HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S155/2025
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Important Information

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Form 27E – Appellant's reply

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: ESTATE OF THE LATE GEOFFREY CROFT

Appellant

and

MTH

First Respondent

STATE OF NEW SOUTH WALES

Second Respondent

SANDRA CROFT

Third Respondent

APPELLANT'S REPLY

Part I: These submissions are in a form suitable for publication on the internet.

Part II: Concise Reply

<u>Amicus Curiae Submissions</u>

1. Section 92(2) EA makes allowance for the admission of evidence to show that a conviction of an offence has occurred. In this case, the theoretical evidence admissible under s 92(2) grounded the Court of Appeal's finding that a certificate of conviction pursuant to s 178 EA could have been tendered to prove the underlying facts in issue leading to the conviction. In the appellant's submission (see AS[47]), whatever scope s 178 may have as to the content of the certificates it contemplates, that which is admissible under s 92(2) is confined to the fact of conviction, and no more. The Court of Appeal conflated s 92(2) and s 178. Even if, contrary to the appellant's submission, a certificate pursuant to s 178 had been admissible as evidence of the elements of the offence, the trial judge found that the first respondent's evidence in the criminal

proceedings was inconsistent with the evidence she gave and upon which she relied in these proceedings;[1] yet the Court of Appeal did not engage with or make findings in relation to such inconsistencies; rather regarding the theoretical certificate as effectively conclusive evidence in light of the death of Mr Croft.

2. *Amici* appear to accept that the application for special leave to appeal to this Court engaged s 92(2)(a) EA, but that its summary dismissal, without consideration on the merits, constituted it being "finally determined". This cannot be correct. The clear purpose of the exceptions to the exception in s 92 is to prevent the plainly prejudicial use of the fact of conviction being deployed where the processes described in the paragraph are incomplete. The prejudice guarded against is amplified in the case of death, where, on the Court of Appeal's reasoning, the non-conclusive evidence of conviction has been rendered admissible, but the deceased can no longer give evidence; a fact, according to the Court of Appeal, making the tender a *fait accompli* of proof.

3. Contrary to the submission at *amici* [5], s 92(2) was not engaged in respect of the Estate. The Estate was not convicted, so the hypothetical certificate did not relate to it; nor did any party "claim through or under" it, only against it.[2]

<u>Duty of the Court to Self-Represented Litigant</u>

4. The Court of Appeal proceeded on the basis that a certificate pursuant to s 178 EA would have been evidence of the facts underlying the conviction, or corroborating them, and admissible to that end pursuant to s 92(2). However, s 178(1) EA applies to the listed facts, being the fact of the conviction, the fact of the sentencing of a person, or the pendency or existence of a civil or criminal proceeding. Such a certificate may set out the matters referred to in sub-s (2), but only if stated in the certificate pursuant to sub-ss (3), (4) and (5).

5. There was no evidence before the Court of Appeal as to what would have been stated in the certificate if a certificate had been applied for. This is significant following a jury trial, with no findings of fact and no reasoning exposed. There was also no

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[1] Appellant's submissions [49], [52].
[2] *Re HIH Insurance Ltd (in liq)* [2015] NSWSC 790, [60]-[66] (Brereton J).

evidence as to whether, during pre-trial directions when the first respondent was represented, the question of a s 178 certificate had been considered.[3]

6. Even if a s178 certificate had been tendered, the trial judge would have had to balance the content and weight of such certificate with his findings that the first respondent had given incorrect, wrong, or false evidence, and that she was either not telling the truth or her memory of the time was fundamentally flawed.[4]

7. The primary judge did not mislead the first respondent. To the contrary, the first respondent was informed that the appellant denied the abuse,[5] and that while the conviction was admitted that did not prove that the abuse occurred.

8. The first respondent was able to and did give evidence in relation to the abuse, but the primary judge noted the inconsistencies between the evidence in the criminal proceedings and the subject proceedings.[6] There was no question of the first respondent failing to claim a right, as she conducted the proceedings aware that she had to prove the abuse occurred. The primary judge was not under a duty to ensure that the first respondent was advised of the potential availability of a s178 certificate of conviction, but for the reasons set out in the appellant's submissions[7] any such certificate would have been limited by s 178(3), (4) and (5), and its admissibility, if any, confined by s 92(2) to the fact of conviction.

