



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

S63/2021

BETWEEN:

EMILY JADE ROSE TAPP

Appellant

and

AUSTRALIAN BUSHMEN'S CAMPDRAFT & RODEO ASSOCIATION LIMITED

ACN 002 967 142

Respondent

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OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

Part I: Certification

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

Part II: Outline of Propositions

1. **Ultimate issues:** (a) whether the CA erred in finding that the Respondent was not liable in negligence because breach and causation were not made out; and (b) if so, whether the CA also erred in finding that the harm suffered by the Appellant was the materialisation of an obvious risk of a dangerous recreational activity: RS [3]-[7].
- 20 2. **Scope of the duty of care:** The duty of care, as admitted at trial (CA [22]), (a) was a duty to take reasonable care to avoid foreseeable risks of personal injury or death to participants; (b) was conditioned to the fact that participants made a voluntary choice to engage in a physical recreational activity carrying a range of special risks: *Agar v Hyde* at [13]-[15], [127]; (c) such risks included a horse slipping and falling for any number of reasons causing injury to a participant: CA [7]-[9], [38], [79], [176]; (d) was imposed upon a voluntary association calling for the skills of practical wisdom of experienced horsemen: PJ [32]-[37]; and (e) was satisfied by making an informed decision as to whether it was safe to continue with the competition: PJ [211]; CA [54]; RS [30]-[31].
- 30 3. **The breach case:** The only extant breach case under s 5B CLA in this Court alleges (CA [22(2)], [23(2)], [68], [70]):
 - (a) as to foreseeable risk: by no later than 6.58pm on the Saturday, the surface of the arena had so deteriorated as to become "slippery" (in some unidentified way) that it carried

a not insignificant risk of a horse slipping and falling causing personal injury or death to a rider in any rounds thereafter conducted on that surface; and

- (b) as to reasonable precautions: a reasonable person in the Respondent's circumstances would have suspended the event and repaired the surface of the arena (in some unidentified way) before recommencing the event the next day (RS [34]).

4. **Standard of review**: The question for the CA was whether the primary judge's findings of fact were demonstrated to be wrong by "incontrovertible facts or uncontested testimony" or were "glaringly improbable" or "contrary to compelling inferences": *Robinson Helicopter Co Inc v McDermott* at [43].

10 5. **Unchallenged concurrent findings of fact**:

- (a) the Appellant failed to prove the composition of the arena surface: CA [26]; [27];
 (b) the Appellant failed to prove how the surface was said to have deteriorated: CA [24];
 (c) some deterioration would be expected in the surface of the arena as many rides occurred over the course of a day: PJ [87], CA [79], [182]; RS [35].

6. **No error in the balance of the concurrent findings of fact**: The Appellant failed to demonstrate error in the balance of the concurrent findings:

- (a) as to the prior falls: the Appellant failed to establish where, or why, any of the prior falls occurred, let alone that the cause of the falls was the condition of the arena, or that any riders who fell suffered injury from them: CA [39]; RS [40];


- 20 (b) as to the Appellant's own fall: the limited evidence showed only that prior to the fall the horse's leg slid, without showing that was due to a deterioration in the surface of the arena, as opposed to any of the other reasons why a horse might slip in a camp drafting event: CA [2], [24], [33]-[38]; RS [41];

- (c) as to Mr Shorten's alleged concessions: no error was shown in the primary judge's assessment that Mr Shorten, while flustered in cross-examination, was doing his best to tell the truth and did not concede that, on the Saturday, he formed the view that the surface was unsafe: CA [47]-[53]; RS [38]-[39].

- 30 (d) as to the decision-making process: the organisers took an informed decision whether it was safe to continue the competition, on two occasions stopping it, considering the Stanton warnings, inspecting the ground, consulting with experienced campdrafters including the judge and participants (some who had themselves fallen), before unanimously deciding to proceed: CA [41]-[43], [54]; (RS [45](c));

- (e) as to the conduct of others: the conduct of experienced campdrafters, in continuing to participate or allow family members to participate, late into Saturday afternoon, supported the conclusions reached by the organisers: CA [40], [43]; RS [45](a), (b)).
7. **Conclusions on s 5B CLA**: The Appellant failed to prove, as at 6.58pm on the Saturday, the nature and extent of the risk posed by the surface of the arena, either generally or near where she fell. As a consequence, the Appellant failed to prove:
- (a) the existence of the specific and foreseeable risk she alleges (cf s 5B(1)(a)-(b)); or
- (b) that a reasonable person in the Respondent's position would have taken the precaution of suspending the event and repairing the ground before allowing competition to recommence, having regard to the considerations in s 5B(2): RS [46].
8. **Causation**: The concurrent findings of lack of factual causation under s 5D (CA [2], [5], [24], [33]-[38]) should not be disturbed, bearing in mind the Appellant's onus (s5E): (a) the case pressed was that the reasonable precaution was to suspend the event pending repair overnight (through "ploughing"?) and resumption on the Sunday; (b) the Appellant did not prove she would not have competed on the Sunday or that, when she competed on the Sunday, she would not have fallen on the repaired ground, having regard to her failure to prove why her horse fell on the Saturday: RS [47], [50]-[51]; (c) the "concession" is not relevant to the case of suspension as pressed in the CA and this Court: RS [48]-[49].
9. **Section 5L methodological issues**:
- (a) *Menz v Wagga Wagga Show Council* at [68]-[79] illustrates the task;
- (b) the "risks" for the purposes of s 5B and s 5L may differ, having regard to the text of the provisions and their purpose: *Cox v Mid-Coast Council* at [47]-[48];
- (c) the purpose of s 5L includes allowing the organiser and participants before the event to order their choices, behaviours and insurance: RS [53]-[56].
10. **Section 5L application**: The CA correctly upheld the defence on 3 cumulative grounds:
- (a) assuming the correctness of the fact findings on breach and causation, the PJ's characterisation of the "risk" at PJ [131] adopted the appropriate level of generality; and the risk so framed was obvious: CA [5], [69];
- (b) alternatively, the Appellant's formulation was unacceptably vague: CA [5], [69], [78];
- (c) alternatively again, the risk as formulated by the Appellant was obvious and the Appellant's remaining submissions should be rejected: CA [77]-[80]; RS [57]-[67].

Dated: 10 November 2021


Justin Gleeson SC