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Details of Filing

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File Title:	GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR
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Important Information

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

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APPLICANT'S OUTLINE OF CLOSING SUBMISSIONS

NSD 2179/2017

GEOFFREY RUSH

Applicant

NATIONWIDE NEWS PTY LIMITED & JONATHON MORAN

Respondents

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A. BACKGROUND

Pleadings

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

2. The current pleadings are:

   (a) Application and Statement of Claimed filed on 8 December 2017;
   (b) Second Further Amended Defence filed on 10 August 2018 (**2FAD**); and
   (c) Amended Reply filed on 3 July 2018[1].

3. The Publications carry serious defamatory allegations about the Applicant - namely, that:

   a) Geoffrey Rush had engaged in scandalously inappropriate behaviour in the theatre;

   b) Geoffrey Rush had engaged in inappropriate behaviour of a sexual nature in the theatre;

   c) Geoffrey Rush had committed sexual assault in the theatre;

   d) Geoffrey Rush had engaged in inappropriate behaviour of a sexual nature in the theatre;

   e) Geoffrey Rush is a pervert;

   f) Geoffrey Rush behaved as a sexual predator while working on the Sydney Theatre Company's production of *King Lear*;

   g) Geoffrey Rush engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of *King Lear*;

   h) Geoffrey Rush, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the Sydney Theatre Company's production of *King Lear*;

[1] The Amended Reply is now of no effect given the abandonment of the s.30 defence after it was filed.

i) Geoffrey Rush had committed sexual assault while working on the Sydney Theatre Company's production of *King Lear*;

j) Geoffrey Rush behaved as a sexual predator while working on the Sydney Theatre Company's production of *King Lear*;

k) Geoffrey Rush engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of *King Lear*;

l) Geoffrey Rush, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of *King Lear*;

m) Geoffrey Rush's conduct in inappropriately touching an actress during *King Lear* was so serious that the Sydney Theatre Company would never work with him again; and

n) Geoffrey Rush had falsely denied that the Sydney Theatre Company had told him the identity of the person who had made a complaint against him.

4. The Respondents now (since August) plead justification to each of the imputations except the last one[2]. The particulars of justification fail, even taken at their highest, to prove the truth of many of the imputations.

Conduct of the proceedings

5. The conduct of the proceedings is largely set out in the Applicant's Outline of Opening and in previous judgments: *Rush v Nationwide News* [2018] FCA 357 (Tab 15); *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550 (Tab 16); *Nationwide News v Rush* [2018] FCAFC 70 (Tab 17); *Rush v Nationwide News Pty Ltd (No 4)* [2018] FCA 1558.

6. As His Honour has observed, although the Respondents "*were quick to publish, they have been slow to defend*".[3] They filed and served a Defence on 1 February 2018 and, since then, have served a number of further versions of the Defence, resulting in interlocutory disputes that were each resolved in the Applicant's favour in March and April 2018. One of those disputes was the subject of an application for leave to appeal, which failed. In August 2018 the Respondents sought leave to amend yet again.

[2] The Respondents admit they intended to convey that imputation - the First Respondent's answer to interrogatory 137(g) (at 1/184), and the Second Respondent's answer to interrogatory 20(g) (at 1/202).
[3] *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550, at [2] (1/281).

7. That amendment was acceded to by the Applicant, in order that he could meet the false allegations which were finally formally made against him - with the result that the 3 September hearing was vacated and the s.30 defence (which had long been pressed by the Respondents despite its obvious failings) was voluntarily abandoned.

8. The Court observed in *Rush (No 2)* at [138]:

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

9. Since *Rush (No 2)*, the quick resolution of the proceedings consistently with s.37M of the *Federal Court of Australia Act* 1976 (Cth) has been further frustrated by yet further applications brought by the Respondents. The first, served on 31 July 2018, resulted in the vacation of the hearing originally scheduled for September 2018. The second, served late in the evening of 28 October 2018, the night before the second week of the trial, was an application to file a Third Further Amended Defence (the seventh different version of the Defence served). The application came after Mr Rush had given evidence and been cross-examined over the first three days, and after most of the witnesses in the Applicant's case had come and gone.

10. The Respondents have reported on each of the interlocutory proceedings, and the trial, and in doing so have caused further harm to the Applicant - particularly by reporting on the original particulars of truth (even after they were struck out in March 2018) and by reporting on material in the particulars of their s.30 defence which they have never sought to prove true: Tab 101; Ex A67; Affidavit of Nicholas Pullen sworn 30 October 2018 (paragraph [13] – [16]); Affidavit of Nicholas Pullen sworn 1 November 2018 (20 pages).

11. The Respondents' conduct in filing hopeless defences, running interlocutory proceedings that had no prospect of success, and reporting on these proceedings so as to cause further harm to the Applicant, is relied on as a matter of aggravation.

Facts

Childhood

12. The Applicant was born in 1951 in Toowoomba, Queensland and grew up in Brisbane. He completed Year 12 in 1968. He then attended Queensland University and completed his Bachelor of Arts degree in 1971. He started acting seriously while at University and took part in many productions: T39.18ff. His wife Jane Menelaus is a theatre and film actress. There were married in 1988 and they have two (now adult) children.

13. His background in film, television and theatre is set out in Exhibit A4 as are his extensive awards, accolades and nominations.

Applicant's standing prior to matters complained of

14. The Applicant was renowned worldwide as a talented actor and contributor to the arts. The fact that he was so well known is relevant to the case made in relation to republication, discussed below, in that his fame made it more likely that the allegations would be republished worldwide.

15. The extent of his fame can be discerned by the many awards that he has won, the many films, television shows and theatre productions in which he has starred over some 40 years, and by the many articles published about him prior to November 2017: Tabs 46, 47, 48.

16. After his success in *Shine* he has appeared in films continuously, most of which have achieved critical and popular success.

17. In his sixties he deepened his experiences and found a diversity in his work – he has done musicals, films and theatre and developed himself as a character actor. He intended to keep working at least into his late 70s: T51.29-52.5.

Twelfth Night

18. On 27 June 2017 the Applicant was engaged to perform the role of Malvolio in the Melbourne Theatre Company ("**MTC**") production of *Twelfth Night*, with rehearsals commencing on 1 October 2018. He agreed to be paid $3,000 per week for rehearsals (which would continue until mid-November) and then $3,000 per week for the performances from 12 November until 5 January (with a possible further week): Tab 49.

Income

19. From 2003 to 2017 the Applicant earned [redacted] His average annual income during that period was [redacted] although, for the period five years prior to the Publications (2013 to 2017), that average annual income had in fact increased to [redacted] His income for the last 11 months has been about [redacted] T134.16; Ex A-62.

Eryn-Jean Norvill

20. The Applicant does not recall precisely when he met Ms Norvill. He knew of her through Lindy Davies from the Victorian College of the Arts ("**VCA**") as part of a group of talented graduates: T73.41-74.1.

21. In 2008 the Applicant and Mr Armfield saw Ms Norvill in a production of *Platonov* - a Chekhov play being directed by Simon Stone: T74.11.

22. He saw her playing Ophelia in *Hamlet* at the MTC in 2011/ 2012, and later in *Cyrano de Bergerac* as Roxanne. He also saw her in Simon Stone's *The Government Inspector*: T74.19-25. They discovered they had both studied with Philippe Gaulier: T74.33-38.

23. He recalls being asked to prepare a reference for her in mid-2014 and he happily prepared one: Tabs 108; 109. He has often been asked to prepare such references and has done so about 25 times over the last 20 years: T109.15-21; T.508.23-24.

24. At some point they developed a joke in which they tried to think of homophones of their names and engaged in a "*one upmanship*" in their texts: T109.39; Tabs 110 and 112.

25. The Applicant recalls being invited to, and attending, Ms Norvill's birthday party in 2014: Tab 110, pp.12/15-20: T108.44-46. They also saw each other at the Sydney Theatre Company (**STC**) launch of *King Lear*: T110.23-24.

26. In 2015, the Applicant returned from shooting *Pirates of the Caribbean* and saw Ms Norvill's performance in *Suddenly Last Summer*. After the show, he met the cast. He was with his voice coach and friend, Barbara Berkery. He also knew a number of other actors in that play including Robyn Nevin and Mark Leonard Winter: T75.8-19.

[4] Table 1, paragraph 3.10 of Mr Potter's and Mr Samuel's joint report, at CB 5/423.

King Lear

27. Mr Rush and Mr Armfield had discussed doing a production of *King Lear* as early as 2009 T71.33-34. Mr Rush had first met Mr Armfield in 1979 at a Nimrod Theatre Company event. He considers Mr Armfield his "*artistic brother*" – they have done over 20 plays together and three films: T70.39-44.

28. It was only in 2014, however, that he was approached by Andrew Upton, the artistic director of the STC. Mr Upton was programing his final, "*farewell season*" at the STC. He said he wanted to do *King Lear* with Mr Armfield and Mr Rush - he said "*I want to do the greatest play with what I regard as the greatest actor in the country and the greatest director in the country*": T71.34 - T72.4.

29. In early 2014 they did a read through of the play at Mr Armfield's house: T74.45. They started to seek interest from others.

30. They did promotional photographs in mid-2014, which were converted into a brochure that was released in the second half of 2014. On 25 March 2015 Mr Rush signed a "Deal Memo" (Tab 113) in which he agreed to be paid $2,815 per week for rehearsals and $2,815 per week for performances. On 13 October 2015 he signed a more detailed STC contract for the production (Tab 114), which confirmed (at Tab 12/29) the Applicant's agreement to accept $2,815 per week for rehearsals and $2,815 per week for performances.

31. Mr Rush had worked with, or knew, many of the actors in the cast and had followed their work: T72.35-74.11. Ms Norvill was cast as Cordelia by Mr Armfield in June 2015 after many other names had been bandied about: T73.27-29.

32. The Applicant's preparation for *King Lear* began in early 2015. It included reading through the script with the key creative team in January 2015, and then the arduous process of learning the script over the course of several months while he was shooting *Pirates of the Caribbean* in Queensland (which included working with a voice coach). He analysed the script and took detailed notes: Tab 118; T75.11-76.3.

33. Ultimately the play included 14 actors, the director (Mr Armfield) and two assistant directors, two musicians, the stage manager (Georgia Gilbert) and two assistant stage managers, set, lighting and costume and sound designers, composers, a voice and text

coach, wardrobe and wig and makeup staff, mechanists, an electrician, sound and mic operators – so about 45 people: Tab 129.

34. Rehearsals for the play commenced on 12 October 2015 and went for 5 weeks in a rehearsal room: T86.7-24. The time allocated was insufficient for a play of that magnitude so the rehearsal period was a busy one for all involved: T87.11. The Applicant was focussed on the task of playing King Lear, in a 3-hour play that was to be performed 8 times per week for 7 weeks.

35. The rehearsal schedules indicate who was present at various times. The actors only had to attend when their scene was being rehearsed: T40.44. It is apparent from those documents that Ms Norvill was often not required to attend rehearsals at all or was only required for half a day: Tab 115, see e.g. 12/54; 12/56; 12/58; 12/64 (not until 4pm); 12/70; 12/72 (only until lunch); 12/88; 12/91 (only for 1 hour); 12/94; 12/96; 12/100; 12/104; 12/124; 12/128 (only for 30 minutes); 12/132; 12/138 (only after lunch). Mr Armfield was always present: T89.40.

36. There was a large stage management team (5 people) and the designers sat in a lot during rehearsals: T87.25-31. They were in charge of running the rehearsals and ensuring that the production ran smoothly by co-ordinating the cast and the creative team.

37. The Applicant got on well with the other cast and crew during the rehearsals including with Ms Norvill: T295.5-6 (Mr Armfield); T352.35; T353.36-37 (Ms Buday); T465.25-31 (Ms Nevin). It seemed happy business as usual: T88.4-8. It felt congenial and collegiate: T113.20-1.

38. Mr Armfield saw his role as paternal. Actors raised issues with him (they are needy creatures, he said in evidence) and he did not notice any inhibition of any of the cast in approaching him: T288.8-18.

<u>Rehearsals of the final scene - Act V, Scene III</u>

39. The rehearsal schedules show that the final scene, Act V Scene III, was first rehearsed in Week 3 on Friday 30 October 2015: Tab 115, p.12/78.

40. The entire cast was required to be present for the rehearsal of that scene. The stage manager and her team were also likely to have been present. Mr Armfield was also present: T89.40-42; T291.1-2; T613.14-29.

41. There was also a technical, mechanical rehearsal of that scene that was choreographed in order to allow Cordelia to be safely carried and then lowered onto the stage. There was quite a bit of discussion as to how to best carry out that part of the scene – in order to ensure Ms Norvill's safety and given the Applicant could not lower her to the stage without assistance: see Tab 115, p.12/108.

42. Other than Act V, Scene III the Applicant was in 3 other scenes with Ms Norvill. Images from the relevant scene are found behind Tab 134 of the Court Book and a DVD of the entire production (from 22 December 2015) is behind Tab 132.

43. On 17 November 2015 the Applicant attended an interview with each of King Lear's daughters - Ms Buday (Goneril), Ms Norvill (Cordelia), and Ms Thomson (Regan). The purpose of the interview was to promote the play. It was conducted on the premises of the STC: Tab 115, p.12/140. It was published by *The Sydney Morning Herald* on 19 November 2015: Tab 116. Ms Norvill said of the Applicant during that interview:

> "*I love Geoffrey's ebullience and that's really something because this play looks into some deep dark holes in humanity…Sometimes fear can get into a rehearsal room and rot it. Nervousness, formality, all that bullshit. But Neil and Geoffrey work from moment to moment and we're all on the same journey together.*" [Tab 116, p.12/173]

44. This was one of a number of interviews that Mr Rush did in order to promote the play: see e.g. Tab 115, pp.12/70; 12/71; 12/72; 12/76; 12/79.

45. The Applicant attended the opening night of *Orlando* on about 13 November 2015 with Ms Norvill and Mr Winter. Mr Rush's daughter, Angelica, also attended as her father's date: T110.26-45.

46. Ms Norvill gave an interview in late November or early December 2015 to the *Daily Telegraph* (after rehearsals had ended and even after the previews, discussed below) in which she joked of Mr Rush: (Tab 117):

> *"*[He] *is always flipping the coin to see what's underneath…Geoffrey is just forever playful. He's so generous he's very cheeky which is perfect for me. I feel very privileged to work with him and proud to be his 'favourite daughter.'"*

Previews

47. There were four previews of the play – Tuesday 24 November to Friday 27 November 2015.

48. There was a full audience for each preview - to give the actors a sense of the audience reactions, and what was still to be fine-tuned. The previews were a vital part of preparing for the play. They were sold out: T88.20.

49. Mr Armfield gave notes after each preview which were emailed to the cast by the Stage Manager. He then spoke to the cast before the next performance: Tab 121, 122, 123, 124, 125, 126, 127, 128; T90.18ff. There is no suggestion in any of the notes, or any of the performance reports, that Mr Rush interacted with, or touched, Ms Norvill in the final scene (Act V, Scene III) any differently from in rehearsals. It is apparent from Mr Armfield's notes, and the performance reports by the Stage Manager, that both of them were watching each preview intently. In fact Mr Armfield said he was watching the previews like "a *hawk*" – so much so that he dictated his notes to the assistant director as the play was running so that he wouldn't miss anything: T291.39-43; T295.28-31.

Performances

50. Opening Night was on Saturday 28 November 2015.

51. The play was about a four and a half hour exercise for the Applicant from start to finish - beginning with humming and other warm-up exercises, then getting into costume, putting on make-up and wigs, then the play itself (about 3 hours). There was an intermission at the end of Act III, Scene VII.

52. King Lear has about 900 lines, so is on stage for about 2 hours. The Applicant was therefore busy changing costumes between scenes – including having to dry off after the storm scenes. He was assisted by stage staff to remove costumes and to reapply make-up between scenes.

53. The Applicant's dressing room was close to the stage, across from the Stage Manager's office. He would often "*hang out"* in the Stage Manager's office during intermission and to see part of the final scene on the plasma TV screen, then go to his dressing room and sit quietly and begin a process to go into neutral mental space to prepare for the final death scene: T101.35.

54. He went through the rear of the theatre in order to take a solo path in the semi-gloom and arrive on prompt side at about the time when the Fool (Ms Nevin) was walking across the stage. He meditated to clear his mind before the scene and then, when performing the scene, imagined his own daughter hit by a bus dead on the sidewalk: T102.6ff; T107.6. None of this evidence was the subject of any challenge.

55. Mr Rush would wait prompt side (stage left) from about the time the Fool was walking across the stage and wait for about 30-40 seconds before going on. In that time the Messenger (Eugene Gilfedder) would run off towards where Mr Rush was waiting: T103.19-104.14. Ms Norvill then stood on a structure so that she could lower herself into Mr Rush's arms before the first "*Howl*": T104.24. About a minute after he ran off stage the Messenger returned to the stage: Ex A-9.

56. There were eight shows per week (around 56 performances in total). Some days there was a matinee as well as the evening show: T88.39-40.

57. About 960 people would watch each show (so about 54,000 people in total): T88.24.

58. There was a break for Christmas day. There was a matinee (possibly 2 shows) on Boxing Day.

59. On 22 December 2015 the STC filmed one of the performances of the play, it was typical of other performances save for minor differences, particularly in timing: Ex A-7; T89.27-38; T288.45-46.

60. The Applicant attended pre-Christmas drinks with Mr Masters (who was shortly after in a personal relationship with Ms Norvill) at Russell Crowe's house: T111.41-112.3.

61. The Applicant was invited, by Ms Norvill, to attend a Christmas Party at Ms Norvill's parents' home – although he does not recall the specific invitation. Ms Norvill recalls saying to him "*come*", "*Yes come*": T611.36. His friends, who were visiting from overseas, were also invited by Ms Norvill to attend. The Applicant and his friends attended the party on Christmas Day: T111.4-30.

62. Throughout the rehearsals and performances Ms Norvill often jokingly referred to the Applicant as "*Daaad*" as a jocular nickname: T112.45-113.2; T564.34-8. The Applicant got along with Ms Norvill during the rehearsal and performance period of *King Lear*: T59.31-32.

63. On 6 January 2016 the Applicant received an email about the play from Andrew Bovell, a playwright, particularly about the relationship between King Lear and Cordelia. He forwarded it to Ms Norvill (and signed off "*Daaad*"). Ms Norvill responded:

> *"That was wonderful.*
>
> *Thanks for sending it through Dearest Daddy DeGush.*
>
> *xoxo"*. (See T112.17-43).

64. The Applicant attended the final party on 9 January 2016 but does not recall specifically seeing Ms Norvill or speaking to her. He did not follow Ms Norvill to the bathrooms: T118.5; T215.1-2.

Complaints

65. Ms Norvill says she drank on the evening of the final party (T558.5) on 9 January 2016 (although Mr Winter disputed that): T688.3. She was upset and spoke to Annelies Crowe (Company Manager of the STC) but did not tell her why she was upset: see Tab 140.

66. Ms Norvill apparently met with Ms Crowe on 5 April 2016 at a bar in Annandale. That meeting was not mentioned in Ms Norvill's statement. Patrick McIntyre (Executive Director of the STC) was informed of this "*off the record*" meeting but appears to have done nothing in response: Tab 140. During the meeting, Ms Norvill told a number of lies – including that Mr Rush followed her into the female toilet.

67. On 14 April 2016 Ms Norvill apparently also met with Rachel Azzopardi and Serena Hill of the STC in a bar, but did not supply any details. Neither Ms Azzopardi nor Ms Hill gave evidence. There is no contemporaneous document recording that encounter. The only record of it were emails in November 2017, over 18 months later, from Serena Hill to Patrick McIntyre: Tabs 141; 142; T613.35.

68. Mr Rush (oblivious to these events) sent a text to Ms Norvill about her opening night in the Arthur Miller play "*All My Sons*", which also featured Ms Nevin (to whom he had also sent a message): T141.35-45; Tab 112.

69. At about the same time, Ms Norvill told Ms Nevin that she was concerned about an issue of sexual harassment towards her friend in another STC production (*Disgraced*): T474.13-38; T475.23-25; T487.37.

70. The Applicant has never been told by anyone at the STC that it has made a decision to never work with him again. There is no document that supports any such contention.

71. In fact, in a media release on 10 May 2016, the STC notes as a highlight in 2015 *"the return of Geoffrey Rush to the STC, tackling one of the great roles of the canon, Lear, in a bold production by director Neil Armfield"*: Tab 140A, 12/721B.

