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

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES ON THE APPEAL

2. This appeal requires the determination of two questions.
3. *First*, leaving aside the operation of any defence available to the Respondent, did both the primary judge (**PJ**) and the majority of the Court of Appeal (**CA**) err in finding that the Respondent was not liable to the Appellant in negligence (the **Liability Question**)?
4. The determination of the Liability Question will require the Court to consider the following two issues: (a) should the Courts below have found, as a factual matter, that the ground of the arena had deteriorated to such a degree that the Respondent ought to have suspended the competition, prior to the Appellant's ride, until the arena surface had been repaired (**no**: see Section C.1); and (b) (an issue not acknowledged by the Appellant) if the Respondent ought to have suspended the competition as the Appellant contends, has the Appellant established that such breach of duty caused her loss? (**No**: see Section C.2.)
5. *Secondly*, if the answer to the Liability Question is "*yes*", did the PJ and the CA also err in finding that the Respondent's s 5L defence under the *Civil Liability Act 2002* (NSW) (**CLA**) was made out (the **Defence Question**)? (**No**: see Section D.)
6. The Defence Question will only arise if the answer to the Liability Question is "yes". The primary issue arising in the determination of the Defence Question will be the proper characterisation of the "*risk*" for the purposes of s 5L of the CLA.
7. Unless both the Liability Question and the Defence Question are answered in the affirmative, the appeal must be dismissed.

PART III: SECTION 78B NOTICE

8. No s 78B Notice is considered necessary.

PART IV: MATERIAL FACTS

9. The facts outlined in Appellant's submissions (**AS**) at [4]-[18] require the following important matters of correction or elaboration.

10. Campdrafting is a competitive sport involving a rider and horse working cattle. Specifically, the sport involves riding the horse at high speed, often in a full gallop, around a course which has pegs. The sport involves a number of risks, including a horse falling by losing its footing or contacting the hooves of the animal being chased, and the rider losing balance and falling off: PJ[14]-[16] CAB 10-11; CA[7]-[9], CAB 93-94.

11. The Respondent is an entity responsible for the overall control of the sport of campdrafting, and operates as a not-for-profit organization: PJ[32]-[34] CAB 17-18.

12. At the time of the accident, the Appellant was very experienced in campdraft events, having ridden horses from the age of five, and having travelled throughout NSW and Qld from the age of 12 to compete in campdraft events: PJ[13] CAB 10; CA[10]; CAB 94.

13. Prior to the commencement of the campdraft event at Ellerston on 7 January 2011, ground maintenance was carried out on the surface of the arena, and the "*risk*" associated with the "*ground surface*" was assessed as low: PJ[48] CAB 20-21.

14. Mr Shorten competed in the campdraft event on Friday 7 January, and found the surface to be "*better than previous years, as it had a better ground covering and did not appear to be as dusty. There was moisture in the topsoil, but it was not wet*": PJ[43] CAB 19-20.

15. On the Friday evening, the arena was renovated by running a tractor with a renovator or aerator attached to it over the surface: PJ[44], [52] CAB 20, 22.

16. On Saturday 8 January, prior to the Appellant's accident, Mr Shorten competed in the maiden draft; one of his sons competed in the juvenile draft; his other son competed in the maiden draft; and his wife competed in and won the first round of the ladies' draft, and had another horse in the final: PJ[53] CAB 22-23. Mr Shorten would not have allowed his family members to compete if he thought the ground was not safe, and nor would he have competed himself in such circumstances: PJ[53] CAB 22-23.

17. Ben Tapp, the Appellant's father, Courtney Turvey, the Appellant's sister, and the Appellant herself also competed in campdraft events over the course of Saturday 8 January, prior to the Appellant's accident: CA[40]; CAB 104. There was no evidence to suggest that any of them identified any deterioration in the ground during their rides.

18. It is correct to state that "*a number of competitors fell*" over the course of the competition on 8 January, ahead of the Appellant's accident: AS[7]. However, it is important to appreciate that: (a) in light of conflicting evidence (e.g. the Incident Report (AFM 213) and the Open Draft (AFM 216)), no finding was able to be made below as to how many competitors fell ahead of the Appellant's accident: PJ[70]-[73] CAB 27; (b) leaving aside the Appellant, only one competitor who fell gave evidence, namely Mr Shorten. His evidence was to the effect that he fell after completing the course, and his fall had nothing to do with the surface of the arena: PJ[55]; [72] CAB 23, 27; (c) there was also evidence to the effect that two other competitors who fell, Mr Gillis and Mr Sadler, did not blame the surface of the arena for their respective falls: PJ[56] CAB 23-24; CA[42] CAB 105; (d) there was no evidence at all and (unsurprisingly) no finding to the effect that any of the competitors' falls over the course of 8 January ahead of the Appellant's ride were caused by the deterioration of the ground: CA[33] CAB 102.

19. Partway through the competition on 8 January, Mr John Stanton complained to Mr Shorten about the surface of the arena. While Mr Stanton was experienced in campdrafting, it seems that, unlike Mr Shorten, he had not competed on 8 January: Open Draft Draw at AFM 216ff. Contrary to AS[10], there is no evidence one way or the other as to whether Mr Shorten "*cavil[led] with Mr Stanton's description of the condition of the surface as being 'slippery'*". Rather, the evidence was to the effect that Mr Shorten simply responded in the manner set out at AS[10]. A further exchange took place which is omitted from the Appellant's summary: Mr Shorten's arm was in a sling when Mr Stanton approached him, by reason of Mr Shorten's earlier fall, in respect of which Mr Stanton said "*look at you*", and Mr Shorten responded "*that's not fair it had nothing to do with the ground, it was my own stupid fault*": PJ[56] CAB 23; CA[41] CAB 104.

