

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 12/09/2018 11:47:23 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	NSD2179/2017
File Title:	GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 17/09/2018 11:11:28 AM AEST

Registrar

### Important Information

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

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

Form 59  
Rule 29.02(1)

# Affidavit



No NSD 2179 of 2017

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

**Geoffrey Roy Rush**

Applicant

**Nationwide News Pty Limited** and another  
Respondents

Affidavit of: **Miriam Anne Stiel**

Address: Level 28, Deutsche Bank Place, 126 Phillip Street, Sydney, NSW

Occupation: Solicitor

Date: 12 September 2018

## Contents

Document Number	Details	Paragraph	Page
1.	Affidavit of Miriam Anne Stiel in support of application dated 12 September 2018 sworn on 12 September 2018.	1	2
2.	Annexure "MAS-1", being copy of the subpoena to produce documents issued to Sydney Theatre Company Limited on 3 September 2018 at the request of the Applicant.	3	5

Filed on behalf of: Sydney Theatre Company Limited, the Addressee of Subpoena to Produce

Prepared by: Miriam Anne Stiel

Law firm: Allens

Tel: (02) 9230 4000

Fax: (02) 9230 5333

Email: MNSS:JKKS (Ms Stiel) Miriam.Stiel@allens.com.au; (Ms Taylor)

Julia.Taylor@allens.com.au

### Address for service:

Deutsche Bank Place, Corner Hunter and Phillip Streets, Sydney NSW 2000

Email: Miriam.Stiel@allens.com.au

DX: 105 Sydney

jkks A0144037871v3 120023772

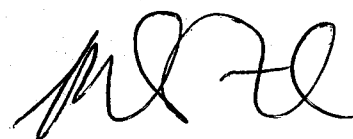
Document Number	Details	Paragraph	Page
3.	Annexure "MAS-2", being an email from Julia Taylor of Allens to Nicholas Pullen and Jeremy Marel of HWL Ebsworth dated 4 September 2018.	6	16
4.	Annexure "MAS-3", being a letter from HWL Ebsworth to Allens dated 4 September 2018.	7	20
5.	Annexure "MAS-4", being a copy of the transcript of the interlocutory hearing before Wigney J on 9 August 2018	9	23

I, Miriam Anne Stiel of Level 28, Deutsche Bank Place, 126 Phillip Street, Sydney, in the state of New South Wales, Solicitor say on oath:

1. I am a partner of Allens. I am acting for Sydney Theatre Company Limited (**STC**) in relation to the subpoenas served on it in this proceeding and the proceeding generally to the extent that it affects STC. I am authorised to make this affidavit on behalf of STC.
2. I make this affidavit from my own knowledge, save where otherwise indicated. Nothing which I say in this affidavit is intended to waive legal professional privilege, nor do I have authority to waive any such privilege.

**Subpoena issued at the request of the Applicant**

3. On 3 September 2018, a subpoena was served on the STC by the Applicant's solicitors. Now produced and shown to me and marked Annexure MAS-1 is a copy of the subpoena (the **Rush Subpoena**).
4. I have been involved in the document collection and review process undertaken by the STC in response to the Rush Subpoena.
5. Since receiving the Rush Subpoena, I and an Allens lawyer under my supervision, Julia Taylor, have met on several occasions to discuss and ascertain the number of documents that may be subject to the Rush Subpoena, where those documents are likely to be located, the resources that would be required to retrieve and collate those documents and the length of time that this task would take. I am also aware that searches have been undertaken by various employees of the STC to ascertain the number of documents that may be subject to the subpoena and where those documents are located.

6. On 4 September 2018, Ms Taylor sent an email to the solicitors for the Applicant, HWL Ebsworth requesting an explanation of the relevance to this proceeding of the categories of documents referred to in paragraphs 3, 4, 5, 7, 8 and 13 of the Rush Subpoena. Now produced and shown to me and marked Annexure MAS-2 is a copy of this email.
7. On 4 September 2018, HWL Ebsworth responded to the email referred to in the preceding paragraph by way of letter. Now produced and shown to me and marked Annexure MAS-3 is a copy of this letter.

**Categories 3, 4 and 5 of the Rush Subpoena**

8. I do not consider that the documents captured by categories 3, 4 and 5 of the Rush Subpoena are relevant to any matter in issue on the current pleadings filed by the parties in this proceeding. The matters referred to in paragraph 1 of the letter from HWL Ebsworth to Allens (contained in Annexure MAS-3) are no longer pleaded by the Respondents.
9. In respect of the outline of evidence referred to in paragraph 2 of the letter from HWL Ebsworth to Allens (contained in Annexure MAS-3), I am aware that His Honour Justice Wigney made the following comments regarding the evidence in this proceeding during a interlocutory hearing on 9 August 2018:

*"... as I said on the last occasion, the evidence in this case will be heard viva voce, not by way of carefully crafted statements and affidavits – and I'm not directing that comment to this statement in particular, but any.*

*The reason that the court, often in cases such as this, hears evidence viva voce rather than in the form of, you know – written form is that it is often far more reliable to hear it from the horse's mouth, so to speak, rather than carefully crafted statements and affidavits, and so Ms Norvill's evidence will be what she says in court, not what's in this statement. And for my own purposes I won't be reading this statement before she gives evidence, because I want to hear her evidence from her..."*

Now produced and shown to me and marked Annexure MAS-4 is a copy of the transcript from that interlocutory hearing.

10. Mr McIntyre has not been served with a subpoena to attend to give evidence at the hearing of this matter.



### Category 7 of the Rush Subpoena

11. Category 7 of the Rush Subpoena covers documents which I do not consider to be relevant to any matter in issue in this proceeding. This is clear from paragraphs 5 to 7 of the letter from HWL Ebsworth (contained in Annexure MAS-3). Further, I believe that any documents which are relevant to this proceeding are already covered by category 6 of the Rush Subpoena.

### Category 8 of the Rush Subpoena

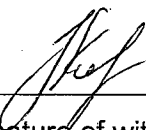
12. The documents captured by category 8 of the Rush Subpoena do not appear to be relevant to any matter in issue in this proceeding. Paragraph 8 of the letter from HWL Ebsworth (contained in Annexure MAS-3) provides no explanation as to how any document "referring to or relating to any proposed claim for contribution or any proposed Cross-Claim proposed to be made against the STC by the Respondents" is relevant to the Applicant's claim for aggravated damages.
13. The documents requested in this category bear no relevance to the matters complained of or their publication by the Respondents.

### Category 13 of the Rush Subpoena

14. I do not consider that the documents requested under category 13 are relevant to any matter in issue in this proceeding.
15. Paragraph 4 of the letter from HWL Ebsworth (contained in Annexure MAS-3) suggests that documents in this category are sought out of speculation regarding allegations of inappropriate behaviour or misconduct during another STC production and the possible connection to changes in human resources policies and practices. Based on this information, I consider that this category amounts to a fishing expedition.

Sworn by the deponent at Sydney  
in New South Wales on 12 September 2018

Before me:

  
\_\_\_\_\_  
Signature of witness

Julia Kovarsky Taylor

Solicitor

Level 28, Deutsche Bank Place,  
Sydney NSW 2000

  
\_\_\_\_\_

Signature of deponent

Form 3 (adapted)  
Rule 29.02(1)(8)

**Annexure certificate**

No NSD 2179 of 2017

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

**Geoffrey Roy Rush**

Applicant

**Nationwide News Pty Limited** and another

Respondents

This is the annexure marked "**MAS-1**" produced and shown to Miriam Anne Stiel at the time of swearing his affidavit this 12 September 2018.

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 31/08/2018 10:01:47 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD2179/2017
File Title:	GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	12/09/2018, 9:30 AM
Place:	Court Room 19C, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



A handwritten signature in black ink, appearing to read "Warwick Soden".

Dated: 3/09/2018 2:33:44 PM AEST

Registrar

### Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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



## Subpoena to produce documents

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

NSD 2179 of 2017

**GEOFFREY ROY RUSH**

Applicant

**NATIONWIDE NEWS PTY LTD** and another (named in the schedule)

Respondents

To: The Proper Officer  
Sydney Theatre Company Limited  
c/- Allens Linklaters  
Level 28 Deutsche Bank Place  
SYDNEY NSW 2000

**You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.**

**Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.**

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 6 September 2018. (See Note 1)

Dated: 31 August 2018

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

Filed on behalf of Geoffrey Roy Rush, Applicant

Prepared by Nicholas Pullen

Law firm HWL Ebsworth Lawyers

Tel +61 3 8644 3500

Fax 1300 365 323

Email npullen@hwle.com.au

Ref NP:687924

**Address for Service HWL EBSWORTH LAWYERS**

Level 26, 530 Collins Street, Melbourne VIC 3000  
DX 564 MELBOURNE





Issued at the request of Geoffrey Roy Rush, whose address for service is:

Place: HWL EBSWORTH LAWYERS  
Level 26, 530 Collins Street  
Melbourne VIC 3000  
DX 564 Melbourne

### Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and the documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date: 12 September 2018

Time: 9.30am

Place: Federal Court of Australia Registry  
Level 17, Law Courts Building, Queens Square  
Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar  
Federal Court of Australia  
New South Wales District Registry  
Level 17, Law Courts Building  
Queens Square  
SYDNEY NSW 2000



## Schedule of documents

In this subpoena:

**"Complaint"** means any allegation made by Eryn Jean Norvill (or made on behalf of Eryn Jean Norvill), whether made formally or informally, in relation to the conduct of Geoffrey Rush in connection with, or at or around the time of, the Sydney Theatre Company's production of *King Lear* from late 2015 to early 2016.

**"Document"** means any record of information, and includes:

1. Originals, copies and electronic records;
2. Anything on which there is writing;
3. Anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
4. Anything from which sounds, images or writing can be reproduced with or without the aid of anything else; and
5. A map, plan drawing or photograph.

**"Production"** means the production of the play *King Lear* which was performed by the Sydney Theatre Company Limited from late 2015 to early January 2016.

**"STC"** means Sydney Theatre Company Limited.

The documents and things you must produce are as follows:

1. All recordings of any performances of the Production during the period from 1 October 2015 until 31 January 2016.
2. A copy of any agreement or contract by which Geoffrey Rush was cast by the STC to play *King Lear* in the Production.
3. All Human Resources policies and procedures of the STC that were in force during 2015, 2016 and 2017.
4. Copies of any documents - including any correspondence, file-notes, Board meeting minutes, and any other documents - referring to, relating to, or recording any change (and the reasons for any change) in the Human Resources policies and/or procedures of the STC that were in force during 2015, 2016 and 2017.
5. Without limiting paragraph 4 above, any documents referring to, relating to, or recording the creation of "Edify" (an online training tool to facilitate the education and induction of STC employees about STC policies).