Matters complained of

72. On 10 November 2017, the Applicant was contacted by a journalist from *The Australian* (also owned by the First Respondent) about a complaint of inappropriate conduct in relation to the STC: T52.38ff. He responded that day to her queries: Ex R2.

73. Mr Rush contacted his agent and PR consultant, Stan Rozenfield, and was advised to contact the STC: T53.24-29. He telephoned the STC and spoke to Patrick McIntyre and asked him about the allegation of inappropriate behaviour during *King Lear*. Mr McIntyre refused to give Mr Rush details because the complainant had requested anonymity and Mr Rush was no longer an employee: T55.16. The *Australian* did not include the allegation in its article: T55.40.

74. By 23 November 2017 Jonathan Moran had apparently decided he needed an Australian #metoo scalp – he was looking for "***anyone*** *willing to speak on the local industry in relation to Weinstein and* ***any*** *local Australian angles"* [our emphasis]: Tab 64.

75. Mr Moran contacted the STC on 28 November 2017 and alleged he had heard reports of Geoffrey Rush harassing "*a number of women"* on the set of *King Lear*: Tab 65. There is absolutely no evidence that Mr Moran had any basis whatsoever for making that false statement, which has never been alleged in these proceedings. This seems to have been the first step taken by the Respondents in a campaign against the Applicant which has continued unrelentingly ever since.

76. On 29 November 2017, Mr Moran informed the STC over the phone that the *Daily Telegraph* would be running a story about the Applicant on the front page. Katherine Stevenson (Public Relations Manager of the STC) "*urged*" Mr Moran not to publish it because, she said, it was the complainant's decision "*if/when to tell story…this is her story to tell and she should tell it*": Tab 66.

77. Mr Rush only became aware *The Daily Telegraph* was proposing to write an article about him on 29 November 2017, at 5:06 pm, after Mr Moran sent an email (Tab 68) to the Applicant's Australian agent, Ann Churchill-Brown. Although the statement from the STC (Tab 67) had referred to alleged "*inappropriate behaviour*", Mr Moran referred in his email to an "*alleged incident of abuse*". The Applicant was told the story was running the next day: Tab 68. He felt "*quite disturbed"* because it was late in the day and time was running out. It was very nerve wrecking because of the nature of the situation and how serious it was looking: T58.25-31.

78. The Applicant engaged his solicitor, Mr Pullen, to respond. Later that evening, Mr Pullen sent an email clearly marked "*NOT FOR PUBLICATION*" to Mr Moran denying the allegations (to the extent they could be discerned from Mr Moran's email): Tab 70.

79. At 6:33pm on 29 November 2017 Ms Stevenson repeated to Mr Moran her assertion that the complainant should have the right to tell the story "*at a time of her choosing – and on her own terms*": Tab 69. She specifically said the complainant "*does not want any part in this story*".

80. The Applicant saw the second matter complained of on 30 November 2017 in the morning. He noticed the font of KING LEER and found it upsetting: T59.26. It was a shock that the statement had been made. It disturbed him that the photo used to promote the play was used with the headline. It polluted the original intention of the image and converted it to look like a police lineup – it made him look like a criminal: T60.26.

81. It was devastating. He was home with his son and wife and he could see how distressed they were, which in turn created a great deal of hurt for him. He felt as though someone had poured lead into his head – he couldn't believe it was happening, he was numb: T60.34-38.

82. Mr Rush interpreted the headline KING LEER to mean "*major depravity*" and that he was a "*major pervert*". It made him feel sick to his stomach. He interpreted "*bard behaviour*" to mean that his conduct was "*despicable rather than Shakespearean*": T61.23-36. The content of the article did not relate to the experience that he had doing the production of *King Lear*. His memory of that was strenuous but cheerful with the other actors: T65.30-45. He was distressed because he felt he was in a diabolical and vulnerable position because he had been ambushed the day before. He was in free fall because he had no information and had been denied access to the allegations: T66.13-16.

83. The Applicant saw the Poster later that same day and thought that the words "*scandal claims*" were overly potent: T66.31. He looked upset in the witness box when he was shown the Poster. At the time, he was outraged and understood that it meant that the STC agreed with the content: T66.40-45.

84. On 30 November 2017, Mr Moran tweeted an image of the first matter complained of: Tab 50, and the Second Respondent's answer to interrogatory 39 (at 1/203).

85. On 30 November 2017 Brandon McClelland, an actor who had not been involved in *King Lear*, tweeted (Tabs 73; 76):

> *"Believe the women. This wasn't just once. It wasn't a misunderstanding. It wasn't a joke."*

86. On 30 November 2017, Meyne Wyatt, who had played Edmund in *King Lear*, made the following Facebook post (Tab 74):

> *"I was in the show. I believe whoever has come forward. It's time for Sydney Theatre Company and the industry in Australia and worldwide as a whole to make a stand on this behaviour!!! It's been going on for far too long! And this culture of protecting people in power has to stop."*

87. At 11:34 am on 30 November 2017 Anthony DeCeglie (Deputy Editor of the *Daily Telegraph*) sent an email to Christopher Dore (the Editor) and Mr Moran referring to a "*mega creep interview from Rush*": Tab 75. That was a reference to the Applicant's interview with the *Sydney Morning Herald* published on 19 November 2015.

88. When Mr Moran tried to contact Mr Wyatt he did not respond.

89. It should already have been obvious to Mr Moran that Mr McClelland's tweet was not based on any direct knowledge of the *King Lear* production (since he was not involved in it), and was probably not about the Applicant at all. The tweet refers to "*women*" (plural), and seems clearly enough on its face to be a tweet in support of the #metoo movement generally rather than a condemnation of the Applicant specifically. To the extent there was any doubt, it soon disappeared when Mr Moran contacted Mr McClelland on 30 November 2017.

90. Mr McClelland messaged Mr Moran (Tab 77):

> *"My tweet was not directly related to any particular individual and I am not able to comment on the complaint filed at STC as I do not have intimate or first hand knowledge regarding that production. I'm sorry."*

During the trial the Respondents indicated that they might call Mr McClelland but did not: T641.25-26.

91. At 4:05pm on 30 November 2017 the STC sent a revised statement to the Second Respondent as follows (Tab 78):

> *"Sydney Theatre Company was asked by a News Ltd journalist earlier this month whether it had received a complaint alleging inappropriate behaviour by Mr Rush while he was employed by the company. STC responded truthfully that it had received such a complaint.*
>
> *At that time the complaint was made, the complainant requested that the matter be dealt with confidentially, and did not want Mr Rush notified or involved in any investigation. STC complied, acting in the interest of the complainant's health and welfare. As already stated, the Company received the complaint after Mr Rush's engagement had ended.*
>
> *STC has at all times been clear that this was an allegation made to (not by) STC and not a conclusion of impropriety."*

92. The Respondents never printed the third, crucial paragraph of that revised statement, despite it being forwarded by Mr Moran to the Deputy Editor: Tab 79.

93. In response to an email from Mr Moran at 2:28pm that day requesting a statement "*confirming Patrick McIntyre spoke with Geoffrey Rush regarding allegations highlighted in today's article. I believe this took place on around November 9 or 10 this year*" Ms Stevenson from the STC (at 5:08pm) said:

> "*A senior member of the STC management team spoke to Geoffrey Rush on or around the 9 or 10 of November. This person did not pass on any specific information regarding the nature of the complaint to Mr Rush as they were maintaining the confidentiality of the complainant, however Mr Rush was aware that a complaint had been made."*

94. Also on 30 November 2017 the STC received many requests for comment from media organisations around the world: Tab 60.

95. On 30 November 2017 Mr Rush's agent received further questions from Mr Moran at 6:20pm. Mr Moran neglected to say there would be a second front-page story the very next day: Tab 80.

96. The third matter complained of was published on 1 December 2017. It was misleading and deceptive. The McClelland tweet was edited to delete the first two sentences. The Wyatt post was redacted and cut off so as to change its meaning - including being edited so that it read "*I believe (the person who) has come forward*" (instead of "*I believe whoever has come forward*"). The article also carries an implication that the actors spoke to Mr Moran when they did not.

97. Mr Rush read the third matter complained of on 1 December 2017. His blood ran cold and he went to jelly when he read the front page heading "*unscripted drama: the Oscar star scandal*": T67.44-47.

98. He was wondering "*who the fuck is Brandon McClelland*"? It was also the first time "*touching*" was used – the only new clue as to what the allegation was: T68.15. He was distraught by the way the story was running off the rails as it did not reflect anything he had personally experienced. He could not understand why younger members of the cast were ganging up: T68.45. He felt he was being demonised by untruths: T69.1. He went into quite an emotional spiral, and was torn between a brave front in front of his son and wife and daughter. They were tough distressing family moments: T70.19.

99. Mr Moran also tweeted the third matter complained of on 1 December 2017: Tab 51.

100. That day, Foxtel and the Seven Network sent a joint letter to AACTA (Tab 53), emphasising that the "*entertainment industry, both here and abroad,* [was] *under intense scrutiny in relation to allegations of unacceptable behaviour*" and that they "*were concerned to ensure that the Board expresses AACTA's general condemnation of inappropriate behaviour by anyone associated with the industry*". The letter did not specifically refer to the Applicant but repeated the precise words, "*inappropriate behaviour*", which had been re-published throughout the world following the Publications.

101. Damian Trewhella, the CEO of AACTA/AFI, had a telephone conversation with Mr Rush on 1 December 2017 telling him there was a dispute at the Board level, "*there was blood on the walls*", and that he would need to resign otherwise he would be asked to resign: T84.39.

102. He then emailed the Applicant on 1 December 2017: Tab 52. Although he referred to the matters complained of as "*a storm full of a lot of bullshit*", nonetheless he said that the stakeholders of AACTA/AFI were "*piling on massive pressure*" - he requested the Applicant "*step aside*" as President of the AACTA. He further stated that there was a concern as to whether "*our awards next week would have a chance of survival"*.

103. The Applicant graciously agreed, and stepped aside from his post as President of the AACTA on 2 December 2017 as a result of the matters complained of: T84.29-85.46. That made him feel regretful: T85.40.

104. That same day, Mr Trewhella responded to Foxtel and Seven Network: Tab 54. He acknowledged the STC's statement about the Applicant was "*serious in nature*", and that the Applicant that stepped aside as President of the AACTA "*until these matters are resolved*".

105. The pressure AACTA put on Mr Rush on 1 December 2017 is referred to in an email from Mr Trewhella on 19 December 2017 to the Board that they "*put massive pressure on him and his representatives (at a very difficult time for them) to act incredibly hastily*": Tab 55, p.7/11.

106. Since then, the negative publications about Mr Rush by the Respondents have been relentless.

107. On 3 December 2017 Mr Moran sent further offensive questions to Mr Rush's agent: Tab 81. Though the Applicant had consistently denied the allegations in the strongest possible terms, Mr Moran nonetheless asked the Applicant whether he would "*like to say sorry to the victim*".

108. The same day *The Daily Telegraph* published an article by Mr Moran entitled "*Rush quits arts academy*" which repeated allegations in the matters complained of and again misused and misquoted the Meyne Wyatt post: Tab 101, p.9/126.

109. On 4 December 2017 yet another article by Mr Moran appeared in *The Daily Telegraph* entitled "*Ugly open secret is centre stage*" (Tab 101, p.9/127). In that article, the Applicant is named, and a photograph of the Applicant is published. The article also repeats the false allegation that the STC changed its policies as a result of the complaint about the Applicant.

110. On 5 December 2017 the *Daily Telegraph* repeated the allegations in another article entitled "*AACTA Awards: Stars of stage and screen urge industry to tackle cancer of sexual harassment*": Tab 61, p.7/122-129. The article contained links to the second and third matters complained of, at 7/125. The article, about the "*cancer of sexual harassment*", again featured a prominent photograph of the Applicant, immediately below the following words: "*Australia's version of the Oscars has been hit by a last-minute plot twist that has put the dark side of the entertainment industry squarely in the spotlight*". The Applicant is referred to, at CB 7/124, as one of "*the figures in the spotlight*".

111. On 7 December 2017 *The Daily Telegraph* published another article about the Applicant - above an article about Kevin Spacey being a "*sex suspect*" and beside a story about "*pioneer*" women speaking out against abuse and harassment: Tab 61, p.7/132; Tab 101, p.9/138.

112. On 8 December 2017, the day the Applicant commenced these proceedings, Chris Dore (Editor of *The Daily Telegraph*) stated that the *Daily Telegraph* stood by and "*would defend its accurate reporting*": Tabs 84, 85. Mr Moran repeated that statement on Facebook on 8 December 2017: Tab 83.

113. On 9 December 2017 the First Respondent published a story in *The Australian* which referred to the Applicant being part of "*a tsunami of sexual harassment, assault and inappropriate behaviour allegations*": Tab 101, p.140. The article repeats imputation 10(g) and notes that the matters complained of "*generated headlines around the world, and has seen the Oscar-winner step aside as president of screen awards body AACTA*": p.9/143. It also repeats the allegation - now known to be false - that the STC had conducted an investigation.

114. On 12 December 2017, after the Applicant was nominated for a Golden Globe, he was gratuitously ridiculed by the First Respondent in an article entitled "*Geoffrey Rush's bizarre nomination rant*": Tab 86. There was nothing bizarre about his comments.

115. On 19 December 2017, Mr Trewhella wrote to the AFI Board: Tab 55. He wanted AFI to attempt to "*re-establish connection and trust*" with the Applicant after he stepped aside as President. At 7/11, Mr Trewhella reminded the Board that the Applicant had "*near singularly built this organisation through his tireless work over 7 years*".

116. On 31 January 2018, the Respondents' solicitor (Mr Todd) had a conversation with the STC's solicitor (Ms Stiel), in which Ms Stiel informed Mr Todd "*that Ms Norvill was not willing to speak to the Respondents' legal representatives or give evidence*".[5]

117. Nonetheless, the very next day, the Respondents served a Defence on 1 February 2018 which particularised vague allegations about the Applicant having inappropriately "*touched*" the Applicant "*on a number of occasions*": Tab 87.

118. On 3 February 2018 the First Respondent published an article entitled "*Rush tries to censor paper's defence*" (Tab 89), even though that application had only been served on 2 February, was not filed until 5 February, and was not made publicly available until after the parties appeared in Court for the first time on 8 February 2018.

119. On 8 February 2018, when the matter was first before the Court, Counsel for the Respondents asserted that the matters complained of did not make any allegation that Mr Rush had engaged in inappropriate conduct of a sexual nature: Tab 89A, lines 13-14. That submission was disingenuous and improper given that the content of the third matter complained of including repeated allegations of unwanted "*touching*". On that occasion, the Respondents' Counsel also stated that her clients' intention was not to abandon the s.30 defence and that it "*will be run*": Tab 91, p.9/81, line 28. That was notwithstanding the submission of the Applicant's Counsel:

> [The] *statutory defence of qualified privilege…is a hopeless defence for media defences in cases like this, because it turns on a touchstone of reasonableness. And once one looks at the headline and the front page, "King Leer", that defence is dead in the water and will be abandoned…*

120. On 8 February 2018 the First Respondent published an article entitled "*Geoffrey Rush secures interim order to gag The Daily Telegraph's evidence*": Tab 92. The headline is self-evidently incorrect given that no evidence was sought to be adduced – the application concerned the Defence, not any evidence. The article also took the opportunity to repeat the matters complained of, including the full text of the Poster. Further, notwithstanding the Respondents' Counsel's submission that day - that the matters complained of made no allegation of misconduct of a sexual nature - nonetheless the article referred to the Applicant having sued over "*a story detailing an investigation into the actor…over alleged sexual misconduct*".

[5] Affidavit of Marlia Saunders dated 31 July 2018, at [12(c)].

121. The Amended Defence (Tab 94) contained allegations that are now completely contradicted by Ms Norvill. It is difficult to see how the Respondents had a proper basis to make many of those allegations given most of them concerned conduct between the Applicant and Ms Norvill alleged to have occurred in no one else's presence (for example the assertion that Mr Rush entered the women's bathrooms and Ms Norvill told him to "*fuck off*"), and given at that time the Respondents did not have Ms Norvill's cooperation. The Respondents later conceded that, until 24 July 2018, they "*did not have knowledge of the details of Ms Norvill's complaint sufficient to plead a defence to the level of specificity required*": Tab 98. They pleaded the Defence anyway.

122. On 19 February 2018 the matter was before the Court in relation to the Amended Defence. Counsel for the Respondents repeatedly asserted that their case was that Mr Rush touched Ms Norvill in a manner that made her "*feel uncomfortable*", that she asked him to stop, but that "*He didn't. He went on doing it.*": Tab 93[6]. Those assertions are now contradicted by Ms Norvill.

123. The First Respondent took the opportunity to further defame Mr Rush on the front pages of both *The Daily Telegraph* and *The Australian* on 20 February 2018 - publishing, what they now say are false, allegations in the Amended Defence and reporting the particulars of their s.30 defence in which scandalous allegations are made about Mr Rush that the Respondents have never asserted are true: Tab 101, pp9-146-148; 9-149-150; Tab 103. Those articles also named Ms Norvill, apparently against her wishes: Tabs 95 and 96. The story also appeared on the front page of the *Courier Mail* in Queensland (Tab 101, pp. 9-151-152) and in *The Herald Sun* in Melbourne, where the Applicant lives: Tab 101, p.9/153.

124. On 19 March 2018 the First Respondent, in *The Australian*, again took the opportunity to repeat the s.30 particular (never said to be true) that Mr Rush touched Ms Norvill's genitals without her consent: Tab 101, p.9/156.

125. On 21 March 2018, the day after the judgment striking out the Amended Defence was delivered, the First Respondent took the opportunity to further publicise particulars of truth that had been struck out. It also reported the Editor of the Daily Telegraph defending the articles: Tab 97; Tab 101, p.9/158. Similar material appeared in other News Corp publications: Tab 101, p.9/157; p.9/159.

[6] 9/86 lines 21-39; 9/87 lines 17-23; 9/88 lines 7-13 and 34-36; 9/89 lines 12-19; 9/90 lines 23-27; 9/91 lines 34-41.

126. On 20 April 2018 Tony Wright from December Media Pty Ltd cancelled Mr Rush's engagement to narrate a documentary about the Great Barrier Reef: Tab 57. He said he had been contacted by the distributors of the film who "*said that they think that* [the] *Geoffrey situation, while unresolved, is currently an issue for them*". It referred to another "*metoo situatio*n".

127. In June 2018 the Applicant was away with his family in Umbria because of the impact these matters were having on him and his family: T62.24-25; T63.18-21; T222.30-41 He decided to withdraw from *Twelfth Night* because of the mental state he was in. He told Simon Phillips, the director, that he thought he would have to withdraw – they had done 12 or 13 productions together in the last 30 years: T63.23.

128. He suffered from sleeplessness, poor appetite and feeling hurt about the levels of distress it was creating in his family. He was weak and weakening: T63.46-64.5. He had hit a brick wall: T64.5. He was worried he wouldn't be in a funny frame of mind: T64.11. He thought his presence in *Twelfth Night* would spoil it because of the stain that had built up over the last 11 months and ruin it for the cast. He thought it would overwhelm the purity of the play: T63.46-64.31.

129. On 9 August 2018 Counsel for the Respondents asserted there would be corroborative evidence of "*touching of her breast and touching of the lower back and tracing his finger across the lower back and those incidents*": Tab 99, lines 44-46. In fact, no such corroboration exists.

130. On 20 August 2018 the Respondents served outlines of evidence from Ms Norvill and Mr Winter, as well as Ms Crowe and Mr McIntyre of the STC. At no time was it suggested on behalf of the Respondents that those witnesses had not cooperated in the preparation of the outlines. The Applicant proceeded from 20 August until 26 November 2018 on the assumption that Ms Crowe and Mr McIntyre had endorsed what was said in the outlines.

131. On 26 November 2018 Counsel for the STC informed the Court that "*there was no cooperation*" and "*no input*" from either Ms Crowe or Mr McIntyre in the preparation of their outlines. In fact, the Court was told, the STC did not receive Mr McIntyre's outline until 4 September and his evidence, if called, would "*be different*" to what was contained in the outline: Tab 35; Tab 100.

132. The Applicant has, since the matters complained of, seen the correspondence from the STC to the Respondents on 30 November 2017 in which the STC clarifies its position. He has seen the McClelland and Wyatt material. His hurt has been aggravated by the fact that the Respondents used such despicable tactics for the purpose of causing maximum damage to his reputation.

