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Details of Filing

Document Lodged:	Outline of Submissions
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File Title:	NATIONWIDE NEWS PTY LIMITED & ANOR v GEOFFREY ROY RUSH
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RESPONDENT'S OUTLINE OF SUBMISSIONS[1]

Nationwide News Pty Limited & Jonathon Moran v Geoffrey Roy Rush

(NSD 679/2019)

A. BACKGROUND

1. The proceedings below were commenced by way of Originating Application and Statement of Claim filed on 8 December 2017. They concerned a poster[2] and two front-page articles[3] published on 30 November and 1 December 2017. The effect of those publications on Mr Rush was immediate, ongoing and devastating. The allegations were repeated worldwide and resulted in Mr Rush being included as part of lists relating to Harvey Weinstein and "#MeToo".

2. The trial took place over 15 days in October and November 2018. It was preceded by a series of interlocutory disputes (including a failed application for leave to appeal) arising from, on the most part, the state of the appellants' pleadings. One of the amendments (the abandonment of the s.30 defence and the late plea of a new justification defence) caused the vacation of the first trial date.

3. The primary judge delivered judgment on 11 April 2019 (***Rush No 7***).

B. APPEAL GROUND 1

4. Where there is an apprehension of bias, it should be raised at the time, lest the right to do so be waived: *Vakauta v Kelly* (1989) 167 CLR 568 at [572]; *Rush No 8* at [27]-[29]. Many of the particulars of apprehended bias at [1] of the Further Amended Notice of Appeal (**FANA**) are said to arise from consideration of the final judgment itself. Others are said to have arisen either during the course of the trial (1(m)(vi)-(xii)) or, earlier still, from interlocutory judgments (1(m)(i)-(v), 1(n), 1(o) and 1(p)). For these matters, it is difficult to see why, if they provide a legitimate basis for bias, they would not have been evident at the time: *Rush No 8* at [6], [93]. Having elected not to raise these matters, the appellants are now precluded from doing so.

5. In an apparent attempt to avoid that outcome, the appellants rely upon *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 (***Royal Guardian***), in

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[1] In addition to the documents referred to in these submissions, the respondent also relies upon the documents referred to in his chronology.
[2] Ex.A-1 (Part B, Tab 30).
[3] Ex.A-2 (Part B, Tab 31) and Ex.A-3 (Part B, Tab 32).

arguing that the particulars of apprehended bias which arose prior to delivery of *Rush No 7* only crystallised upon delivery of *Rush No 7*, at which time the cumulative effect of the various grounds were realised. That contention should be rejected.

6. First, it suggests that the particulars of apprehended bias said to have arisen prior to the judgment were not objectively striking at the time and thus by themselves insufficient to give rise to an apprehension of bias. When one has regard to those matters individually, it is not surprising that this submission has been made.

7. Second, the appellants must persuade the Court that the significance of each individual particular only became apparent for the first time when they had the benefit of *Rush No 7*. Yet those matters do not seem to have been revived, or resurrected, by *Rush No 7* (see *Rush No 8* at [94]-[96]).

8. Third, even if the cumulative effect of the individual particulars of apprehended bias *did* only crystallise upon delivery of *Rush No 7*, this appeal is still not the first opportunity the appellants had to raise them. The appellants raised apprehended bias before Justice Wigney on 10 May 2019, and requested His Honour recuse himself from considering any further contested matters in the proceeding. The parties exchanged written submissions on the application (Part B, Tabs 152 and 153) pursuant to orders made by the primary judge on 10 May 2019. The Court placed no limit on the length of the submissions thus the appellants were unconstrained in what they could rely on.

9. The arguments which were raised by the appellants have been comprehensively dealt with in *Rush No 8*. Otherwise, to the extent the appellants now seek to raise matters which were not raised before Justice Wigney on 23 May 2019, the appellants should be precluded from so doing.

10. In relation to appeal ground 1 as a whole, almost all of the particulars of apprehended bias seem to amount, at their highest, to a complaint about the outcome of a particular issue, or a particular interlocutory judgment, in the proceedings. Even assuming error, however, that would not generally give rise to an apprehension of bias (*Royal Guardian*; *DOQ17 v Australian Financial Security Authority (No 2)* [2018] FCA 1270 (at [24]) (***DOQ17***); *Rush No 8* at [21]-[25]).

11. Further, the appellants must actually articulate a logical connection between that particular and the feared deviation from deciding the case on its merits. In assessing whether there is a logical connection, it is important to bear in mind the characteristics

of modern litigation as recognised in *Johnson v Johnson* (2000) 201 CLR 488 at 493 (***Johnson***) (see also *Rush No 8* at [18]-[20]). For most of the particulars, the appellants have failed to establish the second step.

12. The appellants have conceded several times that none of the particulars would by themselves give rise to an apprehension of bias.[4] It therefore follows that, if only one or even some of the particulars succeed, it would still remain for the appellants to show that the cumulative effect of those successful particulars were sufficient to give rise to an apprehension of bias.

Sub-para 1(a)

13. The respondent relies on the reasoning in *Rush No 8* at [51]-[63].

Sub-para 1(b)

14. Para 1(b) relates to the primary judge's treatment of an email sent by Annelies Crowe on 6 April 2016 (**the Crowe Email**).[5] Ms Crowe was the Company Manager of the Sydney Theatre Company (**STC**). This is dealt with in Rush No 8 at [64]-[67].

15. The appellants refer at para 1(b) to the circumstances in which the Crowe Email was "*tendered by the Respondent as a business record*". It is not clear whether that is intended to signal that the appellants' complaint relates to the admissibility of the document in the first place. If so, that question is dealt with at *Rush No 7* at [356]-[360]. The Crowe Email was included in the bundle of documents to be relied upon at trial by the appellants. Despite that, the appellants objected to its tender on the basis of hearsay and also under s.135 of the *Evidence Act* 1995 (Cth). However, the extent of the appellants' argument in support of that objection was minimal: T592.43-594.12. Regardless of whether or not the Crowe Email was admissible, it is difficult to imagine that a fair-minded lay observer would see any reasonable suggestion of bias in that exchange, about the admissibility of a particular piece of evidence.

16. The appellants further complain (at [100]) that the respondent did not call Ms Crowe as a witness even though they had served Ms Crowe with a Subpoena to Attend[6] and had

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[4] Case management hearing on 10 May 2019 at T12.20-22; appellants' submissions dated 15 May 2019 (Part B, Tab 152, at [6]); case management hearing on 15 July 2019 at T5.16-19; Rush No 8 at [12], [30], [49]; appellants' submissions dated 23 September 2019 at [99].
[5] Ex.A-68 (Part B, Tab 97).
[6] Ex.A-69 (Part B, Tab 98); T594.1-10.

served an Outline of Evidence on her behalf[7]. In those circumstances, and where the onus of proof of the defences was on the appellants, not the respondent, it is difficult to make anything at all of the fact that the respondent chose not to call Ms Crowe to give evidence: see *Ho v Powell* [2001] NSWCA 168 at [16]; T1196.1-24. At any rate, none of that could be said to give rise to any reasonable apprehension of bias.

17. The Crowe Email was one of the many reasons why Wigney J rejected Ms Norvill's evidence: *Rush No 7* at [368]-[377]. The appellants contend that an apprehension of bias arises because the Court below found that their reliance on that email supported Mr Rush's claim for aggravated damages. That assertion mischaracterises the different uses being made of the email (discussed below) and does not give rise to an apprehension of bias.

Sub-para 1(d)

18. This is dealt with in *Rush No 8* at [68]-[70]. The primary judge's finding in *Rush No 7* at [389] was one of six reasons provided by the primary judge as to why Mr Winter's evidence, in relation to allegation one, was unpersuasive and unreliable. That particular evidence was not in Mr Winter's outline of evidence (served prior to the trial) and was given in chief, over objection, without any prior notice to the respondent: T665.24-T671.10; T684.44-47. In those circumstances, it was put to Mr Winter in cross-examination that the first time he had raised this "*incident*" was within the last week. Mr Winter said that his recollection arose in response to the topic being raised by someone at a recent conference with the appellants' and Ms Norvill's solicitors. It was therefore not necessary for the primary judge's finding at [389] to be "*put*" to Mr Winter because it was volunteered in cross-examination *by* Mr Winter himself. Para [389] is an accurate account of Mr Winter's own evidence. At any rate, any connection with bias, actual or apprehended, is absent.

