

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S ECI 2022 01114

WORLD TOURING MELBOURNE LIMITED
(UK CRN 1217 3527)

Plaintiff

V

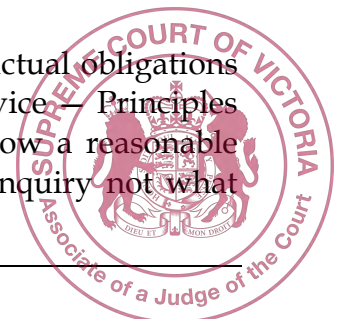
AUSTRALIAN GRAND PRIX CORPORATION
(ABN 86 947 927 465)

Defendant

JUDGE: CROFT J
WHERE HELD: Melbourne
DATE OF HEARING: 27-30 May, 3-6, 9-13 June 2024
DATE OF JUDGMENT: 30 August 2024
CASE MAY BE CITED AS: World Touring Melbourne v Australian Grand Prix Corporation
MEDIUM NEUTRAL CITATION: [2024] VSC 521

MISLEADING OR DECEPTIVE CONDUCT – Agreement between event organiser and statutory corporation responsible for administration of Australian Grand Prix – Agreement to allow Robbie Williams concert associated with 2020 Australian Grand Prix to proceed – Whether defendant contravened s 18(1) of the ACL in representing that concert must be cancelled in line with government advice – Alleged misleading or deceptive conduct to be viewed in context of all relevant surrounding facts and circumstances operative at time of representation – Representation to be examined from perspective of reasonable person in position of party claiming to have been misled or deceived – Whether plaintiff relied on representations made by the defendant – *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 – *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 – *Ireland v WG Riverview Pty Ltd* (2019) 101 NSLWR 658 – *Australian Grands Prix Act 1994* – *Competition and Consumer Act 2010* (Cth) Sch 2, s 18.

CONTRACT – Breach of contract – Whether defendant breached contractual obligations in representing that concert must be cancelled in line with government advice – Principles of contractual interpretation – Commercial purpose of agreement – How a reasonable businessperson would understand actual contractual terms – Primary inquiry not what



would reasonable businessperson consider to be the most appropriate commercial terms – Whether defendant breached express or implied duties of cooperation and good faith – Causation and remoteness – Whether existence of *force majeure* event prevented, hindered or delayed performance – Whether loss and damage caused by plaintiff’s failure to obtain adequate event-cancellation insurance – Whether loss claimed too remote – Whether construction of contract precludes recovery of loss arising from cancellation – *Lebeaupin v Crispin* [1920] 2 KB 714 – *Secured Income Real Estate (Aust) Ltd v Martin Investments Pty Ltd* (1979) 144 CLR 596 – *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 – *SAS (Vic) Pty Ltd v Urban Ecological Systems Ltd* [2021] VSCA 335.

DAMAGES – Whether breach of contract causative of loss claimed – Assessment of quantum of damages – Damages for loss of opportunity – *Sellars* discount – Whether commercial opportunity of some value was lost – Assessment of prospects of success of such opportunity – *Sellars v Adelaide Petroleum NL* (1994) 120 ALR 16 – *Siegwerk Australia Pty Ltd (in liq) v Nuplex Industries (Aust) Pty Ltd* (2016) 334 ALR 443 – *Competition and Consumer Act 2010 (Cth) Sch 2, ss 236, 237.*

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr N. De Young KC with
Mr B. Gibson and
Mr C. Fitzgerald

Gadens Lawyers

For the Defendant

Mr G.D. Dalton KC with
Ms J.D. Watson

Arnold Bloch Leibler



HIS HONOUR:

Introduction and overview

- 1 This proceeding concerns a concert that was scheduled to take place on Saturday, 14 March 2020 at Lakeside Stadium, Albert Park, Victoria, featuring the international artist, Robbie Williams ('concert').
- 2 The plaintiff, World Touring Melbourne Ltd ('WTM'), together with TEG Dainty Pty Ltd ('TEG Dainty'), were the promoters and organisers of the concert. They had contracted with the defendant, the Australian Grand Prix Corporation ('AGPC'), for the right to stage the concert and to use and occupy the Lakeside Stadium for that purpose.
- 3 The concert was promoted by AGPC and WTM in association with the 2020 Australian Grand Prix ('the Grand Prix'). The parties, AGPC and WTM, entered into a Live Music Co-Operation Agreement dated 9 January 2020 ('LMCA') which:
 - (a) contained a recital provision which stated that 'AGPC and WTM wish to establish a framework to govern their respective rights and obligations for the staging of World Tour¹ in relation to the Australian Grand Prix ... on the terms set out in this Agreement';²
 - (b) defined the World Tour Melbourne event as 'the World Tour in relation to the Australian Grand Prix to be held on the applicable dates during the Australian Grand Prix Period as agreed between the parties. Each World Tour Melbourne shall take place during the Australian Grand Prix Period and always in the Declared Area over two nights, or such other period as agreed between the parties';³ and

¹ World Tour was defined in the contract at CB1238 as follows: 'World Tour means a large scale, multi-artist, music event featuring a line-up of international and local A-list Talent, aligned to the 'World Tour' event and broadcast platform.'

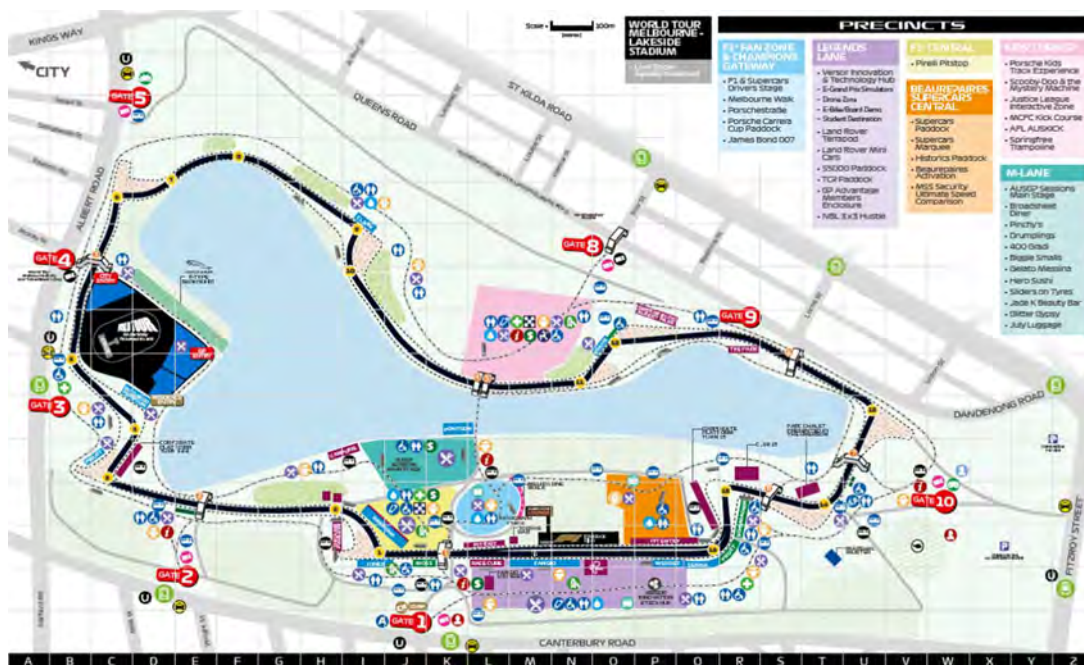
² CB1236.

³ CB1238.



(c) recorded, in clause 2.1,⁴ WTM's appointment as AGPC's exclusive 'Live Music Partner' to stage the World Tour Melbourne, and which restricted AGPC from engaging in certain activities with any third party in relation to or in connection with the promotion, staging and production of a live music event in connection with the Australian Grand Prix.

The concert was originally scheduled to take place on 14 March 2020 alongside the Grand Prix and within the declared area of the Albert Park race track and surrounds.⁵ A visual depiction of Lakeside Stadium within the declared area and the race track is shown by the 2020 Circuit Map⁶ set out below. The stadium is in black highlight on the left-hand side of the declared area.



4 Although the concert was to take place alongside the Grand Prix, it was, nevertheless, a separate event and was separately ticketed from the Grand Prix. It was organised separately from the Grand Prix by WTM and TEG Dainty. These entities arranged the musicians, construction of the stage, seating, food and beverages, merchandise, and security and attended to other associated requirements. Initial arrangements were for a charity concert on the evening of Friday 13 March 2020 at which the international

⁴ CB1239.

⁵ Witness Statement of Thomas Mottram [31] CB475.

⁶ Witness Statement of Thomas Mottram [7] CB471.



artist Miley Cyrus was to perform. However, on 10 March 2020, advice was received that Ms Cyrus' team had chosen not to travel to Australia out of concern as a result of the then spreading COVID-19 infections worldwide.

5 This proceeding arises from the cancellation of the concert in the afternoon of Friday, 13 March 2020, the day before it was scheduled to occur. At that point, WTM contends that the concert was 'ready to go'.⁷ WTM had incurred approximately \$4.2 million in costs in relation to the concert, and approximately \$2.4 million of tickets had been sold, with more expected to be sold before the commencement of the concert the following night.

6 WTM submits that the Court should find in its favour in this proceeding and, in so doing, highlights various matters which are helpfully set out as an introductory overview. The critical issue on liability, as contended by WTM, is whether AGPC failed to accurately pass on to WTM and TEG Dainty the information that it had received on 13 March 2020 from Victoria's Chief Health Officer, Dr Brett Sutton (later AO) (referred to as 'the Chief Health Officer', 'CHO', or 'Dr Sutton').

7 WTM's case on liability is, it submits, clearly established on the evidence. There is a written record of the relevant communications on 13 March 2020 as follows:

- (1) the transcript of a telephone call between Dr Sutton and AGPC's representatives at approximately 8:00am ('8:00am call');
- (2) an email from Dr Sutton at 8:40am forwarded to AGPC ('8:40am email');
- (3) the transcript of a telephone call between the then Chief Executive Officer of AGPC, Mr Andrew Westacott, and other representatives of AGPC, WTM and TEG Dainty at approximately 2:08pm ('2:08pm call');
- (4) a text message exchange between a representative of AGPC and Dr Sutton at approximately 2:50pm ('2:50pm texts'); and

⁷ *Plaintiff's Outline of Closing Submissions*, [4].



(5) an email from AGPC to WTM at approximately 4:25pm ('4:25pm email').

8 In the 2:08pm call, it is put by WTM that Mr Westacott, on behalf of AGPC, represented to WTM that the Grand Prix and the concert were cancelled because of a directive from the Chief Health Officer.⁸ WTM says that, in addition to Mr Westacott conceding the true basis of the concert cancellation, he also conceded that his statement was inaccurate because there was never any directive from Dr Sutton.⁹ It is common ground that Dr Sutton did not, as of 13 March 2020, have any power to give a binding directive, as the declaration of a state of emergency in Victoria was not made until Monday 16 March 2020. Additionally, it is said that, in any event, Dr Sutton gave no directive to AGPC on 13 March 2020 that the concert be cancelled.

9 WTM contends that by this conduct of Mr Westacott, AGPC engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law ('ACL'), and says that AGPC represented to WTM, in trade or commerce, that the Grand Prix and the concert had been cancelled because the Chief Health Officer had determined (directed) that both events could not proceed, which was not the case for the concert. For the same reason, it is said that AGPC breached its contractual obligations to WTM with respect to the concert.¹⁰

10 AGPC advanced various defences which, WTM submits, each depend on the same erroneous premise: that during the 8:00am call, Dr Sutton advised AGPC to the effect that 'there could be no crowds within the declared area of the Grand Prix and that covered the concert'.¹¹ As to the primary position advanced by the AGPC defence, WTM says that the evidence does not come close to establishing that proposition.

11 Additionally, AGPC sought to establish that, on the evidence, WTM and TEG Dainty had made a decision to cancel the concert early in the day of 13 March 2020 and well in advance of communications which, WTM says, are critical to the claimed

⁸ T446/22-25; T447/15-17 (XXN of Mr Westacott).

⁹ T447/18-25 (XXN of Mr Westacott).

¹⁰ Amended Statement of Claim, [11(c)], particular (C) (CB53). Other breaches are relied on.

¹¹ T78/9-11 (Defendant's Opening Submissions). See also Amended Defence to the Amended Statement of Claim, [10E(aa)] (CB69) and [11I] (CB77); and Defendant's Outline of Opening Submissions, [38].



misrepresentations in breach of s 18 of the ACL. WTM contends that the evidence clearly establishes that it was, at all relevant times, seeking to hold the concert and, indeed, only stopped selling tickets at approximately 3:00pm on 13 March 2020.

12 It is AGPC's case, and the evidence of its witnesses, that the 8:40am email confirmed Dr Sutton's advice on the 8:00am call.¹² In that email, Dr Sutton provided recommendations 'on the Grand Prix race'. There was no reference to the declared area or the concert. Indeed, it is said by WTM, that it was not until after the 2:08pm call that AGPC sought advice from Dr Sutton about the concert, and that this would not have occurred if Dr Sutton had already provided the advice of the kind alleged by AGPC. More specifically, in the 2:50pm texts, AGPC asked Dr Sutton the leading question: 'is it your opinion that the concert be cancelled in line with the Grand Prix cancellation'. Dr Sutton did not say 'yes'. Rather, he said while he would support such a decision, it was 'ultimately a matter for the organisers': who were WTM and TEG Dainty. It was also observed that if, in fact, Dr Sutton had addressed the question whether the concert could proceed earlier on 13 March, he would not have contemplated the decision as to whether or not the concert could proceed being left in the hands of the organisers and would, one would expect, have said something along the lines of: 'As I advised earlier, the concert, with the Grand Prix race itself, cannot proceed'. In any event, AGPC did not pass on Dr Sutton's advice flowing from the 2:50pm texts to WTM but, rather, waited until the 4:25pm email to communicate with WTM. In that email, as WTM says, AGPC continued to say that the Chief Health Officer's advice was to the effect that the concert 'must be cancelled', which advice 'must be followed'. Again, WTM contends that by the 4:25pm email, AGPC engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL.¹³

13 As to causation, WTM says that its case is straightforward, logical, rational and has been thoroughly supported by the evidence. In particular, it says that had AGPC not engaged in the impugned conduct, and had WTM and TEG Dainty known the true

¹² Defendant's Outline of Opening Submissions, [40].

¹³ Amended Statement of Claim, [11D]-[11E] (CB56-7).



position about Dr Sutton's advice concerning the concert, they would have decided to go ahead and stage the concert. There was, at that time, no law against that occurring and indeed, the evidence indicates that a number of other mass gatherings occurred in Australia that weekend, including a concert at the Sidney Myer Music Bowl in Melbourne. Moreover, WTM says that such a decision to go ahead with the concert would have been consistent with:

- (1) the advice given by Dr Sutton on the concert (as contained in the 2:50pm texts);
- (2) the joint announcement of the Commonwealth, State and Territory Governments and the Australia Health Protection Principal Committee ('AHPPC') at approximately 3:00pm on 13 March 2020 which advised against non-essential mass gatherings but not before 16 March 2020 ('3:00pm AHPPC announcement'); and
- (3) the fact that various other non-essential mass gatherings occurred around Australia that weekend, including National Rugby League games and the New Order Concert at the Sidney Myer Music Bowl in Melbourne on the same night.

14 Thus it is said that, on the evidence, and contrary to AGPC's case, it is clear that Dr Sutton did *not* advise AGPC on 13 March 2020 that there could be no crowds within the declared area of the Grand Prix. Consequently, it is put that once this is understood, AGPC's various defences fall away. More particularly, Mr Westacott conceded in cross-examination, in the counterfactual where Dr Sutton had *not* provided advice to the effect alleged by AGPC, and in light of the 3:00pm AHPPC announcement, that AGPC would not have taken steps to prevent the concert from occurring and would not have closed the gates to the declared area to prevent patrons from attending.¹⁴

15 Consequently, WTM contends that it lost a commercially valuable opportunity to run the concert which would have allowed it to retain approximately \$2.4 million in ticket revenue that it refunded, and earn further revenue from further ticket sales.

¹⁴ T463/8-21 (XXN of Mr Westacott).



sponsorship, film and TV broadcasting rights, merchandise, and food and beverage sales. WTM's expert, Ms Liesl Malcolm, estimated WTM's loss and damage at approximately \$8.5 million, before any discounts in accordance with *Sellars v Adelaide Petroleum NL*.¹⁵ After such discounts, WTM submits that it should be awarded damages in the sum of approximately \$6.5 million, plus interest and costs.

Background

The parties

16 WTM is part of the Apollo World Touring Group of entities ('AWT Group'). The AWT Group conducts business in the entertainment industry, including in event promotion. The AWT Group was co-founded by Ms Rebecca Artmonsky and Mr Paul Morrison, who are current directors of WTM. In 2020, the AWT Group was producing a global multi-city concert series called the 'World Tour'. The concert series was focused on A-list performances, international DJs and local artists. The live music event the subject of this proceeding formed part of the first in the World Tour series of events. TEG Dainty was WTM's local co-promoter. The President and CEO is Paul Dainty AO, who gave evidence in this proceeding on subpoena.

17 AGPC is a statutory corporation established under s 7 of the Victorian *Australia Grands Prix Act* 1994 ('AGP Act'). At all relevant times, Mr Paul Little was the AGPC Chairman and Mr Westacott its Chief Executive Officer, the latter appointed under s 19 of the AGP Act. The Minister responsible for administering the AGP Act, and for directing and controlling AGPC, was the Hon Martin Pakula (see s 9).

Curial matters

18 WTM commenced this proceeding in April 2022. Its claim, as initially pleaded, was framed solely as a breach of contract claim. However, in July 2022, AGPC disclosed, for the first time, the 8:40am email and the 2:50pm texts. As a result of this disclosure, on 28 October 2022, WTM amended its claim to plead contraventions of s 18 of the ACL. In November 2022, after the majority of WTM's lay evidence had been filed and served, AGPC disclosed, for the first time, recordings of the 8:00am call and the

¹⁵ (1994) 179 CLR 332; and see below [249].



2:08pm call. No explanation has been given as to why these recordings were not disclosed at an earlier time.

19 The parties have agreed to a list of issues to be determined in this proceeding. Issues 1-5 concern liability under s 18 of the ACL; issues 6-11 concern liability for breach of contract; issues 12-13 concern AGPC's *force majeure* defence; and issue 14 concerns WTM's claimed loss and damage. Each of these issues is addressed in the reasons which follow, prefaced with detailed consideration of the issues and evidence raised and heard at trial.

Witnesses

The plaintiff's witnesses

20 WTM submits that the Court should accept the evidence of the witnesses which it called on the basis, in general terms, that their evidence was logical, reliable, consistent, corroborated by contemporaneous documents, and credible. AGPC, on the other hand, submits that an entirely different view should be taken with respect to the WTM witnesses, particularly having regard to their knowledge and the significance which they placed on the statements of the Victorian Premier made on the morning of 13 March 2020.¹⁶ In considering those criticisms, it is helpful to first consider the matters put by WTM with respect to their witnesses.

21 WTM's first witness was Ms Artmonsky. Ms Artmonsky is one of two directors of WTM (the other being Mr Morrison). Ms Artmonsky holds a Master's degree in Economics from the University of Cambridge. She travelled from the United Kingdom for the purpose of giving her evidence in person. Her evidence-in-chief comprised three statements.¹⁷ Ms Artmonsky was in Melbourne during the week commencing 9 March 2020 and participated in the critical conversations the subject of WTM's claim. As one of two decision-makers of WTM, Ms Artmonsky's evidence was of particular

¹⁶ See *Defendant's Outline of Closing Submissions* (12 June 2024), [89]-[95].

¹⁷ Dated 19 September 2022 (CB183-198), 15 December 2022 (CB210-213) and 14 September 2023 (CB331-333). NB: the parties have separately provided the Court with versions of the witness statements relied on in this proceeding showing any passages which were amended, not read or ruled inadmissible. Court book references are used in this outline for convenience.



importance to what decisions had been made, and what decisions were yet to be made, by WTM on 13 March 2020. She also gave evidence concerning certain heads of revenue which WTM expected to derive had the concert proceeded. Ms Artmonsky was cross-examined for the majority of the second day of trial (28 May 2024). She was an articulate and impressive witness. Ms Artmonsky made appropriate concessions in cross-examination and gave answers which are said to be consistent with her witness statements and the contemporaneous documentary evidence.¹⁸

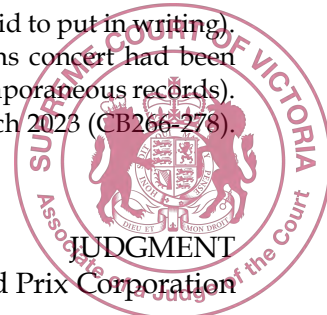
22 Mr Richard Beck, WTM's former Director of Global Touring, was the second witness. Mr Beck travelled to Australia from Europe and gave his evidence in person on 29 May 2024. Mr Beck's evidence-in-chief comprised three witness statements.¹⁹ Mr Beck was involved in negotiations with artists in the lead up to the 2020 World Tour Melbourne and in promoting the Robbie Williams concert before it was cancelled. In Mr Beck's words: 'I sell tickets. And I deal with artists. For my sins'.²⁰ Mr Beck's evidence was relevant to the ticketing arrangements, expected crowd attendance, and expected ticket sales for the concert. He had a recollection of key events, corroborated by contemporaneous documents. Mr Beck's evidence was subject of some attack in cross-examination; but this attack was primarily directed to his memory of particular. It cannot be reasonably expected that he would recall individual documents of that nature some four years later without them having been put to him. As Mr Beck appropriately acknowledged, those statements 'came from my memory two years ago when I did it'.²¹ WTM submits that he was a witness of truth whose evidence should be accepted.

23 Mr Morrison, the second director of WTM, was WTM's third witness. Mr Morrison gave his evidence by audio-visual link on 29 May 2024. His evidence-in-chief

¹⁸ By way of example: Ms Artmonsky made her first witness statement prior to the disclosure of the recording of the 2:08pm call. She gave evidence of her recollection of the contents of that call in her statement dated 16 September 2022, at [156] (CB178). The thrust of her recollection of that conversation was consistent with what was said (including that Mr Westacott said that both the Australian Grand Prix and WTM event were cancelled, and that someone asked for what had been said to put in writing). Ms Artmonsky also gave evidence that no decision to cancel the Robbie Williams concert had been made prior to that call by WTM and TEG Dainty (which was consistent with contemporaneous records).

¹⁹ Dated 16 September 2022 (CB150-182), 14 December 2022 (CB199-209) and 23 March 2023 (CB266-278).
²⁰ T269/1-2 (XXN of Mr Beck).

²¹ T272/9-11 (XXN of Mr Beck).



comprised a single statement.²² Mr Morrison was, WTM says, a forthright and honest witness.²³ Under cross-examination, he was clear in his evidence. His evidence gave clear and direct insight into the decision-making of WTM in relation to the concert on 13 March 2020. In response to suggestions that WTM had already decided to cancel the concert, Mr Morrison said among other things: ‘Ah, you know, my ... venue was within the circuit, and my artist ... is the boss, you know, ... in a concert scenario ... the talent is king. I mean [there are] two things in our game, one is a venue and one is an artist, so that’s the only parts ... I would care about. And again, as I say, the rest is noise’.²⁴ In response to it being put that WTM ‘had already decided that the concert was going to be cancelled’ at the time of a call with Mr Fletcher (the then General Manager of AGPC) at around 1:15pm on 13 March 2020, Mr Morrison said ‘I don’t know a polite way to say nonsense’.²⁵ That sentiment was shared by WTM’s witnesses generally, as addressed further in these reasons.

24 WTM’s fourth witness was Mr Craig Fletcher, current Commissioner of the Australian Motor Racing Commission of Motorsport Australia and previously the General Manager – Motorsport, Entertainment and Industry of AGPC. Mr Fletcher gave evidence in person on 30 May 2024. His evidence-in-chief comprised a statement dated 30 May 2024 prepared during the trial after AGPC agreed not to rely on confidentiality concerns that had previously been raised in relation to Mr Fletcher speaking to WTM’s lawyers.²⁶ Mr Fletcher was the primary contact at AGPC for WTM in relation to the concert. He participated in key conversations on 13 March 2020, including the teleconferences that took place at around 1:15pm and at 2:08pm. Mr Fletcher was also responsible for sending the 4:25pm email although, as he explained, he was not responsible for drafting it.²⁷ Mr Fletcher’s evidence was unique in that he was the General Manager of AGPC, giving evidence on subpoena. At the time of the events in question, he was responsible for, among other things, ‘planning,

²² Dated 20 December 2022 (CB234-262).

²³ *Plaintiff’s Outline of Closing Submissions*, [37].

²⁴ T296/5-12 (XXN of Mr Morrison).

²⁵ T302/10-13 (XXN of Mr Morrison).

²⁶ The statement is at CB5534-5552.

²⁷ See Witness Statement of Craig Fletcher dated 30 May 2024, [47] CB5548.



delivery and contracting of offtrack entertainment connected to the Formula 1 Australian Grand Prix event ... including the ... [2020 World Tour Melbourne] in cooperation with WTM and TEG Dainty'.²⁸ Mr Fletcher was the subject of very limited cross-examination. He was, WTM says, a witness of truth and gave a clear recollection of events, to the extent he could now remember them. He considered the concert to be a 'separately ticketed event'.²⁹ His evidence was that the concert could have proceeded and that, prior to the decision to cancel the concert, no one had said anything to him that caused him 'to believe that TEG Dainty or WTM wanted to cancel the concert, or did not want to proceed with their concert if they were allowed to do so'.³⁰ Mr Fletcher gave unchallenged evidence that 'it would have been easier operationally for the concert to proceed with the 2020 Australian Grand Prix being cancelled'.³¹ WTM submits that he was a witness of credit and his evidence should be accepted.

25 Mr Tom Grayson, a former consultant to WTM, was its fifth witness. He gave his evidence in the evening of 30 May 2024 from the United Kingdom. His evidence-in-chief comprised a statement dated 16 September 2022,³² and primarily concerned insurance arrangements in place by the time the concert was cancelled. Mr Grayson was, WTM says, an articulate and reliable witness with a clear recollection of events. He appropriately limited himself to areas within his own expertise, knowledge and authority.³³ Consistently with other witnesses called by WTM, Mr Grayson gave a clear picture of the 'mixed messages'³⁴ WTM was receiving on 13 March 2020, the lack of information it received from AGPC, and the appropriate contingency planning WTM took as a result of events taking place at the time.³⁵ He

²⁸ Witness Statement of Craig Fletcher dated 30 May 2024, [6(b)]; CB5536.

²⁹ Witness Statement of Craig Fletcher dated 30 May 2024, [56]; CB5551.

³⁰ Witness Statement of Craig Fletcher dated 30 May 2024, [40]; CB5546. See also [57]-[60]; CB5551-5552. See also T321/5-25 (XXN of Mr Fletcher).

³¹ Witness Statement of Craig Fletcher dated 30 May 2024, [60]; CB5552.
³² CB134-149.

³³ See e.g. T361/20-26 (XXN of Mr Grayson).

³⁴ See e.g. T357/16-25 (XXN of Mr Grayson).

³⁵ See e.g. TT368/19-31 and 369/1-3 (XXN of Mr Grayson).



adamantly rejected that any decision had been made by WTM to cancel the concert before the call with Mr Westacott at 2:08pm.³⁶

26 Mr Michael Loney was WTM's sixth witness. He gave evidence on 30 May 2024 by audio-visual link from Dubai. Mr Loney is Robbie Williams' global manager. Mr Loney's evidence-in-chief comprised his statement dated 10 October 2023.³⁷

27 Following an objection to the evidence of his opinion that: 'As Robbie Williams' manager, it was (and is) my belief that he would have performed on 14th May 2020 had the concert not been cancelled',³⁸ WTM was granted leave to adduce *viva voce* evidence from Mr Loney to explain the basis of his opinion. Mr Loney said as follows:³⁹

I've been working with Robbie Williams for 22 years, and in that time he's cancelled one concert in those 22 years at short notice, which was when he had food poisoning in Denmark in 2011. He's incredibly conscientious, very professional and I believe our actions, which was we had the opportunity to not come to Melbourne, and - and we said - but I discussed it with Robbie and he said let's go down, we've sold tickets, until we're told we can't do a show, we'll do a show. Ah, two days before the concert we were - we did ... we did have a discussion before we came to Melbourne, um, I think I - I actually think I said that, where we said we'll - we'll do a show if we're allowed to do a show. Um, and when we arrived in Melbourne, we had a press conference two days before the show, in order to sweep up some last minute tickets, we did some promo in the - in the paddock I believe you call it, where we - where we went and met the drivers, and there were media - it was a media scrum everywhere ... then the day before, ah, the concert, I mean unprecedented is a word that's been overused with the, um, with COVID, but we were in unprecedented times, and - and I had many discussions with him where, you know, we said "Are you still happy to do it if we're allowed to", he said, "Yeah, if we're allowed to we do it". So I absolutely it was my belief, and is my belief, that if we were told the concert's gonna go ahead, we would've performed.