133. Mr Rush has suffered ongoing hurt and anxiety about the Publications. Many people have spoken to him about them. He has read other media that have republished the allegations made by the Respondents and is hurt by the worldwide dissemination of those allegations and is concerned about the damage done to his reputation as a result.

134. He continues to read the media about the matters complained of and these proceedings and suffers as a result. He is always on the internet: T263.38-39; T469.5-6. He has been unable to work since the publications and he has an ongoing concern about the effect of the publications on his family.

135. After each Court listing of this matter Mr Rush read articles about the proceedings published by the Respondents and was upset they were improperly covering the proceedings.

136. He intended to continue acting for about another 10 years. In the past he has generally been offered roles that are uninhibited by his age – he is a character actor meaning he has chameleon like qualities such that he can play many different types of roles: T762.47.

137. Mr Rush suffers from ongoing distress as a result of the publications. He gave evidence that it has been the worst 11 months of his life – the Publications were the starting point and it only got worse: T70.31. Ms Menelaus also gave evidence to that effect: T255.43-46.

138. The First Respondent's reporting of the trial was also offensive: Ex A-67.

B. ISSUES FOR DETERMINATION

139. The *Defamation Act* 2005 (NSW) (the "**Act**") governs the proceedings.

140. The issues for determination (together with the answers to each issue sought by the Applicant) are:

(a) Was each of the matters complained of published? **Yes.**

(b) Was each of the matters complained of republished? **Yes**

(c) Are the Respondents liable for the republications referred to in (b)? **Yes**

(d) Is the first matter complained of (Poster) defamatory of Geoffrey Rush - namely are the imputations pleaded in paragraphs 4 and 5 of the Statement of Claim (or imputations that do not differ in substance) carried (whether in their natural and ordinary meaning or by reason of extrinsic facts) and defamatory? **Yes**.

(e) Is the second matter complained of defamatory of Geoffrey Rush - namely are the imputations pleaded in paragraphs 7 and 8 of the Statement of Claim (or imputations that do not differ in substance) carried (whether in their natural and ordinary meaning or by reason of extrinsic facts) and defamatory? **Yes**.

(f) Is the third matter complained of defamatory of Geoffrey Rush - namely are the imputations pleaded in paragraphs 10 and 11 of the Statement of Claim (or imputations that do not differ in substance) carried (whether in their natural and ordinary meaning or by reason of extrinsic facts) and defamatory? **Yes**.

(g) Are each (or any) of the imputations pleaded in the Statement of Claim substantially true? **No.**

(h) Did Geoffrey Rush suffer economic loss as a result of the publication (and republication) of any of the first, second or third matters complained of, including likely future economic loss? **Yes.**

(i) What amount of general damages should Geoffrey Rush be awarded as a result of the damage done to his reputation by reason of the publication and republication of the matters complained of, his hurt to feelings and in order to vindicate his reputation? **In excess of $800,000.**

(j) Should the amount of general damages payable to Mr Rush be increased by reason of the conduct of the Respondents which is said to have aggravated his damage (such that the statutory cap is exceeded)? **Yes.**

C. PUBLICATION & REPUBLICATION

Publication

141. Publication is admitted by each of the Respondents: [3]; [6]; [9] 2FAD.

142. The extent of each publication was the subject of interrogatories: Tabs 12 & 14.

143. 4,242 copies of the first matter complained of were distributed and displayed in front of news agencies in the ACT and NSW (Tab 12, p.1/155). They are likely to have been seen by hundreds of thousands of people.

144. The second and third matters complained of were widely published and read:

	Second MCO	**Third MCO**
The Daily Telegraph newspaper	933,000[7]	933,000[8]
The Daily Telegraph website	8,706[9]	15,606[10]
Other newspapers operated by First Respondent	984,000[11]	984,000[12]
Other websites operated by First Respondent	979[13]	474[14]
Total	**1,926,685**	**1,933,080**

[7] Tab 12 1/156-157, paragraphs 10 to 17.
[8] Tab 12 1/158, paragraphs 26 to 33.
[9] Tab 12 1/162, paragraph 48; and Tab 14 1/209, paragraph 47.
[10] Tab 12 1/167, paragraphs 76 and 77.
[11] Tab 12 1/160, paragraphs 38 to 41.
[12] Tab 12 1/165, paragraphs 66 to 70.
[13] Tab 14 1/209-210, paragraphs 51 to 58.
[14] Tab 12 1/167-169, paragraphs 80 to 91.

145. However, readership of the second and third matters complained of must have been higher than indicated in the table in the preceding paragraph. The Respondents apparently (and inexplicably) do not know their readership in Victoria and in Queensland (answers 11 and 12 of the First Respondent's interrogatories at p. 1/156, and answers 27 and 28 on p. 1/158), so the further readership in those States are not included in the table. Ms O'Bryan, for example, gave evidence she saw the articles while she was driving past a newsagency in Melbourne: T325.17-21; T328.3-5; T328.14-16.

Republication principles

146. An allegation of republication may be put in one of two ways -as a separate cause of action, or as a matter going to damages said to flow from the initial publication: see, e.g. *Bracks v Smyth-Kirk* [2008] NSWSC 930 at [26]. In the present case, the Applicant has elected to plead the matter as going to damages: [6]; [9] SOC, Tab 5, pp.1/17; 1/19-20.

147. A person is liable for the republication of his words where:

(a) he has directly provided defamatory material to another for inclusion in a publication;

(b) he authorises the republication of his words;

(c) he intended his words to be republished;

(d) the republication is the natural and probable consequence of his original publication; or

(e) the recipient of the original publication has a duty to republish.

Speight v Gosnay (1891) 60 LJQB 231; *Webb v Bloch* (1928) 41 CLR 331 per Isaacs J at 363-366.

Republication evidence

148. The Applicant alleges that the second and third matters complained of were republished:

(a) on the DT website;

(b) other newspapers published by the First Respondent (or related entities);

(c) other websites operated by the First Respondent (or related entities);

(d) worldwide over the internet. (Tabs 61, 62, 63).

149. Each of the second and third matters complained of were published on media websites accessible throughout Australia and worldwide. Given the Applicant's identity (see previous articles about him which show he was of significant media interest – Tabs 46, 47, 48), and the nature of the allegations, it was the natural and probable consequence of the Respondents' conduct that those articles would be republished by media worldwide.

150. Witnesses gave evidence that they heard of the allegations about Mr Rush overseas on or shortly after 30 November 2017: T277.24-33 (Mr Smith); T319.34-42 (Ms Kershaw). Other students and staff at Angelica Rush's school in London knew about the allegations: T266.47-267.5.

D. DEFAMATORY MEANING

151. The Court's task in relation to defamatory meaning is a familiar one, being to decide whether, on the balance of probabilities, the plaintiff has established that one or more (and if so which) of the meanings alleged by the plaintiffs were carried by each of the matters complained of, and if so, whether they were defamatory of him.

152. Mr Rush is relevantly named in each of the matters complained of, so identification is not an issue.

Imputations carried

153. To determine whether the imputations alleged are carried by the publications in question and are defamatory, the Court must place itself in the position of a hypothetical character known as the **ordinary reasonable reader**.

154. The Courts have characterised the ordinary reasonable reader as a person of fixed, unvarying attributes: see generally *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158.

155. The characteristics of the ordinary reasonable reader have long been settled and are well-known, in particular the ordinary reasonable reader: reads between the lines; is of fair average intelligence; is a fair-minded person; is not overly suspicious; is not avid for scandal; is not naïve; does not search for strained or forced meanings; and reads the entire matter complained of: *Lewis v Daily Telegraph* [1964] AC 234 at 260; *Mirror Newspapers v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646; *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 72, 78; *John Fairfax Publications Pty Limited v Rivkin* (2003) 201 ALR 77 at [26] per McHugh J. The Court must place itself in the position of the ordinary reasonable reader.

156. Each imputation relied upon has to be considered in the **context** of the entire matter complained of: *Favell v Queensland Newspapers* (2005) 221 ALR 186 at [17]; *John Fairfax Publications Pty Limited v Rivkin* [2003] HCA 50; (2003) 201 ALR 77 at [26] per McHugh J; *Greek Herald Pty Ltd v Nikolopoulos* (2002) 54 NSWLR 165 at [26] per Mason P (with whom Wood CJ at CL agreed); *Saunders v Nationwide News Pty Ltd* [2005] NSWCA 404 per Hunt AJA (with whom Ipp and Tobias JJA agreed).

157. In *Lewis v Daily Telegraph* [1964] AC 234, Lord Devlin observed:

> *"…the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory."* (at 277.6)

Later:

> *"A rumour that a man is suspected of fraud is different from one that he is guilty of it. For the purpose of the law of libel a hearsay statement is the same as a direct statement, and that is all there is to it."* (at 284.3)

Then later:

> *"[A]lthough suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. … [L]oose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded."* (at 285.3)

158. The repetition by a publisher of **defamatory hearsay** is sufficient to attract liability: *Corby v Allen & Unwin* [2014] NSWCA 227 at [139] – [141] per McColl JA with whom Bathurst CJ and Gleeson JA agreed; *John Fairfax Publications Pty Ltd v Obeid* (2005) 64 NSWLR 485 at [98] – [99] per McColl JA with whom Sheller JA and McClellan AJA agreed.

159. The repetition by the publisher of the defamatory statements will carry the defamatory meanings unless the publication includes something that removes the defamatory conclusion – referred to as **bane and antidote**. This too was discussed by McColl JA in *Corby* (at [142] – [146]), esp. at [146]:

> *The bane and antidote theory reflects the fundamental proposition the "reader is entitled to give some parts of the article more weight than other parts": Rivkin (at [50] per McHugh J). To apply, however, something "disreputable to the plaintiff" must be "removed by the conclusion": see Chalmers v Payne (1835) 2 Cr M & R 156 (at 159); 150 ER 67 (at 68); Ahmed v John Fairfax Publications Pty Limited [2006] NSWCA 6 (at [16]) per McColl JA (Santow and Basten JJA agreeing).*

160. An example of a case where a true antidote was published is *Bik v Mirror Newspapers Ltd* [1979] 2 NSWLR 679. In that matter the purpose of the publication in question, although repeating the allegations against the plaintiff, was to inform the readers that he had been "*completely cleared*".

161. The Respondents apparently take comfort from the decision in *Charleston v News Group Newspaper Ltd* [1995] 2 AC 65 which stands for the limited principle that ordinary reasonable readers of publication are taken to read the whole publication and not just the headline or particular portion of which complaint is made. That is true – so far as it goes.

162. Kirby J in *Chakravarti v Advertiser Newspapers Limited* (1998) 193 CLR 519 at [134] (concurring in a unanimous decision) considered that *Charleston* was incorrectly decided in the context of modern mass media and also expressed the view that to the "*extent that dicta in Charleston or other cases suggest that the courts should attribute to the recipients of matter published in the mass media a close and careful attention to the entirety of the item published, I would not follow that opinion*". This judgment is the only consideration of *Charleston* in the High Court but Kirby J's latter observation about any broader principle or application from *Charleston* is consistent with authority in Australia.

163. Aicken J in *Mirror Newspapers Ltd v World Hosts Pty Ltd* [1979] HCA 3; (1979) 141 CLR 632 at 646 explained that when considering a publication as a whole the jury or Court does not have to give equal significance to each part of the publication and the emphasis provided by the publisher such as to the size of the headline is not to be ignored. It is well recognised that the ordinary reasonable reader may not read publications, particularly sensational newspaper articles, with analytical care: see *Amalgamated Television Services Pty Ltd V Marsden* (1998) 43 NSWLR 158 at 165; *Griffith v John Fairfax Publications Pty Ltd* [2004] NSWCA 300 at [19]; *Malcolm v Nationwide News Pty Ltd* [2007] NSWCA 254 at [14]; *Rayney v State of Western Australia (No 9)* [2017] WASC 367 at [86] (per Chaney J).

164. In *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77, Callinan J at [187] (Gleeson CJ at [1] and Heydon J at [219] agreeing) explained:

> "*It is true that an article has to be read as a whole. But that does not mean that matters that have been emphasized should be treated as if they have only the same impact or significance as matters that are treated differently. A headline, for example, expressed pithily and necessarily incompletely, but designed to catch the eye and give the reader a predisposition about what follows may well assume more importance than the latter. There are two such headline here: "It's a Bad Business" and "Caroline's World and the Rivkin Link". Layout may create its own impression. Some black and white shading which was used for one of the stories does have some sinister overtones. The order is which matters are dealt with can be significant.*"

See also McHugh J (dissenting) at [26]:

> *"But* [that an article has to be read as a whole] *does not mean that the reasonable reader does or must give equal weight to every part of the publication.* [*Mirror Newspapers* at 646] *The emphasis that the publisher supplies by inserting conspicuous headlines, headings and captions is a legitimate matter that readers do and are entitled to take into account.* [*Mirror Newspapers* at 646] *Contrary statements in an article do not automatically negate the effect of other defamatory statements in the article.* [*Savige v News Ltd* [1932] SASR 240; *Hopman v Mirror Newspapers Ltd* (1960) 61 SR (NSW) 631; *Sergi v Australian Broadcasting Commission* [1983] 2 NSWLR 669.]*"*

See also *Malcolm* above at [18].

165. The natural and ordinary meaning of words may either be the literal meaning or an implied or inferred meaning based on the general knowledge of the ordinary reasonable reader: see *Jones v Skelton* (1963) 62 SR NSW 644 at 650. The trier of fact brings his own general knowledge with him, and relies on that experience when deciding what is within the general knowledge of the ordinary reasonable reader: see *Habib v Nationwide News Pty Ltd* [2007] NSWCA 91 at [14]-[15] (Ipp JA), [70]-[75] (Handley AJA). Evidence is not admissible to prove the general knowledge of the ordinary reasonable reader: see *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506 (per Brennan J).

166. In this case, at the time of publication, it was widely publicised, commonly known and notorious that famous men in the entertainment industry were being exposed for misconducting themselves towards others: Tabs 104-107. In particular, the #metoo movement was (and still is) in progress which involved women "*outing*" powerful men in the entertainment industry who had sexually assaulted or harassed them in the past. Therefore, an assertion that a famous actor such as the Applicant had misconducted himself in the theatre in a "*scandal*" would impute sexual assault or sexual misconduct to the ordinary reasonable reader.

<u>True innuendo</u>

167. In addition to pleading imputations that arise from the natural and ordinary meaning of the words, the Applicant also relies, in the alternative, on extrinsic facts known to some readers of the matters complained of to whom additional meanings would have been carried.

168. See *Lewis v Daily Telegraph* [1964] AC per Lord Devlin at 278.5; see also *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 641 in the joint judgment of Mason and Jacobs JJ, where their Honours said:

> *"When read in conjunction with extrinsic facts, words may in the law of defamation have some special or secondary meaning additional to or different from their natural and ordinary meaning. This special or ordinary meaning is not one which the words viewed in isolation are capable of sustaining. It is one which a reader acquainted with the extrinsic facts will ascribe to the matter complained of by reason of his knowledge of those facts because he will understand the words in the light of those facts".*

169. The Applicant relies on the following extrinsic facts[15]:

a. The Applicant is a famous Australian Hollywood actor.

b. In the weeks preceding the publication of the first matter complained of, a number of famous actors and movie and television executives, including in Hollywood, had been portrayed in the media and on social media as sexual predators who had committed acts of sexual assault and/or sexual harassment.

c. In the weeks preceding the publication of the first matter complained of, famous Hollywood film producer Harvey Weinstein had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.

d. In the weeks preceding the publication of the first matter complained of, famous Hollywood actor Kevin Spacey had been portrayed as a sexual predator who had committed acts of sexual assault and/or sexual harassment.

e. In the days preceding the publication of the first matter complained of, Australian television personality Don Burke was portrayed by the media as being a sexual predator.

170. The essential requirement of the plea of true innuendo is that the extrinsic fact is not one within the general knowledge of the hypothetical referees: see *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at [51].

[15] The Respondents have refused to admit the extrinsic facts even in response to the Applicant's Notice to Admit: Tabs 19 and 20.

171. It may well be that the Court forms the view that by November 2017 those facts were notorious, such that a true innuendo plea is unnecessary because those facts formed part of the general knowledge of the ordinary reasonable reader (discussed above). True innuendo is relied on in the alternative if the Court decides to the contrary.

172. The extrinsic facts were effectively admitted by the Respondents in paragraph 29 of the FAD (Tab 10, p.1/120-121) in which they asserted that:

a. There had been widespread reporting in Australia and internationally in relation to allegations of sexual misconduct, bullying and harassment in the entertainment industry which originated with allegations of misconduct by Harvey Weinstein, a powerful Hollywood producer and included allegations of misconduct by other men in the entertainment industry including, but not limited to, Kevin Spacey, Dustin Hoffman, Louis CK and Casey Affleck, as well as a report by the Media Entertainment & Arts Alliance Actors Equity into widespread sexual harassment in Australian theatre (paragraph 29.1).

b. The reporting gave rise to a movement commonly known as the #metoo movement which encouraged women who had been subject to sexual misconduct, bullying or harassment to speak out with a view to discouraging such conduct from occurring (paragraph 29.3).

173. In any event the material appears behind Tabs 104-107. In those circumstances, additional meanings would have been carried to any readers who were aware of the #metoo movement.

Poster

174. Mr Rush complains of the following imputations arising from the Poster in its natural and ordinary meaning:

a. Geoffrey Rush had engaged in scandalously inappropriate behaviour in the theatre;

b. Geoffrey Rush had engaged in inappropriate behaviour of a sexual nature in the theatre.

175. He further complains of imputations arising as a matter of true innuendo:

a. Geoffrey Rush had committed sexual assault in the theatre;

b. Geoffrey Rush had engaged in inappropriate behaviour of a sexual nature in the theatre.

176. The Poster was published in circumstances where a series of allegations of sexual assault and harassment had been made against prominent entertainment industry figures. The fact of Mr Rush's celebrity as a film and theatre star, the sensational presentation of the Poster, and its wording, gives rise to each of the pleaded imputations.

177. The reference to the STC at the bottom of the Poster (*"Theatre company confirms 'inappropriate behaviour'"*) could only be read as meaning that the STC had confirmed the conduct had in fact occurred. There is no reference to any allegation or complaint. Those words would have been understood to mean that the behaviour referred to had been confirmed by the STC.

Second matter complained of

178. Mr Rush complains of the following imputations arising from the second matter complained of in its natural and ordinary meaning:

a. Geoffrey Rush is a pervert;

b. Geoffrey Rush behaved as a sexual predator while working on the STC's production of *King Lear*;

c. Geoffrey Rush engaged in inappropriate behaviour of a sexual nature while working on the STC's production of *King Lear*;

d. Geoffrey Rush, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the STC's production of *King Lear*.

179. He further complains of the same four imputations arising as a matter of true innuendo in the alternative.

180. These imputations are clearly carried by reason of the headline "*KING LEER*" and byline "*Actor accused of Bard Behaviour*" and the presentation of Mr Rush "looking guilty" in the photograph on the front page – as though caught.

181. The inclusion of the Applicant's denials is of no effect in the context of the presentation as a whole – because the ordinary reasonable reader would not give those any weight against

the overwhelming presentation of guilt that is carried. Those denials would definitely not constitute an "antidote" to the bane.

182. Notably, the story forms part of a larger presentation about sexual misconduct in that it is "in the same box" as a story about Don Burke. The newspaper is thus presenting the allegations about Mr Rush in the same category as those against Don Burke – as part of the #metoo movement. That has been an ongoing tactic of the Respondents - other articles in which the allegations against the Applicant are reported as part of the #metoo movement are at, for example: 7/119, 121, 122-129, 130-131, 132, 205-207, 221, 224-227, 232-235, 263-265, 278-280, 285, 299, 309.

Third matter complained of

183. Mr Rush complains of the following imputations arising from the third matter complained of in its natural and ordinary meaning:

a. Geoffrey Rush had committed sexual assault while working on the STC's production of *King Lear*;

b. Geoffrey Rush behaved as a sexual predator while working on the STC's production of *King Lear*;

c. Geoffrey Rush engaged in inappropriate behaviour of a sexual nature while working on the STC's production of *King Lear*;

d. Geoffrey Rush, an acting legend, had inappropriately touched an actress while working on the STC's production of *King Lear*;

e. Geoffrey Rush is a pervert;

f. Geoffrey Rush's conduct in inappropriately touching actress during *King Lear* was so serious that the STC would never work with him again;

g. Geoffrey Rush had falsely denied that the STC had told him the identity of the person who had made a complaint against him.

