide News Pty Ltd and Jonathan Moran, Appellants		
Prepared by	Robert Todd		
Law firm	Ashurst Australia		
Tel	(02) 9258 6000	Fax	(02) 9258 6999
Email	Robert.Todd@ashurst.com		
Address for service	Level 9, 5 Martin Place, Sydney NSW 2000 DX 388 Sydney		



The Appellants appeal from the whole of the following judgments of the Federal Court at Sydney:

1. Judgment given on 11 April 2019 (*Rush v Nationwide News Pty Limited* (No 7) [2019] FCA 496) (**Primary Judgment**);
2. Judgment given on 10 October 2018 (*Rush v Nationwide News Pty Limited* (No 4) [2018] FCA 1558) (**Judgment No 4**);
3. Judgment given on 29 October 2018 (*Rush v Nationwide News Pty Limited* (No 5) [2018] FCA 1622) (**Judgment No 5**);
4. Judgment given on 6 November 2018 (*Rush v Nationwide News Pty Limited* (No 6) [2018] FCA 1851) (**Judgment No 6**).

The Appellants appeal from the following orders of the Federal Court at Sydney:

1. Orders 1, 2(a) and 2(b) of the orders entered on 23 May 2019.

Grounds of appeal

1. The trial miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the following, taken as a whole:
 - (a) The manner in which the primary judge approached the issue of credit as between witnesses called by the Respondent and witnesses called by the Appellants.
 - (b) The primary judge's reliance on an email of Annelies Crowe, tendered by the Respondent as a business record, as a significant basis for his credit finding against Eryn Jean Norvill, in circumstances where the Respondent did not call Ms Crowe, although she was available and subject to subpoena.
 - (c) ~~The primary judge's finding that Ms Norvill was an unreliable witness prone to exaggeration and lacking in credibility.~~
 - (d) The primary judge's finding at Primary Judgment [389] to the effect that Mark Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
 - (e) The primary judge's finding at Primary Judgment [416] which referred to Robyn Nevin and Helen Buday's "impeccable character and integrity", matters which are irrelevant to the issue of credit and in respect of which there was no evidence.



- (f) The primary judge's statement at Primary Judgment [447] that there was no evidence to suggest that the Respondent had in fact sexually harassed anyone in the past, and that that proposition was not put to the Respondent in cross-examination, in circumstances where the truth of this matter was not a matter in issue on the pleadings.
- (g) ~~The primary judge's award of excessive general damages.~~
- (h) The primary judge's finding, at Primary Judgment [773], that the Appellants' pleading of allegations in the amended defence on the basis of the contents of Ms Crowe's email or a hearsay account of that email (see Primary Judgment [771]) was unjustified and warranted an award of aggravated damages, in circumstances where the primary judge relied upon that email as a significant basis for his credit finding against Ms Norvill.
- (i) 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 in circumstances where this had not been pleaded.
- (j) The award of special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where:
 - (i) the case was not pleaded this way and the Respondent himself gave no evidence to this effect; and
 - (ii) there was no evidence in support of the case as pleaded and advanced through the Respondent's expert evidence, namely that the Respondent had received no offers of work, such that the Respondent would have failed in his claim for special damages.
- (k) The primary judge's award of special damages for a period of two years after judgment (on a sliding scale) in circumstances where the expert evidence called on behalf of the Respondent by his agent, Fred Specktor, was that the Respondent would receive offers at the same rate in about 12 months.
- (l) ~~In consequence of the matters referred to in (i), (j) and (k) above, T~~the primary judge's award of excessive special damages which was not supported by the evidence.
- (m) ~~The r~~Repeated references to the Appellants and the matters complained of by the primary judge, orally and in written judgments, in derogatory terms, and the tone in which certain of those references were delivered, as indicated below; ~~and the manner in which those references were delivered~~



