

NOTICE OF FILING

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& ORS
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Sia Lagos

Registrar

Important Information

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Reply

No. NSD 745 of 2022

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

HESTON RUSSELL

Applicant

AUSTRALIAN BROADCASTING CORPORATION and others

Respondents

In answer to the Defence filed on 7 October 2022 (**Defence**), Russell adopts the same defined terms as appear in the Statement of Claim filed on 8 September 2022 (**SOC**) and relies upon the following facts and matters:

1. Save and except in so far as it contains admissions (including deemed admissions), or as otherwise expressly pleaded in this Reply, Russell:
 - 1.1 joins issue with the matters pleaded in the Defence; and
 - 1.2 relies upon the matters pleaded in the SOC.
2. In answer to paragraph 61 of the Defence (s25), Russell:
 - 2.1 denies that any such imputation was true or substantially true;
 - 2.2 says that the plea of justification fails on the particulars by the fact that they are incapable, at their highest, of proving substantially true any of the imputations;
 - 2.3 says that some of the particulars are knowingly false, or otherwise dishonest in their context, evasive and included merely to besmirch Russell, as follows:
 - (a) in relation to particular (3), the ABC, Robertson and Willacy know that Russell and the November Platoon did not engage in any mission in Afghanistan in 2012 until August;

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- (b) in relation to particular (9)(c), s268.115 expressly provides for limited specific acts or omissions on the part of a commander before criminal responsibility attaches;
- (c) in relation to particulars (10) and (11), a breach of the ROE is not per se a criminal offence;
- (d) in relation to particular (12), the IGADF Afghanistan Inquiry was an administrative process and was not a criminal investigation;
- (e) in relation to particular (13), the IGADF Afghanistan Inquiry was completed a year before publication of the November Article and the Linked Article and thus incapable in any respect of proving substantially true any of the relevant imputations;
- (f) in relation to particular (14), the ABC, Robertson and Willacy know that the IGADF Afghanistan Inquiry “*did not find credible evidence of war crimes by the 2nd Commando Regiment*”;
- (g) in relation to particular (14), the ABC, Robertson and Willacy know that the IGADF Afghanistan Inquiry findings referred to in that particular “*all involved the Special Air Service Regiment*” – not commandos;
- (h) in relation to particulars (16), (17) and (18), none of the ABC, Robertson or Willacy have the entire video or the footage preceding that alleged in the particulars;
- (i) in relation to particular (20), warranting investigation does not amount to an allegation of reasonable suspicion or being the subject of an active criminal investigation;
- (j) in relation to particular (21), the IGADF Afghanistan Inquiry was completed a year before publication of the November Article and the Linked Article, found no credible evidence of war crimes against any commando, and thus at the time of publication Russell was not the subject of investigation by the IGADF Afghanistan Inquiry;
- (k) in relation to all of the particulars relied on by the ABC, Robertson and Willacy for imputations 8.1/11.1 the Department of Defence is independent of any criminal investigation, and the IGADF Afghanistan Inquiry was not conducting a criminal investigation at any time, let alone at the relevant time

of publication of the November Article and the Linked Article;