6. Copies of any comments, documents or statements released by or on behalf of the journalist, or member of the press, in relation to the Complaint.
7. Copies of any documents or statements released by or on behalf of the STC to any journalist, or member of the press, in relation to Geoffrey Rush since 1 January 2015.
8. Copies of any documents - including any correspondence, file-notes, Board meeting minutes, and any other documents - referring to or relating to any proposed claim for contribution or any proposed Cross-Claim proposed to be made against the STC by the Respondents to these proceedings.
9. Copies of any call sheets, and any daily rehearsal schedules, during the period of the Production.
10. Copies of any Prompt Book or Prompt Script created or used during the period of the Production, or any other documents recording the cast's cues, entrances and exits for the Production.
11. Copies of the nightly show report for each performance of the Production.
12. Without limiting paragraph 9 to 11 above, copies of any other report or log by stage management or production personnel of the STC relating to any rehearsal for, or production of, the Production.
13. Copies of any documents - including any correspondence, file-notes, Board meeting minutes, and any other documents - referring to, relating to, or recording any allegations of inappropriate behaviour or misconduct occurring in connection with, or during rehearsals or productions of, the STC's production of "Disgraced" in 2016.



## Notes

### **Last day for service**

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

### **Informal service**

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

### **Addressee a corporation**

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

### **Conduct money**

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

### **Production of subpoena or copy of it and documents or things by delivery or post**

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:

- (a) at the address specified in the subpoena for the purpose; or
- (b) if more than one address is specified - at any of those addresses;

so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.

6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

### **Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

**Production of copy instead of original**

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.
- 9A. The copy of a document may be:
- (a) a photocopy; or
  - (b) in any electronic form in any of the following electronic formats:
    - .doc and .docx – Microsoft Word documents
    - .pdf – Adobe Acrobat documents
    - .xls and .xlsx – Microsoft Excel spreadsheets
    - .jpg – image files
    - .rtf – rich text format
    - .gif – graphics interchange format
    - .tif – tagged image format

**Applications in relation to subpoena**

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
  - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

**Loss or expense of compliance**

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

**Contempt of court - arrest**

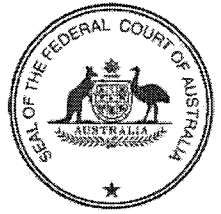
12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

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## Schedule

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

No. NSD2179 of 2017



### Respondents

Second Respondent: **Jonathon Moran**

Date: 31 August 2018



Form 44  
Rule 24.21

## Subpoena - declaration by addressee notice to addressee

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

No. NSD2179 of 2017

**GEOFFREY ROY RUSH**

Applicant

**NATIONWIDE NEWS PTY LTD** and another (named in the schedule)

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in any electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

**You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.**

If you declare that the material you produce is copies of documents, the Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of	<u>Geoffrey Roy Rush, Applicant</u>		
Prepared by	<u>Nicholas Pullen</u>		
Law firm	<u>HWL Ebsworth Lawyers</u>		
Tel	<u>+61 3 8644 3500</u>	Fax	<u>1300 365 323</u>
Email	<u>npullen@hwle.com.au</u>	Ref	<u>NP:687924</u>
<b>Address for Service</b> <b>HWL EBSWORTH LAWYERS</b>			
Level 26, 530 Collins Street, Melbourne VIC 3000			
DX 564 MELBOURNE			

[Version 3 Form approved 03/09/2014]



**Declaration by addressee (subpoena recipient)**

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐ **All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐ **Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

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Dated: 2018

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Signed by or on behalf of Sydney Theatre Company Limited  
Addressee



Form 3 (adapted)  
Rule 29.02(1)(8)

**Annexure certificate**

No NSD 2179 of 2017

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

**Geoffrey Roy Rush**

Applicant

**Nationwide News Pty Limited** and another

Respondents

This is the annexure marked **"MAS-2"** produced and shown to Miriam Anne Stiel at the time of swearing his affidavit this 12 September 2018.

**Taylor, Julia**

---

**From:** Taylor, Julia  
**Sent:** Tuesday, 4 September 2018 1:27 PM  
**To:** 'Jeremy Marel'; Nicholas Pullen  
**Cc:** Stiel, Miriam; Burton, Elliott  
**Subject:** RE: Rush v Nationwide News Pty Ltd & Anor [HWLE-Matter.C0141544.687924]

Dear colleagues

We refer to the subpoena issued on 31 August 2018 to our client, the Sydney Theatre Company Limited, at the request of your client.

We have reviewed the categories of documents requested to be produced in the subpoena. It is not clear to our client how the following categories of documents are relevant to the matters pleaded by either your client or the respondents in this proceeding: 3, 4, 5, 7, 8, and 13. Can you please explain, as soon as possible, why your client considers these documents to be relevant to the matters in issue this proceeding.

Regards  
 Miriam and Julia

Miriam Stiel  
 Partner, **Allens**  
 DL +61 2 9230 4614 M +61 405 134 614 [www.allens.com.au](http://www.allens.com.au)

Julia Taylor (née Kovarsky)  
 Senior Associate, **Allens**  
 DL +61 2 9230 4370 M +61 401 492 876 [www.allens.com.au](http://www.allens.com.au)

**Allens > < Linklaters**

Follow Allens  

---

**From:** Jeremy Marel [mailto:jmarel@hwle.com.au]  
**Sent:** Monday, 3 September 2018 3:45 PM  
**To:** Taylor, Julia; Nicholas Pullen  
**Cc:** Stiel, Miriam; Burton, Elliott  
**Subject:** RE: Rush v Nationwide News Pty Ltd & Anor [HWLE-Matter.C0141544.687924]

Dear Colleagues,

We **\*attach** our letter of 3 September and its enclosure (our client's Subpoena to Produce).

Kind regards,

**Jeremy Marel**  
 Associate

**HWLEBSWORTH**  
 LAWYERS

Level 14, Australia Square 264-278 George Street | Sydney NSW 2000  
 Phone +61 2 9334 8705 Fax 1300 369 656 (Australia) | Fax +61 2 8507 6582 (International)  
[jmarel@hwle.com.au](mailto:jmarel@hwle.com.au) | [www.hwlebsworth.com.au](http://www.hwlebsworth.com.au)

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defects. You are responsible for all loss or damage caused directly or indirectly by the use of this communication. If you do not receive all of the email or attachments please notify us immediately by reply email. This notice should not be deleted or altered.

---

**From:** Taylor, Julia [mailto:julia.taylor@allens.com.au]  
**Sent:** Thursday, 30 August 2018 6:16 PM  
**To:** Jeremy Marel; Nicholas Pullen  
**Cc:** Stiel, Miriam; Burton, Elliott  
**Subject:** RE: Rush v Nationwide News Pty Ltd & Anor [HWLE-Matter.C0141544.687924]


Dear colleagues

We confirm that we will accept service of a Subpoena to Produce on behalf of the Sydney Theatre Company Limited.

Regards

Julia Taylor (née Kovarsky)  
Senior Associate, **Allens**  
DL +61 2 9230 4370 M +61 401 492 876 [www.allens.com.au](http://www.allens.com.au)

## Allens > < Linklaters

Follow Allens  

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**From:** Jeremy Marel <jmarel@hwle.com.au>  
**Date:** 30/8/18 5:18 pm (GMT+10:00)  
**To:** "Stiel, Miriam" <Miriam.Stiel@allens.com.au>  
**Cc:** Nicholas Pullen <npullen@hwle.com.au>  
**Subject:** FW: Rush v Nationwide News Pty Ltd & Anor [HWLE-Matter.C0141544.687924]

Dear Miriam,

We refer to our **\*attached** letter.

Would you please let us know whether or not you have instructions to accept service of our Subpoena to Produce.

Kind regards,

**Jeremy Marel**  
Associate

**HWLEBSWORTH**  
LAWYERS

Level 14, Australia Square 264-278 George Street | Sydney NSW 2000  
Phone +61 2 9334 8705 Fax 1300 369 656 (Australia) | Fax +61 2 8507 6582 (International)  
[jmarel@hwle.com.au](mailto:jmarel@hwle.com.au) | [www.hwlebsworth.com.au](http://www.hwlebsworth.com.au)

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---

**From:** Veronica Aiken [mailto:vaiken@hwle.com.au] **On Behalf Of** Priya Wakhlu  
**Sent:** Friday, 24 August 2018 4:32 PM  
**To:** 'Miriam.Stiel@allens.com.au'  
**Cc:** Nicholas Pullen  
**Subject:** Rush v Nationwide News Pty Ltd & Anor [HWLE-Matter.C0141544.687924]

Dear Madam

Please see letter **attached**.

Regards

**Priya Wakhlu**  
Associate



Level 26, 530 Collins Street | Melbourne VIC 3000  
Phone +61 3 8644 3559 Fax 1300 365 323 (Australia) | Fax +61 2 8507 6582 (International)  
[pwakhlu@hwle.com.au](mailto:pwakhlu@hwle.com.au) | [www.hwlebsworth.com.au](http://www.hwlebsworth.com.au)

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Form 3 (adapted)  
Rule 29.02(1)(8)

**Annexure certificate**

No NSD 2179 of 2017

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

**Geoffrey Roy Rush**

Applicant

**Nationwide News Pty Limited** and another

Respondents

This is the annexure marked **"MAS-3"** produced and shown to Miriam Anne Stiel at the time of swearing his affidavit this 12 September 2018.

Our Ref: NWP:JJM:687924

4 September 2018

Ms Miriam Stiel  
Allens Linklaters  
Level 28, Deutsche Bank Place  
126 Phillip Street  
Sydney NSW 2000

Email: [Miriam.Stiel@allens.com.au](mailto:Miriam.Stiel@allens.com.au)

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Dear Madam,

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

We refer to our client's Subpoena to Produce upon your client, Sydney Theatre Company Limited (STC), and your email of 4 September 2018.