20. After Mr Stanton raised his concerns with Mr Shorten, Mr Shorten spoke to Mr Allan Young and Mr Gallagher, as set out at AS[11]. Following those consultations, it was determined that the competition should continue. Mr Gallagher was the judge of the competition, and so had the opportunity to watch each rider over the course of the day. Mr Young, like Mr Shorten, had competed that afternoon: CA[43] CAB 105.

21. The Appellant omits to note at AS[11] that, after consulting Mr Young and Mr Gallagher, Mr Shorten also spoke to Messrs Gillis and Sadler, being competitors who had fallen that

afternoon.[1] As Payne JA observed, "*Mr Gillis attributed his fall to the fact that 'I rode too hard. I thought I had a chance of making the final'. Mr Sadler said 'I am annoyed because I fell just before the gate which meant I didn't get a score'. Messrs Gillis and Sa[d]ler did not blame the arena surface for their falls*": CA[42] CAB 105.

22. While it is correct to state that at about 6:58pm Mr Brad Piggott fell from his horse (AS[12]), it should be noted that, as Payne JA observed at CA[39] CAB 104, there was no evidence at all as to: "*why Mr Piggott fell, where Mr Piggott fell, or whether Mr Piggott suffered an injury.*" Importantly, *"[t]here is no evidence that Mr Piggott's fall had anything to do with the surface of the arena.*"

23. Around this time, Mr Stanton again approached Mr Shorten raising concerns as to the safety of the ground: CA[42] CAB 105. In response, Mr Shorten again asked Mr Gallagher to hold up the competition, and consulted with a group consisting of not only Mr Gallagher, Mr Young and Mr Wayne Smith (as per AS[12]), but also Mr Callinan, another person experienced in organising and conducting campdrafting events: CA[42]-[43] CAB 105. As is recorded at AS[12], one or both of Mr Young and Mr Smith said that the riders should "*ride to the conditions*" and Mr Young said "*I think the arena surface is still alright*": CA[174] CAB 145-146. The Appellant's submissions omit the fact that Mr Shorten "*considered the condition of the ground. [He] had noticed that the surface was not wet, it was moist in parts. Dust was still flowing up*": PJ[56] and [59] CAB 23-24; CA[174] CAB 146. Following this consideration, the decision was made by the group to continue the competition, but to make an announcement as set out at AS[12].

24. There is no evidence that anyone other than Mr Stanton raised any concern as to the condition of the ground over the course of Saturday 8 January, despite there having been in the order of 700 individual runs over the course of the competition ahead of the Appellant's accident: PJ[87] CAB 32; CA[79] CAB 117.

25. After making the decision not to suspend the competition, and before the Appellant commenced her ride, Mr Young competed on the arena, without incident: CA[43] CAB 105. Indeed, he achieved a high score of 87: AFM 219.

26. While the summary of evidence describing the Appellant's accident at AS[15]-[16] is accurate, it should be noted that it was not possible on the evidence to determine the

[1] The chronology at AS[11]-[13] is incorrect; it is clear from CA[42]-[43], and Mr Shorten's evidence extracted at CA[174] which was not the subject of criticism, that Mr Shorten consulted with Messrs Gillis and Sadler after Mr Stanton's first complaint, rather than after the second (see also AFM 198 [17]). Further, AS[13] is not accurate in the light of evidence cited at [22] above. The express statements of Messrs Gillis and Sadler made clear their opinions that their falls were their own fault and had nothing to do with the state of the arena.

cause of her horse slipping: PJ[133] CAB 43-44; CA[2] CAB 92 (Basten JA); CA[24], [33] CAB 99, 102 (Payne JA). As Payne JA said at CA[33] CAB 102, "*[t]here is no doubt that it was established that immediately prior to the appellant's horse falling its legs slid. What was left unproven was the reason for that slide.*" Importantly, there was no finding that the surface of the arena had deteriorated to such a degree at the time and location of the Appellant's fall so as to cause her horse to slip.

27. As to AS[17], it is not correct that Mr Shorten was the only lay witness who gave evidence for the Respondent; the Respondent also read the evidence of Mr Craig Young, who was not required for cross-examination: PJ[37] CAB 18. Further, the summary of Mr Shorten's evidence at AS[17] is selective. This is dealt with further below.

PART V: ARGUMENT

A. Legislative context

28. The legislative context to the present dispute can be summarised succinctly. While the Appellant pursued a number of claims at first instance, only one is now pressed: her claim in negligence, governed by ss 5B, 5C, 5D and 5E of the CLA. The Respondent raised a number of positive defences to the claim, only one of which remains in issue, namely that under s 5L of the CLA. Sections 5F and 5K are relevant to the consideration of that defence, as those provisions set out the meaning of defined terms used in s 5L.

29. The Respondent does not perceive any disagreement between the parties as to the principles governing the operation of those provisions. In particular, neither party seeks to challenge the summary of principles set out in *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 per Leeming JA (Payne and White JJA agreeing) in respect of the operation of s 5L of the CLA. Rather, the dispute seems to be over the correct application of those principles to the facts of the present case.

B. Uncontentious matters

30. The following matters are uncontentious. *First*, it is admitted that the Respondent "*organised, managed and provided the campdrafting event*", and that the Respondent owed the Appellant a duty of care "*to organise, manage and provide the campdrafting event with reasonable care and skill*": PJ[199] CAB 63; CA[22] CAB 98.

31. *Secondly*, it does not appear that the Appellant seeks to disturb the finding at CA[54] CAB 109 that "*[w]hat was required in taking reasonable care was for an informed decision to be made as to whether it was safe to continue with the competition*" or, to use the Appellant's formulation at AS[20], whether "*the competition ought to have been*

suspended until the arena surface was repaired" (see also CA[18] CAB 96). That is, the duty to exercise "*reasonable care and skill*" was satisfied by making "*an informed decision*" as to whether or not to continue with the competition in all the circumstances.

32. *Thirdly*, the Respondent conceded below that "*if the Court finds the duty alleged and that the breach involved a failure to stop the event before Emily's ride, then it is self-evident that the failure to stop the event was a necessary condition of the harm and the requirements of s 5D are met*": PJ[217] CAB 68. However, as is explained at C.2 below, this limited concession does not have the effect for which the Appellant contends.