184. He further complains of the first six imputations arising as a matter of true innuendo in the alternative.

185. This article is plain in its meaning - the repeated assertion of "touching", the assertion the conduct was such that the STC would never work with him again, the allegation that the conduct occurred over months, all contribute to the carrying of the serious imputations pleaded.

186. The allegations of repeated unwanted touching support imputation (a) – sexual assault.

187. The repeated nature of the alleged touching gives rise to imputation (b) – sexual predator.

188. The remaining imputations clearly arise – including by reason of the inclusion of the image from the front page from the previous day including the KING LEER headline.

Defamatory

189. To determine whether something is defamatory of the plaintiff, the Court must consider whether it tends to lower the plaintiff's reputation in the minds of right thinking ordinary members of the community (persons of fair average intelligence): see *Slatyer v Daily Telegraph Newspaper Co* (1908) 6 CLR 1 per Griffith CJ at 7; *Sim v Stretch* (1936) 53 TLR 669 at 671; *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171 per Jordan CJ at 172; *Mirror Newspapers v World Hosts* (1979) 141 CLR 632 at 638 per Mason and Jacobs JJ.

190. This question is to be decided by considering the Applicant's imputations in the context of each matter complained of.

191. Each of the imputations complained of by the Applicant are extremely serious and are plainly defamatory of him.

192. Finally, in their Outline of Opening Submissions served on 12 October 2018, the Respondents admit (at paragraph 3) that the imputations pleaded are defamatory (having previously denied, in each of their four filed Defences, that the imputations were reasonably capable of being, or were in fact, defamatory[16]).

[16] Another example of improper conduct in the running of the Respondents' defence of these proceedings.

E. JUSTIFICATION

Imputations

193. The Respondents allege that the following imputations are substantially true:

a. the Applicant had engaged in scandalously inappropriate behaviour in the theatre;

b. the Applicant had engaged in inappropriate behaviour of a sexual nature in the theatre;

c. the Applicant had committed sexual assault in the theatre;

d. the Applicant is a pervert;

e. the Applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of *King Lear*;

f. the Applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of *King Lear*;

g. the Applicant, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the Sydney Theatre Company's production of *King Lear*;

h. the Applicant had committed sexual assault while working on the Sydney Theatre Company's production of *King Lear*;

i. the Applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of *King Lear*;

j. the Applicant's conduct in inappropriately touching an actress during *King Lear* was so serious that the Sydney Theatre Company would never work with him again.

Section 25

194. Section 25 of the Act relevantly provides:

> ***Defence of justification***
>
> *It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.*

Substantial truth

195. Section 4 of the Act (the dictionary) defines substantial truth to mean:

> *"true in substance or not materially different from the truth."*

196. In order to succeed, the defendant needs to prove the main charge or gist of the slander – and not statements or comments which do not add to the sting of the charge: see *Chase v Newsgroup Newspapers Limited* [2002] EWCA Civ 1722 at [34].

197. The issue of "*substantial truth*" was also discussed in *Cross v Queensland Newspapers Pty Ltd* [2008] NSWCA 80 at [70] – [71] applying *Howden v Truth and Sportsman Ltd* [1937] HCA 74; (1937) 58 CLR 416 at 420 (per Dixon J) and *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161; (2003) 9 VR 1 at [274].

198. In finding that such an imputation is true, the tribunal of fact is finding that the plaintiff's meaning is true because immaterial variances are to be disregarded - although "*substantial*" does not mean "*near enough*"; every material part of the meaning must be proved.

199. These principles are applied under the Act: see *Setka v Abbott* [2014] VSCA 287 at [107]; *Stone v Moore* [2016] SASCFC 50 at [139]; see also recently, *Pahuja v TCN Channel Nine Pty Ltd (No 4)* [2018] NSWSC 1575 at [26] (per McCallum J).

200. In *Wagner v Harbour Radio Pty Ltd* [2018] QSC 2018 at [440], Flanagan J accepted:

> *"To succeed in a plea of truth, the defendant must prove that the imputations are true in substance or not materially different from the truth. What must be proved to be true is every material part of the imputation relied upon by the plaintiffs; errors in detail are tolerated."*

Truth of all carried defamatory imputations is necessary

201. To succeed in a defence of truth the defendant needs to prove the truth of *all* of the carried defamatory imputations in relation to the matter complained of in question. Proof of the truth of less than all of the carried defamatory imputations does not bear upon the question of liability: s.25.

Natural and ordinary meaning of words

202. The words are to be construed in their natural and ordinary meaning when considering defences unless a true innuendo is pleaded that gives rise to the words having a special meaning to those who know additional facts.

Context of matter complained of

203. It is only in context that the true meaning of the words can be disclosed: *Polly Peck (Holdings) plc v Trelford* [1986] 2 All ER 84 at 94 per O'Connor LJ; *State of New South Wales v Derren* [1999] NSWCA 22.

204. The truth or otherwise of the imputations is to be determined in the context of the matter complained of: *Greek Herald Pty Ltd v Nikolopoulos* (2002) 54 NSWLR 165 per Mason P (with whom Wood CJ at CL agreed).

Timing

205. The rule in *Nikolopoulos* has next to be placed alongside the rule in *Maisel v Financial Times* [1915] KB 336: context is everything. Where the conduct at issue has no proximity to the time or subject-matter of publication of the matter complained of it is so remote that evidence of it is inadmissible. Pickford LJ in *Maisel* emphasised the need for "*relevance ... having regard to the time of the libel*", and its absence making the evidence inadmissible. The question, as Cozens-Hardy MR put it, is whether the conduct was "*too remote to be allowed to be evidence of what a man was likely to have done at the time of publication.*"

206. Therefore, as a general rule an imputation must be proved true by reference to facts as they were at the time that the matter complained of was published and neither side may rely on facts that occur after publication, except to the extent that such facts are in turn probative of the situation at the time of publication. In other words, the respondents must prove that the applicant engaged in the conduct in question during the production of *King Lear*.

Onus

207. The onus is on the Respondents to prove the allegations true.

208. In *Neat Holdings Pty Limited v Karajan Holdings Pty Limited* [1992] HCA 66, at 172-171, the Court stated:

> *"The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the mater to be proved involves criminal conduct or fraud."*

209. This principle is now to be considered in the context of s.140 of the *Evidence Act* 1995.

Respondents' particulars

210. At the outset it should be noted there was no evidence adduced **whatsoever** that the STC had made a decision never to work with Mr Rush again. No document was tendered and no witness was called – despite two STC witnesses (Ms Crowe and Mr McIntyre) being on the Respondents' witness list and the subject of Subpoenas to Appear issued at the request of the Respondents: Ex A-69. Because of those Subpoenas, the Respondents were plainly in a position to call Ms Crowe and Mr McIntyre. The Respondents gave no explanation for their failure to call them. As such, the Court should infer that their evidence would not have assisted the Respondents and should find that **imputation 10(f) is false**. The defence of that imputation should have been withdrawn during the Respondents' opening when it was made clear that Mr McIntyre would not be called as a witness. That is yet another example of unjustifiable conduct on the part of the Respondents, which is relied upon as a matter of aggravation.

211. The particulars, even if proved, are incapable of proving the truth of imputations 5(a) and 10(a)/11(a) "*sexual assault*", 7(b)/8(b) and 10(b)/11(b) "*sexual predator*".

212. The Respondents allege the following conduct occurred during *King Lear*:

213. **First**, that during the third week of rehearsals, from about 26 to 30 October 2015, while the Applicant and Ms Norvill and others were rehearsing the final scene, there was an occasion on which Ms Norvill, as Cordelia, was lying on the floor - on her back, with her eyes closed. She heard laughter, opened her eyes, and saw the Applicant "*hovering his hands over her torso and pretending to caress or stroke her upper torso*". He made "*cupping gestures in the air with two cupper hands*", which the Respondents allege "*were intended to*

simulate and did in fact simulate him groping and fondling [Ms Norvill's breasts]": [15] 2FAD.

214. **Second**, that during the rehearsal period, from about 12 October to 23 November 2015, the Applicant "*regularly*" made comments or jokes about Ms Norvill's body "*which contained sexual innuendo*". He also "*regularly (every few days)*" made lewd gestures to Ms Novill - said to include "*sticking his tongue out and licking his lips and using his hands to grope the air like he was fondling* [Ms Norvill's] *hips and breasts*": [16]; [17] 2FAD.

215. **Third**, that during an interview with *The Sydney Morning Herald* in November 2015, the Applicant described himself having "*a stage-door Johnny crush*" on Ms Norvill: [18] 2FAD.

216. **Fourth**, that during the previews between 24 and 27 November 2015, during the performance of the final scene, the Applicant traced his hand across the side of Ms Norvill's right breast. The Respondents allege (impliedly) that Mr Armfield saw that conduct, and that he gave the Applicant a note, the following evening, to the effect that the Applicant's actions should be more "*paternal*" as they were "*becoming creepy and unclear*": [19], [20] 2FAD.

217. **Fifth**, that during the final weeks of the production, between 14 and 26 December 2015, while the Applicant and Ms Norvill were waiting for their final entrance, the Applicant placed his hand on Ms Norvill's lower back, above her shirt, then moved his hand under her shirt, along the waistline of Ms Norvill's jeans, "*brushing across*" Ms Norvill's lower back. When a cue was given, the Applicant stopped touching her lower back, "*squeezed her hand and went into the mechanical action for the lift*": [22] 2FAD.

218. **Sixth**, that during the final week of the production, between 4 and 9 January 2016, while the Applicant and Ms Norvill were again waiting for their final entrance, the Applicant started to touch Ms Norvill's lower back, on top of her shirt, "*gently rubbing his fingers over* [her] *lower back from right to left*": [23] 2FAD.

219. **Seventh**, that the Applicant sent Ms Norvill a text message on 10 June 2016 in which he said he thought of her "*more than is socially appropriate*": [24] 2FAD.

220. The Applicant will consider each of those claims in turn.

221. However, relevant to all of Ms Norvill's claims is the unchallenged evidence from Mr Rush (T59.31-32), Mr Armfield (T295.5-6), Ms Buday (T352.35; T353.36-37) and Ms Nevin (T465.25-31) that the Applicant was getting along well with Ms Norvill throughout the rehearsal and production period of *King Lear*. Indeed, Mr Armfield thought it seemed like "*a deep friendship*": T295.6. That evidence does not sit well with Ms Norvill's claims that she felt "*compromised*" and "*pressured*" (T518.39); "*extremely intimidated*" (T521.9); "*frightened*" (T528.26); and "*threatened*" and "*panicked*" (T536.31-33).

222. Also, Mr Rush denies the allegations: T113.28-47; T114.31-41; T115.1-5; T117.6; T118.5; T119.11-120.6; T173.1-174.6. His evidence should be accepted. There is no reason why the Court would not accept him completely – his credit was not challenged at all in cross-examination.

Evidence

Allegation 1: Hovering hands above breast and laughter

223. The conduct is said to have occurred during the third week of rehearsals, from about 26 to 30 October 2015. Ms Norvill gave evidence of this allegation which included (not in the particulars) eye bulging and licking of lips: T516.18 - T517.4.

224. The rehearsal schedules at Tab 115 show that the entire cast was required to be present for the rehearsal of the final scene: pp.12/78-12/82. That is at least 14 people: Tab 129. In addition, Mr Armfield was present (T291:1-2) and presumably so too were other members of the crew such as the Stage Manager (Ms Gilbert), the Deputy Stage Manager (Mr Eichorn), and the Assistant Stage Managers (Ms Bowes and Ms Hankin). According to Tab 129, that could have meant over 20 people.

225. Only Mark Leonard Winter was called to attempt to corroborate Ms Norvill. Mr Winter's evidence should not be accepted, including for these reasons:

226. **First**, he gave very belated evidence about his memory of that rehearsal. Notably, his Outline of Evidence (which, curiously, was prepared by Ms Norvill's solicitors rather than the Respondents' solicitors: T677.23; Ex A79) included no such recollection. Mr Winter gave evidence that, in preparing that Outline, he told Ms Norvill's solicitors his "*account of the situation*". There is no satisfactory explanation why that account included no reference whatsoever to the alleged incident in rehearsal.

227. **Second**, Mr Winter's memory of that particular rehearsal apparently only came during a conference with Ms Norvill's and the Respondents' lawyers on 28 October 2018, just prior to him giving evidence: T685.11-37. It suffices to say that preparing a witness in that way, with another witness' (Ms Norvill's) solicitors present, is highly undesirable. It increases the likelihood that Mr Winter's evidence was contaminated (even if only subconsciously) by Ms Norvill through her representatives. Mr Winter also refused to meet with the Applicant's lawyers without Ms Norvill's lawyers present: Ex A-80. The Court should treat Mr Winter's evidence with scepticism.

228. **Third**, Mr Winter's evidence was exceedingly vague. Mr Winter himself described it as "*the vaguest of my recollections*": T672.2-3; T685.8. He was apparently not even paying attention to the scene at the time - he was "*talking to somebody at the time*" and "*tuned into it late*": T672.17-19.

229. **Further**, Mr Winter, who is only a year older than Ms Norvill, confirmed that Mr Rush was an exemplary company leader, from whom he was grateful to receive a reference after *King Lear*: T676.22-23; T679.14-15; T685.42-44. It would be surprising if he held that view having witnessed what he claimed.

230. No other witness was called by the Respondents despite so many people being present. In particular, the Respondents did not call Ms Gilbert, the Stage Manager, who Ms Norvill said she saw recently: T551.21-24.

231. On the other hand, each of Mr Rush, Mr Armfield, Ms Buday and Ms Nevin were present at the rehearsal: T357.13-20; T465.35-36. They each denied the alleged conduct occurred: T113.23-29; T290.38-47; T311.13-25; T357.5-11; T359.25-44; T465.38-T466.3. **Ms Nevin was not challenged on that evidence**.

232. Ms Buday specifically rejected Ms Norvill's (recently invented: T608.6) assertion (not in her statement) that, in response to the alleged conduct, Mr Armfield said "*Geoffrey, stop that*": T359.44. **That version was not even put to Ms Nevin, who was there.** Mr Armfield himself said he had no memory of saying that: T311.22. At any rate, the Court would find he did not say that because he did not observe the conduct in the first place.

233. The Court should find that the conduct did not occur.

Allegation 2: Regular comments on appearance and lewd gestures

234. The conduct is said to have occurred from 12 October to 23 November 2015. It is said to have occurred daily, though Ms Norvill was not required to attend each day of rehearsals. Despite the frequency of the occurrence, and Ms Norvill's assertion that it occurred in front of others, not one person was called to corroborate it.

235. In Ms Norvill's signed statement of 13 August 2018, at paragraph 18, she stated she did not recall the precise comments made, or words spoken, by Mr Rush: T608.11-15. Despite that, she complained, for the first time on 30 October 2018, that Mr Rush had called her "*scrumptious*" and "*yummy*": T517.32-35.

236. Mr Rush did not specifically recall calling Ms Norvill *scrumptious* or *yummy*, although he conceded he may have: T179.41-42; T180.19-25. Mr Armfield, Ms Buday and Ms Nevin denied hearing Mr Rush call Ms Norvill *scrumptious* or *yummy*: T311.27-36: T366.40-41; T367.9-12; T466.8-10. Ms Nevin was not challenged on her denial.

237. Even if the Court accepted Mr Rush did call Ms Norvill *scrumptious*, or *yummy*, which the Court should not accept, that conduct is not in itself inappropriate. Context is everything. Even if reasonable minds might come to different views whether - at an abstract, hypothetical level - a male describing a female colleague as *scrumptious*, or *yummy*, might in some circumstances be inappropriate (in say an office workplace), there is no reason to think it was inappropriate in this particular theatre setting. Mr Rush has given an innocent explanation why he may have used the words (T179.41-44; T180.14-25), and has explained the particular environment in which the words might have been uttered ("*Theatrical rehearsal rooms can be very boisterous, very playful, very mocking, very sardonic, very self-deprecating environments*": T212.35-40). He did not agree they were inappropriate. It is worth noting that Mr Armfield recalled hearing Patrick White call John Gaden "*yummy*" in a rehearsal room: T311.34-35.

238. Ms Norvill also gave evidence the Applicant would regularly make gestures towards her, including making hourglass shapes with his hands, licking his lips, raising his eyebrows, bulging out his eyes, and growling: T517.17-32. Ms Norvill gave evidence that the behaviour occurred "*a lot*" (T518.12), then later said it occurred "*daily*": T518.47. She then said it was a "*normalised*" and "*regular part of our day*": T550.42-43.

239. Mr Rush denied those allegations: T113:31-44; T173:1 - T174.6; T180.37-44.

240. Mr Rush's denial at T173.22-29 is particularly revealing - in effect, he would never have behaved like that because it would endanger the relationship between King Lear and Cordelia, which he described as the "*spine to the play*". The totality of Mr Rush's evidence, and indeed the evidence of the Applicant's other witnesses and even the Respondents' witnesses, makes clear that he was utterly committed to, and focused on, his role. He would not have made such gestures to Ms Norvill - not only because it would be out of character for him, but also because it would have ruined the production.

241. In addition, each of Mr Armfield (T290.46-47; T291.4-16; T311.6-36), Ms Buday (T358.15-24; T366.37 - T367.12) and Ms Nevin (T466.5-22) denied hearing any such comments or seeing any such gestures. Mr Armfield gave evidence that, had he observed any such behaviour, or had Ms Norvill raised it with him, he would have confronted Mr Rush about it together with Ms Gilbert: T291.21-24. Ms Nevin gave similar evidence that, had she observed such behaviour, she would have spoken to Mr Armfield and Ms Gilbert: T467.13-17. Had Ms Buday seen such behaviour she would have "*of course*" done something: T357.31-32.

242. Importantly, Mr Winter - called for the Respondents - was not asked a single question about whether he had heard or seen the alleged comments and gestures. The Court should infer his evidence, on that topic, would not have assisted the Respondents.

243. Despite the complete lack of evidence from any other person on this issue, Ms Norvill maintained that Mr Rush made such comments and gestures not only towards her but also towards others. The behaviour, she said, was also directed to: Georgia Gilbert (T519.15-16), "*some of the younger ASMs*" (T519.23-24), Helen Buday, and Helen Thomson: T519.24. None of those allegations are contained within Ms Norvill's statement. Mr Armfield gave evidence that he "*never saw*" Mr Rush make gestures to Ms Gilbert and that Ms Gilbert "*would have slapped Geoffrey on the face had such a thing happened*": T312.29-31. Both Ms Buday (T358.20) and Ms Nevin (T466.24-29) specifically denied that Mr Rush made any such comments or gestures to them. **That evidence was not challenged**. The Respondents did not call any evidence from Ms Thomson.

244. In relation to the "*younger ASMs*", Ms Norvill first asserted that the conduct was directed towards them (T551.45-46) – later, she said they happened to be on either side of Ms Gilbert (T554.20-22), and later still she changed that evidence when challenged on it: T554.6-43. She was, literally, making it up as she went along: T619.11.

245. Not one of the 45 or more people working on the production has corroborated any part of Ms Norvill's evidence in relation to the comments or gestures. It is highly improbable, almost to the point of impossibility, that such behaviour occurred "*daily*", as alleged, throughout the rehearsal period between 12 October and 13 November 2015, without a single person observing them.

246. Importantly, however, Ms Norvill went further still. She claimed (for the first time in the witness box) that, in response to the Applicant making such comments and gestures, Helen Thomson "*would always hit Geoffrey and say, 'Geoffrey, stop that'*" and that there was otherwise "*a chorus of, 'Geoffrey, stop that'*" within the rehearsal room: T521.26-27. There is absolutely no support from any other witness for that proposition – in fact it was not put to the other witnesses. That is astounding given that Ms Norvill's position is not that Mr Rush made comments, and gestures, to her (and to Ms Buday and Ms Gilbert and Ms Thompson and some of the younger ASMs) without those comments and gestures being observed. She says the opposite - that they <u>were</u> observed, and that they were observed by so many people that, she says, it was not just Mr Armfield's voice that rose in complaint but a "*chorus*" of voices. Who are these people and where are they?

247. The Court should positively find that **Ms Norvill has lied in the witness box** when she said that the Applicant made comments and gestures to her, and to Ms Buday, and to Ms Gilbert, and to Ms Thomson, and to the younger ASMs; and that such comments and gestures were observed by the rehearsal room. That finding is particularly important because of Ms Norvill's assertions that such behaviour became "*regular*" and "*normalised*" in the rehearsal room (T519.24-25) - which she went on to describe as "*a room that was complicit*". Those assertions can only be understood as a serious claim that the cast and crew, as a collective, observed the alleged behaviour and deliberately turned a blind eye. In effect, Ms Norvill's position is that the cast and crew were "*complicit*" in her sexual harassment.