- (i) The primary judge's remarks at [17] of the judgment of 20 March 2018 [2018] FCA 357, in circumstances where statutory qualified privilege, malice and aggravated damages were in issue.
 - (ii) The primary judge's remarks at [1] and [2] of the judgment of 20 April 2018 [2018] FCA 550 which suggested impulsiveness and recklessness, in circumstances where statutory qualified privilege, malice and aggravated damages were in issue.
 - (iii) The primary judge's remarks in [71] and [152] of the same judgment which constituted an unjustified finding that the Appellants' application to amend was an abuse of process; and in circumstances where the proposition was not put to the deponent of the Appellants' affidavit in support of the application.
 - (iv) The primary judge's remarks in [5] of Judgment No 5.
 - (v) The primary judge's remarks in [10], [29], [33], [37] – [39], [66], [71], [111] of Judgment No 6.
 - (vi) The primary judge's remarks at T203 – 204 and the tone in which they were delivered.
 - (vii) The primary judge's remarks at T830 – 834 suggesting an abuse on the part of the Appellants and the tone in which they were delivered.
 - (viii) The primary judge's remarks at T858 – 860 in the course of the application to amend on 2 November 2018, and the tone in which they were delivered.
 - (ix) The primary judge's remark at T1123 that part of the third matter complained of was "fundamentally misleading" in the course of submissions about defamatory meaning.
 - (x) Unnecessary remarks disparaging the Appellants that, regarded singly, would not give rise to an apprehension of bias, but did so in combination with the other matters in this ground: T133.17 – 20; T863.09 – 15; T1080.33 – 1081.08; T1102.33 – 43.
- (m)(n) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody.
- (n)(o) The primary judge's decision in Judgment No 5 to admit as expert evidence opinions of two close associates of the Respondent.
- (e)(p) The primary judge's decision in Judgment No 6 refusing the Appellants' leave to amend the defence and to rely upon the evidence of Witness X.



2. The primary judge's decision in Judgment No 4 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
3. The primary judge's decision in Judgment No 5 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
4. The primary judge's decision in Judgment No 6 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
5. The Respondents-Appellants were denied procedural fairness by reason of:
 - (a) The primary judge's finding at Primary Judgment [389] to the effect that Mr Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
 - (b) The primary judge's finding at Primary Judgment [416] which referred to Ms Nevin and Ms Buday's "impeccable character and integrity", matters which are irrelevant to the issue of credit and in respect of which there was no evidence.
 - (c) The primary judge's statement at Primary Judgment [447] that there was no evidence to suggest that the Respondent had in fact sexually harassed anyone in the past, and that that proposition was not put to the Respondent in cross-examination, in circumstances where the truth of this matter was not a matter in issue on the pleadings.
 - (d) 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 in circumstances where this had not been pleaded.
 - (e) The award of special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where the case was not pleaded this way and the Respondent himself gave no evidence to this effect.
 - (f) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody.
6. The primary judge's decision in Judgment No 5 to admit as expert evidence opinions of two close associates of the Respondent.



- 6-7. The primary judge erred in the exercise of his discretion refusing the Appellants leave to amend their defence in Judgment No 6.
- 7-8. The primary judge erred in finding that the imputation “the Applicant is a pervert” was conveyed by the second and third matters complained of.
9. The primary judge erred in finding that the Appellants had not established each of the imputations is substantially true:
- (a) The primary judge erred in finding (at Primary Judgment [459]) that the groping and fondling gesture (allegation one) did not occur. For the reason set out at 10(e) below, the primary judge was in error in finding at Primary Judgment [462] that Mr Winter’s evidence did not corroborate Ms Norvill’s evidence. For the reasons set out at 10(a) below, the primary judge was in error in finding at Primary Judgment [464] – [465] that Ms Norvill’s public praise of the Respondent, for promotional purposes, was inconsistent with allegation one occurring. The primary judge also relied on his erroneous finding that Ms Norvill was an unreliable witness (ground 10, below), and that the incident was merely unseen by two other witnesses (Primary Judgment [461]).
 - (b) The primary judge erred in finding (at Primary Judgment [502]) that allegations two and three did not occur;
 - (c) The primary judge erred in finding (at Primary Judgment [576]) that allegation five did not occur;
 - (d) The primary judge erred in finding (at Primary Judgment [610]) that allegation six did not occur;
 - (e) The primary judge erred in finding (at Primary Judgment [634]) that allegation seven did not occur;
 - (a)(f) The primary judge erred in finding (at Primary Judgment [634]) that the sending of the text of 10 June 2016 was not inappropriate.
10. The primary judge erred in finding that Ms Norvill was an unreliable witness prone to exaggeration and lacking in credibility:
- (a) The primary judge at Primary Judgment [332] relied on a supposed inconsistency between Ms Norvill’s evidence about the Respondent and positive statements made by her about the Respondent to the press for the purpose of promoting “King Lear”, in circumstances where it was fanciful to expect Ms Norvill to publicly express any reserve about working with the Respondent, or to do other than characterise their collaboration as a highly positive experience;-



