HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

RENAE EVANS
First Appellant

STEPHANIE EVANS
Second Appellant

and

AIR CANADA ABN 29 094 769 561
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of argument

2. ***General principles of construction.*** **(1)** The cause of action asserted by the Appellants arises under s 9B of the *Civil Aviation (Carriers' Liability)* ***Act*** *1959* (Cth) (**JBA vol 1, tab 3, page 24**), which gives the 1999 **Montreal** Convention the force of law in Australia. **(2)** Montreal must be construed according to the applicable rules of international law: AJ [6]-[9] (**CAB 60-61**). **(3)** Rule 105 of the Respondent's "International **Tariff** General Rules" must be construed as a matter of (presumptively Australian) contract law, while recognising that the Tariff speaks to passengers flying on a Canadian airline to and from various parts of the world, often with no connection to Australia, and whose carriage is governed by various conventions (or no convention at all) and is likely to be regulated by the rules of non-Australian jurisdictions (particularly Canada). **(4)** The ultimate question is whether r 105, properly construed, has removed a valuable entitlement of the carrier under Montreal. **(5)** Clear language is required before concluding that a party to a contract has abandoned valuable rights which arise by operation of law: *The Cape Bari* [2016] UKPC 20 (**JBA vol 4, tab 9**) at [28]-[33], [36], [38]-[39]: **RS [11]-[14], [42]-[45]**.

3. ***Background to Montreal.*** **(1)** The Warsaw Convention (Sch 1 to the Act) imposed a form of presumptive liability for death or injury to passengers or damage to baggage, cargo or by delay (Arts 17-19). This was subject to a series of defences or limits (Arts 20-25), in particular a financial limit or cap on liability for each category of claims (Art 22): *Povey v Qantas Airways Ltd* (2002) 223 CLR 189 (**JBA vol 3, tab 8**) at [20]-[21]: **RS [15]-[19]**. **(2)** The financial limit on passenger claims provoked dissatisfaction. The 1996 IATA Agreement, as a partial solution, saw certain carriers agreeing not to invoke the financial limit on liability in Art 22 but to maintain the Art 20(1) defence above the stipulated limit and preserve all other defences: AJ [30]-[48] (**CAB 72-78**); **RS [20]-[22]**.

4. ***The achievement of Montreal.*** **(1)** Montreal (Sch 1A to the Act) produced a new, freestanding treaty, drawing on concepts from the Warsaw regime, but making sufficient changes to assuage its critics. **(2)** For damage to baggage, cargo or by delay, Montreal continued a system of limited financial liability through a presumption of liability (Arts 17(2)-(4), 18, 19); defences (Arts 17(2), 18(2), 19, 20); and financial limits or caps on liability (Art 22, noting its heading). A customer could escape the financial limits only by way of a special declaration (for Arts 22(2)-(3)); proof of intentional or reckless

causing of damage (Art 22(5)) or by a special stipulation by the carrier (Art 25). **(3)** By contrast, for claims of death or personal injury of passengers, Montreal by Arts 17(1) and 21 created a system of unlimited financial liability divided into **two tiers**:

(a) In the ***first tier***, Art 21(1) operates so that the carrier's liability is strict up to the specified number of SDRs. The carrier cannot escape liability by proving it was not at fault. All that is left to it is the general contributory negligence defence (Art 20);

(b) In the ***second tier***, from the specified number of SDRs up to an unlimited amount, the carrier is presumptively liable. In this tier, in addition to the contributory negligence defence in Art 20, the carrier can defend its liability for damage above the specified number of SDRs to the extent that it can prove that such damage was not due to the negligence or other wrongful act or omission of the carrier or was solely due to the acts or omissions of a third party (Art 21(2)): **RS [23]-[28]**.

5. ***Error in the Appellants' interpretation of Montreal.*** **(1)** Art 21(2) does not impose a financial limit on liability to the specified amount of SDRs. **(2)** Art 21(2) does create a (partial) defence to the liability created by Art 17(1). **(3)** Each of Arts 20 and 21(2) have the hallmark of an "affirmative defence". **(4)** The purpose of Art 25 is not to create the conditions under which a carrier may agree to a higher limit of liability than the number of SDRs specified in Art 21 (indeed, up to no limit at all): **RS [32]-[37]**; cf **AR [5]-[10]**.