*Categories 3, 4, 5 and 13*

1. In their Defence filed on 1 February 2018, the Respondents alleged (at paragraph 36.7(h)) that, prior to publication of the matters complained of, the Respondents understood that *"the Sydney Theatre Company had changed its HR policies and practices as a result of the complaint against the Applicant"*. That assertion was repeated in the Respondents' Amended Defence filed on 20 February 2018, and in the Respondents' Further Amended Defence filed on 23 April 2018.
2. The outline of evidence of Patrick McIntyre, Executive Director of the STC, states that *"the Sydney Theatre Company, due to the seriousness of the allegations made by Eryn Jean Norvill against the Applicant, would not work with the Applicant again and subsequently amended its human resources policy"*.
3. Our client is entitled to test those allegations by analysing any changes made to your client's HR policies and practices (and the reasons for any such changes). It is on that basis that we request the documents sought by paragraphs 3, 4, 5 and 13 of our client's Subpoena to Produce.
 

Adelaide  
Brisbane  
Canberra  
Darwin  
Hobart  
Melbourne  
Norwest  
Perth  
Sydney
4. We request the documents at paragraph 13 because we understand there arose out of the production an allegation of inappropriate behaviour or misconduct which was likely to have been the cause of any change to your client's HR policies and practices.

Category 7


5. At paragraph 26 and 27 of the Respondents' Second Further Amended Defence filed on 10 August 2018, the Respondents assert:
  26. *In or about April 2016, the Complainant made a complaint to the Sydney Theatre Company about the Applicant's conduct towards her during the Production.*
  27. *Following the complaint, the Sydney Theatre Company decided that it would never work with the Applicant again.*
6. Our client is entitled to know who on behalf of the STC made that decision, when it was made, and on the basis of what evidence and information. Against that background, our client is entitled to a copy of all documents and statements released by or on behalf of the STC to any journalist or member of the press, which may cast light on the STC's attitude towards him and whether or not it is true that the STC "*decided that it would never work with [him] again*".
7. In addition, we note that Katherine Stevenson of the STC stated on 30 November 2017: "*STC has at all times been clear that this was an allegation made to (not by) STC and not a conclusion of impropriety*". Our client is entitled to all documents and statements released by or on behalf of the STC to any journalist or member of the press, which may cast light on whether or not the STC did make any conclusions of impropriety.

Category 8

8. The documents sought by category 8 are relevant to our client's claim for aggravated damages against the Respondents.

We trust this satisfies your concerns, and that documents will be produced to the Registry as soon as possible prior to the return date on 12 September 2018.

Yours faithfully,

  
 per **Nicholas Pullen**  
 Partner  
 HWL Ebsworth Lawyers

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Form 3 (adapted)  
Rule 29.02(1)(8)

**Annexure certificate**

No NSD 2179 of 2017

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

**Geoffrey Roy Rush**

Applicant

**Nationwide News Pty Limited** and another

Respondents

This is the annexure marked **"MAS-4"** produced and shown to Miriam Anne Stiel at the time of swearing his affidavit this 12 September 2018.





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**TRANSCRIPT OF PROCEEDINGS**

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O/N H-924943

**FEDERAL COURT OF AUSTRALIA**

**NEW SOUTH WALES REGISTRY**

**WIGNEY J**

**No. NSD 2179 of 2017**

**GEOFFREY ROY RUSH**

**and**

**NATIONWIDE NEWS PTY LIMITED and ANOTHER**

**SYDNEY**

**10.16 AM, THURSDAY, 9 AUGUST 2018**

**MR S.T. CHRYSANTHOU appears for the applicant**

**MR A. LEOPOLD SC appears with MS L. BARNETT for the respondents**

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MR A. LEOPOLD SC: May it please the court, I appear with my learned friend, MS BARNETT, for the applicants on the interlocutory application who are the respondents in the substantive proceeding.

5 HIS HONOUR: Thank you, Mr Leopold.

MS S.T. CHRYSANTHOU: May it please the court, your Honour, I appear for Mr Rush.

10 HIS HONOUR: Thank you, Ms Chrysanthou. Yes, Mr Leopold.

MR LEOPOLD: Our understanding, your Honour, is that the privilege issue has gone away completely - - -

15 HIS HONOUR: Yes.

MR LEOPOLD: - - - and that there's no opposition to the application for us to amend in terms of the draft second further amended defence annexed to the first affidavit of Ms Saunders, which propounds a number of particulars of a defence of truth of all of the particulars bar one about misleading conduct - but bar one, but all of the sexually inappropriate, sexual perversion, etcetera, imputations, we allege truth and there's no opposition to those amendments going forward. Now, that is on condition that the hearing date can be vacated and dealt with seven weeks later. Now, your Honour said on the last occasion October was okay.

25 HIS HONOUR: Yes.

MR LEOPOLD: And your Honour will have seen from the submissions of both sides that 22 October is mooted. Now, your Honour, did say about November, that November involves Full Court sittings. It would impinge on the first week or so of Full Court sittings if one started on 22 October. All the lawyers on both sides are available for a trial starting then. It may be necessary to have audio-visual link for a few - some of the - of Mr Rush's witnesses. We don't object to that. The question is whether your Honour can impinge to some extent on the Full Court sittings in November.

HIS HONOUR: The answer to that question is yes. I do, at the moment, have a two-day hearing on the 29<sup>th</sup> and the 30<sup>th</sup>. I will endeavour to have those parties contacted to see if I can move those dates.

40 MR LEOPOLD: They could have an earlier, your Honour.

HIS HONOUR: Sorry?

45 MR LEOPOLD: They can have an earlier hearing now.

HIS HONOUR: Maybe. But – and I will endeavour to do so. I don't think that there's anything particularly pressing in that matter, at least not that I'm aware of. So we will proceed on the basis that I can move those dates and that it's not going to be a problem to impinge on the Full Court period. I should say, though, that I would  
 5 myself – I know that counsel have some availability issues if it goes beyond 13 days or 14 days, but I would propose this may encourage the parties to make sure that it actually does conclude within that period. But I would, at the very least, continue to sit until the evidence was concluded.

10 MR LEOPOLD: Yes.

HIS HONOUR: If the submissions couldn't be concluded in that two-week period, that could perhaps be accommodated. But I would certainly want the evidence to be concluded in that two-week period.

15 MR LEOPOLD: Yes. It's not atypical for there then to be a break for - - -

HIS HONOUR: Yes.

20 MR LEOPOLD: - - - short written submissions and then oral submissions just a few weeks later. It wouldn't want to be too much later, or it will be out of everybody's minds, but - - -

HIS HONOUR: Yes. But anyway.

25 MR LEOPOLD: - - - if it could be later in the month, perhaps.

HIS HONOUR: But - - -

30 MR LEOPOLD: Yes, we – did your Honour say 10? The estimate is up to 13 days. I thought your Honour said - - -

HIS HONOUR: I think I said 13.

35 MR LEOPOLD: 13. I thought you - - -

HIS HONOUR: But anyway, I will say 14 and we will see how we go.

40 MR LEOPOLD: Now, there are three issues raised. One is whether we should have up to 31 August to put on our outlines of evidence. Now, your Honour will see that, as we indicated in paragraph 10 of our written submissions, any further lay evidence will be in the nature of corroborating what Ms Norvill says about the conduct of Mr Rush towards her in the nature of the incidents your Honour has read about, about touching of her breast and touching of the lower back and tracing his finger across  
 45 the lower back and those incidents. That will be – there will be corroborative evidence of that - - -

HIS HONOUR: Have you told Ms Chrysanthou who that corroborative evidence will come from?

5 MR LEOPOLD: Not the names, but persons who were present at the time. And the point though - - -

HIS HONOUR: Why can't you tell her the names?

10 MR LEOPOLD: Well - - -

HIS HONOUR: And I'm not suggesting you tell me, certainly not at this stage anyway, but why can't you tell her?

15 MR LEOPOLD: Well - - -

HIS HONOUR: So I only say - I'm not being flippant, but the concern that has been expressed is that - and it's a legitimate one, it would seem, at first blush that Mr Rush has to go about preparing marshalling his evidence - - -

20 MR LEOPOLD: Yes.

HIS HONOUR: - - - in relation to these issues. So I think, at the very least, you can tell her. As I said, not now - that is, in this public forum, but I think you should at least - - -

25 MR LEOPOLD: Yes. Well - - -

HIS HONOUR: - - - endeavour to tell her within a short space of time - - -

30 MR LEOPOLD: Can we - - -

HIS HONOUR: - - - who it is envisaged that will be.

35 MR LEOPOLD: Yes, your Honour. Can we give two answers to that? I mean, one is it's - the nature of the allegations and the position Mr Rush holds in the acting world is such that not everybody necessarily wants to come out and say something about these allegations. And we don't want to give him names of people who we can't then put forward. The second thing is, they know exactly the territory. They know the confines of our pleading and they know - because we said it in our written  
40 submission - that it will merely corroborate what has already been said by Ms Norvill. And in those circumstances, they know the exact substance already. The  
- - -

45 HIS HONOUR: I think, the inference that I've just drawn from what you've just said is that you don't know who your corroborating witnesses will be - - -

MR LEOPOLD: Well - - -

HIS HONOUR: --- or if you will have any.

MR LEOPOLD: Well, your Honour draws that inference, and it's of the nature of the allegations that there's an element of accuracy in the way your Honour put it. It's  
 5 not wholly accurate, with respect, in the sense that there are people we know who can corroborate it, but whether we can ..... is another question.

HIS HONOUR: Yes. Well, anyway, that's one issue and I will ---

10 MR LEOPOLD: That's one issue. Another is, apparently, whether this application should be permitted not only on the basis that we've accepted readily, that we should bear costs straight away by virtue of the amendments, but that it's said -- for reasons that we don't understand -- that those costs should be on an indemnity basis. And the Colgate-Palmolive test involves the imposition of indemnity costs in circumstances  
 15 which it might be characterised as warranting the opprobrium of the court. But we made an application within two days of getting a statement of Ms Norvill, which, for the first time, was described as a final statement, having only had a signal from her earlier in July that she was prepared to embrace after -- your Honour has seen from Ms Saunders' affidavit, after indicating for some months that she did not wish to  
 20 cooperate. Now, we did everything we could, and there's no opprobrium in our conduct.

HIS HONOUR: I think the point -- I don't want to steal Ms Chrysanthou's thunder, but I think that point that's made against you -- or there's three points made against  
 25 you: (1) there is -- no attempt has been made to explain the late change of mind on the part of the witness' cooperation; and (2), perhaps more significantly, at the end of the day, the blame can be sheeted home to your clients because they chose to publish these articles in circumstances where they plainly had not spoken to the actress, they plainly had not secured her cooperation. And that is, at the end of the  
 30 day, the root cause for why you had to make three amendment applications. Now, that's the second point. And the third -- I've just forgotten now what the third point was. Well, I think it is that this is the third amendment application.