- (l) in relation to particular (23), the breach of the ROE alleged is not a criminal offence and Major General Brereton (having questioned Russell about it) found no credible evidence of war crimes by the 2nd Commando Regiment (which included Russell);
- (m) in relation to particular (24), the alleged breach not being a crime, the speculative plea that "*Russell may be reasonably suspected*" of breaching the ROE which is also irrelevant to the substantial truth of the imputations which all relevantly involve crimes;
- (n) in relation to particular (27), Oscar Platoon was not also known as October Platoon other than by Willacy and the ABC who erroneously referred to it as such in the first version of the October Article;
- (o) in relation to particulars (31) - (39), Commando S has contested the account;
- (p) in relation to particular (34), the assertion without any particulars that at the time in question the soldiers were "*under Russell's effective command and control, or effective authority and control*";
- (q) in relation to particular (37), the speculative plea that "*it may reasonably be suspected by the OSI*" that soldiers had committed murder;
- (r) in relation to particular (38), the irrelevant plea that it warranted investigation;
- (s) in relation to particular (39), the unparticularised and irrelevant assertion that, a year after publication of the November Article and the Linked Article soldiers are "*the subject of an investigation*" by the OSI (no claim that such investigation was ongoing at the time of publication), in circumstances where Russell may or may not be included in that ambiguous and evasive claim, and such plea is irrelevant to more serious imputations of reasonable suspicion;
- (t) in relation to particulars (40) and (41), the absence of Russell from the video, the fact that a former special operations legal officer who has acted for members of the 2nd Commando Regiment and knows many of them has said that the video was a joke and on viewing the video it is self-evidently a joke;
- (u) in relation to particular (42), the speculative plea that "*it may be reasonably*

suspected’ that members of November Platoon had *inter alia* breached the ROE without nominating whether that ambiguous and evasive claim includes Russell;

- (v) in relation to particular (43), the irrelevant plea that the conduct of unspecified members of November Platoon warranted investigation;
- (w) in relation to particulars (44) - (52), the fact that the 2nd Commando Regiment had 4 companies comprising 2 to 3 platoons per company, and “Josh” never named November Platoon;
- (x) in relation to particulars (44) and (47), the allegation that the asserted incident occurred towards the start of a May 2012 deployment towards the north of Afghanistan when November Platoon had no missions before August, and none in 2012 towards the north of Afghanistan;
- (y) in relation to particular (48), the documents sought in (a), (b) and (d) of the FOI Application did not exist and the documents in (c) did not relate to November Platoon, making the conclusions in (50) and (51) irrational and the headline of the November Article absurd and contrary to any genuine understanding of the English language having regard to the response of the Department of Defence in (49);
- (z) in relation to particular (53), the speculative plea that “*Russell may be reasonably suspected of being criminally responsible*”, a scandalous and serious allegation that is wholly unsupported by any proper particular and which is also irrelevant to the substantial truth of the imputations;
- (aa) in relation to particular (54), the irrelevant allegation that Russell warrants investigation;
- (bb) in relation to particulars (55), the unparticularised and irrelevant allegation that at the time of the pleading (as opposed to the time of publication of the November Article and the Linked Article) that Russell is under investigation for unspecified conduct.

2.4 Each of the matters referred to in the preceding particular were known to the ABC, Robertson and Willacy by reason of the following:

- (a) public statements by Russell from October 2020 until November 2021;

- (b) the article published in the Daily Telegraph on 28 October 2020;
- (c) The ABC's response to the article in the preceding paragraph;
- (d) the article published in the Daily Telegraph on 20 November 2020 written by Russell;
- (e) the content of the FOI application by the ABC and the Department of Defence response;
- (f) the statement by the Department of Defence on about 24 November 2021 denying any confirmation of a criminal investigation into November Platoon;
- (g) the broadcast of a segment on the ABC's Media Watch programme on 6 December 2021 about the November Article and the Linked Article;
- (h) editorial complaints by Russell to the ABC dated 17 October 2021 and 16 December 2021;
- (i) the broadcast of the story 'Line of Fire' in two parts on the ABC's 7.30 programme on 20 and 21 September 2022 produced by Willacy (2 weeks before the Defence was filed);
- (j) the article published on the ABC's website on 20 September 2022 written by Robertson and Willacy (2 weeks before the Defence was filed).