<u>Allegation 3: Stage-door Johnny crush</u>

248. The Applicant was being interviewed by the *Sydney Morning Herald*, to promote the play. The first page of the article makes it clear the Applicant was joking with the journalist. The Applicant's shrug in the photograph is playful. The headline ("*Three girls - lucky me! Says Geoffrey Rush as he plays in King Lear*") is a joke. The question he asked of the journalist ("*Do I have that regal stud-muffin quality coming through*") was a joke.

249. His comment that after seeing Ms Norvill in *Hamlet* he "*developed an immediate stage-door Johnny crush*" is, quite obviously, also a joke. Mr Rush told the Court he intended the comment to be ironic (T116.44) and "*whimsical*" (T117.2). He had just complimented his other colleagues, Ms Buday and Ms Thomson, and was trying to also compliment Ms Norvill.

250. The allegation that the comment was somehow inappropriate is ridiculous, cannot possibly be relevant to the truth of any of the imputations, and should never have been pleaded.

251. Indeed, Ms Norvill's complaint about the Applicant describing himself as having a "*stage door Johnny crush*" seems to be a retrospective attempt to find some impropriety where there was none. Ms Norvill's evidence that she found the comment concerning (T522.19-22) should be rejected. She never complained to anyone about that comment, or about the interview, before it was pleaded as part of the Respondents' original Defences in February 2018. She did not raise it with Mr Rush at any time: T575.42-47.

252. Mr Armfield gave evidence he observed that Mr Rush, Ms Buday, Ms Norvill and Ms Thomson returned from the interview "*in high spirits*": T290.35-36. Ms Buday gave evidence that she did not observe Ms Norvill to be in "*any discomfort*" either during or after the interview: T353.17-20.

253. Neither Mr Armfield nor Ms Buday were cross-examined about that evidence. Further, there is no mention of the interview in Annelies Crowe's email of 6 April 2016 (Tab 140) or in the subsequent email exchange between Serena Hill and Patrick McIntyre of 9 November 2017: Tab 141 and Tab 142.

254. The Court should find Ms Norvill's "*distress*" about the interview is a fabricated, self-serving recent invention.

255. At any rate, there was nothing objectively wrong, or even inappropriate, with the joke made by Mr Rush. It was consistent with the joking nature in which Mr Rush and Ms Norvill had previously interacted: Tabs 108-110. It was also consistent with the joking manner in which Ms Norvill referred to Mr Rush during interviews at that time: Tabs 116 and 117.

Allegation 4: Breast allegation

256. It was put to Mr Rush that he deliberately traced the side of Ms Norvill's right breast in a continuous eight second motion with his right hand: T201.35; T202.40.

257. Ms Norvill gave evidence that, during a preview performance of the final scene:

> *Geoffrey placed his hand on my - my face, and then his other hand touched under my armpit or just near my armpit and stroked down my - across my right side of my breast and onto my hip.* [T525.44-47]

258. She gave evidence that "*three of four fingers*" of the Applicant's hand was "*halfway up*" her right breast: T526.4-5. His hand was on her breast for "*Two, three, four seconds*": T527.2. She said that she was on her back as in p.12/700 and 12/701: T626.15.

259. She alleges that, the following day, Mr Armfield gave Mr Rush a note to the effect that the touch "*had become unclear and creepy and that he should make it more paternal*": T529.8-11. She asserts that Mr Armfield did so because he saw the breast touch that she says occurred: T621.6; T628.21-27.

260. Each of those allegations should be rejected as false.

261. First, the conduct as described by Ms Norvill makes no practical sense: T620.16-22. It would have required Mr Rush to unnaturally extend his right arm back over her body and twist his hand (otherwise it would have been the back of his hand touching her – which was not suggested): Tab 134; T628.39-629.6.

262. Further, if it had occurred, it would have been seen by other members of the cast, and by the audience: T620.21-41; T627.1-5. The suggestion that the audience would have been watching King Lear alone, and not watching Cordelia, is ridiculous given their relative positions to the audience: T620.36-41.

263. Mr Rush denied it, and Mr Armfield denied seeing it: T291.46-297.5; T299.36-45. Mr Armfield was watching each preview "*like* a *hawk*": T291.39.

264. Mr Winter thinks he saw Mr Rush's hand on Ms Norvill's breast. However, his evidence directly contradicted Ms Norvill on this issue. He gave evidence it was the left breast that was touched, not the right breast: T673.47; T681.46-47. He also said that it was a "*cupping*" motion which is not what Ms Norvill described: T672.45.

265. He agreed it would have been impossible for Mr Rush to have touched Ms Norvill on the right breast in the position that he was in: T683.11-18.

266. If the touch had occurred as alleged by Mr Winter then many people in the audience would have seen it – the theatre holds 960 people and the seats ascend up into the theatre from the stage: T700.1-6. It is absurd to suggest that Mr Winter was the only person who saw a cupping motion on the left breast that lasted more than 5 seconds.

267. There is no "*note*" from Mr Armfield to the effect that Mr Rush needed to be more "*paternal*" or was being "*creepy*". The only references to that part of the scene in relation to the Applicant, in Mr Armfield's carefully prepared written notes, are that:

(a) he should "*pull at collar of shirt*" (Tab 121, p.12/667);

(b) he should "*laugh at gilded butterflies*" and should "*try pressing your face against EJ's looking towards prison*" and "'*hence like foxes' clearer*" (Tab 123, p.12/674);

(c) he was "*a little too far downstage with Cordelia*" (Tab 123, p.12/674);

(d) he should "*claw at shirt more simply on 'undo this button'*" (Tab 123, p.12/675);

(e) he was "*too far downstage lowering Cordelia to floor" and "'feather stirs; she lives more concentration*" (Tab 125, p.12/683);

(f) he should "*take in Colin on walk around*" (Tab 125, p.12/683);

(g) "*don't let us hear your first breath before first Howl*" and "'*Prithee away' [needs to be] obsessively intense*" (Tab 127, p.12/687);

(h) "*don't hug Kent quite so much*" (Tab 127, p.12/687);

(i) "*maybe settle back on to haunches through the two 'look there', as if in a weird loving comforted satisfaction*" (Tab 127, p.12/687).

268. Mr Armfield gave evidence he did not give such a note (T300.1-7), and he thought it improbable that he used the word "*paternal*": T302.34. He also gave evidence that if he thought Mr Rush was being "*creepy*" he would have told him in his dressing room. He denied using the word "*creepy*" to Mr Rush: T309.24-25. He said he had no memory of the note and believed that he would have remembered it had he said it: T305.6-14.

269. Mr Armfield saw no "*gratuitous*" action outside what was required for the performance of the scene: T291.4-5.

270. Ms Buday was present during the note sessions following each preview and she did not hear Mr Armfield say "*creepy and unclear*" or "*paternal*": T358.29-31; T358.44-46. **She was not cross-examined about this.**

271. Ms Nevin was also present during the note sessions and she did not ever hear Mr Armfield give Mr Rush a note that he was being "*creepy or unclear*" or that he needed to be more "*paternal*": T467.23-27. **She was not cross-examined about this.**

272. At any rate, even if the Applicant accidentally brushed Ms Norvill's breast, that does not justify any of the imputations. The Respondents can only succeed if the touch is proven to have been intentional. Mr Rush has strongly denied he ever "*intentionally touched*" Ms Norvill's breast: T115.1; T203.21-22; T203.42-43.

273. The Applicant gave emotional evidence about his state of mind during those particular moments of the scene. He said (at T107:6-12):

> *For this scene I always imagined that it was my own real-life daughter…And that she had been hit by a bus on the street near where we live in Camberwell and I knew she was gone. I carried her to the footpath and every night I would reinvent that scene in my mind because she's in her early to mid-twenties now and she was my daughter and I needed that - I needed that trigger.*

274. It is clear from Mr Armfield's and Mr Rush's evidence they were aiming to demonstrate "*the most powerful physical expression*" (T286.8) of the grief of King Lear over his dead daughter. Mr Rush was focused on that aim.

275. Ms Norvill agreed that Mr Rush was an utterly dedicated professional, and that the scene is an extremely challenging one: T614.22-31. She also agreed that Mr Rush is a focussed actor: T6157-8. Mr Winter concurred that Mr Rush is a dedicated actor: T700.14-15.

276. The Court should find that, given it was the emotional climax of a 3-hour play, in which the Applicant was imagining his own real-life dead daughter in order to access the depth of grief required for that most tragic scene, the Applicant would not have deliberately touched Ms Norvill's breast.

277. The Court should also find that, if that had occurred, it would have been obvious to the audience and crew watching the performance – none of whom have given evidence.

Allegations 5 and 6: Back touching

278. Ms Norvill alleges that Mr Rush rubbed her back with his left hand twice while she was standing on the chair – a few weeks before Christmas 2015 and then again in the final week on 8 January 2016: T534.46-536.28. She says that on that second occasion she told him to stop and he did: T541.1-41. Strangely she said that she said nothing on the first occasion (which was early-mid December) because there were only "*a couple of days left*": T537.17.

279. Ms Norvill's evidence was that she would stand on a chair, ready for the final entrance, "*a minute or two, three maybe*" before she would be carried on: T532.11-13. Her evidence was that Mr Rush would arrive 20-40 seconds before the entrance: T532.25-27. Her eyes would be closed: T532.47. She said that there was no gap between the end of the back stroking motion and the lift: T536.21-28.

280. Mr Rush denies the allegations: T117.4-19. At the time, as he waited backstage, he was focusing in an "*alert state of neutrality*" in preparation for the "*howl*": T104.35-38. He knew it was "*the biggest challenge of the whole production*" that "*could make or break a performance any night*" and he knew that "*there was no way of coming in under par on that level of raw primal grief*": T102.30-33. He then "*went on stage to light the fuse of Lear's grief cutting through the air like a knife*": T209.39-43.

281. There is no corroborative evidence. Further, the evidence is incredible given that Mr Gilfedder, the actor who played the Messenger, catapulted himself at high speed off stage towards Ms Norvill and Mr Rush during that scene, and then remained there until after the "*howl, howl, howl*", at which time the Applicant and Ms Norvill entered the stage: Ex A-9.

Allegation 7: Text message of 10 June 2016 (Tab 112)

282. The text message is irrelevant to any of the imputations. It was sent 6 months after the production of *King Lear* had ended in June 2016: Tab 112. It is completely innocuous and is clearly a joke – it is utterly consistent with their previous communications.

283. Mr Rush was cross-examined at length about the text. He explained what he intended by its content, and why he sent it: T141.15-T146.10. His evidence should be accepted.

284. The proposition that a comical emoji, intended as a joke, was intended to be sexual or "*panting*", or some sort of veiled sexual invitation, is preposterous.

285. Ms Buday, an actress with lengthy experience in film and in the theatre, agreed there was nothing inappropriate about the text: T362.30-35.

286. Further, Ms Norvill did not actually identify in her evidence she said was the problem with the text: T543.8-544.5. She was led through parts of the text and she said that she was "*bewildered*" because she did not "*understand why he would have sent me a message in the first place*". She then said that she was "*probably panicked*" because she believed "*Geoffrey to be unsafe*". In other words it was the mere receipt of the text that concerned her, not any of its content. No doubt that is because she did not actually have an issue with it – she had sent Mr Rush flirtatious texts before – and gave evidence "*there is nothing wrong with that*": T560.43. In cross-examination she confirmed that she criticised Mr Rush for sending the text at all – "*to think that we were on terms to speak*": T563.39-42. Again, she did not criticise the content of the text. That is curious evidence given her position that she never complained to Mr Rush.

287. Finally, it is worth noting the Applicant had used the exact same phrase – "*socially acceptable*" – in a previous text on 6 September 2014 (CB Tab 110, 12/19).

Ms Norvill's evidence generally

288. There are many other difficulties with Ms Norvill's evidence.

289. By the time Ms Norvill was cast in *King Lear*, she was an experienced actor, having worked for all of the major Australian theatre companies and having appeared in major roles in a number of classical plays – she was no novice – she had been working for 10 years: T506.24-45; Ex R-10. She was not, as she suggested, "*the bottom of the rung*": T520.8.

290. The correspondence between Mr Rush and Ms Norvill from 2014 until mid-2016 proves a friendly relationship: Tabs 108-112. Ms Norvill seemed to accept that her correspondences were flirtatious - particularly T560.44-46; T562.36-37; T563.32. Her attempt to distinguish between intellectual flirtation and sexual flirtation was, in the Applicant's submission, evasive and insincere. At the very least, she and Mr Rush were communicating as equals and friends – again, it would not be true to say, as Mr Norvill

attempted to say, that there was a hierarchy separating her from Mr Rush or that she found Mr Rush's "*power…intimidating*": T519.7-10.

291. Ms Norvill claims that she tried to keep her distance from Mr Rush by hiding in the Stage Manager's office: T529.26-28. That makes no sense given the Stage Manager's office was across the hallway from Mr Rush's dressing room and he used that office as a "*hangout room*": T101.38; T610.6-17.

292. Ms Norvill claims she did not complain to Mr Rush, at the time, because it might have ruined the play. However, she then claims she said "*stop that*" right before the final scene on 8 January 2016: T541.24-25. It did not ruin the play.

293. Ms Norvill signed a statement in these proceedings and, prior to that, prepared a number of drafts of that statement (with the assistance of her solicitor): T546.41-547.5. It was prepared over two to three weeks: T639.26-27. She ensured that it was complete and accurate, and she read it carefully before signing it: T547.10-20. Despite that, the following matters were raised <u>for the first time at trial</u> (none of which were in her signed statement, and most of which were not put to Mr Rush in cross-examination – so one can infer she did not tell any lawyer who prepared her to give evidence):

(a) Standing too close to her in the Green Room and downstairs during *Suddenly Last Summer* (not in statement, not corroborated by Mr Winter, and Mr McClelland not called) (T605.19-32; T606.42; T641.26);

(b) Whispering in her ear in the Green Room at *Suddenly Last Summer* (not put to Mr Rush, not in statement, not corroborated by Mr Winter) (T606.45-47);

(c) "*Scrumptious*" and "*yummy*" (not in statement – in fact, she said in her statement she could not recall the precise words spoken);

(d) Eye bulging while sticking tongue out (not in statement, not put to Mr Rush) (T608.20-25);

(e) Growling while sticking tongue out (not in statement) (T517.32; T608.21-25);

(f) Whispering in ear during rehearsals (not in statement, not put to Mr Rush) (T519.43-44; T609.39);

(g) Comments towards Ms Buday (not in statement, not put to Mr Rush, not put to Ms Buday in cross-examination (T519.24), further expanded upon in cross-examination that he would "*often do the eye – eye bulging and the lip – the lips – the licking of the lips, and the hand gestures*" (T553.5-9);

(h) Comments towards Ms Gilbert (not in statement) (T519.15; T551.40);

(i) Conduct directed toward "*younger ASMs*" (not in statement, not put to Mr Rush) (T519.23-24; T554.1-43);

(j) Mr Armfield saying "*Geoffrey Stop It*" (not in statement – in fact contrary to assertion that the "*room was complicit"*);

(k) Ms Thomson hitting Mr Rush and telling him to "*stop it"* and "*don't*" (not in statement – again contrary to assertion that the "*room was complicit*"; and also not put to Mr Rush) (T519.24; T553.44-47; T608.30-32);

(l) Ms Buday saying "*Geoffrey, that's disgusting*", "*Geoffrey don't do that*", "*Oh, Geoffrey, stop it*" (T553.14-16) (not in statement, not put to Ms Buday, raised for first time in cross-examination – she agreed she never said it before) (T553.20-28);

(m) Chorus of "*don't*" (not in statement – in fact contrary to assertion that the "*room was complicit*", and also not put to Mr Rush) (T608.30-34);

(n) "*Daad*" as a way to tell Mr Rush off (T520.17-19) (not in statement – in fact contrary to assertion that she said nothing – recent invention once there was evidence that she used that nickname for him during the production – she later agreed it was a jocular reference and a nickname) (T564.34-38);

(o) Hand fondling and playing with fingers (not in statement despite being said to have occurred 8-10 times) (T533.4-47; T609.20-33) (not in particulars – objected to T.207.11-17);

(p) Standing too close to her <u>during</u> the bow (often) then later <u>before</u> the bow backstage (clearly made up in the witness box – not in statement and not put to Mr Rush – not mentioned at all until cross-examination) (T588.10-15; T589.1; T605.1-13);

(q) Conversation with Ms Nevin during *King Lear* performances while Ms Nevin was wearing sparkly dress (not in statement) (T608.39-43);

(r) Conversation with Ms Nevin during *All My Sons* (not in statement) (T545.1-546.10);

(s) Conversation with Mr Armfield where she said she "*wasn't in a good place*" and she assumed they were talking about Mr Rush (not in statement, not put to Mr Armfield, raised for the first time in cross-examination) (T557.5-37);

(t) New allegation that she was "*closed down*" from her girlfriend because of Mr Rush's behaviour (alleged for the first time in re-examination) (T634.36-38).

294. In her evidence in chief, the new allegation of hand/finger fondling was said to have started in the previews and occurred 8-10 times: T533.1-534.2. In cross-examination, she said it did not occur until the last weeks of the performances: T616.16-19; T616.38-40.

295. On one of her many versions, Ms Norvill did not complain to anyone, about any conduct of Mr Rush, until mid-April 2016. Mr Armfield gave evidence that there was never "*any inhibition*" on any member of the cast raising any concern or issue with him: T288.20-22.

296. In relation to the "*younger ASMs*", she first said Mr Rush's conduct was directed at them (T519.24), then she said "*when Geoffrey used to speak to Georgia of the ASMs would be on either side of her; that's why I mentioned them*" (T554.19-22). When the difficulty with this was pointed out to her, she tried to fix it up by saying "*Georgia being at the table and Geoffrey speaking to the ASMs – it was directed at them"*: T554.39-43.

297. In relation to Mr Armfield – she claimed he was in the room and complicit, but otherwise gave new evidence that he reprimanded Mr Rush and sounded angry: T555.1-16.

298. Similarly, apparently the admonishments given by others still made them complicit: T555.18-20.

299. The evidence about the bow was bizarre, and clearly made up on the spot. At first she said that Mr Masters saw Mr Rush standing close to her "*when we were doing the bow*" and that Mr Masters would often stand in the way: T588.10. She later claimed it was before they were going to do the bow: T589.1-5. Later still, she said it happened off-stage but agreed she had never said that before: T605.1-13. She then claimed it was before the "*encore bows*": T620.4. Notably, she and Mr Rush are not standing anywhere near each other during the bows: Ex A9.

300. Ms Norvill falsely asserted to other people, including Ms Crowe and Mr Winter, that Mr Rush had followed her into the female toilets on 9 January 2016. That never occurred, nor is it now being said by Ms Norvill to have occurred. It is beyond belief that Ms Norvill could have mistakenly thought that Mr Rush deliberately followed her into the bathroom; that he stood outside her cubicle; that she shouted at him; and that he then left the toilet. Those allegations could only have been deliberately false.

301. More significantly, **Ms Norvill then lied in the witness box** about making that allegation. She said she did not tell Annelies Crowe that she was following into the bathroom (T558.17-18; T600.33-34). However, it is quite plain from Tab 140 that she did. Where could Ms Crowe have otherwise got those very precise allegations? It could not have been a mistaken, or misunderstood, reference. It is a contemporaneous document (the day after Ms Crowe and Ms Norvill met), written by Ms Crowe to her boss, and recording some very serious allegations. Further, Ms Crowe records much more than simply that Mr Rush followed Ms Norvill "*into*" the bathroom – she writes with precision that, when Ms Norvill turned around in the bathroom, Mr Rush was "*in there standing behind her*"; that Ms Norvill then "*fell to the floor and told him to leave*"; and that she Ms Norvill saw "*some recognition in his face that he realised he had crossed a line*". That could only have come from Ms Norvill.

302. Ms Norvill also denied in the witness box that she made the same false allegation to Mr Winter on the evening of the party: T600.45-601.2. He said that she <u>did</u> tell him that on 9 January 2016, and, further, that she was <u>not</u> drunk at the time: T688.3-9.