MR LEOPOLD: Yes. Well ---  
 35

HIS HONOUR: Now, there seems to me to be a fair argument that some opprobrium attaches to each of those points.

MR LEOPOLD: The -- well, we would say, as to it being the third application, that  
 40 one must take each application on its merits. And if there's to be an indemnity costs order in relation to this application, it's because of something about the nature of this application, not that we had two earlier failed applications. And the second thing we would say is that it's readily understandable that somebody in the acting world who's a relatively junior actor, such as Ms Norvill, who is the subject of -- or, sorry, who is  
 45 the centre of allegations about a very senior, indeed, iconic figure in the acting world, would be reluctant to come out and speak. Now, the publication was made at the outset and the original defence was pleaded on the basis of a second-hand version,

which your Honour held was not good enough or precise enough. But it's not as if News didn't have information at hand. News had information at hand which was second-hand information and the - - -

5 HIS HONOUR: Seems to also be, on your version – on the version of events in the defence now, to have been quite unreliable and inaccurate information.

MR LEOPOLD: Well, it's, with respect, in large part – the clearly arguable case on what we've pleaded, in large part, accurate because we've been able to plead a  
10 defence to the truth of all of the sexual impropriety allegations. Now, to the extent – it's not the case in the publishing world that one can't operate on the basis of hearsay. They're not bound by the laws of evidence. Publishers can't realistically be expected to go out and get a suite of signed statements or outlines every time they publish a story.

15 HIS HONOUR: Well, you can operate that way, but then you can't use that as an excuse when it doesn't work out for you in the long run - - -

MR LEOPOLD: Well, we can't - - -

20 HIS HONOUR: - - - and that's what has happened here.

MR LEOPOLD: You can't use as an excuse if you publish something that turns out to be wrong, because the defence of justification will fail and it might also rebound  
25 against you on the defence of qualified privilege, but what it doesn't do is warrant any opprobrium for amending when you get more precise information to hand.

HIS HONOUR: Yes.

30 MR LEOPOLD: And as to not having not spoken to Ms Norvill, there are statements of – our outlines of evidence amongst our qualified privilege witnesses which talk about the attempts to speak to Ms Norvill and which talk about the second-hand information which was received, including through the theatre company. Your Honour will have also seen annexed to the affidavit – the first  
35 affidavit of Ms Saunders the draft outline of evidence of Ms Norvill. Does your Honour have the reference to that?

HIS HONOUR: Yes.

40 MR LEOPOLD: Paragraph 37.

HIS HONOUR: Now, I just want to be a little bit careful here because - - -

MR LEOPOLD: I'm not trying to - - -

45 HIS HONOUR: No, no, no. It's only that if this affidavit is read, then it becomes a – I'm just trying to think of the term – an unrestricted document and can - - -

MR LEOPOLD: Yes.

HIS HONOUR: Including it annexures. And it is then, in the ordinary course, able to be released to the public.

5

MR LEOPOLD: Well - - -

HIS HONOUR: And I am, I have to say, extremely concerned about the draft proof of evidence or statement being made available to the public for a number of reasons. That is because, as I said on the last occasion, the evidence in this case will be heard viva voce, not by way of carefully crafted statements and affidavits – and I’m not directing that comment to this statement in particular, but any.

10

The reason that the court, often in cases such as this, hears evidence viva voce rather than in the form of, you know – written form is that it is often far more reliable to hear it from the horse’s mouth, so to speak, rather than carefully crafted statements and affidavits, and so Ms Norvill’s evidence will be what she says in court, not what’s in this statement. And for my own purposes I won’t be reading this statement before she gives evidence, because I want to hear her evidence from her and I don’t want there to be extensive public discussion about the contents of this document and, in particular, I have to say, some of the annexures thereto which are interesting, to say the least.

15

20

MR LEOPOLD: The substance of what’s in the outline is replicated in our amendments which will, we hope, be filed, and that will become a file document and then there will be separate questions about the extent to which that becomes public or doesn’t become public, as with any pleading.

25

HIS HONOUR: Well, there may be. In the absence of any application by anyone, I don’t have a problem with the pleading – necessarily have a problem with the pleading being made public – I think there’s a public interest in that and whoever reads it may draw their own inferences – but it’s manifestly clear from the pleading itself that they are no more than particulars of allegations, not anyone’s evidence.

30

MR LEOPOLD: Yes. Well, I was going to refer your Honour as to an explanation for why - - -

35

HIS HONOUR: Yes. Well, I’m happy to look at it for that purpose, but - - -

MR LEOPOLD: Well, paragraph 37 - - -

40

HIS HONOUR: - - - I don’t think that – perhaps you shouldn’t read great slabs of it into – onto the public record, that’s all.

MR LEOPOLD: Well, I can either read this small slab or leave your Honour to read it, but it’s - - -

45

HIS HONOUR: How about you just let me read it.

MR LEOPOLD: I beg your pardon, your Honour?

5 HIS HONOUR: I will just read it.

MR LEOPOLD: Yes. Paragraph 37, particularly from the sixth line “I was feeling”, but the whole.

10 HIS HONOUR: I understand that. That deals with a different point. That is why the actress didn’t speak to people at the Sydney Theatre Company at around the time when these events were said to have occurred. Now, this is back in April 2016 and then this all blew up into a – in the media. There was then defamation proceedings and then further media comment in relation to amendments and the like, and still the  
15 actress hadn’t come forward in mid-2017.

MR LEOPOLD: Well, I was merely addressing the first of your Honour’s three points about the late change of mind.

20 HIS HONOUR: Yes.

MR LEOPOLD: Your Honour said there had been no explanation. Now, also can we - - -

25 HIS HONOUR: Well, my point is I don’t think that is an explanation in her statement.

MR LEOPOLD: Well, it’s to be read also with paragraph 39, particularly the last three lines, but the whole.

30 HIS HONOUR: Yes.

MR LEOPOLD: Now, that does address your Honour’s first point and, to an extent, also your Honour’s second point that we hadn’t spoken to her – it’s true – and I’ve  
35 said what I want to say about that. The third of the matters between – the third and final part – one of the matters between the parties is that our learned friends want to put on some more expert evidence and they seem to be using this occasion as a reason for taking that on. If they want to put on further expert evidence they should seek leave to do so and give an explanation in the usual Aon v ANU sense of why  
40 they’re doing it now, but their chances will be enhanced by the fact that there’s an extra seven weeks in the timetable to potentially avoid any prejudice.

HIS HONOUR: Yes.

45 MR LEOPOLD: In any event, we say that should be the subject of a proper application and a proper explanation – pardon me for just a moment – and that



application will, no doubt, specify who the expert is or at least the nature of the discipline and what it's intended to cover.

HIS HONOUR: Yes.

5

MR LEOPOLD: May it please the court.

HIS HONOUR: Sorry. Before you sit down, Mr Leopold, the applicant's submissions had a series of orders and - - -

10

MR LEOPOLD: Yes. We've got a set of orders, which we can hand up, which has the 31 August date in paragraph 6 for our outlines and then a date 5 October for our learned friend's outlines of evidence.

15

HIS HONOUR: Yes.

MR LEOPOLD: So that was the first of the three matters in contention, and any reference to costs doesn't say indemnity costs - - -

20

HIS HONOUR: Yes.

MR LEOPOLD: - - - in the hope that it doesn't.

25

HIS HONOUR: Are they broadly consistent? One thing that I was attracted to, I must say - - -

MR LEOPOLD: Well, there's a mark-up.

30

HIS HONOUR: Yes.

MR LEOPOLD: We will hand up a mark-up and - - -

35

HIS HONOUR: One thing I was attracted to was the - and I confess I haven't read any of the evidence but the conclave or, as some people say, hot tubbing exercise between the experts that ought - this is really just a joint report conference. And is that embraced in your orders?

MR LEOPOLD: Yes, your Honour.

40

HIS HONOUR: Yes. Yes. Sorry, yours are the marked up ones.

MR LEOPOLD: They're both ours, but one is a mark-up from theirs and the other one is clean.

45

HIS HONOUR: Okay. Yes. Yes, Ms Chrysanthou.

MS CHRYSANTHOU: Your Honour, this is – although only the third formal attempt to amend the defence – in fact, the seventh version of the defence that has been served on us. And we, having considered it carefully, have formed the view that, in fact, most of the particulars that are provided are deficient in many respects and are not capable of proving most of the imputations. We form the view that that's something that can be dealt with at trial by way of objections to evidence, so we wish to make it plain that in not opposing the amendment the applicant in no way concedes that what's put forward is an adequate defence to the imputations pleaded.

10 HIS HONOUR: Does that mean that even though – I mean, the point of particulars sometimes is – at least to one of the main points and particulars is to define the issues so that objections as to relevance, for example, at trial can be considered by reference to the pleadings. Are you saying that I shouldn't take the particulars in the second further amended defence as being agreed in the sense that you would still object to evidence on the basis of relevance, even if they fell within those particulars?

MS CHRYSANTHOU: Yes, your Honour. So we say these particulars put us on notice of the case the respondents will try to prove, but we say at trial your Honour will have regard to the imputations and to the evidence sought to be adduced and determine whether or not each such piece of evidence, if objected to, is, in fact, relevant to proving the truth of any of those imputations. So we don't want to be met at trial with the response that it's relevant because it's in the particulars. We say that's not appropriate at this stage. We don't want to have a strikeout application at this point. We think that's a waste of time. We think the appropriate course is for the evidence adduced by the respondents will have to fall within these particulars as a matter of fairness and notice, but that's by no means a concession on our part that, in fact, these matters are relevant. For example, if your Honour looks at page 76 of Ms Saunders' first affidavit, particular 26 - - -

30 HIS HONOUR: I'm sorry. Just bear with me.

MS CHRYSANTHOU: - - - we say that wouldn't be admissible evidence to prove any conduct on the part of our client. That would be inadmissible, in fact, under the credibility rule under section 102 of the Evidence Act. It's irrelevant, it's inadmissible, and it could only be deployed in re-examination if, for example, an attack is made on Ms Norvill in the witness box of recent invention in some respect. So that's one example. Another example is the text message relied on that's said to occur six months after the events in question. We don't concede that that message is in any way relevant to any fact in issue.

40 HIS HONOUR: Which particular – is that one - - -

MR LEOPOLD: Twenty-four.

45 MS CHRYSANTHOU: Thank you – on page 76 of the affidavit. So that's six months after the events in question.

HIS HONOUR: That perhaps – I see.