33. *Finally*, the Appellant accepts that campdrafting is a "*dangerous recreational activity*": see CA[15] CAB 95. It follows that the only matter in dispute on the Defence Question is whether the "*risk*" which materialised (however that risk is to be defined) was "*obvious*".

C. Liability

34. The Appellant's case on the Liability Question can be summarised as follows. *First*, the Courts below ought to have found that, at least by the time Mr Piggott fell at 6:58pm on 8 January, the ground of the arena had deteriorated to such a degree that a reasonable person in the Respondent's position would have suspended the competition until the arena surface was repaired: AS[20]. *Secondly*, it follows from the concession set out at [32] above that, if the Court is satisfied that an exercise of "*reasonable care and skill*" in the circumstances required the Respondent to suspend the competition until the surface arena was repaired, causation is made out and liability is proved: AS[20]. *Thirdly*, and relatedly, there is no need for the Appellant to prove the precise mechanism by which the deterioration of the surface of the arena had caused the ground to become unsafe in order for liability to be made out: AS[21]. None of these contentions should be accepted.

C.1 The ground had not deteriorated to such a degree as to require suspension

35. To succeed on liability, the Appellant needs to overcome concurrent findings in the Courts below that "*it was not established … that the surface of the arena had become unsafe or that the exercise of reasonable care in all the circumstances required the event to be stopped*": CA[56] CAB 109; see also PJ[133] CAB 43-44; CA[2] CAB 92 (Basten JA); [24] CAB 99 (Payne JA). Specifically, the Appellant needs to overcome the factual findings below and establish in this Court (a) that the deterioration of the ground posed a sufficiently serious risk of injury to competitors so as require the Respondent to consider suspending the competition; and, further still, (b) that the deterioration was to such a degree that an "*informed decision*" by the Respondent no later than Mr Piggott's fall

would necessarily lead to the conclusion that it was not safe to continue with the competition, such that the competition must be suspended until the ground was repaired.

36. ***Mr Shorten's evidence:*** The primary basis upon which the Appellant contends that this Court ought to find that the ground of the arena had deteriorated to such a degree as to require the suspension of the competition, is a series of purported concessions given by Mr Shorten in cross-examination. The Appellant contends that these concessions were erroneously disregarded by the Court of Appeal, on the basis that: (a) the concessions did not involve the use of hindsight (AS[23]) and (b) to the extent that Mr Shorten did use hindsight in giving concessions, those concessions could nonetheless support inferences concerning the deterioration of the ground prior to the Appellant's accident (AS[24]). The Appellant does not, however, specifically identify which parts of Mr Shorten's evidence it says (a) were erroneously disregarded by the Court of Appeal as based on hindsight; or (b) ought to have supported inferences in the Appellant's favour.

37. If the Appellant's case hinges on the purported concessions summarised at AS[17], we offer first a general answer and then a series of more particular ones.

38. As to the general answer: There is a danger in extracting short passages from answers given in cross-examination without considering the full context in which they were given. The primary judge was in the best position to assess the true significance of the concessions, including whether they were affected by the witness being "*flustered by the processes of cross-examination*" (PJ[68] CAB 26). Further, the majority of the Court of Appeal then fully and properly exercised the rehearing function by a very close examination of the transcript of evidence to establish how far it went (see CA[47]-[55] CAB 107-109). This was in no way a truncated examination or (cf AS[25]) a deprivation of the Appellant's right to an appeal according to law. The dissenting reasons of McCallum JA do not establish any error by the majority in the exercise of the rehearing function. Rather, her Honour's dissenting conclusions were based on inferences her Honour was prepared to draw from certain aspects of the evidence (CA[172]-[182] CAB 144-149), being inferences urged upon and rejected by the majority upon their own careful consideration of the evidence. When the evidence is considered as a whole, for reasons explained in detail below, the inferences relied upon by McCallum JA are not available, and the majority's conclusions are to be preferred.

39. As to the particular answers:

    a. Mr Shorten's acknowledgment that it would be "*practically unprecedented*" to have seven falls over the course of an entire event let alone a single day (AFM 397 T168

L11-14) needs to be qualified. *First*, the distinction between an "event" and a "single day" does not assume significance given that prior to 2010, campdrafting events had only been over two days: PJ[50] CAB 21. *Secondly*, the evidence did not demonstrate that there were in fact seven falls on 8 January (see [18] above), and so the concession rests on an unproved assumption. *Thirdly*, it could not be inferred from this concession that each of the falls that did occur had a single cause, let alone the cause being the deterioration of the ground. Given positive evidence that some falls were due to rider fault/discretion (see [18] and [21] above), the concession does not assist.

b. Mr Shorten's evidence that a "*bad fall is … a signal that the surface needs attention to prevent another fall*" (AFM 394 T165 L9-12) is again at too high a level of abstraction to be given much weight. In any event, following Mr Stanton raising his concerns, the Respondent, through Mr Shorten and others, carefully considered the safety of the surface, before determining to proceed. This decision, based on an application of no doubt considerable expertise and experience to the specific facts before them, is of far more significance than any general principle of the kind put to Mr Shorten.

c. Mr Shorten's acceptance of the proposition that "*[t]he condition of the arena had been identified by you and others at that stage as being dangerous*" (AFM 419 T190 L8-10) must be read in context. The proposition was put to Mr Shorten amongst questions relating to whether the Appellant was given the opportunity, before her ride, to "*go around the course first*". Given that the Appellant was not given such an opportunity, the "*stage*" referred to in the question in issue is far from clear. Further, the concession is contrary to Mr Shorten's conduct in the lead up to the Appellant's fall, during which he carefully considered the state of the ground, consulted widely, and ultimately concluded the competition should proceed. There is simply no evidence, other than a one line concession in the midst of cross-examination on a different topic, that Mr Shorten and "*others*" considered the condition of the arena to be "*dangerous*" prior to the Appellant's accident. Mr Shorten's answer when read in context is an example of Mr Shorten's view being infected by hindsight, and otherwise being "*flustered by the processes of cross-examination*" (PJ[68] CAB 26).

