

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 6/11/2018 9:49:43 AM 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: 6/11/2018 9:49:47 AM 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.



## APPLICANT'S OUTLINE OF OPENING SUBMISSIONS

NSD 2179/2017

**GEOFFREY RUSH**

Applicant

**NATIONWIDE NEWS PTY LIMITED & JONATHON MORAN**

Respondents

### TABLE OF CONTENTS

- A. BACKGROUND – p2**
- B. ISSUES FOR DETERMINATION – p26**
- C. PUBLICATION & REPUBLICATION – p27**
- D. DEFAMATORY MEANING – p29**
- E. JUSTIFICATION – p35**
- F. GENERAL DAMAGES – p37**
- G. SPECIAL DAMAGES – p40**

## 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. As His Honour has observed, the Respondents "*were quick to publish, they have been slow to defend*".<sup>1</sup> They filed and served a Defence on 1 February 2018, outside the period allowed under Rule 16.32. Since then, they 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. 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) voluntarily abandoned.
3. 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<sup>2</sup>.
4. 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;

---

<sup>1</sup> *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550, at [2] (Tab 16 p.1/280).

<sup>2</sup> The Amended Reply is now of no effect given the abandonment of the s.30 defence after it was filed.

- 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*;
- 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.

5. The Respondents now (since August) plead justification to each of the imputations except the last one<sup>3</sup>. The particulars of justification fail, even taken at their highest, to prove the truth of many of the imputations.

6. The Respondents persistently refuse to admit facts that are notorious matters of public knowledge such as the existence of the #metoo movement and the fact that the Applicant has won an Academy Award and has been Australian of the Year. That is despite the fact that

---

<sup>3</sup> The Respondents admit they intended to convey that imputation - the First Respondent's answer to interrogatory 137(g) (at CB 1/184), and the Second Respondent's answer to interrogatory 20(g) (at CB 1/202).

the First Respondent's publications have made these assertions repeatedly: Tabs 19, 20, 28, 29, 31, 33, 34.

### **Conduct of the proceedings**

7. The Respondents filed and served their Defence at 9.30pm on 1 February 2018. The Applicant raised complaints about the Defence, and sought particulars of it, in the early afternoon on 2 February 2018. The Applicant also filed, that same day, an Interlocutory Application to strike out the Defence and a Notice to Produce seeking documents which had been referred to in the Defence.
8. At the first directions hearing on 8 February 2018, the Respondents were not ready to proceed and had not responded to the particulars sought. They requested an adjournment in order to prepare and propound an Amended Defence, acknowledging that they had not supplied all of the necessary particulars. In answer to the Notice to Produce, despite referring to complaints and findings about the Applicant in their Defence, the only document the Respondents could produce was a newspaper article from 2015 (CB 9/77-79).
9. On 14 February 2018 the Respondents caused the issuing of a Subpoena to the Sydney Theatre Company Limited (**STC**) seeking a raft of documents.
10. On 15 February 2018 the Respondents served an Amended Defence which:
  - (a) failed to rectify the defects in the justification defence;
  - (b) abandoned the defence of common law qualified privilege;
  - (c) rectified some of the complaints regarding s.30;
  - (d) included new, irrelevant, and scandalous particulars of s.30.
11. They also responded to the Applicant's request for particulars on 2 February 2018, but failed to provide most of the particulars sought.
12. The Applicant moved to strike out the defence of justification and the irrelevant parts of the s.30 defence and to set aside the Subpoena. At the argument of the application on 19 February 2018 the following notable concessions were made by the Respondents:
  - (a) they were not in a position to improve the justification particulars (T18.34-35; 79.29-46; 102.34-36);

- (b) they could not explain the relevance to the issue of reasonableness of the new material pleaded (T85.25-86.23 - compare to T.103.25-44);
  - (c) they could not explain why they had provided particulars of the truth of some of the new s.30 particulars and not others (T88.11-89.19 - compare to T.104.9-106.4).
13. By judgment handed down on 20 March 2018 the Court struck out the justification defence, struck out particulars 14-28, 36.9A-36.9C of the Amended Defence, and set aside the Subpoena: *Rush v Nationwide News* [2018] FCA 357 (Tab 15). The Applicant sought orders that morning to progress the matter, including an order for the earliest possible hearing date. Those orders were opposed by the Respondents who sought time to review the judgment.
  14. The matter was listed for further directions on 27 March 2018. The Respondents, for the first time, notified the Court and the Applicant that they sought an order to file a Cross-Claim for contribution against the STC as a joint tortfeasor: T6.5-22. They also notified their intention to seek leave to appeal in relation to the struck out s.30 particulars: T2.33. They again opposed any orders to progress the matter: T4.33.40.
  15. The next day, 28 March 2018, the Applicant filed his Reply, alleging that the Respondents were motivated by malice in publishing each of the Publications, namely an improper motive to harm the Applicant.
  16. At 8.23pm on 3 April 2018 the Respondents served their application to file a Cross-Claim out of time and their application for leave to appeal. Later that evening, at 10.17pm, they served a proposed Further Amended Defence.
  17. On 11 April 2018 before Lee J, in relation to the application for leave to appeal, the Respondents informed the Court that if they were successful in seeking to further amend their Defence they may no longer pursue the appeal.
  18. A second proposed Further Amended Defence was served after 6pm on 11 April 2018. It inserted some particulars previously ruled to be irrelevant to the s.30 defence and included a new plea in mitigation of “*background facts*”.
  19. Each of the Respondents’ interlocutory applications and their application for leave to appeal failed: *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550 (Tab 16) and *Nationwide News v Rush* [2018] FCAFC 70 (Tab 17).