- (b) The primary judge at Primary Judgment [333] erred in relying on inconsistencies between Ms Norvill's evidence and exhibit A68, for the reasons set out in ground 11;
- (c) The primary judge at Primary Judgment [334] – [336] relied on differences between Ms Norvill's evidence and the contents of a statement prepared by her solicitors for the purpose of allowing the Appellants to make an application to amend their defence. The primary judge did not explain how he took into account the matters he set out at Primary Judgment [328] in assessing Ms Norvill's credit in light of Primary Judgment [334] – [336], and it appears from those paragraphs that he did not do so.
- (d) The primary judge at Primary Judgment [337] erred in relying on the fact of a number of social interactions between Ms Norvill and the Respondent as grounds for doubting the reliability of her evidence, and in finding (at Primary Judgment [338]) that her explanations were "not particularly persuasive".
- (e) The primary judge erred in finding (at Primary Judgment [339]) that "Mr Winter's evidence, when closely analysed, provided little support for Ms Norvill's version of events". In relation to allegations of groping and fondling gestures during rehearsal, the primary judge accepted Mr Winter's description of the Respondent's gestures as "boob squeezing" (at Primary Judgment [385]).
- (f) The primary judge erred in finding that Ms Norvill's evidence as to her conversations with Ms Nevin (Primary Judgment [432] – [449]), in which the Respondent was discussed, was unreliable (at Primary Judgment [448]). In circumstances where Ms Nevin knew that Ms Norvill was the complainant referred to in the first matter complained of, and had therefore made a most serious, unexpected and unfounded allegation of misconduct against her close friend, she texted Ms Norvill in highly sympathetic terms entirely consistent with the matter having been previously discussed between them as deposed to by Ms Norvill. Ms Nevin's evidence was glaringly improbable.
- (a)(g) The primary judge erred in finding (at Primary Judgment [339]) that the fact some of Ms Norvill's evidence was uncorroborated supported a finding, in combination with the foregoing matters, that she was an unreliable witness prone to exaggeration and lacking in credibility.

8.11. The primary judge erred in relying on an email of Ms Crowe, tendered by the Respondent as a business record, as a significant basis for his credit finding against Ms Norvill, in circumstances where the Respondent did not call Ms Crowe, although she was available and subject to subpoena.



- 9.12. The primary judge erred in holding, at Primary Judgment [389], that Mr Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
- 40.13. The amount of general damages awarded was excessive.
- 44.14. The primary judge erred in finding, at Primary Judgment [773], that the Appellants' pleading of allegations in the amended defence on the basis of the contents of Ms Crowe's email or a hearsay account of that email (see Primary Judgment [771]) was unjustified and warranted an award of aggravated damages, in circumstances where the primary judge relied upon that email as a significant basis for his credit finding against Ms Norvill.
- 42.15. The primary judge erred in admitting into evidence the opinions of Fred Specktor and Fred Schepisi as expert evidence (Judgment No 5).
- 43.16. The primary judge erred in following the decision of *Wilson v Bauer Media* (2018) 361 ALR 642. The Appellants contend that that decision is plainly wrong and ought not be followed.
- 44.17. The primary judge erred in awarding special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where:
- (a) the case was not pleaded this way and the Respondent himself gave no evidence to this effect; and
 - (b) there was no evidence in support of the case as pleaded and advanced through the Respondent's expert evidence, namely that the Respondent had received no offers of work, such that the Respondent would have failed in his claim for special damages.
18. The primary judge erred in awarding special damages for a period of two years after judgment (on a sliding scale) in circumstances where the expert evidence called on behalf of the Respondent by his agent, Mr Specktor, was that the Respondent would receive offers at the same rate in about 12 months.
- 45.19. In consequence of the matters referred to in grounds 17 and 13 above, the primary judge erred in making orders 2(a) and (b) on 23 May 2019.
- 46.20. The primary judge erred in failing to recuse himself before hearing the Respondent's application for injunctions on 23 May 2019.
- 47.21. The award of special damages was excessive and not supported by the evidence.