MS CHRYSANTHOU: So, your Honour – so we say the most efficient course is for the pleading to be allowed on the basis that the trial would be moved to 22  
5 October. But that's not to be taken in any way to be a concession on Mr Rush's part that the pleading is any good. And we think it's not appropriate at this stage to have arguments about the particulars when those arguments can just be dealt with by way of evidence – objections at trial.

10 HIS HONOUR: Yes.

MS CHRYSANTHOU: Now, our client's position is - - -

15 HIS HONOUR: Sorry.

MS CHRYSANTHOU: Yes.

HIS HONOUR: Can I just ask, in that context - - -

20 MS CHRYSANTHOU: Yes.

HIS HONOUR: - - - annexure C to the draft – or the proof of evidence - - -

25 MS CHRYSANTHOU: Yes.

HIS HONOUR: I take it that the text message – that just referred to, in particular, 24 – is somewhere within that exchange – is it? Or - - -

30 MS CHRYSANTHOU: Yes, I think it's right at the end. So there's – your Honour will see there's messages from two years earlier.

HIS HONOUR: Yes.

35 MS CHRYSANTHOU: And then there's a big gap. And then there's the one in question.

MR LEOPOLD: That's 54, your Honour.

40 MS CHRYSANTHOU: And the one in question is cut off. It's not even the full message. So, on page 58, it just ends.

MR LEOPOLD: It's in – if you read 54 and 56 together, your Honour, they're – the whole ..... see it ends again at 56.

45 MS CHRYSANTHOU: No, it's cut off still. No, it's clearly cut off.

MR LEOPOLD: Well, it continues - - -

MS CHRYSANTHOU: So there's part of it missing.

MR LEOPOLD: - - - on page 58 as well.

5 MS CHRYSANTHOU: Yes, and it's cut off.

MR LEOPOLD: Well - - -

10 MS CHRYSANTHOU: Yes. It's not the whole message. So, obviously, your Honour, we anticipate issuing a subpoena for the full set of text messages, for example. That's one of the inquiries we would have to make. So - yes.

HIS HONOUR: I did go looking for that - that - perhaps understand why I gave up trying to find it.

15 MS CHRYSANTHOU: Yes, it's a bit confusing.

HIS HONOUR: Anyway - - -

20 MS CHRYSANTHOU: But we - there would have to be a subpoena to Ms Norvill, not just for that message and all the messages, but any other relevant communications, we anticipate. So, since last week, given your Honour's indication that there was availability in October, we have gone for some length to secure a date - with the cooperation of my learned friends - that everyone can do. And 22  
25 October has been arrived at with some difficulty on our part, because Mr - - -

HIS HONOUR: Well, I should - I have to say - say this sincerely - I congratulate the parties for reaching agreement about this, because it could have got ugly, basically.

30 MS CHRYSANTHOU: Yes. No. There was a supreme effort of cooperation by those at the bar table to ensure we could find - - -

HIS HONOUR: Yes.

35 MS CHRYSANTHOU: - - - a date that would suit everyone. And at least three of the three four people who would be appearing have trials to then attend to on 12 November. So it's not without some difficulty - - -

40 HIS HONOUR: Yes.

MS CHRYSANTHOU: - - - that the date's been arrived at. And, in those circumstances - Mr McClintock, in particular, who's been brought into this matter because Mr McHugh wasn't available for the September period - can only prepare  
45 for the 22 October date. He is in court from mid-September until mid-October. So he has accepted that he can appear on the 22 October date on the basis that he will do

the bulk of his deliberation in early September, at this time when this trial was originally supposed to - - -

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

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

HIS HONOUR: Well, it's - - -

20 MS CHRYSANTHOU: And that's the real problem.

HIS HONOUR: I mean, putting aside the fairly obvious fact that I can't imagine anyone would be particularly enthusiastic about giving evidence for either side, you're faced with a potential difficulty – you're both approaching the same potential witnesses, I suppose.

MS CHRYSANTHOU: Well, there's a limited pool, your Honour. There's a pool of people who were present. Given that there's no allegation, really, that these things were now occurring on stage in front of thousands of people, the pool has been reduced from the last version of the truth case. But, still, we're entitled – once we know who these witnesses are – to approach them ourselves, to issue subpoenas to them for relevant documents – and those sorts of inquiries – and it's not fair that we should have to wait until the end of August to make those inquiries. Now, I remind your Honour that one of the orders - - -

35 HIS HONOUR: When is Mr McClintock's window of opportunity to prepare?

MS CHRYSANTHOU: Well, the window of opportunity is when this trial was set down.

40 HIS HONOUR: I see.

MS CHRYSANTHOU: He has - - -

45 HIS HONOUR: Of course.

MS CHRYSANTHOU: He is back in court the following week until mid-October – until the – I think it's halfway through the week before the trial is to start – so until 17 – or 16 October.

- 5 So what we say is – they've known about this potential amendment application since 3 July – so over a month. They've had plenty of time – having been told by Mr Norvill's solicitor that she was willing to cooperate over a month ago – to make their own inquiries as to other witness. And, when your Honour looks at the affidavits of – the affidavit of Ms Saunders – they've been looking under stones for eight months.  
10 They've been talking to her family. They've been talking to her. No doubt they've been trying to talk to others.

- And the interlocutory application that was ultimately filed – and the basis upon which we have come to, in effect, not oppose – is – the order that is sought is that  
15 they will file their outlines of evidence by 10 August. That's one of the orders in the interlocutory application filed on 31 July. That should be done. And, if they can't get their outlines by tomorrow, they have to at least – as your Honour has said – tell us who the witnesses are – or who the witnesses could be – and perhaps have one more week to finalise their outlines, at most.

- 20 HIS HONOUR: Well, I don't – to be fair, I don't think 10 August is feasible at all.

MS CHRYSANTHOU: Well, it was - - -

- 25 HIS HONOUR: I mean, I understand why you say that it should be, but I don't – there's probably little point in me making that order, because it would be making an order which is likely to not be complied with. But, realistically - - -

- MS CHRYSANTHOU: Well, it is the order they asked for, your Honour. It's the  
30 order they were prepared to agree to 10 days ago. So what have they been doing?

MR LEOPOLD: I should point out that was when the trial was – we were hoping the trial would go ahead on - - -

- 35 HIS HONOUR: Yes.

MS CHRYSANTHOU: - - - 23 September.

- MS CHRYSANTHOU: No – so that's one issue, your Honour. So 31 August is just  
40 not feasible. Now, the next issue - - -

- HIS HONOUR: In the spirit of compromise, if they are directed to do it by 17 August – and these are just outlines of evidence. They're not – they don't have to be carefully crafted documents. They are just to give the other side fair notice of the  
45 name of the witness – number 1 – and the substance of their expected evidence. Now, that, Mr Leopold, gives you just over a week. Now, I know that's not - - -

MR LEOPOLD: Perhaps – could your Honour split the difference once more and make it mid the following week – that is, the 22<sup>nd</sup>?

HIS HONOUR: How about the 20<sup>th</sup>.

5 MS CHRYSANTHOU: We will take the 20<sup>th</sup>, your Honour. They have had eight months. They did publish two front page articles accusing my client of sexual misconduct when they had nothing. They're coming to your Honour in this affidavit of Ms Saunders telling your Honour that they had nothing. And now we know what  
10 they did have was rubbish, because they filed - - -

MR LEOPOLD: That's rubbish.

15 MS CHRYSANTHOU: - - - a defence, and they filed an amended defence, and then - - -

HIS HONOUR: You need to remember, Ms Chrysanthou, I'm not a jury - - -

20 MS CHRYSANTHOU: Your Honour - - -

HIS HONOUR: - - - even - - -

MS CHRYSANTHOU: - - - the front page - - -

25 HIS HONOUR: - - - particularly in an interlocutory application.

MS CHRYSANTHOU: The front page, after the amended defence was filed, on The Daily Telegraph, was stop doing it.

30 HIS HONOUR: Yes, well, that's - - -

MS CHRYSANTHOU: An allegation that they - - -

35 HIS HONOUR: That I have to - - -

MS CHRYSANTHOU: - - - now say is not correct.

40 HIS HONOUR: That I have to say is one of the reasons and you, no doubt, going to come to this why I'm a bit reluctant to – it may not arise because no one's going to have to read that affidavit, so I don't – probably don't have to make an order. I'm a bit concerned about releasing that draft statement, and, in particular, the annexures thereto.

45 MS CHRYSANTHOU: Well, some of the annexures are said by the person who prepared the statement to be confidential, and I should also note there are some confidential, for example, email addresses - - -

HIS HONOUR: I can understand that - - -

MS CHRYSANTHOU: - - - and things.

5 HIS HONOUR: - - - having read them.

MS CHRYSANTHOU: Yes. Now – so that’s the issue of the timing of the evidence. Your Honour, in relation to costs, I do read my instructing solicitor’s affidavits that have been filed in relation to the application. There’s the affidavit –  
 10 the original affidavit, which we called in the submissions Pullen 1, the date of which escapes me momentarily. I will just get that out. And there’s the affidavit of 2 August, and then the affidavit filed yesterday of 8 August, and those affidavits are relevant to the costs application which we now make. We say that costs should be paid on an indemnity basis. The reason, your Honour – sorry, it’s the - - -

15 MR LEOPOLD: Your Honour, there are some objections to those affidavits, but it can’t be that the whole of those affidavits is relevant to the indemnity costs application. Because I do have some objections to it, could we just – is it possible to just identify the parts that are said to go to the indemnity costs application?

20 HIS HONOUR: Well, why don’t you – why don’t we do it this way - - -

MS CHRYSANTHOU: Tell us the objections.

25 HIS HONOUR: - - - put your submissions - - -

MS CHRYSANTHOU: Yes.

HIS HONOUR: - - - which will include the facts that you say support them, and if  
 30 there’s any dispute about those facts then we can go to the affidavit - - -

MS CHRYSANTHOU: Yes, your Honour.

HIS HONOUR: If there’s no dispute about the facts we don’t have to go to  
 35 anything.

MS CHRYSANTHOU: Yes, your Honour. The first fact is that the matters complained of were published without the cooperation of this person.