Sub-para 1(e)

19. This is dealt with in *Rush No 8* at [71]-[74]. Para [416] of *Rush No 7* needs to be read with [414]-[415]. The appellants had made a submission that Ms Buday's evidence, Ms Nevin's evidence and also Mr Armfield's evidence needed to be considered in context. That context was said to include Ms Norvill's evidence recorded at [414]. The

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[7] T594.1-10.

appellants' submission appeared to be that Ms Buday and Ms Nevin may have witnessed the alleged behaviour but may not have appreciated it was culturally inappropriate ("*because of their age*" or because they were from "*different generations*"). In rejecting that submission, the primary judge noted that: a) no such suggestion was put to any of the relevant witnesses in cross-examination; and b) no question had been raised about the character or integrity of those witnesses. In those circumstances, it is fanciful to suggest that a fair-minded observer, reading [416] in its context, would discern any partiality of the primary judge towards the respondent.

Sub-para 1(f)

20. This is dealt with in *Rush No 8* at [75]-[77]. Para [447] of *Rush No 7* also needs to be read in context. The primary judge was weighing up the evidence of Ms Norvill against the conflicting evidence of Ms Nevin in relation to a certain conversation between the two, which was said to have occurred during an STC production of *All My Sons* in mid-2016 (see [436]-[448]). In preferring Ms Nevin's evidence on that issue ([445]), the primary judge found Ms Norvill's evidence to be unreliable for the two reasons set out at [446] and [447]. The second reason was that Ms Norvill's evidence was "*somewhat improbable in light of Ms Nevin's evidence generally*". According to Ms Norvill, Ms Nevin had said "*I didn't think Geoffrey was doing that anymore*", which the primary judge said implied that Ms Nevin believed, or knew, that the respondent "*had sexually harassed other people in the past*". As the primary judge observed, however, that premise had not been proven (or even suggested). As such, the primary judge concluded, "*it is difficult to accept that Ms Nevin would have said the words attributed to her by Ms Norvill*". Within that context, even if the passage complained of at para 1(f) of the FANA was not directly "*in issue on the pleadings*", it was relevant to the primary judge's assessment of the likelihood of Ms Nevin having said the words attributed to her by Ms Norvill, and therefore the reliability of Ms Norvill's evidence on that issue. At any rate, there is nothing in that analysis which would give rise to an apprehension of bias. The primary judge's reasoning was logical but otherwise unremarkable.

Sub-para 1(h)

21. This is dealt with in *Rush No 8* at [78]-[81]. The appellants complain about the primary judge's finding (at [773]) that the pleading of allegations in their Amended Defence, based on the contents of the Crowe Email or a hearsay account of that email, was unjustified so as to give rise to an award of aggravated damages. At [765]-[777], the primary judge found that the appellants' conduct throughout the proceedings, including their reporting on the proceedings, aggravated the harm suffered by the respondent.

22. One particularly troubling aspect of the appellants' conduct was the particulars of truth pleaded in their Defence (Part A, Tab 3, pp.5/6) and Amended Defence (Part A, Tab 4, pp.5-7). Those particulars are summarised at *Rush No 7* at [767]. They included very serious allegations about Mr Rush that were subsequently contradicted by Ms Norvill (and were never the subject of any evidence). It is difficult to see how the appellants could have had a proper basis to plead those allegations given most of them concerned conduct between Ms Norvill and Mr Rush which was alleged to have occurred without witnesses (such as the assertion that Mr Rush followed Ms Norvill into a female bathroom until she told him to "*fuck off*"), and given the appellants did not at that time have Ms Norvill's cooperation.[8]

23. On 19 February 2018, the appellants' senior counsel repeatedly said in open Court that it was the appellants' case that Mr Rush touched Ms Norvill in a way that made her "*feel uncomfortable*", that she asked him to stop, but that he "*went on doing it*".[9]

24. On 20 February 2018, the day after a temporary non-publication order in relation to the Amended Defence was lifted, the first appellant published two front-page articles which set out those particulars: *Rush No 7* at [768]; Part B, Tab 83 (Ex.A-54 - pp.9/146-153).

25. The appellants' defence was struck out (*Rush No 1*), with the particulars of truth being found to be "*defective and deficient in a number of respects*" (*Rush No 7* at [769]). As the primary judge observed (at [769]-[770]), those particulars "*have never resurfaced*" and it is "*abundantly clear from the evidence given by Ms Norvill in this proceeding that they never occurred*". Further, the appellants "*have never sought to explain exactly how they came to include these allegations in their initial truth defence*", nor have they ever apologised to Mr Rush "*for trumpeting those false allegations on the front page*" of

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[8] Affidavit of Marlia Ruth Saunders dated 31 July 2018, at [12]; Rush No 4 at [7]; appellants' submissions dated 23 September 2019 at [68].
[9] Transcript of 19 February 2018: T74.21-39; T75.17-23; T76.7-13; T77.12-19; T79.23-27; T81.34-41.

their papers. Against that background, it is hardly surprising the appellants' conduct gave rise to an award of aggravated damages.

26. The primary judge inferred (at [771]) that the allegations were made on the basis of the contents of the Crowe Email, "*or possibly a hearsay account of the contents of that email or the general nature of Ms Norvill's complaint provided by someone else*". Notably, the appellants have not disputed that this inference was not reasonably open, or was wrong. Instead, the complaint at 1(h) seems to be that the primary judge should not have criticised the appellants' reliance on the Crowe Email, in pleading their original defence of justification, in circumstances where the email was used "*as a significant basis*" for adverse credit findings against Ms Norvill. However, the comparison that is sought to be drawn - between the way the Crowe Email was used in relation to aggravated damages, and the way it was used in relation to Ms Norvill's evidence - is not persuasive:

(a) In relation to aggravated damages, the point being made (at [772]-[773]) was that the appellants' conduct - notably, the pleading of very serious allegations in their defences, then the publication of those allegations on the front page of their papers - was improper given they had not spoken to Ms Norvill, at the time, to confirm whether the allegations were true. That was particularly so where she was perhaps the only person (other than Mr Rush, who had strongly denied the allegations) with actual relevant first-hand knowledge.

(b) In contrast, in relation to Ms Norvill's evidence, the Crowe Email was telling because it was found to be reliable evidence of what Ms Norvill actually said to Ms Crowe.

27. Thus one of these considerations (aggravated damages) focused on the Crowe Email as an unreliable indication of what actually happened to Ms Norvill, while another of these considerations (Ms Norvill's credit) focused on the email as a reliable guide as to what Ms Norvill had said had happened. These were conceptually quite different (but legitimate) uses of the Crowe Email. It is no basis whatsoever for any apprehended bias to be discerned.

Sub-para 1(i)

28. This is dealt with at paras [801] to [807] of *Rush No 7*, as well as at paras [82]-[85] of *Rush No 8*. The respondent's withdrawal from the *Twelfth Night* was not pleaded in the

Statement of Claim because he only withdrew from the production in early July 2018 (six months after the pleading were filed). However, the appellants were on notice the respondent intended to rely upon his withdrawal from the *Twelfth Night* in support of his claim for economic loss.[10] At any rate, para 1(i) seems really to be an assertion that the Court erred in the exercise of its discretion to admit evidence relating to the *Twelfth Night*. Such an error (if there was one), would not give rise to an apprehension of bias.

Sub-para 1(j)

29. This is dealt with in *Rush No 8* at [88]-[89]. Though it was not specifically pleaded, the appellants were put on notice that the respondent's claim for economic loss included a claim of lack of earning capacity.[11] This is dealt with at paras [808] to [810] of *Rush No 7*, and would not give rise to any apprehension of bias.