Orders sought

1. Allow the appeal.
2. Set aside orders 1, 2 and 3 of the Court below entered on 11 April 2019, and any further orders 2(a) and 2(b) made on 10-23 May 2019 and any further orders in relation to special damages.
3. Enter judgment for the Appellants.
4. Alternatively to order 3:
 - (a) remit the proceedings to the Court for a re-trial before a different trial judge;
 - (b) set aside orders 1 and 2 entered on 10 October 2018;
 - (c) set aside order 1 made on 29 October 2018;
 - (d) set aside order 1 entered on 6 November 2018;
 - (e) remit the Appellants' applications determined in the following judgments for determination by a different judge:
 - (i) Judgment No 4;
 - (ii) Judgment No 5;
 - (iii) Judgment No 6.
5. Set aside order 1 of the Court below entered on 23 May 2019 and any orders made by the primary judge subsequent to 23 May 2019.
6. Order the Respondent to pay the Appellants' costs of the appeal.
7. Order the Respondent to pay the Appellants' costs of the proceedings below.

Appellants' address

The Appellants' address for service is:

Place: Ashurst Australia, Level 9, 5 Martin Place, Sydney NSW 2000

Email: Robert.Todd@ashurst.com


The Appellants' address is 2 Holt Street Surry Hills NSW 2010



Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 7 June 2019


Signed by Robert Todd
Lawyer for the Appellants

**Schedule**No. 679 of 2019

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

Appellants

Second Appellant: Jonathan Moran

Date: 7 June 2019

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 5/07/2019 11:33:51 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	NSD679/2019
File Title:	NATIONWIDE NEWS PTY LIMITED & ANOR v GEOFFREY ROY RUSH
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



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

Dated: 5/07/2019 11:50:19 AM AEST

Registrar

Important Information

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

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

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



Form 122
Rules 36.01(1)(b); 36.01(1)(c)

Further Amended Notice of appeal

No. 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 named in the schedule

Appellants

Geoffrey Roy Rush

Respondent

To the Respondent

The Appellants appeal from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000

Date:

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

Filed on behalf of	Nationwide News Pty Ltd and Jonathan Moran, Appellants
Prepared by	Robert Todd
Law firm	Ashurst Australia
Tel	(02) 9258 6000
Email	Robert.Todd@ashurst.com
	Fax (02) 9258 6999
Address for service	Level 9, 5 Martin Place, Sydney NSW 2000 DX 388 Sydney

[Version 2 form approved 09/05/2013]



The Appellants appeal from the whole of the following judgments of the Federal Court at Sydney:

1. Judgment given on 11 April 2019 (*Rush v Nationwide News Pty Limited (No 7)* [2019] FCA 496) (**Primary Judgment**);
2. Judgment given on 10 October 2018 (*Rush v Nationwide News Pty Limited (No 4)* [2018] FCA 1558) (**Judgment No 4**);
3. Judgment given on 29 October 2018 (*Rush v Nationwide News Pty Limited (No 5)* [2018] FCA 1622) (**Judgment No 5**);
4. Judgment given on 6 November 2018 (*Rush v Nationwide News Pty Limited (No 6)* [2018] FCA 1851) (**Judgment No 6**).

The Appellants appeal from the following orders of the Federal Court at Sydney:

1. Orders 1, 2(a) and 2(b) of the orders entered on 23 May 2019.

Grounds of appeal

1. The trial miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the following, taken as a whole:
 - (a) The manner in which the primary judge approached the issue of credit as between witnesses called by the Respondent and witnesses called by the Appellants.
 - (b) The primary judge's reliance on an email of Annelies Crowe, tendered by the Respondent as a business record, as a significant basis for his credit finding against Eryn Jean Norvill, in circumstances where the Respondent did not call Ms Crowe, although she was available and subject to subpoena.
 - (c) [Not used]
 - (d) The primary judge's finding at Primary Judgment [389] to the effect that Mark Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
 - (e) The primary judge's finding at Primary Judgment [416] which referred to Robyn Nevin and Helen Buday's "impeccable character and integrity", matters which are irrelevant to the issue of credit and in respect of which there was no evidence.



