NOTICE OF FILING

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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD2179/2017
File Title:	GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 8/08/2018 4:10:24 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.

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APPLICANT'S OUTLINE OF SUBMISSIONS

LEAVE TO FILE SECOND FURTHER AMENDED DEFENCE

NSD 2179/2017

GEOFFREY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED & JONATHON MORAN

Respondents

A. BACKGROUND

1. This matter was commenced by way of Application and Statement of Claim filed on 8 December 2017. It concerns a poster and two front page articles published by the Respondents on 30 November and 1 December 2017 (the "**publications**").

2. The Court observed in *Rush v Nationwide News Pty Ltd* (No. 2) [2018] FCA 550 (**Rush No. 2**), at [138]:

   > *Mr Rush commenced these proceedings promptly. He has, at each opportunity, sought to pursue his claim without delay. He seeks public vindication at a time when the alleged defamatory publications are still fresh in the mind of the public. As the chronology of the proceedings...clearly shows, however, Mr Rush's attempts to have his matter heard at the earliest opportunity have been frustrated by Nationwide and Mr Moran's conduct of their defence.*

3. Over 3 months after that judgment, the Respondents bring yet another application. On 31 July 2018 the Respondents filed an interlocutory application seeking leave to amend their Defence, yet again, to include a defence under s.25 of the *Defamation Act* 2005. The matter is set down for hearing commencing, in less than 4 weeks, on 3 September 2018 for 8 days at which time the only questions on the current pleadings to be determined are the s.30 defences, malice and damages.

4. The procedural history is otherwise set out in the affidavits of Nicholas Pullen sworn 9 April 2018 (**Pullen 1**), 2 August 2018 (**Pullen 2**), and 8 August 2018 (**Pullen 3**). When the

application came before the Court on 3 August, despite the urgency of it, the Respondents were not ready to proceed.

5. The Applicant opposes the application because, if it is allowed, it will necessarily result in the vacation of the hearing date and the re-setting of various interlocutory processes, which will cause irreparable prejudice to the Applicant.

B. LEGAL PRINCIPLES

Overriding purpose of case management

6. The overriding purpose of civil case management, set out in ss.37M and 37N of the *Federal Court of Australia Act* 1976, is relevant to the exercise of the Court's power to strike out pleadings.

Amendment

7. The Respondents require leave to file a Second Further Amended Defence (**2FAD**): *FCR* 16.53.

8. In *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 the High Court held that an application for leave to amend a pleading should not be approached on the basis that a party is by right entitled to raise an arguable claim, subject to the payment of costs. The High Court held that the power is given to permit the amendments of pleadings in a way deemed by the Court to be appropriate but the overriding purpose of the power is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense: at [90]. In exercising the power, the Court will consider the nature and importance of the amendment, the degree of prejudice, any waste of costs and the extent of delay in seeking the adjournment and the delay that will be occasioned by the adjournment: at [102]. Efficient judicial administration and the avoidance of delay are relevant considerations as a matter of principle: *Sali v SPC Ltd* (1993) 116 ALR 625 at [636]. See also *University of Sydney v ObjectiVision Pty Ltd* [2016] FCA 1199 at [62] – [64]; *Domino's Pizza Enterprises Limited v Precision Tracking Pty Ltd (No 6)* [2018] FCA 910 at [8]; *Rush (No. 2)* at [25] – [30].

9. The observations in *Aon* concerning prejudice caused by delay were considered and applied in a defamation context by Bleby J (with whom White J agreed) in *Channel Seven Adelaide Pty Ltd v Manock* [2010] SASCFC 59 (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 rules" by which the amendment of pleadings may be permitted.*

10. The Applicant submits that a matter of significance when assessing the importance of delay as a factor in the exercise of discretions concerning procedural matters of this kind is the nature and purpose of the proceeding. A principal purpose of defamation proceedings is public vindication. The longer that vindication is delayed, the greater is the risk that the purpose of the proceedings will be undermined. That is particularly the case here where the Applicant is a public figure and the matters complained of received worldwide attention.