3. In answer to paragraphs 62 - 65 of the Defence (s26), Russell:

- 3.1 says that the contextual imputations are bad in form, imprecise and disclose no reasonable defence;
- 3.2 denies that the contextual imputations are carried by the November Article in addition to the imputations pleaded in paragraph 8 of the SOC;
- 3.3 denies that the contextual imputations are carried by the Linked Article in addition to the imputations pleaded in paragraph 11 of the SOC;
- 3.4 denies that any such contextual imputation was true or substantially true at the time of publication of the November Article and the Linked Article;
- 3.5 says that the plea of contextual truth fails on the particulars by the fact that they are incapable, at their highest, of proving substantially true any of the contextual imputations;

- 3.6 says that the contextual imputations are incapable of giving rise to a defence under s26 of the Defamation Act; and
- 3.7 otherwise relies on and repeats the matters in paragraph 2, above.
4. In answer to paragraphs 66 - 67 of the Defence (s29A), Russell:
- 4.1 admits that the November Article concerns an issue of public interest;
- 4.2 admits that the Linked Article concerns an issue of public interest;
- 4.3 says that s29A requires the defamatory matter to be engaged by each element of the defence, not just the matter;
- 4.4 denies that any of the ABC, Robertson or Willacy reasonably believed at the time of publication that the November Article was in the public interest;
- 4.5 denies that any of the ABC, Robertson or Willacy reasonably believed at the time of publication that the Linked Article was in the public interest;
- 4.6 says that in publishing the November Article and the Linked Article the ABC, Robertson and Willacy instead had no belief in the truth of the allegations in the November Article and the Linked Article about Russell as evidenced by the matters set out in paragraph 5, below;
- 4.7 says that in publishing the November Article and the Linked Article the ABC, Robertson and Willacy instead were motivated to harm Russell and/or members of the November Platoon as evidenced by the matters set out in 5, below.
5. In further answer to paragraphs 66 - 67 of the Defence (s29A), Russell says that in publishing the November Article and the Linked Article, instead of reasonably believing that the allegations about Russell were in the public interest, the ABC, Robertson and Willacy were actuated by the improper purpose or purposes of harming Russell and/or other members of November Platoon as evidenced by the following:

Failure to adhere to journalists' standards

- 5.1 The ABC is bound to comply with the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Broadcasting Services Act 1992* (Cth), which require that the ABC and its journalists comply with the ABC Code of Practice.
- 5.2 The ABC Code of Practice requires each of the ABC, Robertson and Willacy to:

- (a) Make reasonable efforts to ensure that material facts are accurate and presented in context.
 - (b) Not present factual content in a way that will materially mislead the audience. In some cases, this may require appropriate labels or other explanatory information.
 - (c) Acknowledge and correct or clarify, in an appropriate manner as soon as reasonably practicable:
 - i. significant material errors that are readily apparent or have been demonstrated; or
 - ii. information that is likely to significantly and materially mislead.
 - (d) Gather and present news and information with due impartiality.
 - (e) Where allegations are made about a person or organisation, make reasonable efforts in the circumstances to provide a fair opportunity to respond.
- 5.3 In publishing the November Article and the Linked Article, in the circumstances described further in the sub-paragraphs below, each of the ABC, Robertson and Willacy failed to adhere to each of the standards set out in the preceding sub-paragraph.
- 5.4 Public interest journalism requires, at least, that:
- (a) it concerns a topic of public interest;
 - (b) it includes original investigation such as primary documents, interviews and original material;
 - (c) its claims are factual, transparent and verifiable;
 - (d) it is presented in a fair and balanced manner;
 - (e) it minimises harm; and
 - (f) it allows a right of reply.
- 5.5 By reason of the matters described further in the sub-paragraphs below, to the extent that each of the November Article and the Linked Article referred to Russell

and/or November Platoon, it was not in the public interest or published for the public benefit.