30. The appellants also contend that the respondent himself gave no direct evidence that he was unable to work as a result of the publications. However:

    (a) As noted at [815] of *Rush No 7*, there was "*effectively undisputed evidence that the effect that the publications had on Mr Rush personally was devastating*" (see also [702]-[715]; [789]; [819]-[827]; [848]).

    (b) There was evidence - including evidence from Mr Rush - as to why he withdrew from *Twelfth Night* (see [818] and [830]). Although the primary judge observed (at [832]) that it may be accepted that some of those reasons might be unique to that particular production, or unique to acting in the theatre, nonetheless Mr Rush's evidence about his withdrawal from the *Twelfth Night* "*plainly revealed his state of mind at the time in relation to acting generally*".

31. It was therefore open for the primary judge to have found that the respondent had been unable to work as a result of the publications.

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[10] Affidavit of Nicholas Pullen sworn 9 April 2018 (Part B, Tabs 5 and 5.1); letter from respondent's solicitors to appellants' solicitors dated 22 May 2018 (Part A, Tab 7); letter of instruction to Michael Potter dated 14 June 2018 at para 3(f) (Part B, Tab 104, p.2/41); affidavit of Nicholas Pullen sworn 2 August 2018 (Part B, Tabs 6 and 6.1, paras 39 and 40); the appellants' Subpoena to Produce issued upon the Melbourne Theatre Company (filed on 24 August 2018); letter from respondent's solicitors to appellants' solicitors dated 19 September 2018 serving documents proposed to be tendered at trial (see document 11, 38, 39); Court Book Tabs 49, 58, 59; respondent's Outline of Opening Submissions dated 12 October 2018 at para 246 (Part B, Tab 147).

[11] Affidavit of Nicholas Pullen sworn 9 April 2018 (Part B, Tabs 5 and 5.1); letter from respondent's solicitors to appellants' solicitors dated 22 May 2018 (Part A, Tab 7); letter of instruction to Michael Potter dated 14 June 2018 at para 3(f) (Part B, Tab 104, p.2/41); outline of evidence of Geoffrey Rush served 15 June 2018 (paras 51, 53, 54, 60, 61); outline of evidence of Jane Menelaus served 15 June 2018 (paras 10-12); outline of evidence of Fred Specktor served 15 June 2018 (para 13); affidavit of Nicholas Pullen sworn 2 August 2018 (Part B, Tabs 6 and 6.1, paras 36-40); report of Fred Schepisi dated 18 September 2018 (Part B, Tab 80, p.5/18, para 10); report of Robin Russell dated 18 September 2018 (Part B, Tab 102, p.5/41, para 10); report of Fred Specktor dated 18 20 September 2018 (Part B, Tab 101, p.5/61, para 10); respondent's Outline of Opening Submissions dated 12 October 2018 at paras 24, 125, 129, 245-246, 250 (Part B, Tab 147).

32. Finally, the appellants contend that there was no evidence in support of the respondent's claim that he had received no offers of work since the publications. There *was* evidence from Mr Rush's American agent, Mr Specktor, that he was "*not fielding offers*" (see [841]). In the respondent's submission, that evidence should have been understood as meaning that Mr Specktor had not been receiving offers for Mr Rush since the publications. By contrast, the appellants submitted that Mr Specktor's evidence meant he was not actively seeking work for Mr Rush (or that he may have been receiving offers, but was declining them). However, as the primary judge observed (at [842]), if that was right, "*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*".[12] In other words, it strongly supported the inference that Mr Rush had not worked because he and his agent both believed he was unable to work as a result of the publications. Either way, therefore, Mr Specktor's evidence supports Mr Rush's claim for economic loss, and the primary judge's ultimate findings.

33. At any rate, none of the matters referred to at para 1(j) of the FANA would give rise to an apprehension of bias (even if there was found to be some error).

Sub-para 1(k)

34. This is dealt with in *Rush No 8* at [90].

35. Mr Specktor's report[13] stated "*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.*" Mr Specktor's evidence is addressed at [884] and [893] of *Rush No 7*.

36. The respondent also called expert evidence from Mr Schepisi and Ms Russell:

    (a) Mr Schepisi gave evidence that, even with a favourable judgment, there would be a delay of 12-18 months "*before anyone would even start to think of considering Mr. Rush for film work of the level he has been used to*".[14]

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[12] See also Mr Specktor's evidence referred to at [823]-[825]).
[13] Part B, Tab 101 (Ex.A-72 - p.5/47 (at para 25)).
[14] Part B, Tab 80 (Ex.A-51 - p.5/5 (at para 26)).

(b) Ms Russell gave evidence that, with a favourable judgment, there would still "*be a lag period of at least 12 months, and possible more, between the judgment and those offers*".[15]

37. It was therefore open for the primary judge, on any of those opinions, to award future economic loss on a sliding scale for a period of more than 12 months after judgment. It should also be noted that all of the respondent's experts gave evidence to the effect that Mr Rush may never be able to return to work. As such, the primary judge's award of future economic loss was at the lowest end of the spectrum. There is no part of the primary judge's analysis which would give rise to a reasonable apprehension of bias (even if there was error).

Sub-para 1(l)

38. It follows from the matters referred to at paras 28 to 37 above (in relation to particulars 1(i), (j) and (k)) that the award of economic loss was not excessive, and was reasonable and open on the evidence. At any rate, even if the primary judge fell into error, that would still not give rise to an apprehension of bias (see *Rush No 8* at [92]). It should also be noted that the primary judge accepted the appellants' accountant evidence in finding that Mr Rush's income from the Pirates of the Caribbean franchise should be excluded ([855]). The quantification of Mr Rush's pre-publication earnings was therefore at the low end, and likewise the findings in relation to future economic loss were on the lower end.

Sub-para 1(m)

39. The appellants complain of specific references (particularised at sub-paras 1(m)(i) to 1(m)(xii)) which are said to be references by the primary judge about the appellants, or about the matters complained of, "*in derogatory terms*". At the outset, it can be noted that:

(a) None of these complaints was raised at the time, and many of them were not even raised before the primary judge on 23 May 2019;

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[15] Part B, Tab 102 (Ex.A-73 - p.5/28 (at para 30)).

(b) Only the references particularised at sub-paras 1(m)(i)-(v) of the FANA were raised before Justice Wigney on 23 May 2019. Those references are dealt with in *Rush No 8* at [93]-[118].

(c) All other references - those particularised at sub-paras 1(m)(vi)-(xii), and all references to the "*tone*" in which they were delivered (sub-paras (iv), and (vi)-(xii)) - were not raised before Justice Wigney on 23 May 2019. In the respondent's submission, the appellants are precluded from relying upon those particulars.

Sub-para (i) - Rush No 1 (20 March 2018)

40. This is dealt with in *Rush No 8* at [97]-[98]. Further, *Rush No 1* was appealed[16] - in that appeal, there was no complaint about the primary judge's remark at [17], or any suggestion of apprehended bias generally.

Sub-para (ii) - Rush No 2 (20 April 2018)

41. This is dealt with in *Rush No 8* at [99]-[102].

Sub-para (iii) - Rush No 2 (20 April 2018)

42. This is dealt with in *Rush No 8* at [103]-[110].

Sub-para (iv) - Rush No 4 (10 October 2018)

43. This is dealt with in *Rush No 8* at [111].

Sub-para (v) - Rush No 6 (6 November 2018)

44. This is dealt with in Rush No 8 at [112]-[116].

Sub-para (vi) - primary judge's remarks at the trial (day 3, 24 October 2018)

45. The appellants' case was that Mr Rush had deliberately traced his hand across the side of Ms Norvill's breast during a preview performance of Act V, Scene III (Part A, Tab 9, p.8 at [19]). The cross-examination of Mr Rush in that regard had started at T200.16. The effect of Mr Rush's evidence had been that King Lear was caressing the "*empty, lifeless vessel*" (T201.33) that had been his daughter. At T202.3-4, Mr Rush denied any

[16] *Rush v Nationwide News Pty Ltd* [2018] FCA 357.

