

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 12/11/2018 4:22:31 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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



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

Dated: 12/11/2018 4:22:41 PM AEDT

Registrar

Important Information

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

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



No. NSD2179 of 2017

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

Geoffrey Roy Rush

Applicant

Nationwide News Pty Limited and another

Respondents

Respondents' Note in relation to the application to have the evidence at T62

1. The Applicant seeks an order that the limitation placed upon the evidence at T62-63 regarding the Applicant's withdrawal from Twelfth Night be removed.
2. The objection was made to that evidence, and the limitation was sought, on the basis that the withdrawal from Twelfth Night was not particularised as part of the Applicant's case on special damages.
3. There does not appear to be any dispute that the withdrawal from Twelfth Night was not particularised.
4. Instead, the Applicant now seeks to assert, by reference to a chronology set out in the letter of 22 October 2018, that the Respondent's should have understood that the withdrawal of Twelfth Night was relied upon in support of the claim for special damages.
5. A number of matters may be said about that.
6. First, the purpose of pleadings and particulars is to place the other side of litigation on notice of the case they are called upon to meet. A party is not expected to divine a case not particularised by reference to events.
7. Secondly, the Respondents did not in fact understand that the withdrawal from Twelfth Night was part of the Applicant's claim for special damages for a number of reasons as set out below.

8. It was inferred from the fact that the claim was not particularised, in circumstances where it was clearly known to the Applicant's solicitors (and referred to in an affidavit of Mr Pullen dated 3 August 2018), that the Applicant did not intend to rely upon it.
9. Further, it was inferred from the way in which the Applicant's case was put that the loss of this particular item of work was not relied upon. That is, the Applicant's case, as advanced through the assumptions given to Michael Potter and Mr Potter's expert report has been in effect that he has obtained and performed no work at all since the publication of the matters complained of. He seeks to be compensated for this by an award equivalent to a full year's income, based upon the average yearly income he has enjoyed in the past. As such, lost work within the year after publication is already accounted for in the case the Applicant seeks to bring. A case that seeks in addition to be compensated for the loss of particular income would be seeking double compensation.
10. The above may be tested this way. If the Applicant did in fact perform in Twelfth Night and receive compensation, he must accept that the income he received must be offset against any award which equates to a full year's lost income. The fact that he did not receive it would simply restore the award to the full year's value (assuming such an amount is awarded).
11. The Respondent's position in relation to Twelfth Night is that as this was work that the Applicant had available to him and chose to withdraw from (as opposed to the producers withdrawing the offer) the amount ought be taken into account on mitigation of any award equating to a full year's lost income. It was for this purpose that the subpoena to the Melbourne Theatre Company was issued, not for the purpose that the Applicant submits.
12. The Applicant's reliance upon the inclusion in the Court Book of documents going to Twelfth Night as placing the Respondent's on notice of the reliance of this material is similarly misplaced. The Respondents objected to each of those documents on relevance grounds. The Applicant did not respond informing the Respondents that they were relevant to some unparticularised claim for special damages.
13. Further and in any event, if the Applicant sought to have the limitation on the evidence removed the time to do that was on 23 October 2018 after the position had been considered overnight (and the letter sent). The fact that it was not raised then (or soon after) caused the Respondents to believe it was not pressed

as a claim for special damages and forensic decisions as to cross-examination were made accordingly. This issue also concerns the evidence of Mr Phillips, the director of Twelfth Night, of whom the Respondents did not ask any questions. Had it been pressed as a particular of special damages earlier the Respondents may have asked different questions of Mr Rush or sought to ask questions of Mr Phillips, but that opportunity has now been lost.

Tom Blackburn SC **and** **Lyndelle Barnett**

Counsel for the Respondents

Dated: 6 November 2018