d. The reference to Mr Shorten's evidence that the arena surface was "*getting more unsafe*" as the afternoon progressed at AFM 414 T185 L45-50 again needs to be read in context. Mr Shorten was there being questioned about the second time Mr Stanton raised a concern: "*Q. But you see the ground hadn't gotten any safer in that time, had it? A. No it wouldn't have, no. Q. It was still as unsafe as it was when Mr Stanton first*

raised it and it was getting more unsafe wasn't it? A. Well— Q. It was, wasn't it Mr Shorten? You can answer that? A. Yes, yes, it probably was, yes." It is trite to observe that the ground would have – it some sense – deteriorated as the competition wore on. This answer does not assist the Appellant, who must demonstrate that the surface had deteriorated to such a degree that the competition should have been suspended.

e. As to Mr Shorten's agreement with the proposition that "*the fact that a disc plough was used demonstrates how bad the condition of the ground was at 6:45pm on Saturday, 8 January 2011*" (AFM 401 T172 L23), the effect of this concession is limited, because no explanation or elaboration of the phrase "*how bad*" is given. More fundamentally, this concession is infected by hindsight; the question expressly requires Mr Shorten to opine on the condition of the ground prior to the Appellant's accident by reference to steps that were taken after it occurred. The concession cannot therefore support a conclusion viewed prospectively as to the condition of the ground prior to the Appellant's accident. Mr Shorten's contemporaneous actions are better evidence of that matter. The Courts below were correct to conclude that the fact that ploughing took place on the Sunday, the day after the Appellant's fall, cannot affect the assessment of the Respondent's liability: PJ[214] CAB 67; CA[57] CAB 110.

f. Mr Shorten's statement that "*[w]e used a disc plough because we thought at the time that would be the reason for no more falls*" (AFM 401 T172 L16-21) constituted a frank acknowledgement that, after the Appellant's catastrophic fall, a decision was taken to plough the arena out of an abundance of caution. While a cautious approach was taken in light of the Appellant's accident, this says nothing of whether, prior to the Appellant's accident, a reasonable person in the position of the Respondent, making an informed decision as to the safety of proceeding, would have concluded that the competition ought be suspended and the ground ploughed.

g. The contention at AS[17] that Mr Shorten conceded that "*the reason why the event was allowed to continue was because 'the event had to go on' (T177, 178, 198) and that this 'took precedence over safety' (T198)*" overstates the evidence. At AFM 406 T177 L10-25, Mr Shorten said that he "*can't remember saying*" that the event "*will just have to keep going … and see if we can get through to the end*". When he was pressed he accepted that "*[i]t happened, yes, we kept the event going*" but continued to reject the suggestion that he made the statement that we would "*just have to keep going … and see if we can get through to the end*".

h. Finally, Mr Shorten's alleged concessions at AFM 427 T198 L26-37 need to be read in context. Mr Shorten is asked to recall the Appellant's fall, following which the following exchange unfolds: "*Q. The justification in your mind for continuing the event after Mr Stanton had raised the condition of the field with you, the arena, the justification for continuing was the event had to go on? A. Yes. Q. That took precedent over safety, didn't it? A. I'd have to say yeah … (not transcribable) … yes. Q. That really wasn't an adequate justification for letting the event go on, was it? It wasn't, was it? A. Under the circumstances now, no.*" This exchange is infected by hindsight reasoning and ought be accorded limited weight. This is confirmed by Mr Shorten's evidence in re-examination to the effect that he would not have let his wife or sons ride, or ridden himself, if he thought – at the time – that the conditions were unsafe: see AFM 431-433 T202-T204. In any event, regardless of what was "*in [Mr Shorten's] mind*" at the time, in circumstances where the decision to proceed was not made by Mr Shorten alone, this evidence does not detract from the conclusion that an "*informed decision*" was made by the Respondent to proceed with the competition following Mr Stanton raising his concerns.

40. ***The prior falls****:* The Appellant also places reliance on the fact that a number of competitors fell over the course of 8 January, in an attempt to prove the extent of the deterioration of the surface of the arena on that day: AS[25](b). While there was evidence that at least four falls occurred prior to the Appellant's accident, an inference that those falls were caused by a deterioration in the surface of the arena is not available in circumstances where there was no evidence at all linking <u>any</u> of those falls to the condition of the arena: CA[33], [39], [56] CAB 102, 104, 109-110. As the Appellant accepted in cross-examination, there are many reasons why riders fall from horses: AFM 265-266 T38 L33 to T39 L37; CA[38] CAB 103. In fact, the only evidence as to the causes of the earlier falls was to the effect that at least three competitors who fell (Messrs Shorten, Gillis and Sadler) did not blame a deterioration of the ground for their falls: see CA[41]-[42] CAB 104-105 and [18] and [21] above. In those circumstances, Payne JA's conclusion at CA[56] CAB 109-110 is unimpeachable: "*[t]he bare fact of the number of falls, in the absence of any evidence that those falls were causally related to any deterioration in the surface of the arena, does not establish that the exercise of reasonable care in all the circumstances required the event to be stopped*".

41. It follows from the absence of any proof of a connection between falls on 8 January and the state of the ground, that no inference can be drawn from a comparison between "*the*

number of falls on the Saturday and the absence of falls once the surface had been renovated on the Sunday morning" (cf AS[25](b)). In any event, it should be noted that far less riders competed on the Sunday than on the Saturday: see the Open Draw at AFM 216. It follows that one is not comparing "*like with like*" when comparing falls on the Saturday and the Sunday.