"*deliberate attempt to run* [his] *hands across* [Ms Norvill's] *breasts*". At T203.12-14, there was a further denial that there would have been any "*deliberation in such a movement at that point - in that moment of the play*". Having twice denied that any such contact was deliberate, Mr Blackburn then asked whether it was "*possible*" that some part of Mr Rush's hand touched the side of Ms Norvill's breast. That question was objected to and His Honour asked Mr Rush the relevant question, whether he had "*intentionally groped*" Ms Norvill (T203.21-22). Mr Rush denied it emphatically. His Honour re-phrased the question at T203.42-43. Mr Rush again denied it. His Honour was simply suggesting, to the appellants' senior counsel, that his line of questioning - about a "*possible unintentional*" touch (T204.19) - was not of assistance. That ought to have been obvious when the appellants' case depended on a finding that Mr Rush deliberately, not unintentionally, touched Ms Norvill. See *Antoun v The Queen* [2006] HCA 2 at [27].

Sub-para (vii) - primary judge's remarks at the trial (day 10, 2 November 2018)

46. The transcript references at T827-T834 were in relation to the appellants' amendment application - dated 28 October 2018 but not brought until 30 October 2018 (T494.5) - to rely upon a Third Further Amended Defence and introduce the evidence of Witness X. The transcript refers to, and should be read with, the affidavits relied upon by the respondent in opposition to that amendment application and also in support of his application for suppression orders.[17] It should also be read with the respondent's written submissions.[18] That evidence, and those submissions, are also relevant to appeal grounds 1(p), 4, and 7 (which all relate to *Rush No 6*). The appellants' complaint is that the primary judge's remarks suggested "*an abuse*" by the appellants.

47. The respondent's submission before the primary judge was that the intervention of Witness X, through her solicitor (the same solicitor acting for Ms Norvill), may have amounted to the exertion of improper pressure or a threat. That submission related to Witness X, not the appellants.[19] The primary judge noted that the "*mediation*" which was said to have occurred on 26 October 2018 did not involve any of the appellants' lawyers: T831.10-25; T842.9-16. Further, the primary judge made clear that the allegation was coming from the respondent, not from the Court: T829.20; T829.35; T834.22-25. In those circumstances, the primary judge's remarks were not

[17] Part B, Tabs 7, 8, 8.1, 9, 9.1, 10, 112.
[18] Written submissions dated 31 October 2018 (x2), 1 November 2018, and 2 November 2018.
[19] See, for example, T844.26-36; T847.32-T848.1.

"*derogatory*" towards the appellants, or the matters complained of, and did not suggest "*an abuse*" by the appellants, because they were not about the appellants at all.

Sub-para (viii) - primary judge's remarks at the trial (day 10, 2 November 2018)

48. The transcript references at T856-T861 were also in relation to that same amendment application. The primary judge explained that he was raising "*concerns*" (T857.27-28; T857.40) and then gave Mr Blackburn the opportunity to address those concerns (T856.28-29; T857.12-13; T857.20-21; T858.1). The exchange at T860 was in relation to the cause of the delay. The respondent had submitted - in writing[20] and orally[21] - that the cause of the delay was the appellants' choice to publish the original allegations without having, at the time of publication, any first-hand evidence (or any sufficient evidence of justification), such that they were forced to scavenge for such evidence during the proceedings. That was a relevant factor in the exercise of the Court's discretion.

Sub-para (ix) - primary judge's remarks at the trial (day 14, 8 November 2018)

49. The appellants complain about the primary judge's remark that the words "*We're with you*", in the third matter complained of, were "*fundamentally misleading*". The words "*We're with you*" were relevant to the argument about defamatory meaning, because, as His Honour observed (T1123.29-31), they tended to undermine Mr Rush's denials in the third matter complained of. His Honour invited the appellants to address him on that issue (T1123.30-31). At any rate, however, the words "*We're with you*" were fundamentally misleading. Indeed, much of the third matter complained of was misleading. This is addressed in *Rush No 7* at [743]-[764]. The appellants do not, by way of any ground of appeal, challenge the factual findings at [743]-[764] – they therefore accept that the third matter complained of was fundamentally misleading and that finding was necessary in considering Mr Rush's application for aggravated damages.

Sub-para (x) - "Unnecessary remarks" by the trial judge

50. T863.09-14 is not a comment by the primary judge about the appellants. At T1080.33-T1081.08, the primary judge refers to Ms Norvill having been dragged into the

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[20] Written submissions dated 31 October 2018, at [29], [32].
[21] T861.16-47.

litigation "*involuntarily*". He said that "*may*" reflect on the appellants. As with the comment referred to in sub-para 1(m)(i), therefore, it was no more than the expression of a tentative view. The reference at T1102.33-43 is a mild criticism of the "*bad puns*" in the matters complained of. The submission that a fair-minded lay observer would reasonably apprehend that the primary judge might not bring an impartial mind to the resolution of the proceedings because he was not amused by the subeditors' sense of humour needs only to be stated to be rejected.

Sub-para (xi) - "Other observations and comments" by the trial judge

51. The appellants allege that the comments referred to, at sub-para (xi), gave "*the appearance of hostility towards the Appellants and pre-judgment of the issues*". T401.1-402.43 is an unremarkable exchange about the admissibility of the respondent's experts reports. It should be noted that, although His Honour says "*That's enough*" (at T402.43), he then allows the appellants to make further submissions until T407.15. There is no appearance of hostility, nor could there be any reasonable suggestion of pre-judgment.

52. The primary judge's comment at T561.36 was in response to an objection by the appellants' senior counsel to a particular line of questioning by the respondent. The primary judge simply said that he found the line of questioning "*very relevant*". That could not reasonably be said to suggest a closure of the judicial mind.

53. The primary judge's comments at T563.1-13 were also given in the course of ruling on an objection. It is another wholly unremarkable exchange. There is no hostility towards the appellants and certainly no suggestion of pre-judgment.

54. T622-T627, and also T629.16-29, relate to some questions asked of Ms Norvill by the primary judge. The purpose of the questions was made clear at the outset ("*so I've got it straight in my mind*"[22]). He was trying to better understand Ms Norvill's evidence. The questions were fair. In order to place them in context, the primary judge reminded Ms Norvill of her evidence (including reading the transcript verbatim).[23] At T626.40-41, he urged Ms Norvill to "*listen to my question and please don't for one second agree with me simply because I'm a judge*". At T627.15, he invited Ms Norvill to correct him if he was wrong. The appellants did not object to the questioning at the time - either on the

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[22] T622.14-15
[23] T622.21-T624.3.

basis that there was some unfairness or vice in the questions themselves, or on the basis they gave rise to any apprehended bias.

55. T873-T876 is in relation to the appellants' amendment application. The discussion was about a "*mediation*" said to have occurred on 26 October 2018. The previous evidence was that it did not involve any of the appellants' lawyers (T831.10-25). The primary judge's comments are therefore not about the appellants. Likewise, the references to "*a threat*" (at T874.2 and T875.46) are references to a threat by Witness X, not by the appellants. The appellants are shown no hostility, and there is no suggestion of pre-judgment (and, even if there was, pre-judgment of what issue?).

56. T1032.14-16 is in relation to Mr Rush's SMS of 10 June 2016 (*Rush No 7* at [641]). The primary judge is inviting an explanation of the appellants' submission, that the SMS was some sort of sexual invitation. The submission required explanation.

57. T1067-T1068 is utterly unremarkable and could not possibly give rise to apprehended bias.

Sub-para (xii) - the primary judge's remarks in the judgment summary

58. Within the context of considering the respondent's claim for aggravated damages, the primary judge made findings that the publication of the second and third matters complained of were "*recklessly irresponsible*" ([738] and [760]). Those findings were not made in a vacuum. The respondent had invited the primary judge to find that the matters complained of were published with "*calculated cruelty*", "*calculated falsehood*", and "*dishonesty*", and were "*improper and reckless*" ([717]).