40 HIS HONOUR: Yes.

MS CHRYSANTHOU: They should never have been published. So for News Ltd a – one of the best resourced litigants in the defamation world, to come to court and say this isn’t our fault. It’s not our fault she wouldn’t cooperate. We hounded her  
 45 and hounded her, and she wouldn’t cooperate, it’s not our fault. Well, it is, because it was completely inappropriate to publish those two front page articles without her cooperation, and, in fact, as your Honour will see from the amended reply, not only



did they not have her cooperation, the STC begged the journalist to not publish the article, in an email saying this is her story to tell. So not only did they not have her cooperation, they had a message through the STC that she didn't want the articles to proceed.

5

Now, they now stand here and we're at a point which the worst has happened, the hearing date is about to be vacated. My client has been preparing himself for this hearing since it was set in April. His witnesses have been preparing themselves. Everyone knows it's going to be a hearing that attracts a lot of attention, and it's stressful, not just for my client, but for the witnesses that have agreed to attend. We have to now adjust the expectations, not only of my client, but all the witnesses, some of whom have gone to some significant trouble to make themselves available in September, and I should say, your Honour, we've got a dozen reputation witnesses, all of them selected in addition because of their knowledge of the reputation of the applicant, but because of their availability in September.

15

There were many other witnesses we could have called, who we didn't because they weren't available in September. So that has thrown our preparation in disarray as far as that part of the case is concerned. Mr Rush has, as your Honour has seen from the affidavit evidence, has continuing – is suffering continuing trauma because of these proceedings and because of the allegations, so the delay of seven weeks is, maybe not a big deal to News Ltd, but it is a big deal to him. And now they stand here and say - - -

20

HIS HONOUR: As you point out in your written submissions, and, again, this is a fact I doubt is in issue, you have, effectively, said at each case management hearing in response to each application that your client is anxious to have his day in court at the earliest opportunity.

25

MS CHRYSANTHOU: Yes, and I should say the only reason we're consenting to this adjournment, even though the delay is intolerable to Mr Rush, is because, frankly, it's in his interest for these allegations to be dealt with as a matter of finality, in full. He's ready to come to court, and he wants them to be determined. And that's the reason why the application is not opposed. And even though seven weeks is intolerable, it's not his fault that this delay is occurring. And, your Honour, I should say, one thing that is a substantial part of this amendment is the complete abandonment of the section 30 defence.

35

Now, one can infer, perhaps, that the readiness with which the respondents were willing to abandon this defence reflects their views on the prospects of that defence. Your Honour will recall the first directions hearing in this matter when Mr McHugh called the defence a joke. We've maintained that position throughout the proceedings. We have had to incur huge expense, and this is dealt with in Mr Pullen's affidavit sworn yesterday, interlocutory processes, reviewing discovery, folders of discovery by the respondents only on the section 30 issues, preparing to cross-examine the witnesses, preparing written submissions because our written submissions were due in a couple of weeks, on the section 30 issues.

40

45

HIS HONOUR: On that point then I suppose we need to clarify this. In terms – the expression costs thrown away is generally well understood, but do you say that the costs thrown away will include all of your costs incurred in relation to the section 30 defence?

5

MS CHRYSANTHOU: Yes, yes, definitely. The amendment now includes the deletion of the section 30 defence.

MR LEOPOLD: We accept that.

10

HIS HONOUR: Yes.

MS CHRYSANTHOU: Now, there is no reason, given we have taken a pragmatic view, and we're not opposing the application, that Mr Rush should be out of pocket at all because of this amendment and because of the vacation of this hearing date. He has done nothing wrong.

15

HIS HONOUR: That's an important point because, as I recall it, I mean – well, let me put it this way. The purpose of a costs order is not to punish, it's to compensate, and you say that in all the circumstances here, putting aside the allocation of blame and the like, the – what you would say the exceptional circumstances in this case say that he should be fully compensated - - -

20

MS CHRYSANTHOU: Yes.

25

HIS HONOUR: - - - which is, at the end of the day, what an indemnity costs order is - - -

MS CHRYSANTHOU: Otherwise - - -

30

HIS HONOUR: - - - it's not punishment.

MS CHRYSANTHOU: Well, it's not punishment, otherwise the prejudice to him is actually in the form of hundreds – you know, tens of thousands of dollars because the amendment is so substantial. If the amendment was only to add something, and not to take something away, then the costs thrown away wouldn't really be significant, but we're talking about months of work, on this side of the bar table, and from those behind me, not only going through discovery, interrogatories only directed to the section 30 issues, the confidential source – 12 confidential sources, and having to prepare as to how to deal with that. That's all a section 30 issue, completely irrelevant to the truth case, the reply, the amended reply, a huge amount of work, so if the amendment's allowed and they can just drop their section 30 defence at this point, then it's hundreds of thousands of dollars wasted, and that should be compensated on an indemnity basis. Now, the other relevant factor - - -

45

HIS HONOUR: One saving grace of the qualified privilege defence was that I got to learn about the Burstein principle, something about which I knew nothing before this case.

5 MS CHRYSANTHOU: Well, that was a damages issue. that was - - -

HIS HONOUR: Wasn't that part of the – anyway, it doesn't matter.

10 MS CHRYSANTHOU: It was interesting, your Honour. Now, the final issue is, as your Honour has already raised, Mr Zweir, Ms Norvill's solicitor, has put on an affidavit, and he has not explained why, all of a sudden, the night before the mediation in this case, he was instructed to communicate with News Ltd to cooperate in this case. No explanation at all.

15 HIS HONOUR: Well, I didn't know it was the night before the mediation, but anyway.

20 MS CHRYSANTHOU: So in those circumstances, your Honour, the delay is their fault. The prejudice is extreme to Mr Rush, and I should say, your Honour, we will be making an application at the end that the seven-week delay be compensated by way of aggravated damages because it has been caused by the respondents. It has been caused by their reckless journalism in printing two front-page stories when they had absolutely nothing. It has been caused by their conduct in filing two versions of a defence that they may now, on their current position, say were wrong and then  
25 reporting those wrong defences on the front page: ongoing hurt to my client and ongoing misconduct on the part of the respondents.

HIS HONOUR: Yes.

30 MR LEOPOLD: Thank you.

MS CHRYSANTHOU: Sorry. Just one small point, your Honour. We're not seeking to put on new expert evidence. We're just seeking to reply to an expert that they've put on - - -

35 HIS HONOUR: Yes.

40 MS CHRYSANTHOU: - - - to which – we had no notice they were putting on an expert, being a lawyer.

HIS HONOUR: Was there already provision in the orders for a reply to the expert report?

45 MS CHRYSANTHOU: No. There wasn't, and all we're seeking is – we're not seeking to put on new evidence-in-chief. We're only seeking to reply to their report.

HIS HONOUR: Strictly a reply.

MS CHRYSANTHOU: Strictly a reply, and if it strays beyond that, then my learned friends can object.

5 HIS HONOUR: Is it from a – so it will be from a different witness, because it was not - - -

10 MS CHRYSANTHOU: Yes. Well, it's possible that it will be from Mr Spector, who's Mr Rush's agent, but it's possible, because he's not necessarily independent – he has been Mr Rush's agent for 20 years – that we might get someone who's at – more at arm's length.

HIS HONOUR: Yes. Mr Leopold, just dealing with the factual matters that underpin those submissions, is there any dispute about any of those?

15 MR LEOPOLD: Yes. Yes. As to the fourth of the matters, which was continuing trauma by Mr Rush, I was going to object to the admissibility of paragraphs 37 to 40 of the first affidavit of Mr Pullen. No. No. The first of the two affidavits on this application, the one of - - -

20 HIS HONOUR: 2 August.

MR LEOPOLD: Around 2 August. Yes.

25 HIS HONOUR: Yes.

MR LEOPOLD: Partly because it grossly violates the opinion rule, partly because it's just bare assertion, and, if I was going to be technical about it, it doesn't even purport to be on information and belief. So it doesn't even satisfy section 75 of the Evidence Act.

30 HIS HONOUR: What about – sorry. What paragraphs did you object to?

MR LEOPOLD: 37 to 40.

35 HIS HONOUR: What about 39? It has the withdrawal from the Twelfth Night and the – that – whatever is – may be said about that, that exhibits a report. I suppose the media report is - - -

40 MR LEOPOLD: Well - - -

HIS HONOUR: - - - a hearsay report, but it seems to now be a fairly notorious fact.

MR LEOPOLD: Well, we particularly object to the words “had to” in the second line and the reference to medical advice in the quoted passage.

45 HIS HONOUR: I'm just trying to think of the best – what do you say in response to that, Ms Chrysanthou?

MS CHRYSANTHOU: Your Honour, I'm surprised that paragraph 37 is actually in dispute, given a Google search would demonstrate that Mr Rush is associated with the Me Too movement as a result of the respondent's conduct. Your Honour, the rest of it is hearsay evidence which is admissible under section 75 of the Evidence –  
 5 because it's an interlocutory application. Mr Pullen is Mr Rush's solicitor. He has day-to-day contact with him, and he's putting these matters on information and belief. Well, if – I'm happy to put Mr Pullen in the witness box to say that he puts these matters on information and belief. My friend did call for Mr Pullen to come up from Melbourne to be cross-examined. So he is here, and I should say, your Honour,  
 10 the opening part of the affidavit, paragraph 2, covers that in any event. So he probably doesn't need to get in the witness box.

HIS HONOUR: Think that's right, Mr Leopold.

15 MR LEOPOLD: Yes. As – that's right as to paragraph 37, your Honour.

MS CHRYSANTHOU: And 38 and 39 – – –

20 MR LEOPOLD: No.

MS CHRYSANTHOU: – – – and 40.

MR LEOPOLD: Well, thirty – 38, 39 and 40 are all infected by a violation of the opinion rule, that is:

25 *...continues to suffer from emotional and physical turmoil –*  
*etcetera.*

30 HIS HONOUR: Well, I read – I think that if they're read as being that Mr Rush has told his solicitor that he continues to suffer from emotional and physical turmoil, then – – –

MR LEOPOLD: Yes, your Honour. If that's the way it's read, that's his own  
 35 personal characterisation of it, that then – no further objection.

HIS HONOUR: Yes.

MR LEOPOLD: Then 39: "had to" is redolent of some sort of medical condition  
 40 and then – and particularly when it's then – – –

HIS HONOUR: Well, again, I will read that as being that's what Mr Rush told his solicitor.

45 MR LEOPOLD: And then there's just dangled there "medical advice", without deigning to annex the medical advice:

*...due to my current circumstances and medical advice –*

dot, dot, dot.

5 HIS HONOUR: Yes.

MR LEOPOLD: Yes. But it's – it would be in for all purposes, and then lastly, paragraph 40, the "because of" is a causal nexus which is again – raises matters of medical opinion.

