

## 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



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 8/08/2018 3:37:01 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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**Respondents' Outline of Submissions in relation to the Interlocutory Application  
filed 2 August 2018**

No. NSD2179 of 2017

Federal Court of Australia

District Registry: New South Wales

Division: General

**Geoffrey Roy Rush**

Applicant

**Nationwide News Pty Limited** and another

Respondents

**The Respondents' application for leave to amend their defence**

1. By Interlocutory Application filed 2 August 2018 the Respondents seek leave to amend their Defence in the form of the Second Further Amended Defence which is annexure MRS-2 to the affidavit of Marlia Saunders dated 31 July 2018 (the **First Saunders Affidavit**).
2. The effect of the amendments is to plead a defence of justification to all of the plaintiff's imputations save for imputation 10(g).
3. The principles concerning applications for leave to amend are set out in the Court's decision in this matter dated 20 April 2018: *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550 at [25]-[30], esp at [28].
4. There can be no doubt that the amendments are important to the Respondents. The amendments seek to raise significant matters by way of defence to a claim which is potentially of very large value ([22] of the First Saunders Affidavit).
5. The explanation for the delay in bringing forward a defence of justification as it is now pleaded is simple: up until 24 July 2018 the Respondents did not have knowledge of the details of Ms Norvill's complaint sufficient to plead a defence to the level of specificity required ([19] of the First Saunders Affidavit; *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [46] and [52]ff). Thereafter the Respondents acted without delay in bringing forward this application ([18] of the First Saunders Affidavit). The amendment application does not result from any change by the Respondents in their forensic choices.

6. Nor is there any material prejudice. In the affidavit of Nicholas Pullen dated 2 August 2018 the Applicant, in substance, points to two matters of alleged prejudice:
  - (a) First, it is asserted that the proceedings will not be able to proceed in September 2018 as there is insufficient hearing time scheduled to accommodate a hearing involving a defence of justification; and
  - (b) Secondly, it is asserted that there is insufficient time between now and September for the Applicant to prepare to meet a justification defence.
7. That prejudice may be cured by the Court vacating the September hearing dates and listing the proceedings for hearing with an 11-13 day estimate<sup>1</sup> commencing on 22 October 2018<sup>2</sup>. That would defer the start of the trial by only 7 weeks. Whilst not entirely immaterial, that period is relatively slight in the context of proceedings which have to date been on foot for around 8 months.
8. The Respondents understand that commencement of the trial on 22 October 2018 suits the convenience of the Applicant's counsel.
9. In order to ensure that the hearing can be concluded within 11-13 days, the Respondents are prepared to withdraw the defence of qualified privilege ([9] of the affidavit of Marlia Saunders dated 6 August 2018 (the **Second Saunders Affidavit**)).
10. The Respondents can serve outlines of any further lay evidence upon which they rely by 31 August 2018. The Respondents anticipate that those statements of witnesses will be in the nature of evidence that corroborates the evidence of Ms Norvill. This would allow the Applicant to serve any outlines he relies upon in relation to the defence of justification by 5 October 2018 (just over 8 weeks from now, 5 weeks from the service of the balance of the Respondents' outlines and 2 weeks prior to the commencement of the hearing).
11. The Respondents do not seek to rely upon any reports of experts that have not already been served.

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<sup>1</sup> See annexure MRS-5 to the Second Saunders Affidavit.

<sup>2</sup> Further to [8] of the Second Saunders Affidavit, Mr Blackburn SC has indicated that if 15 October 2018 is unavailable to the Applicant he can make himself available up to 9 November 2018.

12. Further, the Respondents consent to an order that they pay the Applicant's costs thrown away by virtue of the amendments ([11] of the Second Saunders Affidavit).
13. In the circumstances summarised above, and in the interests of the real questions in the controversy between the parties being properly agitated (*Rush (No. 2)* at [25]), the need for there to be a "just" determination of the proceedings (see section 37M(2)(a)) strongly points to the granting of the application to amend.