- 5.6 In publishing and promoting the November Article and the Linked Article as set out in paragraphs 6, 9, 12, 13, and 34 of the SOC, the ABC, Robertson and Willacy failed to adhere to each of the standards set out above.
- 5.7 In publishing and promoting the November Article and the Linked Article as set out in paragraphs 6, 9, 12, 13, and 34 of the SOC, the ABC, Robertson and Willacy were not acting for the public benefit or in order to protect public interest journalism.
- 5.8 The amendments and failures to correct, retract and apologise for the errors in each of the November Article and the Linked Article as pleaded in paragraphs 18, 23, 26, 28, 30, 33, 35, 44, 45 of the SOC amounted to a failure by the ABC, Robertson and Willacy to adhere to each of the standards set out above.
- 5.9 The repeated and knowingly false claim by the ABC and Willacy that the October Article made no link between the allegations by “Josh” and November Platoon was disingenuous and amounted to a failure by the ABC, Robertson and Willacy to adhere to each of the standards set out above.

No belief in the truth of the allegations

- 5.10 Each of the November Article and the Linked Article was written and presented so as to carry the imputations pleaded in paragraphs 8 and 11 of the SOC.
- 5.11 No care was taken by any of the ABC, Robertson or Willacy to ensure that serious allegations of guilt were not carried about Russell by each of the November Article and the Linked Article.
- 5.12 Each of the ABC, Robertson and Willacy willfully misinterpreted the response by the Department of Defence to the ABC’s request for information resulting in a headline in the November Article and the Linked Article which was seriously defamatory, false and unfair.
- 5.13 Each of the ABC, Robertson and Willacy falsely and/or recklessly reported in the November Article and the Linked Article that the American helicopter pilot named November Platoon as the subject of his allegations about the murder of the Afghan prisoner.
- 5.14 Each of the ABC, Robertson and Willacy took no care at all in making a series of

allegations in the November Article and the Linked Article about Australian soldiers, naming and picturing Russell alone as one of those soldiers and November Platoon and thus publishing seriously defamatory and baseless allegations against him.

- 5.15 The content of the November Article and the Linked Article was not newsworthy or timely, in the sense that the allegations by “Josh” had been made to the ABC in July 2020, some 16 months earlier.
- 5.16 “Josh” had not actually seen any person killed, and the ABC, Robertson and Willacy had no eye witness at the time of publication of the November Article and the Linked Article to support the serious allegation of murder by Australian soldiers.
- 5.17 The information that “Josh” had about another Australian soldier was hearsay through another unnamed person, such that the serious assertions being made by the ABC, Robertson and Willacy were unsupported by any reliable evidence or actual eye witness.
- 5.18 In October 2020 and November 2021 Willacy believed that the alleged killing took place in Helmand province which is in southern Afghanistan.
- 5.19 As at 25 October 2021 Willacy believed that the allegations made by “Josh” concerned a mission in June or July 2012, one can infer, by reason of his information from “Josh”.
- 5.20 On 19 November 2021 Robertson believed that the alleged killing took place in June or July 2012, one can infer, by reason of his information from “Josh”.
- 5.21 On 19 November 2021 Robertson believed that the alleged killing took place in Helmand province which is in southern Afghanistan.
- 5.22 To Willacy and Robertson’s knowledge, November Platoon had no mission in Helmand Province until September 2012.
- 5.23 At the time of publication of each of the November Article and the Linked Article none of the ABC, Robertson or Willacy believed in the truth of any of the allegations about Russell carried by those publications.
- 5.24 Each of the ABC, Robertson and Willacy had knowledge of the falsity of the imputations carried by the November Article and the Linked Article about Russell, having never asserted that any of those imputations were true or substantially true

including by reason of the following matters:

- (a) the 2nd Commando Regiment had up to 12 platoons at any given time, each with about 40 commandos;
- (b) the IGADF Afghanistan Inquiry found no credible evidence of war crimes by the 2nd Commando Regiment;
- (c) November Platoon was not on any mission in June or July 2012 in Afghanistan;
- (d) November Platoon did not have a mission in Helmand Province until September 2012;
- (e) “Josh” had not named November Platoon as the commando platoon in question;
- (f) the Department of Defence had not confirmed any criminal investigation into November Platoon or Russell;
- (g) the ABC, Robertson and Willacy had no knowledge that Russell was on the raid in question.

