HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **EMILY JADE ROSE TAPP**

Appellant

and

AUSTRALIAN BUSHMEN'S CAMPDRAFT & RODEO ASSOCIATION LIMITED
ACN 002 967 142

Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. These reply submissions are in a form suitable for publication on the internet.

PART II: REPLY

2. ***Factual background***. The appellant accepts {RS [21]} that the conversation Mr Shorten had with Pat Gillis and Adam Sandler occurred prior to the fall of Mr Piggott and that {AS [12] and [13]} should be in reverse order.

3. The respondent relies upon Mr Shorten's evidence that he would not have allowed his wife and sons to compete if he thought the ground was unsafe {RS [16]; AFM195 at [8]; AFM431.29-433.5}. However, they participated prior to the Open Draw. Mr Shorten's ride (17) occurred *before* Mr Clydesdale (65), Mr Sadler (between 71 and 72), Mr Gillis (82) and Mr Piggott (98) fell, i.e. prior to the time at which the appellant contends the respondent was on notice of the deterioration in the surface.

4. There was no finding to the effect that any of the competitors' falls prior to the appellant's were caused by the deterioration of the ground {RS [18](d)} but it is incorrect to assert that there was no evidence from which such an inference could be drawn. It was at the least implicit in the entreaties made by Mr Stanton calling for the event to be suspended that the deterioration was (at least in his view) the, or a, cause of those falls. It is also implicit in the decision made by Mr Shorten to offer to refund the entry fee of competitors who withdrew from the event that the deterioration of the surface was regarded as at least a *possible* cause of those falls, and a *potential* cause of further falls as the event proceeded. Mr Shorten's response to the suggestion by Mr Stanton that the condition of the surface was "slippery" does not in fact cavil with that description {cf RS [19]}. If he in fact disagreed he could and would have said so in his evidence.

5. Apart from describing Mr Gallagher as a judge, the evidence does not disclose precisely what his role was and therefore there is no basis for inferring that he had "the opportunity to watch each rider over the course of the day" {cf RS [20]}. If he had something relevant to say he would have been called by the respondent.

6. Re RS [27]: Craig Young's evidence was limited to proving the appellant's membership of the respondent, the non-profit status of the respondent, the volunteer nature of its committee members, and the respondent's Constitution. Significantly, he gives no evidence of his

assessment of the condition of the arena or of his involvement in the deliberations with Mr Shorten. Nor did any of the other individuals.

7. Notably absent from the RS is any reference to the obligations of the respondent under Rule Com15.5 of the ABCRA Rule Book {AFM86; CA[172] CAB144}. It could not have made clearer the role to be played by the respondent in relation to the surface, a matter over which the respondent had all, and the appellant no, control. Also notably absent from the RS, and from the respondent's case, is any attempt to explain why the Incident Report should not be given the weight it deserved, other than to say, at RS [43], that it was given four days after the injury. The need for accuracy of an Incident Report in light of the fact that its contents might later be used as evidence in litigation was made clear from the Risk Management Rules at 6.5 to 6.7 {AFM168}.

8. Further to RS [43], the views of the "experienced campdrafters" on the day, at best, were subject to the qualification that the actual decision was in effect that you could choose to compete or get your money back. It was an abdication by the respondent of its responsibilities to persons in the position of the appellant, not a performance of them. The occurrence of the four falls referred to in AS[9] in a short time period demanded a better response. The evidence of the appellant, her sister and her father, unchallenged in relevant respects and extracted at AS [15]-[16] was that the horse's front legs *slid* from underneath. That evidence strongly suggested that the surface had become slippery.

9. At RS [31] the respondent seeks to "soften" the ambit of the obligations of the respondent in relation to the condition of the ground, and then relies on the obligation as so softened as being the relevant test: {eg RS [35]}. But the safety of the ground conditions was not optional: it was an obligation of the respondent to ensure that was so. That is an obligation that the respondent did not perform.

10. ***Mr Shorten's evidence***. A great deal of the RS is devoted to showing that Mr Shorten's evidence[1] - very adverse to the respondent's case – should not have been relied on. Whether the correct number of falls was four or seven or some other number, Mr Shorten conceded that they were of significance and for the reasons he gave {AFM394.5-.26; AFM397.7-.22}. One bad fall was a *signal* that the surface needed attention to prevent another fall. This is hardly at too high a level of abstraction {cf RS [39(b)]}. Whether Mr Shorten

[1] Contrary to {RS [36]} the concessions the appellant contends were erroneously disregarded as hindsight by Payne JA are identified at {AS [22]} by reference to {AS [17]} where the relevant transcript references are provided.

"carefully", or sufficiently carefully, considered the safety of the surface rather begs the question of negligence, but in any event it is clear that some imperative of fairness was placed over and above the considerations of safety that he acknowledged ought to have taken precedence.

11. At to {RS [39(c)] the "stage" at which Mr Shorten had identified the surface as being "dangerous" {cf RS 39(c)} is identified by the preceding question as being "immediately before she [ie the appellant] entered when she had her fall" {AFM419.4}. Again, this cannot be regarded as irrelevant by the assertion that the evidence is contrary to his conduct in having "carefully considered the state of the ground…and concluded the competition should proceed". Rather, the issue is whether at the time he had sufficiently carefully considered the state of the ground and taken necessary action as a consequence.