Particulars of truth

11. The precision with which particulars of truth must be set out was the subject of earlier submissions by the Applicant in these proceedings and dealt with in *Rush v Nationwide News* [2018] FCA 357 (**Rush No. 1**) at [46]-[54].

12. In this case the Respondents have also annexed in support of their application the evidence that they intend to rely on at trial in support of those particulars – so the Court is in the unusual position of being able to assess the particulars in that context.

C. SECOND FURTHER AMENDED DEFENCE

Nature of the amendments

13. The Respondents now seek to justify nearly every single imputation pleaded (all except 10(g)), including serious allegations of criminal conduct - they seek to prove true that: the Applicant had engaged in scandalously inappropriate behaviour in the theatre (4(a)); the Applicant had engaged in inappropriate behaviour of a sexual nature in the theatre (4b)); the Applicant had committed sexual assault in the theatre (4(c)); the Applicant is a pervert (7(a), 8(a), 10(e), and 11(e)); the Applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of *King Lear* (7(b) and 8(b)); the Applicant engaged

in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of *King Lear* (7(c), 8(c), 10(c), and 11(c)); 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* (7(d) and 8(d)); the Applicant had committed sexual assault while working on the Sydney Theatre Company's production of *King Lear* (10(a) and 11(a)); the Applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of *King Lear* (10(b) and 11(b)); the Applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of *King Lear* (10(d) and 11(d)); and 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 (10(f) and 11(f)).

14. The allegations, in summary, are that:

    (a) Between 26-30 October 2015, during rehearsals, the Applicant made groping gestures in the air about the complainant's torso, mocking her, and causing the other cast members to laugh;

    (b) At unknown times or days from about 12 October - 13 November 2015, the Applicant made comments or jokes about the complainant or her body which contained sexual innuendo – no actual words or details are provided (and indeed the complainant concedes, at paragraph 18 of her unsigned statement, that she cannot recall the precise comments made or words that were spoken);

    (c) The Applicant made lewd gestures in the Applicant's direction at unknown times or days from about 12 October – 13 November 2015;

    (d) The Applicant made a comment to a reporter that he had a "*stage-door Johnny crush*" on the complainant in November 2015;

    (e) The Applicant's hand "*traced across*" the side of the complainant's right breast during a preview performance between 24-27 November 2015;

    (f) Between 14-28 December 2015 the Applicant touched the complainant's lower back under her shirt to her waistline;

(g) Between 4-9 January 2015 the Applicant started to touch the complainant's lower back again, she told him to stop and he did; and

(h) The Applicant sent the complainant a text message on 10 June 2016 (6 months after the production) stating that he thought of her "*more than is socially appropriate*".

15. None of this material, at its highest, could be regarded as "*scandalously inappropriate*", or amount to "*sexual assault*". It also could not result in a finding that the Applicant is a "*pervert*" or a "*sexual predator*". Therefore the pleading, as currently propounded, should not be allowed.

16. If the Court does allow the application, however, even then some of the proposed new particulars should not be allowed:

16.1. The allegations in relation to jokes and gestures (at paragraphs 16 and 17 of the proposed 2FAD) lack precision and cannot be meaningfully responded to – there are no actual words alleged, nor times, dates or circumstances. Those particulars should not be allowed.

16.2. The allegation regarding the "*stage-door Johnny crush*" (at paragraph 18 of the proposed 2FAD) should not be allowed for the reasons dealt with in Rush No. 1 at [69].

16.3. Any allegations relating to a complaint being made should not be allowed. The fact that a complaint may have been made is not capable of establishing the truth of the substance of the complaint.

17. Also, no explanation has been given by those certifying the pleading for the stark differences between the particulars previously relied upon by the Respondents (and struck out in March 2018) and those sought to be included now. Notably, in the earlier pleading:

17.1. In early January 2016, in the final week of the production, the Applicant touched the complainant "*in a manner that made the Complainant feel uncomfortable*" (Defence para 18).

17.2. The complainant asked the Applicant not to touch her in that way, but he repeated the conduct on a number of occasions throughout the week (Defence paras 20-21).

