HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

BLAKE WILLS
APPELLANT

AND

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
FIRST RESPONDENT

PRODUCTIVITY PARTNERS PTY LTD (TRADING AS CAPTAIN COOK COLLEGE) ACN 085 570 547
SECOND RESPONDENT

SITE GROUP INTERNATIONAL LIMITED ACN 003 201 910
THIRD RESPONDENT

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1: Knowledge for accessorial liability

2. An accessory to a primary contravention of s 21 *Australian Consumer Law* must know that the conduct of the primary contravenor has the character of being unconscionable. This is because the unconscionable character of the impugned conduct is an essential matter giving rise to the primary contravention: AS [15]-[18]; AS [28]-[42].

3. Accessorial liability arises from intentional participation in the contravention and it is not possible to participate intentionally without knowing all of the essential matters giving rise to the primary contravention: AS [37]-[38].

4. It is uncontroversial that it is not necessary for an accessory to know that the act or acts constituting the primary contravention breach the law: AS [24]; RS [27(b)]. It is also uncontroversial that it is not necessary for an accessory to think in the words or language of the statute: *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 73-74 (**Vol 5, Tab 37**).

5. But whilst it is not necessary for an accessory to characterise the conduct subjectively using the word "unconscionable", it is necessary for the accessory to understand that the conduct has the character that means it is against conscience. It is not possible to participate intentionally in immoral conduct without knowing it is immoral: Reply [5].

6. This follows from *Giorgianni v R* (1985) 156 CLR 473 (**Vol 5, Tab 33**) and *Yorke v Lucas* (1985) 158 CLR 661 (**Vol 5, Tab 38**): AS [15]-[17]; cf RS [18]-[23]. The majority below, like some other Courts addressing misleading or deceptive conduct, misconstrued *Yorke* (AS [23]-[25]; Reply [5]).

7. The standard for accessorial liability is the same whatever the crime or whatever the primary contravention (AS [28]-[33]:

   (a) If a primary contravention requires the primary contravenor to have a particular state of mind, then an accessory must know of the primary contravenor's state of mind: Reply [4].

   (b) Similarly, for misleading or deceptive conduct, the correct resolution of the controversy over *Yorke* is that reached by the New South Wales Court of Appeal in

Anchorage Capital Master Offshore Ltd v Sparkes (2023) 11 NSWLR 304 (**Vol 6, Tab 41**). Knowledge of falsity or the misleading character of the conduct is required: cf RS [39]-[41].

8. The ACCC's five reasons for why it says the approach for which Mr Wills contends is in error should not be accepted: RS [28]-[37].

(a) A foundational premise of the first and fourth reasons seems to be a purported distinction between, on the one hand, a factual element of the primary contravention and, on the other hand, what is said to be "a subjective normative judgment": RS [29] and [33]. The distinction should not be accepted as meaningful or as reconcilable with principle: Reply [2]-[4], [7]-[9]. In this respect, the ACCC misconstrues *Giorgianni* (RS [21] and [33]): the Court there said that it was not necessary for an accessory to know that the conduct was culpable (in the sense of against the law) but none of the judgments say it was not necessary to know that the driving was "dangerous to the public" (an element of the primary offence).

(b) The second reason, that *Rural Press* forecloses the approach, is incorrect: RS [30]; AS [35]. The judgment of the plurality of Gummow, Hayne and Heydon JJ in *Rural Press* does not alter the standard in *Giorgianni* and *Yorke*.

(c) The third reason, that the construction for which Mr Wills contends is "unworkable in practice", is unsound in principle: RS [31]. The standard for being knowingly concerned is the same whatever the primary contravention; it cannot change because it is thought difficult for a regulator to prove knowledge of an essential elements of the primary contravention: AS [28]. In any event, the reliance on penalty privilege as justifying this exception to the usual standard of accessorial liability is misconceived both in principle and in practice.

(d) The fifth reason has the same conceptual problem as the third reason because it suggests the standard for accessorial liability should change in the case of unconscionable conduct because one of the essential elements invokes morality: RS [34]-[35]. The deriding of the appellant's approach as "narrow" (RS [17]) misses the point: the legislative choice was to apply the standard for accessorial liability derived from the criminal law (rather than a different standard derived from equity or tort) (AS [41]; *Yorke*).

Ground 2: Participation after 20 November 2015

9. The majority used pre-20 November 2015 conduct as an essential premise for the finding of participation against Mr Wills: AS [50]-[56]; cf RS [48]; Reply [14]. This conduct could not make Mr Wills an accessory because he did not have knowledge before 20 November 2015: AS [47].

10. The limited post-20 November 2015 matters referred to by the majority for the finding of participation are insufficient. Accessorial liability depends upon some positive conduct of the accessory that practically associates the accessory with the primary contravention. Holding roles, attending meetings and receiving reports is not itself sufficient to give rise to accessorial liability: AS [60]-[66]. What is required is some positive step. It is not the case that Mr Wills needs or seeks positive findings that he was a "passive presence" at meetings and a "silent observer" as a senior executive: cf RS [50]. It is the absence of positive steps as alleged by the ACCC (or found by the trial judge) that is the problem: AS [56]-[59].

11. The majority purported to fill this absence with a finding that Mr Wills "implicitly gave his support and concurrence" to the process changes. The nature of this implicit support is unidentified and unexplained. It was not pleaded or tested at trial. What the majority means by "implicit" support is further confused because the majority incorrectly cited *Rural Press* for the proposition that accessorial liability could arise from implicit approval or assent to unlawful conduct: AS [68]-[71].

12. The ACCC raises two further factual points as to participation that should not be accepted:

    (a) First, the ACCC attempts in this Court to establish a different basis for participation after 20 November 2015 from that found by the majority: RS [49]. That course is not open to the ACCC and, in any event, misstates the relevant factual findings: Reply [15].

    (b) Secondly, the ACCC seeks by its notice of contention to bring the date of knowledge for Mr Wills to 7 September 2015: RS [45]. But that contention is inconsistent with a finding of the primary judge and premised on misstatement of the evidence: Reply [12]-[13].

Date: 7 February 2024

Michael Hodge