59. In relation to the second matter complained of, the primary judge's findings are at [728] to [742]. Those findings included that the articles were published in "*an extravagant, excessive and sensationalist manner*" ([728]-[729], [734]); were "*unfair*" ([730]); were, and were intended to be, "*a direct and full-frontal attack on Mr Rush's reputation*" ([731]); that it was "*difficult to see how the front page image could possibly be considered to be justifiable*" ([732]); that it should be inferred that the appellants' motive "*was to boost sale and increase circulation by way of sensationalist articles concerning the #MeToo movement*" ([735]-[736]); and that the articles were, in all the circumstances, "*unjustified and improper because they were reckless as to the truth or falsity of the defamatory imputations*" [737].

60. In relation to the third matter complained of, the primary judge's analysis is at [743] to [764]. Those findings included that the appellants' aim was to "*set about 'bootstrapping' the story to include misleading statements of support of the complainant's allegations*" ([760]). Apart from the appellants' dishonesty in relation to Mr McClelland's tweet[24] and Mr Wyatt's Facebook post[25], there are two more particularly important features of the third matter complained of. The primary judge noted (from [756]) that on 30 November 2017 Mr Moran had been copied into an email from the STC which provided "*an updated statement from the STC*". That statement[26] concluded with these words:

> *STC has at all times been clear that this was an allegation made to (not by) STC and not a conclusion of impropriety.*

61. Yet those words were not published. The primary judge inferred "*that was a conscious decision*" and at any rate "*conveyed a false impression of the position that had been taken by the STC*" (at [757]).

62. In addition, the primary judge noted (at [758]) that the third matter complained of had included the following statement: "[d]*espite denials, Rush was told who made the claims in a phone call with the executive director Patrick McIntyre weeks ago*". That was notwithstanding that Mr Moran had received an email[27] from Ms Stevenson of the STC, the afternoon before the publication, 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.*

63. The primary judge's comment in the judgment summary, of which the appellants now complain, only repeats the same comments made in the judgment itself. The comment might be thought to make clear, in quite unequivocal terms, the Court's condemnation of the reckless publication of the matters complained of. But that is no reason why it should give rise to apprehended bias.

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[24] Ex.A-42 (Part B, Tab 71); see also Ex.A-45 (Part B, Tab 74).
[25] Ex.A-43 (Part B, Tab 72).
[26] Ex.A-46 (Part B, Tab 75); Ex.A-47 (Part B, Tab 76).
[27] Ex.A-48 (Part B, Tab 77).

Sub-para 1(n) - Rush No 4

64. This is dealt with in *Rush No 8* at [119]-[121]. The appellants should not be permitted, now, to raise arguments they did not raise before Justice Wigney.

Sub-para 1(o) - Rush No 5

65. Sub-para 1(o) is comparable to sub-para 1(n). This was dealt with in Rush No 8 at [122].

Sub-para 1(p) - Rush No 6

66. Again, sub-para 1(p) is comparable to sub-paras 1(o) and (p). This is dealt with in *Rush No 8* at [123]-[124].

Conclusions in relation to appeal ground 1

67. Given the negligible weight of the matters raised in the individual grounds, it is difficult to see how they could have any significant cumulative effect. See also *Rush No 8* at [132]-[133].

C. APPEAL GROUND 2

68. The majority of the particulars in support of appeal ground 1 relate to matters subsequent to *Rush No 4*, and it would therefore seem those particulars could have no bearing on whether or not *Rush No 4* miscarried. Only sub-paras 1(m)(iv) and 1(n) relate to *Rush No 4*. Unless each of those individual sub-paras succeed, and unless their cumulative effect would, together, give rise to a reasonable apprehension of bias, Rush No 4 will not have miscarried.

D. APPEAL GROUND 3

69. Only sub-para 1(o) of appeal ground 1 relates to *Rush No 5*. As such, given the appellants concede that none of the individual sub-paras of appeal ground 1 is, by themselves, sufficient to give rise to an apprehension of bias, *Rush No 5* has not miscarried (even if sub-para 1(o) succeeds). None of the other particulars of appeal ground 1 seems to have any relevance to whether or not Rush No 5 miscarried.

E. APPEAL GROUND 4

70. Appeal ground 4 is similar to appeal ground 2. Only sub-para 1(m)(v) and (1)(p) relate to *Rush No 6.*

F. APPEAL GROUND 5

71. Para 5(a): see [18] above (in relation to appeal ground 1(d)). It should also be noted that the appellants re-examined Mr Winter (T693.45). They had the opportunity to re-examine him on his evidence referred to at [389] of Rush No 7, but elected not to.

72. Para 5(b): see [19] above (in relation to appeal ground 1(e)).

73. Para 5(c): see [20] above (in relation to appeal ground 1(f)).

74. Para 5(d): see [28] above (in relation to appeal ground 1(i)).

75. Para 5(e): see [29] to [33] above (in relation to appeal ground 1(j)).

76. Para 5(f): see [64] above (in relation to appeal ground 1(n)).

G. APPEAL GROUNDS 6 and 15

77. Rush No. 5 was an evidentiary ruling in the course of the trial as to the admissibility of the expert evidence of Mr Specktor and Mr Schepisi, both friends of Mr Rush.

78. The admissibility of expert opinion is governed by s.79 of the *Evidence Act* 1995 (Cth) which, notably, says nothing about independence. Justice Wigney comprehensively dealt with the appellants' objections to these reports in *Rush No. 5.* No error in his Honour's reasons is identified in the appellants' cursory submissions on this topic at [77]-[78].

H. APPEAL GROUND 7

79. The appellants' contend that his Honour erred in refusing an application to amend in the middle of the trial, at the close of Mr Rush's case, which would have had the effect of adjourning the matter part-heard for many months and required Mr Rush to give evidence and be cross-examined again. This was in circumstances where the appellants had already amended many times (as a result of which the first hearing was vacated) and when the second and third matters complained of were still published online.

80. The trial judge set out his careful reasons for refusing the amendment in *Rush No. 6* and no error has been identified in those reasons. Contrary to what is asserted by the appellants (at [50]), the six month delay would have been occasioned by the Court's availability, not Ms Stone's: T856.45.

I. APPEAL GROUND 8

81. The appellants complain only that imputations 7(a), 8(a), 10(e), and 11(e) - "*The Applicant is a pervert*" - should not have been found to have been conveyed. They do not dispute, for example, the findings that the publications conveyed imputations that Mr Rush behaved as a sexual predator[28], had engaged in inappropriate behaviour of a sexual nature[29], had committed sexual assault[30] and had inappropriately touched an actress.[31] It follows from the fact that the publications carried all of those imputations, that it also carried the imputation that the respondent was a pervert – or, to put it another way, no appellable error is committed by reasoning in this way.

82. The primary judge gave detailed reasons as to why he found this imputation was carried by the second matter complained of ([127]-[146]) and by the third matter complained of ([195]-[201]). The appellants give no compelling reason why those findings should be overturned. Their reasoning is based on an elevated meaning of the word "pervert" that is not the natural and ordinary meaning.

83. In any event, given the other meanings that were found to be carried – allegations of serious criminal offences - the finding in relation to "pervert" had no impact on the outcome of the matter, including the damages awarded.