Mr Loney was not cross-examined. There is, WTM contends, no reason to doubt the truthfulness of his account, or the reliability of his recollection of conversations with Mr Williams during the lead up to and on 13 March 2020. WTM submits that evidence should be accepted.

³⁶ T369/4-31 (XXN of Mr Grayson).

³⁷ CB337-339.

³⁸ CB339, [14].

³⁹ TT372-374 (XIC of Mr Loney).



28 Mr James Gow (Chief Financial Officer of WTM) and Mr Henrick ('Macky') Drese (General Manager, Live of Apollo World Touring AG) were, respectively, the seventh and eighth witnesses called by WTM. Messrs Gow and Drese's statements⁴⁰ and underlying documents were tendered by consent without cross-examination. Mr Gow's evidence was directed to establishing the costs incurred to run the concert on 14 March 2020, and was necessary to form the underlying basis for the opinions of the independent experts. Mr Drese's evidence went, *inter alia*, to arrangements in place for hospitality sales and VIP arrangements at the concert. Absent any challenge, it is submitted that their evidence should be accepted.

29 Ms Samantha Smith (former General Manager, Apollo World Touring) was the ninth witness called by WTM. Ms Smith's evidence-in-chief comprised her statement dated 30 March 2023.⁴¹ She was cross-examined, particularly in relation to her knowledge of whether a decision had already been made by WTM to cancel the concert prior to the 2:08pm call. As did other witnesses, she confirmed that no such decision had been made prior to that call. Ms Smith was also questioned about her knowledge of arrangements in place for WTM to derive revenue from the concert, including in relation to anticipated revenue for TV and film content.

30 WTM's final witness was Mr Paul Dainty AO, who gave evidence under subpoena on 11 June 2024.⁴² Mr Dainty was and remains the President and CEO of TEG Dainty, WTM's co-promoter. He has extensive experience in the industry and was well-regarded by the other witnesses for that fact. Similarly to Messrs Fletcher and Loney, Mr Dainty is not in WTM's 'camp'. He was, WTM submits, a reliable and credible witness.

⁴⁰ Statement of Mr Drese dated 26 March 2023 (CB279-288); statement of Mr Gow dated 28 March 2023 (CB289-308).

⁴¹ CB309-330.

⁴² Mr Dainty gave evidence on that date following an unnecessary pre-trial interlocutory skirmish instigated by AGPC about whether he should be permitted to attend to give evidence remotely. No issues arose during the course of trial for those witnesses who did give evidence remotely.



31 Mr Dainty's evidence-in-chief comprised his statement dated 21 May 2024.⁴³ He gave important evidence including that: (1) he wanted the concert to proceed and believed it could before speaking to Mr Westacott at 2:08pm on 13 March 2020; (2) he had 'no doubt the concert would have gone ahead' had the decision been left to TEG Dainty and WTM;⁴⁴ (3) he was aware of another concert taking place that same evening at Sidney Myer Music Bowl of a similar magnitude to the Robbie Williams concert;⁴⁵ and (4) he believed that at least 2,000 to 3,000 additional tickets would have been sold to the Robbie Williams concert 'based on [his] 40+ years of experience in promoting concerts'.⁴⁶ Mr Dainty was cross-examined about the decision-making of TEG Dainty and WTM on 13 March 2020. Consistently with other WTM witness evidence, Mr Dainty adamantly rejected the suggestion that a decision had been made to cancel the concert prior to the phone call with Mr Fletcher at 1:15pm or prior to the 2:08pm call on 13 March 2020. His evidence was, WTM submits, simple, and believable and he was a reliable, clear and credible witness. It is said that there is no reason to doubt his evidence of what occurred so it should be accepted in its entirety.

32 As submitted by WTM, Mr Dainty's view on likely future ticket sales is in the nature of opinion. It is, nevertheless, one which I accept the Court should take into account when assessing the likelihood of further ticket sales prior to the concert commencing. This is a matter addressed in the reasons which follow with respect to quantum.

33 As indicated previously, AGPC made both general and particular criticisms of the plaintiff's witnesses, in the following terms:⁴⁷

89. The Plaintiff's witnesses were highly evasive in recognising both their knowledge of and emphasis placed on the Premier's statements made that morning. Ms Artmonsky said she could not recall whether she saw the Premier's announcement⁴⁸ and could not say whether she watched it live on TV, or had been relayed the contents of the Premier's statement from David Butorac.⁴⁹ Mr Beck said that he could recall the

⁴³ CB5392-5403. An outline of expected evidence had previously been filed. The statement was obtained following the Court's order that a statement be filed.

⁴⁴ See Mr Dainty's statement dated 21 May 2024, [23] (CB5396).

⁴⁵ Mr Dainty's statement dated 21 May 2024, [25] (CB5396).

⁴⁶ Mr Dainty's statement dated 21 May 2024, [34] (CB5397).

⁴⁷ *Defendant's Outline of Closing Submissions* (12 June 2024), [89]-[95].

⁴⁸ T155.27-28 (XXN of Ms Artmonsky).

⁴⁹ T156.3-7 (XXN of Ms Artmonsky).



Premier's statement being on TV "in the background".⁵⁰ Mr Grayson says that the Premier's announcement was on the TV on the wall in the Crown hotel room with the volume low, so it was hard to recall in any detail what was being said.⁵¹ Those witnesses also refused to accept that they knew on the morning of 13 March 2020 that the reason that the Premier said that the Grand Prix event would be cancelled or run patron-free was because of the risk of transmission of corona-virus.⁵²

90. These statements of purported recollection years after the fact should be rejected. As Ms Smith conceded in cross-examination, any adviser responsibly advising WTM would have sought to find out the content of the press release by the Premier.⁵³ Mr Dainty likewise acknowledged in cross-examination that the Premier's announcement was relevant to how WTM and TEG Dainty were placed in relation to the concert.⁵⁴
91. The statements of WTM's other witnesses to the contrary are inconsistent with the documentary record, which show that at the same time of the Premier's announcement and in the minutes which immediately followed between 9:08 am and 9:33 am on 13 March 2020:
- (a) Mr Beck sent a WhatsApp message in a thread including Ms Artmonsky and Mr Morrison stating "Premier talking now ... Premier says no fans at race if event goes ahead";⁵⁵
 - (b) Ms Artmonsky sent a WhatsApp message to Mr Beck, Mr Morrison and Mr Gow stating "Seen announcement re no crowds";⁵⁶
 - (c) Ms Artmonsky sent a WhatsApp message to Mr Morrison stating "All being cancelled ... Getting on zoom with Robbie team and Tom Grayson now. Want to join?";⁵⁷
 - (d) Ms Artmonsky sent a WhatsApp message to Danielle Norris of AGPC stating "Saw it on tv. Not ideal!";⁵⁸
 - (e) Mr Beck sent an email to Edwina Tarrant in response to an earlier email from Ms Tarrant asking whether the World Tour concert was going ahead. Mr Beck stated "It's not happening, but we need to be official on this";⁵⁹
 - (f) [Ms] Artmonsky sent a WhatsApp message to Mr Morrison and others stating "Dealing with 5 different parties under 5 different agreements and 5 different insurance arrangements ... f1, agpc, Robbie, dainty and us". That was followed by a further message

50 T255.4-5 (XXN of Mr Beck).

51 T351.1-2 (XXN of Mr Grayson).

52 T351.17-28 (XXN of Mr Grayson); T411.9-16 (XXN of Mr Smith).

53 T410.14 (XXN of Mr Smith).

54 T570.20-27 (XXN of Mr Dainty).

55 CB3433.

56 CB3521.

57 CB3481.

58 CB3449.

59 CB3522.



saying “Everyone trying to claim its nothing to do with covid19!”.⁶⁰

92. The documentary record shows that the Plaintiff was immediately aware of what the Premier was saying, placed significant emphasis on his statements, and were aware that the cancellation on public health grounds was because of the risk of transmission of corona-virus. There is no documentary record which shows the Plaintiff’s witnesses questioning why the Grand Prix was cancelled or whether the Premier’s announcement did not apply to concert. That is because it was clear that it did.
93. Based on the Premier’s statements, Mr Beck said “It’s not happening”,⁶¹ Ms Artmonsky made immediate inquiries of relevant parties’ insurance arrangements and immediate plans were made to speak with Robbie Williams’ representatives with the Plaintiff’s internal counsel, Mr Grayson. All of these tends to the inescapable inference that the Plaintiff knew precisely what the Premier’s announcement meant for the concert to occur at the Grand Prix – that it was cancelled. The weight of the Premier’s announcements was described best by Mr Morrison in his WhatsApp communication to Mr Fletcher at 9:10 am “Victorian Premier has just announced no fans ... That sounds quite official ... And live across all networks”.⁶²
94. Any reasonable person in the position of the Plaintiff viewing the above events would have understood the obvious – that the announcement by the Premier that there will be no fans at the Grand Prix on public health grounds, the closure of the gates to the Declared Area by the statutory corporation responsible for that area, AGPC, and a press conference by the governing bodies at an empty Albert Park track meant the necessary and unavoidable cancellation of the World Tour concert scheduled to occur within the Declared Area of the Grand Prix the next day.
95. The additional factor which confronted WTM was that it had not obtained insurance for cancellation of the concert because of a corona-virus pandemic, as required under cl 14.2(b) of the LMCA.⁶³ It was therefore imperative that the Plaintiff have the concert cancelled for it before WTM was required to do so itself.

34 The first, general, criticism made of these witnesses raises the important issues in respect of human memory of events which are, critically, on a day now over four years ago. In this respect, AGPC made reference to relevant authority in the context of a submission that a conclusion must be drawn from the evidence that WTM had decided early in the day on 13 March 2020 – at least prior to 1:15pm or the 2:08pm call – that

⁶⁰ CB3524.

⁶¹ CB3522.

⁶² CB874.

⁶³ CB1246-1247.



it would not stage the concert, a matter to which reference has been made previously and which is addressed in detail in the reasons which follow. In this context, it is submitted that:⁶⁴

85. The conclusion that WTM had decided that it would not stage World Tour Melbourne 2020 emerges clearly from the contemporaneous documentary records of WTM which are in evidence. Those contemporaneous documents provide the best evidence of what occurred on the day. As McClelland [CJ in Eq] said in *Watson v Foxman*:⁶⁵

... human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions of self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously construed.

86. For this reason, the evidentiary value of contemporaneous documentary records has been consistently recognised, including by Jagot J in *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)*,⁶⁶ where her Honour accepted that “in cases involving disputed facts from years ago contemporaneous or near contemporaneous documents, where available, are invaluable and often more revealing of the true position than flawed attempts at recollection by those with an interest in the outcome of the litigation”.

35 In my view, the AGPC submissions do not support the proposition that WTM’s witnesses were highly evasive, generally or with respect to the Victorian Premier’s statement made on 13 March 2020. Rather, in my view, the matters raised by way of criticism do not support the proposition as, on the basis of the matters put by WTM in relation to the evidence of their witnesses, I agree with its submissions that their evidence should be accepted by the Court. Moreover, in my view, there is nothing in the matters cited by AGPC which indicate statements by WTM’s witnesses contrary to or inconsistent with the documentary record. With respect to the inferences sought to be drawn and assertions made by AGPC by way of criticism of the WTM witnesses, I am inclined to think that these suffer from the very problems highlighted in the

⁶⁴ *Defendant’s Outline of Closing Submissions* (12 June 2024), [85] and [86].

⁶⁵ (1995) 49 NSWLR 315, 319.

⁶⁶ [2012] FCA 1200, [1247].



authorities with respect to reliance on human memory to which AGPC referred. This is particularly true, in my view, of its submissions with respect to the veracity of the evidence of the WTM witnesses as not being supported by the documentary record of the various telephone conversations and meetings from, and including, the 8:00am call through to the 4:25pm email on 13 March 2020. For these reasons, I reject the AGPC criticisms and submissions with respect to the evidence of the WTM witnesses.

The defendant's witnesses

36 AGPC had initially intended to call three witnesses in support of its defence: Mr Andrew Westacott, Mr Tom Mottram (General Manager - Operations of AGPC) and Ms Danielle Norris (former Senior Legal Counsel of AGPC). AGPC decided to not call Ms Norris. Messrs Westacott and Mottram gave their evidence on 6 June 2024. Mr Westacott's evidence-in-chief comprised three statements (two filed after commencement of trial).⁶⁷ Mr Mottram relied on a single statement.⁶⁸

37 In the course of cross-examination, Mr Westacott made some appropriate concessions. Importantly, he conceded that AGPC had never received a 'directive' from Dr Sutton that the concert was cancelled, and that it was not accurate to say otherwise to WTM and TEG Dainty as he did during the 2:08pm call.⁶⁹ He also conceded that, in the counterfactual, AGPC would have followed Dr Sutton's advice as to the concert and AGPC would not have prevented WTM and TEG Dainty running the concert (etc.).⁷⁰ However, there were parts of Mr Westacott's evidence which, WTM submits, should not be accepted. Despite the 8:42am email, the 2:50pm texts and the 3:00pm AHPPC announcement, he sought to maintain that Dr Sutton's recommendation in the 8:00am call extended to the concert.⁷¹ He maintained that there was no ambiguity about the application of Dr Sutton's recommendation to the concert.⁷² Mr Westacott's evidence in that regard was, WTM submits, also plainly inconsistent with his own text message

⁶⁷ See the first statement of Mr Westacott dated 26 June 2023 (CB340-469); his supplementary statement dated 26 May 2024 (CB5532-5533) and his further supplementary statement dated 4 June 2023 (CB5553-5554).

⁶⁸ See the statement of Mr Mottram dated 26 June 2023 (CB470-585).

⁶⁹ See T439/6-7, T445/26-27 and T447/15-25 (XXN of Mr Westacott on 6 June 2024).

⁷⁰ See T461/17-31, T462/1-31, T463/1-31 and T464/1-8 (6 June 2024, XXN of Mr Westacott).

⁷¹ See e.g. T452/1-8 (XXN of Mr Westacott).

⁷² T452/19-27.



to the Minister sent shortly after the 2:08pm call, in which he said that: ‘We have just pulled the pin. Based on CHO advice that it was cancellation or no crowd for GP - neither of which is plausible for a concert. also avoids ambiguity with decision made on the GP’.⁷³ In any event, Mr Westacott conceded that there was no directive made by the Chief Health Officer. In addition, he conceded that his statement at 2:08pm was inaccurate. It does not matter what Mr Westacott thought or now thinks about what Dr Sutton meant in the 8:00am call: it is enough that he, on behalf of AGPC, made a statement of fact in the 2:08pm call that was objectively incorrect.

38 Mr Mottram gave evidence following Mr Westacott. Before adopting his witness statement as his evidence, Mr Mottram recanted from two detailed paragraphs of his witness statement concerning the teleconference at 8:00am on 13 March 2020.⁷⁴ In those paragraphs, Mr Mottram had previously said that towards the end of the 8:00am call with Dr Sutton, he mentioned the word ‘concert’ to which Mr Westacott responded ‘separate’.⁷⁵ Mr Mottram’s prior statement had included that he ‘raised the issue of the concert with Andrew because [he] thought it might be useful to have the CHO expressly confirm that his recommendation extended to the concert’ and because he thought ‘it would be good to have absolute clarity and transparency that the CHO’s recommendation extended to the concert’.⁷⁶

39 As WTM observes, the obvious inference to be drawn from this evidence is that Mr Mottram and, by extension, AGPC had doubts that Dr Sutton’s recommendation applied to the concert. In his oral evidence, Mr Mottram withdrew those paragraphs on the basis he did not recognise if it was him, or someone else, on the recording who said the word ‘concert’ in the 8:00am call.⁷⁷ Mr Mottram made that recording – and it had been in his possession – since 2020. Mr Mottram was unable to say who from AGPC said the word ‘concert’. Mr Mottram’s preparedness to make a statement acknowledging that he had raised the concert and setting out, in some detail, his

⁷³ CB3440.

⁷⁴ Mr Mottram’s statement dated 26 June 2023, [71]-[72]; and CB481-482.

⁷⁵ CB481-482.

⁷⁶ CB481-482.

⁷⁷ See T475/25-28 and T476/1-5 (6 June 2024, XXN of Mr Mottram).



reasons for doing so, only then to recant from this evidence is, as WTM contends, not satisfactory. In my view, a reasonable inference to be drawn is that he sought to recant this evidence because it was not helpful to AGPC's case.

40 Each of Messrs Westacott and Mottram were questioned about Dr Sutton's 2:50pm text. The evidence that they understood Dr Sutton's reference to the 'organisers' to be a reference to AGPC as organisers of the Grand Prix should be rejected.⁷⁸ The Grand Prix had been cancelled long before that text message. As discussed further in these reasons in the context of the events of 13 March 2020, it was obvious on the face of that text message exchange that the question directed to Dr Sutton related to the concert. The idea that Dr Sutton's reference to 'organisers' meant, or even included, AGPC is, in my view, simply, not credible. Unlike Mr Mottram, Mr Westacott was at least prepared to soften his position to an extent, explaining he could not 'say what the Chief Health Officer was intending';⁷⁹ having earlier accepted that 'the organisers of [the] concert were [WTM] and TEG Dainty'.⁸⁰

The experts

41 Two independent experts gave evidence concerning the loss and damage claimed by WTM: Ms Liesl Malcolm of Pitcher Partners (for WTM) and Ms Dawna Wright of FTI Consulting (for AGPC). Each expert produced a report and both attended to give evidence jointly on 6 May 2024.⁸¹ The experts agreed as to the proper methodology for calculating loss. The differences between them primarily rest on assumptions they relied upon: as discussed in the context of their evidence which is considered in the reasons which follow with respect to quantum.

Jones v Dunkel

42 The principles in respect of when a *Jones v Dunkel* inference will be drawn are settled; though it has been said that the 'rule in *Jones v Dunkel* is one of the most invoked but

⁷⁸ T451/3-7 (XXN of Mr Westacott). See also T499/11-30 (XXN of Mr Mottram).

⁷⁹ T451/25-26 (XXN of Mr Westacott).

⁸⁰ T437/1-2 (XXN of Mr Westacott).

⁸¹ Ms Malcolm's report (with attachments) is at CB633-715. Ms Wright's report (with annexures) is at CB717-811.



least understood rules in litigation'.⁸² The rule merely reflects common-sense.⁸³ The unexplained failure by a party to call a witness may, in appropriate circumstances, support an inference that the uncalled evidence would not have assisted the party's case.⁸⁴ Further, the failure to call a witness may also permit the court to draw with greater confidence any inference that is unfavourable to the party that failed to call the witness, if that inference is open on the evidence and the uncalled witness appears to be in a position to cast light on whether the inference should be drawn.⁸⁵ Critically, the rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown up in the pleadings and by the course of evidence in the case. A *Jones v Dunkel* inference can only make evidence that has been given more or less probable; it cannot, itself, supply a gap in the evidence.⁸⁶ Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led.⁸⁷

The plaintiff

43 Two witnesses were not called by WTM who had prepared statements in this proceeding. They were Mr Christopher Murray and Mr Charles Hunting. Mr Murray was a consultant to WTM at the time of the events the subject of the present dispute. Mr Hunting was a director of a third party, AgBioEn Pty Ltd, which was the counterparty to a global sponsorship agreement ('AgBioEn'). WTM contends that no *Jones v Dunkel* inference ought to be drawn in relation to either of these individuals.

44 In this context, WTM submits that Messrs Murray and Hunting are not and have never been in WTM's employ. Moreover, Mr Hunting was outside the jurisdiction at the

⁸² As the Full Court of the Federal Court observed in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53, [78]-[79], cited with approval in *Paul's Retail Pty Ltd v Sporte Leisure Pty Ltd* (2012) 202 FCR 286, [88] (Jacobson, Yates & Katzmann JJ); and see *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2012] VSC 239, [344]-[349].

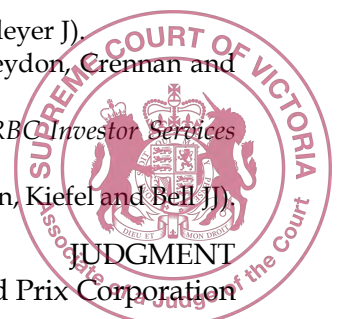
⁸³ *Ibid.*

⁸⁴ *Jones v Dunkel* (1959) 101 CLR 298, 308 (Kitto J), 312 (Menzies J) and 320-321 (Windeyer J).

⁸⁵ *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 384-385 [63] (Heydon, Crennan and Bell JJ).

⁸⁶ See, eg, *Coles Supermarkets Australia Pty Ltd v Tormey* [2009] NSWCA 135, [72]; *RBC Investor Services Australia Nominees Pty Limited v Brickworks Limited* [2017] FCA 756, [101] and [359].

⁸⁷ *ASIC v Hellicar* (2012) 247 CLR 345, 412 [165] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).



time of the hearing and could not be compelled to give evidence. Neither Mr Murray nor Mr Hunting was a decision-maker for WTM at the time of events in this proceeding. Further, it is submitted, and most importantly, by the time it was proposed each of those witnesses be called to give evidence in the trial:

- (1) Ms Artmonsky and Mr Morrison had given evidence-in-chief about the existence of the oral agreement reached with Mr Hunting;⁸⁸
- (2) Ms Artmonsky was subjected to limited cross-examination about her recollection of the agreement and payments made by AgBioEn following cancellation of the concert.⁸⁹ Relevantly for present purposes, she was not challenged on her evidence that an agreement had been reached with AgBioEn to sponsor the concert;
- (3) Mr Morrison was not cross-examined on this matter at all;
- (4) it was not put to either Ms Artmonsky or Mr Morrison that no such agreement existed or was reached;
- (5) in those circumstances, and having not put the truthfulness of their accounts into issue in accordance with the rule in *Browne v Dunn*,⁹⁰ it is said that AGPC cannot complain that it did not have the opportunity to test Mr Hunting's recollection of those same events; and
- (6) Mr Murray's evidence would have been mere duplication of evidence already given by WTM's other witnesses. Mr Murray was not an employee or officer of WTM or a decision-maker whose evidence could either help or harm WTM.

45 Finally, and with respect to Mr Hunting, AGPC foreshadowed on 11 June 2024, following the close of the parties' cases, that it 'would not object' to Mr Hunting's statement being tendered by consent. WTM had not relied upon the statement.

⁸⁸ Supplementary witness statement of Ms Artmonsky dated 15 December 2022, [8]-[12] (CB212-213); witness statement of Mr Morrison dated 20 December 2022, [64] (CB254-255).

⁸⁹ T203/6-19 and TT204-208 (up to line 23) (XXN of Ms Artmonsky).

⁹⁰ (1893) 6 R 67.



AGPC's position had not been foreshadowed and, in any event, took place at a time when WTM had already closed its case.

46 For these reasons and matters relied upon by WTM, on a proper understanding of the rule in *Jones v Dunkel*, I am of the view that no issue arises with respect to the case of WTM on this basis.

The defendant

47 In opening, WTM observed that two key witnesses were not being called by AGPC to give evidence: namely, Mr Little (former Chair of AGPC) and the Hon Martin Pakula (current Chair of AGPC and the former Minister for Tourism, Sport and Major Events; and the Minister responsible for AGPC under provisions of the AGP Act).⁹¹ AGPC also confirmed that it would not be calling Ms Norris (former Senior Legal Counsel of AGPC) to give evidence. Other witnesses from AGPC's camp, including Ms Hill (former General Manager - Operations) and Mr Lane (former Division Manager - Corporate Affairs and Communications) were not called. The former Premier, The Hon Daniel Andrews (later AC), and the former Chief Health Officer, Dr Sutton were not called.

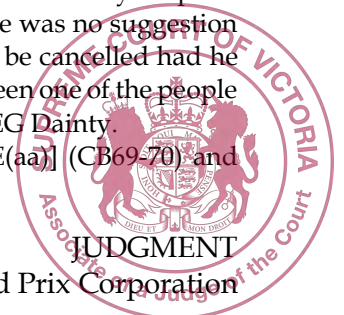
48 Mr Little, Minister Pakula, Ms Norris and Ms Hill were witnesses in the AGPC camp and, on this basis, WTM submits that an inference should be drawn that their evidence would not have assisted AGPC's case.⁹²

49 With respect to Dr Sutton, the Chief Health Officer, if AGPC wished to establish that he advised AGPC that 'there could be no crowds within the declared area of the Grand Prix and that covered the concert',⁹³ contrary to the terms of his 8:42am email, the 2:52pm text and the 3:00pm AHPPC announcement, it was incumbent on AGPC to

⁹¹ TT 10/2-17 and 76/20-29.

⁹² Mr Little and Ms Hill participated in the 8:00am call. Ms Hill was a recipient of the 8:42am email, and directed Mr Mottram later on 13 March 2020 to send a text message to Dr Sutton seeking clarification as to whether his recommendation extended to the concert. Minister Pakula was in relatively frequent communication with Mr Westacott throughout 13 March 2020 and, glaringly, there was no suggestion in Mr Westacott's statement that the Minister would have required the concert to be cancelled had he known the true position. Mr Fletcher's recollection was that Ms Norris may have been one of the people who had been involved in drafting the (misleading) 4:25pm email to WTM and TEG Dainty.

⁹³ T78/9-11. See also Amended Defence to the Amended Statement of Claim, [10E(aa)] (CB69-70) and Defendant's Outline of Opening Submissions, [38].



call him as a witness. Likewise, it is said, as to the former Premier, if AGPC wished to have the Court find that it was ‘impossible’ for the concert to proceed following his statements at a press conference at approximately 9:00am on 13 March 2020, it was incumbent on AGPC to call him as a witness.

50 Concluding with respect to these possible witnesses, WTM submits that their absence as a witness should give the Court greater confidence to reject AGPC’s case with respect to the issues to which its submissions in this respect are directed. In light of the reasons which follow and the contents and findings with respect to key facts and documents, it is not necessary to further address any *Jones v Dunkel* issues with respect to these witnesses.

Key facts and documents

51 The events in question in this proceeding arose in March 2020, at around the time when Formula 1 activity was to commence at the 2020 Australian Grand Prix. It will be recalled that during this time the world was becoming aware that, what had been described generally as the ‘novel Coronavirus’, was seen to be emerging as a global health threat. As we are all aware, this virus, COVID-19, produced a severe global pandemic over a number of years, the worst since the Spanish Flu pandemic in the early part of the 20th century. Events of and preceding March 2020 must, however, be viewed from the perspective of those times, rather than with the now benefit of hindsight as to the seriousness of the COVID-19 threat; particularly during 2020 when vaccines were not available to prevent community spread, both generally and especially as a result of mass gatherings.

52 Another consideration, or caution, in the consideration of events in early 2020 is that this is now over four years ago, a matter which immediately raises issues as to the fallibility of human memory. As the authorities to which reference has been made indicate,⁹⁴ the evidentiary value of contemporaneous documentary records has been

⁹⁴ See above [34].



recognised consistently. This is also a consideration of importance in the present context.

53 Finally, it should be observed that the documentary evidence which has been tendered and considered in this proceeding is to a large extent a collection of emails, text messages and transcripts of telephone conversations or meetings. This documentary evidence, valuable and significant as it may be, is not in the nature of or the product of carefully considered contractual drafting and, as such, may well be regarded as inconsistent and in some conflict in particular instances. Nevertheless, this documentary evidence lies in the environment of commercial dealings. The High Court has, in numerous authorities, indicated that the proper approach to construction of commercial agreements is that in applying the usual rules of construction the courts should, where possible, construe their provisions in order to give business efficacy to the contractual arrangements.⁹⁵ Clearly it is not for the courts to substitute their views as to appropriate commercial objectives or decision making on the part of the parties. However, it would, in my view, be contrary to the authorities and approach of courts not to have regard to an underlying commercial purpose or purposes in viewing documentary evidence which may contain ambiguities and inconsistencies.