- (f) The primary judge's statement at Primary Judgment [447] that there was no evidence to suggest that the Respondent had in fact sexually harassed anyone in the past, and that that proposition was not put to the Respondent in cross-examination, in circumstances where the truth of this matter was not a matter in issue on the pleadings.
- (g) [Not used]
- (h) The primary judge's finding, at Primary Judgment [773], that the Appellants' pleading of allegations in the amended defence on the basis of the contents of Ms Crowe's email or a hearsay account of that email (see Primary Judgment [771]) was unjustified and warranted an award of aggravated damages, in circumstances where the primary judge relied upon that email as a significant basis for his credit finding against Ms Norvill.
- (i) 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 in circumstances where this had not been pleaded.
- (j) The award of special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where:
 - (i) the case was not pleaded this way and the Respondent himself gave no evidence to this effect; and
 - (ii) there was no evidence in support of the case as pleaded and advanced through the Respondent's expert evidence, namely that the Respondent had received no offers of work, such that the Respondent would have failed in his claim for special damages.
- (k) The primary judge's award of special damages for a period of two years after judgment (on a sliding scale) in circumstances where the expert evidence called on behalf of the Respondent by his agent, Fred Specktor, was that the Respondent would receive offers at the same rate in about 12 months.
- (l) In consequence of the matters referred to in (i), (j) and (k) above, the primary judge's award of excessive special damages which was not supported by the evidence.
- (m) Repeated references to the Appellants and the matters complained of by the primary judge, orally and in written judgments, in derogatory terms, and the tone in which certain of those references were delivered, as indicated below:



- (i) The primary judge's remarks at [17] of the judgment of 20 March 2018 [2018] FCA 357, in circumstances where statutory qualified privilege, malice and aggravated damages were in issue.
- (ii) The primary judge's remarks at [1] and [2] of the judgment of 20 April 2018 [2018] FCA 550 which suggested impulsiveness and recklessness, in circumstances where statutory qualified privilege, malice and aggravated damages were in issue.
- (iii) The primary judge's remarks in [71] and [152] of the same judgment which constituted an unjustified finding that the Appellants' application to amend was an abuse of process; and in circumstances where the proposition was not put to the deponent of the Appellants' affidavit in support of the application.
- (iv) The primary judge's remarks in [5] of Judgment No 54, and the tone in which the primary judge delivered the oral judgment.
- (v) The primary judge's remarks in [10], [29], [33], [37] – [39], [66], [71], [111] of Judgment No 6.
- (vi) The primary judge's remarks at T203 – 204 and the tone in which they were delivered.
- (vii) The primary judge's remarks at T830827 – 834 suggesting an abuse on the part of the Appellants and the tone in which they were delivered.
- (viii) The primary judge's remarks at T8586 – 8601 in the course of the application to amend on 2 November 2018, and the tone in which they were delivered.
- (ix) The primary judge's remark at T1123 that part of the third matter complained of was "fundamentally misleading" in the course of submissions about defamatory meaning and the tone in which it was delivered.
- (x) Unnecessary remarks disparaging the Appellants that, regarded singly, would not give rise to an apprehension of bias, but did so in combination with the other matters in this ground: T133.17 – 20; T863.09 – 15; T1080.33 – 1081.08; T1102.33 – 43 and the tone in which they were delivered.
- (xi) Other observations and comments giving the appearance of hostility towards the Appellants and pre-judgment of the issues, and the tone in which they were delivered: T401.01 – 402.43; T561.33 – 36; T563.01 –



13; T622 – 627; T629.16 – 29; T873 – 876; T1032.14 – 16; T1067 – 1068.

(xii) The primary judge's remarks about the Appellants' "recklessly irresponsible journalism" at page 17 of the judgment summary of the Primary Judgment and the tone in which they were delivered.

- (n) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody.
 - (o) The primary judge's decision in Judgment No 5 to admit as expert evidence opinions of two close associates of the Respondent.
 - (p) The primary judge's decision in Judgment No 6 refusing the Appellants' leave to amend the defence and to rely upon the evidence of Witness X.
2. The primary judge's decision in Judgment No 4 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 3. The primary judge's decision in Judgment No 5 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 4. The primary judge's decision in Judgment No 6 miscarried in that the conduct of the proceedings by the primary judge gave rise to an apprehension of bias, which may be apprehended from the matters referred to in ground 1.
 5. The Appellants were denied procedural fairness by reason of:
 - (a) The primary judge's finding at Primary Judgment [389] to the effect that Mr Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
 - (b) The primary judge's finding at Primary Judgment [416] which referred to Ms Nevin and Ms Buday's "impeccable character and integrity", matters which are irrelevant to the issue of credit and in respect of which there was no evidence.
 - (c) The primary judge's statement at Primary Judgment [447] that there was no evidence to suggest that the Respondent had in fact sexually harassed anyone in the past, and that that proposition was not put to the Respondent in cross-examination, in circumstances where the truth of this matter was not a matter in issue on the pleadings.