10

HIS HONOUR: Well, I will admit those paragraphs on the basis that they are – amount to no more than what Mr Rush has informed Mr Pullen, as opposed to being evidence of anyone else's opinion about Mr Rush's mental or physical state.

15 MR LEOPOLD: Yes, your Honour. Now, also in dispute is the assertion by our learned friend that the STC begged News not to publish the article, didn't want to proceed, etcetera.

20 HIS HONOUR: So that's – you say that's just – that's asserted in the reply, but it's only an assertion in their reply.

MR LEOPOLD: It's a bare assertion, and it's contrary to the fact. I mean, it may be that there was a discussion about whether she should be named or not, but the gravamen of what our learned friend put was just wrong.

25

HIS HONOUR: Well, let me just have a look at that.

MS CHRYSANTHOU: It's just – it's paragraph (t) of the amended reply. So it's our assertion.

30

MR LEOPOLD: It's a – yes. That's right. It's a fact in – I was asked whether ..... was a fact in issue, and it's in issue.

HIS HONOUR: Well, there's no evidence of it.

35

MR LEOPOLD: None. None.

HIS HONOUR: It's simply an allegation in the defence. Yes. In the reply.

40 MR LEOPOLD: And on my instructions, it's wrong.

HIS HONOUR: Yes.

45 MR LEOPOLD: Now, our learned friend also puts – so they're the matters that are – the factual matters that are in issue.

HIS HONOUR: Yes.

MR LEOPOLD: Now, our learned friend also put that the – made a complaint of shouldn't have been published without getting a statement from or speaking to Ms Norvill. I've already - - -

5 HIS HONOUR: You accept as a fact that it was published without - - -

MR LEOPOLD: Yes. But the – we do, and I've already addressed that in chief - - -

HIS HONOUR: Yes.

10

MR LEOPOLD: - - - but I would add that an indemnity costs order, if one looks at the principles explained in Colgate-Palmolive, can't be made to extend to what our learned friend says is the quality of the journalism, which we don't accept - - -

15 HIS HONOUR: Yes.

MR LEOPOLD: - - - but if she's critical of the quality of the journalism, there's nothing that one can find in the principles explained in Colgate-Palmolive that would permit an indemnity costs order for the quality of journalism. Then – I should have said, sorry, another fact which didn't seem to – there is one other fact, I think, that's not subject of evidence ..... our learned friend said there are other witnesses who could have been called, but they weren't available in September, when – that has caused disarray.

20

25 We don't think – I would have to double-check, but we don't think there's any evidence of that, but it doesn't – again, these are just points made about possible prejudice, which don't in any way go to the principles as to when an indemnity costs order should be made. Another point made about indemnity costs was as to the section 30 or qualified privilege defence, and our learned friend said your Honour would infer from the fact that we are not pressing it that that says something about the prospects of success. Now, Ms Saunders said in her affidavit – I haven't read it yet, but I will if I need to, and it can be challenged or not challenged – that it was in order to – it was dropped in order to accommodate the hearing on 22 October, so that it wouldn't go not just 13 days but some much longer period. That's the reason given as to why it was dropped and - - -

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35

HIS HONOUR: I think Ms Chrysanthou put it no higher than that – accepting that that's the reason given in evidence, that the willingness – that there's an inference that should be drawn from the willingness to drop that. Now, that's an inference.

40

MR LEOPOLD: Well, we say the inference shouldn't be drawn.

HIS HONOUR: Whether it can or should be drawn is another thing, I suppose. You take - - -

45

MR LEOPOLD: We say it shouldn't be drawn.

HIS HONOUR: Yes.

MR LEOPOLD: And I've got a paragraph of an affidavit I can read if it's necessary. It shouldn't be necessary.

5

HIS HONOUR: I don't think it's in issue that that's what - - -

MR LEOPOLD: No. Then, again, veering into other areas outside indemnity costs, our learned friend, going back to her own view – personal view about quality of journalism, in a flourish, held up the front page and said it was false because it had said that – what are the words on the front page?

10

HIS HONOUR: “Just stop it”, I think.

15

MR LEOPOLD: “Stop doing that”.

HIS HONOUR: Something – “stop doing it”.

MR LEOPOLD: “Stop doing it”. Your Honour will see, if your Honour looks back at that statement of evidence which your Honour had open and looks at paragraph 28 – yes, in the fifth line, paragraph 28.

20

HIS HONOUR: Yes.

MR LEOPOLD: Now, if your Honour were, despite all our submissions to the contrary, minded to make an indemnity costs order, there should be a distinction between some opprobrium, which we sense from some of your Honour's comments, in relation to the late nature of the amendments going to justification, on the one hand, and the dropping of qualified privilege on the other hand. The reason given – and I will read the paragraph. It's paragraph 9. So I will read paragraphs 1 and 9 of the affidavit of Ms Saunders of 6 August.

30

HIS HONOUR: Yes. No objection to that, Ms Chrysanthou? That's just - - -

35

MS CHRYSANTHOU: No, objection, your Honour.

HIS HONOUR: Yes.

MR LEOPOLD: Now, there's – to plead a defence and then to not press it on further reflection – and particularly when the further reflection is underlined by the reasons given in paragraph 9, cannot, in our respectful submission, warrant, as an exercise of discretion, an indemnity costs order based on the principles explained in Coalgate-Palmolive. And I haven't brought the principles along because I – well, I wasn't expecting an extensive debate about it today, but that's our submission.

40

45

HIS HONOUR: Yes.



MR LEOPOLD: Now, that deals with everything we want to say about indemnity costs. There's one other matter we should draw your Honour's attention – well, pardon me just a moment. Much of what our learned friend has put has also been said in the context of what is already claimed by way of aggravated damages. Now,  
 5 there's a risk if indemnity costs are ordered that there will be some sort of double counting. But even if your Honour is against us on the justification amendments being made a late part of the argument, the dropping of qualified privilege should, in our respectful submission, clearly be excised from any such order. It's quite a separate category.

10

HIS HONOUR: Sorry, just to make that clear, you accept that there was an order for costs thrown away that includes the work engaged in relation to the defence of qualified privilege, but it shouldn't be an indemnity cost in relation to - - -

15

MR LEOPOLD: Yes, your Honour. That's – yes, and it must – that's the first part of that proposition.

HIS HONOUR: Yes.

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MR LEOPOLD: It must cover it because the amendments include the deletion of that.

HIS HONOUR: Yes.

25

MR LEOPOLD: But, yes, your Honour, with respect, put it entirely accurately. It's really just the costs of this application and any costs arising from the adjournment, but it's difficult to see that the adjournment itself is going to cover any costs if there was anything wasted for a trial on 3 September, but it's – in any event, your Honour has the submission that it really has exercise - - -

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HIS HONOUR: Well, it may - - -

MR LEOPOLD: - - - has to excise - - -

35

HIS HONOUR: It may not be – if Mr McClintock is going to use that period of time to prepare, then it may be that there's not – that we're not arguing about a significant - - -

40

MR LEOPOLD: It's hard to see how it could be. But anyway, our primary submission is that it's way – the whole lot is way outside any principle your Honour will find on a reading of the principles in Colgate-Palmolive, and it ought to be an ordinary order for costs thrown away by virtue of the amendments.

HIS HONOUR: Yes.

45

MR LEOPOLD: There's one matter which I haven't mentioned yet which we should just draw your Honour's attention. Your Honour will have seen in our

learned friend's written submissions in paragraph – around paragraph 15 – the word “criminal” appears around paragraph 15. I was meant to find that, your Honour, I'm sorry.

5 MS CHRYSANTHOU: No, it's 13.

MR LEOPOLD: Paragraph – thank you very much. Paragraphs - - -

MS CHRYSANTHOU: Line – the second line.

10

MR LEOPOLD: Thanks very much. Paragraph 13, line 2:

*...including serious allegations of criminal conduct.*

15 That – we're not precisely sure what that relates to, but it seems that it could only relate to the words “sexual assault” appearing - - -

HIS HONOUR: Yes.

20 MR LEOPOLD: - - - three lines later. Now, it has never been suggested that the imputation pleaded in the statement of claim, which includes the phrase “sexual assault”, is intended to agitate an imputation, which would be gleaned by the ordinary reasonable reader from reading the articles, that the applicant engaged in the criminal offence of sexual assault within the meaning of the law of New South  
25 Wales, which involves some sort of penetration, as I understand it. Now, that could not possibly be gleaned from these articles. If that's the way it's put, we will have to file an application seeking to have that imputation struck out. We had anticipated  
- - -

30 HIS HONOUR: I'm not sure that – I'm not sure – though this was never my area of practice, but I'm not sure that sexual assault is confined to acts of penetration in New South Wales or anywhere else.

MR LEOPOLD: Well, I think, as opposed to – I think, in the Criminal Code - - -  
35

HIS HONOUR: Anyway, I understand your point.

MR LEOPOLD: Yes. We took it to be something that the ordinary reasonable reader would understand - - -

40

HIS HONOUR: Yes.

MR LEOPOLD: - - - to be sexual assault, and that's the way we've pleaded to it. If it's meant to be the crime of “sexual assault” in New South Wales, then we will have  
45 to put on application to have it struck out because no – that is, if we're right in our understanding that it involves penetration.

HIS HONOUR: Well, I think – again, it was never my area, but I think the crimes that deal with assaults of a sexual nature, so they’re not limited to one section of the Crimes Act or any other Act, that – I think there’s any number of different types of offences, but, as I said, I’m not - - -

5

MR LEOPOLD: They have different language. There’s indecent assault - - -

HIS HONOUR: That’s – yes.

10 MR LEOPOLD: - - - which could cover a groping-type act, but as – our understanding is not sexual assault. Now, if that’s right, this should be clarified before the trial so it doesn’t go off the rails. There was a case called *Singleton v French* in the 1970s or early 1980s involving the phrase “breach of trust” and the entire thing went off the rails and - - -

15

HIS HONOUR: This is ensuring that the parties are - - -

MR LEOPOLD: Clear about the case they’re being asked to meet.

20 HIS HONOUR: - - - clear about what the imputation is – the meaning of the imputation is. Now, that would obviously be a particularly critical matter if the matter was to be tried by a jury, but – or the - - -

MR LEOPOLD: Yes.

25

HIS HONOUR: - - - factual issues to be determined by a jury, but even so, the parties should – there should be some measure of agreement as to what that means - - -

30 MR LEOPOLD: Yes, yes.

HIS HONOUR: - - - or at least needs to be clarified before the trial. Yes, I accept that.