The 2020 Australian Grand Prix

54 As has been observed, AGPC is a statutory corporation established under the AGP Act.⁹⁶ Its purpose includes ‘to facilitate the holding of an annual Formula One Grand Prix at Albert Park’.⁹⁷ Under s 3 of the Act:

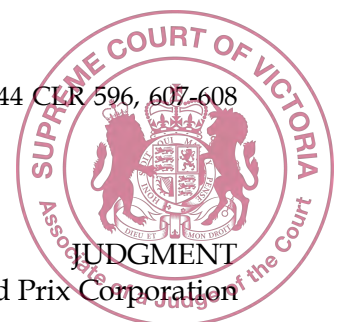
Formula One event means a motor car race –

(a) that takes place in Australia; and

⁹⁵ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607–608 (Mason J).

⁹⁶ See above [17].

⁹⁷ AGP Act, s 1(b).



- (b) that—
 - (i) is approved by the Fédération Internationale de l'Automobile; or
 - (ii) is entered in the International Calendar of the Fédération Internationale de l'Automobile; or
 - (iii) counts towards the Formula One World Championship—

and includes any race, event or activity promoted by the Corporation in association with that race ...

55 Under s 27 of the AGP Act the Minister administering the *Crown Land (Reserves) Act 1978* and the Minister administering the AGP Act, acting jointly, by notice published in the Government Gazette, may declare:

- (a) an area, being part or all of the Albert Park specified in the notice together with such other land (if any) surrounded by Albert Park and specified in the notice, the 'declared area' in respect of a year specified in the notice; and
- (b) that a period (not exceeding seven days) specified in the notice is the 'race period' in respect of a year specified in the notice.

In accordance with the statutory powers, on 12 December 2019, the Ministers declared that for the year commencing 6 December 2019 and ending 4 December 2020:

- (a) all of the area of Albert Park together with the land surrounded by Albert Park was the 'declared area'; and
- (b) the period commencing at 12:01pm on Tuesday, 10 March 2020 and ending at 11:59pm on Monday, 16 March 2020 was the 'race period'.⁹⁸

56 The 'declared area' was approximately 176,000 square metres, or the equivalent of 28 MCGs.⁹⁹ Lakeside Stadium forms a separate part of that area, as indicated in the plan of the area set out previously.¹⁰⁰

⁹⁸ Amended Statement of Claim [4]; Defence to Amended Statement of Claim [4].

⁹⁹ Witness Statement of Mr Mottram dated 26 June 2023, [6] (CB471). See also T492/8-9.

¹⁰⁰ See above [3].



57 The functions of the AGPC are outlined in ss 20 and 21, respectively, of the AGP Act. The latter includes numerous statutory powers for the purpose of performing its functions, including the power to control admission to the declared area during the race period and to do all other things necessary or convenient to be done for, or in connection with, or as incidental to, the performance of its functions. Section 30 requires the AGPC to manage and control the declared area in respect of a year for the race period in respect of that year.

58 Under s 9 of the AGP Act, AGPC is subject to the direction and control of the Minister in the performance of its functions and in the exercise of its powers. At the relevant time, the then Minister for Tourism, Sport, and Major Events, the Hon Martin Pakula, had statutory responsibility for administering the AGP Act. The Government Department responsible for administering the AGP Act was the Department of Jobs, Precincts and Regions (now known as the Department of Jobs, Skills, Industry and Regions). The Secretary of that Department at the relevant time was Mr Simon Phemister. Mr Westacott was, as noted previously, then Chief Executive Officer of AGPC, and Mr Little was then Chairman of AGPC. They had a direct line of communication with Minister Pakula and Mr Phemister. Mr Westacott's evidence was that his usual practice was to communicate by text or by phone call with those individuals.¹⁰¹

The 2020 World Tour Melbourne

59 In 2020, Apollo and WTM, in conjunction with Westbrook Inc., were producing a multi-city concert series branded 'World Tour'. World Tour was intended to be a global, multi-genre, eco-conscious concert series featuring A-list performers, international DJs and local artists.

60 The idea of holding a World Tour event alongside the Grand Prix had its inception in conversations between Mr Morrison and the former CEO of AGPC, Mr Drew Ward going back to 2009.¹⁰² The 2020 World Tour Melbourne was to be the first live music

¹⁰¹ Witness Statement of Andrew Westacott [26] CB345.

¹⁰² Witness Statement of Mr Morrison dated 20 December 2022, [11]-[14] (CB236-237).



event in the World Tour series produced on a global scale. It was the product of lengthy negotiations between representatives of WTM, Apollo and AGPC, resulting in a multi-year deal for WTM to produce concerts in connection to the Australian Grand Prix.¹⁰³ WTM's concerts were to be separately ticketed from the Grand Prix. Initially, the 2020 World Tour Melbourne was to comprise of two concerts: one on 13 March 2020 headlined by Miley Cyrus, and the concert on 14 March 2020 headlined by Robbie Williams.¹⁰⁴ Those concerts were to take place in Lakeside Stadium. Unlike under AGPC's previous model, WTM's music event was self-funded and separately ticketed to the Grand Prix.¹⁰⁵ Moreover, WTM was solely responsible for the construction of the concert facilities within Lakeside Stadium.

The three primary contracts

61 On 9 January 2020, WTM, AGPC and TEG Dainty entered into various agreements which are relevant to this dispute. The first is the LMCA;¹⁰⁶ secondly, the Stadium Use Agreement between TEG Dainty and AGPC ('SUA');¹⁰⁷ and, thirdly, the Co-Promotion Agreement between WTM and TEG Dainty ('CPA').¹⁰⁸

LMCA

62 The LMCA is the primary contract that governed the relationship between WTM and AGPC and, as recorded at paragraph (B) of the 'Background' being the recitals to that agreement, established a framework to govern WTM and AGPC's respective rights and obligations for the staging of the World Tour in relation to the Australian Grand Prix.¹⁰⁹ WTM submits that the parties recognised, by the LMCA, that there was a

¹⁰³ See, e.g. the first witness statement of Mr Beck dated 16 September 2022, [7] (CB151).

¹⁰⁴ Noting that it was separately ticketed to the Grand Prix, Mr Mottram distinguished WTM's concert to other 'ancillary events' that ran alongside the Grand Prix: T496/5-13 (XXN of Mr Mottram).

¹⁰⁵ Recognised by Mr Westacott in his first witness statement dated 26 June 2023, [32] (CB346-347).

¹⁰⁶ CB1234-1259.

¹⁰⁷ CB1260-1293.

¹⁰⁸ CB1294-1338.

¹⁰⁹ See above [3].



distinction between the Australian Grand Prix and the World Tour Melbourne events.¹¹⁰

63 AGPC, however, emphasises the close association or connection between the Australian Grand Prix and the World Tour Melbourne events.¹¹¹ It does so in support of its position that cancellation of the Grand Prix meant that it followed, having regard to this position, that the concert was, clearly, also cancelled. These matters are addressed further in the reasons which follow.

64 ‘Australian Grand Prix’ was defined in cl 1.1 to mean ‘a Formula 1 Australian Grand Prix event (as defined in the [AGP Act]) during the Term’. ‘World Tour’ means ‘a large scale, multi-artist, music event featuring a line-up of international and local A-list Talent, aligned to the “World Tour” event and broadcast platform’. The ‘World Tour Melbourne’ was relevantly defined to mean: ‘the World Tour in relation to the Australian Grand Prix to be held on the applicable dates during the Australian Grand Prix Period as agreed between the parties’. ‘Declared Area’ was defined as ‘the declared area comprising all or part of Albert Park, including the Albert Park Grand Prix Circuit, as declared by the Minister each year in accordance with the [AGP Act]’. Under cl 2.1, and subject to cl 3, ‘AGPC ... agreed to appoint WTM on an exclusive basis, as its “Live Music Partner” to stage World Tour Melbourne in accordance with’ the LMCA. WTM contends that this clause conferred a right on it to stage its event. AGPC denies this.

65 Under cl 2.4 of the LMCA, ‘WTM’s right to stage World Tour Melbourne’ would be suspended ‘should AGPC receive’:

...an unequivocal Ministerial Direction requiring AGPC to suspend the Australian Grand Prix and all associated events including those operated by Other Event Organisers and including World Tour Melbourne, such

¹¹⁰ The LMCA did not, for instance, define an ‘Event’ as including both the World Tour Melbourne and Australian Grand Prix. In addition to defining the World Tour Melbourne, cl 3 explicitly referred to ‘AGPC Events’ and preserved AGPC’s right to conduct its own activities or arrangements in respect of non-ticketed live music acts or performances at the Circuit. The LMCA also explicitly recognised that the two events were separately ticketed: see e.g. item 4 of the Schedule. ‘Other Event Organisers’ was defined in cl 1.1 to include *inter alia* ‘Formula One Marketing Limited, Formula One World Championship Limited [etc.]’.

¹¹¹ *Defendant’s Outline of Closings Submissions* (12 June 2024), [29]-[34].



suspension requirement to be communicated immediately to WTM on receipt and to remain in force only for the period of suspension required by the Ministerial Direction.

There is, however, no issue in this case that any direction for the purposes of cl 2.4 was in fact made, or that one would have been made in the counterfactual.

66 Clause 4 of the LMCA set out WTM's 'Responsibilities' (listed in Sch 1 to the LMCA). Those Responsibilities included *inter alia* talent procurement, stage design, promotion/advertising (etc.). In performing and delivering its Responsibilities, WTM was able at its sole discretion to 'use a local partner of its choice': cl 4.2(a). The local partner appointed by WTM was TEG Dainty. WTM's primary obligations under the LMCA were otherwise set out in cls 4.3 to 4.7.

67 AGPC's express obligations were set out under cl 5. Relevant obligations included:

- (1) An express obligation to 'cooperate in good faith with WTM in all matters relating to the World Tour Melbourne and/or the Responsibilities': cl 5.1(a).
- (2) Obligations to 'provide to WTM in a timely manner all documents, information, items and materials in any form ... required under Schedule 1 or otherwise reasonably required by WTM in connection with the World Tour Melbourne and/or the Responsibilities and ensure that they are accurate and complete in all material respects': cl 5.1(b).
- (3) An obligation to 'provide and/or procure a Venue that is fit for purpose during the Term': cl 5.1(d).

68 WTM contends that AGPC was also subject to an implied duty to do all things reasonably necessary to enable WTM to enjoy the full benefit of the LMCA and not to hinder or prevent the fulfilment of the purpose of express promises made in it to WTM (referred to as the 'implied duty'). AGPC admits it was subject to the implied duty, but disputes what that duty required of it or that it was breached.



SUA

69 The SUA was a licence agreement between AGPC and TEG Dainty under which AGPC conferred a right on TEG Dainty to ‘occupy and use’ Lakeside Stadium at Albert Park ‘for the purpose of [TEG Dainty] co-promoting with WTM the Live Shows in connection with the Event’ (Recitals, item D. See also cl 4.1).¹¹² As described in the LMCA, its purpose was to ‘gover[n] the staging of the relevant World Tour Melbourne ...’: LMCA, cl 1.1). As with the LMCA, the parties to the SUA recognised that the ‘Live Shows’ to be held by WTM and TEG Dainty were connected to, but distinct from, the ‘Event’ (defined to mean the ‘Formula 1 Australian Grand Prix event’ in cl 1.1 of the SUA).

CPA

70 The CPA was the agreement entered into between WTM and TEG Dainty under which WTM engaged TEG Dainty to co-promote its ‘Event’. ‘Event’ in the CPA was defined to mean ‘a large scale, multi artist, music event featuring a line-up of international and local A-List Talent, aligned to the “World Tour” event and broadcast platform and to be held on the applicable Event Dates’: cl 1.1. It similarly distinguished between WTM’s ‘Event’ and the ‘Formula 1 Grand Prix’ (see, e.g. cls 7.2(h) and 11.2). The CPA contained a detailed division of responsibilities between WTM and TEG Dainty, and a framework for the division of costs and revenue derived in relation to WTM’s event.

Coronavirus risk

71 AGPC was aware, based on media and government press releases in January and February 2020, of the growing issue of COVID-19.¹¹³ Mr Westacott gave evidence as to AGPC’s monitoring of coronavirus throughout early 2020, up to 13 March 2020, and its development of plans and risk measures to provide guidance and instruction for AGPC personnel as to the preparation, planning and response to the COVID-19 pandemic.¹¹⁴ This included AGPC’s development of a ‘COVID-19 Preparedness and Response Plan’,¹¹⁵ which was stated to be for reference ‘in the planning and delivery

¹¹² AGPC was not the registered proprietor of the land on which the venue stands. It was granted its own licence to use Lakeside Stadium by the State Sports Centre Trust on 27 August 2019: see CB98.

¹¹³ Witness Statement of Andrew Westacott [37] CB347.

¹¹⁴ Witness Statement of Andrew Westacott [37]-[86].

¹¹⁵ CB371.



of the event and to provide a framework for preparation and response to the escalating spread of Covid-19 disease, including a suspected or confirmed case of Covid-19 affecting the event'.¹¹⁶

72 AGPC liaised with the Victorian Department of Health and Human Services ('DHHS') as to what precautions should be taken at the 2020 Australian Grand Prix event to deliver it safely.¹¹⁷ On 26 February 2020, AGPC issued a Final Statement on Coronavirus stating that AGPC would 'continue to closely monitor the situation in the lead-up to the Grand Prix' and 'take guidance from subject matter experts, including Victorian and National Chief Health Officers'.¹¹⁸

Events leading to 13 March 2020

73 The events leading up to the week of 9 March 2020 are largely not in dispute.¹¹⁹ By 9 March 2020, WTM (through TEG Dainty) had engaged A-List talent and support acts to perform at the 2020 World Tour Melbourne. WTM was marketing and selling tickets, and taking necessary steps to ensure the concerts were ready to proceed. Robbie Williams was to headline the concert scheduled to take place on 14 March 2020, supported by other artists.¹²⁰ At the same time, AGPC, Formula 1 and the Federation Internationale de l'Automobile ('FIA'), were conducting final preparations for the Australian Grand Prix.¹²¹

74 On 9 March 2020, TEG Dainty provided AGPC with a Non-Appearance Insurance: Confirmation of Cover. The policy excluded *inter alia* any loss directly or indirectly arising out of, contributed to by, or resulting from Coronavirus.¹²² Mr Grayson gave unchallenged evidence at trial that policies at the time 'would not cover cancellation due to coronavirus (as such coverage was not available)' and that the insurance market

¹¹⁶ CB373.

¹¹⁷ Witness Statement of Andrew Westacott [39] CB348.

¹¹⁸ Witness Statement of Andrew Westacott [39] CB348.

¹¹⁹ *Plaintiff's Outline of Closing Submissions* (12 June 2024), [106]-[125]; and *Defendant's Outline of Closing Submissions* (12 June 2024), [38].

¹²⁰ A running sheet of that concert is at CB5194-5195.

¹²¹ The 2020 Australian Grand Prix timetable on 14 March 2020 is at CB369.

¹²² CB3068.



had ‘started to require a specific coronavirus exclusion’ from as early as 9 January 2020 the day when the LMCA was executed.¹²³

75 On 10 March 2020, WTM issued a flier for concertgoers for the Robbie Williams concert on 14 March setting out important information about the event. Concertgoers were reminded that the ‘World Tour Melbourne is a separately ticketed event’.¹²⁴ Additionally, a map was attached to the flyer depicting the entry points to the WTM event. That same day, Miley Cyrus’ agent notified WTM and TEG Dainty that Ms Cyrus would not be travelling to Australia to perform on 13 March 2020. Ms Cyrus later tweeted: ‘[d]ue to recommendations of local, state, federal and international government authorities including the Centre for Disease Control’ in the United States she would not be travelling to Australia.¹²⁵ After that time, WTM, TEG Dainty and AGPC proceeded on the basis that the 2020 World Tour Melbourne would only comprise the Robbie Williams concert on 14 March 2020.¹²⁶

76 The parties were, however, optimistic everything would proceed as planned bearing in mind that on 8 March 2020 the women’s T20 World Cup Final was held at the MCG with an audience of more than 80,000 people.¹²⁷ As AGPC repeatedly announced to the public and to WTM, it was ‘all systems go’.¹²⁸

77 Also on Tuesday 10 March 2020, meetings occurred between AGPC and Formula 1 representatives about how various events during the Grand Prix might be adjusted to reduce the risk of the transmission of COVID-19 to drivers and also Formula 1 teams, including, for example, driver autograph sessions being changed to Q&A sessions.¹²⁹

78 On Wednesday 11 March 2020, then Prime Minister, the Hon Scott Morrison MP, announced that Australia would close its borders to persons travelling from Italy from 6:00pm that night based on the large outbreaks of coronavirus in Italy at that time.

123 See Mr Grayson’s witness statement dated 16 September 2022 [29] (CB140) and [36] (CB142).

124 CB3108.

125 CB3158.

126 The AGPC does not take issue with this.

127 Mr Westacott’s statement dated 26 June 2023, [49] (CB349).

128 See, e.g. CB427, 866 2801-2802, 2820, 2855, 2928 and 3631.

129 Witness Statement of Andrew Westacott [55] CB350.



This was an issue for the event because there were still Ferrari personnel due to arrive in Melbourne after 6:00pm. Mr Westacott and Mr James Rosengarten liaised with representatives of Australian Border Force about flexibility in relation to those persons in transit.¹³⁰ Mr Westacott was also aware that Formula 1 team personnel were presenting to the Albert Park Medical Centre and were meeting the criteria for COVID-19 testing.¹³¹ Ms Amy Hill emailed the DHHS to see if test results could be expedited. During the night of 11 March 2020, COVID-19 was declared a global pandemic by the World Health Organisation ('WHO').¹³² The WHO statement recognised that '[a]ll countries must strike a fine balance between protecting health, minimising economic and social disruption, and respecting human rights'. It said nothing about large or mass public gatherings. As Mr Westacott accepted in cross-examination, the WHO declaration 'did not change anything operationally for the [AGPC] with respect to the Grand Prix'.¹³³ In the evening of 11 March 2020, there was an opening party for the Grand Prix called 'Glamour on the Grid', with 550 people attending at a facility at the Formula 1 paddock at Albert Park.¹³⁴

79 Also on Wednesday 11 March 2020, Robbie Williams arrived in Melbourne with his manager, Mr Loney. Mr Williams' musicians, dancers and support crew also arrived that day and on 12 March 2020.¹³⁵ By that time, many of WTM's key representatives had also flown to Melbourne.

80 On Thursday 12 March 2020, the gates to the declared area were opened at 9:15am. At 10:05am, Mr Westacott had a telephone conversation with Minister Pakula, who asked AGPC to begin working through potential evacuation scenarios. The Minister said to Mr Westacott words to the effect that he was concerned about the increasing risk of transmission of COVID-19 in the community and the risk of the spread of COVID-19 at the event.¹³⁶ In any event, around 45,000 spectators attended the track

¹³⁰ Witness Statement of Andrew Westacott [60] CB351.

¹³¹ Witness Statement of Andrew Westacott [64] CB352.

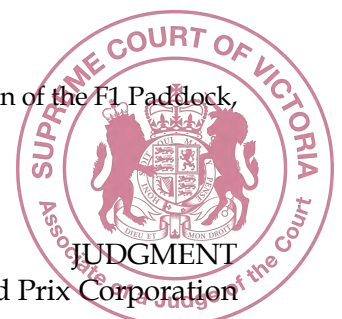
¹³² See CB5617-5620.

¹³³ T434/6-9 (XXN of Mr Westacott).

¹³⁴ Mr Westacott's first statement dated 26 June 2023, [63] (CB351). As for a description of the F1 Paddock, see Mr Westacott's first statement dated 26 June 2023, [12] (CB342).

¹³⁵ Witness statement of Mr Loney dated 10 October 2023, [7] (CB338).

¹³⁶ Witness Statement of Andrew Westacott [73] CB353.



that day.¹³⁷ All parties proceeded on the basis that the Grand Prix, and the concert, would be continuing.

81 On or around 11 or 12 March 2020, Ms Artmonsky, Mr Morrison and Mr Dainty met with Mr Charles Hunting, director of AgBioEn. In circumstances where Ms Cyrus had cancelled her concert, those parties discussed the possibility of AgBioEn providing sponsorship for the Robbie Williams concert on 14 March. WTM says that they reached an oral agreement that AgBioEn would pay USD 2.5 million to sponsor the Robbie Williams concert – an issue that is addressed further in the reasons which follow. AGPC contests the proposition that there was such an agreement. In any event, by 12 March, ‘the stage at Lakeside Stadium had been built and the grass protection had been completed’ for the 2020 World Tour Melbourne.¹³⁸ Over 13,000 tickets had been sold, and the concert was, WTM contends, being heavily marketed.

82 Robbie Williams attended a press conference at Lakeside Stadium on the afternoon of 12 March 2020 with members of the press to promote his concert. He also held a paddock tour and meet and greet with Formula 1 driver Daniel Ricciardo, arranged by AGPC, near the Renault Formula 1 garage area.¹³⁹ During the press conference at Lakeside Stadium, Mr Williams said he had been ‘looking forward to coming down to Australia now for about 2 to 3 months’ and he ‘wasn’t going to let anything get in the way’.¹⁴⁰ Later on the evening of 12 March 2020, representatives of WTM, AGPC, TEG Dainty, Formula 1 and others attended a formal welcoming dinner at Government House. Among those attending were Ms Artmonsky, Mr Morrison, Mr Westacott and Mr Fletcher. Mr Westacott delivered a speech that weekend, in which he said that the Grand Prix was going ahead as planned.¹⁴¹ During the evening, Mr Westacott was informed by Mr Mottram that a McLaren Racing team member had tested positive for COVID-19.¹⁴² Ms Artmonsky also heard rumours about the McLaren team member that evening, and further rumours that the Grand Prix might

¹³⁷ CB353, [72].

¹³⁸ Witness Statement of Craig Fletcher dated 30 May 2024, [31] (CB5543).

¹³⁹ Witness Statement of Craig Fletcher dated 30 May 2024, [31] (CB5543).

¹⁴⁰ See news clip of that press conference at CB5326.

¹⁴¹ Ms Artmonsky’s first witness statement dated 19 September 2022, [42] (CB191).

¹⁴² Witness Statement of Andrew Westacott [77] CB353.



be cancelled.¹⁴³ Mr Morrison was aware of similar rumours by that time.¹⁴⁴ Nevertheless, no decision was announced by AGPC until the following morning.

83 At about 9:20pm on 12 March 2020, Mr Westacott, Mr Little, Mr Mottram and other AGPC representatives attended a call with the Chief Health Officer, Ms Andrea Spiteri, Director of Emergency Management, DHHS, Ms Annaliese van Dieman, the Deputy Chief Health Officer, and Ms Melissa Skilbeck, Deputy Secretary, Regulation, Health Protection and Emergency Management, DHHS. During that call, the Chief Health Officer said words to the effect that: (i) the McLaren team member had extensive contact with almost all of the McLaren team and maybe members from other teams; (ii) persons who had close contact with the McLaren team member would have to isolate for 14 days; and (iii) the McLaren situation ‘speaks to the transmission of the virus’, ‘it’s a good case for keeping internationals separate from locals’, and ‘we are still thinking it through’.¹⁴⁵

84 Mr Westacott had discussions with Formula 1 representatives at 1:33am and 2:03am on 13 March 2020, which culminated with Mr Westacott being informed by Mr Ross Brawn that McLaren had withdrawn from the race, that Mercedes Petronas had withdrawn their support for the race and for their personnel to have any involvement in the race, and that Ferrari did not think that they would race.¹⁴⁶ After speaking further about whether the race could proceed, Mr Westacott said to Mr Brawn that AGPC would have to wait until the morning to make any final decision as it did not yet know the final position of all the teams, Formula 1 and FIA.¹⁴⁷ In any event, this conversation culminated in Mr Westacott sending the following email to Mr Brawn, as the Managing Director, Formula 1 at 2:34am on 13 March 2020:¹⁴⁸

- You have advised that the FIA / F1 have reached the decision to cancel the race and all F1 sessions associated with the Formula 1 Rolex Australian Grand Prix 2020.
- No announcement is to be made until after we have met at 0830

¹⁴³ See e.g. TT145-28-31 and 146/1-14 (Ms Artmonsky).

¹⁴⁴ See, e.g. T292/2-29 (Mr Morrison).

¹⁴⁵ Witness Statement of Andrew Westacott [81]-[82] CB354.

¹⁴⁶ Witness Statement of Andrew Westacott [90]-[91] CB355-356.

¹⁴⁷ Witness Statement of Anrew Westacott [93] CB356.

¹⁴⁸ See CB356 [95] and CB5472.



- Please use best endeavours to ensure team principals respect our request to keep this confidential until we have concluded our meeting.
- The AGPC has an obligation to refer the matter to our Premier and Minister before matters are finalised. Additionally, we request you do all you can to respect our need to do this whilst the confidentiality of your decision is maintained
- we request that the current position / decision be confirmed in writing by Formula 1 for the meeting
- We would like this matter to be discussed with Chase Carey upon his arrival at the Albert Park Circuit
- The AGPC, Vic Govt, F1 and FIA will agree on an approved press release statement, and conduct a joint press conference on circuit, if mutually agreed.
- as agreed, AGPC has NOT communicated to fans or the broader public nor should any communication be issued until the AGPC Chair and CEO have concluded communications with the Victorian Government.

As contended by WTM, that email does make clear that it was FIA cancelling, or potentially cancelling, the Formula 1 Grand Prix. The absence of McLaren meant that the race would not be a championship race. As Mr Westacott's records show, the Mercedes-Benz Petronas and Ferrari racing teams pulled out with McLaren as those teams had interdependencies – of staff and equipment – with each other, meaning the absence of McLaren and Mercedes would impact the other teams.¹⁴⁹

85 At 6:22am on 13 March 2020, Mr Westacott sent a WhatsApp message to the AGPC Leadership Team – being all the general managers who reported to him – saying 'All, please get into work absolute ASAP – will need you in our building 1. Gates open to public as normal. Track program will start as normal. Absolutely no speculation and no discussion with media. AW'.¹⁵⁰ Mr Westacott sent all staff an email and text, shortly before 8:00am, confirming that gates would open at 8:45am and track activity would commence as scheduled at 9:10am.¹⁵¹

Subsequent events of 13 March 2020

86 By the early hours of the morning of 13 March 2020, foreign media were reporting that the Grand Prix had been cancelled.¹⁵² No public announcement to that effect had been made. To the contrary, at about 7:45am, and despite the media speculation, Mr Westacott emailed all suppliers and organisers for that event: 'The gates will open

¹⁴⁹ See e.g. CB456.

¹⁵⁰ Witness Statement of Andrew Westacott [99] CB357.

¹⁵¹ Witness Statement of Andrew Westacott [101] CB357-358.

¹⁵² Ms Artmonsky's first witness statement dated 19 September 2022, [424] (CB192); Mr Morrison's witness statement dated 22 December 2022, [74] (CB256-257).



at 8.45am and track activity will commence as scheduled at 9.10am'.¹⁵³ Then, at 7:55am, Mr Little told the Nine Network that the Grand Prix was going ahead.¹⁵⁴

8:00am call

87 At around 8:00am, representatives of AGPC including Mr Westacott, Mr Mottram, Mr Little and others attended the 8:00am call with Dr Sutton. The teleconference was partially recorded by Mr Mottram.¹⁵⁵ No representatives of WTM or TEG Dainty were invited to attend. The existence of the recording was not disclosed to WTM until 18 November 2022.¹⁵⁶ The Court has heard the recording of the 8:00am call, as far as it was recorded, and has the benefit of a (largely) agreed transcript.¹⁵⁷ As WTM emphasises, what the Court does not have is any record, or evidence, of a witness' recollection of what was said before Dr Sutton commenced speaking at the outset of the recording.¹⁵⁸ I accept that, in the absence of that evidence, the Court is not in a position to determine, for instance, what preceded the recorded aspects of the call, nor what prompted Dr Sutton to immediately provide his 'recommendation' to AGPC.

88 AGPC made detailed submissions in relation to the content and effect of the call, with reference to the transcript of the call as to the extent that it was recorded; submissions to which I now turn.¹⁵⁹

89 AGPC first observes that Dr Sutton recommended 'cancellation from today' or that it be 'a spectator free event - if that makes a material difference'. When asked further about timing, he confirmed that it included 'today', should take effect 'immediately' and meant that AGPC should not 'open the gates'. Mr Westacott asked Dr Sutton directly, 'So, ... the Department of Health and Human Services via yourself as Victoria's Chief Health Officer has made a recommendation from now for the

¹⁵³ CB99.

