



SCI 2017 00891

Case: S CI 2017 00891

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**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST**

BETWEEN

MICHELA JOY BURKE

Plaintiff

and

ASH SOUNDS PTY LTD

Defendant

AMENDED DEFENCE

(filed pursuant to the order of Justice McDonald made 22 November 2018)

Date of document: 15 November 2018

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Filed on behalf of the Defendant

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In answer to the plaintiff's second amended statement of claim dated 25 October 2018 ~~7 April 2017~~, the defendant says as follows:

Preliminary

1. It admits the allegations in paragraph 1.
2. As to paragraph 2, it says:
 - (a) the Grand Theatre was a large tent, inside which there was a stage on which musicians would perform;
 - (b) the tent had three exits, located approximately in the directions of southwest, southeast and east;
 - (c) the tent was completely open on the northern side;
 - (d) it admits that a number of people suffered injury at the Festival in or near the tent at approximately 9:47 pm on 30 December 2016;
 - (e) most of the persons who suffered injury were already outside of the tent, having exited the tent via the southwest and southeast exits;

- (f) it otherwise does not admit the allegations in paragraph 2.
3. It admits the allegations in paragraph 3.
 4. It admits the allegations in paragraph 4.
 5. It admits the allegations in paragraph 5.
 6. It ~~does not~~ admits the allegations in paragraph 6.
 7. It admits it is a company incorporated pursuant to the *Corporations Act 2001* (Cth) with ACN 160 019 152, but otherwise does not admit the allegations in paragraph 7.
 8. As to paragraph 8 it:
 - (a) admits paragraph 8(a);
 - (b) admits it was an occupier of the area where the Festival was conducted, but otherwise does not admit paragraph 8(b);
 - (c) does not admit paragraph 8(c);
 - (d) admits paragraph 8(d).

Contract, occupier's liability and negligence

9. It admits paragraph 9 and says further that there were terms of the contract that:
 - (a) tickets must be exchanged for a wristband once on site (clause 18);
 - (b) ~~entry to the Festival was at the ticket holder's own risk, and appropriate footwear must be worn at all times (clause 22);~~
 - (c) ~~to the full extent permitted by law, ticket holders waive all legal rights of action against and fully release the defendant for all claims for compensation for loss, damage, injury or death howsoever arising out of or in relation to their participation in the Festival including, without limitation, liability for any negligent or tortious act or omission, or under statute, or for breach of the contract terms and conditions (clause 23).~~

Particulars

The contract was express and was in writing, comprising the ticket issued to patrons and The Falls Music and Arts Festival Terms and Conditions 2016-2017.

10. It does not admit paragraph 10.
11. It admits it was an occupier of the area where the Festival was conducted, and otherwise does not admit paragraph 11.
12. As to paragraph 12 it:
 - (a) admits that it owed a duty of care at common law to patrons of the Festival to take reasonable care to avoid foreseeable risks of physical injury to patrons or physical damage to their personal property;
 - (b) denies that any duty of care is created by s 14B(3) of the *Wrongs Act 1958* (Vic);
 - (c) otherwise does not admit paragraph 12.
13. It admits that the event described in paragraphs 1 and 2 of the second amended statement of claim was caused by the defendant's breach of the duty it owed to the plaintiff and group members at common law, which duty is admitted in paragraph 12(a), and expressly admits each of the particulars of breach of duty appended to paragraph 13, and otherwise does not admit paragraph 13.

~~It denies paragraph 13, and says further that:~~

- ~~(a) the Festival had been held since 1993 without any incident similar to the incident that occurred on 30 December 2016;~~
- ~~(b) a reasonable person in the circumstances and in the defendant's position would not have taken the precautions alleged, as is required by s 48(1)(c) of the *Wrongs Act*;~~
- ~~(c) any harm suffered by the plaintiff and group members was a result of the materialisation of an inherent risk under s 55(1) of the *Wrongs Act*;~~
- ~~(d) the defendant's alleged negligence was not a necessary condition of the occurrence of the harm to the plaintiff, as required by s 51(1)(a) of the *Wrongs Act*;~~

(e) ~~further or in the alternative, it is not appropriate for the scope of the defendant's liability to extend to the harm caused by the alleged negligence of the defendant, as required by s 51(1)(b) of the *Wrongs Act*.~~

14. ~~It refers to and repeats its denial in paragraph 13 of any breach of duty and its denial that any breach of duty caused the incident, It admits that as a consequence of the defendant's breach of duty (as admitted in paragraph 13), the plaintiff has suffered injury, loss and damage, but expressly does not admit the extent of such injury, loss and damage, and otherwise does not admit paragraph 14.~~

Australian Consumer Law

14A. It admits paragraph 14A(a) ~~but does not admit paragraph 14A(b).~~

14B. It admits paragraph 14B.

14C. It admits paragraph 14C.

14D. It admits ~~denies~~ paragraph 14D.

14E. It admits ~~refers to its denial in paragraph 14D, and therefore denies~~ paragraph 14E.

14F. It admits ~~denies~~ paragraph 14F.

14G. It admits ~~denies~~ paragraph 14G and expressly admits the particulars appended to paragraph 14G.

14H. It admits that the loss or damage of the plaintiff (without admitting its extent) was because of the conduct of the defendant, and otherwise ~~denies~~ paragraph 14H.

15. It admits that questions (b), (e) and (f) are common questions, but otherwise does not admit paragraph 15 and says further that questions (c) and (d) are not in dispute between the parties.

Further matters

16. Further or alternatively to the matters set out by way of defence above, the defendant relies on the provisions of Parts VA, VB, VBA and XI of the *Wrongs Act* in respect of each group member who is alleged to have suffered personal injury, and in particular says that by reason of s 28LE no group member is entitled to recover damages for non-economic loss in respect of an injury unless the person injured has suffered 'significant injury' as defined in s 28LF.

17. Further, the plaintiff has not served any certificate of assessment under s 28LN of the *Wrongs Act*, and as a result the Court has power to stay her proceeding under s 28LZMA.
- ~~18. Further or alternatively, it relies on Part VIB of the *Competition and Consumer Act 2010* (Cth) in respect of each group member who is alleged to have suffered personal injury, and in particular says that:~~
- ~~(a) by reason of s 87S of the *Competition and Consumer Act*, the Court must not award personal injury damages for non-economic loss to any group member who has suffered non-economic loss that is less than 15% of a most extreme case;~~
 - ~~(b) under s 87P(2), a most extreme case means a case in which the plaintiff suffers non-economic loss of the gravest conceivable kind.~~
19. Further, as a sign of goodwill towards its patrons, the defendant paid compensation to certain group members expressly without any admission of liability for the incident, which compensation will be required to be set-off or alternatively taken into account in assessing any damages payable to those group members.
20. Further, if any group member was a worker who suffered injury arising out of, or in the course of, employment, then such group member cannot recover any damages or bring any proceedings against the defendant by reason of ss 326(c), 333 and 335(2) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), except in accordance with Division 2 of Part 7 of that Act. To the extent the present proceeding is brought on behalf of any such group member, such group member has no cause of action against the defendant, and the proceeding is to that extent a nullity.

Dated: 15 November 2018

J J Gleeson

M J Hooper

Lander & Rogers

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Lander & Rogers
Lawyers for the Defendant