17.3. 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 (Defence para 23).

18. The assertion that the Applicant continued to touch the complainant after being asked not to was raised repeatedly by the Respondents during the argument in February 2018 and was prominently reported in the First Respondent's newspapers (see pages 2 to 9 of Exhibit NP-1). Now their case is the opposite – that he did stop. No explanation (or apology) has been provided for this change.

19. Further, the Respondents asserted (and reported) that the Applicant followed the complainant into the female toilets. The complainant now says that it is her recollection that Mr Rush did not follow her in.

20. There have therefore been different (and at times inconsistent) particulars of truth provided in the various versions of the Respondents' Defences, and likewise apparently various versions of the complainant's statement (Zwier at [10]-[12] and Saunders at [18] and [19]). The version which is now relied upon is still unsigned.

21. Notably, Mr Rush denies the allegations (Pullen 2, at [35]). If the amendments are allowed, he intends to call witnesses from the cast and crew of *King Lear* to contradict the assertions made.

22. The Respondents have still not confirmed whether they intend to rely on any further witnesses (other than the complainant), nor the nature of the evidence which would be given by any such further witnesses. That is despite the fact that the Respondents' solicitors have apparently been aware since 3 July 2018 that the complainant may provide a statement (Zwier at [8]; Saunders at [18(a)]). In those circumstances, the Applicant may well need to call further witnesses, depending on what any such other witness called by the Respondents says. If all of these issues are ventilated, at least 4-5 days will be added to the current hearing estimate of 8 days.

Delay in the proceedings

23. The pleadings have been closed since 28 March 2018 when the Reply was filed.

24. The Respondents' conduct of this matter, set out under the heading "Background" above, has already caused substantial delay in the proceedings, notably:

    (a) their filing of a plainly inadequate Defence on 1 February 2018;

    (b) their lack of preparedness on 8 February 2018 to proceed with the application returnable that day;

    (c) their Subpoena – which amounted to a fishing expedition;

    (d) their filing of an Amended Defence, similarly hopelessly particularised;

    (e) their abandonment of the common law qualified privilege defence (which should never have been pleaded);

    (f) their application to file a Further Amended Defence (**FAD**), and their conduct in propounding three different versions of that proposed FAD;

    (g) their repeated refusal to agree to case management orders;

    (h) their application for leave to appeal, on an issue of discretion and practice and procedure, in relation to particulars that would really make no difference to the outcome of the proceedings;

    (i) their unmeritorious application to file a cross-claim, including a second version of that hopeless pleading.

25. Had these delays not occurred then a hearing would have likely already have taken place this month, if not earlier.

26. Against that specific background, if the application is allowed, the further delay would may be such as to undermine, or potentially undermine, the public's confidence in the administration of civil justice and the efficient use of judicial resources (as in *Aon*).

27. The Respondents apparently contend that the current delay is not their fault because, despite relentlessly pursuing the complainant since 8 December 2017 (see Saunders at [6] – [14]), she only agreed to cooperate in early July: Saunders at [18]. Despite the complainant's solicitor affirming an affidavit on this application, no explanation has been provided as to why the complainant now wishes to participate: Zwier at [5] – [12]. It is asserted that since

3 July 2018 Mr Todd and Mr Zwier spoke multiple times per day. It is asserted that those communications were "*privileged and confidential*", but it is unclear how that could be the case given that there is no legal dispute between their respective clients. The Respondents have therefore elected not to enlighten the Court as to the content of those conversations, or their understanding of why the complainant has had a sudden and complete change of heart.

28. In reality, however, the delay can only be the fault of the Respondents. The fact that the complainant has only recently decided to intervene in the proceedings should not overshadow the fact that the Respondents did not have, at the time of publication, sufficient evidence of justification, and so have had to scavenge for such evidence during the proceedings themselves. The Applicant should not be prejudiced because the Respondents have only now, some 8 months after the publications, obtained the cooperation of the complainant (cooperation which, one might think, ought to have been a precondition to publishing in the first place).

29. There is no suggestion that the Respondents made any attempt to contact the complainant prior to the publication of the matters complained of.