¹⁵⁴ Ms Artmonsky's first witness statement dated 19 September 2022, [44] (CB192).

¹⁵⁵ Witness statement of Mr Mottram dated 26 June 2023, [69] (CB481).

¹⁵⁶ See CB5624-5627.

¹⁵⁷ The recording is at CB513 (an enhanced version is at CB515). The transcript is at CB5477-5482; again, to the extent that the call was recorded.

¹⁵⁸ Cf. Mr Mottram's statement dated 26 June 2023, [69] (CB481); Mr Westacott's statement dated 26 June 2023, [104] (CB358). Mr Westacott, who was at other times seemingly meticulous in his notetaking, did not refer to any such notes in his evidence.

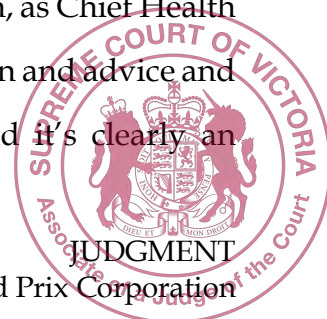
¹⁵⁹ *Defendant's Outline of Closing Submissions* (12 June 2024), [39]-[48].



cancellation of the event or at least the staging of the event with no patrons?' Dr Sutton said, 'That's right'. In response to a further question from Mr Westacott, Dr Sutton confirmed that the Premier and Minister 'are aware of the recommendation', and that he had 'provided written advice to the Minister for Health'. He had also spoken to the 'Chief Medical Officer with respect to [his] recommendation' who was with the First Ministers, including the Victorian Premier, at that time. Dr Sutton was asked if he could provide his written advice to AGPC and he agreed to provide it.

90 AGPC submits that the 8:00am call statements by Dr Sutton were not limited to the Formula 1 activities. Rather, it is submitted that those statements, and the health concern on which they were based – gatherings – applied to the event generally. AGPC specifically asked if Dr Sutton's advice would change 'should Formula One be taken out of the picture' and AGPC were to 'run Australian-based support categories only'. Dr Sutton said that it would not because there would still be 'spectators'; and there 'are a lot of internationals here who've obviously come for the Formula One race' and 'it would be a mass gathering'. In his opinion, 'the risk has materially changed from even a few days ago'. The health issue identified by Dr Sutton and communicated to AGPC was, it says, 'spectators being in close proximity'. So, AGPC contends, the cancellation of the Formula 1 activities only, whilst allowing other ancillary mass gathering events to proceed within the declared area, would not address the health issue identified by Dr Sutton.

91 Towards the end of the call, Dr Sutton was informed that AGPC had advised the public that the 'gates were opening as normal' at 8:45am and was asked would his advice be 'keeping the gates closed or letting them in and then dealing with them'. He responded that 'the preference is probably to close the gates' because '[y]ou want to set the expectations appropriately and try to provide as much written or verbal advice at the gates that it's been cancelled ...'. As AGPC observed, Dr Sutton, as Chief Health Officer, was aware of the serious consequences of his recommendation and advice and said, 'I will make an apology, you know, this is my decision and it's clearly an



inconvenience but I think that's the way to go'. Mr Westacott again confirmed that AGPC would not 'be opening the gates now', to which Dr Sutton replied 'Terrific'.

92 Significantly, in the present context, as AGPC observes, towards the end of the call, one of either Mr Mottram or Mr Fletcher asked as an aside, 'concert?', to which Mr Westacott replied 'separate, Tom, tomorrow night'. Mr Westacott's unchallenged evidence, it is said, is that AGPC had a lot to deal with at that point in time, that the decision to cancel the concert was already made and would be dealt with in order of priority. He did not ask Dr Sutton about all individual events with the Grand Prix event because he understood 'the whole thing was off'.¹⁶⁰ This assertion by AGPC on the basis of what Mr Westacott says he thought or understood at that time is critical in the context of these proceedings. For the reasons which follow, it is, in my view, ill-founded and not supported by the objective evidence, documentary or otherwise, the importance of which AGPC stressed in its submissions,¹⁶¹ and, consequently, should be given little weight.

93 WTM, on the other hand, stressed in its submissions what, in my view, are the matters which the 8:00am call evidence establishes on an objective basis. In this respect it observes that:¹⁶²

- (1) Dr Sutton commenced by communicating what was, in his words, a 'recommendation'. The 'recommendation' was 'cancellation from today' or a 'spectator free event';¹⁶³
- (2) Dr Sutton did not use the word 'directive'. On the one occasion when Mr Westacott used that¹⁶⁴ word, Dr Sutton responded by reference to his 'recommendation';

¹⁶⁰ Witness Statement of Andrew Westacott [110]; CB359.

¹⁶¹ See above, [33].

¹⁶² *Plaintiff's Outline of Closing Submissions* (12 June 2024), [132].

¹⁶³ CB5477.

¹⁶⁴ CB5478; and in effect similarly at CB5480.



- (3) Dr Sutton only discussed the Formula 1 race and racing activities ('Australian-based support categories');¹⁶⁵
- (4) there was no reference to the 'declared area' or to other activities within that 'declared area' or within Albert Park generally, or otherwise;
- (5) Dr Sutton said that he had discussed his recommendation with the Chief Medical Officer (Cth) and had provided that advice to the Minister for Health in writing.¹⁶⁶ At Mr Mottram's request, Dr Sutton agreed to provide that written advice to the AGPC (see below);
- (6) there was no mention of the WTM concert on 14 March 2020 whatsoever save for the end of the conversation when someone from AGPC asked Mr Westacott about the 'concert' to which Mr Westacott responded to the effect it was 'separate, tomorrow night';¹⁶⁷ and
- (7) no one asked Dr Sutton about whether his recommendation extended to the concert the following night or to all activities in the declared area.

94 After the 8:00am call concluded, a meeting of the Critical Incident Management and Recovery Team ('CIMRT') group took place from just before 8:17am.¹⁶⁸ Mr Mottram, Ms Hill and Mr Lane were among those who attended. AGPC contends that the minutes of this meeting demonstrate that it was concerned, in the immediate term, to give effect to the Chief Health Officer's advice without communicating the cancellation of the event. The gates would be 'not open to the public or patron ticket holders' but the 'messaging' would be that 'gate opening are (sic) delayed'. This, AGPC says, is consistent with its goal of finalising the cancellation with Formula 1 before publicly announcing it. Minutes of that meeting recorded that Apollo had been notified the 'situation is fluid' and that AGPC 'will provide [a] further update as we can'.¹⁶⁹ Given the timing of that record, and in the absence of any other evidence, WTM says that the

¹⁶⁵ CB5478.

¹⁶⁶ CB5478.

¹⁶⁷ CB5482

¹⁶⁸ CB3510-3512.

¹⁶⁹ CB3510.



Court can infer that the ‘notification’ referred to was a WhatsApp message sent from Mr Fletcher to Mr Morrison at 8:23am, in which Mr Fletcher said: ‘It’s all very fluid at the moment – as soon as I know and there’s certainty you’ll know’. WTM says that the suggestion that there was ‘fluidity’ and that there remained ‘[un]certainty’ about the concert confirms the existence of ambiguity as to whether Dr Sutton’s recommendation would apply to the concert the following evening. In response to this suggestion, AGPC says that is untenable as the plain purpose of notifying WTM that ‘the situation is fluid’ was because AGPC was delaying any announcement of cancellation until it had spoken with Formula 1. It says it was similarly to tell CAMS (Confederation of Australian Motorsport, now known as Motorsport Australia), ‘to delay track schedule’. However, in my view, as events unfolded during 13 March 2020, and having regard to communications with Dr Sutton in the afternoon of that day, the submission by AGPC is simply untenable and not established by the evidence, at all or simply on an objective documentary basis.

8:40am email

95 In response to the request, during the 8:00am call, for Dr Sutton’s written advice to the Minister, at 8:42am, Ms Spiteri, the Director Emergency Management at the DHHS sent an email to Mr Mottram and Ms Hill of AGPC (cc’d to Dr Sutton among others), which forwarded an email from Dr Sutton to Ms Spiteri that he had sent two minutes earlier and which stated:¹⁷⁰

For the written record, my recommendations on the Australian Grand Prix Race below, provided as two possible alternatives:

- (a) For the immediate (approximately 8.30, 13th March, 2020) cancellation of the race. OR
- (b) For the race to continue only as a closed-door (patron-free) event, starting immediately, for the remainder of the event.

96 AGPC’s case in this proceeding, consistently with the evidence of Mr Mottram and Mr Westacott, is that this email confirmed the advice which had been given by Dr Sutton on the 8:00am call.¹⁷¹ His recommendation was ‘on the Australian Grand

¹⁷⁰ CB3516.

¹⁷¹ See e.g. T470/27-31. See also Mr Mottram’s statement dated 26 June 2023, [78] (CB482).



Prix Race'. The email did not refer the concert and did not refer to the declared area. Dr Sutton did not refer to the Grand Prix 'event' generally. The only 'event' to which Dr Sutton referred to in his email was the 'race'. Moreover, there is no evidence of AGPC responding to this email.

97 Under cross-examination, Mr Westacott conceded – and WTM submits correctly – that, with the benefit of hindsight, Dr Sutton's recommendation communicated in the morning of 13 March 2020 did not in fact apply to the concert, even though the concert was within the declared area.¹⁷² When pressed with reference to the 8:40am email and a later text message from Dr Sutton to Mr Mottram, Mr Westacott said as follows:¹⁷³

... Mr Westacott – if Dr Sutton's advice provided that morning did apply to the concert, then Dr Sutton would not have said in his 8.40 am email that his advice was 'on the Grand Prix race,' but rather would've said it was on any activity in the declared area, correct? ---Possibly, yes.

...

... If Dr Sutton's advice provided that morning did apply to the concert, then Dr Sutton would have simply said yes in his text response to Mr Mottram's simple question, correct?---Possibly, yes.

98 AGPC, on the other hand, contends that the 8:40am email cannot be read independently or in isolation from the advice and statements made by the Chief Health Officer and the public health risks he identified in the 8:00am call. In particular, it is said that it cannot be read as limiting or qualifying what he had previously advised at 8:00am. AGPC says that the email is not expressed to do so, and it would not be read by a reasonable person in the position of AGPC as having done so.¹⁷⁴

99 AGPC made further submissions in this vein, directed to more detail as to the health risks identified by Dr Sutton to avoid 'mass gatherings' and 'spectators in close proximity'.¹⁷⁵ The difficulty with these submissions is, in my view, that it is clear on the evidence that the 8:40am email is the written confirmation of Dr Sutton's

¹⁷² T448/15-31.

¹⁷³ TT449/21-26 and 450/27-30.

¹⁷⁴ See *Defendant's Outline of Closing Submissions* (12 June 2024), [53]-[56].

¹⁷⁵ *Defendant's Outline of Closing Submissions* (12 June 2024), [54]-[56].



recommendation during the 8:00am call and is, as a matter of plain language, limited to the 'Australian Grand Prix Race'. Additionally, as the evidence is clear, mass gatherings were not generally restricted prior to the declaration of the State Emergency in Victoria the following Monday 16 March 2020 and there were mass gathering sporting events actually held in Australia during the weekend of 14 and 15 March 2020. Moreover, as discussed further in the reasons which follow, this view of the effect or scope of the 8:40am email was not supported by and is not consistent with further communications with Dr Sutton in the afternoon of 13 March 2020.¹⁷⁶

Premier's 9:00am announcement

100 At about 9:00am, the Premier of Victoria, the Hon Daniel Andrews, in response to questions by reporters in Canberra, made the following statement in relation to crowds at the Grand Prix:¹⁷⁷

On public health grounds there will be no spectators at the Grand Prix this weekend, if a race actually happens at all ... That's a matter for them and they'll make announcements, I think, very soon.

Any other changes to any mass gathering or large events will be based on advice from the Chief Health Officer. That's exactly what has happened with the Grand Prix. There's been events at the Grand Prix, I think they have been widely reported. There's been a whole lot of developments around the world.

The Chief Health Officer has updated his advice, that's been communicated to Grand Prix organisers and now they're making that choice between no event or an event without fans. But at the very least there will be no fans at the Grand Prix this weekend.

The Premier's announcement confirmed that the result of the Chief Health Officer's advice was that AGPC was required to make a choice between cancelling the event, or holding an event without fans, and further that there would be 'no fans at the Grand Prix'¹⁷⁸ that weekend. It will be observed that, when asked about other mass gatherings, the Premier said that each event was different and would have to be judged on its merits based on advice from the Chief Health Officer. The Premier made

¹⁷⁶ See below, [116]-[123].

¹⁷⁷ CB5478.

¹⁷⁸ CB5350.



no reference to the concert or to any other event save for the Australian Football League.

Information available

101 WTM submits that, despite AGPC's contractual obligations, it was not informed of Dr Sutton's 8:40am email. Amidst the increasing media storm about the cancellation of the Grand Prix race, WTM sought information from AGPC about the concert. WTM received no such information. It is submitted that the asymmetry of what was known is best captured in the following exchange between Mr Morrison and Mr Fletcher throughout the morning of 13 March 2020:¹⁷⁹

Mr Fletcher at 8:23am:	'It's all very fluid at the moment – as soon as I know and there's certainty you'll know'
Mr Morrison at 8:59am:	' http://www.skysports.com/share/11956439 '
Mr Morrison at 9:00am:	'No one is telling us anything Craig. Not cool. Call us please'
Mr Fletcher at 9:03am:	'Standby – it's volatile'
Mr Morrison at 9:04am:	'If media reporting this we should have been informed way before they knew'
Mr Fletcher at 9:09am:	'It's multi layered standby'
Mr Morrison at 9:10am:	'Victorian Premier has just announced no fans'
Mr Morrison at 9:10am:	'That sounds quite official'
Mr Morrison at 9:10am:	'And live across at networks'
Mr Morrison at 9:12am:	'??'
Mr Fletcher at 9:28am:	'Current confidential info is the Victorian Chief Health Officer has not imposed mass gathering restrictions in Victoria at this point.'
Mr Morrison at 9:40am:	'When can we get formal line? Very important'
Mr Fletcher at 9:50am:	'Tom from our operations team will call u soon with latest'
Mr Fletcher at 10:45am:	'Got text from Dept Health – they are getting advice and will come back to us – we'll be in touch.'

¹⁷⁹ CB873-874.



102 WTM waited to receive further information from AGPC before it decided how to proceed. There was, unsurprisingly, internal speculation as to what cancellation of the Grand Prix meant for its concert event.¹⁸⁰ As the day progressed, WTM began to prepare for both possibilities. Staff and contractors prepared a draft press release for the contingency that the concert would be cancelled.¹⁸¹ WTM contends that the suggestion by AGPC that the preparation of that announcement proves that WTM had decided to cancel the concert is fanciful and inconsistent with the evidence. In my view, as also discussed further in these reasons, it cannot be inferred that because WTM prepared for the possibility of cancellation by way of a press release, the terms the contents of which had to be agreed by a variety of stakeholders, this could be taken as evidence of an intention at the time to cancel the concert. In my view, the evidence with respect to the preparation of such a press release is merely indicative of prudent and sensible management on the part of WTM in a difficult and uncertain situation and where, should cancellation of the concert occur, it would be necessary to act quickly to advise patrons, the public and stakeholders. Moreover, the suggestion by AGPC that its contentions in this respect were confirmed by the fact that WTM did not prepare a press release announcing that the concert would proceed has no substance because, as WTM witnesses observed,¹⁸² such a press release would be a very simple matter, merely a confirmation of the status quo arrangements that the concert would proceed. Such a press release did not require prior consultation with stakeholders as it would have been merely the confirmation of an existing position.

103 At around 10:07am, Formula 1 released a statement notifying the cancellation of the Grand Prix.¹⁸³ AGPC issued a press release shortly after the Formula 1 statement.

104 Formula 1's statement made no reference to Dr Sutton's recommendation. Instead, the decision to cancel Formula 1 activity was said to have been made due to a majority of teams reaching a view that the race 'should not go ahead'. Its statement recorded that the decision was made after a member of the McLaren Racing Team had tested

¹⁸⁰ See, e.g. CB3430, 3434, 3522, 3525 and 3527.

¹⁸¹ See e.g. Ms Artmonsky's first witness statement dated 19 September 2022, [56] (CB195-196).

¹⁸² See below [148].

¹⁸³ CB3531-3532 and 3465; and see also CB3558.



positive for COVID-19 and after that team had decided to withdraw from the race. The withdrawal of McLaren meant that it would not be a championship, Formula 1, race. It also meant that, for practical reasons, cancellation followed because the services provided by the McLaren team to other teams would not be available.

105 Soon after, AGPC released its own press release which included the following:¹⁸⁴

At 9am today the Australian Grand Prix Corporation was advised by Formula 1 of their intention to cancel all Formula 1 activity at the Formula 1 Australian Grand Prix.

In light of this decision and updated advice this morning from the Chief Health Officer of the Victorian Government's Department of Human and Health Services, the Australian Grand Prix Corporation confirms the Formula 1 Australian Grand Prix is cancelled immediately.

Last night a member of the McLaren Racing team tested positive for the COVID-19 virus. A further seven individuals returned negative results, confirming that they do not have the COVID-19 virus.

Additionally, a ninth individual has been assessed and tested for the COVID-19 virus, with the results of this test pending. This individual is not associated with any Formula 1 team, the FIA or associated suppliers.

Our first priority is the safety of everyone including attendees, our personnel, all event partners and members of the local community.

As can be seen, the AGPC statement recorded that a decision had been made to cancel 'the Formula 1 Australian Grand Prix'. The statement referred to the decision being made in light of Formula 1's intention to cancel all Formula 1 activity at the Grand Prix and updated advice from the Chief Health Officer; seemingly a reference to Dr Sutton's recommendation referred to previously. As WTM observes, there was, again, no mention of the concert, the declared area, or all activities within the declared area.

106 There was some evidence that, at around 10:45am, representatives of WTM participated in a teleconference with Mr Mottram in which Mr Mottram said '[n]o thought' had been 'given to questions about' WTM's event.¹⁸⁵ That evidence, WTM says, is consistent with Mr Fletcher's WhatsApp message to Mr Morrison at 9:50am.

¹⁸⁴ CB465; and see CB3531-3532.

¹⁸⁵ CB3847.



referred to previously,¹⁸⁶ which read: ‘Tom from our operations team will call u soon with latest’. Mr Mottram could not remember saying this, but conceded it was possible he did.¹⁸⁷ That evidence is, WTM observes, inconsistent with his evidence that there was no ambiguity that the Chief Health Officer’s recommendation applied to the concert. At 12:30pm, Mr Beck, Mr Dainty and others attended a teleconference to discuss contingency planning. Mr Beck recalls that, in that conversation, Mr Dainty said that ‘it made no sense to cancel the concert because, if we were holding the event anywhere else in Victoria, it would be able to proceed’.¹⁸⁸

107 At 1:15pm, Mr Morrison, Ms Artmonsky, Mr Dainty, Mr Beck, Mr Grayson and Ms Smith attended a teleconference with Mr Fletcher. This call took place more than three and a half hours after it had been announced that the Grand Prix had been cancelled. It was, WTM says, its and TEG Dainty’s first opportunity to speak with someone from AGPC who they thought might be able to give them some clarification about their event.

108 WTM submits that the recollection of the witnesses of the key aspects of that teleconference is consistent. In essence, it is said that they all agreed that in response to being asked by Mr Dainty whether the concert could still go ahead, Mr Fletcher was unclear and could not give a definitive answer.¹⁸⁹ Mr Dainty became agitated and demanded that a phone call be arranged with someone who could give WTM a definitive answer. Specifically, WTM says:¹⁹⁰

- (1) **Mr Morrison** recalled that Mr Fletcher said the Grand Prix had been cancelled, but that he (Mr Fletcher) “could or would not say what that meant for our event”. He recalled Mr Dainty saying that “he wanted a clear answer from [Mr] Westacott...”.¹⁹¹ Under cross-examination, Mr Morrison explained that Mr Dainty became “very angry” “because of the ambiguity in Mr Fletcher’s messaging”.¹⁹²

¹⁸⁶ See above [101].

¹⁸⁷ CB483 [83].

¹⁸⁸ Mr Beck’s first witness statement dated 16 September 2022, [154] (CB177).

¹⁸⁹ Mr Fletcher’s recollection was that he said he was ‘hopeful’ the concert could still go ahead. See his statement at [40] and T321/16-23.

¹⁹⁰ *Plaintiff’s Outline of Closing Submissions* (12 June 2024), [149].

¹⁹¹ Witness statement of Mr Morrison dated 20 December 2022, [78]-[79] (CB258-259).

¹⁹² T271/5-6 (XXN of Mr Morrison).



- (2) **Ms Artmonsky** “dreaded” what Mr Fletcher might say in that call. She described what Mr Fletcher said as “very confused” and that it was “difficult to understand what we were being told”. She added “[it] was sort of noncommittal, it wasn’t saying hey, go ahead, it was just kind of going well it’s up to you, and yeah, it was very difficult to understand what that meant in the context of everything”.¹⁹³
- (3) **Mr Beck** similarly recalled that what Mr Fletcher said was ambiguous. He rejected a proposition that WTM was told “very clearly” in that call that “the concert could proceed”, and said “that is not my takeaway from the call at all”.¹⁹⁴
- (4) **Mr Fletcher** recalled that during that conversation he said words to the effect he was “hopeful” the concert could proceed and that “perhaps” it could. He recalled Mr Dainty saying words to the effect he wanted “100% confirmation either way”.¹⁹⁵
- (5) **Mr Dainty** recalled asking Mr Fletcher during that call “what the cancellation of the race meant for the concert and whether the concert could proceed”. He became frustrated as Mr Fletcher did not answer that question.¹⁹⁶ Under cross-examination, he later explained TEG Dainty and WTM were “doing everything to get answers from Craig Fletcher [about] whether we could proceed”. They needed “clear direction”. [Mr Fletcher] could not give that to them. It was only then that Mr Dainty “became a bit uncharacteristically upset”.¹⁹⁷ In response to being asked whether he “got upset” because it was his “plan not to proceed”, Mr Dainty categorically denied the question, saying: “That is absolutely just not the fact”.¹⁹⁸ In relation to the 2.08 pm call, Mr Dainty later added what Mr Westacott said was “obviously not what I wanted to hear, but I accepted what [Mr Westacott] relayed to us”.¹⁹⁹
- (6) **Mr Grayson’s** recollection was that Mr Fletcher in effect “[read] out ... [a] statement that” had previously been communicated, that what Mr Fletcher said was “uncertain”, and that he “didn’t give [a] clear position”.²⁰⁰ He described the “proposition that Craig Fletcher said clearly ... the event could proceed is inaccurate”.²⁰¹
- (7) **Ms Smith** similarly remembered feeling quite “dismayed” by Mr Fletcher on the call, and of his lack of understanding about WTM’s event.²⁰² She explained in cross-examination that her concern arose as “there was a lot more discussion that needed to happen at that stage”.²⁰³

¹⁹³ T193/23-30 (XXN of Ms Artmonsky).

¹⁹⁴ T271/1-4 (XXN of Mr Beck).

¹⁹⁵ Witness statement of Mr Fletcher dated 30 May 2024, [40]. See also T321/19-25 (XXN of Mr Fletcher).

¹⁹⁶ Witness statement of Mr Dainty dated 21 May 2024, [15] (CB5394).

¹⁹⁷ TT585/8-9, 585/27-31 and 586/1-5 (XXN of Mr Dainty).

¹⁹⁸ T586/8-9 (XXN of Mr Dainty).

¹⁹⁹ T597/12-13 (XXN of Mr Dainty).

²⁰⁰ TT362/4-6 and 363/26-28 (XXN of Mr Grayson).

²⁰¹ TT363/31 and 364/1-2 (XXN of Mr Grayson).

²⁰² Witness statement of Ms Smith dated 30 March 2023, [80] (CB327).

²⁰³ T415/8-9 (XXN of Ms Smith).



Thus WTM contends that each of its witnesses rejected the proposition that the concert could not proceed in the absence of the Grand Prix race²⁰⁴ and that WTM had itself made a decision to cancel the concert by this point in time.²⁰⁵ Moreover, as emphasised, in support of this contention, Mr Fletcher's evidence was that no one had said anything to him that caused him 'to believe that TEG Dainty or WTM wanted to cancel the concert, or did not want to proceed with their concert if they were allowed to do so'.²⁰⁶

109 AGPC, on the other hand, contends that when presented with the option of proceeding with the concert by Mr Fletcher during this call, that possibility was flatly rejected by Mr Dainty. On this basis it is submitted that the Court should infer that this can only be because a decision had already been made to cancel the concert. Moreover, it is said that there are three separate contemporaneous records which verify that Mr Fletcher said to the plaintiff's representatives and Mr Dainty that the concert could proceed and that this was rejected by the plaintiff. In my view, the evidence of what was said at the 1:15pm conference provides no basis for inferring that WTM had already made a decision to cancel the concert. The evidence establishes, in my view, quite the contrary and that any 'outburst' by Mr Dainty in the course of these discussions merely reflects frustration that, at four hours or so after the Premier's announcement at 9:00am, no representative of AGPC with authority to make a decision on its behalf had communicated AGPC's decision as to whether the concert could proceed.

²⁰⁴ See e.g. Mr Morrison's statement dated 20 December 2022, [87] (CB260); T198/14-19 (XXN of Ms Artmonsky); T257/18-24 and T270/20-23 (XXN of Mr Beck); T321/14-25 (XXN of Mr Fletcher); T359/29 - T360/4 (XXN of Mr Grayson); T415/3-19 (XXN of Ms Smith); T577/11-13 (XXN of Mr Dainty).

²⁰⁵ See e.g. T190/10-12 (XXN of Ms Artmonsky); T268/5-10 (XXN of Mr Beck); T296/2-12 and 302/10-13 (XXN of Mr Morrison); T369/4-17 (XXN of Mr Grayson); T572/11-13 and T584/31 - T585/11 (XXN of Mr Dainty).

²⁰⁶ See Witness Statement of Craig Fletcher dated 30 May 2024, [40] CB5546. See also [57]-[60] CB5551-5552. See also T321/5-25 (XXN of Mr Fletcher).



110 AGPC contends that there are three separate contemporaneous records verifying the position put in its submissions:²⁰⁷

- (a) the timeline prepared by WTM employees and contractors on 29 and 30 March 2020 which reflected their “collective memory of the events of 12th/13th March”,²⁰⁸ and which was signed off by Apollo General Manager Samantha Smith, who intended the record to be a reliable record. That timeline recorded that in the 1.15 pm meeting on Friday 13 March 2020, Craig Fletcher communicated to WTM that “despite the race cancellation due to safety concerns [AGPC] were comfortable for the Saturday evening [World Tour] event to proceed. This was challenged strongly and a more formal response was sought;²⁰⁹
- (b) an email from Mr Grayson to Benjamin Arnall of TEG Dainty dated 1 April 2020, which was copied to Mr Beck and Mr Dainty, which states: “There were also many calls with AGPC in the days running up to the event and on the day of cancellation. I was only one of those in the early afternoon of Friday 13th. Paul D was too. On that call they informed us that we could go ahead with our event notwithstanding that the GP was cancelled. We (Paul) told them correctly that was ludicrous”;²¹⁰
- (c) an email from Ms Artmonsky to Mr Westacott, copied to Mr Fletcher, Mr Dainty, Mr Morrison, Mr Beck and Mr Grayson dated 26 April 2020, which stated: “In fact, we were told by AGPC on a call at 1.15 pm on Friday 13th March that our event could go ahead as the government position was only advisory but this was subsequently reversed in the call which you joined shortly thereafter”.²¹¹

On the basis of these documents, it is submitted by AGPC that the response of WTM was not, words to the effect of, ‘thank you, we will be proceeding with the concert’, rather that it would be ‘ludicrous’, was ‘challenged strongly’, and ‘more formal advice was sought’. It is said that if WTM had wished to run the concert, this would not have been their response and that response is inconsistent with an intention to proceed with the concert. In my view, these responses are both consistent with an intention to proceed with the concert together with WTM’s frustration at the failure of AGPC to provide definitive and authoritative confirmation that the concert could or could not proceed.²¹² In this respect, I do not accept the submissions by AGPC that the matters

²⁰⁷ *Defendant’s Outline of Closing Submissions* (12 June 2024), [108].

²⁰⁸ CB3847.

²⁰⁹ CB3892-3893; Witness Statement of Samantha Smith [86] CB329; T401.8-9 (XXN of Mr Smith); T402.1-5 (XXN of Mr Smith).