9. The submissions at *amici* [23] concerning *SZRUR*[8] seek to equate treating statements from the bar table by a litigant in person as a lack of evidence with a failure to advise on questions of law and evidence and the potential applicability of legislation. This mischaracterizes what occurred in the present case, and the duty owed to an unrepresented litigant; here, the primary judge advised the litigant of the need to call and/or give evidence as to the abuse, which the first respondent did, but which evidence was not accepted by the primary judge for the detailed, careful, and cogent reasons he gave.[9]

10. For the reasons set out in the appellant's submissions,[10] the abuse would not have been established by the tender of the s 178 certificate. The primary judge was correct to

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[3] Appellant's submissions [19]; as to the timing of the lack of representation, see First Respondent's submissions, 23 April 2026, [3].
[4] Appellant's submissions [20].
[5] CAB 16 [44], 172 [72].
[6] CAB 48 [206], 52 [229] – [234], 55 [242], [244], [250].
[7] Appellant's submissions paragraph [38-39].
[8] *SZRUR v The Minister for Immigration and Border Protection* (2013) 216 FCR 445.
[9] Appellant's submissions paragraph [20].
[10] Appellant's submissions paragraph [38]-[39], [45].

inform the first respondent that the conviction did not prove the factual matters in issue, and the first respondent thereafter gave evidence and called other witnesses to give evidence at the trial.

11. The finding of the Court of Appeal that the primary judge "misled" the first respondent is inconsistent with the primary judge's comment that the conviction of itself did not prove the abuse. That finding was wrong, and is unsustainable.

12. The primary judge did not find that the first respondent did not prove the fact of conviction; he found that he could not accept the first respondent's evidence in relation to whether any abuse had taken place based on the inconsistent evidence between the criminal and civil proceedings,[11] and the balance of the evidence in the primary proceedings, with the result that she did not establish the material facts upon which her cause of action relied. Even on Adamson JA's reasoning, a s 178 certificate is not conclusive evidence. Unfortunately, the Court of Appeal in practical terms treated it as such, and in doing so failed to engage with the body of evidence at trial and evaluate the evidence according to law.

Section 75A *Supreme Court Act 1970* (NSW)

13. At [36], the *amici* suggest that there is intermediate appellant case law to the effect that a s 178 certificate is evidence of the existence of facts in issue in the criminal proceedings, but not the detailed facts of the offending, relying upon *Dajani v Dajani*.[12] In *Dajani*, a certificate of conviction had been tendered and counsel conceded that the certificate carried with it proof of the elements of the offence. In this matter, the fact of the alleged abuse was always in dispute.

14. The trial judge here made specific credit findings in relation to the first respondent. In doing so the trial judge recognized the disadvantage of the first respondent appearing for herself,[13] and noted that the parties co-operated with her in the presentation of her case. The trial judge explained that the first respondent was permitted to call such evidence as she wished to call.[14] His Honour noted that the outcome of the matter was to be determined on the evidence at hearing.[15]

[11] Appellant's submissions paragraph [20].
[12] [2025] FedCFamC1A 28, [27].
[13] CAB 34 [137].
[14] CAB 34 [137].
[15] CAB 35 [137].

15. The trial judge explained that the first respondent did not present well in giving evidence and detailed the reasons for that finding,[16] noting she did not respond to questions but provided self-serving statements, or responded aggressively when being cross-examined, as if her time was being wasted.[17] His Honour's impression was that she was not a person suffering from any significant psychiatric condition albeit it might be consistent with the personality disorder which had been referred to in some of the medical evidence.[18]
16. The trial judge found that the first respondent's evidence to be inaccurate, and to arise from a faulty memory, or reconstruction of the faulty memory, or just deliberate lies;[19] and that substantial matters were incorrect in the first respondent's evidence and could not be accepted.[20]
17. The Court of Appeal did not address the profound inconsistencies found by the trial judge. The trial judge's findings were determinative of the issue of whether or not the alleged abuse occurred, and the quantification of damages.

First Respondent's Submissions

18. The first respondent's submissions appear to address issues other than the issues before the Court. The first respondent's book of further materials is likewise replete with material that was not before the courts below.
19. The appellant notes the first respondent's reference to a "certificate of fact" at RS[29], which appears to be a reference to a s 178 certificate of conviction, although this is not entirely clear, noting the first respondent's submissions at [29], which appear to relate to some matter that was addressed at an interlocutory case management hearing.

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16 CAB 35 [138].
17 CAB 35 [138].
18 CAB 36 [139].
19 CAB 50 [221].
20 CAB 51 [223].