303. The re-examination of Ms Norvill (after a conference with the lawyers for the Respondents) **was contrived and was followed by a further lie**. Ms Norvill attempted to deflect blame onto Ms Crowe by asserting that she was drunk on 5 April 2016: T631.5-14. That allegation was astounding given she never made such a suggestion previously, and given the failure of the Respondents to call Ms Crowe (again, Ms Crowe was available to be called and the Court should infer her evidence would not have assisted the Respondents). Ms Norvill had previously given evidence that she told Ms Crowe the truth during that meeting: T546.37-39.

304. The email from Ms Crowe is a significant document in the Court's consideration of Ms Norvill's credit since it is a contemporaneous record of what she said to Ms Crowe at the bar in April 2016. It also records that Ms Norvill **did not** mention Mr Rush's name at the

party on 9 January 2016, since that was only "*revealed*" to Ms Crowe on 5 April 2016: Tab 140. Ms Norvill **lied** about this in her evidence: T558.27-31. She was also cross-examined about other lies that she told Ms Crowe: T583.28ff; T588.1-592.34.

305. Ms Norvill **lied in the witness box** in chief when she said she did not personally invite Mr Rush to her Christmas Party (or at all) because she did not want him to meet her family and because he wasn't her friend any more: T537.23-47. In cross-examination, when confronted with the fact that she did invite Mr Rush in front of Ms Gilbert, she then finally admitted she did invite him – she said "*Yes*, *come*" in order to be polite: T611.26-46. It is difficult to see how her earlier denial could have been anything but a lie.

306. Ms Norvill's evidence about the interviews she gave about Mr Rush (in which she was complimentary and joking) was unsatisfactory and should be rejected. On her evidence, she lied to the journalists at the time but should be believed now: T570.42. It was clearly the opposite.

307. She attended *Orlando* with Mr Rush and Mr Winter after much of the alleged conduct is said to have occurred – she offered no explanation why she did so when, prior to that time, she had apparently been subjected to sexual harassment by Mr Rush: T611.13-24.

308. In relation to Ms Nevin, Ms Norvill said that:

    (a) Mr Rush's gestures towards her, and other women, were daily and were normalised (T518.47; T519.20);

    (b) Everyone saw it and didn't have a problem with it (T520.13-16);

    (c) Ms Nevin at the time didn't say anything so maybe she wasn't aware (T548.37-39);

    (d) Maybe Ms Nevin didn't see the behaviour the way she did (T551.1-3);

    (e) Ms Nevin had always been kind to her (T552.23-24) but the room was complicit and the room included Ms Nevin (T549.30-41);

    (f) Nobody spoke up because they were "*frightened*" - they "*enabled*" the behaviour - although Ms Nevin herself was not "*frightened*" (T580.6-26);

    (g) Ms Nevin showed her no kindness (Tab 142).

309. All of this contradictory evidence should be considered in light of the caring, friendly text messages from Ms Nevin in December 2017, and Ms Norvill's response: Ex R-10. Much was made of that exchange by the Respondents. It is unclear why. Ms Nevin could not recall how she found out the complainant was Ms Norvill but it is quite clear that (although not yet in the newspaper) it was already generally known it was her given the email from Mr Moran to Mr Rush's agent on 29 November 2017 in which she is named: Tab 68. It is likely Ms Menelaus told Ms Nevin the complainant's identity given they likely emailed, texted or spoke before they saw each other on the weekend: T481.35-46.

310. The email from Ms Norvill to Mr Rush on 7 January 2016 (two days before the production closed) confirms they still had a collegiate, happy relationship. It is in stark conflict with the allegations in the 2FAD, and with the evidence of Ms Norvill: Tab 108. Her evidence about that email was incredible and clearly also a lie. Her affection towards Mr Rush in that email was consistent with her earlier correspondence in a period in which there is no dispute they were on friendly terms: Tabs 104 - 108.

311. It was suggested to Mr Rush that if Ms Norvill had complained then the play would not have run as clockwork and he agreed: T172.17-20. That was bizarre evidence given the Respondents do (now) assert that she told him to stop (right before they went onto stage); he was told by Mr Armfield to stop, he was told by Ms Thomson to stop, there was a chorus of "*don't*", and Ms Norvill remonstrated him as "*Daad*". If Ms Norvill is to be believed, she now says that there <u>were</u> complaints to Mr Rush. If that had occurred, according to the Respondents, the show would not have run like clockwork and the uncontroverted evidence (led by the Respondents in cross-examination) is that it did run like clockwork. It also contradicts all of her evidence, led at length in chief where she gave evidence of her reasons for not complaining.

Witnesses not called

312. Where a party bears the onus of proof, they Subpoena a relevant witness, and they then do not call that person, unless it is established that the witness has since otherwise become unavailable then it is open to the Court to draw the conclusion that the evidence of that witness would not have assisted that party: *Ho v Powell* [2001] NSWCA 168 at [13] – [16] per Hodgson JA with whom Beazley JA agreed.

313. The Respondents have not adduced any evidence from other cast or crew to corroborate Ms Norvill. That is despite her repeated assertions that the conduct occurred in the presence of others (everyone saw it; regular part of our day; normalised): T550.42-45; T551.40-43.

314. It is highly unlikely (to the point of being unbelievable) that such conduct occurred, on the scale alleged by Ms Norvill, and that no one saw it given the 45 people involved: Tab 129.

315. Further, Mr Winter, who was present, did not give evidence to corroborate Ms Norvill on key issues. It can be inferred that his evidence would not have assisted the Respondents.

316. None of the other cast, or the creative team or management, were called to give evidence.

317. Mr Gilfedder, the actor who played The Messenger, who was in the wings with Mr Rush and Ms Norvill every night before the final scene, was also not called: Ex A-9.

318. Ms Gilbert was not called – despite the Respondents putting to Mr Rush (for the first time at trial, and even though there was no mention of her in any of the six versions of the Defence) that he made a lewd gesture to her (and despite the fact that Ms Norvill saw her a little while back): T551.21-24.

319. Mr Masters, who was in a relationship with Ms Norvill shortly after the production, was not called.

320. Ms Thomson, who is alive and well and performing at the STC, and who was the subject of many (recently invented) assertions by Ms Norvill in evidence, was not called: T608.36-37.

321. Jacek Koman, who was standing over King Lear and the body of Cordelia on the stage during each performance, was not called: Tab 134. He is alive and well according to Mr Winter: T613.29: T701.19-26.

322. Despite being subpoenaed by the Respondents to appear, and despite service of outlines of evidence, they did not call Ms Crowe or Mr McIntyre from the STC. The Court can infer their evidence would not have assisted the Respondents.

323. The was no onus on Mr Rush to prove anything in relation to truth. He did not need to adduce any evidence about the issue.

324. In any event, the evidence is such that the Court can comfortably find, and should find, that the conduct **did not occur**.

F. GENERAL DAMAGES

General principles

325. If the matters complained of are found to be defamatory of the plaintiff, then he is entitled to at least some award of damages, since damage is presumed: *Bristow v Adams* [2012] NSWCA 166 at [20] – [31] per Basten JA.

326. *"In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded"*: s. 34 *Defamation Act* 2005.

327. There are three purposes to an award of damages in defamation:

(a) consolation for hurt to feelings;

(b) recompense for damage to reputation (including where relevant, business reputation); and

(c) vindication of the plaintiff's reputation,

Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44 at 60.7-61.2 per Mason CJ, Deane, Dawson and Gaudron JJ; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 347 [60] per Hayne J, Gleeson CJ and Gummow J agreeing.

328. In the assessment of compensatory damages for harm to reputation in a case such as this it is important to take into account the observations of Mahoney, ACJ in *Crampton v Nugawela* (1996) 41 NSWLR 176, p 193 that *"... In some cases, a person's reputation is, in a relevant sense, his whole life. The reputation of a clerk for financial honesty and of a solicitor for integrity are illustrations of this ... the trustworthiness, actual or reputed of a professional colleague is a matter of a legitimate and ongoing interest*", and p 195 "*In my opinion, the law should place a high value upon reputation and in particular upon the reputation of those whose work and life depend upon their honesty, integrity and judgment*".

329. In *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, Brennan J held (p 507) that account may be taken of an especially adverse impact of the defamatory imputation upon the plaintiff's reputation in the eyes of some group or class in the community.

The Cap

330. Damages are capped at $250,000: s. 35 *Defamation Act* 2005. The maximum damages amount has been increased, from 1 July 2015, to the sum of $ $398,500 by declaration published in the NSW Government Gazette No. Gazette No 66 of 29.06.2018, p3970. The increase in the cap from 2006 is thus over 50%.

331. The cap does not require the Court to engage in a scaling exercise, rather it merely acts as a "*cut off*" amount: *Cripps v Vakras* [2014] VSC 279 at [599] – [609] per Kyrou J; *Carolan v Fairfax (No. 6)* [2016] NSWSC 1091 at [125]-[127] per McCallum J; *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 at [197]-[213]; c.f. *Attrill v Christie* [2007] NSWSC 1386.

Aggravation

332. For an award of aggravated damages to be made, the conduct of the defendant toward the plaintiff must be found to be improper, unjustifiable, or lacking in bona fides - the so-called "rule in *Triggell v Pheeney*" (1951) 82 CLR 497.

333. An example of the application of these principles is that if the plaintiff is cross-examined in a manner that is unjustifiable, that can give rise to an award of aggravated damages: *Haertsch v Channel Nine Pty Ltd & Ors* [2010] NSWSC 182 per Nicholas J at [54]; *Fairfax Media Pty Limited v Pedavoli* [2015] NSWCA 237. A failure to make enquiries is relevant to this question, particularly where there is an obligation to do so – *Warehouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 77 per Hunt J. The assessment of factors of aggravation includes the defendant's conduct from the date of publication to the date of judgment: C*erutti v Crestside Pty Ltd* [2014] QCA 33 at [37] per Applegarth J.

334. An award of aggravated damages does not need to be made separately from the award of general damages: *Cerutti* at [42] per Applegarth J; *Bauer* at [217]-[227].

335. Previously, an award for aggravated damages could result in an amount being awarded above the statutory cap where that amount represented the award for aggravated damages: *Forrest v Askew* [2007] WASC 161 per Newnes J at [74] discussed in *Cripps* at [610] – [615] per Kyrou J; *Al Mouderis v Duncan* (No. 3) [2017] NSWSC 726 at [120]-[122] per Rothman J.

336. A different approach was adopted by Dixon J in *Wilson v Bauer Media* [2017] VSC 521 at [65] – [82]. His Honour held that once a finding was made that an award of aggravation was warranted, then the cap became irrelevant to the award of general damages. Dixon J awarded the plaintiff $650,000 in general damages including aggravation.

337. In *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 the reasoning of Dixon J was upheld on appeal. Their Honours at [215] rejected an argument that (the Victorian equivalent of) s35(1) *Defamation Act* 2005 fixed an upper limit of a range of damages. Their Honours continued at [228] to hold that s35(2) *Defamation Act* 2005 allows the statutory cap to be exceeded in respect of both compensatory damages and aggravated compensatory damages (to be awarded in a global sum) if an award of aggravated damages is warranted.

338. In doing so they relied on the plain reading of s.35 (read with s.34) and rejected the need to consider extrinsic materials, such as the Second Reading Speech, for the purposes of construing the section: esp. at [236] – [238].

339. Their Honours concluded at [249]:

> *"the court is entitled to make an order for damages for non-economic loss that exceeds the statutory cap in respect of both pure compensatory damages and aggravated compensatory damages. In other words, the statutory cap does not then constrain the court's assessment of damages for non-economic loss; when an award of aggravated damages is warranted, the statutory cap is inapplicable."*

340. However, the assessment remains subject to s.34, which stands as "*an ever-present guide*": at [244].

341. This reasoning was considered and applied by McCallum J in *Pahuja v TCN Channel 9* (No. 3) [2018] NSWSC 893 at [26] – [28]; by Dixon J in *Moroney v Zegers* [2018] VSC 446 at [241] and by Flanagan J in *Wagner v Harbour Radio* [2018] QSC 201 at [758]-[762].

Evidence

Prior good reputation

342. The Applicant had an exemplary reputation prior to the Publications. That is evident from the awards he has won and the accolades he has been honoured with. It is also evident from the material at Tabs 46-48. It would be no exaggeration to say the Applicant was, prior to the Publications, one of the most acclaimed and eminent talents Australia had ever produced.

343. Jane Menelaus is a theatre actress who has known the Applicant since 1984. They have worked together in 9 or 10 plays, and they are married with two children. Ms Menelaus knows many people who know the Applicant, in professional and personal circles. Prior to the Publications he had a reputation of being focussed as an actor (and he was admired for that): T251.41-252.35.

344. Trevor Smith is a of a theatre company in Bath and another in London. He has known the Applicant since 1970 when they did a play together at University: T276.38. Although he now lives in the United Kingdom, he sees the Applicant about once per year: T276.45-277.1. He knows friends, theatre colleagues and people who have worked in films who also know the Applicant. Prior to the Publications Mr Rush had a reputation (in Australia and the United Kingdom) as a "*supreme actor*" with a reputation of "*the highest quality of such incredible respect*": T277.16-17.

345. Neil Armfield is a world renowned director of theatre and opera with decades of experience in Australia and worldwide: see Ex A-25. He has known the Applicant since 1979 when Mr Armfield was co-artistic director of the Nimrod Theatre and the Applicant was invited from Brisbane to Sydney with his production of *Clownroonies:* T280.43-281.4. They have done 22 plays together and 3 films. They are close friends. Prior to the Publications, Mr Rush had a reputation amongst people who Mr Armfield knew (in Australia, the United Kingdom and the United States) as one of the greatest actors in the world. He was "*an internationally important actor*", with a reputation of being "*utterly diligent*", "*playful*", and "*spirited*": T281.39-43.

346. Robyn Kershaw is an Australian independent film and TV producer and was the General Manager of Belvoir Street Theatre and the Head of Drama and Narrative Comedy for the ABC: see Ex A-27. She has known the Applicant since 1989 when they worked together

on *Diary of A Madman:* T315.7-10. They have since worked together a number of times. Ms Kershaw knows people in theatre, film and television who know the Applicant. They are also friends and mix socially. Prior to the Publications, he had a "*legendary reputation*" (T317.10) as being a collaborator of extraordinary energy, as being incredibly funny, and warm-hearted, with an exceptional understanding of actor-audience relationships: T317.7-16; 317.35-37. He had "*achieved what so many actor* [only] *dream of: international accolades that were beyond just what was recognised in LA but all over the world*": T317.46 -318.1.

347. Margaret (Marnie) O'Bryan is a university academic who has known Mr Rush and Ms Menelaus since the early 2000's. Their sons went to school together, and they developed a close family friendship. She has friends and acquaintances in common with them. Prior to the Publications, Mr Rush had a reputation of being committed to his family, and to being "*the best father that he could be*": T324.23. He was passionate about the community and about education: T325.4-5. He was "*a man of gravitas and grace in equal proportions*": T324.28-29.

348. Simon Phillips is a well-known Australia theatre director who met the Applicant in 1988 when he was an Associate Director of the MTC and cast the Applicant in an adaptation of *Tristram Shandy:* T337.15-19. He has worked with Mr Rush on a number of occasions since that time and has become friends with him. He knows many actors, directors and producers in Australian theatre who also know the Applicant. Prior to the Publications, Mr Rush had a reputation amongst those persons as a "*hugely admired and respected actor*" (T337.41) who was held in the highest regard and whose position was unparalleled.

349. John Gaden is an actor and director who has appeared in countless plays since 1966 (and is still working). He has worked for most of the major theatre companies throughout Australia: T342.19-29. He has known the Applicant since 1982 and has either acted with, or directed, him in many plays since then. Mr Rush had an "*extraordinarily high*" reputation prior to the Publications (T343.14) of being a "*consummate theatre and film actor*" - who brought creativity, joy, light heartedness, and "*meticulous attention for detail*" and "*such focus*" into the rehearsal room: T343.14-18.

350. Helen Buday is an Australian theatre actress who also appeared in film and television: T344.36-37. She has been an actress for 35-40 years: T344.30-31. *King Lear* was Ms Buday's fifteenth production with the STC: T345.9-10. She first met Mr Rush in 1981

when he tutored Ms Buday's class at NIDA: T345.33-38. Even at that time, he had an "*aura*" and passed on what he had learnt in France to his aspiring Australian students: T346.6-9. Prior to *King Lear*, Ms Buday had worked alongside the Applicant in *The Importance of Being Earnest* in 1988 and *Uncle Vanya* in the mid-1990's: T346.11-17. Ms Buday gave evidence that, prior to the Publications, the Applicant was "*iconic*" (T350.21-30) - even in the south of France where Ms Buday now lives. Quite poignantly, Ms Buday recalled that when the Applicant won his Academy Award, he thanked "*every Australian actor*" he had "*ever worked with*": T350.35-36. The effect of Ms Buday's evidence was she understood the Applicant was acknowledging her part, and the part of all Australian actors, in the Applicant's own success - even with fame in Hollywood, the Applicant would return to Australian theatre - "*he comes back*": T350.34-38.

351. Fred Schepisi is a film director, producer and screenwriter who has won many awards over his lengthy career. He has known the Applicant for about 14 years (T413.24), socially and professionally, and knows many people who know Mr Rush. Amongst those persons, the Applicant had been prior to the Publications admired as dedicated, friendly, and extremely professional: T413.40-T414.3. He had a reputation for mentoring younger actors, and for being hard working: T414.5-8. Overseas, he was also known for his collaborative skills, marketability, professionalism, and talent: T44.10-16. In his report (Tab 38), he noted that the Applicant was "widely recognised and loved by the international public" (at [16]).

352. Judy Davis is a well-known and highly regarded Australian actor who has been in more than 50 films: see Ex A-63. She first worked with the Applicant in the 1980's during a film called *The Burning Piano* (T459.44-45), and has since then worked with him in *Children of the Revolution* in 1996, *Swimming Upstream* in 2003, and *The Eye of the Storm* in 2011. Ms Davis gave evidence that, prior to the Publications, the Applicant had a "*very fine reputation*" (T460.26), not only in Australia but also in the US and UK: T460.39-43. He had a "*tremendous record of achievement*" and was regarded as having "*a very serious heavyweight reputation…as an actor*": T460.39-43.

353. Robyn Nevin is one of Australia's most experienced actors having worked as an actor since 1959: see Ex A-64. She has won many awards over her lengthy career in theatre, film and television. She met the Applicant in the 1980s and is friends with Jane Menelaus. They have since worked together on a number of productions and she has seen him perform in other show. She knows people who know Mr Rush. Prior to the Publications, she said that Mr Rush was "*celebrated internationally*" and "*held in very high esteem*": T464.7-15.

354. Fred Specktor has been a talent agent in Los Angeles for about 60 years. He has represented the Applicant for over 20 years, and knows people in the United States in the film and television industry who know the Applicant. Amongst those persons, prior to the Publications, Mr Rush had a "perfect" reputation. He was an actor who other actors, and directors and film-makers, wanted to work with: T708.1-19; Tab 40 - paragraphs 18, 19.

355. Indeed, even the Respondents' witnesses gave evidence of the Applicant's prior good reputation. Ms Norvill gave evidence that the Applicant was a role model who went overseas and took over the world: T507.35-39. Mr Winter gave evidence that the Applicant was an "*exemplary company leader*" during *King Lear* (T679.14-15), that he had great enthusiasm and energy (T679.30-38), and that he was "*a consummate professional*" (T670.11-12), that he was "*utterly dedicated to his craft*": T670.14-15. Mr Marks gave evidence that he admired the Applicant, that he is a "*consummate character actor*", and that "*there's very few actors, working actors, very few actors with awards, very few actors like Geoffrey Rush*": T763.4; T781.37-44.

Extent of publication and republication

356. Relevantly the Publications were both front page stories and also appeared on the internet. The readership figures are set out above – hundreds and thousands of readers.

357. The allegations have been repeated worldwide since that time, causing irreparable damage to the Applicant's reputation: Tabs 61, 62 and 63. Mr Smith, for example, read the allegations in *The Guardian* in England: T277.28-29. Ms Kershaw read them in Los Angeles: T319.34-40.

Damage to reputation

358. The damage to the Applicant's reputation is presumed by reason of the seriousness of the allegations and their distribution throughout the world: Tabs 61-63; Affidavit of Jeremy Marel sworn 5 November 2018.

359. Judy Davis heard people talking about the Applicant after the articles – people were saying that his "*career was finished*": T461.5-6.

360. Robyn Nevin was in a play in Melbourne at the time and the news of the Publications "*spread amongst the group*" which was rehearsing: T467.40-43.