²¹⁰ CB3934.

²¹¹ CB4013-4014.

²¹² Cf *Defendant’s Outline of Closing Submissions* (12 June 2024), [109]-[111].



which it relied upon in support of its contentions can be regarded as ‘objective facts’ against the position being put by WTM. More particularly, AGPC made reference to Mr Beck’s denial of the version of the conversation recorded by Mr Grayson in his email on 1 April 2020, describing it as ‘entirely erroneous’, notwithstanding that he received the email at the time and did nothing to correct it.²¹³ He also denied the truth of the version to similar effect set out in the email from Ms Artmonsky to Mr Westacott on 26 April 2020.²¹⁴ The critical aspects of this email, to which reference was made by AGPC in its submissions, is the following statement:²¹⁵ ‘In fact, we were told by AGPC on a call at 1:15pm on Friday 13th March that our event could go ahead as the government position was only advisory but this was subsequently reversed in the call which you joined shortly thereafter’.²¹⁶ Again, in my view, these documented communications and responses on questioning about them merely evidence the concern of WTM, and also TEG Dainty, at the lack of clear and definitive response by AGPC to the question whether or not the concert could proceed.

111 Additionally, AGPC seeks to maintain its contention that WTM had already decided to cancel the concert at about 1:15pm by reference to the, so-called, timeline in Mr Grayson’s email of 1 April 2020; a document which Mr Grayson described as a mere ‘internal working record’,²¹⁷ with the concession that the purpose of the timeline was for use in seeking to recover costs of the cancelled concert.²¹⁸ AGPC submits that Mr Grayson’s evidence should be rejected as that of a witness unwilling to concede objective facts which he perceived would be adverse to the plaintiff’s case. Further, it is said that it strains credulity to suggest that those three, independently written, contemporaneous documents were erroneous and that the evidence of witnesses, prepared 2-3 years later, should be preferred. Ms Smith, in contrast, it is said, was much more forthright in accepting that the timeline was intended to be a reliable

²¹³ T273.5-19 (XXN of Mr Beck).

²¹⁴ T274.3-16 (XXN of Mr Beck).

²¹⁵ See *Defendant’s Outline of Closing Submissions* (12 June 2024), [230].

²¹⁶ CB4014.

²¹⁷ T364.20-21 (XXN of Mr Grayson).

²¹⁸ T364.29-31 (XXN of Mr Grayson).



record of the events on the day.²¹⁹ In my view, the submissions of AGPC in this respect should be rejected on the basis that, at best, it might be said that these documents are ambiguous. They must be viewed in the context of the evidence, particularly the documentary evidence, as a whole. In my view, this is a particularly apposite observation having regard to the absence of evidence which would support the view that there was any commercial imperative or commercial reason, more generally, why WTM or TEG Dainty would be likely to be seeking cancellation of the concert. Strong and consistent evidence is very much to the contrary.

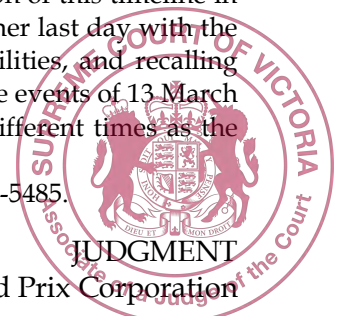
2:08pm call

- 112 Mr Fletcher arranged for a subsequent telephone call to take place with Mr Westacott. That call was at 2:08pm and various representatives attended, including Ms Artmonsky, Mr Morrison, Mr Dainty, Mr Beck, Ms Smith, Mr Westacott, Mr Mottram and Ms Hill. As WTM observes, by the time the 2:08pm call took place, it had been over six hours since the 8:00am call took place between AGPC and Dr Sutton, and over five hours since the Premier's announcement.
- 113 The 2:08pm call was also recorded by AGPC and a transcript has been agreed.²²⁰ During the call, Mr Westacott said, as follows:

We received some information overnight ... based on the science and epidemiology of this [COVID19] virus ... in writing ... *that there were two alternatives for activities at the Grand Prix. One was immediate cancellation, or the second was relating to ... closed-door, but that was ... hit on the head very quickly. So, it became ... one, which was cancellation, and that doesn't have any exclusions of anything. ... [I]t's a blanket directive from the Chief Health Officer and government ... And overnight ... early this morning, when Paul Little and I had been talking to the Minister and Premier about things, it was about the cancellation of the event in its entirety, and that will include, sadly, for all of us, the cancellation because of government directive [of] the ... World Tour concert on the Saturday night ...*

²¹⁹ T401.8-9 (XXN of Mr Smith). Ms Smith provided further context for the production of this timeline in addressing that her request for the timeline occurred within four or five days of her last day with the business and such a timeline was necessary for the handover of her responsibilities, and recalling various requests from TEG Dainty and Mr Morrison for details of the timing of the events of 13 March 2020, in light of the fact that the people involved were in various locations at different times as the events unfolded (at T400:24-T401:13).

²²⁰ The enhanced recording is at CB3578 (tab 553). The agreed transcript is at CB5483-5485.



... *There's not any questioning about this. There's not roads to appeal. There's not other things. It's just one of those unfortunate things we have to deal and move on with ...*

... I would have loved to have been there listening to things along with thousands of others across the Grand Prix week and everything, but I can't be ... It's the right thing to do. And we'll all have to work on the – the fallout of this and the Premier and Minister and others in government that have been communicated are cognisant that there's impact in many, many areas and – and you know, you can bet your bottom dollar that's taken into account by them when the discussions and decisions are made. *But what I learned all along is that the Chief Health Officers and the medicos are the ones who are quite rightfully calling the directions and the shots, and it's all the other things that take direction from those ... We will confirm it in writing, okay?*

[WTM's emphasis]

In relation to these statements by Mr Westacott, WTM says that its immediate response is that there had been no 'directive' from the Chief Health Officer that the concert must be cancelled nor had there been a 'blanket directive' from the Chief Health Officer about 'all activities' at the Grand Prix. There had been, at most, it is said, a recommendation about the Grand Prix race itself. WTM made further submissions in relation to other aspects of Mr Westacott's statement and those submissions are addressed in the reasons which follow.

114 Further and contrary to what Mr Westacott said during that call, WTM says he was apparently aware that Dr Sutton's advice did not extend to the concert. In support of this position, WTM makes reference to a text message sent to Minister Pakula shortly after the 2:08pm call where Mr Westacott said as follows:²²¹

FYI

RE CONCERT

We have just pulled the pin. Based on CHO advice that it was cancellation or no crowd for GP - neither of which is plausible for a concert. also avoids ambiguity with decision made on the GP.

Paul Dainty was on the call.

More particularly, WTM submits that it should be inferred from this text message that Mr Westacott: (1) understood Dr Sutton's recommendation was for the 'GP' (Grand

²²¹ CB3440.



Prix race); (2) understood if the concert was not cancelled, there would be 'ambiguity' as to why the race was cancelled but the concert was not; and (3) decided himself to 'pull the pin' on the concert in order to avoid this perceived ambiguity; and (4) understood there was no direction from Dr Sutton about the concert. In my view, subsequent communications, namely the 2:50pm texts on that day, lend significantly strong support to these inferences for which WTM contends.

115 At 2:26pm, Mr Beck emailed key stakeholders notifying them that the concert had been cancelled and asking that the recipients 'let all talent know'.²²² At 2:34pm, Mr Beck emailed Mr Fletcher the text of a proposed press release to this effect. Mr Fletcher responded at 2:50pm, copying Mr Rosengarten, and confirming that AGPC was happy with WTM's proposed draft press release.²²³

2:50pm texts

116 Despite AGPC having:

- (1) already represented to WTM that the Chief Health Officer had directed that the WTM concert be cancelled; and
- (2) become aware that WTM would announce that cancellation and be offering ticketholders a full refund;

at 2:52pm that afternoon, AGPC asked Dr Sutton whether he recommended that the concert be cancelled 'in line with' Dr Sutton's recommendation on the Grand Prix race.

117 In a text message sent to Dr Sutton at 2.52pm, Mr Mottram said:²²⁴

Hi Brett, Tom from Grand Prix. We've had further considerations about staging the concert on Saturday night. Although it's a separately ticketed event it is still within our venue and in our declared area. There will be many of the same crowds also. Is it therefore your opinion that the concert should be cancelled in line with the Grand Prix cancellation?

²²² CB3585.

²²³ CB3586.

²²⁴ CB3591.



118 Mr Mottram’s evidence was that Ms Hill, who had attended the 2:08pm call, directed him to write a message to Dr Sutton along those lines.²²⁵ Mr Mottram’s evidence was that Ms Hill had told him about Mr Westacott telling WTM that the Chief Heath Officer had recommended that the event, including the concert, was cancelled. Ms Hill then asked Mr Mottram to text the Chief Heath Officer and get ‘absolute confirmation’ from him that his recommendation applied to the concert. Ms Hill asked Mr Mottram to ‘[w]rite it along these lines’: ‘mention it is a separately ticketed event, same crowds’ and that she needed from him ‘a yes/no cancel’.²²⁶

119 WTM made a number of points with respect to the text that was being sent by Mr Mottram. In my view, these are very telling points which strongly, if not unequivocally, support the contentions made by WTM with respect to communications and meetings during the day beginning with the 8:00am meeting and whatever discussions may have taken place before that meeting. More particularly, WTM contends:²²⁷

- (1) It may be inferred that the text message would never have been sent at all had the AGPC been advised by Chief Health Officer that “there could be no crowds within the declared area of the Grand Prix and that covered the concert” as the AGPC contends.²²⁸ Likewise, Ms Hill would not have been seeking to get “a yes/no cancel” answer from Dr Sutton if this was the case.
- (2) The reference to having “further considerations about staging the concert” is inexplicable. By the time of this text, the concert was in the process of being cancelled. Mr Mottram conceded in cross-examination that at this point there was no ongoing consideration about staging the concert.²²⁹
- (3) The reference to the concert being “a separately ticketed event” “on Saturday night” acknowledged that the concert was a separate “event” to the Grand Prix race and that staging the concert the following night was a separate consideration to running the race. Objectively, the concert was a “separate” event for the reasons outlined above.

²²⁵ See Mr Mottram’s statement dated 26 June 2023, [87] (CB484). See also T490/4-28.

²²⁶ See Mr Mottram’s statement dated 26 June 2023, [87] (CB484). See also generally TT490-491 (XXN of Mr Mottram).

²²⁷ *Plaintiff’s Outline of Closing Submissions* (12 June 2024), [163].

²²⁸ T78/9-11. See also Amended Defence to the Amended Statement of Claim, [10E(aa)] and Defendant’s Outline of Opening Submissions, [38].

²²⁹ T491/27-29 (XXN of Mr Mottram).



- (4) It should be inferred from the 'leading' form of the message, that the AGPC was looking to solicit a response that supported ex post facto the position it had communicated to WTM on the 2:08pm call.
- (5) That the text was intended to elicit an affirmative response from Dr Sutton is also evident from the facts selectively referred to in the text in support of cancellation. For example, the suggestion that the concert was in the same venue or area as the race and would have many of the same crowds was incomplete and apt to mislead. For example, the suggestion that the concert is in the same venue or area as the race and will have many of the same crowds was incomplete. The concert was to be in a separate stadium to the race and would have had much smaller crowds. The issue of Formula 1 team member testing positive to COVID-19, which led to the decision to cancel the race, had no relevance to the concert.
- (6) Finally, the reference to the concert being cancelled "in line with" the "Grand Prix cancellation" is an acknowledgment that the recommendation provided by Dr Sutton earlier that day had been limited to the Grand Prix race.

120 As submitted by WTM, just as telling as the text message to Dr Sutton at 2:52pm was the Chief Health Officer's response at 2:55pm, which was as follows:²³⁰ 'I'd absolutely support that decision. I think it's ultimately for organisers.'

121 As WTM contends, I accept that it may be inferred that had the Chief Health Officer advised that 'there could be no crowds within the declared area of the Grand Prix and that covered the concert' as AGPC contends, he would have asked why the question was being asked at all at 2:52pm, but in any event would have confirmed the position in answer to Mr Mottram's text message. Dr Sutton also responded: 'I'd absolutely support that decision. I think it's ultimately for organisers'. It is, in my view, very clear from this language and in the context of the communications eliciting this response from the Chief Health Officer that his advice on the concert was that, while he would support a decision to cancel, the decision to cancel or proceed with the concert was 'ultimately [a matter] for the organisers'; the organisers being WTM and TEG Dainty. AGPC sought to argue that this reference to 'the organisers' referred to AGPC as the 'organiser' of the Grand Prix and the Grand Prix events in total. However, this is, in my view, at odds with the clear language and the context in which this text message response from Dr Sutton was provided. Clearly, as the text message

²³⁰ CB3591.



was in response to a question addressed to him from AGPC, it would reasonably be inferred that if Dr Sutton had meant that ‘the organisers’ was a reference to AGPC, he would (1) not have used the plural; and (2) used the word ‘you’ or a reference to the AGPC – or even the Minister – were the position otherwise than a reference to WTM and to TEG Dainty.

122 As WTM observes, no doubt this response from Dr Sutton put AGPC in a very difficult position as:²³¹

- (1) The Chief Health Officer had previously made no recommendation, much less direction, about the WTM concert;
- (2) Nevertheless, Mr Westacott had incorrectly represented to WTM and TEG Dainty that the Chief Health Officer and the Victorian Government had directed that the concert be cancelled. It was, to use his words, “a blanket directive from the Chief Health Officer and government” from which there was no “questioning” or “roads for appeal”;²³²
- (3) Mr Westacott had informed Minister Pakula that he had “pulled the pin” on the WTM concert to avoid ambiguity with the decision made on the Grand Prix race;
- (4) By around this time, following the 2:08pm call, WTM and TEG Dainty had notified ticketholders of the cancellation and had offered ticketholders full refunds. WTM had published a Tweet at 2.53 pm, and TEG Dainty had published a Tweet at 2.59 pm, notifying the public of the decision;²³³
- (5) When asked to confirm that the concert should be cancelled, Dr Sutton’s response was to the effect that while he would support that decision it was ultimately a matter for the organisers, which was contrary to the representation that had been made to WTM; and
- (6) Moreover, WTM had asked that the position be “confirmed in writing” by the AGPC, which Mr Westacott had agreed to do.

123 At 3:18pm, WTM published a statement notifying the public that the concert had been cancelled. AGPC published a similar statement at around 3:34pm.²³⁴ WTM was not provided with a copy of the 8:40am email or the 2:52pm text from Dr Sutton before it made that announcement or at any time prior to the proceeding. Worse still, WTM

²³¹ *Plaintiff’s Outline of Closing Submissions* (12 June 2024), [168].

²³² Cf. CB5484.

²³³ CB3587-3589 and CB3592-3596.

²³⁴ CB3608 and CB3610.



contends, and after receiving Dr Sutton’s text message, as explained below, AGPC continued to misstate the position to WTM.

AHPPC’s announcement

124 At around 3:09pm, the Prime Minister, the Minister for Health and the Chief Medical Officer of the Commonwealth issued the 3:00pm AHPPC announcement.²³⁵ In that announcement they said as follows:

Based on the expert medical advice of the Australian Health Protection Principal Committee (AHPPC), Commonwealth, State and Territory governments have agreed to provide public advice against holding non-essential, organised public gatherings of more than 500 people from Monday 16th March 2020 ...

Dr Sutton, as the Victorian Chief Health Officer, was a member of the AHPPC. As was evident from the 8:00am phone call and Mr Westacott’s notes of his conference with the Chief Health Officer the prior evening, Dr Sutton was communicating with other Chief Health Officers. It was also evident that the Chief Medical Officer, Chief Health Officers and governments of the Commonwealth, States and Territories were acting in unison with respect to the advice concerning mass gatherings in the 3:00pm AHPPC announcement.

125 AGPC criticized WTM’s submissions that the relevant advice of the Chief Health Officer that applied to the concert was contained in that announcement.²³⁶ AGPC submitted that this contention should be rejected and that the advice of the Chief Health Officer relevant to the Grand Prix was given directly by the Chief Health Officer during the 8:00am call and in the 8:42am email and was not changed before or after the 2:08pm teleconference, based on circumstances peculiarly relevant to the Grand Prix.²³⁷ At the core of the submission is the following:²³⁸

141. In response to the proposition that the concert could have run consistent with the advice of the AHPPC, Mr Westacott said that the AHPPC “didn’t have jurisdiction over the entities in the – in our event”.²³⁹ The Court questioned whether that was a serious answer. It

²³⁵ CB561-562. See also CB5622 and CB5623.

²³⁶ *Defendant’s Outline of Closing Submissions* (12 June 2024), [137].

²³⁷ See *Defendant’s Outline of Closing Submissions* (12 June 2024), [138]-[145].

²³⁸ *Defendant’s Outline of Closing Submissions* (12 June 2024), [141]-[144]

²³⁹ T459/12-14 (XXN of Mr Westacott).



was. In answering the question Mr Westacott was plainly alluding to the fact that, in relation to the cancellation of the Grand Prix event, the AGPC was acting on the advice of the Victorian CHO that was specific to the Grand Prix. He did not consider the AHPPC announcement relevant because AGPC was taking advice directly from the Department of Health and Human Services and from Dr Sutton in relation to the event.²⁴⁰

142. During his announcement of the AHPPC advice, the Prime Minister acknowledged the:

- (a) then present risk of the COVID-19 pandemic: “there is growing evidence as we received particularly overnight and over the course of the day of greater community transmission of the coronavirus throughout Australia”²⁴¹ ... “based on the advice we’ve received today about the increasing number of cases and the evidence of community transmission”;²⁴²
- (b) accepted evidence of community transmission in mass gathering events: “all the international evidence suggests that if you have some community transmission the way in which it can be spread more rapidly is in very large event, you might only have one or two people at a very large event who might be carrying the virus and the chances of that being spread at those large events accelerate the rate of progression of the virus. So, this is a precautionary measure on the basis of the number slowly increasing over the course of the last week in Australia”.²⁴³ This was followed by statements by Professor Brendan Murphy that “we’re talking about a static gathering where people are together for a period of perhaps up to two hours, is generally where you have a high risk of exposure”;²⁴⁴
- (c) measures already adopted by the Government in response to that risk: “We certainly introduced very aggressive measures early on”;²⁴⁵
- (d) autonomy of the States and Territories to make their own decisions in relation to the management of the risk of the COVID-19 pandemic: “Practical issues about the management of the national response to the coronavirus, each and every State and Territory that is represented here is completely sovereign and autonomous in the decisions that they make”.²⁴⁶

143. These announcements make clear large gatherings posed are real risk for the spread of coronavirus and that the States, including Victoria, had autonomy over practical management. It is to be remembered that WTM allege that at least 21,000 patrons would have attended the

²⁴⁰ T465/2-17 (RE-XN of Mr Westacott).

²⁴¹ CB1251 at 1:58-2:09.

²⁴² CB1251 at 5:35-5:41.

²⁴³ CB1251 at 11:09-11:40.

²⁴⁴ CB1251 at 13:33-13:44.

²⁴⁵ CB1251 at 10:42-10:46.

²⁴⁶ CB1251 at 8:25-8:37.



14 March 2020 concert. That is 42 times the 500-patron threshold referred to in the AHPPC recommendation.

144. The Court should reject the contention that AGPC should have followed the general advice of the AHPPC in circumstances where it had specific, individualised advice from the Victorian CHO that the Grand Prix and related spectator based activities should be cancelled or run without crowds so as to avoid the risk of spread of coronavirus from large numbers of spectators in close proximity. The corollary of WTM's contention is that AGPC was free to have reopened the gates to spectators and run all events scheduled for the declared area other than Formula 1. That would have plainly been contrary to the CHO's advice.

126 In my view, these submissions by AGPC entirely miss the point that WTM was making in its submissions. I do not take WTM to be submitting that the AHPPC announcement was directly applicable because it is made clear that it was for the States and Territories to make their own decisions in relation to the management of the risk of the COVID-19 pandemic, as the then Prime Minister acknowledged. The position in Victoria was, as indicated previously, that restrictions on mass gatherings were not imposed until Monday 16 March 2020, the day upon which the State of Emergency was declared in Victoria. Rather, in my view, the WTM submissions in the respect seek to make what must be regarded in the circumstances as a very obvious point, namely that throughout 13 March 2020 and prior to discussions at 8:00am on the morning of that day, Dr Sutton was very aware of issues with respect to mass gatherings and also aware that he had no power to make directions with respect to mass gatherings until the state of emergency was declared in Victoria, in response to the national coordinated approach by all governments which led to the AHPPC announcement.

127 It follows, nevertheless, that it might be said that WTM was contending that the advice of Dr Sutton should be understood as reflecting an approach consistent with the AHPPC announcement and the then lack of any restrictions in Victoria on mass gatherings. Moreover, it is consistent in light of other mass gathering events which occurred on Saturday and Sunday 14 and 15 March 2020, including the New Order concert at the Sidney Myer Music Bowl in Melbourne, in the absence of such



restrictions.²⁴⁷ This concert was attended by 8,634 people, and there were also National Rugby League matches held around the country that weekend. It is quite clear that if the concert venue had been, for example, the Sidney Myer Music Bowl, the MCG, or anywhere else in Victoria – apart from the Grand Prix declared area – there would not have been any obstacle to its going ahead on 14 March 2020 – and whether it did would, clearly, be a matter for the organisers of the concert. In effect, Dr Sutton was, in my view, in his response to the 2:52pm text to him from AGPC saying just this. However, in light of his knowledge and the work he had been undertaking with respect to the COVID-19 pandemic, particularly leading up to the AHPPC meeting, he would be happy to support a decision not to proceed with a concert or any other mass gatherings; but that was a matter for the organisers of those gatherings.

4:25pm email

128 After the concert had been cancelled, and ticketholders informed, Mr Fletcher at 4:25pm emailed WTM and TEG Dainty on behalf of AGPC. The subject line of that email was ‘World Tour Live Show advice’. The email, which was intended to be the written confirmation of what had been communicated at 2:08pm call,²⁴⁸ read as follows:²⁴⁹

Dear Paul and Paul,

On 13 March 2020, the *Chief Health Officer* of the Victorian Government’s Department of Health & Human Services *advised* the Australian Grand Prix Corporation that *the Formula 1 Australian Grand Prix must be cancelled or run patron-free.*

This advice extends to other activities within the Declared Area/venue.

The final decision on the World Tour Melbourne sits with the organisers, but this advice must be followed.

Regards

Craig

[WTM’s emphasis]

²⁴⁷ See Mr Dainty’s statement dated 21 May 2024, [25] (CB5396).

²⁴⁸ See CB5484.

²⁴⁹ CB3614.



129 Mr Fletcher’s evidence was that this email was drafted by either Ms Norris or Mr Rosengarten, each legal counsel for the AGPC at the time.²⁵⁰ Neither Ms Norris nor Mr Rosengarten were called to give evidence.

130 On Monday, 16 March 2020 a State of Emergency was declared in Victoria. As a result, Dr Sutton was empowered to make certain decisions as the Chief Health Officer under the *Public Health and Wellbeing Act 2008*. Dr Sutton’s *first* direction included a ban on non-essential mass gatherings to take effect from midday on 16 March 2020.²⁵¹ AGPC and its witnesses acknowledged that the Chief Health Officer had no power to direct, and had not directed the cancellation of any mass gathering, including the concert, prior to 16 March 2020.²⁵²

Liability: Misleading or Deceptive Conduct (Agreed Issues 1-5)

Overview

131 It is not in dispute that AGPC was a ‘person’ engaged in ‘trade or commerce’ with WTM and, consequently, subject to the statutory prohibition contained in s 18 of the ACL. WTM contends that AGPC contravened s 18 of the ACL on two occasions: first, during the 2:08pm call, and secondly, in the 4:25pm email both on 13 March 2020. On each occasion, WTM contends that AGPC made representations to it about present facts that were objectively false. WTM claims to have relied upon those misrepresentations and suffered significant losses as a result.

Agreed Issues 1-5

132 Five issues arise with respect to WTM’s misleading or deceptive conduct case. Issues 1-3 concern the 2:08pm call, and issues 4 and 5 concern the 4:25pm email.

Principles

133 Section 18(1) of the ACL provides that ‘[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’. In assessing whether there had been misleading or deceptive conduct in the context

²⁵⁰ Witness Statement of Craig Fletcher dated 30 May 2024, [47] (CB5548).

²⁵¹ CB3701-3705.

²⁵² T445/18-30 (XXN of Mr Westacott) and T508/19-31 (XXN of Mr Mottram).



of the provision, a two step analysis is required. First, it is necessary to ask whether each of any of the pleaded representations is conveyed by the facts, and second, it is necessary to ask whether the representations conveyed are false, misleading or deceptive, or likely to mislead or deceive.²⁵³

134 The question whether conduct is misleading or deceptive, or is likely to mislead or deceive, is an objective question of fact that is to be determined on the basis of the conduct of the respondent as a whole viewed in the context of all relevant surrounding facts and circumstances, including both internal and external factors operative at the time the representation was made.²⁵⁴ It is wrong to ignore the wider context.²⁵⁵ A representation may be oral, in writing or be implied from words or conduct.²⁵⁶

135 In *Butcher v Lachlan Elder Realty Pty Ltd*,²⁵⁷ a majority of the High Court held that:

it is important that the ... conduct be viewed as a whole. It is not right to characterise the problem as one of analysing the effect of its “conduct” divorced from ... circumstances which might qualify its character. Everything relevant ... must be taken into account.

136 In *Campbell v Backoffice Investments Pty Ltd*,²⁵⁸ Gummow, Hayne, Heydon and Kiefel JJ quoted with approval the following passage from the judgment of McHugh J in *Butcher*,²⁵⁹ which passage has particular relevance in this case:

The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct. Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole.

²⁵³ *SPEL Environmental Pty Ltd v IES Stormwater Pty Ltd* [2022] FCA 891, [34]-[35].

²⁵⁴ *ACCC v Employsure Pty Ltd* [2021] FCAFC 142, [75]; see also what Gibbs CJ said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199.

²⁵⁵ (1982) 149 CLR 191, 199.

²⁵⁶ *Given v Pryor* (1979) 24 ALR 442, 446.

²⁵⁷ (2004) 218 CLR 592, 605 [39].

²⁵⁸ (2009) 238 CLR 304 (*‘Campbell’*), 341-2 [102].

²⁵⁹ (2004) 218 CLR 592, 625 [109].



137 French CJ said in *Campbell*²⁶⁰ that '[t]he test is necessarily objective'. The Chief Justice went on to say that '[t]his Court has drawn a practical distinction between the approach to characterisation of conduct as misleading or deceptive when the public is involved, on the one hand, and where the conduct occurs in dealings between individuals on the other',²⁶¹ and that:²⁶²

[i]n the case of an individual ... [c]haracterisation may proceed by reference to the circumstances and the context of the questioned conduct. The state of knowledge of the person to whom the conduct is directed may be relevant, at least insofar as it relates to the content and circumstances of the conduct.

138 The impugned representation must be examined from the perspective of a reasonable person in the position of the party claiming to have been misled or deceived.²⁶³ 'Conduct that objectively leads one into error is misleading'.²⁶⁴ In this respect, emphasising objectivity, O'Bryan J observed in *ASIC v Dover Financial Advisers Pty Ltd*²⁶⁵ that 'the Court is able to assess whether the conduct is likely to mislead or deceive in light of the objective circumstances, including the known characteristics of the individual concerned'.

139 Where a claimant claims relief to compensate them for loss and damage they have suffered, they must establish the misleading or deceptive conduct of the other person caused them loss or damage: ss 236(1)(a) and 237(1)(a) of the ACL. In *Butcher*, the plurality said:

[t]he plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone.²⁶⁶

²⁶⁰ *Campbell* (2009) 238 CLR 304, 319 [25].

²⁶¹ *Campbell* (2009) 238 CLR 304, 319 [26].

²⁶² *Campbell* (2009) 238 CLR 304, 319 [26].

²⁶³ *Ireland v WG Riverview Pty Ltd* (2019) 101 NSLWR 658, 673 [65] (Macfarlan JA, with whom Bell ACJ and Barrett AJA agreed at [1] and [91] respectively).

²⁶⁴ *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 635-6 [111] (McHugh J).
²⁶⁵ [2019] FCA 1932, [99].

²⁶⁶ *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 604-5 [37] (Gleeson CJ, Hayne and Heydon JJ).