35 MR LEOPOLD: Yes. We seek – in light of the word “criminal” - - -

HIS HONOUR: Yes.

40 MR LEOPOLD: - - - in paragraph 13, we seek clarification of that and invite your Honour to - - -

HIS HONOUR: Yes.

45 MR LEOPOLD: - - - ensure that our learned friend clarifies that.

HIS HONOUR: Well, probably the appropriate course in that regard is – well, perhaps the easiest way - - -

MR LEOPOLD: To write a letter.

HIS HONOUR: - - - is for you to speak to Ms Chrysanthou - - -

5 MR LEOPOLD: All right. All right. Yes.

HIS HONOUR: - - - in due course and try and sort that out.

10 MR LEOPOLD: Yes.

HIS HONOUR: If it needs to be the subject of correspondence, then so be it. But if there is an issue, then I accept that it's something that may need to be dealt with prior to the trial.

15 MR LEOPOLD: Yes, your Honour.

HIS HONOUR: And if it's necessary to have a further case management hearing to resolve that issue, then it can be done.

20 MR LEOPOLD: Yes, your Honour. Pardon me just a moment. Yes. So the problem is that in Crimes Act 1900, section 61I headed "Sexual Assault" provides:

*Any person who has sexual intercourse with –*

25 etcetera, etcetera, but it's the one headed Sexual Assault.

HIS HONOUR: I see

30 MR LEOPOLD: And 61H, likewise. I don't need to take his Honour to a definition of sexual intercourse, but – which is contained in section 61H, but - - -

HIS HONOUR: Just proves that everything is defined in the legislation these days. It leaves nothing to the imagination.

35 MR LEOPOLD: There can be such a thing as over-definition, your Honour. But anyway, we will seek to clarify it, but the word "criminal" in paragraph 13 of the submissions screamed out to us that we were heading for a problem.

40 HIS HONOUR: Yes. Well, if there is any issue about – and any of the imputations, then that should be resolved prior to the trial, I think - - -

45 MR LEOPOLD: Particularly when we've pleaded to it on an assumption to date – in the draft – an assumption to date that it meant what an ordinary reasonable reader would understand by the expression. And in any event, it would have to be thought that no ordinary reasonable reader would have a grasp of what the technical sexual assault connoted and, therefore, it would be what's called a true innuendo where it would only be defamatory in the eyes of certain persons who read the article who

knew of what the technical meaning of “sexual assault” was. So our learned friends really need to grapple with that, but we will deal with that.

HIS HONOUR: Yes.

5

MR LEOPOLD: Please the court.

HIS HONOUR: Now, aside from the costs issue, Ms Chrysanthou, have you seen the marked-up version of the orders and - - -

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MS CHRYSANTHOU: Yes. So there’s a – the marked-up version deletes our order to file evidence in reply to the evidence of Mr Marks.

HIS HONOUR: So where is that?

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MS CHRYSANTHOU: Sorry. I will just get the version. I’ve got a few different versions here.

HIS HONOUR: I see that. I think that’s on page 2 - - -

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MS CHRYSANTHOU: Yes.

HIS HONOUR: - - - just before the paragraph numbered.

25 MS CHRYSANTHOU: So looking at the marked-up version - - -

HIS HONOUR: Yes.

30 MS CHRYSANTHOU: - - - they’ve deleted – yes, they’ve deleted the order under order 13 at the bottom of the page.

HIS HONOUR: So you would want to reinstate - - -

MS CHRYSANTHOU: Yes.

35

HIS HONOUR: - - - at least the second of those deleted paragraphs.

MS CHRYSANTHOU: Yes.

40 HIS HONOUR: Yes.

MS CHRYSANTHOU: And I think there’s no issue about, now, the signing of the key statements, so we’ve got not issue with order 7 – sorry – order 8.

45 HIS HONOUR: So the issues are in relation to order 6, that’s the date there, but I think - - -

MS CHRYSANTHOU: The date, yes.

HIS HONOUR: Well, I can resolve that now. Let's – I think we settled after the negotiation process on 20 August.

5

MS CHRYSANTHOU: Yes.

HIS HONOUR: So that date would be included there. You would want the reinstatement of that paragraph about your reply evidence.

10

MS CHRYSANTHOU: Yes.

HIS HONOUR: The matters that the court notes have been moved to the end.

15 MS CHRYSANTHOU: Yes, that's fine, and then order 20, the basis of the costs order.

HIS HONOUR: It's only, then, the indemnity costs. Yes.

20 MS CHRYSANTHOU: And I should just flag one small thing, your Honour. It has been the subject of correspondence and will probably be the subject of further correspondence which may require a case management hearing in the future. But we've, as is typical in these matters, received answers to interrogatories about extent of publication, and we find that the numbers we've been provided with are  
25 completely bizarre and don't accord with other documents that we've seen issued on the part of the respondents as to their readership figures. And that's something that we will try and sort out by correspondence, but it may give rise to an application for further and better answers to interrogatories.

30 HIS HONOUR: Yes.

MS CHRYSANTHOU: And, for example, there's a claim that no one read the digital version of these articles in some of the other – there were no hits on the digital version, so we think there's a misunderstanding between the parties as to what hit  
35 means, and we think that needs to be sorted out.

HIS HONOUR: I think you may be able to sort that out, hopefully, but we will see.

40 MS CHRYSANTHOU: Yes. It's strange, because I've read it, so I don't understand how there's no hits, so - - -

MR LEOPOLD: That's just a fact, your Honour.

45 MS CHRYSANTHOU: Yes. Anyway. So that's something we've raised in correspondence and we will explore further in correspondence. Yes.

MR LEOPOLD: Sorry. Your Honour, I meant to mention that if your Honour is shrinking the day in paragraph 6 I was wondering if paragraph 7 could come back a bit. It's – paragraph 7 now would give 46 days and they're not even necessarily in reply or response. It's not just 46 days. It's from now to 5 October.

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HIS HONOUR: Yes.

MS CHRYSANTHOU: We would actually propose 14 September. My friends are the ones that gave us all that time, so that's their order.

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HIS HONOUR: Anyway, it doesn't matter who came up with it.

MS CHRYSANTHOU: Yes. Well - - -

15 HIS HONOUR: You're happy with 14 September.

MS CHRYSANTHOU: Well, if they're getting an extra week we will say 21 September, your Honour.

20 HIS HONOUR: Very well.

MS CHRYSANTHOU: They're actually getting more than an extra week, so - - -

25 HIS HONOUR: Yes. Very well. Would it be useful to agree on a date for the case management hearing at some stage after some of these interlocutory steps have been complied with, to lock it in now so that if there is any issue or dispute that needs to be resolved we can resolve it then. If there is nothing that needs to be resolved then I would be more than happy to vacate it, but it might be useful that maybe lock in a date when counsel is available now. And, as I said, if everything is going along swimmingly – which is probably unlikely, but we will see – then we can vacate that date, perhaps - - -

30

MS CHRYSANTHOU: Well, the week of 3 September has just opened up. I'm available then.

35

HIS HONOUR: Well, I think your outlines of evidence aren't due until 21 September. Why don't we make it some time towards the end of September or early October so that most of – at least all of the evidence should be complete and if there are any issues or misunderstandings, 2 October or the week of the – I think 1 October is a public holiday.

40

MR LEOPOLD: 2 October, your Honour.

MS CHRYSANTHOU: Sorry. I'm not available on 2 October, your Honour - - -

45

HIS HONOUR: It can be any - - -

MS CHRYSANTHOU: - - - but 3 October is suitable.

5 HIS HONOUR: 3 October. Very well. And, as I said, that's to resolve any issues that arise and it may be convenient, if there is any issue about the imputations, that we can ventilate it at that hearing. And, as I said, if it's unnecessary then I don't want to put the parties to the expense of it, but I will list it for 9.30 on 3 October. Is there anything else?

10 MR LEOPOLD: No, your Honour. Please the court.

HIS HONOUR: Ms Chrysanthou.

MR LEOPOLD: Your Honour, is your Honour reserving on the - - -

15 HIS HONOUR: Yes. So what I propose to do is to make the orders in the draft short minutes and, Ms Chrysanthou, I might get you, just so there's no misunderstanding, to provide a final version of this today.

20 MS CHRYSANTHOU: Yes, your Honour. We will email that.

HIS HONOUR: But what I had in mind is making those orders, inserting the date 20 – sorry – 20 August in order 6, 21 September in order 7 reinserting the direction – the order in relation to further expert evidence in reply. So that's strictly evidence in reply, I think, resolves Mr Leopold's concern about.

25 MR LEOPOLD: Yes, your Honour.

HIS HONOUR: I will reserve on the question of the nature of the costs order, and I will make a decision and deliver some short reasons next week.

30 MS CHRYSANTHOU: Yes, your Honour.

35 HIS HONOUR: And I will also add in an order fixing the matter for a further case management hearing at 9.30 am on 3 October 2018. Now, just to be clear, I think the evidence that has been read in relation to today's case management hearing is essentially limited to paragraphs 37 to 39 of Mr Pullen's affidavit of 2 August 2018, paragraph 9 of Ms Saunders' affidavit, I think.

40 MR LEOPOLD: Yes, and 1, if it matters.

HIS HONOUR: And paragraph 1 – it must be her second affidavit, sorry – Ms Saunders' affidavit of - - -

45 MR LEOPOLD: 6 August.

HIS HONOUR: - - - 6 August. I will make it clear that I don't – and so Ms Saunders' affidavit of 31 July 2018 is not read, and so it – but most particularly the



annexures thereto are not – remain as restricted documents at this stage. I take it that you have no application to make in relation to any non-publication order in relation to the defence.

5 MS CHRYSANTHOU: No, your Honour.

HIS HONOUR: The other documents that are being relied on in relation to this application are the respective written submissions. There's no issue in relation to those being made public.

10

MS CHRYSANTHOU: No, your Honour.

MR LEOPOLD: No, your Honour.

15 HIS HONOUR: No. Yes. Very well. Well, Ms Chrysanthou, if you send up a final version of those orders I will make them in chambers. As I said, I will reserve on the question of the nature or type of costs order to be made, that is whether it's costs in an indemnity sense or otherwise, and I will deliver some brief reasons next week, otherwise I will adjourn.

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MS CHRYSANTHOU: Thank you, your Honour.

MR LEOPOLD: Please the court.

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**MATTER ADJOURNED at 11.32 am UNTIL  
WEDNESDAY, 3 OCTOBER 2018**