- (d) 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 in circumstances where this had not been pleaded.
 - (e) The award of special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where the case was not pleaded this way and the Respondent himself gave no evidence to this effect.
 - (f) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody.
6. The primary judge's decision in Judgment No 5 to admit as expert evidence opinions of two close associates of the Respondent.
 7. The primary judge erred in the exercise of his discretion refusing the Appellants leave to amend their defence in Judgment No 6.
 8. The primary judge erred in finding that the imputation "the Applicant is a pervert" was conveyed by the second and third matters complained of.
 9. The primary judge erred in finding that the Appellants had not established each of the imputations is substantially true:
 - (a) The primary judge erred in finding (at Primary Judgment [459]) that the groping and fondling gesture (allegation one) did not occur. For the reason set out at 10(e) below, the primary judge was in error in finding at Primary Judgment [462] that Mr Winter's evidence did not corroborate Ms Norvill's evidence. For the reasons set out at 10(a) below, the primary judge was in error in finding at Primary Judgment [464] – [465] that Ms Norvill's public praise of the Respondent, for promotional purposes, was inconsistent with allegation one occurring. The primary judge also relied on his erroneous finding that Ms Norvill was an unreliable witness (ground 10, below), and that the incident was merely unseen by two other witnesses (Primary Judgment [461]).
 - (b) The primary judge erred in finding (at Primary Judgment [502]) that allegations two and three did not occur;
 - (c) The primary judge erred in finding (at Primary Judgment [576]) that allegation five did not occur;
 - (d) The primary judge erred in finding (at Primary Judgment [610]) that allegation six did not occur;
 - (e) The primary judge erred in finding (at Primary Judgment [634]) that allegation seven did not occur;



- (f) The primary judge erred in finding (at Primary Judgment [634]) that the sending of the text of 10 June 2016 was not inappropriate.
10. The primary judge erred in finding that Ms Norvill was an unreliable witness prone to exaggeration and lacking in credibility:
- (a) The primary judge at Primary Judgment [332] relied on a supposed inconsistency between Ms Norvill's evidence about the Respondent and positive statements made by her about the Respondent to the press for the purpose of promoting "King Lear", in circumstances where it was fanciful to expect Ms Norvill to publicly express any reserve about working with the Respondent, or to do other than characterise their collaboration as a highly positive experience;
 - (b) The primary judge at Primary Judgment [333] erred in relying on inconsistencies between Ms Norvill's evidence and exhibit A68, for the reasons set out in ground 11;
 - (c) The primary judge at Primary Judgment [334] – [336] relied on differences between Ms Norvill's evidence and the contents of a statement prepared by her solicitors for the purpose of allowing the Appellants to make an application to amend their defence. The primary judge did not explain how he took into account the matters he set out at Primary Judgment [328] in assessing Ms Norvill's credit in light of Primary Judgment [334] – [336], and it appears from those paragraphs that he did not do so.
 - (d) The primary judge at Primary Judgment [337] erred in relying on the fact of a number of social interactions between Ms Norvill and the Respondent as grounds for doubting the reliability of her evidence, and in finding (at Primary Judgment [338]) that her explanations were "not particularly persuasive".
 - (e) The primary judge erred in finding (at Primary Judgment [339]) that "Mr Winter's evidence, when closely analysed, provided little support for Ms Norvill's version of events". In relation to allegations of groping and fondling gestures during rehearsal, the primary judge accepted Mr Winter's description of the Respondent's gestures as "boob squeezing" (at Primary Judgment [385]).
 - (f) The primary judge erred in finding that Ms Norvill's evidence as to her conversations with Ms Nevin (Primary Judgment [432] – [449]), in which the Respondent was discussed, was unreliable (at Primary Judgment [448]). In circumstances where Ms Nevin knew that Ms Norvill was the complainant referred to in the first matter complained of, and had therefore made a most serious, unexpected and unfounded allegation of misconduct against her close friend, she texted Ms Norvill in highly sympathetic terms entirely consistent with



the matter having been previously discussed between them as deposed to by Ms Norvill. Ms Nevin's evidence was glaringly improbable.