140 A statement made by a person ‘honestly believing it to be true’ may nevertheless ‘give rise to liability, notwithstanding that person’s belief in its truth because, to the target audience, that statement has presented as one of fact, and not of opinion or belief’.²⁶⁷

141 There is no issue in this case that the impugned representations were statements of opinion or belief. Rather, each of them was presented as fact. Representations as to a past or present fact will be misleading or deceptive if false. Moreover, a representation will remain ongoing where there is an obligation to correct it if it is or becomes untrue. In this case, WTM submits that there was such an obligation on AGPC.

142 Lastly, and where a person is alleged to have contravened s 18(1) of the ACL by making a statement of past or present fact, its ‘state of mind is immaterial unless the statement involved the state of the corporation’s mind’.²⁶⁸ Again, there is no issue in this case that the impugned representations involved a statement of corporate mind. Rather, as WTM emphasises in its submissions, the representations were as to fact. As such, the AGPC’s state of mind is irrelevant in this case.

The misrepresentations

The first misrepresentation

143 WTM contends that the first misrepresentation arose from the 2:08pm phone call. The relevant part of the transcript of that call relied upon has been set out previously in these reasons.²⁶⁹

144 WTM submits that in the 2:08pm call, as was conceded in cross-examination,²⁷⁰ Mr Westacott on behalf of AGPC represented to WTM, in substance, that the Grand Prix and concert were cancelled because of a directive from the Chief Health Officer, Dr Sutton. It is said that by that conduct, AGPC represented to WTM, in trade or commerce, that the Grand Prix and the concert have been cancelled because the Chief

²⁶⁷ *Ireland v WG Riverview Pty Ltd* (2019) 101 NSLWR 658, 666-7 [33] (Bell ACJ) citing *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197.

²⁶⁸ *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88 (Bowen CJ, Lockhart and Fitzgerald JJ).

²⁶⁹ See above, [113].

²⁷⁰ *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88 (Bowen CJ, Lockhart and Fitzgerald JJ).



Health Officer of Victoria, Dr Sutton, had determined (directed) that both events could not proceed ('First Misrepresentation'). This is, WTM says, its answer to agreed issue 1.

145 Further, WTM submits, as Mr Westacott also conceded in cross-examination,²⁷¹ the First Misrepresentation was inaccurate because there was never any directive from Dr Sutton. Dr Sutton had no power to give a directive at the time as the declaration of the State of Emergency did not occur until the following Monday, 16 March 2020. Thus, it is said, it is clear that Dr Sutton gave no directive to AGPC on 13 March and, as such, it was objectively misleading or deceptive, or likely to mislead or deceive to represent that he did so. This is, WTM says, its answer to agreed issue 2.

146 WTM says that AGPC's defence on issues 1 and 2 is unclear. In opening, it was argued that Mr Westacott 'didn't say that the Chief Health Officer had specifically said that the concert was cancelled'.²⁷² WTM contends that that assertion is not maintainable in light of the evidence of what was said in the transcript and of the 2:08pm phone call and the concession made by Mr Westacott in cross-examination.²⁷³

147 In reliance on the First Misrepresentation, WTM (1) notified ticketholders and stakeholders that the concert was cancelled, (2) arranged for tickets to be refunded, and (3) did not run its event or earn any revenue from it. That is, WTM says, its answer to agreed issue 3.

148 WTM submits that the consistent evidence of the witnesses called by WTM was that, had they been allowed to run the concert on 14 March 2020, they would have done so. The AGPC defence on issue 3 is that WTM and TEG Dainty had allegedly already decided to cancel the concert prior to the 2:08pm call. This, it is said, remains nothing more than a speculative theory as the proposition was put to almost every one of WTM's witnesses and was resoundingly rejected. AGPC took those witnesses to numerous documents. Mr Morrison, Ms Artmonsky and Mr Dainty unequivocally

²⁷¹ T447/18-25 (XXN of Mr Westacott).

²⁷² T107/22-23 (Defendant's Opening Submissions).

²⁷³ T446/22-25; T447/15-17 (XXN of Mr Westacott).



rejected the suggestion that they had decided to cancel the concert before the 2:08pm phone call. Their consistent evidence, WTM contends, is that it and TEG Dainty wanted to run the concert if they could. That evidence is, it is said, rational and was supported by contemporaneous records and the events of 13 March 2020.

149 AGPC, on the other hand, submits that the position is quite contrary to the position put by WTM and that, in summary, the First Misrepresentation will not be established because no such representation was made. Further, it says that at least by 1:15pm, and certainly by 2:08pm, WTM had decided not to stage the World Tour Melbourne concert.²⁷⁴ Additionally, it is contended that the alleged First Misrepresentation was not misleading or deceptive in any event.

150 The denial by AGPC that the First Misrepresentation was made is based on the statements made by Mr Westacott, to which it made reference in its closing submissions:²⁷⁵

65. At the outset of the call, Westacott stated that his comments related to “the ‘event’ in the broader context”. He went on to state that it was a “cancellation ... that doesn’t have exclusions of anything – it’s a blanket directive from the Chief Health Officer”. He later said, “when Paul Little and I had been talking to the Minister and Premier about things, it was about the cancellation of the event in its entirety”.

66. When communicating the cancellation of the concert, he said that “*the cancellation of the event in its entirety ... will include ... the cancellation, because of government directive, of the world tour concert on the Saturday night*” (emphasis added). That was not a statement that the CHO had separately determined that the concert could not proceed. It was a statement that, in light of the cancellation of the Event, the concert was cancelled.

It must be observed that the focus on these statements alone and out of the context of both the whole of the discussion in the 2:08pm call, not to mention being out of context of the events and discussions and communications preceding the call on 13 March 2020, does not provide the whole picture which is of relevance in assessing the nature and effect of statements and communications on which WTM relies as the First Misrepresentation. Moreover, such a narrow snapshot as contended for by AGPC is,

²⁷⁴ Defendant’s Outline of Closing Submissions (12 June 2024), [63]-[113].

²⁷⁵ Defendant’s Outline of Closing Submissions (12 June 2024), [65]-[66].



in my view, at odds with the manner in which courts must approach the operation of s 18(1) of the ACL, as indicated in the authorities to which reference has been made.²⁷⁶

151 Consequently, on this basis I reject such a narrow approach and, rather, accept the submissions of WTM on this issue on the basis of the material relied upon and the reasons advanced; and, particularly, having regard to the preceding reasons where the events of 13 March 2020 prior to the 2:08pm call are considered in detail.

152 In relation to the issue whether the First Misrepresentation was misleading or deceptive (issue 2), AGPC revisits and repeats to a large extent the submissions already made with respect to the preceding events of 13 March 2020.²⁷⁷ In support of the submission that the representation was never made, AGPC submits that from the opening of the 8:00am call the Chief Health Officer, Dr Sutton, and also in the confirmatory 8:40am email which he provided, was clear that his recommendation for cancellation of the Grand Prix race or its proceeding spectator-free applied to all Grand Prix events, including the concert. In support of this submission, reference is also made to subsequent communications by Mr Westacott and others on behalf of AGPC with the Chief Health Officer with respect to his earlier advice. As indicated previously, I am of the view that it is clear from the objective evidence with respect to the 8:00am call and the 8:40am email and subsequent events that the position of the Chief Health Officer was that his recommendations applied solely to the Grand Prix race itself and not to other events, such as the concert.²⁷⁸ Indeed, the subsequent communications with the Chief Health Officer which AGPC seeks to rely upon in support of its submissions only serve to make clear, in my view, that this is exactly the position.²⁷⁹ Moreover, I do not understand or accept, as AGPC contends, that WTM's submissions are based on a narrow literal reading of the 8:40am email without regard to the advice received from the Chief Health Officer of 8:00am.²⁸⁰

²⁷⁶ See above [133]-[142].

²⁷⁷ *Defendant's Outline of Closing Submissions* (12 June 2024), [67]-[83].

²⁷⁸ See above [87] -[99].

²⁷⁹ See, particularly, *Defendant's Outline of Closing Submissions* (12 June 2024), [71]-[78].

²⁸⁰ See *Defendant's Outline of Closing Submissions* (12 June 2024), [80].



153 Rather, as indicated previously, I am of the opinion that a proper consideration and analysis of what was said and what was not said in the 8:00am call, the 8:40am email and subsequent events during 13 March 2020 does not provide any basis for a critique of the WTM submissions in these terms. Moreover, I reject the position being put by AGPC that the 8:40am email must be read more broadly because the first recommendation was for the ‘immediate ... cancellation of the race’, which was not to be held until Sunday, indicates that there must have been a direction broadly, beyond the race and to include other events, including the concert. This is, in my view, drawing a long bow, to say the least. Not only does such a suggestion connote a proposition which is not supported by the documentary and other evidence already considered but it must also be regarded as being a proposition without any foundation having regard to the need, the clear need, to indicate publicly whether the Grand Prix race would proceed. The imperative to indicate the position publicly is, in my view, indicated by the fact that it was apparently thought necessary for the Premier of Victoria to make an announcement in this respect at 9:00am on 13 March 2020. It does not require much imagination to realise that the logistics of staging an event like the Grand Prix would require a decision of this nature well before the Sunday, only about 48 hours hence.

154 AGPC also refers to matters which it says would have been within the knowledge of the plaintiff at the time of the 2:08pm call, including knowledge of the:²⁸¹

- (a) COVID-19 pandemic and the ability of the coronavirus to transmit amongst people;²⁸²
- (b) fact that AGPC would be taking advice from the CHO as to whether the event could proceed safely in the face of the pandemic;²⁸³
- (c) positive COVID-19 test result of a McLaren team member;²⁸⁴
- (d) statements made by the Victorian Premier that there would be no spectators at the Grand Prix, if there was an event at all;²⁸⁵

²⁸¹ *Defendant's Outline of Closing Submissions* (12 June 2024), [81].

²⁸² CB3111; T144/7-11 (XXN of Ms Artmonsky).

²⁸³ TT144/31-145/3 (XXN of Ms Artmonsky); T565/5-8 (XXN of Mr Dainty).

²⁸⁴ CB4202; T146/5-10 (XXN of Ms Artmonsky); TT293/22-294/10 (XXN of Mr Morrison).

²⁸⁵ CB3433; TT255/23-256/6 (XXN of Mr Beck); T298/3-14 (XXN of Mr Morrison); T402/26-29 (XXN of Mr Smith).



- (e) cancellation of all Formula 1 events at the 2020 Australian Grand Prix;²⁸⁶
- (f) closure of the gates by AGPC to the declared area;²⁸⁷ and the
- (g) fact that the World Tour concert was to occur within the declared area.²⁸⁸

On this basis AGPC contends that WTM, having knowledge of these matters, would have readily understood the basis of the decision communicated by Mr Westacott. This explains, AGPC says, in part why WTM so readily accepted the cancellation of the concert in the 2:08pm call, as is evident from the content of what was said, and the tone and demeanour of the persons whose voices can be heard on that recording. It was not necessary, it is said, for Mr Westacott to recite each of these matters, or every part of the 8:00am call in order to convey the Chief Health Officer's advice. For the reasons indicated previously, I do not accept that WTM accepted the cancellation of the concert in the 2:08pm call or that it did not remain critical for Mr Westacott to fully and clearly answer the questions and concerns on the part of WTM and TEG Dainty whether AGPC would allow the concert to proceed.

155 The matters said to be relevant to the knowledge of WTM at 2:08pm are matters which, in my view, clearly indicate why WTM was so concerned to obtain a definitive answer from Mr Westacott on behalf of AGPC. Rather, as seems to be implied in these submissions, AGPC is saying that as there was a concern in relation to the spread of COVID-19 as a result of mass gatherings, WTM would have realised that it was not necessary for Mr Westacott to make himself clear because, in context, it should have been appreciated that mass gatherings were to be avoided and that the Chief Health Officer's direction with respect to the race must clearly have extended to the concert. As indicated, I do not accept that the 8:00am conversation or the 8:40am email on 13 March 2020 indicated such a position on the part of the Chief Health Officer and, indeed, such a view would be completely inconsistent with the response of the Chief

²⁸⁶ CB3533; T175/20-25 (XXN of Ms Artmonsky).

²⁸⁷ CB3564; T259/14-18 (XXN of Mr Beck); T574/13-18 (XXN of Mr Dainty).

²⁸⁸ T256/9-10 (XXN of Mr Beck); T296/2-12 (XXN of Mr Morrison); T413/8-9 (XXN of Mr Smith); T562/6-8 (XXN of Mr Dainty).



Health Officer in the 2:50pm texts on that day,²⁸⁹ the fact that other mass gatherings were permitted during 14 and 15 March 2020 and it was not until the declaration of the State of Emergency on Monday 16 March 2020 that mass gatherings were restricted generally.

156 In relation to causation and reliance (issue 3), AGPC submits that in the event that the Court finds that it made the First Misrepresentation, it should find that this conduct did not cause WTM's loss because it would not have proceeded with the concert. More particularly, it says that by at least by 1:15pm on 13 March 2020, WTM had either decided that it would not stage the concert or at least had no intention of doing so given the cancellation of the Grand Prix. In support of the proposition, it says that the conclusion that WTM had decided that it would not stage the concert emerges clearly from the contemporaneous documentary records of WTM which are in evidence. Moreover, it says that those contemporaneous documents provide the best evidence of what occurred on the day.²⁹⁰ AGPC then made detailed submissions in relation to what it says is the documentary evidence in support of this proposition.²⁹¹ It is to those submissions that I now turn.

157 In terms of the objective evidence sought to be relied upon by AGPC in this context, references made to what is said to be the circumstances confronting WTM on the morning of 13 March 2020, as follows:²⁹²

- (a) the Premier of Victoria announced at 9:08 am that "on public health grounds, there will be no spectators at the Grand Prix this weekend, if a race actually happens at all" ... "The Chief Health Officer has updated his advice, that's been communicated to Grand Prix organisers and now they're making that choice between no event or an event without fans. But at the very least, there will be no fans at the Grand Prix this weekend";²⁹³

²⁸⁹ See above [87]-[99]; [116]-[123].

²⁹⁰ See above [34] with respect to the authorities with respect to the significance of contemporaneous documentary records; particularly *Watson v Foxman* (1995) 49 NSWLR 315, 319 (McClelland J); and *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, [1247] (Jagot J).

²⁹¹ *Defendant's Outline of Closing Submissions* (12 June 2024), [87]-[113].

²⁹² *Defendant's Outline of Closing Submissions* (12 June 2024), [87].

²⁹³ CB5350.



- (b) Formula 1 announced at approximately 10:00 am that all Formula One related events at the 2020 Australian Grand Prix were cancelled following the confirmation that a member of the McLaren Racing Team had tested positive for COVID-19 and the team's decision to withdraw from the Australian Grand Prix;²⁹⁴
- (c) AGPC announced at approximately 10:00 am that, in light of the decision of Formula 1 to cancel all Formula 1 activity at the Formula 1 Australian Grand Prix and the updated advice from the CHO, the Formula 1 Grand Prix was cancelled immediately;²⁹⁵ and
- (d) at around 11:45 am, whilst all gates to the Declared Area remained closed at every entry point, there was a press conference on the circuit at the Paddock entrance confirming the cancellation of the 2020 Australian Grand Prix.²⁹⁶

158 In regard to these matters, AGPC contends that any reasonable person who had any commercial involvement in the Grand Prix would have undoubtedly placed significant emphasis on what the Premier had said at 9:00am as being a clear and unequivocal statement of an official nature by the most senior politician in the State. On the basis of this proposition, AGPC submits that the WTM witnesses were highly evasive in recognising both their knowledge of and emphasis placed on the Premier's statements made that morning. More particularly, it is submitted that Ms Artmonsky said she could not recall whether she saw the Premier's announcement²⁹⁷ and could not say whether she watched it live on TV, or had been relayed the contents of the Premier's statement from David Butorac.²⁹⁸ Mr Beck said that he could recall the Premier's statement being on TV 'in the background'.²⁹⁹ Mr Grayson says that the Premier's announcement was on the TV on the wall of the Crown hotel room with the volume low, so it was hard to recall in any detail what was being said.³⁰⁰ AGPC says that those witnesses also refused to accept that they knew on the morning of 13 March 2020 that the reason that the Premier said that the Grand Prix event would be cancelled or run patron-free was because of the risk of transmission of coronavirus.³⁰¹ In my view, there was no basis for saying the WTM witnesses were highly evasive as put by

²⁹⁴ CB3529-3530.

²⁹⁵ CB3533.

²⁹⁶ Witness Statement of Andrew Westacott [116] CB360.

²⁹⁷ T155/27-28 (XXN of Ms Artmonsky).

²⁹⁸ T156/3-7 (XXN of Ms Artmonsky).

²⁹⁹ T255/4-5 (XXN of Mr Beck).

³⁰⁰ T351/1-2 (XXN of Mr Grayson).

³⁰¹ T351/17-28 (XXN of Mr Grayson); T411/9-16 (XXN of Mr Smith).



AGPC in these submissions. Moreover, in my view, having regard to the events of 13 March 2020, as discussed previously in these reasons, all concerned were under a great deal of pressure and somewhat preoccupied given the rapidly unfolding events of that day. And, in any event, the Premier never made any mention of the concert. Additionally, I am of the opinion that, for the preceding reasons, there was no basis for assuming that the announcement extended to the concert.

159 Nevertheless, AGPC submitted further:³⁰²

90. These statements of purported recollection years after the fact should be rejected. As Ms Smith conceded in cross-examination, any adviser responsibly advising WTM would have sought to find out the content of the press release by the Premier.³⁰³ Mr Dainty likewise acknowledged in cross-examination that the Premier's announcement was relevant to how WTM and TEG Dainty were placed in relation to the concert.³⁰⁴
91. The statements of WTM's other witnesses to the contrary are inconsistent with the documentary record, which show that at the same time of the Premier's announcement and in the minutes which immediately followed between 9:08 am and 9:33 am on 13 March 2020:
 - (a) Mr Beck sent a WhatsApp message in a thread including Ms Artmonsky and Mr Morrison stating "Premier talking now ... Premier says no fans at race if event goes ahead";³⁰⁵
 - (b) Ms Artmonsky sent a WhatsApp message to Mr Beck, Mr Morrison and Ms Gow stating "Seen announcement re no crowds";³⁰⁶
 - (c) Ms Artmonsky sent a WhatsApp message to Mr Morrison stating "All being cancelled ... Getting on zoom with Robbie team and Tom Grayson now. Want to join?";³⁰⁷
 - (d) Ms Artmonsky sent a WhatsApp message to Danielle Norris of AGPC stating "Saw it on tv. Not ideal!";³⁰⁸
 - (e) Mr Beck sent an email to Edwina Tarrant in response to an earlier email from Ms Tarrant asking whether the World Tour

³⁰² *Defendant's Outline of Closing Submissions* (12 June 2024), [90]-[93].

³⁰³ T410/14 (XXN of Mr Smith).

³⁰⁴ T570/20-27 (XXN of Mr Dainty).

³⁰⁵ CB3433.

³⁰⁶ CB3521.

³⁰⁷ CB3481.

³⁰⁸ CB3449.



concert was going ahead. Mr Beck stated “It’s not happening, but we need to be official on this”,³⁰⁹

- (f) Mr Artmonsky sent a WhatsApp message to Mr Morrison and others stating “Dealing with 5 different parties under 5 different agreements and 5 different insurance arrangements ... fl, agpc, Robbie, dainty and us”. That was followed by a further message saying “Everyone trying to claim its nothing to do with covid19!”.³¹⁰

92. The documentary record shows that the Plaintiff was immediately aware of what the Premier was saying, placed significant emphasis on his statements, and were aware that the cancellation on public health grounds was because of the risk of transmission of corona-virus. There is no documentary record which shows the Plaintiff’s witnesses questioning why the Grand Prix was cancelled or whether the Premier’s announcement did not apply to concert. That is because it was clear that it did.

93. Based on the Premier’s statements, Mr Beck said “It’s not happening”,³¹¹ Ms Artmonsky made immediate inquiries of relevant parties’ insurance arrangements and immediate plans were made to speak with Robbie Williams’ representatives with the Plaintiff’s internal counsel, Mr Grayson. All of these tends to the inescapable inference that the Plaintiff knew precisely what the Premier’s announcement meant for the concert to occur at the Grand Prix – that it was cancelled. The weight of the Premier’s announcements was described best by Mr Morrison in his WhatsApp communication to Mr Fletcher at 9:10 am “Victorian Premier has just announced no fans ... That sounds quite official ... And live across all networks”.³¹²

160 In my view, none of the matters the materials referred to in these submissions by AGPC indicate anything more than great uncertainty in the mind of WTM and TEG Dainty as to whether or not the concert would be permitted and that the position with respect to the concert needed to be clarified one way or the other. Statements such as Mr Beck’s that ‘it’s not happening’ are, in my view, in context no more than questioning statements in this respect or outbursts of exasperation at the then prevailing uncertainty which WTM thought was not being addressed by AGPC. AGPC’s answer to this seems to be that WTM should have drawn its own inferences on the basis that the Premier and others had expressed concern in relation to mass

³⁰⁹ CB3522.

³¹⁰ CB3524.

³¹¹ CB3522.

³¹² CB874.



gatherings and, consequently, should have ‘joined the dots’, so to speak, and realised that the concert not proceed. In this vein, in my view, AGPC submitted:³¹³

Any reasonable person in the position of the Plaintiff viewing the above events would have understood the obvious – that the announcement by the Premier that there will be no fans at the Grand Prix on public health grounds, the closure of the gates to the Declared Area by the statutory corporation responsible for that area, AGPC, and a press conference by the governing bodies at an empty Albert Park track meant the necessary and unavoidable cancellation of the World Tour concert scheduled to occur within the Declared Area of the Grand Prix the next day.

In this context AGPC added that the ‘additional factor’ which confronted WTM was that it had not obtained insurance for cancellation of the concert because of a coronavirus pandemic, as required under cl 14.2(b) of the LMCA.³¹⁴ Thus it is said that it was imperative that WTM have the concert cancelled for it before WTM was required to do so itself. This is, of course, pure speculation on the part of AGPC. There were issues as to the liability of pandemic insurance at that time, a matter considered further in relation to contractual and other matters.³¹⁵

161 For these reasons, I do not accept the objective evidence establishes that it should have been clear to WTM on the morning of 13 March 2020 that the concert could not proceed and that was the effect of the Premier’s announcement; an announcement to which WTM is said by AGPC to have paid no proper regard, together with the implications sought to be drawn from this position.

162 The further basis upon which AGPC submits that there was no reliance on the First Misrepresentation is because WTM only took steps consistent with the cancellation of the concert.³¹⁶ Thus AGPC submits:³¹⁷

96. The documentary record shows that, in the morning and early afternoon of 13 March 2020, the Plaintiff’s representatives issued communications and took steps consistent only with cancellation of the World Tour concert scheduled to take place on 14 March 2020.

³¹³ *Defendant’s Outline of Closing Submissions* (12 June 2024), [94].

³¹⁴ CB1246-1247.

³¹⁵ See below [218]-[230].

³¹⁶ *Defendant’s Outline of Closing Submissions* (12 June 2024), [96]-[99].

³¹⁷ *Defendant’s Outline of Closing Submissions* (12 June 2024), [96]-[97].



97. By 9:16 am, in the immediate aftermath of the Premier’s statements, Mr Beck said to Ms Tarrant “It’s not happening”.³¹⁸ Mr Beck said in his examination that the “It” in that statement is a reference to the Grand Prix, and not the concert.³¹⁹ That explanation must be rejected based on an objective analysis of the documents. Mr Beck was responding to an email from Ms Tarrant which said “I have Smooth / Nova all over me as they are flying people into Melbourne today for some of the promos they ran. Can I give them a timeline? We’re off if they are off right??”. The email was specifically in relation to the concert and questions being asked of Ms Tarrant by radio stations about whether the concert was going ahead. The only reasonable reading of Mr Beck’s email was that he was informing Ms Tarrant that the concert was not happening. Mr Beck’s explanation four years later, in the context of this litigation, that he was not in fact answering the question put to him, and only talking about the Grand Prix,³²⁰ defies credulity.

163 Continuing, AGPC submitted:³²¹

98. That Mr Beck was responding to Ms Tarrant confirming that the concert was not happening is consistent with communications which followed in the timeline (bold emphasis added):

- (a) at 10:22 am, David Butorac emailed Apollo investors, Mr Morrison and Ms Artmonsky stating: “Following last night’s announcement that a member of the McLaren F1 team has tested positive for Corona Virus, and their subsequent decision to withdraw the McLaren team from the weekends F1 race, the Victorian state Premier has this morning announced that if the F1 event were to go ahead as planned it would be without the admission of spectators to the track. Following that announcement, the F1 have just announced that the entire event has now been cancelled. We are urgently seeking guidance as to the status of the World Tour Robbie Williams concert, but I suspect this will mean a similar outcome”;³²²
- (b) at 10:49 am, Mr Beck sent a WhatsApp message to Ms Gow, Mr Smith, Mr Morrison, Ms Artmonsky and others stating: “Meeting on hold for now Stephen. We need to deal with the **cancellation issue** and **announcement** first. So no meeting. Lara stay in room please for now as you are at the crown”;³²³
- (c) at 10:55 am, Ms Artmonsky wrote to Apollo investors “Just to provide everyone with an update – we are working with all of our lawyers and those of our partner Dainty TEG to find the best possible outcome based on this morning’s news.”;³²⁴

³¹⁸ CB3522.

³¹⁹ T258/29-31 (XXN of Mr Beck).

³²⁰ T258/29-31; T259/1-7 (XXN of Mr Beck).

³²¹ *Defendant’s Outline of Closing Submissions* (12 June 2024), [98]-[100].

³²² CB3541.

³²³ CB3546.

³²⁴ CB3508.



- (d) at 11:27 am, Ms Artmonsky wrote to Ms Smith “What’s the latest Sam. Be good to agree **exit plans** with paul and myself before briefing whole team”;³²⁵
- (e) at 11:47 am, Mr Beck emailed Ms Tarrant, in relation to a proposed cancellation announcement, “We cannot carry or retweet any announcement by a media organisation. We need to try that they only release our statement. That statement will be with you soon. For the avoidance of doubt, we cannot encourage or approve or carry any third party statement”;³²⁶
- (f) at 12:50 pm, Mr Marks emailed Mr Beck, Ms Artmonsky, Ms Gow, Mr Morrison, Mr Butorac and others stating “Guys I feel like a spare part here. I’m not sure if ROBBIE has now pulled out or what the situation is but obviously it is key that we try and minimise the costs as much as possible. This will probably take a roundtable agreement between ROBBIE, APOLLO and DAINTY. Let me know. Thanks STEPHEN.”;³²⁷
- (g) in response, Mr Beck said “Back very soon. We need to manage the legal side and the announcement green light. **Then we can pull everything.**”;³²⁸
- (h) at 1:24 pm, Mr Grayson said in a WhatsApp communication to Ms Artmonsky “Becky – I am concerned if we do not get on the front foot with a **cancellation announcement** RW team will think very badly of us and will not refund any fee. My view is we need to go public and clear with a **cancellation announcement now.**”³²⁹
99. These communications point only to the conclusion that the Plaintiff had decided that the concert could not proceed, and was that morning acting only to assess its legal position in relation to the known cancellation. Mr Beck stated at 12:52 pm for example that the Plaintiff “was in constant discussion with Dainty about legal position”.³³⁰
100. Notwithstanding that there were 95 communications between WTM employers and consultants between 11:43 pm on Thursday 12 March 2020 and 9:43 pm on Friday 13 March 2020 (all of which are collated at Annexure A), not a single communication referred to the possibility of the concert proceeding. There is no document which states that the Plaintiff considered it possible that the concert could proceed, or which suggests (let alone establishes) that the Plaintiff took steps toward that possibility.

³²⁵ CB3475.
³²⁶ CB3540.
³²⁷ CB3546.
³²⁸ CB3547.
³²⁹ CB3560.
³³⁰ CB3546.