361. Fred Schepisi gave evidence you "*would have to be dead not to have come across*" the articles (T413.21), and that it was a shock to "*the whole industry*": T414.24. He said the damage will be particularly acute in Hollywood - in the current "*Me Too world*": T415.46-T416.3. He also gave evidence the allegations about Mr Rush in these proceedings are "*all over the place in the Hollywood trades*": T440.39-41. He went on to say the Hollywood trades are Hollywood online and printed trade newspapers, which are of "*special interest*" in the cinema and film industry: T443.7-16.

Hurt to feelings

362. It is difficult to imagine any article having a more severe effect on a plaintiff.

363. Prior to considering the evidence, it is important to attempt to understand Mr Rush's personality and psyche.

364. Ms Menelaus, who knows him best, said he *"is his work*" (T264.35-36). He had so deeply invested himself in his work, over a 40-year career, that his identity, personality, and sense of self had come to be inseparable from his work - his personal and professional selves were entwined one with the other. Ms Menelaus gave evidence that "*you cannot extract Geoffrey's work from Geoffrey*" (T260.11-12) and similarly that "*you can't divorce Geoffrey from his work*". The Publications, in attacking the Applicant's character and conduct as a professional, have therefore attacked him to his core. Ms Menelaus described that, after the Publications, "*Everything in his life was gone*": T264.16-17. Ms O'Bryan described watching "*a light go out*": T327.5. Several witnesses gave evidence that they feared he may never recover. The harm has been as grave as one could imagine.

The Applicant's evidence

365. The Applicant gave evidence that, when he saw the first and second matters complained of on 30 November 2017, "*it was devastating*" (T60.34). His son and wife were home. He could see how distressed they were, which in turn "*created a great deal of hurt*" for him personally. He felt as though someone had poured lead into his head (T60.32-38). He was "*numb*" (T60.48) and sick to his stomach (T61.29).

366. He was particularly disappointed, and distressed, that the Publications had misappropriated and "*polluted or…dirtied*" the photograph of him as King Lear - in an attempt to make him appear as a criminal or madman: T60.26-30.

367. The very next day, he saw the third matter complained of. His blood ran cold and he went to jelly (T67.45-46). He was "*distraught by the way the story was running off the rails*" (T68.43). He felt "*demonised by untruths*": T69.2.

368. Unfortunately, that was just"*the starting point*" and it "*only got worse*": T70.32. Since then, he went into an "*emotional spiral*" (T70.20) - he has experienced the worst 11 months of his life: T70.32-33.

369. In addition to his express evidence, the Court should contrast the ease and eloquence with which the Applicant spoke of other matters (such as his background and filmography) with the obvious discomfort he showed in attempting to explain the depth of his hurt following the Publications. That is consistent with the evidence of other witnesses – that, as a result of the Publications, the Applicant has withdrawn or retreated within himself. For example, Mr Armfield described that he has "*closed down*": T282.36. The Court could infer, from all of that, that in fact the harm and hurt suffered by the Applicant has been even more severe than he has been able to express to the Court.

370. The proceedings have been a very long process in which his sense of self has been under ongoing, pejorative media coverage and insinuations: T120.10-20.

The evidence of other witnesses

371. Ms Menelaus gave evidence of her husband's suffering over the last 11 months. Her evidence was compelling. She said they went to bed on 29 November 2017 "*with a terrible sense of dread*" (T253.41-42), that they "*didn't sleep very much*" that night (T254.30-31), and that the next day when they saw the first and second matters complained of it was even worse than they had imagined: T254.36. She described Mr Rush's reaction to that first article as "*tragic*" (T254.37) - he put his arms around her and wept: T254.46. He went very quiet which was unlike him: T255.38-39.

372. Ms Menelaus gave evidence that Mr Rush has still not recovered from having seen the first article: T255.33-34.

373. At times he was foetal on the bed (T255.41-42); he could not sleep (T255.42); he groaned "*every morning*" (T255.42); he told Ms Menelaus "*I dread going to bed and I dread waking up*": T255.43.

374. Perhaps worst of all, Ms Menelaus gave evidence that Mr Rush thought - first, that his children no longer loved him as much as they had prior to the Publications (T260.2); and second, that his career and livelihood had been taken away from him "*in an instant*": T260.35-36.

375. The effect of the Publications can hardly be over-stated:

> *I saw a man so altered and changed. His eyes sunk into his head. He treated very much from…the world…*[H]*e was retreating into a sort of solo world. He would get up very late, he would not speak for a lot of the day. I was - we were losing him, and to a certain extent we have…*[I]*t will take us a very, very long time to get over this…*[O]*ur approach to the world and people has changed, and I - I think Geoffrey will take a very - we will all take a very long time to get over it.* (T263.26-36)

376. Trevor Smith, who has known Mr Rush since the early 1970s, gave evidence he visited Australia and found the Applicant in "*a miserable condition*": T277.38. He convinced the Applicant to leave the house ("*He hadn't been out of the house for months and months*"). He was afraid to join Mr Smith in Adelaide because he was scared people might spit on him: T277.42-43.

377. Robyn Kershaw gave evidence that the Applicant was "*incredibly distressed*". He was anxious about his family, and about the future; he was "*laden with grief*"; and he obsessed over the allegations "*to the point where he couldn't talk about anything else*" and "*his whole life* [was] *subsumed*": T320.1-10. The articles had a visceral effect on the Applicant - he stopped laughing (T320.9), and he stopped using his hands: T320.16. He has, since the Articles, "*lived…in a very dark place*": T320.20. Ms Kershaw said the Applicant "*fears that he will never be able to recover from this period in his life*": T322.21-22.

378. Marnie O'Bryan, a family friend, visited the Applicant on 4 December 2017. She telephoned Ms Menelaus who was hysterical and sobbing: T325.34. She went to the Applicant's house. He and Ms Menelaus were in a terrible state - they were "*extremely agitated, smoking very heavily, crying - almost nonstop crying, really not functioning very well*": T325.37-38. She cooked them dinner, but Mr Rush didn't eat: T325.42-43. Since then, they have not improved. Ms O'Bryan described that, "*over the last 11 months it's like we have watched a light go out, the joy, and the…lightness of spirit, the outward-looking person*": T327.3-6.

379. Simon Phillips gave evidence that the Applicant was angry and distressed by the Publications, to the extent that it affected his ability to play Malvolio in the MTC's production of *Twelfth Night*: T338.31-34.

380. Fred Schepisi gave evidence that he contacted Mr Rush and Ms Menelaus soon after the Publications. They were "*taken aback*" and housebound. Ms Menelaus told him she thought the butcher was "*staring at her*", "*as though she was culpable of something as well*": T414.29-37. When Mr Schepisi went to the Applicant's house, the Applicant was was a "*basket case*": T414.12. Mr Schepisi gave evidence that, since then, "*despite the good face he was putting on…he was still entirely rattled*" and was not able "*to look forward to what life was going to hold for him*": T415.37-41.

381. Robyn Nevin gave evidence that she visited Mr Rush and Ms Menelaus soon after the Publications. Ms Menelaus was "*hysterical*" (T468.13). She found it "*deeply upsetting*" (T468.13). She also stayed with Mr Rush and Ms Menelaus when they were in Umbria in mid-2018 – they had hoped for a period "*of peace and reparation*" but, even there, they were "*terribly upset*": T468.20-32. After that, Mr Rush started "*losing his capacity to work*": T469.20. He told her he was "*grieving for the loss of walking into a room and not being able to start*". He was, Ms Nevin described, "*talking about a kind of death*": T469.25.

382. Fred Specktor is concerned that the Publications have damaged the Applicant's "*psyche*", and that he has had "*a very difficult time thinking about acting in anything*": T710.13-18. He went on to say that "*his psyche has changed, and it's about his ability to work that concerns me and probably concerns him*": T727.40-42.

Aggravation

383. The Applicant relies upon the matters set out in the document handed up on 7 November 2018 as aggravating the damages to which he is entitled.

384. The Court should find the conduct of the Respondents, including their reporting on the proceedings, was calculated to, and did in fact, aggravate the harm and hurt suffered by the Applicant.

385. In that regard, the Applicant gave evidence he has been harmed not just by the original Publications but by "*the events of the last 11 months*" and "*the accumulation of events*" (T62.23-25); and by "*the wear and tear of the toing and froing with News Corp and my legal team*" (T63.15-16); and by "*the developments that had started with these articles*" (T63.20-21); and by "*the stain that was building up over the last 11 months*": T64.22.

386. He gave evidence that he had experienced "*the worst 11 months of* [his] *life*" - that the matters complained of had been "*the starting point of that*" but that things "*only got worse*" (T70.31-34). He gave (somewhat understated) evidence the litigation had "*been a very long process*": T120.10. He also gave evidence, specifically in relation to Exhibit A-53, that he felt "*nauseated, by this continuing process of up to the last minute snooping around beyond what [he] thought were the legal precedents*": T125.13-16.

387. All of that evidence makes clear that, while the Applicant was obviously distressed and hurt by the original Publications, he has also continued to suffer ongoing harm and hurt by the course of events over the last 11 months - the Court would comfortably conclude that included the conduct of the Respondents, including their biased and relentless reporting.

Conclusion

388. The amount of damage done to a plaintiff's reputation is nearly always speculative. In this case the imputations are directed to Mr Rush's conduct in his profession. They allege conduct which would make him unsuitable to continue as an actor because it is alleged that he behaves inappropriately towards his colleagues. It would be hard to imagine him ever being offered another role in a film for children – something that he had done previously.

389. The amount of general damages awarded needs to be sufficiently high to vindicate the Mr Rush's reputation internationally by "*nailing the lie*".

390. Annexed as the Schedule to these submissions are comparative damages awards. Notably, most of these awards were made before the decision in *Bauer*. The larger awards in which there was an aggravated damages component may have been constrained by a different interpretation of s.35 than was held to be correct in *Bauer.*

G. ECONOMIC LOSS

Key facts

391. The Applicant's body of work, and income, prior to the Publications are not in dispute: Ex A4. Mr Specktor gave evidence that, prior to the Publications, the Applicant could have done 2.5 to 3 films each year, if he wanted: T708.21-24. He was "*a star and was steadily working*" Tab 40 at [21]; T708.26-27. Ms Russell also noted the Applicant "*has worked very consistently for the last 40 years*": T743.25-33.

392. The Applicant has not worked **at all** since the Publications: T134.39-44. The Court would comfortably find that the only reason for him not working is the Publications. It is quite clear from the whole of the Applicant's evidence that he has not been in the right emotional and physical state to work. Ms Kershaw, for example, gave evidence that the Applicant no longer even talks about work. She described that: "*all of his body - everything - all of his DNA is subsumed by the grief that he is carrying, and the injustice*": T320.23-24. Mr Specktor expressed concern that the Applicant's "*psyche*" is such that he does not have the confidence to work.

393. Mr Phillips discussed Mr Rush's withdrawal from *Twelfth Night*. He said this:

> *So he spent some months - you know, some weeks in a state of anxiety and confusion about what actually was going on. And then, the more that things progressed and it went on, and the more things that came out in different articles, he became angrier and more distressed and eventually we obviously started to talk about the extent to which what was happening would affect his ability to take part in the play.*
>
> *...*
>
> *He felt very anxious that it would only - at the most extreme, it would only take one person to heckle him as a result of the contents of the articles for the entire - his entire confidence as a performer to deflate, and indeed…he was very, very concerned also for the morale of the rest of the actors in the production, that they would go on stage nighty with a sense of insecurity and uncertainty…*

(T338.26-34; T339.16-26)

394. He went on to say, in relation to the Applicant's ability to work:

> [H]*e increasingly lost confidence in his ability to perform. He became depressed and…obsessed about - about the nature of - of what was being said about him publicly and his ability to* ***- I felt that his ability to focus on…performing had diminished to a point of no return*** … (T341.8-17)

395. All of Mr Phillips' evidence was unchallenged.

396. Ms Nevin described how the Applicant started "*losing his capacity to work*": T469.20.

397. The Applicant's income has plummeted since the Publications - since the Publications he has only earned around $45,000 - being mostly residuals from past films: T134.46-47; Ex A62.

398. The Applicant has also expressed to his family and friends that he does not wish to, or does not think he can, work again in the future: T264.33-34. Ms O'Bryan gave the following evidence (T326.23-28):

> *And there has been a sense in which he has expressed, many times, that this is the end of his life as he knows it. That he can't see himself going back to acting, he - he has always believed that the audience is with him, and he says to me, "I can't - "you know, you make yourself vulnerable when you go on stage, and "I can't make myself vulnerable if I think the audience is not with me, and I don't know that they are anymore."*

399. Ms O'Bryan accurately described that as "*a loss to all of us*".

400. Similarly, Mr Phillips gave evidence that "*Geoffrey has talked about the fact that the inherent joy that he felt in performing has been beaten out of him by the proceedings over this year*": T341.16-17.

401. The Respondents suggest, in their Outline of Closing Submissions (at [81]), that "*the Applicant may well be able to act, and will be able to work again, shortly after the conclusion of these proceedings*". The Court should readily reject that submission as being utterly unrealistic in light of the totality of the evidence, largely unchallenged, of the significant damage done to Mr Rush by the Publications. The evidence supports a finding that the Applicant may not recover for a long time.

402. At any rate, regardless of the Applicant's own feelings about his future work, Ms Davis gave evidence that, since the Publications, she has heard people saying that the Applicant's "*career is finished*": T461.5-6. The Applicant's experts each also express fears about the Applicant's prospects of obtaining future work, even with a favourable Court outcome: Tab 38 at [24]-[26]; Tab 39 at [28]-[30]; Tab 40 at [24]-[25].

403. Prior to the Publications, the Applicant was an international success, and was in constant demand. He gave unchallenged evidence that he intended to work at least into his 70s: T51.29-40. There is no evidence he would have been impeded in that aim for any reason.

404. The expert evidence of Mr Schepisi (Tab 38), Ms Russell (Tab 39) and Mr Specktor (Tab 40) support the proposition that Mr Rush's career was an ongoing concern. Indeed, his income had increased in the last 5 years: T939.14-15.

405. The opinions of Mr Marks are, with respect to him, outdated and not based on any relevant data or examples. They are also contradicted by each of Mr Schepisi, Ms Russell and Mr Specktor. Mr Marks could not give one example of a younger actor that was aged to play an older actor (where the character does not age in the film), he had no real basis to assert there "*are generally more roles for younger actors than older actors*", and he did not take into account the fact that over the last few years the amount of content that is made has substantially increased because of streaming services (such that there is therefore more work for all actors, including older actors): T797.38-41; T798.14-24.

406. Mr Marks also could not think of one example where the cost of cast insurance was determinative of the casting of a particular role: T799.14-22. In that regard, Mr Specktor gave evidence he had "*never*" had a problem obtaining insurance for an older actor: T710.1-8. He went on to say: "*Nobody has ever said, 'I don't want to buy that actor because insurance is too expensive*": T727.4-5. Ms Russell gave evidence that the cost of insuring an older actor would only be higher than the cost of insuring a younger actor if the older actor had some particular issue such as a significant health problem: T749.14-16. She had only ever (in 35 years) had two issues obtaining cast insurance – they were in relation to a 32 year old woman with a drug problem, and a 41 year old man "*who showed up on a street corner with a gun*": T749.18-30. She specifically disagreed that an older actor is less likely to be cast than a younger actor because of the increased cost of cast insurance: Tab 39 at [24]; T750.3-12.

407. Mr Marks clung to the general proposition that older actors tend to get less work than older actors, but he repeatedly emphasised there are exceptions to that general rule. The Applicant's position is: first, that general rule may well be wrong in the first place; and second, at any rate, Mr Rush is clearly an exception to that rule.

(a) Mr Schepisi (T433.32-45) and Ms Robin (T744.4-17) disagreed there are fewer roles for older actors;

(b) Mr Schepisi gave evidence that Mr Marks' general proposition does not apply to actors which Mr Schepisi described as "*elite actors*", including Mr Rush: Tab 38 at [17], [20], [23]; T431.12-23. So did Ms Russell (Tab 39 at [26] and [27]) and Mr Specktor (Tab 40 at [15]). Mr Specktor gave evidence that, but for the Publications, there would have been "*enough roles offered to* [Mr Rush] *that he could play enough – as much as he wants to*": T719.9-12.

408. Each of Mr Schepisi (T434.42-44), Mr Specktor (Tab 40 at [22]) and Ms Russell (Tab 39 at [22]) disagreed with Mr Marks' general view that older roles are played by younger actors.

409. Mr Marks accepted that Mr Rush is "*an immensely talented actor*" and "*in that rarefied air of character actors*": T781.25-41. He conceded there are "*very few actors like Geoffrey Rush*": T781.39-41. He conceded further that, but for the Publications, the Applicant would have continued playing supporting roles: T785.30-38. The diverse roles that the Applicant has been offered, and played successfully in the past, show the success with which he can transform himself into any character – irrespective of age. Mr Specktor, in his expert report (Tab 40 at [20]), expressed the following view:

> *Mr Rush is what is described as a "character actor". He is not an "action star" (those sorts of roles may require a younger actor who is more physical). Leading men might lose value as they get older because it is not as easy to step into character roles. Geoffrey likes to play character roles and complex human beings. For example, King's Speech and Genius. His age does not matter for those sorts of roles. If anything, his age works in his favour in my opinion.*

410. At the very least, the Applicant would always, regardless of his age, have been able to be stunt casted. Ms Russell disagreed that Mr Rush was "*not famous enough to appear in a movie in a stunt casting role"*: T746.35-44.

411. Mr Marks accepted that the Applicant had been stunt casted in the past – for example, in *Intolerable Cruelty* (T789.36-T790.3; T791.30-36), and *Gods of Egypt* (T793.36-T794.2), for which he was paid over [redacted]

412. Mr Rush had also been "*stunt cast*" in a number of children's films including *Finding Nemo* and *Minions*: Ex A4. Mr Marks agreed that the trend has been for a number of years to cast famous actors to do the voices in animated children's films: T792.17-43. He also agreed that age was not an impediment to an actor carrying out such work: T792.39-43.

413. In those circumstances, the Court can safely find that the Applicant's career would have continued for at least another 10 years. That is particularly so given his average income had actually increased in the last 5 years.

414. As to whether he will ever work again, even if he is vindicated by these proceedings:

(a) at the moment the Applicant does not have the "*spirit*" or the confidence to work – there is no suggestion that will change (or change any time soon).

(b) the outcome of the proceedings will not likely eradicate the extent of the publication of the allegations on the internet – see, for example, T436.5-8; T442.8-14.

(c) there will be many people, particularly in the context of the #metoo movement, who will not accept the Court's findings irrespective of what they are – to the extent that is not logical or reasonable, the unfortunate reality is there are many individuals who are not logical or reasonable: T808.37-38. That is exactly the point made by Mr Schepisi when, referring to the Hollywood trade papers, he said (T440.39-T441.2):

> [T]*hey're the organs that…everybody there reads and everybody makes judgments on.* ***But they don't make good judgments****. They take the headlines, the things that somebody's accused of and because they're Hollywood, because they have a certain attitude to the – what the public might and might not like, even though it's highly hypocritical, it affects them and it affects their decisions.*

(d) in circumstances where millions of dollars are invested in films, it is unlikely that, given the allegations, film studios will take the risk.

(e) the #metoo movement is a new cultural and social phenomenon. It is impossible to predict whether a favourable Court outcome, for Mr Rush, would be enough to erase, or even start to meaningfully unwind, the negative effect of the Publications. In

response to the question whether Hollywood would forgive Mr Rush, if he wins this case, Mr Specktor said that "*one can't say yes or no*": T727.40-41. Ms Russell gave evidence she had been in the business for 35 years and had "*never seen anything like*" the #metoo movement: T752.3-4. Importantly, her view was that the mere association of Mr Rush with that movement, regardless of whether or not the allegations were found to be true or false, was enough for him to be a risk to film-makers: T752.2-24; T753.28-33; T754.1-6; T754.23-26; T754.39-44; T756.5-45. Mr Schepisi expressed a similar view – that there is a negative stigma attached to anyone caught up in the #metoo movement, which is likely to continue to effect Mr Rush's prospects of obtaining work regardless of the outcome of these proceedings: Tab 38 at [24], [25]; T438.27-T439.2.

(f) the likelihood of the Applicant being selected for a children's film in the future must be remote given the nature of the allegations against him: c.f T793.23-34.

Principles

415. As a matter of principle, a loss of earning capacity productive of financial loss is recoverable in proceedings for defamation and general principles of causation and remoteness of loss apply in the same way as they apply to other torts: *Duffy v Google Inc (No 2)* [2015] SASC 206.