5.25 No attempt was made by any of the ABC, Robertson or Willacy to put all of the serious allegations about Russell to him prior to publication to give him an opportunity to respond to the allegations in the November Article and the Linked Article.

5.26 Despite the matters set out above, each of the ABC, Robertson and Willacy continue to publish each of the November Article and the Linked Article on the ABC website.

6. In answer to paragraph 68 of the Defence (Mitigation) Russell says that:

6.1 The matters pleaded in paragraph 68 are embarrassing, ambiguous and disclose no reasonable ground of mitigation.

6.2 The plea in subparagraph 68(c) is nonsensical.

6.3 The plea in subparagraph 68(d) is wholly unparticularised, ambiguous and will cause an undue waste of time and costs.

6.4 The plea in subparagraph 68(e) is embarrassing and bad in form in that it breaches

the rule in *Scott v Sampson*, fails to identify any relevant sector of Russell's reputation, could not possibly be relevant to any sector of reputation relevant to the proceedings, is ambiguous and discloses no reasonable ground of mitigation and is so untenable that it has been included for an improper purpose such that it is scandalous and vexatious.

7. Russell repeats and relies on the matters set out in the preceding paragraphs 2 to 6 as matters within his knowledge that have aggravated the hurt and harm occasioned to him by the publication of each of the November Article and the Linked Article.
8. Russell relies on the following additional improper conduct of the ABC, Robertson and Willacy in the conduct of the litigation that is unjustifiable and lacking in bona fides:
 - 8.1 The improper denial by Willacy that he published each of the November Article and the Linked Article.
 - 8.2 The improper denials in paragraphs 8 and 11 of the Defence that the imputations pleaded in the SOC are defamatory.
 - 8.3 The plea of truth to some imputations, without any particulars supporting said plea.
 - 8.4 The knowingly false, otherwise misleading and/or irrelevant particulars in Schedule 1 referred to in paragraph 2, above.
 - 8.5 The pleas in Schedule 1, particulars (27) - (39) against unnamed members of November Platoon, which by definition includes Russell, accusing them of murder in a wholly imprecise, improper and unparticularised manner.
 - 8.6 The amended and concocted plea in Schedule 1 of the Defence in relation to the "Josh" allegations which in the November Article and the Linked Article were said to have occurred in June or July 2012 in Helmand province (which is in southern Afghanistan) and are now said to have occurred at some unknown time in the early part of "Josh's" deployment (which started in May 2012) in the north of Afghanistan.
 - 8.7 The pleas of contextual truth that are on their face manifestly hopeless and unsupported by particulars.
 - 8.8 The knowingly unmeritorious plea of contextual truth which includes imputations that on 24 August 2022 they admitted were not even defamatory of Russell.
 - 8.9 The pleas of mitigation which are contrary to legal principle and embarrassing.

8.10 The response dated 24 August 2022 to the Concerns Notice which made unwarranted claims of defences such as election qualified privilege and fair report.

9. All of the conduct of the ABC, Robertson and Willacy set out in the SOC and this Reply evidences and/or was part an attempt to intimidate and put improper pressure on Russell to dissuade him from commencing and/or maintaining these proceedings.

Date: 14 October 2022

A handwritten signature in black ink, appearing to be 'R. Giles', written on a light-colored background.

Signed by Rebekah Ruth Giles
Solicitor for the Applicant

This pleading was prepared by Sue Chrysanthou SC and Rebekah Giles, solicitor.

Certificate of lawyer

I, Rebekah Giles, certify to the Court that, in relation to the Reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 14 October 2022

A handwritten signature in black ink, appearing to read 'Rebekah', is written on a light-colored rectangular background.

Signed by Rebekah Ruth Giles
Solicitor for the Applicant