First Respondent's reporting of the proceedings

30. Pullen 1 evidences the manner in which the First Respondent has reported on these proceedings. Of particular note are the two front page stories in the *Daily Telegraph* and *The Australian* on 20 February 2018, the day after the Amended Defence was released to the public. The purpose of those publications, excessive in nature for a Court report, was clearly calculated to cause, and did cause, further harm to the Applicant: pp. 32-34; pp.44-46 Pullen 1.

31. The First Respondent also continued to report the content of the Amended Defence after it was struck out: [2(s) Reply].

32. Given the First Respondent's ongoing campaign against the Applicant, the loss of the 3 September hearing date would cause irreparable damage to the Applicant.

Prejudice to Applicant

33. The evidence concerning the effect that the publications and the reporting by the Respondents of the proceedings have had on Mr Rush is compelling: [5] Pullen 1; and [36]-

[40] Pullen 1. That effect is significant and ongoing - so much so that he has had to pull out of a theatre production that he was supposed to take part in later this year: [39]-[40] Pullen 2. The harm to the Applicant is substantial and ongoing, and the need for vindication on his part is pressing.

34. The evidence demonstrates that if the amendments are allowed, the current trial date cannot fairly be maintained, in particular:

    (a) The current length of the trial cannot accommodate the proposed amended case (Pullen 2 at [29]-[30]);

    (b) Senior Counsel for the Applicant is only available for the allocated 8 days (Pullen 2 at [31(c)]);

    (c) Counsel for the Applicant have only set aside enough time to prepare for the s.30 defences and damages case (Pullen 2 at [31(c) and (d)]);

    (d) There is not enough time for the Applicant's legal representatives to generally prepare to meet the truth defence, including by arranging witnesses (Pullen 2 at [32]-[34]);

    (e) The Applicant has not been able to determine if the relevant witnesses are available in September, indeed one of them is not (Pullen 2 at [33]);

    (f) There is not enough time to complete further discovery and to issue subpoenas in addition to meeting the other steps necessary to prepare for trial (Pullen 2 at [32]-[34]).

35. If the effect of the amendment is the vacation of the hearing date, then the prejudice to the Applicant is so great that the amendment should not be allowed. That prejudice is so significant, in this particular case, that it cannot be ameliorated by a costs order in the usual way. An order that the Respondents pay the Applicant's costs thrown away by reason of the amendments would not satisfactorily redress that prejudice. First, it would be difficult, practically, to disentangle the costs which have been thrown away (costs specifically referable to the anticipated hearing in September) from the costs which would have been incurred regardless. Secondly, whatever the costs order, it cannot compensate the Applicant for the acute anxiety and distress which has been caused not only by the publication of the articles in the first place but also by the Respondents' regrettable conduct in this litigation.

The evidence is that the Applicant now "*barely eats*", is "*full of anxiety*", wakes with a "*terrible sense of dread*", suffers from "*lack of sleep*", and "*has been virtually housebound*" (Pullen No.1 at [5]). In those circumstances, a delay of even a single week should not be indulged by the Court, so great would be the prejudice to the Applicant and his family.

36. Similarly, the Court should not entertain a situation where the amendment is allowed and the hearing date preserved given that the Applicant is not in a position to prepare to meet the truth case at such short notice.

No prejudice to Respondents

37. The justification defence now propounded lacks merit for the reasons set out above. Some of the particulars lack precision and should not be allowed, and others are incapable of proving the truth of the most serious allegations.

38. In those circumstances, there is no substantial prejudice to the Respondents in the amendment being disallowed.

39. In weighing the respective position of the parties, the conduct of the Respondents in publishing the matters complained of without any direct evidence to prove any of the allegations, and their conduct in these proceedings, and in reporting these proceedings, should all be weighed against the amendments being allowed.

40. If the Court is minded to allow the amendments, the Applicant's lawyers are hopeful they will be able to meet those amendments if the current hearing is vacated and the hearing is set down to commence on 22 October 2018, with a 13 day estimate. Such an adjournment will result in further upset and harm to the Applicant and his family, and, if allowed, will be sought to be compensated by way of aggravated damages. The Applicant anticipates that he will only be able to be ready to meet the amendments, if interlocutory orders are made such as those set out in the ***attached** Short Minutes.