20. On 31 July 2018 the Respondents served yet another Interlocutory Application seeking leave to plead truth to nearly all of the imputations on the basis of belated cooperation by Eryn-Jean Norvill. At the first return date of that application on 3 August 2018, the Applicant was ready to proceed but the Respondents were not: T2.39-44; T4.28-41. The Applicant submitted that, if the amendment was allowed, the hearing would have to be vacated. The Respondents submitted that was not necessarily the case: T5.4; T10.10-11. Despite that submission, the Respondents then filed an affidavit of Marlia Saunders on 6 August 2018 in which they accepted, at paragraph 9, that both of the defences of justification and qualified privilege could not be heard in the allocated hearing time in September. They abandoned their s.30 defence in order to accommodate a new October hearing. The abandonment of the s.30 defence resulted in a massive waste of costs (as set out in the affidavit of Nicholas Pullen filed 8 August 2018, at paragraph 10). It might be thought that their readiness to jettison that defence reflected its poor prospects.
21. The Respondents have reported on each of the interlocutory proceedings, causing further harm to the Applicant - particularly by reporting on the particulars of truth (even after they were struck out) and by reporting on some of the more scandalous material in the particulars of their s.30 defence which they have never sought to prove true.
22. The repeated assertions by the Respondents that no allegation of misconduct of a sexual nature arises from the Publications are absurd. The headline of the second matter complained of was "*King Leer*", it appeared alongside an article about Don Burke (who is described in that article as a "*sexual predator*"), and each of the first three iterations of the Respondents' own Defence acknowledged, at paragraph 29, that the Publications were released against a background of "*widespread reporting in Australia and internationally [of] allegations of sexual misconduct*" (colloquially referred to as the #metoo movement).
23. Prior to the Publications, the Applicant had an impeccable reputation in Australia and overseas. He has received many awards which recognise his achievements as an actor over a 40-year career. In certain eyes he is the finest actor Australia has ever produced.
24. The effect of the Publications on the Applicant, and on his career, has been acute and ongoing. He has been unable to work since they were published (and then re-published throughout the world) and has suffered such intense harm to his reputation that he is not receiving the same offers of work as prior to the Publications.

25. The s.30 defences relied upon by the Respondents until as late as August 2018 (being the only substantive defences until that point) were hopeless to the point of being unarguable. The Applicant submits the Respondents' persistent reliance upon it, in circumstances in which it must have been clear it was hopeless and would fail, was improper and lacking in good faith, and therefore gives rise to a claim in aggravated damages: Tab 24. In addition to a failure of reasonableness on the part of the Respondents in hastily preparing and publishing the Publications, the Respondents were clearly actuated by malice – namely a predominantly improper purpose in making the Publications.
26. 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. Also relied on as aggravation is material that has come to light through the discovery process.

## **Facts**

### Childhood

27. The Applicant was born in 1951 in Toowoomba, Queensland and grew up in Brisbane.
28. He completed Year 12 in 1968. He was very active in the School Drama Club and was in a school rock band. He attended Queensland University and completed his Bachelor of Arts degree there in 1971. He started acting seriously while at University and took part in many productions.
29. His wife Jane Menelaus is a theatre and film actress. They were married in 1988 and they have two (now adult) children.

### Theatre

30. Mr Rush joined the Queensland Theatre Company (**QTC**) and also taught drama during 1971 at a Brisbane high school. He took part in 24 productions with the QTC between 1971 and 1974.
31. In 1975 he moved to Paris to study mime, movement and theatre at L'École Internationale de Théâtre Jacques Lecoq. In the late 1970s he did part-time teaching at NIDA.
32. From 1978 to 2016 he took part in many stage productions including the following:



- (a) The Fool in *King Lear* (QTC)
- (b) Co-Director of *A Midsummer's Night Dream* (QTC)
- (c) *Clowneroonies*
- (d) *Dave in On Our Selection* (Jane St Theatre)
- (e) Vladimir in *Waiting for Godot* (Jane St Theatre)
- (f) *The Revengers Tragedy* (South Australian Theatre Company (**SATC**))
- (g) *No End of Blame* (SATC)
- (h) Various plays for the Lighthouse Company, including *Marriage of Figaro*
- (i) Various plays for the Magpie Theatre for Young People
- (j) Co-Director *Cabaret Scandals of '85* (Belvoir Street Theatre (**Belvoir**))
- (k) Director *Pearls Before Swine* (Belvoir)
- (l) *Benefactors* (STCSA)
- (m) *On Parliament's Hill* (Belvoir)
- (n) *Shepherd on the Rocks* (STCSA)
- (o) *The Winter's Tale* (STCSA)
- (p) Director of *Merry Wives Of Windsor* (QTC)
- (q) Director of *The Popular Mechanicals* (Belvoir)
- (r) *Tristram Shandy* (Melbourne Theatre Company (**MTC**))
- (s) The Fool in *King Lear* (STCSA)
- (t) *The Importance Of Being Earnest* (MTC)
- (u) *Troilus and Cressida* (Grin and Tonic Theatre Company - Queensland)
- (v) *Les Enfants du Paradis* (Belvoir)

- (w) *The Diary of A Madman* (Belvoir)
- (x) Director of *The Wolf's Banquet* (Belvoir)
- (y) *Marat-Sade* (STCSA)
- (z) *The Comedy Of Errors* (STCSA)
- (aa) *The Importance of Being Earnest* (STC)
- (bb) *The Government Inspector* (STC)
- (cc) *Popular Mechanicals 2* (Belvoir)
- (dd) *Uncle Vanya* (STC)
- (ee) Director of *FROGS* (Belvoir)
- (ff) *Oleanna* (STC)
- (gg) Horatio in *Hamlet* (Belvoir)
- (hh) *The Alchemist* (Belvoir)
- (ii) *The Marriage of Figaro* (QTC).
- (jj) *Small Poppies* (Belvoir)
- (kk) *Life x 3* (MTC)
- (ll) King Berenger in *Exit the King* (Malthouse Theatre and Belvoir then Broadway)
- (mm) Man in Chair in *The Drowsy Chaperone* (MTC)
- (nn) *The Diary of a Madman* (Belvoir)
- (oo) Lady Bracknell in *The Importance of Being Earnest* (MTC)
- (pp) Pseudolus in *A Funny Thing Happened On the Way to the Forum* (MTC)
- (qq) King Lear (STC)

33. He has been represented in Australia by Shanahan Management Pty Ltd since 1979, and has been represented in America by Fred Specktor of Creative Artists Agency since 1996.

## Film and Television

34. In about 1979/1980 the Applicant did a 3-part series called *Consumer Capers* for the ABC.
35. In 1980/81 he did a television series for the ABC s called *Menotti*.
36. He has appeared in roles on television dramas including *The Burning Piano* (1993) and *Frontier* (1997), as well as a number of short films including *Small Confessions* (1994/1995) and *Five Easy Pizzas* (1996).
37. At the end of 1995 he appeared in *Mercury* - a 12 part television series for the ABC.
38. In 2004 he co-starred with his wife Jane as guests in an episode of *Kath'n'Kim*.
39. In 2006, he hosted and co-wrote material for the Australian Film Institute (AFI) Awards for the Nine Network. He was the 'Master of Ceremonies' again at the 2007 AFI Awards.
40. In the beginning of 2009, he appeared in a series of special edition “*Australian Legends*” series postage stamps (Tab 6/56) featuring some of Australia's internationally recognised personalities.
41. In 2011, he made a cameo in a commercial, *The Potato Peeler*, for the Melbourne International Film Festival (MIFF).
42. In August 2011 the Applicant was appointed the foundation President of the newly formed Australian Academy of Cinema and Television Arts (AACTA).<sup>4</sup>
43. He narrated 2 six-part seasons of ABC TV's *Low Down* in 2012/13.
44. In 2012 he was in a web series episode of *Being Brendo* – created as a community service by the Victorian Aids Council.
45. In 2016-2017 he appeared in *Genius*, playing Albert Einstein in a 10 part series, for which he was nominated for a Golden Globe for Best Actor (Miniseries or Television Film), a Primetime Emmy Award (for Outstanding Actor in a Limited Series or Movie), and a Screen Actors Guild Award (for Outstanding Performance by a Male Actor in a Miniseries or Television Movie).

---

<sup>4</sup> The AACTA was formerly the AFI.