J. APPEAL GROUND 9

84. Although the appellants complain that the primary judge found they had not established "*each of the imputations*" substantially true, it should be noted that:

(a) There was no defence pleaded to imputation 10(g) ("*The applicant had falsely denied that the Sydney Theatre Company had told him the identity of the person*

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[28] Imputations 7(b), 8(b), 10(b) and 11(b).
[29] Imputations 7(c), 8(c), 10(c) and 11(c).
[30] Imputations 10(a) and (11)(a).
[31] Imputations 10(d), 10(f), 11(d) and 11(f).

who had made a complaint against him"). That was notwithstanding that the appellants conceded they intended to convey that imputation.[32]

(b) There was no evidence in support of imputation 10(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*"). That was notwithstanding that two STC witnesses, Ms Crowe and Mr McIntyre, were subject to Subpoenas to Appear issued by the appellants (Ex A-69). The truth defence to this imputation was ultimately withdrawn in final address.[33]

(c) It was the respondent's position[34] that the appellants' pleaded particulars of truth, even if they were each proven, were still incapable of proving the truth of imputations 5(a), 10(a) and 11(a) (the "*sexual assault*" imputations) and imputations 7(b), 8(b), 10(b) and 11(b) (the "*sexual predator*" imputations).

85. As such, there can be no doubt Mr Rush was entitled to a judgment in his favour. Appeal ground 9 could only potentially be relevant to damages.

86. Prior to responding to the matters specified at sub-paras 9(a) to 9(f) of the FANA, it is necessary to consider Ms Norvill's evidence as a whole. That is because, apart from the scantest of potentially corroborating evidence from Mr Winter, Ms Norvill's evidence was the only evidence in support of the appellants' particulars of truth. As such, if Ms Norvill's evidence was not accepted as credible, or was found to be false, or was otherwise rejected as unreliable, it would almost certainly follow that the appellants' defence would fail, in respect of each of the imputations.

87. The primary judge gave four separate reasons (at [332]-[339]) which were said to undermine Ms Norvill's credibility and reliability:

(a) First, Ms Norvill's evidence was generally inconsistent with the contemporaneous statements[35] she made to journalists about what it was like to work alongside Mr Rush in *King Lear* ([332]; [464]-[465]; [494]-[501]; [508]). On a similar note, it also might be noted there was unchallenged evidence from Mr Rush (T59.31-32), Mr Armfield (T295.5-6), Ms Buday (T352.35; T353.36-

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[32] Ex A-65 (Part B, Tab 94).
[33] Part B, Tab 149, p.12, para 59.
[34] Respondent's written submissions (Part B, Tab 151, para 211).
[35] Ex.A-60 (Part B, Tab 89); Ex.R-9 (Part B, Tab 19).

37) and Ms Nevin (T465.25-31) that Mr Rush was getting along well with Ms Norvill throughout the rehearsal and production period of *King Lear*. Indeed, Mr Armfield thought it seemed like "*a deep friendship*": T295.6. That evidence does not sit well with Ms Norvill's claims that she felt "*compromised*" and "*pressured*" (T518.39); "*extremely intimidated*" (T521.9); "*frightened*" (T528.26); "*threatened*" and "*panicked*" (T536.31-33).

(b) Second, Ms Norvill's account in Court was inconsistent, in important respects, with the prior account she gave to Ms Crowe on 5 April 2016 ([333]). The Crowe Email was devastating to Ms Norvill's credit - see [347]-[379], including, in particular, the eight inconsistencies between the account that Ms Norvill provided to Ms Crowe and the account she gave in her evidence ([369]-[376]).

(c) Third, although Ms Norvill signed a statement in these proceedings, her evidence in Court went well beyond that statement and was inconsistent with that statement ([334]-[336]; [423]; [426]; [433]; [455]; [485]; [604]; [607]-[608]; [627]). See also [293] of the respondent's written submissions below.

(d) Fourth, Ms Norvill's evidence was inconsistent with three relatively contemporaneous events or incidents ([337]-[338]).

88. The primary judge found, at [343], that it was not possible to reduce the contested factual issues to the simple question of whether or not Ms Norvill is a liar, or has told lies. However, it would certainly have been open to the primary judge to have made those findings, at least in relation to certain parts of her evidence - particularly:

(a) Ms Norvill told Ms Crowe that, during the closing night party on 9 January 2016, Mr Rush followed her into the bathroom, prompting her to break down, fall to the floor and tell Mr Rush to leave (see [373]; Crowe Email). Ms Norvill's evidence in chief did not refer to any such incident. In cross-examination, she said she did not believe Mr Rush followed her into the bathroom or that she told him to leave, and said she did not believe she had told Ms Crowe that he had (T558.7-22; T590.1-16). Mr Winter said that Ms Norvill told him that Mr Rush had followed her into the bathroom (T687.47-T688.9). Ms Norvill lied to Ms Crowe and Mr Winter.

(b) In her evidence in chief, Ms Norvill twice denied that she invited Mr Rush to her Christmas party in 2015 (T537.23-26). In cross-examination, she again

denied that she invited Mr Rush (T611.26-29). When it was then suggested that she did invite Mr Rush, in front of a witness, she admitted she did invite him (T611.31-41). Those three original denials were lies.

89. For all of those reasons, even if it was a contest only between Ms Norvill's evidence and Mr Rush's evidence, even then the Court would plainly have been right to accept Mr Rush's evidence and to positively reject Ms Norvill's evidence. Mr Rush was found to be a credible, honest and impressive witness ([312]-[319]). There was no reason why the Court should not have accepted him entirely. There was every reason to reject Ms Norvill's evidence.

90. However, it was not a contest between only two witnesses. Ms Norvill's evidence was denied by, or was inconsistent with, the evidence given by Mr Armfield, Ms Buday, and Ms Nevin. It was even inconsistent with Mr Winter's evidence. The absence of any corroborating witness was significant in circumstances where Ms Norvill claimed that Mr Rush engaged in much of the conduct in question on a daily basis for (at least) a 5 week period in front of cast and crew. The allegations being made, in that context, were prima facie incredible.

Allegation one (sub-para 9(a) of the Further Amended Notice of Appeal)

91. The primary judge's reasons are at [380]-[466] and the findings are at [459]-[466]. The respondent relies upon [223] to [233] of his submissions below (and each of the documents referred to in those paras). The appellants give four reasons why, they say, the primary judge fell into error.

92. First, they contend the primary judge was in error in finding (at [462]) that Mr Winter's evidence did not corroborate Ms Norvill's evidence. In relation to allegation one, an extract of Mr Winter's evidence is at [385]. The primary judge gave six reasons why that evidence was unreliable ([387]-[393]). The fourth of those reasons ([390]) was that Mr Winter's version was not consistent with, and was not nearly as serious as, Ms Norvill's version. Mr Winter had described the event as a "*Three Stooges*" style "*skit*". He described a gesture which mimicked "*boob squeezing*". The primary judge did not accept that evidence (as the appellants suggest). The point being made was simply that even Mr Winter's version did not support Ms Norvill's version. There was therefore no evidence in support of Ms Norvill's version.

93. Second, the appellants contend the primary judge was in error in finding (at [464]-[465]) that Ms Norvill's interviews were inconsistent with allegation one having occurred. This is dealt with in more detail at [494]-[501] and [508]. There was an objective inconsistency between Ms Norvill's evidence in relation to allegation one and her contemporaneous statements about Mr Rush and his behaviour, including during rehearsals. That inconsistency, like so many others in Ms Norvill's evidence, required an explanation. The primary judge did not accept Ms Norvill's explanation. See also *Rush No 8* at [125]-[131].

94. Third, the appellants contend the primary judge should not have found Ms Norvill to be an unreliable witness. Ms Norvill was plainly a highly unreliable witness (see [87] to [90] above, and appeal ground 10 below).

95. Fourth, the appellants contend the primary judge should not have relied upon the fact that, they say, "*the incident was merely unseen by two other witnesses*" (at [461]). The conduct was said to have occurred in front of the whole room. The rehearsal schedules[36] show the whole cast was required to be present for the rehearsal. That is at least 14 people and potentially over 20 people.[37] Apart from Mr Rush, each of Mr Armfield (T89.40-43; T291.1-2; T613.14-21), Ms Buday (T357.13-20; T613.14-19) and Ms Nevin (T613.14-19; T465.35-36) were present at the rehearsal. Mr Armfield (T290.38-47; T311.13-25), Ms Buday (T357.5-11; T359.25-44) and Ms Nevin (T465.38-T466.3) denied seeing the incident occur. Ms Nevin was not challenged on that evidence. Other than Mr Winter, the appellants called no other witness.