416. Adopting the approach of the High Court of Australia in *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, the question is whether or not the publication of the defamatory material was a cause of the loss of earning capacity productive of financial loss to the Applicant. As to causation, it is sufficient to establish that the publication of the defamatory imputations was a cause of, or materially contributed to, the loss; *Selecta Homes and Building Co Pty Ltd v Advertiser-News Weekend Publishing Co Pty Ltd* [2001] SASC 140 at [142]-[143] and *Haertsch v Channel Nine Pty Ltd & Ors* [2010] NSWSC 182 at [75].

Cancellations

417. From the date of the publication of the matters complained of, and until the conclusion of the proceedings, the Applicant has not been able to carry out any paid work.

418. Further, the Applicant has lost opportunities for acting roles as a result of the Publications, including his role in *Twelfth Night*. The evidence from Mr Rush and Mr Phillips shows he was forced to withdraw from *Twelfth Night* as a result of the Publications. Mr Phillips gave evidence that Mr Rush was anxious that "*it would only take one person to heckle him as a result of the contents of the articles for…his entire confidence as a performer to deflate*" (T339.18-26). He also gave evidence (T341.8-12):

> [H]*e increasingly lost confidence in his ability to perform. He became depressed…and obsessed about…what was being said about him publicly and his ability to - I felt that his ability to focus…on performing had diminished to a point of no return."*

419. He was willing and able to carry out these roles prior to the Publications. The revocation of the offer of *The Great Barrier Reef* was a direct consequence of the publications, and is compensable as a separate head of special damages: *Flegg v Hallett* [2015] QSC 167 at [267] to [271]. A discount for appropriate contingencies is appropriate: *Flegg v Hallett* [2015] QSC 167 at [267] to [271]. The lost opportunities to Mr Rush were secured to a high degree, and any contingency discount applied would be minimal.

Calculations of past earnings

420. The parties' experts are largely agreed on the value of the Applicant's past earnings.

421. Mr Potter is instructed [in Questions 4(a) and 4(b)] to determine the past income of Mr Rush for the last 15 years (since 2013), and the proportion of that income that arises from new work and from royalties. Mr Samuel is instructed to review the accuracy of Mr Potter's answers to 4(a) and 4(b), and whether any income derives from other than acting work.

422. Mr Samuel identifies a number of errors in Mr Potter's original report (TS[17]), all of which have been corrected (Joint Report [2.5(b)]). Further, Mr Samuels identifies sources of income from other than acting work (TS[18]-[19]), and these discrepancies have also been addressed (JR[2.5(b)]).

423. In relation to past income, the only remaining disagreement concerns the "Over There" entity – (TS[21]). Mr Samuels says he is unable to determine from source documentation the exact nature of the income earned through the entity (specifically whether there is any income included which is not from acting) – TS[65]. Further, an amount of $250,367 in 2016 described as "US Income" in Appendix 4 of Potter's report should have been excluded in Methods 3 and 4 – TS[64].

424. Apart from the above, the agreed amended Potter model appears at pp.436 to 710 of CB5. A summary of the model outcomes is at Appendix B which appears at pp.430-434 of CB5. At page 431 CB5, Table 1 shows the past average income for Mr Rush and a breakdown of the income types, in response to Potter's questions 4(a) and 4(b). This is a revision of the table which originally occurs at Page 5 of Mr Potter's report (p.9, CB2).

425. The revised table shows the following 'total sums' and 'averages' for the period 2003 to 2017:

Past economic loss

426. Mr Rush has not been offered, or been able to carry out, any work since the first publications on 30 November 2017.

427. His past economic loss caused by the publication was calculated by Mr Potter from 30 November 2017 to the (originally set) date of the conclusion of the hearing on 12 September 2018 - p.8 of Mr Potter's report, Court Book 2, p.12. Revised figures appear at Court Book 5, p.431 in Table 2 entitled "Net loss after discounting: 30-Nov-2017 to 12-September-2018".

428. Adjusting for the present value of the net loss, and including an amount for pre-judgment interest and a 47% gross-up for tax, the total amounts for past economic loss calculated in accordance with Methods 1 to 4 employed by Mr Potter are as follows for 'new works' and 'royalties':

429. The "Total Loss" figures above represent the loss of income to Mr Rush caused by publication for the period 30 November 2017 to 12 September 2018, a period of 286 days. The average daily loss of income over this period is therefore:

Future Economic Loss

430. Mr Potter has undertaken an assessment, pursuant to the four methods outlined at paragraph 3.9 of his report (see Tab 36 p.2/24), of the future economic loss caused to Mr Rush for 10 years from the date of publication.

431. Mr Samuels disagrees with the calculation of future economic loss in this way, principally on the basis that the approach taken by Mr Potter does not allow for specific risks with Mr Rush generating future income (Joint Report [2.4]). Mr Samuels disagrees with Mr Potter discounting at a risk-free rate, and says the failure to take into account specific risks means that the methodology employed by Mr Potter does not account for specific risks. He suggests Mr Potter should:

a) Identify general and specific factors to Mr Rush to identify all possible reasonably likely future cash flow scenarios;

b) Discount all future cash flow scenarios to allow for their inherent risks (and not at the risk-free rate employed by Potter);

c) Apply a probability weighting to each potential scenario.

432. The Applicant disagrees with this. Whilst it is true that specific risks have not been taken into account by Potter, his analysis of scenarios allowing for reductions of 25%, 50% and 75% of future earnings (over the course of 10 years from the date of publication) adequately provides an outline to the Court of the complete range of possible outcomes for his future earnings, having regard to the associated possible future earning scenarios, and the associated risks.

What time period should the loss be calculated for?

433. Mr Schepisi, a film director, producer and screen writer of more than 50 years' experience, gives an opinion in his expert report at Tab 38, p.5 at [26] that "*even with the most favourable outcome in court it is reasonable to assume there would be a delay of twelve to eighteen months before anyone would even start to think of considering Mr Rush for film work of the level he has been used to*".

434. Ms Robin Russell, a senior business executive in the motion picture and television industry of more than 30 years' experience, gives an opinion at Tab 39, p.28 [30] of her report that "*if he does start to receive offers again, following a judgment in his favour, there would still in my opinion be a lag period of at least 12 months, and possibly more, between the judgment and those offers*".

435. Likewise, Mr Fred Specktor at Tab 40, p.47 at [25] of his report states "*Even if Mr Rush's case is successful, and he is cleared by the Court, I think there would still be a lag of twelve months or more before he would receive offers for movies at the same rate as before the publication of the articles*".

436. At the least, the Court should take into account future economic loss following judgment to Mr Rush for a period of 12 months. Mr Potter has provided revised figures (incorporating the amendments agreed in the joint report) calculating the loss to Mr Rush for past economic loss and future economic loss for a period of 12 months to 12 September 2019 (i.e., 12 months from the original hearing date). The results are set out in Table 4 located at Tab 45, p.5/432.

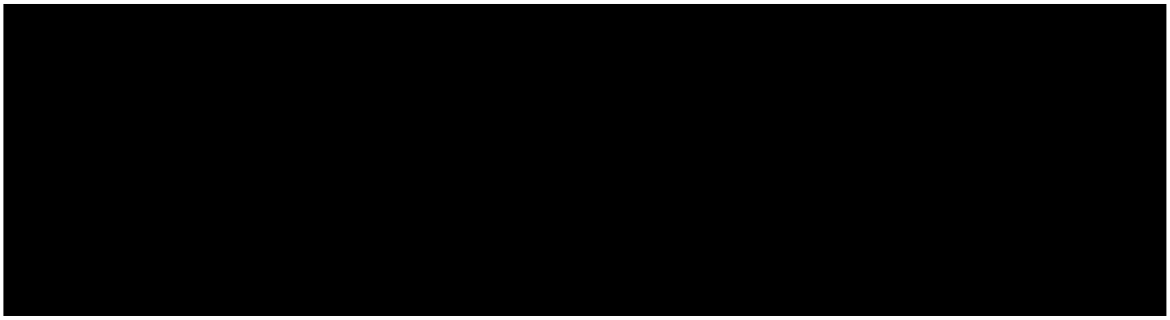
437. The loss from ‘new works’, ‘royalties’ and the combined sums of both are as follows:

438. The figures for “total loss” represent the economic loss to the Applicant caused by the Respondents' publication of the matters complained of from 30 November 2017 to 12 September 2019. In light of the evidence, and having regard to the fact that it is highly likely that judgment will be reserved for an unknown period, it is reasonable in the circumstances to infer that the economic loss sustained by the Applicant will be at least sustained until 12 September 2019, being only 11 months from the date of the conclusion of the proceedings.

439. The Applicant has given evidence that he intended to continue his acting career for 10 years following publication of the matters complained of. Mr Schepisi, Ms Russell and Mr Specktor have given evidence that, given the high regard that the Applicant held in the acting industry, but for the Publications, he would have been able to obtain and carry out acting work at a level consistent with his previous level of work in the acting industry for 10 years from publication. Mr Schepisi, Ms Russell and Mr Specktor have also given evidence that the Applicant is likely to suffer sustained financial loss for the period of his resumption of paid employment after a favourable judgment.

440. Mr Potter has calculated the values of such losses for a period of 10 years from 30 November 2017. The values in tables 6, 8 and 10 at CB5, page 430 outline the possible range of values for the future economic loss that Mr Rush will suffer as a result of publication of the matters complained of (assuming varied amounts of work being offered and carried out by Mr Rush, namely whether he will be offered an average of only 75%, 50% or 25% of his nominal past workload after 12 September 2019).

441. The results for the 'Grand Total Loss' (i.e., the combined loss of New Work and Royalties) for each of these 3 possible scenarios, and employing each of Mr Potter's 4 methods, is reproduced below:



442. The special damages sustained by Mr Rush for the remaining period following 12 September 2019 and which are caused by the Respondents' publication of the matters complained of is substantial, ranging from , assuming Mr Rush is offered and carries out 75% less acting work in future (including income from the Pirates of the Caribbean franchise for the purposes of the calculation), to assuming Mr Rush is offered and carious out only 25% less acting work in future (excluding income from the Pirates of the Caribbean franchise for the purpose of that calculation).

***Andrews* Damages**

443. In the alternative to his claim for special damages, the Applicant seeks Andrews Damages in increasing his general damages as a result of his exposure to the potential of future financial loss: *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225.

444. The agreed figures contained in the Joint Report of Mr Potter and Mr Samuel establish that Mr Rush had an average net yearly earning of over the 15 year period prior to 30 November 2017. Following publication, the Applicant has not been offered or carried out any work. Further, the evidence of Mr Schepisi, Ms Russell and Mr Specktor is that the Applicant will continue to experience a decline in his business following a judgment in his favour. This decline in the Applicant's business should be taken into account by the court in increasing any award of general damages.

***Bauer Media Pty Ltd & Anor v Wilson Media (No 2)* [2018] VSCA 154**

445. In assessing the economic loss occasioned to the Applicant, it would be appropriate to consider the recent decision of the Court of Appeal of the Supreme Court of Victoria in *Bauer Media Pty Ltd and Anor v Wilson (No 2)* [2018] VSCA 154 (**Bauer**).

446. The findings in Bauer turned on the facts and evidence in that case and do not affect findings in respect of special damages and Andrews damages in these proceedings for the following reasons:

a) Ms Wilson was unable to establish the existence of a valuable opportunity which was lost. Mr Rush has lost the opportunity to perform in the MTC's production of *Twelfth Night*, for which he signed a "Deal Memo" on 27 June 2017 and which was scheduled to commence rehearsals on 1 October 2018, with an opening night of 16 November 2018 and closing night of 5 January 2019 – Court Book 7, Page 1, page 21 and page 22.

b) The matter complained of in Bauer was published in a local Australian magazine. No satisfactory evidence was adduced by Ms Wilson to establish the spread and impact of the grapevine effect in respect of the matters complained of to the United States. On the other hand, there is no doubt that the substance of the matters complained of in these proceedings has spread internationally, including most importantly to both the United States and the United Kingdom. Partially, this is due to the rapid and sustained international interest in the "Me Too" movement, and the relevance of the allegations contained in the Publications to that movement.

c) The allegations made against Mr Rush are far more serious in nature than those that were levelled against Ms Wilson, particularly in light of the "Me Too" movement. The impact that the allegations had on Mr Rush's professional career was both swift and severe. On 1 December 2017, the day following publication of the first matter complained of, Mr Rush was asked by the CEO of the Australian Film Institute | Australian Academy of Cinema and Television Arts to step down as its President. This followed immediate concerns from sponsors. Mr Rush complied with this request - (CB 7, pages 5-8).

d) Ms Wilson was able to gain subsequent employment in a major acting role. On the other hand, Mr Rush has not been offered or been able to carry out any work since publication. In the circumstances, the Court can readily infer that the publications caused this direct financial loss to the Applicant.

e) Mr Rush, unlike Ms Wilson, is an established actor with a career spanning more than four decades. The largely agreed evidence in the joint report of Mr Potter and Mr Samuel is that, over the past 15 years, Mr Rush's average net yearly income has been $1,490,454. Conversely, Ms Wilson had an acting career of less than 10 years. She was only recently established as a prominent celebrity earning significant amounts. Mr Rush, having established consistently (for at least the past 15 years) a relatively steady income from acting, demonstrates that there is demand for his acting and a consistent stream of suitable roles. In the circumstances, the absence of being offered any such work since publication leads to no competing hypothesis as to the cause of the loss other than the publications.

Bruce McClintock SC

Sue Chrysanthou 8 November 2018

Counsel for the Applicant

H. SCHEDULE: COMPARATIVE AWARDS

a. *Wagner v Harbour Radio* [2018] QSC 201 an award of $750,000 for each of 4 plaintiffs including aggravation for allegations by Alan Jones that they were responsible for the deaths of others.

b. *Pahuja v TCN Channel 9* (No. 3) [2018] NSWSC 893 award of $300,000 for a Current Affair programme broadcast on Channel 9 that the plaintiff was part of a scheme to exploit vulnerable immigrants.

c. *Mirabella v Price* [2018] VCC 650 award of $175,000 for a publication in a local newspaper that a politician had pushed another politician out of a photograph. Newspaper apologised a few months later.

d. *Fraser v Business News Group* [2018] VSC 196 $150,000 for publication on a subscription website targeting at hotel and tourism industry alleging that the plaintiff was incompetent as the CEO of a hotel and not a fit and proper person.

e. *Zaia v Eshow* [2017] NSWSC 1540 $150,000 for a series of Facebook posts against a religious leader alleging hypocrisy, incompetence and unfitness to be a bishop in relation to the appointment of priests.

f. *Sheales v The Age* [2017] VSC 380 $175,000 for a publication in *The Age* newspaper accusing the plaintiff, a barrister, a deliberately misled Racing Stewards when appearing before them.

g. *Al Mouderis v Duncan* (No. 3) [2017] NSWSC 726 award of $480,000 for an orthopaedic surgeon that was defamed in a number of website publications alleging gross negligence, including calling the plaintiff a "butcher", unethical and disgraceful conduct, breach of interlocutory injunctions aggravated damage.

h. *Weatherup v Nationwide News Pty Ltd* [2016] QSC 266 award of $100,000 for allegations in a newspaper that the plaintiff was habitually intoxicated.

i. *Douglas v McLernon [No 4]* [2016] WASC 320 awards of $250,000, $250,000 and $200,000 to 3 plaintiffs who brought claims against common defendants in relation to internet publications. Various allegations including distribution of pornography, is dangerous to others, sets up internet sites to blackmail people, committed perjury, threatens women and children, firebombed a premises, is part of a criminal gang.

j. *Carolan v Fairfax* [2016] NSWSC 1091 and award of $300,000 in damages including aggravation for Fairfax online articles alleging that a personal trainer injected football players with HGH, got fired from a football club, took unauthorised blood tests from football players and leaked blood tests results to an organised crime figure.

k. *Flegg v Hallett* [2015] QSC 167 an award of $275,000 in damages including aggravated damages for allegations made during a press conference and a radio interview by a former staffer that he had lost trust in the plaintiff and the plaintiff had opened himself up to a charge that he had misled a Parliamentary committee and should be dismissed as a Minister.

l. *Gacic v Fairfax* [2015] NSWCA 99 damages of $175,000 for each plaintiff for Restaurant reviews that the plaintiffs served unpalatable food, gave bad service and were incompetent in their conduct of their restaurant (issues of mitigation).

m. *Polias v Ryall & Ors* [2014] NSWSC 1692 damages totaling $340,000 against 4 defendants for 5 Facebook publications and 3 slanders alleging that the plaintiff, a poker player was a thief. Grapevine effect significant, aggravated damages awarded. Final injunctions granted.

n. *Pedavoli v Fairfax* [2014] NSWSC 164 damages of $350,000 to a school teacher defamed in the Sydney Morning Herald where she was not named but identified by extrinsic facts published. Imputations of being a sexual predator.

o. *Fisher v Channel Seven Sydney* [2014] NSWSC 1616 damages of $125,000 for a bus driver who was accused on television of being a menace to the safety of others and stranding children who were passengers on his bus. Imputations that he drove in a dangerous manner and without wearing a seat belt found to be true (thus mitigating the damages award).

p. *Cripps v Vakras* [2014] VSC 279 where compensatory damages in the amount of $250,000 were awarded for limited internet publications concerning the plaintiff in respect of imputations of being a disgraceful individual who is to be avoided assiduously; being a racist; bullying; intimidating artists and sexually harassing volunteers and staff. (rehearing on a number of issues ordered after appeal so damages will be revisted).

q. *Kunoth-Monks v Healy & Anor* [2013] NTSC 74 general damages of $125,000 for a Radio National broadcast concerning a protest at a tent embassy during which the plaintiff was accused of stirring up trouble at the protest and demeaning her community by calling it racist.

r. *Ahmed v Harbour Radio* [2013] NSWSC 1928 award of $240,000 (and a further $40,000 for a second broadcast) for imputations that the plaintiff was a contemptible person, brought a vexatious AVO, and was unfit to run her business because she was associated with a convicted sex offender via radio broadcast (rehearing on a number of issues ordered after appeal so damages will be revisted).

s. *McMahon v John Fairfax Publications Pty Limited (No 7)* 277 FLR 418 where compensatory and aggravated damages in the amount of $225,000 were awarded in respect of one of the publications (allegations of professional misconduct including an attempt to avoid paying employee entitlements – one imputation proved true).

t. *Marshall v Megna* [2013] NSWCA 30 where compensatory damages of $300,000 and $200,000 respectively were awarded to each plaintiff for allegations of dishonesty and incompetence published in leaflets distributed in letterboxes.

u. *Ahmed v Nationwide News* (unreported NSWDC, 7.12.12) $325,000 against two defendants in relation to allegations that the plaintiff was a corrupt cop who associated with criminals and was involved in a mortgage scam.

v. *Association of Quality Child Care Centres of NSW v Manefield* [2012] NSWCA 123 where compensatory damages of $150,000 were awarded for allegations of mismanagement, incompetence, and deceitfulness published to about 650 persons.

w. *Trkulja v Google* [2012] VSC 533 award of $200,000 general damages for internet publications (where extent of publication was not extensive) carrying imputations that the plaintiff is a criminal and is a significant figure in Melbourne's criminal underworld.

x. *Belbin & Ors v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535 award of compensatory damages in the amount of $70,000 each for 3 plaintiffs and $85,000 for the fourth plaintiff in respect of publication of a letter to a handful of people. Imputations that they broke the law and acted irresponsibly.

y. *Petrov v Do* [2012] NSWSC 1382 $175,000 against each defendant (totalling $350,000) for allegations in a Macedonian language newspaper accusing the plaintiff of seeking to improperly obtain financial advantage from an elderly person such that she was a thief.

z. *Heartsch v TCN Channel 9* [2010] NSWSC 182, an award of $240,000 for imputations alleging incompetence and disgraceful conduct as a plastic surgeon on a television broadcast.

aa. *Simone v Walker* [2009] SASC 201 where compensatory damages of $187,500 were awarded to the first plaintiff and $195,000 awarded to the second plaintiff for allegations distributed in 6 letters to about 100 persons impugning professional and business conduct.

bb. *Lewincamp v ACP Magazines Ltd* [2008] ACTSC 69 where compensatory damages of $325,000 and aggravated damages of $50,000 were awarded for allegations of abuse of position and breach of duty published in a magazine.

cc. *Smith v Dahlenburg* [2008] VSC 557 where compensatory damages of $210,000 were awarded when the management capabilities of the plaintiff were questioned in two letters to two individuals.