Bruce McClintock SC 8 August 2018

Sue Chrysanthou

Counsel for the Applicant

Short Minutes of Order

No. NSD2179 of 2017

Federal Court of Australia

District Registry: New South Wales

Geoffrey Roy Rush

Applicant

Nationwide News Pty Limited

First Respondent

Jonathon Moran

Second Respondent

...

The Court orders:

1. The current hearing - listed on 3 September 2018, with an 8 day estimate - be vacated.
2. The proceedings be listed for hearing on 22 October 2018, with a 13 day estimate.
3. The Respondents agree not to pursue their defence under s.30 of the *Defamation Act 2005* (NSW).
4. The Respondents are to file and serve their Second Further Amended Defence, without the current defence under s.30 but otherwise in the form annexed to the affidavit of Ms Marlia Saunders affirmed on 31 July 2018, by 4.00pm on 10 August 2018.
5. The Court notes that, in consenting to the filing of the Second Further Amended Defence, the Applicant does not concede that the particulars of truth are relevant, and does not concede they are capable (whether taken individually or together) of proving the truth of the Applicant's imputations, and the Applicant reserves his right to object to the particulars of truth.
6. The Respondents may not further amend the Second Further Amended Defence without leave of the Court.

7. The Respondents are to serve a signed copy of the complainant's Outline of Evidence, as annexed to the affidavit of Ms Marlia Saunders affirmed on 31 July 2018, by 4.00pm on 10 August 2018.

8. The Respondents are to serve any further Outlines of Evidence, in support of their defence under s.25, by 4.00pm on 10 August 2018.

9. The Respondents may not rely upon any further evidence, other than the evidence referred to in orders 7 and 8 above, without leave of the Court.

10. The Applicant is to serve any proposed categories of discovery, in respect to the Respondents' defence under s.25, by 4.00pm on 17 August 2018.

11. The Respondents are to serve verified lists of documents, by 4.00pm on 24 August 2018.

12. The parties are to agree, by 4.00pm on 31 August 2018, on a joint letter of instruction to be provided to the parties' accounting experts, Mr Michael Potter and Mr Tony Samuel - in order that those experts might then prepare a joint report on matters agreed and matters not agreed.

13. The parties' joint letter of instruction is to be provided to the parties' accounting experts by 4.00pm on 5 September 2018, and the experts are to provide their joint report by 4.00pm on 5 October 2018.

14. The Applicant is to serve any further Outlines of Evidence, by 4.00pm on 14 September 2018.

15. The Applicant is to serve any further expert evidence, in reply to the report of Mr Richard Marks served by the Respondents on 27 July 2018, by 4.00pm on 14 September 2018.

16. The parties are to exchange bundles of documents on which they intend to rely at trial, by 4.00pm on 19 September 2018.

17. The Applicant is to prepare and serve a Court Book index, by 4.00pm on 21 September 2018.

18. The parties are to agree on the final version of the Court Book index, by 4.00pm on 26 September 2018.

19. The Applicant is to provide to the Court, and serve upon the Respondents, the Court Book by 4.00pm on 1 October 2018.

20. The parties are to exchange objections to documents for tender, by 4.00pm on 8 October 2018.

21. The parties are to provide to the Court, and serve upon each other, Outlines of Opening Submissions, and accompanying Lists of Authorities, by 4.00pm on 12 October 2018.

22. The Respondents are to pay the Applicant's costs of the Respondents' Interlocutory Application dated 31 July 2018 including the costs thrown away by reason of the amendments, on an indemnity basis.

23. Liberty to apply on 3 days' notice (including in the event that the parties cannot reach agreement in relation to the proposed categories of discovery).

Applicant

Signature	______________________
Name	______________________
Capacity	
Date of signature	/ / 2018

First and Second Respondents

Signature of legal representative	______________________
Name	______________________
Capacity	Solicitor
Date of signature	/ / 2018