### **The Respondents' claim for legal professional privilege**

14. By Notice to Produce dated 2 August 2018 (the **Notice**) the Applicant sought production of various documents (see annexure MRS-3 to the Second Saunders Affidavit).
15. The Respondents assert legal professional privilege in the documents caught by the Notice, save for the document called upon by category 7 which has been notionally produced (it is annexure MRS-1 to the First Saunders Affidavit). The bases for the claims for legal professional privilege are set out in annexure MRS-4 to the Second Saunders Affidavit. On the basis of the matters set out in that schedule, each document is plainly a document protected by legal professional privilege.
16. It is unclear whether the Applicant challenges the Respondents' assertion that legal professional privilege attaches to the documents, or asserts there has been a waiver of such privilege (or challenges the claim at all). No evidence was served by the Applicant by 7 August 2018, as directed by the Court on 3 August 2018.
17. The documents comprise communications between various legal representatives of the Respondents and various legal representatives of Ms Norvill, and in some instances attach other documents to the communications such as draft witness statements of Ms Norvill.
18. An appropriate starting point when applying the dominant purpose test is to ask what the intended use or uses was/were of the document which accounted for it being brought into existence: *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at [35] per Finn J. In respect of each document the

dominant purpose for the communication was in substance for the Respondents to be provided with advice in relation to these proceedings or for the Respondents' representatives to provide them with professional legal services relating to these proceedings.

19. 'Professional legal services' has a broad ambit, and includes:
  - (a) work performed by a lawyer in relation to a witness' statement of evidence (including third party witnesses), "where the lawyer is asked to advise on what the statement should contain and settle the form of the statement": *New Cap Reinsurance Ltd* [2007] NSWSC 258 at [28];
  - (b) professional advice as to what a party should prudently or sensibly do in the relevant legal context, as well as legal work carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client: *AWB v Cole (No 5)* (2006) 155 FCR 30 at [44(7)-(8)] (45-46) per Young J; and
  - (c) work that may be similar or analogous to that included in the definition of "legal services" in the *Legal Profession Act 2004 (LPA)* which is "*work done, or business transacted, in the ordinary course of legal practice*": *789TEN Pty Ltd v Westpac Banking Corporation Ltd* (2005) 215 ALR 131; [2005] NSWSC 123 at [44]. The statutory successor to the LPA is the *Legal Profession Uniform Law (NSW)*, which defines 'legal services' in identical terms to the LPA.
  
20. In the ordinary course of events, draft statements of evidence are privileged: *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd & Ors* (2009) 174 FCR 547 (***Cadbury Schweppes***) at [45]. This is because:
  - (a) the rationale for litigation privilege rests on the basis that, in the adversarial system, parties and their legal representatives "*generally control and decide for themselves which evidence they will adduce at trial, without any obligation to make disclosure to the opposing party or parties of the material acquired in preparation of the case*": *Cadbury Schweppes* at [38]; *Dingle v Commonwealth Development Bank of Australia* (1989) 23 FCR 63 at 66; and
  - (b) draft affidavits may only be intended to be used by the legal representatives involved in preparing the witness statement for the

purpose of professional legal services, as was referred to in *Cadbury Schweppes* at [73] (cited with approval in *Buzzle Operations v Apple Computer Australia* (2009) 74 NSWLR 469 at [25]):

*"A draft may well include information which is not included in a final version of a witness statement given to an opposing party. A draft may well be a "discussion" document, intended only to be seen and considered by the party's legal adviser. It should not be assumed that the final version is just a reproduction of anything that comes before it."*

(c) disclosing draft statements might disclose the precise character of confidential communications between the witness and/or client and the solicitor, by showing the alterations made from time to time: *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 496.

21. If the Applicant asserts that there has been a waiver of privilege, such an assertion is, with respect, misconceived. A waiver may occur where a party asserting a privilege has acted inconsistently with the maintenance of the privilege: *Mann v Carnell* (1999) 201 CLR 1. A mere reference to a privileged communication, without disclosing its substance, does not constitute a waiver: *AWB v Cole* (2006) 152 FCR 382 at [135]-[139].
22. For these reasons the Court ought to find that the documents described in annexure MRS-4 are protected by legal professional privilege.

**Alec Leopold SC**                                    **and**                                    **Lyndelle Barnett**

Counsel for the Respondents

Dated: 8 August 2018