42. ***Subsequent conduct irrelevant:*** An inference as to the deterioration of the ground cannot be drawn from the mere fact that the event was "*stopped until the surface could be renovated*" following the Appellant's accident (cf AS[25](b)). Such a conclusion would involve hindsight reasoning – a decision taken, no doubt out of an abundance of caution, to renovate the ground following the Appellant's catastrophic accident does not support an inference that the ground had deteriorated to such a degree as to require renovation prior to the accident. The primary judge and Court of Appeal correctly concluded as much: PJ[214] CAB 67; CA[57] CAB 110.

43. ***No other evidence of deterioration***: Beyond the mere fact of the falls, and, perhaps, Mr Shorten's purported concessions, there is no evidence that the ground had deteriorated to such a degree as to warrant the event being suspended on the grounds of safety. Specifically: while the Incident Report notes "*[t]he ground had begun to deteriorate due to moisture from rainfall earlier in the week and the onset of afternoon air*" (AFM 214), this statement, written four days after the event, does not support an inference that the ground was unsafe prior to the Appellant's accident, in circumstances a group of experienced campdrafters considered the ground on the day in question, and concluded that the ground was in an acceptable state for the competition to proceed. Similarly, nothing in the Open Draft (AFM 216ff) refers to the quality of the ground at the time each ride took place. While at trial, the Appellant sought to prove deterioration by other means (a series of photographs (see PJ[73] CAB 27; CA[35] CAB 102-103) and certain expert evidence (see PJ[78] CAB 29; CA[44], [46] CAB 105, 107)) none are sought to be resuscitated in this Court. Accordingly, the Court is left with nothing other than the fact of a number of falls on 8 January (without details of precisely how many falls occurred or where, when, and why they occurred), together with a small number of purported concessions of Mr Shorten in support of the Appellant's case on liability in this Court. This evidence does not form a sufficient basis upon which to find a deterioration of the ground of the kind for which the Appellant contends.

44. ***Timing issue****:* The lack of precision in the Appellant's case as to the time at which the campdrafting event should have been suspended also speaks to the failure to prove

sufficient deterioration of the ground as to necessitate suspending the competition. For example, the basis for the selection of Mr Piggott's fall as the latest time by which suspension should have been ordered[2] is wholly unclear, in circumstances where it is not known why Mr Piggott fell, where he fell, whether he suffered injury, or whether his fall had anything to do with the surface of the arena at all: CA [39] CAB 104. There is simply no evidence to support the conclusion that Mr Piggott's fall should have triggered the suspension of the competition. The selection of Mr Piggott's fall appears to be the product of hindsight, given the fall occurred shortly before the Appellant's accident.

45. ***The evidence strongly suggests no deterioration justifying suspension****:* The following matters weigh against a conclusion that the ground had deteriorated to such a degree as to require a reasonable person in the position of the Respondent to suspend the event.

a. Each of Mr Tapp, Ms Turvey and the Appellant competed on the day of the Appellant's accident. Ms Turvey gave evidence that she competed in the late afternoon ("*perhaps five*"), and, therefore, shortly before the Appellant: AFM 331 T103 L1-18. Neither Mr Tapp nor Ms Turvey raised any concern with the ground at the time they competed, nor suggested that the Appellant not compete by reason of the deterioration of the ground. To the contrary, Mr Tapp offered the Appellant his spot in the Open Draft which he would not have done if he had any concern as to the safety of the ground: see CA[40] CAB 104.

b. Mr Shorten had also competed on two occasions on 8 January, and had even suffered a fall in one of his events: CA[41], [43] CAB 104-105. Nonetheless, he did not perceive the surface of the arena to pose any danger, when he was called to consider the matter by Mr Stanton on two occasions. It should be noted that Mr Shorten's wife and sons were competing on the same surface, and his evidence (which was accepted by the primary judge) was to the effect that he would not have let them compete had he perceived any danger: PJ[53] CAB 22-23. In all of those circumstances, his view that it was not necessary to suspend the competition should be accorded significant weight.

c. The decision that the surface was sufficiently safe for the competition to continue was not made by Mr Shorten alone; he consulted Allan Young, Jack Gallagher, Pat Gillis, Adam Sadler, Jack Callinan and Wayne Smith: CA[42]-[43] CAB 105. All were experienced campdrafters. Mr Gallagher was the judge of the competition and so had

[2] While AS[25](c) refers to a "*Mr Gillespie*", this must be a slip as no "*Mr Gillespie*" fell from a horse. Given the Appellant contended below that the event should have been suspended following, at the latest, Mr Piggott's fall (CA[57] CAB110), it is assumed that the reference to Mr Gillespie is intended to refer to Mr Piggott.

the advantage of closely examining all riders. Messrs Sadler, Young, Smith and Gillis had competed in events on that day. The group included riders who had fallen (Messrs Shorten, Gillis and Sadler) and a rider who competed after the decision to continue the competition was made (Mr Young). The group was appropriately placed to make an "*informed decision*" as to whether it was safe to continue. Their unanimous decision to proceed weighs against the conclusion that the ground had deteriorated to such a degree by the time Mr Piggott fell that the competition ought to have been suspended.

d. No one, other than Mr Stanton, raised any concern as to the safety of the ground on 8 January, notwithstanding the fact that there had been some 700 runs prior to the Appellant's accident: CA[79] CAB 117. This weighs against giving determinative weight to Mr Stanton's concerns, particularly in circumstances where it seems, based on the Open Draft Draw, that Mr Stanton was not competing on 8 January.

46. ***Conclusion – no breach of duty****:* In light of the matters set out above, the evidence does not support the conclusion, on the balance of probabilities, that there was deterioration in the area of the Appellant's fall of <u>any identifiable kind</u> let alone deterioration that extended beyond ordinary variances that might be expected during the day so as to require a reasonable person in the position of the Respondent to not only <u>consider</u> suspending the competition but to in fact make an <u>informed decision to suspend</u> the competition until the ground had been repaired. In short, the propositions set out at [35] above have not been made good. It follows that the contentions in AS[25](a)-(c) must be rejected, the Liability Question answered in the negative, and the appeal dismissed.