46. He was the narrator for the ABC TV Series *Lowdown* in 2010.
47. He was narrator for short film *The Nightingale and the Rose* in 2015.
48. He has also appeared in the following films from 1981 until 2017 - being a mixture of Australian films, Hollywood films and films made in the United Kingdom:
  - a) *Hoodwink* (1981);
  - b) *Starstruck* (1982);
  - c) *Twelfth Night* (1987) - an Australian film in which the Applicant played Sir Andrew Aguecheek);
  - d) *Dad and Dave: On Our Selection* (1995);
  - e) *Children of the Revolution* (1996);
  - f) *Shine* (1995)
  - g) *A Little Bit of Soul* (1997) - an Australian film in which the Applicant was nominated for an AFI Award for Best Actor in a Supporting Role;
  - h) *Les Misérables* (1998);
  - i) *Elizabeth* (1998) - for which the Applicant won a BAFTA Award for Best Actor in a Supporting Role;
  - j) *Shakespeare in Love* (1998) - for which the Applicant won a Screen Actors Guild Award (for Outstanding Performance by a Cast in a Motion Picture); and for which he was nominated for various other awards including an Academy Award for Best Supporting Actor, a BAFTA Award for Best Supporting Actor, a Golden Globe Award for Best Supporting Actor (Motion Picture), and a Screen Actors Guild Award (for Outstanding Performance by a Male Actor in a Supporting Role);
  - k) *House on Haunted Hill* (1999);
  - l) *Mystery Men* (1999);
  - m) *Quills* (1999) - for which the Applicant won various awards including a Florida Film Critics Circle Award for Best Actor, a Kansas City Film Critics Circle Award for Best

Actor, a Las Vegas Film Circle Award for Best Actor, a Phoenix Film Critics Society Award for Best Actor, and a Satellite Award for Best Actor (Motion Picture Drama); and for which he was nominated for various other awards including an Academy Award for Best Actor, a BAFTA Award for Best Supporting Actor, a Golden Globe Award for Best Actor (Motion Picture Drama), and a Screen Actors Guild Award (for Outstanding Performance by a Male Actor in a Leading Role);

- n) *The Magic Pudding* (2000);
- o) *Tailor of Panama* (2001);
- p) *Lantana* (2001);
- q) *Frida* (2002);
- r) *Banger Sisters* (2002);
- s) *Pirates of the Caribbean: The Curse of the Black Pearl* (2002/2003);
- t) *Swimming Upstream* (2003);
- u) *Ned Kelly* (2003);
- v) *Harvey Krumpet* (2003);
- w) *Finding Nemo* (2003);
- x) *Intolerable Cruelty* (2003);
- y) *The Life and Death of Peter Sellers* (2004) - for which he won a Primetime Emmy Award for Outstanding Lead Actor in a Miniseries or Movie, a Golden Globe Award for Best Actor (Miniseries or Television Film), and a Screen Actors Guild Award (for Outstanding Performance by a Male Actor in a Miniseries or Television Movie); and for which he was nominated for various other awards;
- z) *Munich* (2005);
- aa) *Candy* (2006) - for which the Applicant won a Film Critics Circle of Australia Award for Best Actor in a Supporting Role and was nominated for an AFI Award for Best Actor in a Supporting Role;

- bb) *Pirates of the Caribbean: Dead Man's Chest* (2006);
- cc) *Elizabeth: The Golden Age* (2007);
- dd) *\$9.99* (2007);
- ee) *Pirates of the Caribbean: At World's End* (2007);
- ff) *Bran Nue Dae* (2009);
- gg) *Warriors Way* (2010);
- hh) *The Legends of the Guardians* (2010) - for which the Applicant was nominated for an Annie Award for Best Voice Acting in an Animated Feature Production;
- ii) *The King's Speech* (2010) - for which the Applicant won various awards including a BAFTA Award for Best Actor in a Supporting Role, British Independent Film Award for Best Supporting Actor, and Screen Actors Guild Award (for Outstanding Performance by a Cast in a Motion Picture); and was nominated for various other awards including an Academy Award for Best Supporting Actor, a Golden Globe Award for Best Supporting Actor (Motion Picture), and a Screen Actors Guild Award (for Outstanding Performance by a Male Actor in a Supporting Role);
- jj) *The Eye of The Storm* (2011);
- kk) *Green Lantern* (2011);
- ll) *Pirates of the Caribbean: On Stranger Tides* (2011) - for which the Applicant was nominated for a People's Choice Award for Favourite Ensemble Movie Cast;
- mm) *The Man Who Could Not Dream* (2012);
- nn) *The Best Offer* (2013);
- oo) *The Book Thief* (2013) - for which the Applicant was nominated for an AACTA International Award for Best Supporting Actor;
- pp) *Unity* (2014);
- qq) *The Daughter* (2015);

- rr) *Minions* (2015);
- ss) *Holding The Man* (2014);
- tt) *The Gods of Egypt* (2016);
- uu) *The Final Portrait* (2017);
- vv) *Genius* (2017);
- ww) *Pirates of the Caribbean: Dead Men Tell No Tales* (2017);
- xx) *Storm Boy* (2018).

49. He reprised his character's voice for the enhancements at the *Pirates of the Caribbean* attractions at the Disneyland and *Magic Kingdom* theme parks, which involved an Audio-Animatronic with his likeness being installed (including one at Tokyo Disneyland).