6. ***The travaux.*** The *travaux préparatoires* of Montreal confirm the correctness of this view as to how Arts 17, 20 and 21 operate. Participants at the Montreal Diplomatic Conference repeatedly described Arts 17 and 21 as providing for "*unlimited*" liability divided into "*two tiers*" and subject to "*defences*" in what became Arts 20 and 21(2): **RS [29]-[31]**.

7. ***Other authority.*** Academic commentary, case law and relevant Australian extrinsic materials have described these provisions of Montreal in the same terms: Dempsey Report (**RBFM 280-286**); *The Montreal Convention: A Commentary* (**JBA vol 5, tab 24**) at [21.26], [27.09]; *Kern v Qantas Airways Ltd* [2015] NSWSC 1565 (**JBA vol 4, tab 10**) at [43]: **RS [34], [37]**; and Explanatory Memorandum to the Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008 (Cth) at [3.19].

8. ***Proper construction of the Tariff — Rule 105(B).*** **(1)** The purpose of r 105(B) is identification and stipulation. The laws and conventions that may govern the carrier's liability to passengers are identified. Where rights under a convention are waived, that occurs by explicit language referencing the provision being modified: r 105(B)(1), (4). **(2)** In contrast to any suggestion of waiver, r 105(B)(5) uses the language of incorporation

of Montreal in full. **(3)** The result of r 105(B)(1) and (5) read together is that, via different techniques — partial waiver of rights under Warsaw consistent with the 1996 IATA Agreement (see AJ [46] (**CAB 77**)); incorporation of Montreal in full — all passengers on the same flight, whether their carriage is governed by Warsaw or Montreal, will have the same rights. **(4)** "*Mobility aids*" are treated as a special case, whatever the convention: r 105B(4): **RS [47]-[49]**; cf **AR [15]**.

9. ***Proper construction of the Tariff — Rule 105(C).*** **(1)** Rule 105(C) contains no language of waiver. Rather, it uses self-evidently summary language ("*in most cases*" and "limits of liability *may apply*"). **(2)** The rule serves to notify passengers, in a short-hand manner, of what financial limits of liability may apply depending on: (i) which convention applies to their carriage; and (ii) the choices made in r 105(B). The desirability of providing passengers with a summary of the effect of this complex liability regime as it applies to them is reflected in Art 3(4) of Montreal itself and regulations in relevant foreign jurisdictions (including r 122 of the Canadian *Air Transportation Regulations*, SOR/88-58 (**RBFM 293**)). **(3)** Rule 105(C)(1)(a) is an accurate summary of the unlimited financial liability under Montreal. **(4)** Rule 105(C)(1)-(3) do not deal with defences to liability that may be available, whether on no-fault or contributory negligence grounds: **RS [46]-[52]**.

10. ***Additional considerations.*** The Court of Appeal's construction of r 105 also avoids: **(1)** internal inconsistency between rr 105(B)(5) and 105C(1)(a); **(2)** the problem of how r 105C(1)(a) could sensibly be construed as waiving the Respondent's entitlement to rely on Art 21(2) but not Art 20 (noting that the purported solution at **AR [10]** fails because it is premised on the incorrect notion that Art 21(2), unlike Art 20, does not operate as a defence); and **(3)** the uncommercial result produced by the Appellants' construction, whereby the Respondent has accepted under Montreal (but not Warsaw) unprecedented and unlimited liability for death or bodily injury, for no *quid pro quo*, and for passengers who may be on the same plane: **RS [53]-[54]**.

11. ***Conclusion.*** AJ [66]-[86] (**CAB 84-92)** correctly found error in J [48]-[61] (**CAB 19-22**).

12. ***Notice of Contention (if reached).*** Leading commentaries on Montreal support the persuasive view that Art 25 (unlike Art 27) operates only on provisions (e.g. Arts 22(1)-(3)) which impose a monetary limit on liability. It cannot be engaged for a liability that is already unlimited (e.g. liability under Arts 17 and 21). The Appellants have declined to rely on Art 27; this provides a further reason why their appeal must fail: **RS [55].**

Dated: 12 March 2025

Justin Gleeson

Justin Gleeson SC