96. It is implausible that the conduct described by Ms Norvill was unwitnessed – in any event she claimed that she heard laughter and murmuring [381]. She said Mr Armfield said "*Geoffrey, stop that*", in an "*angry*" and "*reprimanding*" tone of voice [381]. That latter evidence was not in her statement (T607.6-16). Mr Rush denied this occurred (T187.10-14). Mr Armfield did not recall saying it (T311.18-22). Ms Buday specifically denied it (T.359.39-44). Ms Nevin was not even asked about it. Ms Norvill's version of events was therefore not "*merely unseen*" - it was specifically denied, and otherwise without any support.

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[36] Ex.A-59 (Part B, Tab 88 - pp.12/78-12/82).
[37] Ex.R-4 (Part B, Tab 14).

Allegations two and three (sub-para 9(b) of the Further Amended Notice of Appeal)

97. The primary judge's reasons are at [467]-[512]. His findings are at [502]-[512]. The respondent relies upon [234] to [247] of his submissions below.

Allegation five (sub-para 9(c) of the Further Amended Notice of Appeal)

98. The primary judge's reasons are at [530]-[593]. His findings are at [576]-[593]. The respondent relies upon [256] to [277] of his submissions below (and each of the documents referred to in those paras).

Allegation six and seven (sub-paras 9(d) and 9(e) of the Further Amended Notice of Appeal)

99. The primary judge's reasons are at [594]-[635] and the findings are at [609]-[629] (allegation six) and [634]-[635] (allegation seven). The respondent relies upon [278] to [281] of his submissions below.

The text of 10 June 2016 (sub-para 9(f) of the Further Amended Notice of Appeal)

100. The primary judge's reasons are at [636]-[656]. His findings are at [648]-[656]. The respondent relies upon [282] to [287] of his submissions below.

101. The appellants' submissions (at [43]) do not contend with Ms Norvill's evidence about this (and previous texts) which confirmed that she had no problem with the content of the text – only that Mr Rush contacted her at all given what she said occurred during *King Lear*. Given she repeatedly gave evidence that she made no complaint to him about his alleged conduct, the fact that he contacted her could not objectively be regarded as inappropriate in any way. The contention that the message was "*suggestive*" (and thus inappropriate because of their respective ages) ignores Ms Norvill's "*sexually flirtatious*" language in previous communications[38] between them (T560.43), and that Mr Rush denies it was intended to be suggestive.

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[38] Ex.A-19 (Part B, Tab 48).

K. APPEAL GROUND 10

102. Ms Norvill's credit has been dealt with generally in response to appeal ground 9. The respondent further relies upon [288] to [311] of his submissions below (and each of the documents referred to in those paras).

Sub-para 10(a)

103. This has been dealt with at paras 87(a) and 93 above.

Sub-para 10(b)

104. This has been dealt with at paras 14-17, 21-27, and 87(b) above.

Sub-para 10(c)

105. In support of their late application to amend, the appellant's served a statement that was subsequently signed by Ms Norvill. It was not the same as other outlines served in the matter which were unsigned: c.f [22] appellants' submissions. Ms Norvill gave evidence that she wrote her statement (T547.1-2), that it went through several drafts over several weeks (T547.4-5), that she wanted it to be accurate and complete (T547.16), that she read it carefully before signing it (T547.18-20), and that it was true (T547.10-14). As the primary judge observed, it was also apparent that Ms Norvill was represented by solicitors who had assisted her in the preparation of the statement. Those same solicitors had prepared Mr Winter's outline of evidence (T677.20-39) and participated in the conference in which Mr Winter's memory about the "*incident*" in rehearsal was revived (T685.5-37).

106. Ms Norvill's evidence in Court went well beyond that statement and was inconsistent with that statement. She gave an explanation why that was so. It was unpersuasive. She said she "*remembered things that* [she] *hadn't before*". As the primary judge observed (at [336]), that explanation may perhaps have been reasonable if the additional "*things*", not in her statement, were few or were minor. The problem was that the additional "*things*" were "*not few in number and were not of minor significance*".

107. The matters at [328] were generic, in relation to people who make allegations relating to sexual assault or sexual harassment. Those general matters would not displace the many specific reasons why the primary judge rejected Ms Norvill's specific allegations against Mr Rush.

Sub-para 10(d)

108. The appellants have no shown no error in relation to [337] and [338]. That is dealt with further at [299]-[302] of *Rush No 7*. The social interactions between them before and after the alleged harassment was plainly relevant to his Honour's consideration as to whether he accepted that such harassment occurred.

Sub-para 10(e)

109. This has been dealt with at para [92] above. The primary judge did not accept Mr Winter's description of the gesture as "*boob squeezing*". He simply noted the description was inconsistent with, and did not support, Ms Norvill's evidence.

Sub-para 10(f)

110. As the primary judge observed (at [442]), it does not follow from the fact that Ms Nevin was aware that Ms Norvill was the complainant, by 4.31pm on 1 December 2017, that her awareness was the result of a conversation with Ms Norvill during *All My Sons*. There were other explanations including that Ms Menelaus told her ([443]). Mr Rush and Ms Menelaus were aware Ms Norvill was the complainant by the evening of 29 November 2017, because Mr Rush had received an email from Mr Moran which named her as the "*complainant*".[39] It was likely Ms Menelaus told Ms Nevin that. At any rate, the primary judge was not persuaded that Ms Nevin knew Ms Norvill was the complainant because Ms Norvill had previously told her she had been sexually harassed by Mr Rush ([444]). Ms Nevin had denied that, repeatedly, in emphatic terms (T475.27-T476.34; T482.1-14; T485.37-38; T486.5-8).

111. The primary judge also accepted Ms Nevin's evidence about why she sent the SMS to Ms Norvill ([449]). She said her concern for Mr Rush "*was paramount*" but she "*also had compassion and concern*" for Ms Norvill "*because both of their lives had been damaged*" by the publications (T477.21; T478.1-39; T486.18-41). There is nothing "*glaringly improbable*" about Ms Nevin having shown compassion to a person whose anonymous complaint had been disclosed by the STC, then published by the appellants on the front page of their newspapers, without her consent, regardless of whether or not she thought the complaint was true.

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[39] Ex.A-5 (Part B, Tab 34).

Sub-para 10(g)

112. Notwithstanding that Ms Norvill's evidence was that much of Mr Rush's alleged conduct was witnessed, that evidence was specifically disputed by others who were present and was otherwise wholly unsupported. That was a legitimate and important factor telling against Ms Norvill's credit and reliability.

L. APPEAL GROUND 11

113. This has been dealt with at paras [14] to [17], above (appeal ground 1(b)).

114. The Crowe Email was a contemporaneous business record made by a person to her superior about a serious matter. It was made the day after Ms Norvill met with Ms Crowe. The self-serving evidence in re-examination that Ms Crowe was intoxicated did not assist Ms Norvill's credit. The Crowe Email contains allegations that clearly came from Ms Norvill that she claimed in evidence did not occur. The allegation regarding the toilet stands out – given that Ms Norvill made the same false claim to Mark Winter.

115. In the face of that document, the appellants contend that Mr Rush should have called Ms Crowe to confirm the content of that document (which was admissible and admitted without the need for any oral evidence) and that his failure to do so gives rise to an adverse inference: [36] appellants' submissions. That submission is misconceived. Given the appellants bore the onus of proof and were in a position to call Ms Crowe, any adverse inference is as against them: *Ho v Powell* [2001] NSWCA 168 at [16].

M. APPEAL GROUND 12

116. This has been dealt with at [18] above (appeal ground 1(d)).

N. APPEAL GROUND 13

117. The principles in relation to an award of compensatory damages is set out at *Rush No 7*: [666]-[673]. With the exception of "*the Bauer issue*" (appeal ground 16), those principles are not in dispute.