12. As to RS [39(d)] the evidence of Mr Shorten was not merely that the surface of the arena had "deteriorated", but that it "was getting more *unsafe*" {AFM414.45-.50}. While the evidence of Mr Shorten that the fact a plough was subsequently used demonstrated "how bad the condition of the ground was" {AFM401.23} is retrospectant, there is nothing impermissible about using such evidence for the purposes of establishing the deterioration of the surface of the arena {cf RS [39(e)]}. While he did not concede he *said* to Mr Gallagher "we will just have to keep going" {cf RS [39(g)]} he does accept that this fitted with his thoughts {AFM406.25} and that this was his justification for continuing the event {AFM427.27-.33}. That passage is *not* infected with hindsight.

13. ***Prior falls***. As to {RS [40]}, it is not the "bare fact of the number of falls" that is relied upon by the appellant, but the fact of what the falls indicate to experienced horsepeople, including Mr Stanton (implicitly, given his entreaties to suspend the event) and Mr Shorten (expressly, as noted at para 10 above).

14. As to {RS [45(a)]} the effect of the evidence of Ms Turvey {AFM331.8} and Mr Tapp {AFM347.4} was that despite the draw recording Mr Tapp as having entered the Open event riding Jack {AFM223.39} it was in fact Ms Turvey that rode Jack. This ride (entry 72) occurred prior to the "bad falls" of Mr Gillis (entry 82) and Mr Piggott (entry 98). In any event, the fact that two riders competed without incident cannot detract from: the actual knowledge of Mr Shorten of the safety concerns of an experienced horseman in the form of Mr Stanton; Mr Shorten's knowledge of the fact of the falls of (at least) Mr Clydesdale, Mr Sadler, Mr Gillis and Mr Piggott; the significance of those falls as an indication of the

condition of the surface of the arena; and his decision to prioritise completion of the event over the safety of the competitors.

15. ***Causation***. RS [4(b)] is incorrect. The appellant *does* acknowledge that it is necessary for her to establish that the breach of duty by the respondent caused her loss. As noted at AS [20] the appellant relies upon the concession made by the respondent at trial in written submissions which said: "The only way in which the plaintiff can succeed on causation is if it is established that the ABCRA was under a duty to stop the competition." At RS [48] the respondent seeks to avoid this concession by engaging in a semantic exercise which draws a distinction between a failure to "suspend" the event until the surface of was repaired, and a failure to "stop" the event altogether. No such distinction was drawn in the respondent's submissions in the Court of Appeal, settled and presented by experienced Senior Counsel who had appeared at trial, undoubtedly because the distinction is illusory and, with respect, absurd.

16. Also, contrary to RS [47] the respondent does *not* have a finding from the Court of Appeal that the appellant failed to prove causation if by that is meant causation at law. All it has is a finding that the appellant did not prove the precise nature of the deterioration of the surface of the arena, which for the reasons set out at AS [41] is irrelevant. In the Court of Appeal no submission was made that the appellant could not succeed because she had not established the precise nature of the deterioration of the surface of the arena (being the matter of apparent significance to Payne JA at {CA[24] CAB99}). In the Court of Appeal the respondent's submission was simply that it had not been established that the reason for the appellant's horse slipping was the condition of the arena surface as opposed to "horsemanship, the speed and complexity of the manoeuvre, the qualities of the horse" {at [27]}.

17. ***Operation of section 5L***. It is respectfully submitted that the proposition in *Goode v Angland* (2017) 96 NSWLR 503 at [185] that s 5L is a "liability-defeating rule" that can be applied independently of consideration of the elements of the appellant's cause of action is wrong as a matter of principle. In this regard the relevant "risk" that (a) has materialised and (b) is asserted by the respondent to have been "obvious" is the same as that identified by the appellant as being the subject of the duty of care, against which the respondent failed to take precautions (as described in s 5B), and which was caused by the negligence of the respondent (as described in s 5D). In many cases it will not be possible to determine what the relevant risk ultimately is until considerations of duty, breach and causation have been determined. Furthermore, determination of s 5L independently of and

in advance of determination of the constituent elements of the cause of action has a tendency to result in a truncated consideration of the elements of the cause of action of the factual findings necessary to enable determination of the elements of the cause of action.

18. The fact that it is only the materialisation of an "obvious" risk of a dangerous recreational activity for which the respondent is not liable serves to emphasise the importance of determining those risks that are *not* obvious and for which the respondent may therefore remain liable. To observe that one purpose of s 5L is to require participants to adjust their behaviour to manage the obvious risks of the activity {RS [58(b)]} rather illustrates the point made by the appellant as to the relevance of who has the capacity to manage the obvious risk. If the appellant is not (subjective) and could not have been expected to be (objective) aware of the dangerous deterioration of the surface, it is difficult to see how the appellant could have "adjusted her behaviour" to manage it.

19. The appellant accepts that the sport of campdrafting carries with it certain risks of a horse falling {cf RS [59]}. They are identified in Mr Shorten's evidence at {AFM204 at [6]}. In the present case, however, the appellant's horse did not merely lose its footing or contact another beast. It slipped, and on the available evidence the compelling inference is that it slipped because of the dangerous deterioration of the surface of the arena. While the very purpose of an activity may be to test oneself in conditions that vary from time to time, there is a difference between the natural and expected variability in and deterioration of conditions, and conditions that deteriorate beyond that expectation, as the Court would properly infer has occurred here.

20. ***Conclusion***. For the reasons given in AS and above McCallum JA was correct to find that the appellant established that the respondent breached its admitted duty of care to the appellant as a result of which she sustained serious injury. Her Honour was also correct to find that the risk that materialised was not an obvious risk to a reasonable person in the position of the appellant (see AS [40]-[43]) and defence afforded by CLA s 5L was not available to the respondent. The trial judge and the majority in the Court of Appeal erred in holding otherwise.

Dated: 16 July 2021

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