C.2 Even if the competition ought to have been suspended, causation not made out

47. While not squarely acknowledged by the Appellant, the Respondent has the benefit of a finding by the majority of the Court of Appeal that the Appellant failed to prove causation: CA[2], [5], [33], [37]-[38]; CAB 92, 102, 103. The Appellant needs to overturn this finding in order to succeed in this Court. Notwithstanding this, the Appellant does not contest the CA's finding that "*at the trial, and on appeal, the appellant never clearly identified the way in which it was alleged the surface had deteriorated: (i) that it was hard and compacted when it should have been soft; (ii) that it was rough and broken up when it should have been smooth; (iii) that it was slippery in some other way (for example by reason of rainfall during the day)*": CA[24] CAB 99. Rather, the Appellant says that she does not need to prove the way in which it is alleged

the surface had deteriorated prior to her accident, as she is able to rely on the Respondent's concession at trial set out at [32] above to establish causation: AS[20]-[21].

48. This concession was made in the context of a broader case run by the Appellant at trial, which alleged that the Respondent should have stopped the competition when the ground became unsafe (PJ[195]-[196] CAB 61-62; CA[22] CAB 98). On appeal, the Appellant relied on a narrower case to the effect that the Respondent should have simply suspended the event until the arena area was repaired (see Appeal Ground 1(a) at CAB 79 and CA[23](2) CAB 99). Only the narrower case is pressed in this Court: AS[20]. The Respondent's concession at trial was expressly limited to the scenario in which the Court found that the breach involved a failure to stop – end or terminate – the competition; that is, it was relevant to the Appellant's broader case run at trial. It did not extend to a concession in the context of the Appellant's narrower case run on appeal and in this Court to the effect that the breach involved a failure to suspend the competition and repair the ground, before permitting the competition to recommence. The limited concession at trial was appropriately made because, as senior counsel for the Respondent put it, it is "*self-evident*" that if competition ought to have been terminated before the Appellant's ride, she would never have fallen from her horse. The same is not true in a scenario where the event merely ought to have been suspended; in such circumstances, the Appellant would still have competed on Xena Lena but a little later; whether she would have fallen depends on whether the reason for her fall was connected to the state of the ground.

49. Accordingly, the concession does not assist the Appellant in the narrower case she now puts. To make out liability, the Appellant must prove not only that the surface of the arena had deteriorated to such a degree that the Respondent – acting with reasonable care and skill – ought to have suspended the competition, but also: the place and manner in which the surface had deteriorated; the appropriate form of remediation for that type of deterioration; and that following such remediation the Appellant's fall would not have occurred once the competition resumed. Only by demonstrating these matters could the Appellant prove that a failure to suspend the competition and repair the ground was a "*necessary condition*" of the occurrence of harm: s 5D(1)(a) of the CLA.

50. The primary judge's finding, undisturbed on appeal, was that if "*the Court concludes that the breach of duty was limited to the preparation of the arena surface and that there should have been ploughing rather than, or in addition to, using an aerator to prepare the surface, there is no evidence that taking those steps would have led to a different outcome*": PJ[217] CAB 68. It is not to the point that the primary judge was here dealing

with a contention of breach based on a failure to plough prior to competition on 8 January. The contention that "*the competition ought to have been suspended until the arena surface was repaired*" engages the same considerations, given the allegation of breach at AS[20], while imprecise, appears to contemplate the ploughing of the arena.

51. As Payne JA observed at CA[27] CAB 100, "*[t]here was, in truth, no relevant evidence at the trial about the composition of the surface of the arena at Ellerston*". In those circumstances, even if the Court were prepared to infer that the surface of the arena had significantly deteriorated prior to the Appellant's accident, there is no evidence supporting a finding as to the kind of deterioration of the ground (too soft? too hard? otherwise?) or where precisely it occurred in the arena. Absent such findings, it cannot be concluded on the balance of probabilities that repairing the ground through ploughing (or some other undescribed action) would have prevented the Appellant's fall. As such, even if breach were made out, the Appellant's case must fail at the level of causation, the Liability Question must be answered in the negative, and the appeal dismissed.

D. Section 5L Defence

52. If the Court reaches the Defence Question, the Court should find that, in summary: (a) if the Appellant's characterisation of the "*risk*" is to be adopted, such a risk was "*obvious*" to a "*reasonable person in the position of*" the Appellant (s 5F(1)); (b) no error has been identified in the primary judge's formulation of the "*risk*", which was also "*obvious*" to a "*reasonable person in the position of the Appellant*"; (c) on either the Appellant's or the primary judge's formulation of the "*risk*", the s 5L defence is made out.

D.1 Applicable principles

53. The principles applicable to the operation of s 5L of the CLA were stated by Leeming JA in *Menz*. That statement was approved by all members of the five-Judge bench in *Singh bhnf Ambu Kanwar v Lynch* (2020) 103 NSWLR 568.

54. To make out the defence, the Respondent must establish that: (a) the Appellant was engaged in a "*recreational activity*" (this is admitted); (b) the recreational activity was a "*dangerous*" one as defined in s 5K (this is now conceded); (c) there was a risk "*of that activity*" which was an "*obvious*" one, being "*a risk that, in the circumstances, would have been obvious to a reasonable person in the position of [the Appellant]*" per s 5F; and (d) the harm suffered was the "*result of the materialisation of*" that "*obvious risk*".

55. Three general observations should be made. *First*, as Leeming JA observed in *Menz* at [70], "*the obvious risk is in principle to be specified with a degree of generality*",

although, as his Honour explained at [74], "*the proper characterisation is fact-dependent, and will turn on the evidence in any particular case of what occurred, and why the risk is one that is obvious.*" *Secondly*, the question of whether a risk is "*obvious*" for the purposes of s 5L is to be determined objectively, rather than by reference to the subjective knowledge of – here – the Appellant; as much is clear from s 5L(2). *Thirdly*, it is accepted that the relevant description of the risk must encompass the risk that in fact materialised in the case of the plaintiff: AS[29]; *Menz* at [71].