118. In support of his claim for damages, the respondent called evidence from: his wife, Ms Jane Menelaus; Mr Trevor Smith; Mr Neil Armfield AO; Ms Robyn Kerhsaw; Ms Margaret O'Bryan; Mr Simon Phillips; Mr John Gaden AO; Ms Helen Buday; Mr Fred Schepisi AO; Ms Judith; Ms Robyn Nevin AM; and Mr Fred Specktor.

119. The evidence of those witnesses, in relation to the respondent's prior good reputation, is summarised in [342] to [354] of the respondent's written submissions below. It is dealt with at [674]-[694] of *Rush No 7*. Their evidence as to the damage occasioned to the respondent's reputation is summarised at [359] to [361] of the respondent's written submissions below (see also [701]), and their evidence in relation to the harm and hurt suffered by the respondent is summarised at [362] to [382] of the respondent's written submission below (and dealt with at [702]-[716] of *Rush No 7*). That harm was aggravated by the appellants' conduct so as to give rise to an award of aggravated damages ([728]-[783]).

120. It has been noted that the process of awarding compensatory damages is "*essentially a matter of impression*" (*Broome v Cassell & Co* [1972] AC 1027 at 1072) and is "*the product of a mixture of inextricable considerations*" (*Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 at 150). Recently it was described as "*an essentially impressionistic evaluation*" (*Fairfax Media Publications Pty Ltd v Gayle* [2019] NSWCA 172 at 161). That being so, the Court should be slow to disturb the findings of the primary judge, who had the benefit of hearing the evidence in person.

121. At **Schedule A** are examples of other recent awards of damages. Contrary to the appellants' submissions at [57] there is no inconsistency with the award of general damages in this matter as compared to other recent cases.

122. In *Gayle*, the trial judge actually awarded $500,000 in total against the 3 publishers, but mitigated that amount because they were from the same stable of publishers. Further, there was no award for aggravated damages at all in favour of Mr Gayle – quite different to this case. Although it concerned allegations of sexual impropriety, the allegations were not as serious as those made by the appellants against Mr Rush. Further, in this case there was substantial evidence of world-wide republication[40] – not present in *Gayle*.

123. The Wagner family did not enjoy the same world-wide reputation held by Mr Rush prior to these publications. They were not public figures outside of being known in Queensland and despite that were each awarded $850,000. The same can be said for Mr Rayney who was awarded $600,000.

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[40] Ex.A-37 (Part B, Tab 66).

124. What each of these cases demonstrates is that the award of $850,000 in this matter cannot be seen as erroneous.

O. APPEAL GROUND 14

125. The use of the Crowe Email has been dealt with at paras 21 to 27, above (appeal ground 1(h)).

126. As to the finding that the two front page articles published on 20 February 2018 aggravated Mr Rush's conduct, one only need have regard to those publications and Mr Rush's evidence (and evidence from his wife) about his reaction to those publications to understand that finding. A mere Court report of the contents of a Defence that has been the subject of a strike out application does not look like either of the articles that appeared in the *Daily Telegraph* and the *Australian* on 20 February 2018.

P. APPEAL GROUND 16

127. The parties have exchanged, and filed, written submissions on appeal ground 16. The appellants' submissions were filed on 7 June 2019; the respondent's submissions were filed on 12 June 2019.

Q. APPEAL GROUND 17

128. This is dealt with at paras 29 to 33 above (in relation to appeal ground 1(j)).

R. APPEAL GROUND 18

129. This is dealt with at paras 34 to 37 above (in relation to appeal ground 1(k)).

S. APPEAL GROUND 19

130. Orders 2(a) and 2(b) made on 23 May 2019 would only be disturbed if the appellants succeed on appeal grounds 17 or 18.

T. CONCLUSION.

129. The appeal should be dismissed, and the appellants ordered to pay the respondent's costs.

Bret Walker

10th October 2019

Sue Chrysanthou

Counsel for the Respondent

"SCHEDULE A"

Case	Facts	Award
Haertsch v TCN Channel Nine Pty Ltd [2010] NSWSC 182	Allegations in a television broadcast that the plaintiff, a plastic surgeon, was incompetent.	$240,000
Petrov v Do [2012] NSWSC 1382	Allegations in a Macedonian language newspaper that the plaintiff sought to improperly obtain financial advantage from an elderly person.	$350,000
Kunoth-Monks v Healy [2013] NTSC 74	Allegation in a Radio National broadcast that the plaintiff stirred up trouble at a protest.	$125,000
Ahmed v Harbour Radio Pty Ltd [2013] NSWSC 1928	Allegation in a radio broadcast that the plaintiff was a contemptible person because she associated with a convicted sex offender.	$280,000
Pedavoli v Fairfax Media Publications Pty Ltd [2014] NSWSC 164	Allegation in the *Sydney Morning Herald* that the unnamed but identifiable plaintiff was a sexual predator.	$350,000
Fisher v Channel Seven Sydney Pty Ltd [2014] NSWSC 1616	Allegation in a television broadcast that the plaintiff, a bus driver, was a dangerous driver and a menace to the safety of others.	$125,000
Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99	Allegation in restaurant reviews published in *The Sydney Morning Herald* that the plaintiffs served unpalatable food, gave bad service and were incompetent.	$175,000

Case	Facts	Award
Flegg v Hallett [2015] QSC 167	Allegation in a press conference and radio interview that the plaintiff had opened himself up to the charge that he had misled a Parliamentary committee.	$275,000 (incl. aggravation)
Carolan v Fairfax Media Publications Pty Ltd (No. 6) [2016] NSWSC 1091	Allegation in online Fairfax articles that the plaintiff injected football players with banned substances.	$300,000 (incl. aggravation)
Al Muderis v Duncan (No 3) [2017] NSWSC 726	Online allegations on several websites including to the effect that the plaintiff, a surgeon, had been grossly negligent, was unethical, and had mutilated patients.	$480,000 (incl. aggravation)
Weatherup v Nationwide News Pty Ltd [2016] QSC 266	Allegation in the *Courier Mail* that the plaintiff was habitually intoxicated.	$100,000
Sheales v The Age & Ors [2017] VSC 380	Allegation in *The Age* that the plaintiff, a barrister, deliberately misled racing stewards.	$175,000
Fraser v Business News Group Pty Ltd [2018] VSC 196	Allegation on a subscription website targeting the hospitality industry that the plaintiff was not a fit and proper person to manage a hotel.	$150,000
Mirabella v Price [2018] VCC 650	Allegation in a local newspaper that the plaintiff, a politician, had pushed another politician out of a photo.	$175,000
Pahuja v TCN Channel Nine Pty Ltd (No. 3) [2018] NSWSC 893	Allegation on *A Current Affair* that the plaintiff was part of a scheme to exploit vulnerable migrants.	$300,000

Case	Facts	Award
Gayle v Fairfax Media Publications Pty Ltd [2018] NSWSC 1838	Allegation in *The Sydney Morning Herald* that the plaintiff, a famous cricketer, had indecently exposed himself to a woman.	$300,000 (incl. aggravation)
Wagner v Harbour Radio Pty Ltd [2018] QSC 201	Allegation by Alan Jones that the plaintiffs were responsible for multiple deaths in the Grantham Floods.	$850,000 (incl. aggravation)
Oskouie v Maddox [2019] NSWSC 428	Publications in emails and on a website alleging the plaintiff was a criminal, hacker, and fraud.	$425,000 (incl. aggravation)
Tavakoli v Imisides (No 4) [2019] NSWSC 717	Allegations in a Google review that the plaintiff, a doctor, charged the defendant for a procedure he did not perform, and that he acted incompetently and improperly in relation to that procedure.	$530,000 (incl. aggravation)
O'Neill v Fairfax Media Publications Pty Ltd (No 2) [2019] NSWSC 655	Allegations in *The Sydney Morning Herald* that the plaintiff, a doctor, had conducted himself incompetently, negligently, and recklessly by allowing a boxing match to continue after one of the boxers had been struck.	$385,000 (incl. aggravation)