- (g) The primary judge erred in finding (at Primary Judgment [339]) that the fact some of Ms Norvill's evidence was uncorroborated supported a finding, in combination with the foregoing matters, that she was an unreliable witness prone to exaggeration and lacking in credibility.
- 11. The primary judge erred in relying on an email of Ms Crowe, tendered by the Respondent as a business record, as a significant basis for his credit finding against Ms Norvill, in circumstances where the Respondent did not call Ms Crowe, although she was available and subject to subpoena.
- 12. The primary judge erred in holding, at Primary Judgment [389], that Mr Winter's recollection of the incident in rehearsal was prompted by someone at a conference with the Appellants' lawyers and Ms Norvill's lawyers, in circumstances where that allegation was not put to Mr Winter or to the Appellants in order to give them an opportunity to respond.
- 13. The amount of general damages awarded was excessive.
- 14. The primary judge erred in finding, at Primary Judgment [773], that the Appellants' pleading of allegations in the amended defence on the basis of the contents of Ms Crowe's email or a hearsay account of that email (see Primary Judgment [771]) was unjustified and warranted an award of aggravated damages, in circumstances where the primary judge relied upon that email as a significant basis for his credit finding against Ms Norvill.
- 15. The primary judge erred in admitting into evidence the opinions of Fred Specktor and Fred Schepisi as expert evidence (Judgment No 5).
- 16. The primary judge erred in following the decision of *Wilson v Bauer Media* (2018) 361 ALR 642. The Appellants contend that that decision is plainly wrong and ought not be followed.
- 17. The primary judge erred in awarding special damages on the basis that the Respondent was unable to work due to the emotional effect the articles had on him, in circumstances where:
 - (a) the case was not pleaded this way and the Respondent himself gave no evidence to this effect; and
 - (b) there was no evidence in support of the case as pleaded and advanced through the Respondent's expert evidence, namely that the Respondent had received no offers of work, such that the Respondent would have failed in his claim for special damages.



18. The primary judge erred in awarding special damages for a period of two years after judgment (on a sliding scale) in circumstances where the expert evidence called on behalf of the Respondent by his agent, Mr Specktor, was that the Respondent would receive offers at the same rate in about 12 months.
19. In consequence of the matters referred to in grounds 17 and 18 above, the primary judge erred in making orders 2(a) and (b) on 23 May 2019.
20. The primary judge erred in failing to recuse himself before hearing the Respondent's application for injunctions on 23 May 2019.

Orders sought

1. Allow the appeal.
2. Set aside orders 1, 2 and 3 of the Court below entered on 11 April 2019, orders 2(a) and 2(b) made on 23 May 2019 and any further orders in relation to special damages.
3. Enter judgment for the Appellants.
4. Alternatively to order 3:
 - (a) remit the proceedings to the Court for a re-trial before a different trial judge;
 - (b) set aside orders 1 and 2 entered on 10 October 2018;
 - (c) set aside order 1 made on 29 October 2018;
 - (d) set aside order 1 entered on 6 November 2018;
 - (e) remit the Appellants' applications determined in the following judgments for determination by a different judge:
 - (i) Judgment No 4;
 - (ii) Judgment No 5;
 - (iii) Judgment No 6.
5. Set aside order 1 of the Court below entered on 23 May 2019 and any orders made by the primary judge subsequent to 23 May 2019.
6. Order the Respondent to pay the Appellants' costs of the appeal.
7. Order the Respondent to pay the Appellants' costs of the proceedings below.

Appellants' address

The Appellants' address for service is:

Place: Ashurst Australia, Level 9, 5 Martin Place, Sydney NSW 2000

Email: Robert.Todd@ashurst.com

The Appellants' address is 2 Holt Street Surry Hills NSW 2010



Service on the Respondent

It is intended to serve this application on the Respondent.

Date.

5.7.19
[Handwritten signature]

Signed by Robert Todd
Lawyer for the Appellants

**Schedule**

No. 679 of 2019

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

Appellants

Second Appellant: Jonathan Moran

Date: 5/7/19