### Awards

50. The Applicant is one of 23 people to have won the 'Triple Crown of Acting' - an Academy Award, a Primetime Emmy Award, and a Tony Award.
51. He was the first actor to win the Academy Award, BAFTA Award, Critics' Choice Movie Award, Golden Globe Award, and Screen Actors Guild Award for a single performance in film for *Shine* in 1996.
52. He won the **Academy Award** for Best Actor for playing David Helfgott in *Shine* (1996). He was also nominated for: an Academy Award for Best Supporting Actor for *Shakespeare in Love* (1998); an Academy Award for Best Actor for playing Marquis de Sade in *Quills* (2000); and an Academy Award for Best Supporting Actor for playing Lionel Logue in *The King's Speech* (2010).
53. He has won three **British Academy Film Awards (BAFTA's)** for: Best Actor in a Leading Role, for *Shine* (1996); Best Actor in a Supporting Role, for *Elizabeth* (1998); Best Actor in a Supporting Role, for *The King's Speech* (2010). In addition, he was nominated for a BAFTA for: Best Supporting Actor in *Shakespeare in Love* (1998); Best Supporting Actor in *Quills* (2000).

54. He has won two **Golden Globe Awards** for: Best Actor in *Shine* (1996); and Best Actor (Miniseries or Television Film) for *The Life and Death of Peter Sellers* (2004). In addition, he was nominated for a Golden Globe for: Best Supporting Actor (Motion Picture) in *Shakespeare in Love* (1998); and Best Actor (Motion Picture) for *Quills* (2000); and Best Supporting Actor (Motion Picture) for *The King's Speech* (2001).
55. He has been awarded four **Screen Actors Guild Awards** for: Male Actor in a Leading Role for *Shine* (1996); Cast in a Motion Picture for *Shakespeare in Love* (1998); Male Actor in a Miniseries or TV Movie for *The Life and Death of Peter Sellers* (2004); and Cast in a Motion Picture for *The King's Speech* (2011). In addition, he has been nominated for further Screen Actors Guild Awards for: Cast in a Motion Picture for *Shine* (1996); Male Actor in a Supporting Role for *Shakespeare in Love* (1998); Male Actor in a Leading Role for *Quills* (2001); Male Actor in a Supporting Role for *The King's Speech* (2011); and Male Actor in a Miniseries or Movie for *Genius* (2017).
56. He has won three **AFI Awards**: for Best Lead Actor for *Shine* (1996); a Global Achievement Award in 2003; and the Raymond Longford Award in 2009. In addition, he has been nominated for further AFI Awards for: Best Supporting Actor for *A Little Bit of Soul* (1998); Best Lead Actor for *Swimming Upstream* (2002); Best Supporting Actor for *Candy* (2006); and Best Lead Actor for *The Eye of the Storm* (2012).
57. He has won two **Helpmann Awards**<sup>5</sup> - the first for Best Male Actor in a Play, for *The Diary of a Madman* (2011); and the second for Best Male Actor in a Musical, for *A Funny Thing Happened On The Way To The Forum* (2013). He has also been nominated for Helpmann awards for: Best Male Actor in a Play, for *The Small Poppies* (2001); Best Male Actor in a Play, for *Exit the King* (2008); and Best Male Actor in a Musical, for *The Drowsy Chaperone* (2010).
58. He was awarded the **Sidney Myer Award** in 1993. The Sidney Myer Awards were created in 1984 to mark the 50<sup>th</sup> anniversary of the death of Sidney Myer, and are intended recognise outstanding achievements in Australian performing arts.
59. In 2004 he received the **Charles Chauvel Award**. That award was established in 1992, in honour of Australian filmmaker Charles Chauvel, and recognises significant contribution to the Australian screen industry.

---

<sup>5</sup> The Helpmann Awards are accolades which recognise artistic achievement and excellence in Australia's live performance sectors, including theatre (and so are similar to the Tony Awards on Broadway, or the Olivier Awards in London).



60. In 2009 he received the **AFI Raymond Longford Award**. That award was first presented in 1968 in honour of the Australian film pioneer Raymond Longford. The website of the AFI/AACTA describes the Raymond Longford Award as "*the highest honour that the Australian Academy can bestow upon an individual*" and states that it "*recognises a person who has made a truly outstanding contribution to the enrichment of Australia's screen environment and culture*". Apart from the Applicant, other recipients of the Raymond Longford Award include Cate Blanchett, David Stratton, Jan Chapman, Fred Schepisi, and Peter Weir.
61. The Applicant is the founding President of the AACTA which honours achievements (performance and technical in 49 categories) for Australian screen excellence. The AACTA was formerly (1958 – 2011) known as the Australian Film Institute (AFI).
62. He is the Patron of the Melbourne International Film Festival, the Empire Theatre Foundation for Young Artists in Toowoomba, and the Spina Bifida Foundation of Victoria. He is also an Ambassador of the Melbourne Symphony Orchestra and UNICEF.
63. In 2012 he was named Australian of the Year for services to the arts and community.
64. In 2013 he was honoured for 4 months in a career retrospective multi-media exhibition (*The Extraordinary Shapes of Geoffrey Rush*) at the Victoria Arts Centre.
65. On Australia Day in 2014 Mr Rush was awarded a Companion of the Order of Australia for eminent service to the arts as a theatre performer, motion picture actor, role model and mentor for aspiring artists, and through support for, and promoting of, the Australian Arts Industry.
66. In 2017 the Applicant was honoured with the Berlinale Camera award at the Berlin Film Festival.