D.2 The 'risk' for the purposes of s 5L

56. ***Task****:* Identifying risk at an appropriate level of generality will be a fact specific exercise, but it will also have regard to the fundamental reasons why the s 5L defence has been created, namely to increase personal responsibility and to avoid findings of liability for the obvious risks of dangerous sports and other risky activities[3], in line with the principle that "*people should take reasonable care for their own safety*": Ipp Report at [8.40]. Importantly, s 5L is a liability-defeating defence that ought to be capable of being applied without the Court engaging in the full analysis of breach and causation: *Goode v Angland* (2017) 96 NSWLR 503 at [185]; *Menz* at [38].

57. ***The present case****:* In the present case the primary judge and the majority quite correctly found that there was considerable difficulty in identifying the risk for the purposes of s 5L at the right level of generality, given the evidentiary deficiencies in the Appellant's case. If it becomes necessary for this Court to decide the Defence Question, that would only be after at least some findings of the majority of the Court of Appeal on breach and causation have been overturned. This creates difficulties in responding to ground 2 of the Notice of Appeal: CAB 171. Nonetheless, the following observations may be made.

58. The basic statutory purpose of s 5L is (a) to recognise that if a person has chosen to engage in what is properly viewed as a "*dangerous recreational activity*" there will be a category of risks flowing from the everyday engagement in that activity which can properly be viewed as "*obvious*" from the perspective of a participant in the activity; and (b) to provide that if a person chooses to engage in the activity in the face of those "*obvious*" risks, they need to adjust their behaviour to manage those risks. That is, s 5L

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[3] See the title of Div 4 of Pt 1A of the CLA ("*Assumption of risk*"); Recommendation 32 of the 'Review of the Law of Negligence Final Report', Sept 2002 (**Ipp Report**) which informed the drafting of s 5L of the CLA; Second Reading Speech for the Civil Liability Amendment (Personal Responsibility) Bill 2002, which introduced s 5L and its associated provisions: see NSW Legislative Assembly, Parliamentary Debates (Hansard) 23 October 2002 at p 5765.

provides that the consequences of harm arising from "*obvious risks*" are to be borne by participants in dangerous recreational activities, rather than organisers (or their insurers).

59. Applying this analysis to the present context, it is a central risk of campdrafting that a rider's horse may slip and fall during competition. There are a range of circumstances which may lead to the horse slipping or falling. A number were identified by Mr Shorten in his evidence, which was unchallenged and referred to at CA[38] CAB 103. Approaching the matter most favourably to the Appellant and accepting for the sake of argument that the "*risk*" for the purposes of s 5L should be formulated as the Appellant contends, namely "*the risk of injury resulting from a horse that slipped by reason of the deterioration of the surface of the arena*" (AS[36]), the question then becomes whether the risk of a horse slipping "*by reason of the deterioration of the surface of the arena*" is to be viewed as within the list of ordinary circumstances which may lead a horse to slip in a campdrafting competition, examples of which appear at CA[38], such that the risk is "*obvious*" in the relevant sense. That question must be considered in light of the fact that, self-evidently, the condition of an arena is expected to deteriorate to some degree as a competition proceeds – a fact recognised and accepted by all members of the Court of Appeal: see below at [62]. The question must also be considered in light of the fact that a central part of the responsibilities of organisers of a campdrafting competition from time-to-time will be to make decisions as to whether the condition of the arena requires any remedial work or whether it is appropriate for the competition to continue with riders riding to the conditions. The question invokes in a different context the observations of Gleeson CJ in *Agar v Hyde* (2000) 201 CLR 552 at [15]; that is, that a central part of competition in dangerous recreational activities will be to test oneself to the limits against the conditions as they vary from time to time in such activities.

60. Applying that approach, even if the Appellant's characterisation of risk is to be accepted, the majority of the Court of Appeal were perfectly correct to find the risk to be an "*obvious*" one. The bare assertion at AS[43] to the contrary should be rejected. This is so for the reasons explained by Payne JA at CA[79]ff CAB 117, namely because, prior to the Appellant's fall, some 700 riders had competed on the arena surface, including multiple rides by the Appellant, her father and her sister. As Payne JA observes, "*[t]he fact that, after such a day, the surface of the arena would have 'deteriorated', heightening the risk of a horse slipping and fall, would have been obvious to a reasonable person in the position of the Appellant.*" In short, the risk of a horse slipping by reason of deterioration of the surface of the arena is no different to the risks identified

by Mr Shorten and recorded at CA[38] CAB 103 – it is one of several reasons a horse may fall in a campdrafting competition.

61. The fact that it is the responsibility of the organiser of a campdrafting competition to make decisions throughout the competition as to whether the condition of the arena requires remedial work does not alter the fact that the risk of a horse slipping and falling by reason of the deterioration of the arena is "*obvious*" in the relevant sense. As Ipp JA observed in *Fallas v Mourlas* (2006) 65 NSWLR 418 at [53], "*[i]t goes without saying that in certain circumstances the risk of a person being negligent (and causing harm) might be obvious*". Indeed, the defence only has room to operate in the event of a finding of negligence. Even if it be the case that the risk identified by the Appellant would only come to pass in circumstances where the organiser of a campdraft competition is negligent (which is not admitted), this would not affect the conclusion that the risk is "*obvious*" in the relevant sense.