These submissions are followed by references to various communications directed to internal approval of a draft public announcement for the cancellation of the concert.³³¹

164 As indicated previously in these reasons, I am of the view that the evidence to which reference has been made by AGPC in support of its submissions (including the documents collated at Annexure A to its Closing Submissions)³³² established no more than that WTM and TEG Dainty were, in an atmosphere of real uncertainty as to whether AGPC would permit the concert to proceed, acting responsibly in seeking to be in a position to make a public announcement in the event that AGPC decided and told them the concert could not proceed. As appears from the evidence, and discussed previously, there were a variety of stakeholders and others concerned with concert arrangements, including Robbie Williams, who needed to be consulted with respect to the form of any public announcement of cancellation of the concert, should such an announcement need to be made. Much has been made by AGPC's lack of any evidence of an announcement that the concert would proceed as somehow indicating a decision on WTM's part to cancel the concert. As discussed previously, the evidence indicates, and as, it might be said, a matter of common sense, there would be no need to settle a form of announcement to stakeholders and others for a public announcement that merely maintained the then status quo and reaffirmed the position that the concert would proceed. Moreover, in the absence of any clear position on the part of AGPC as to whether the concert could proceed, WTM and TEG Dainty would be acting irresponsibly to be making public statements in the meantime that the concert would proceed. This is particularly the case as ticket sales for the concert were still open during the morning of 13 March 2020 and, indeed, tickets were available for purchase up until approximately 3:00pm on that day. The fact that not many concert tickets may have been purchased during that day does not affect the significance of this position.

165 The AGPC submissions continued in the context of its submissions that there was no reliance by WTM on any representation submissions directed, particularly, to the

³³¹ See *Defendant's Outline of Closing Submissions* (12 June 2024), [101]-[105].

³³² As to what, see also [552]-[556], below.



proposition that by 1:15pm, WTM had decided not to stage the concert. This issue has been considered previously, in the context of the 1:15pm teleconference with Mr Fletcher and, as indicated, I do not accept this proposition.

The second misrepresentation

166 WTM claims that the second misrepresentation arose from the 4:25pm email, the body of which is set out previously.³³³ With respect to this email, WTM says that AGPC rightly accepted that there was an ‘obvious’ ‘degree of incongruity’ between the 4:25pm email and Dr Sutton’s 2:50pm text message in response to Mr Mottram.³³⁴ Indeed, AGPC conceded in its opening that the 4:25pm email ‘had some lawyering done to it’.³³⁵

167 As to the email, WTM submitted:³³⁶

198. Like the First Misrepresentation, the 4.25 pm email continued to inaccurately convey the advice of the Chief Health Officer in relation to the concert. In this regard:

- (1) The first substantive paragraph (to the effect that the Chief Health Officer had advised that the Formula 1 Grand Prix must be cancelled or run patron free) was inaccurate, because Dr Sutton’s advice was a recommendation only.
- (2) The second paragraph (that this advice extends to other activities in the declared area/venue) was inaccurate. Dr Sutton had given no advice about other activities in the declared area or venue and had not agree to the leading proposition that the concert should be cancelled “in line” with his advice on the Grand Prix, stating that this was ultimately a matter for the organisers.
- (3) The final substantive paragraph (beginning “The final decision...”) combined:
 - i. a statement that “final decision of the World Tour Melbourne sits with the organisers” (which the CHO had said in his 2.55 pm text to Mr Mottram); with
 - ii. an objectively inaccurate statement that “this advice [that the concert must be cancelled] must be followed”. The Chief Health Officer had given no such advice and his statement that the decision to cancel or proceed with

³³³ See above, [128].

³³⁴ T109/6-11.

³³⁵ T80/6.

³³⁶ *Plaintiff’s Outline of Closing Submissions* (12 June 2024), [198].



the concert was ultimately a matter for the organisers was not qualified.

168 WTM submits that the effect of this email was to represent, in trade or commerce, to WTM that the advice of the Chief Health Officer, Dr Sutton, that the Grand Prix must be cancelled or run patron free 'extend[ed] to other activities with the Declared Area/venue', which included the concert and 'this advice must be followed' by WTM ('Second Misrepresentation').

169 WTM submits, further, that the Second Misrepresentation was misleading or deceptive, or likely to mislead or deceive, because the Chief Health Officer had not in fact advised or recommended that the concert be cancelled or run 'patron free'. Rather:

- (1) in his 2:50pm text, Dr Sutton had said to the AGPC, when asked whether the WTM concert should be cancelled, was to the effect that cancellation was ultimately a matter for the organisers (i.e. WTM and TEG Dainty); and
- (2) in his 8:40am email, the Chief Health Officer advice 'on the Grand Prix Race' made no reference to the concert, the declared area or all activities in the declared area.

These submissions reflect WTM's answer to agree issue 4.

170 In terms of reliance on the Second Misrepresentation, WTM says: (1) it did not resume marketing or selling tickets to the concert; (2) it did not advise existing or prospective ticketholders, or the general public, that the concert was proceeding; (3) it did not proceed with the concert; and (4) it refunded ticket-holders of the concert. WTM says that this is its answer to agreed issue 5.

171 AGPC submits, on the other hand, that the 4:25pm email was not misleading or deceptive but, rather, accurately represented the advice of the Chief Health Officer that had been received by AGPC in relation to the Grand Prix event which included the WTM concert. In this respect, it relies on previous submissions with respect to the



nature and extent of the advice of the CHO earlier on 13 March 2020, going back to the 8:00am call on that day. More particularly, it submits:³³⁷

124. It was also clear that the CHO's 8.00 am recommendation and the reasons for it were not limited to the Formula 1 Grand Prix itself but applied to all spectator activities at the Grand Prix event, including the concert. When asked whether his advice would change if Formula 1 was taken out and only Australian-based support categories proceeded, the CHO was clear. It did not change his advice because his concern was not the type of activity being undertaken, but "mass gatherings" and the presence of "spectators in close proximity" given that the "risk has materially changed from even a few days ago".

125. The health risk identified by the CHO in relation to mass gatherings applied with equal or greater force to WTM's concert as they did to the Formula 1 and other on- and offtrack entertainment at the Grand Prix. On the Plaintiff's case, approximately 21,000 people would have attended the Robbie Williams' concert.³³⁸ Plainly, that would have constituted a "mass gathering" with "spectators in close proximity", including "a lot of internationals" in a concentrated area (see circuit map above).³³⁹ Mr Mottram had told the CHO that the concert was within the declared area and would have "many of the same crowds also".

...

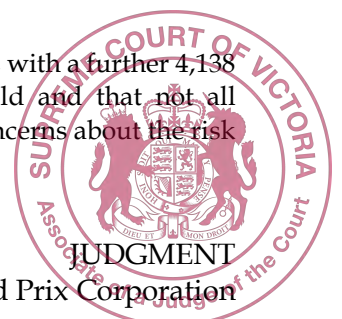
131. A reasonable person in the position of AGPC would not have read the two line text message from the CHO at 2.52 pm as contradicting or communicating a 180 degree turnaround from his previous formal detailed advice, and the statements of the Premier, as permitting crowds into the Grand Prix area to see the concert. That is particularly so given that the text is more readily understood consistently with the CHO's existing recommendation and the public health reasons he gave for it.

172 In support of these submissions AGPC, in substance, rehearses submissions made previously with respect to the events of 13 March 2020 and further submissions in that vein with respect to the claimed First Misrepresentation. Again, what is being put, effectively, is that WTM should have realised that, as a result of or on the basis of statements with respect to the conduct of the Grand Prix race and the risks associated with mass gatherings, it followed that the advice of the Chief Health Officer early on

³³⁷ *Defendant's Outline of Closing Submissions* (12 June 2024), [124], [125], [131].

³³⁸ 13,407 tickets had been sold and 3,417 complimentary tickets had been given away, with a further 4,138 available for sale (AGPC submits that no further tickets would have been sold and that not all ticketholders would have attended given some ticket-holders would have held concerns about the risk of transmission of coronavirus).

³³⁹ T302/28-30 (XXN of Mr Morrison).



13 March made it clear the concert could not proceed. Additionally, having regard to AGPC's position as a statutory authority, WTM should have understood that it would follow that AGPC would comply with the Dr Sutton's advice and not permit the concert to take place. As indicated in the preceding reasons, I do not accept that the evidence establishes that the Chief Health Officer's advice on any occasion during 13 March 2020 with respect to the Grand Prix race or otherwise could reasonably be construed, in all the circumstances, as extending to the concert. In my view, Dr Sutton made this absolutely clear in the 2:52pm text message from him to AGPC. AGPC, on the other hand, seeks to interpret what, in my view, are clear words in the text message from Dr Sutton quite differently, submitting:³⁴⁰

132. The opening sentence of the text, "I'd absolutely support that decision", is consistent with the CHO's 8.00 am advice that, effective immediately, there should be no mass gatherings or spectators in close proximity and that the gates to the declared area should be closed.
133. Consistently, the second sentence, "I think it's ultimately for organisers" simply means that it was for organisers, not the CHO, to decide whether to cancel the concert or, alternatively, run it patron free – being the only election open to organisers at the time. The decision that was "for organisers" was not between cancelling the concert and running it with spectators, but between cancelling it and running it "patron free".

It follows, consequently, AGPC submits, that '[i]f the CHO had meant to depart from his previous advice in such a significant way, such as to allow a mass gathering for a concert within the Grand Prix track, a reasonable person in the position of AGPC would expect that he would have done so only in clear and explicit terms'.³⁴¹ Again, as indicated previously, I am of the opinion that reference to the matter being 'ultimately for organisers' means, and can only mean in context, the organisers of the concert.³⁴²

173 As I have said, AGPC submissions in this vein are based on the false premise, in my view, that the 2:52pm text from Dr Sutton was inconsistent with his previous advice in any way. In my opinion, this text confirms that Dr Sutton had given no previous

³⁴⁰ *Defendant's Outline of Closing Submissions* (12 June 2024), [132]-[133].

³⁴¹ *Defendant's Outline of Closing Submissions* (12 June 2024), [135].

³⁴² See above [121].



advice at all in relation to the staging or otherwise of the concert. Moreover, having regard to the position with respect to mass gatherings in Melbourne over the weekend of 14 and 15 March 2020, there was no reason to suppose that a concert of this nature could not otherwise proceed in any other part of Victoria. I ask rhetorically, with no crowds for the Grand Prix, what difference could it possibly make in this respect that the concert which was to be held in the Lakeside Stadium, would be in any different position? Neither did Dr Sutton absolutely support cancellation, though unsurprisingly, for the reasons indicated previously, he would support such a decision if that were the decision made by the ‘organisers’. Having regard to the nature of the concert arrangements, as previously discussed, it is no answer to assert, as does AGPC, that it was not a ‘private event’ but was part of the ‘Grand Prix’ event. The nature and significance of the AHPPC’s announcement and the Prime Minister’s announcement a little after 3:00pm on 13 March has already been considered and, for the reasons indicated previously, does not advance AGPC’s position in the present context.³⁴³

174 In terms of causation and reliance, AGPC observes that WTM pleads that it did not resume marketing and selling tickets to the concert on 14 March; it did not advise existing or prospective ticket-holders, or the general public, that the concert was proceeding.³⁴⁴ In response, AGPC submits that the fact is that WTM had cancelled the concert and removed tickets from sale by shortly after 3:00pm on 13 March 2020. Consequently, it is said that the 4:25pm email which is alleged to convey the Second Misrepresentation was ‘obviously not relied on’ and was not causally relevant to that decision. This is, however, not the reliance which WTM refers to. Nevertheless, AGPC submits that WTM has not led any evidence to establish that but for the alleged misleading nature of the 4:25pm email, it would have cancelled its cancellation, resumed the sale of tickets and informed ticket-holders and the general public that the concert was back on again. Thus it is said the Court has no evidential basis on which it can make the finding contended for by WTM. In conclusion, it is said that the

³⁴³ See above [124]-[127].

³⁴⁴ *Defendant’s Outline of Closing Submissions* (12 June 2024), [148].



alleged Second Misrepresentation had no causal role in the cancellation of the concert and was not in any other relevant way relied upon or causative of the loss of WTM.

175 It is, however, in my view, very clear on the evidence that WTM was intending to proceed with the concert if permitted to do so and that it could not be supposed, on any reasonable basis, that a short time of less than two hours between a cancellation announcement and an announcement 'cancelling the cancellation' would have meant the concert could not proceed. Moreover, there is no evidence which establishes that the commercial imperative on WTM was not to take that course. Rather, there is nothing in the evidence to suggest that the commercial imperative was not the diametrically opposite.

Liability: Breach of Contract (Agreed Issues 6-11)

Overview and agreed issues 6-11

176 The further claim put by WTM, in the alternative, is that AGPC breached its obligations under the LMCA. Agreed issues 6 to 11 concern that contract claim. In relation to the contract case, AGPC raised some concern in its submissions that there had been a failure to articulate the contract case.³⁴⁵ In my view, there is no substance in these criticisms as the issues involved are raised in the pleadings and, to the extent there may have been any ambiguity or issues with the pleaded case, this is a matter which could and should have been raised earlier by AGPC. In any event, the issues in controversy are more than adequately articulated in agreed issues 6-11.

Principles of contractual interpretation

177 As the WTM case in this respect involves the proper interpretation of certain clauses in the LMCA, it is helpful to summarise the orthodox principles guiding construction of commercial contracts in order to determine the proper construction of those clauses. Those principles are well-established³⁴⁶ and, as WTM submits, can be relevantly summarised as follows:³⁴⁷

³⁴⁵ *Defendant's Outline of Closing Submissions* (12 June 2024), [150]-[155].

³⁴⁶ See generally *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201, [70]; *Butler v Kenny* [2022] VSCA 102, [27].

³⁴⁷ *Plaintiff's Outline of Closing Submissions* (12 June 2024), [204].



- (1) The rights and liabilities of parties under a provision of a contract are determined objectively,³⁴⁸ by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.³⁴⁹ “Preference is given to a construction supplying a congruent operation to the various components of the whole”.³⁵⁰
- (2) It is an accepted principle that anything which the parties said or did after a contract was made “cannot be used as an aid in the construction of” the contract.³⁵¹ That principle derives from the objective theory of contract, which provides that the legal obligations of the parties to the contract do not depend upon their subjective beliefs but upon the view of the reasonable bystander informed as to the surrounding context and circumstances, which in practice means the view of the court based on the evidence before it.³⁵²
- (3) In determining the meaning of the terms of a commercial contract, it is necessary to ask: what would a reasonable businessperson have understood those terms to mean?³⁵³ That requires consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.³⁵⁴
- (4) Ordinarily, the process of construction is possible by reference to the contract alone. If an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.³⁵⁵
- (5) Recourse to events, circumstances and things external to the contract may sometimes be necessary.³⁵⁶ It is not necessary in the present case.

³⁴⁸ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 117 [46] (French CJ, Nettle and Gordon JJ); *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656 [35]; [2014] HCA 7 (*Woodside*).

³⁴⁹ *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 350 (*Codelfa*) (citing *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995-996; [1976] 3 All ER 570, 574).

³⁵⁰ *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, [16] (Gleeson CJ, McHugh, Gummow, Kirby JJ).

³⁵¹ *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; 238 CLR 570, [35] (Gummow, Hayne and Kiefel JJ), referring to the statement of Lord Reid in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603.

³⁵² *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150, [120], citing *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 775 (Lord Hoffmann); *Wilson v Anderson* [2002] HCA 29; 213 CLR 401, [8] (Gleeson CJ); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165, [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, [16] (Lord Hoffmann, PC); and see Lewison and Hughes, *The Interpretation of Contracts in Australia* (Law Book Co, 2012), [2.04]-[2.05]. See also *Tripple a Pty Limited v WIN Television Qld Pty Ltd* [2018] QCA 246, [59].

³⁵³ *Woodside*, 656 [35].

³⁵⁴ *Woodside*, 656-657 [35].

³⁵⁵ *Codelfa*, 352.

³⁵⁶ *Woodside*, 657 [35], citing *Codelfa*, 350. See also *Eureka Operations Pty Ltd v Viva Energy Australia Ltd* [2016] VSCA 95, [45]-[47] (Santamaria, Ferguson and McLeish JJA).



- (6) Unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption “that the parties ... intended to produce a commercial result”.³⁵⁷ Put another way, a commercial contract should be construed to avoid it “making commercial nonsense or working commercial inconvenience”.³⁵⁸
- (7) The utilisation of commercial purpose must not be taken too far. Whilst a court should construe a commercial contract to avoid absurdity, it is not part of its role to construe an agreement that otherwise has an explicable commercial result in a manner that increases the commercial benefits to one party to the agreement.³⁵⁹ It does not constitute a licence to alter the meaning of a term to achieve a result the court may think to be reasonable.³⁶⁰

These authorities ‘underline the obvious importance of the contractual text to the contract’s construction’.³⁶¹ The primary inquiry ‘remains what a reasonable businessperson would understand the actual terms to mean, not what a reasonable businessperson would consider the most appropriate commercial terms to be’.³⁶²

Claimed breaches of the LMCA

178 WTM claims that AGPC breached cls 2.1, 5.1(a), 5.1(b), 5.1(d) of the LMCA and the implied duty.

Clause 2.1 (right to stage)

179 WTM contends that on a proper construction, cl 2.1 conferred a right on WTM to stage its event, and a corresponding obligation on the AGPC to allow it to do so, subject to the terms and conditions contained in the LMCA.³⁶³ The right to stage the event at the venue was, WTM says, the key commercial purpose underlying the LMCA. The plain language and context of cl 2.1 is also said to support WTM’s commercial interpretation

³⁵⁷ *Woodside*, 657 [35], citing *Re Golden Key Ltd* [2009] EWCA Civ 636, [28].

³⁵⁸ *Woodside*, 657 [35], citing *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530, 559 [82].

³⁵⁹ *Apple and Pear Australia Ltd v Pink Lady America LLC* [2016] VSCA 280; 343 ALR 112 (Tate, Ferguson and McLeish JJA) [2016] VSCA 280, [152], approved in *PCCEF Pty Ltd v Geelong Football Club Ltd* [2019] VSCA 144, [55] (Whelan, McLeish and Emerton JJA).

³⁶⁰ *Great Union Pty Ltd v Sportsgirl Pty Ltd* [2021] VSCA 299, [32] (McLeish and Kennedy JJA and Macaulay AJA), citing *Ancor Ltd v Barnes* [2021] VSCA 6, [648] (Ferguson CJ, Beach and Whelan JJA). See also *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 579–81 [98] (Nettle J).

³⁶¹ *SAS (Vic) Pty Ltd v Urban Ecological Systems Ltd* [2021] VSCA 335, [66] (‘SAS’).

³⁶² *SAS*, [66].

³⁶³ See CB1239.



that it held a right as the Live Music Partner to 'stage World Tour Melbourne'. This is WTM's answer to agreed issue 6.

180 WTM submits that AGPC's contention that cl 2.1 is simply a 'recitation of' WTM's appointment³⁶⁴ gives the clause no work to do. It also says that this interpretation flies in the face of the clear and unequivocal the words of cl 2.1 and in its contractual context including cl 2.4.³⁶⁵ Clause 2.1 provided that AGPC agreed to appoint 'WTM on an exclusive basis, as its "Live Music Partner" to stage World Tour Melbourne in accordance with' the LMCA. WTM contends that the 'appointment' carried with it a corresponding obligation to allow WTM to 'stage World Tour Melbourne in accordance with' the LMCA.

181 Paragraph (C) of the 'Background' to the LMCA recognised that the purpose of the LMCA was 'to establish a framework to govern' the parties' 'respective rights and obligations for the staging of World Tour in relation to the Australian Grand Prix ... on the terms set out in this Agreement'.³⁶⁶

182 The framework of the LMCA, balancing as it does respective rights of the parties, is evident in provisions such as cl 2.4 which recognised that WTM's 'right to stage' could be 'suspended' by AGPC where AGPC receives an unequivocal Ministerial Direction requiring AGPC to suspend the Australian Grand Prix and all associated events. The LMCA was also entered into against the statutory framework established by the AGP Act. During the race period, the 'rights and interests of any person, other than [the AGPC], in relation to the declared area in respect of a year are suspended for the race period, except as provided in' s 30(3).³⁶⁷ The World Tour in Melbourne was to take place in the declared area during the race period. Had it not been conferred with the

³⁶⁴ T111/17-25.

³⁶⁵ See CB1240. Cl 2.4 of the LMCA provides:

WTM's right to stage World Tour Melbourne shall be suspended should AGPC receive an unequivocal Ministerial Direction requiring AGPC to suspend the Australian Grand Prix and all associated events including those operated by Other Event Organisers and including World Tour Melbourne, such suspension requirement to be communicated immediately to WTM on receipt and to remain in force only for the period of suspension required by the Ministerial Direction.

³⁶⁶ CB1239.

³⁶⁷ See AGP Act, particularly ss 30(3) and (4).



right to stage the event (recognised by s 30(3)), it could not have carried on the business in the ‘declared area’.

183 WTM submits that if it is accepted that cl 2.1 of the LMCA did confer upon it a ‘right to stage’ the 2020 World Tour Melbourne on 14 March 2020, that right was breached by the AGPC’s conduct in terms of Mr Westacott’s statement in the 2:08pm call³⁶⁸ and by the 4:25pm email. WTM says that this is its answer to agreed issue 7.

184 The thrust of the AGPC submissions is that cl 2.1 of the LMCA does not state or otherwise provide that AGPC is required to ‘allow WTM to stage the 2020 World Tour Melbourne’. Properly construed, cl 2.1 is no more than a provision appointing WTM as AGPC’s exclusive Live Music Partner. This is said to be evident from the title and subject matter of that clause. It is titled ‘Commencement and Duration’. Clause 2.1 states that ‘AGPC has agreed to appoint WTM on an exclusive basis, as its “Live Music Partner” to stage World Tour Melbourne in accordance with this Agreement’. It then sets out the scope of the exclusivity. Reference is then made to cl 2.2 with respect to the commencement and duration of the Appointment and cl 2.3 providing for an option to extend the term.³⁶⁹ Reference is also made to cl 2.4 to which reference has already been made. In relation to these provisions, AGPC submits:³⁷⁰

162. These sub-clauses are each concerned with WTM’s appointment as “Live Music Partner” and the commencement and duration of that appointment. They do not otherwise create substantive rights or obligations. Clause 2.4 does not assist in construing cl 2.1 to be read as conferring any absolute right on WTM to stage the concert, subject only to an unequivocal direction. Given the preceding sub-clauses, and the heading to clause 2, the reference to “*right to stage World Tour Melbourne*” in cl 2.4 should be read as a reference to WTM’s appointment as Live Music Partner. That is to say, cl 2.4 should be read as providing that WTM’s appointment as Live Music Partner can be suspended in the event of an “*unequivocal Ministerial Direction requiring AGPC to suspend the Australian Grand Prix and all associated events*”.

AGPC contends that this construction of cl 2.1 is confirmed by cls 4 and 5, which identified the parties’ responsibilities and obligations – provisions which are said to

³⁶⁸ See above [112]-[115].

³⁶⁹ CB1239.

³⁷⁰ *Defendant’s Outline of Closing Submissions* (12 June 2024), [162].



give substance to the words ‘in accordance with this Agreement’ in cl 2.1. Attention is then turned to the particular provisions of cls 4 and 5³⁷¹ including, AGPC submits:³⁷²

166. Given clauses 4 and 5 identify in detail and with particularity the substantive responsibilities and obligations of the parties, cl 2.1 cannot be construed conferring a substantive right of the kind alleged. Instead, consistently with its text, it should be construed as appointing WTM as AGPC’s exclusive Live Music Partner, “in accordance with this Agreement”. Clause 2.1 no more obliges AGPC “to allow WTM to stage World Tour Melbourne” than it obliges WTM “to stage World Tour Melbourne.” The extent of each parties’ obligations under the appointment in cl 2.1 are defined “in accordance with this Agreement”.

185 In my view, the construction of cl 2.1 propounded by AGPC should be rejected in favour of the submissions and approach advocated by WTM on the basis of and for the reasons indicated in its submissions. Moreover, the approach of AGPC is at odds with the principles for contractual interpretation to which reference has been made, particularly in its disregard of the commercial purpose of the provisions of cl 2.1 of the LMCA and the associated provisions of the remainder of that clause, namely cls 2.2, 2.3 and 2.4. These provisions, in my view, give substance to the nature of the appointment in cl 2.1 and are comfortably and properly construed with the provisions of cls 4 and 5 providing,³⁷³ as they do, for WTM’s responsibilities and the obligations of AGPC. In the context of these provisions cl 2.1 cannot, in my view, be treated as a bare appointment carrying with it no reciprocal obligations, express and implied, on AGPC to give effect to that appointment consistently with the terms of the LMCA. In particular, I accept that, as WTM submits, AGPC’s contention that cl 2.1 is simply a ‘recitation of’ WTM’s appointment gives the clause no work to do and, in effect, renders these provisions as no more than an ineffective and redundant statement in the Agreement which leads nowhere. Moreover, in the context of these provisions, other provisions of the LMCA, particularly cls 4 and 5, do not in any sense negate the construction of cl 2.1 as being a substantive provision which carries with it the obligations of AGPC contended for by WTM. Rather, these other provisions may be

³⁷¹ *Defendant’s Outline of Closing Submissions* (12 June 2024), [164]-[165].

³⁷² *Defendant’s Outline of Closing Submissions* (12 June 2024), [166].

³⁷³ CB1240-42.



viewed as procedural or regulatory provisions which do not detract from the fundamental obligation of AGPC to give effect to the Appointment.

Clauses 5.1, 5.1(b) and the implied duty

186 Reference has already been made to the provisions of cl 5.1.³⁷⁴ WTM contends that the same conduct that resulted in contraventions of s 18 of the ACL resulted in breaches of these clauses. It says that by failing to ensure that the information given to WTM about Dr Sutton's advice was 'accurate and complete', and instead giving information that was inaccurate and incomplete, meant that AGPC breached its obligations under cls 5.1(a), 5.1(b) and arising from the express and implied duties of cooperation.³⁷⁵ These matters are, WTM says, its answers to agreed issues 7 to 10.

187 AGPC made detailed submissions with respect to issues 7 and 8 concerning whether there was an implied duty to cooperate and an obligation to cooperate in good faith arising out of the provisions of cl 5.1(a) of the LMCA. In this respect, WTM contended that '[b]y reason of the First Misrepresentation, on 13 March 2020, AGPC failed to cooperate with WTM to enable the 2020 World Tour Melbourne to take place, including by failing to facilitate access to the venue, provide utilities, or provide security staff to facilitate an exit from the event in the case of an emergency'.³⁷⁶ In response, AGPC contends that the First Misrepresentation was not made but that in the event that the Court finds that the First Misrepresentation was made, it submits that there was no implied duty to cooperate and, further, how the content of the express duty to cooperate in good faith is different, and whether that different obligation was breached.

188 As to the implied duty, AGPC submits that it is 'a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract'.³⁷⁷ The negative correlate is a 'covenant not to hinder or prevent the fulfilment of the purpose of the

³⁷⁴ See above [67]; CB1241.

³⁷⁵ Matters discussed previously in these reasons, see above [143]-[169].

³⁷⁶ *Defendant's Outline of Closing Submissions*, 40 [167] citing Amended Statement of Claim, 8 [11](f)(D).

³⁷⁷ *Butt v M'Donald* (1896) 7 QLJ 68, 70-71; *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 (Mason J); *Park v Brothers* (2005) 222 ALR 421, 431-2 [38].



express promises'.³⁷⁸ The ambit of the implied duty is limited to what has been promised under the contract³⁷⁹ and, as stated by the New South Wales Court of Appeal:³⁸⁰

[T]here cannot be a duty to cooperate in bringing about something which the contract does not require to happen ... A contract may 'contemplate' many benefits for the respective parties, but each can only call on the other to provide, or cooperate in the providing of, benefits promised by that party.

Similarly, the Victorian Court of Appeal likewise stated that: 'the scope of the ... obligation is defined by what has been promised under the contract; it is not a general duty to ensure another party obtains an anticipated benefit'.³⁸¹ Relatedly, the content and the operation of the duty to cooperate – and its negative correlate – are subject to the express terms of the contract which means that the implied term cannot be inconsistent with, or contradicted by, the express terms of the contract.³⁸² Additionally, the implied duty of cooperation is also limited by what can be reasonably required in the circumstances.³⁸³ On the basis of these propositions and authorities, AGPC submits that WTM's allegation that it breached the implied duty of cooperation fails on a number of bases, the particular aspects of which are matters to which I now turn.

189 AGPC in its submissions raised four matters:³⁸⁴

176. First, there is in fact no evidence that WTM asked AGPC to allow it to run the concert, or that WTM asked AGPC to facilitate access to the venue, provide utilities, or provide security staff to facilitate an exit from the event in the case of an emergency. ...

...

181. Second, the implied duty cannot enlarge what was promised, and AGPC had no obligation under cl 2.1 of the LMCA to allow WTM to stage the Concert ..., and did not fail to procure and provide a venue

³⁷⁸ *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, 142 [36].