Applicant's standing prior to matters complained of

67. 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 on republication, discussed below, in that his fame made it more likely that the allegations would be republished worldwide.

68. The extent of his fame can be discerned, not only by the many awards that he has won, nor by the many films, television shows and theatre productions in which he has starred over some 40 years, but by the many articles published about him prior to November 2017: Tabs 46, 47, 48. The Applicant has prepared summaries of this material to assist the Court.
69. The Applicant is a living National Treasure.

### Twelfth Night

70. On 27 June 2017 the Applicant was engaged to perform the role of Malvolio in the 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

71. [REDACTED]

### 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. She decided not to write a story after he responded to her.
73. 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.
74. Mr Moran contacted the STC on 28 November 2017 and alleged he had heard reports of the Applicant 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 unrelentingly continued ever since.

---

<sup>6</sup> Table 1, paragraph 3.10 of Mr Potter's and Mr Samuel's joint report, at CB 5/423.

75. 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.
76. Mr Rush only became aware that *The Daily Telegraph* was proposing to write an article about him on 29 November 2017, at 5:06pm, 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 instead referred in his email to an “*alleged incident of abuse*”. The Applicant was told the story was running the next day: Tab 68.
77. 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 told Mr Moran that the complainant “*does not want any part in this story*”.
78. The Applicant was shocked and appalled when he read Mr Moran's email to Ms Churchill-Brown. He engaged a solicitor to respond who, later that evening, sent an email clearly marked “*NOT FOR PUBLICATION*” to Mr Moran in which he denied the allegations (to the extent they could be discerned from Mr Moran's email): Tab 70.
79. The Applicant saw the first and second matters complained of on 30 November 2017. He was horrified.
80. 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 Tab 13, p.1/203).
81. 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.”*

82. Also on 30 November 2017 Mayne Wyatt (who 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."*

83. 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 the Second Respondent 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.

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

85. 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. 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."*

86. 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 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."*

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

88. Also on 30 November 2017 the STC received many requests for comment from media organisations around the world: Tab 60.
89. 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.
90. 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 - for example, it was 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.
91. Mr Moran also tweeted the third matter complained of on 1 December 2017: Tab 51.
92. Mr Rush saw the third matter complained of on 1 December 2017. He was devastated.
93. That day, Foxtel and 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.
94. Damian Trehwella, the CEO of AACTA/AFI, emailed the Applicant on 1 December 2018: 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.
95. 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.
96. That same day, Mr Trehwella 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*".

97. Since then, the negative publications about the Applicant by the Respondents have been relentless: Tab 61.
98. 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*".
99. 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.
100. 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, alongside actress Yael Stone's comments - the comments were in relation to the #metoo movement generally, but were quoted as though she was referring to the Applicant. The article also repeats the false allegation that the STC changed its policies as a result of the complaint about the Applicant.
101. 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*".
102. 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 women speaking out against abuse and harassment being "*pioneers*": Tab 61, p.7/132; Tab 101, p.9/138.
103. 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.
104. Mr Moran repeated that statement on Facebook on 8 December 2017: Tab 83.

105. 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.
106. 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.
107. 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”.
108. On 31 January 2018, the Respondents' solicitor (Mr Todd) had a conversation with Ms Norvill'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”.<sup>7</sup>
109. Nonetheless, the very next day, the Respondents served a Defence on 1 February 2018 which sought to prove true vague allegations about the Applicant having inappropriately “touched” the Applicant “on a number of occasions”. Mr Rush saw that original Defence and considered it to be preposterous and manufactured: Tab 87.
110. 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.
111. 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 the content of the matters complained of

---

<sup>7</sup> Affidavit of Marlia Saunders dated 31 July 2018, at [12(c)].

including repeated allegations of unwanted "*touching*" in the third matter complained of. 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...*

112. On 8 February 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*".
113. The Amended Defence filed on 20 February 2018 (Tabs 8 and 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 which is alleged to have occurred in no one else's presence (for example the assertion that Mr Rush entered the female 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.
114. 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<sup>8</sup>. Those assertions are now contradicted by Ms Norvill.