62. ***Appellant's criticisms without merit:*** The Appellant's various criticisms of Payne JA's reasons on this topic are without merit. *First,* the contention at AS[37] that his Honour's conclusion was "*unsupported by any evidence*", including because the proposition of the obviousness of risk "*was not put to the appellant, or any other witness*", is misconceived. The concept of "*obviousness*" under s 5F involves a consideration of what would have been obvious "*to a reasonable person in the position of*", here, the Appellant. Evidence adduced in cross-examination would not necessarily assist; individual witnesses may not be a proxy for a "*reasonable person*", and the fact that the Appellant herself may not personally have recognised the risk is not relevant to the analysis: s 5L(2). The Court is entitled to take notice of the fact that a reasonable person experienced in campdrafting would appreciate that ground deteriorates following large numbers of horses running over that ground, increasing the prospect of a horse slipping. As much was accepted by all members of the Court of Appeal: see Payne JA at CA[79] CAB 117, Basten JA agreeing at CA[1] CA 92 and McCallum JA at CA[176] CAB 147.

63. *Secondly,* Mr Shorten's evidence that falls were rare does not undermine the conclusion that the risk identified by the Appellant was "*obvious*" (cf A[37]). A risk that is unlikely to eventuate may nonetheless be "*obvious*" in the relevant sense: s 5F(3).

64. *Thirdly*, there is no elision in Payne JA's observation at CA[80] CAB 117 that there is a tension between contending that the Appellant's fall was "*unexpected*" and was similarly predictable given the earlier falls (cf AS[38]). Section 5L is concerned with the perspective of a person in the position of the plaintiff, and in circumstances where the

Appellant was herself an experienced campdrafter, there is a tension in contending that the risk was objectively "*unexpected*" to a person in the Appellant's position while contending that it was predictable to an experienced campdafter such as Mr Shorten.

65. *Fourthly*, the Appellant's youth at the time of the accident does not assist the Appellant on the question of obviousness (cf AS[40]). The Appellant was 19 years old at the time of the accident, and was very experienced in campdrafting: see above at [12]. A reasonable person in her position would have recognised the risk of her horse slipping by reason of deterioration of the ground as "*obvious*", in light of that experience.

66. *Fifthly*, the subjective knowledge of the Appellant is not relevant to the existence of an "*obvious risk*" under s 5L given that the question of the existence of an "*obvious risk*" is to be determined objectively: s 5F(1). In those circumstances, the relevance of the observations in AS[41]-[42] as to the Appellant's subjective knowledge is unclear. Given the objective question involved, there was certainly no need to put to the Appellant in cross-examination that any particular formulation of risk was "*obvious*" (cf AS[42]). Indeed, senior counsel for the Appellant objected to questions concerning "*risk*" on the basis that they go to a legal issue: see e.g. AFM 266 T39 L17-27. If the implication of AS[41]-[42] is that a reasonable person in the Appellant's position should not be imbued with knowledge of prior falls and the Respondent's announcement, so much may be accepted. The basis upon which the relevant "*risk*" to the Appellant was objectively "*obvious*" is not dependent on an awareness of those matters.

67. *Sixthly*, the contentions in AS[41] as to the Respondent's "*motivation for continuing the competition*" and to the effect that "*no representative of the respondent had arrived at a positive state of persuasion that the surface of the arena was safe*" are not supported by findings by the primary judge or the majority of the Court of Appeal and cannot be relied upon for the purposes of the s 5L analysis.

68. *Finally*, the criticisms of Payne JA's reasons at AS[33] are without merit. The effect of his Honour's observations at CA[69] CAB 113 is as follows. The Appellant's formulation of "*risk*" for the purposes of s 5L is bound up in her identification of the cause of the harm suffered. Thus in circumstances where the Appellant contended that her accident was caused by her horse slipping by reason of the deterioration of the surface of the arena, without any precise identification of the "*way in which it was alleged the surface had deteriorated*" (CA[69] CAB 113)), it followed that her formulation of risk for the purposes of s 5L also referred to the risk of slipping "*by reason of the deterioration of the surface of the arena*" rather than a more specific identification of

risk. Had the Appellant identified the "*risk*" for the purposes of s 5L at a greater level of granularity, the likelihood of a finding that such a risk was "*obvious*" would have been reduced. However, absent the proof of a more precise causal mechanism of her fall, the Appellant could not obtain the benefit of a more precise formulation of "*risk*" for the purposes of s 5L on the facts. It was therefore appropriate to assess the obviousness of risk at a greater level of generality than might otherwise be the case. To put the point another way, the particularity with which the "*risk*" for the purposes of s 5L is capable of being identified in a particular case will depend in part on the precision with which the risk that materialised to cause the harm in question has been identified on the facts. These observations are wholly unobjectionable.

69. ***The primary judge was, in any event, correct***: While the foregoing analysis presumes, for the sake of argument, the correctness of the Appellant's formulation of the "*risk*", the Respondent nonetheless defends the formulation of risk relied upon by the primary judge. This formulation was as follows: "*the risk of falling from the horse and suffering an injury whilst competing in a campdraft competition, given the complexities and risks inherent in and associated with that activity*" (PJ[131] CAB 43). This formulation encapsulates the risk of a horse slipping, including by reason of deterioration of the ground of the arena, this being within the scope of the primary judge's reference to the "*complexities and risks inherent in and associated with*" campdrafting. It follows that the distinction between the characterisation of risk adopted by the primary judge and that pressed by the Appellant is slight and no error in her Honour's formulation has been identified. The risk identified by the primary judge was an "*obvious risk*" for the same reasons the formulation pressed by the Appellant is "*obvious*" as per s 5F.

D.3 Conclusion on s 5L Defence

70. It follows from the foregoing that the Respondent's s 5L defence is made out. The harm the Appellant suffered when she fell from her horse was the materialisation of an "*obvious risk*" of a "*dangerous recreational activity*" engaged in by the Appellant. On this basis too, the appeal should be dismissed.

PART VII: TIME ESTIMATE

71. The Respondent estimates that it will require 2 hours to present its oral argument.

Dated: 1 July 2021

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ANNEXURE

Legislation (as in force at 8 January 2011)

1. *Civil Liability Act 2002* (NSW) ss 5B, 5C, 5D, 5E, 5F, 5K, 5L