115. 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 also taking the opportunity to report 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, pp.9-146-148; 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* (Tab 101, pp. 9-151-152) and in *The Herald Sun* (Tab 101, p.9/153).
116. On 19 March 2017 the First Respondent, in *The Australian*, again took the opportunity to repeat the s.30 particular (not said to be true) that Mr Rush touched Ms Norvill’s genitals without her consent: Tab 101, p.9/156.
117. 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.
118. 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 to the film who “*said that they think that [the] Geoffrey situation, while unresolved, is currently an issue for them*”.
119. In July 2018 the Applicant was forced to withdraw from *Twelfth Night* for medical reasons: Tabs 58 and 59.
120. 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.

---

<sup>8</sup> 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.

121. 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 September 2018 on the assumption that Ms Crowe and Mr McIntyre had endorsed what was said in the outlines. He was confused and distressed by the positions they had apparently taken.
122. On 26 September 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.
123. 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.
124. 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. He is concerned about the damage done to his reputation as a result.
125. He continues to read the media about the matters complained of and about these proceedings, and suffers as a result. He has been unable to work since the publications and he has an ongoing concern about the effect of the publications on his family.
126. 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.
127. He has been further upset by the Respondents' conduct of the proceedings including their hopeless interlocutory applications to amend and to bring a Cross-Claim against the STC.
128. 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.

129. Since the Publications he has felt unable to work at all, and at any rate has had projects withdrawn. He has also been unable to promote the work he completed before the matters complained of. He is unsure whether he will be able to work in the future.
130. He suffers from ongoing distress as a result of the Publications.

**B. ISSUES FOR DETERMINATION**

131. The *Defamation Act 2005 (NSW)* (the “**Act**”) governs the proceedings.
132. 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 the Applicant - 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 the Applicant - 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 the Applicant - 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 the Applicant 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 the Applicant 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

133. Publication is admitted by each of the Respondents: [3]; [6]; [9] 2FAD.
134. The extent of each publication was the subject of interrogatories: Tabs 12 & 14.
135. 4,242 copies of the first matter complained of were distributed and displayed in front of newsagencies in the ACT and NSW (Tab 12, p.1/155).
136. The second and third matters complained of were widely published and read:

	Second MCO	Third MCO
<i>The Daily Telegraph</i> newspaper	933,000 <sup>9</sup>	933,000 <sup>10</sup>
<i>The Daily Telegraph</i> website	8,706 <sup>11</sup>	15,606 <sup>12</sup>
Other newspapers operated by First Respondent	984,000 <sup>13</sup>	984,000 <sup>14</sup>
Other websites operated by First Respondent	979 <sup>15</sup>	474 <sup>16</sup>
<b>Total</b>	<b>1,926,685</b>	<b>1,933,080</b>

<sup>9</sup> Tab 12 1/156-157, paragraphs 10 to 17.

<sup>10</sup> Tab 12 1/158, paragraphs 26 to 33.

<sup>11</sup> Tab 12 1/162, paragraph 48; and Tab 14 1/209, paragraph 47.

<sup>12</sup> Tab 12 1/167, paragraphs 76 and 77.

<sup>13</sup> Tab 12 1/160, paragraphs 38 to 41.

<sup>14</sup> Tab 12 1/165, paragraphs 66 to 70.

<sup>15</sup> Tab 14 1/209-210, paragraphs 51 to 58.

<sup>16</sup> Tab 12 1/167-169, paragraphs 80 to 91.

137. 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.

### **Republication principles**

138. 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. 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.

139. 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; *Sims v Wran* [1984] 1 NSWLR 317 at 320D per Hunt J.

### **Republication evidence**

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

- (a) on the *Daily Telegraph* website;
- (b) by other newspapers published by the First Respondent (or related entities);
- (c) on other websites operated by the First Respondent (or related entities); and
- (d) worldwide over the internet.

Tabs 61, 62, 63. The Applicant has prepared summary tables of that material.

141. Each of the second and third matters complained of were published on media websites accessible throughout Australia and worldwide. Given the Applicant's identity, 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. The Respondents are liable for the damage caused to Mr Rush by those republications.

#### **D. DEFAMATORY MEANING**

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

143. The Applicant is relevantly named in each of the matters complained of, so identification is not an issue.

#### **Imputations carried**

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

145. 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.

146. 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.

147. 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).

148. 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)

149. 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.

150. 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*).*

151. An example of a case in which 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*”.

152. 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).
153. 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.

#### True innuendo

154. 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.
155. 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".*

156. The Applicant relies on the following extrinsic facts:



- 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.
157. 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]. 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.
158. 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).

159. In those circumstances, additional meanings would have been carried to readers who were aware of the #metoo movement.

### **Poster**

195. The Applicant 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.

196. 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.

197. 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 the Applicant'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.

### **Second matter complained of**

198. The Applicant 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.
199. He further complains of the same four imputations arising as a matter of true innuendo in the alternative.
200. These imputations are clearly carried by reason of the headline and byline as well as by the presentation of Mr Rush "*looking guilty*" in the photograph on the front page – as though caught in the "*scandal*" referred to in the Poster.
201. The inclusion of his 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 otherwise carried. Those denials would definitely not constitute an "antidote" to the bane.
202. 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.

### **Third matter complained of**

203. The Applicant 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.

204. He further complains of the first six imputations (paragraphs (a) to (f) above) arising as a matter of true innuendo in the alternative.
205. The article is plain in its meaning - the repeated assertion of “*touching*”, the assertion that 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.

### **Defamatory**

206. To determine whether something is defamatory of the Applicant, the Court must consider whether it tends to lower the Applicant'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.
207. This question is to be decided by considering the Applicant's imputations in the context of each matter complained of.
208. It would be surprising if the Respondents debated this issue. Each of the imputations complained of by the Applicant are extremely serious and are plainly defamatory of him.

### **E. JUSTIFICATION**

#### **Section 25**

209. 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**

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

*“true in substance or not materially different from the truth.”*

211. In order to succeed, the Respondents must 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].
212. The issue of “*substantial truth*” was also discussed in *Cross v Queensland Newspapers Pty Ltd* [2008] NSWCA 80 at [70] – [71].
213. In finding that such an imputation is true, the tribunal of fact is finding that the Applicant'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.

#### Truth of all carried defamatory imputations is necessary

214. To succeed in a defence of truth the Respondents must 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

215. 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

216. 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.
217. 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

218. 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.

219. 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.*”
220. 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.
221. In other words, the Respondents must prove that the Applicant engaged in the conduct in question during the production of *King Lear*.

## **Onus**

222. The onus is in the Respondents to prove the allegations true.
223. 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 matter to be proved involves criminal conduct or fraud.”*

224. This principle is now to be considered in the context of s.140 of the *Evidence Act 1995*.
225. The Respondents will not be able to prove their case. Indeed, the Applicant and other witnesses will give evidence that will comfortably satisfy the Court that the alleged conduct did not occur.

## **F. GENERAL DAMAGES**

### **General principles**

226. If the matters complained of are found to be defamatory of the Applicant, 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.

227. Section 34 of the Act provides: “*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*”.

228. 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.

229. 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 - at 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 at p 195, that: “*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*”.

230. 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**

231. 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%.

232. 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**

233. 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 Pheeny*” (1951) 82 CLR 497.

234. An example of the application of these principles is that if the Applicant 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]. 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: *Cerutti v Crestside Pty Ltd* [2014] QCA 33 at [37] per Applegarth J.

235. 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 Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 at [217]-[227].

236. 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 Moudaris v Duncan (No. 3)* [2017] NSWSC 726 at [120]-[122] per Rothman J.

237. 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.

238. 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) s.35(1) *Defamation Act* 2005 fixed an upper limit of a range of damages.



Their Honours continued at [228] to hold that s.35(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.

239. In doing so the Court of Appeal 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]. 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.”*

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

## **Conclusion**

241. The amount of damage done to a plaintiff’s reputation is nearly always speculative. In this case, the imputations are directed to the Applicant’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.

242. The amount of general damages awarded needs to be sufficiently high to vindicate the Applicant’s reputation internationally by “*nailing the lie*”.

## **G. SPECIAL DAMAGES**

### **Principles**

243. As a matter of principle, a loss of earning capacity productive of financial loss is a head of special damages recoverable in proceedings for defamation. 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.

244. 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**

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

246. Further, the Applicant has lost opportunities for acting roles as a result of the Publications, including his role in *Twelfth Night* and *Great Barrier Reef*. 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 the Applicant were secured to a high degree, and any contingency discount would be minimal.

247. The Applicant will never know what other work he was not offered as a result of the Publications.

### **Calculations of past earnings**

248. The parties each rely on expert reports in relation to calculations of past and future earnings.

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

### **Past economic loss**

250. The Applicant has not been offered, or been able to carry out, any work since the first and second matters complained of were published on 30 November 2017.

251.

[REDACTED]

### **Future Economic Loss**

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

253. 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 at [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 the Applicant 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.

254. The Applicant disagrees with this. This issue will therefore need to be determined.

255. Also a matter of dispute is the period of time in the future in relation to which to award economic loss.

### **Andrews Damages**

256. 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.

---

<sup>17</sup> Up until 12 September 2018, being the conclusion of the original hearing which was to commence on 3 September 2018 with an 8 day estimate.

257. The agreed figures contained in the Joint Report of Mr Potter and Mr Samuel (Tab 45) establish the Applicant's annual net income prior to 30 November 2017. Following publication, the Applicant has not been offered, nor has he carried out, any work. Further, the evidence of the Applicant's experts - Mr Schepisi, Ms Russell and Mr Spektor (Tabs 38-40) - is that the Applicant will continue to experience a significant 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.

Bruce McClintock SC

Sue Chrysanthou

12 October 2018

Counsel for the Applicant