³⁷⁹ *Beerens v Bluescope Distribution Pty Ltd* (2012) 39 VR 1, 13 [54] (Nettle JA).

³⁸⁰ *Australis Media Holdings Pty Ltd v Telstra Corp Ltd* (1998) 43 NSWLR 104, 124-5.

³⁸¹ *Wolfe v Permanent Custodians Ltd* [2013] VSCA 331 [28].

³⁸² *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 358 [168]; *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201 [279] (McLeish JA) (in dissent but not on this point).

³⁸³ *Secured Income Real Estate (Aust) Ltd v Martin Investments Pty Ltd* (1979) 144 CLR 596, 610, 615.

³⁸⁴ *Defendant's Outline of Closing Submissions* (12 June 2024), [176], [181], [182], [183].



... The implied duty cannot require more than was promised under the LMCA.

182. Third, the implied duty must be construed consistently with cl 14 and 19 of the LMCA, which contemplated that the concert venue may not be available in the event of a pandemic (cl 19), and that WTM was to bear that risk by obtaining insurance in the event of cancellation in the event of a pandemic (cl 14). The Concert was cancelled because of COVID-19, declared to be a global pandemic on 11 March 2020.³⁸⁵ Again, the implied duty cannot require more than was promised under the LMCA.
183. Fourth, the scope of the implied duty is limited by what is reasonable. Where the CHO had advised AGPC that the Event must be cancelled or run spectator free, it was reasonable for AGPC to advise WTM that the Concert was cancelled. The implied duty cannot require AGPC to engage in conduct that was unreasonable in the circumstances.

On the basis of those circumstances to which reference is made in these submissions, it is submitted that the Court cannot find that there was any breach of the obligation to cooperate with WTM to enable WTM to have the benefit of the contract.

190 In my view, the first proposition advanced by AGPC is bordering on the absurd.³⁸⁶ There can be no doubt on the basis of the evidence and controversy between the parties in these proceedings that both the Grand Prix race and the concert were ready to proceed during the days following 13 March 2020 and in the case of the concert the next day, on 14 March. To contend that during the afternoon of 13 March 2020 AGPC is relieved of its obligations under the LMCA because there is no evidence that WTM asked AGPC to allow it to run the concert is unsustainable. In any event, were this position to be taken seriously it would have to be said that the evidence of what occurred on 13 March 2020 carries the very clear basis for such an implied request on the basis of WTM and, or alternatively, a clearly common position as between the parties that WTM was seeking to stage the concert on 14 March 2020. More particularly, it follows on the basis of matters relied upon by WTM with respect to the First Misrepresentation that AGPC was saying that the concert could not proceed. Such a response can hardly be necessary had AGPC not understood that the preconditions to its proceeding under the LMCA upon which AGPC now seeks to rely

³⁸⁵ Witness Statement of Andrew Westacott [70]; CB352.

³⁸⁶ See *Defendant's Outline of Closing Submissions* (12 June 2024), [176]-[180].



had not been complied with. The second matter relied upon is at odds with the proper construction of AGPC's obligations under cl 2.1 of the LMCA which was discussed previously. And as to securing and providing a venue, it seems to me to be bordering on disingenuous to suggest that a venue was being provided, in a sense relevant to matters in issue in this proceeding, AGPC having told WTM that, in effect, it could not use Lakeside Stadium for the purposes of the concert. The third matter relied upon is not borne out by the events of 13 March 2020. As discussed previously, the matters sought to be relied upon by Mr Westacott with respect to cl 14 of the LMCA must, in light of the actual events of 13 March 2020, now be regarded as *ex post facto* rationalisation which carry no weight in this context. As to the fourth matter, it is clear, in my view, for the reasons indicated in relation to events and communications in March 2020, that it would have been reasonable for AGPC to have permitted the concert to be staged; particularly having regard to the lack of any restrictions on mass gatherings in Victoria at that time and the position of the Chief Health Officer, Dr Sutton, that whether or not the concert proceed was a matter for the organisers, namely WTM and TEG Dainty.

191 As to the express obligation to cooperate in good faith, AGPC makes reference to WTM's allegation that:

185. It will be recalled that WTM's allegation is that "[b]y reason of the First Misrepresentation, on 13 March 2020, AGPC failed to cooperate with WTM to enable the 2020 World Tour Melbourne to take place, including by failing to facilitate access to the venue, provide utilities, or provide security staff to facilitate an exit from the event in the case of an emergency", and WTM seeks to rely on cl 5.1(a) for this allegation of breach.

192 As to the operation of cl 5.1(a) of the LMCA, AGPC submits:³⁸⁷

186. Clause 5.1(a) of the LMCA provides that AGPC shall "co-operate in good faith with WTM in all matters relating to the World Tour Melbourne and/or the Responsibilities".

187. Clause 5.1(a) picks up the concept of co-operation, which bears the same content as the discussion of the implied duty of cooperation at paragraphs 167 - 169 above. However, in construing the content of clause 5.1(a), it is critical to note that "cooperate in good faith" is a

³⁸⁷ Defendant's Outline of Closing Submissions (12 June 2024), [186]-[190].



composite expression. The obligation that it imposes is an obligation to cooperate, which is qualified by the requirement that cooperation be in good faith. The significance of this is as follows.

188. Obligations of good faith in a commercial contract are narrower than a duty of utmost good faith or obligations of good faith which exist in fiduciary contexts.³⁸⁸ In a commercial contractual setting, duties of good faith do not “ordinarily operate so as to restrict decisions and actions, reasonably taken, which are designed to promote the legitimate interest of a party”.³⁸⁹ As a consequence, courts have held that the purpose or motive of the party which is alleged to have breached the duty is relevant. Courts have held that there is no breach of a contractual obligation to act in good faith where:

- (a) a lessor of a city building caused the local council to issue a fire safety notice and then sought to recover the cost of compliance from the lessee, pursuant to the lease between the lessor and lessee, in circumstances where the lessor had a legitimate interest in ensuring that the building was properly protected;³⁹⁰
- (b) a car dealer terminated a dealer’s franchise in reliance on a clause in the dealership agreement for good commercial reasons and with reasonable notice;³⁹¹
- (c) a franchisor allowed a new franchise to open near an existing franchisee where that decision was motivated by the franchisor’s interests and not with specific intent to harm the franchisee.³⁹²

189. In contrast, a breach of an obligation of good faith will be established where a party exercises its rights under a contract “in a capricious or arbitrary manner, or for an extraneous purpose”.³⁹³ A breach of good faith was found to have occurred where a minister, whose mind was “so distorted by prejudice and misinformation that he was unable to comprehend the facts in respect to which he had to pass judgment”, cancelled a public works contract.³⁹⁴

190. It follows from the above, that in order to be satisfied that AGPC breached the obligation in cl 5.1(a), the court must have regard to AGPC’s motive or purpose in giving the advice that was given in the 2.08 pm call and in the 4.52 pm email.

193 Following on from these submissions, AGPC relies on a number of matters in support of the position that there is no basis to impugn AGPC’s motive or purpose in giving

³⁸⁸ *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104, [112].

³⁸⁹ *South Sydney District Rugby League Football Club Ltd v News Ltd and Others* (2001) 177 ALR 611, 696 [394].

³⁹⁰ *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 369G-370A (Sheller JA), 370 (Powell and Beazley JJA agreeing).

³⁹¹ *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903.

³⁹² *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310, [117].

³⁹³ *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 368D (Sheller JA), 370 (Powell and Beazeley JJA agreeing).

³⁹⁴ *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 276C.



the advice that was given in the 2:08pm call and in the 4:52pm email.³⁹⁵ It also makes the point that there has been no allegation, pleadings, written submissions, list of issues, or oral argument of bad faith or improper conduct by Mr Westacott. An allegation of this nature would need to be pleaded and particularised and clearly pleaded and particularised.³⁹⁶

194 In terms of more substantive matters, the gravamen of the AGPC submissions in this respect is that Mr Westacott believed that the advice of the Chief Health Officer required him to cancel the Grand Prix in its entirety, the race and all events with no exceptions and so he acted on that advice to cancel the event in its entirety. As indicated in the preceding reasons in relation to the events of 13 March 2020 and related matters, AGPC, Mr Westacott and others did not communicate in a clear or timely manner with WTM in relation to whether or not the concert could proceed. This was notwithstanding that it must or should have been readily apparent to AGPC that WTM and TEG Dainty would have real and legitimate commercial and other concerns to know whether the concert could proceed and to have that question determined without delay. As AGPC would or should have appreciated, the commercial imperatives AGPC was dealing with in relation to the Grand Prix and all the preparations and commercial consequences of cancellation would be expected to raise the same or similar concerns for WTM, TEG Dainty and others involved in related events to the Grand Prix. Nevertheless, as indicated previously, AGPC did not accurately communicate the advice of Dr Sutton, the Chief Health Officer, for no reasons which are readily apparent. Whether this failure by AGPC and its representatives was due to the unrelenting pressures of the rapidly unfolding events of 13 March 2020 or just sheer incompetence is not readily clear. It might be thought the latter is more likely, particularly having regard to the seeming afterthought of the 2:50pm text where, at long last, AGPC for the first time sought the advice of the Chief Health Officer in relation to whether the concert could be staged. On this basis, I accept that there is insufficient evidence to find lack of good faith on the part of

³⁹⁵ See *Defendant's Outline of Closing Submissions* (12 June 2024), [191]-[196].

³⁹⁶ *Supreme Court (Civil Procedure) Rules 2015* (Vic) r 13.10(3)(b); *Young Investments Group Pty Ltd v Mann* (2012) 293 ALR 537, 450-1 [7]-[11]; *Deputy Commissioner of Taxation v Leaver* [2015] FCA 1454, [7].



AGPC or Mr Westacott. This does not, however, detract from the implied duty of AGPC to cooperate with WTM under the provisions of the LMCA which have been discussed.

195 Turning now to issues 9 and 10 which go to WTM's reliance on cl 5.1(b) for the contention that AGPC failed to provide documents, information etc.

196 WTM alleges that AGPC breached cl 5.1(b) insofar as it:

- (a) "failed to provide WTM with a copy of the [8.42am email] or the [2.52pm text] prior to making the First Misrepresentation and/or cancelling the 2020 World Tour Melbourne";³⁹⁷
- (b) "failed to provide WTM with an accurate account of the Recommendation or the Response from the Chief Health Officer, prior to making the First Misrepresentation and/or cancelling the 2020 World Tour Melbourne as outlined above".³⁹⁸

Clause 5.1(b) provides that AGPC shall 'provide to WTM in a timely manner all documents, information, items and materials in any form required under Schedule 1 or otherwise reasonably required by WTM in connection with the World Tour Melbourne and/or the Responsibilities and ensure that they are accurate and complete in all material respects'.

197 As to the proper construction of cl 5.1(b), AGPC submits:³⁹⁹

- 204. Clause 5.1(b) provides that AGPC shall provide all documents, information, items and materials either required under Schedule 1 or otherwise reasonably required by WTM in connection with the World Tour Melbourne.
- 205. The documents, information, items and materials required to be provided under Schedule 1 are set out in paragraph 4 of Schedule 1. They include "tickets to the Australian Grand Prix" ([4.1] and [4.2]); the sale of "tickets that allow access to both the World Tour Melbourne shows and the Australian Grand Prix" ([4.4]); and "all relevant customer data collected on its ticketing database in relation to World Tour Melbourne" ([4.6]).⁴⁰⁰ These are the documents, information, items and materials that WTM "required" and identified for AGPC at the time of the LMCA.

³⁹⁷ ASOC [11(f)(G)].

³⁹⁸ ASOC [11(f)(H)].

³⁹⁹ *Defendant's Outline of Closing Submissions* (12 June 2024), [204]-[207].

⁴⁰⁰ CB1255-1256.



206. The question is the scope of the words “otherwise reasonably required by WTM” in the context of cl 5.1(b) and the LMCA generally. AGPC submits that a matter within clause 5.1(b) is only “required by WTM” once it has identified and requested it. AGPC is then obliged to provide it in a timely manner – provided, of course that what is requested is reasonably required. That construction indicates a use of the word “required” in the sense of “to call on authoritatively, order or enjoin” or “to call for or exact as obligatory”.⁴⁰¹
207. The alternative construction is unlikely to be correct because, unlike with the documents and materials identified in Schedule 1, it would be for AGPC to identify what it was that WTM “reasonably required”. This would be a use of the word “required” in the sense of “to have need of”.⁴⁰² It is unlikely that it was the intention of the parties that it was for AGPC to predict what “documents, information, items and materials” WTM might reasonably “have need of” from time to time. The obligation to provide “in a timely manner” confirms the impracticality of such an obligation. How is AGPC to predict when WTM might reasonably require a particular piece of information or item or material unless WTM asks for it?

On this basis, AGPC contends that upon its true construction there was no breach of cl 5.1(b). In this respect it says that WTM was told about the Chief Health Officer’s ‘advice in writing’ during the 2:08pm teleconference and did not request it. Moreover, it says that even on WTM’s construction of these provisions, there was no breach. AGPC says that if WTM knew of the existence of the 8:42am email and did not ask for it, it can hardly contend that it reasonably required it. Further, and in any event, AGPC says it took reasonable steps to keep WTM informed of the Chief Health Officer’s advice in the circumstances of the day. In support of this proposition it refers to a number of communications and other matters which have already been the subject of consideration in the preceding reasons.⁴⁰³

198 Having regard to the discussion and with respect to the events of 13 March 2020 and, particularly, as regards to the First Misrepresentation and the Second Misrepresentation, I am of the view that AGPC did not take reasonable steps to keep WTM informed of the Chief Health Officer’s advice in the circumstances of the day. Moreover, construing cl 5.1(b) in the literal and restrictive way in which AGPC seeks to do is, in my view, in the context of the provisions of the LMCA and its clear

⁴⁰¹ *Macquarie Dictionary* (online at 12 June 2024) ‘require’ (defs 2 and 5).

⁴⁰² *Macquarie Dictionary* (online at 12 June 2024) ‘require’ (def 1).

⁴⁰³ *Defendant’s Outline of Closing Submissions* (12 June 2024), [211]-[212].



commercial purpose is at odds with the proper approach to construction of commercial documents and to the principles set out previously. The approach of AGPC in this respect serves to evoke the perhaps now notorious statements of United States Secretary of Defense Donald Rumsfeld's reference to 'known unknowns and unknown unknowns'.⁴⁰⁴ In my view, a proper construction of cl 5.1(b) does not excuse a party subject to those obligations from breach as a result of failing to provide a critical document or documents to the beneficiary of the obligations in circumstances where it is quite clear that the document or documents contained information that would have been sought by the beneficiary had the beneficiary known of its existence at the relevant time. For these reasons, I am of the view that AGPC was in breach of its obligations under cl 5.1(b) of the LMCA.

199 Issue 11 goes to the allegation by WTM that AGPC breached its obligations under cl 5.1(d) of the LMCA to 'provide and/or procure a Venue that is fit for purpose during the Term'.⁴⁰⁵

200 AGPC says that it satisfied the obligation under these provisions to procure and provide a venue that was fit for purpose by entering into the Stadium Use Agreement with TEG Dainty.⁴⁰⁶ AGPC says that WTM's own case is that they were ready to proceed with the concert on 14 March 2020 which is to say, the venue was available and fit for purpose at the relevant time.⁴⁰⁷ The reason that WTM was not able to stage World Tour Melbourne 2020 was not, AGPC says, because it failed to procure and provide a venue. Rather, it says it was because AGPC, on advice from the Chief Health Officer, informed WTM that the Grand Prix event was cancelled, including the

⁴⁰⁴ *Clarke (as Trustee of the Clarke Family Trust) and ors v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liq)* [2014] VSC 516 Annexure [2014] VSC 334, [3595]:

"Reports that say something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns - the ones we don't know we don't know." [Department of Defense News Brief - Secretary Rumsfeld and General Myers, February 12, 2002 (www.defense.gov/transcripts/transcript.aspx?transcriptid=2636)].

⁴⁰⁵ ASOC [11(f), Particulars (A)].

⁴⁰⁶ CB1260.

⁴⁰⁷ See e.g. Witness statement of Rebecca Artmonsky [62]-[63] CB197-198; Witness statement of Paul Dainty [24] CB5396.



concert. AGPC says that this does not constitute a failure to procure and provide a venue.

201 As indicated previously, I do not accept that AGPC was acting on the advice of the Chief Health Officer when it informed WTM that the Grand Prix event was cancelled, including the concert. In light of the point raised by AGPC in relation to the provision of access to the Lakeside Stadium as set out in the SUA and that WTM does not allege any breach of that agreement, it is, in my view, quite clear that AGPC deprived WTM access to the venue for the purpose of staging the concert. As indicated previously, on the basis of the evidence of events on 13 March 2020 there is no basis for the assertion that this was as a result of AGPC acting on advice of the Chief Health Officer.

Force Majeure and Insurance (Agreed Issues 12, 13 and 14(c))

Overview

Force majeure defence

202 It is agreed that two issues concerning a *force majeure* defence arise to be determined in this proceeding:⁴⁰⁸

12. Did any of the matters alleged in paragraphs 10D, 10E(aa), 10E(a), 10E(b), 10E(c)(i), 10E(d) and 10E(h) of the DASOC constitute a force majeure event (within the meaning of cl 19.1(b) or 19.1(e) of the LMCA) which prevented, hindered or delayed its performance of that obligation? (DASOC, [11(e)(iii)]; Amended Reply filed 13 April 2023 (AR), [11(a)])?
13. If the answer to question 12 is “yes”, did the email sent from Craig Fletcher of AGPC to WTM at 4.25 pm on 13 March 2020 satisfy the requirements of cl 19.4 of the LMCA (DASOC, [11(e)(iv)] and [11(f)(iv)]; AR, [11])?

203 The ‘matters alleged in paragraphs 10D, 10E(aa), 10E(a), 10E(b), 10E(c)(i), 10E(d) and 10E(h)’ of the Amended Defence to the Amended Statement of Claim (‘ADASOC’) are as follows:

⁴⁰⁸ See CB104.



- (1) The World Health Organisation declaring COVID-19 a worldwide pandemic on 11 March 2020 (ADASOC, [10D]).
- (2) The “advice” given by Dr Sutton during the 8:00am call (ADASOC, [10E(aa)]).
- (3) Notification of Formula 1’s position received during a meeting between Formula 1 and the AGPC at around 8:30am, to the effect that a majority of teams had decided to withdraw from the competition and, on that basis, Formula 1 and FIA concluded it was not possible for Formula activity to take place, and had decided to cancel that activity (ADASOC, [10E(a)]).
- (4) Dr Sutton’s written recommendation received by the AGPC at 8:42pm (ADASOC, [10E(b)]).
- (5) Formula 1’s public statement issued at around 10:00am (ADASOC, [10E(c)(i)]).
- (6) The AGPC’s 4:25pm email to WTM and TEG Dainty (ADASOC, [10E(h)]).

The AGPC alleges that *those* matters constituted either a ‘pandemic’ or ‘action taken by a government or public authority’ giving rise to a *force majeure* event. Either *force majeure* event is alleged to have ‘prevented, hindered or delayed’ the performance of its obligations under the LMCA. It asserts that the 4:25pm email constituted the necessary notice required by the LMCA.

Principles

204 A *force majeure* clause is a mechanism to reallocate liability in respect of performance of an obligation that is prevented, hindered or delayed due to factors outside the control of a party and avoids any such failure from becoming a breach of the agreement.⁴⁰⁹ At common law, ‘*force majeure*’ is not a term of art. The effect of such a clause depends in each case on the words used.⁴¹⁰ The particular content of the concept of *force majeure* in a given case is determined requiring ‘close attention to the

⁴⁰⁹ *Woolworths Group Ltd v Twentieth Super Pace Nominees Pty Ltd* [2021] NSWSC 344, [65]. See discussion of the (non)application of a similar clause in *European Bank Ltd v Citibank Ltd* (2004) 60 NSWLR 153.

⁴¹⁰ *Sucden Middle-East v Yagci Denizcilik Ve Ticaret Limited Sirketi – “The MV Muammer Yagci”* [2019] 2 All ER, 354 (Comm) (Knowles J).



words which precede or follow it, with due regard to the nature and general terms of the contract'.⁴¹¹ It is not to be determined by reference to some generalised *a priori* concept of what *force majeure* means. In other words, as with any contractual provision, such a clause falls to be construed by reference to the text of the clause having due regard to the nature and general terms of the agreement.⁴¹²

205 Where a *force majeure* clause is relied on, a causal connection must be established between the circumstance relied upon – the event – and the effect on performance.⁴¹³ Impracticability of performance is not generally recognised as a ground of discharge of a contracting party's obligations.⁴¹⁴ As Basten JA said in *Gardiner v Agricultural and Rural Finance Pty Ltd*,⁴¹⁵ 'in considering the operation of a *force majeure* clause, the courts have commenced by determining on which party the contract intended the risk of unforeseen economic circumstances should lie'.

206 Lastly, and given the possible impact on parties' rights, *force majeure* clauses, including any mechanical elements, are often construed strictly.⁴¹⁶ For instance, in *AGL Sales*⁴¹⁷ a *force majeure* notice was found to be invalid as it was not issued 'without delay' as required by the relevant *force majeure* clause. Chesterman JA observed:⁴¹⁸

[111] ... generally, contractual notices which one party may give another unilaterally altering the rights of the parties to the contract must comply strictly with the terms which govern the giving of notice ...

[112] Clause 14 sets out the circumstances in which Dawson will be relieved from its contractual obligations. The suspension of those obligations is a matter of considerable importance to AGL and those who buy gas from it. The right conferred on Dawson to give a curtailment notice affects AGL's rights to buy gas and may expose it to liability. The Agreement is to run for a long time and the amounts of gas and money

⁴¹¹ *Lebeaupin v Crispin* [1920] 2 KB 714, p.719-720 (McCardie J).

⁴¹² *Woolworths Group Ltd v Twentieth Super Pace Nominees Pty Ltd* [2021] NSWSC 344, [27], citing *Lebeaupin v Richard Crispin & Co* [1920] 2 KB 714, 720. *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd* [2010] QCA 128, [26]–[27] (Fraser JA, Muir & A Lyons JJA agreeing).

⁴¹³ *Woolworths*, [56], citing *Hyundai Merchant Marine*, [62].

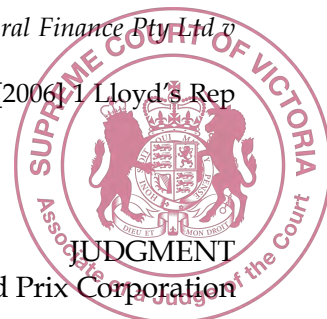
⁴¹⁴ *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* [2006] FCA 1324; 236 ALR 115, [60] (Kiefel J, as her Honour then was).

⁴¹⁵ 2007] NSWCA 235 [205]. Appeal allowed but on other issues: *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; 238 CLR 570, 575 [6].

⁴¹⁶ See, e.g. *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc* [2006] 1 Lloyd's Rep 163, 168; [2005] EWHC (Comm) 2528, [25], [28].

⁴¹⁷ *AGL Sales (Queensland) Pty Ltd v Dawson Sales Pty Ltd* [2009] QCA 262.

⁴¹⁸ See also [34]–[38] (Muir JA).



which change hands pursuant to its terms are considerable. The parties are to be taken to have intended that the alteration of obligations in such a contract which may have such consequences should be permitted only in the precise circumstances the parties themselves specified. Relevantly that means that unless a Curtailment Notice be given without delay it will be invalid.

The force majeure clause in the LMCA

207 Clause 19 of the LMCA is the operative clause in the LMCA in this respect. Its terms are set out now for convenience:

19.1 **Force Majeure Event** means any circumstance not within a party's reasonable control including, without limitation:

...

(b) epidemic or pandemic;

...

(e) any law or any action taken by a government or public authority

...

...

19.2 Provided it has complied with clause 19.4, if a party is prevented, hindered or delayed in or from performing any of its obligations under this Agreement by a Force Majeure Event (**Affected Party**), the Affected Party shall not be in breach of this Agreement or otherwise liable for any such failure or delay in the performance of its obligations ...

...

19.4 The Affected Party shall:

(a) as soon as practicable after the start of the Force Majeure Event, notify the other party in writing of the Force Majeure Event, the date on which it started, its likely or potential duration, and the effect of the Force Majeure Event on its ability to perform any of its obligations under the agreement; and

(b) use all reasonable endeavours to mitigate the effect of the Force Majeure Event on the performance of its obligations.

208 Clause 30 of the LMCA set out requirements for notices to be issued under the LMCA to WTM, including that any notice – if from AGPC and sent by email – be sent by email to Sam Smith at a specified email address.⁴¹⁹

⁴¹⁹ LMCA, cl 30.1(b)(i).



AGPC's force majeure defence

209 AGPC relies on cl 19.2 in its defence. That clause has the following elements:

- (1) First, a force majeure event must have existed within the meaning of cl 19.1.
- (2) Second, the force majeure event must have 'prevented, hindered or delayed' a party from performing its obligations under the LMCA.
- (3) Third, cl 19.2 only operates if the party seeking to rely on it (being the 'Affected Party') has 'complied with clause 19.4' which requires notice to be given in compliance with cls 19.4(a) and 30, and for the Affected Party to use all reasonable endeavours to mitigate in accordance with cl 19.4(b).

210 WTM contends that AGPC has failed to establish that those elements were satisfied. More particularly, it contends that no *force majeure* 'event' existed:

- (1) there is no evidence that COVID-19 itself prevented, hindered or delayed performance by AGPC.⁴²⁰ Rather, the position of AGPC was that it would follow the advice of the Chief Health Officer in this regard;
- (2) nor was no 'action taken by a government or public authority' outside of AGPC's reasonable control that engaged cl 19.4 or prevented, hindered or delayed performance;
- (3) the WHO declaration of a pandemic did not 'prevent, hinder or delay' AGPC's performance: indeed, in full knowledge of that declaration made on 11 March 2020, the parties continued in preparing for the concert (cf. ADASOC, [10D]). Mr Westacott conceded that the WHO's declaration 'did not change anything operationally for the [AGPC] with respect to the Grand Prix';⁴²¹
- (4) nor did Dr Sutton's advice regarding the concert, properly understood, prevent, hinder or delay performance. Dr Sutton had no power to prevent or restrict events of that nature from proceeding until the following Monday

⁴²⁰ Conceded by the AGPC in opening: T112/20-22.

⁴²¹ T434/6-9 (XXN of Mr Westacott).



16 March 2020⁴²² and, for reasons outlined above, he did not purport to take any ‘action’ with respect to the concert: cf. ADASOC, [10E(aa)] and [10E(b)]. Indeed, the evidence establishes that once Dr Sutton was aware of the concert, his view was that it was a ‘ultimately for organisers’;⁴²³

- (5) decisions by Formula 1 and FIA likewise had no bearing on the ability of AGPC to perform its obligations under the LMCA: cf. [10E(a)] and [10E(c)(i)];
- (6) the 4:25pm email was an email from the AGPC itself: no commercial businessperson would understand cl 19 to enable the AGPC to create a *force majeure* event by its own conduct;⁴²⁴ and
- (7) no other “event” is relied on in the AGPC’s pleaded case.

211 WTM submitted, in opening, that AGPC sought to go beyond its pleaded case by submitting that the words in the chapeau to cl 19.1 – ‘any circumstances not within a party’s reasonable control’ – applied to the circumstances at hand such that, even if no pandemic or action taken by a government or public authority existed, there existed a circumstance(s) ‘not within [its] reasonable control’.⁴²⁵ WTM says that such a claim has not been adequately articulated and, in any event, must fail for the same reasons as raised previously in its submissions. More particularly, it says that there was no particular ‘event’ which prevented, hindered or delayed performance of the concert outside of AGPC’s own making.

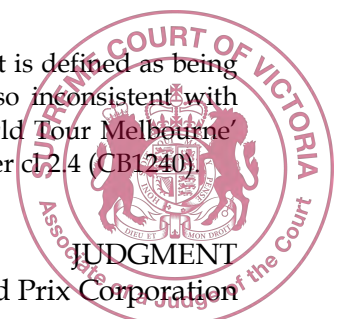
212 Further, and in any event, WTM contends that AGPC has not established that it complied with the notice requirements of cl 19.4. To the contrary, it says, the 4:25pm

⁴²² 189A State of Emergency, under s 198 of the *Public Health and Wellbeing Act 2008* (Vic), which gave the Chief Health Officer the power to exercise the emergency powers (in s 200 of the Act), including to cancel mass gatherings of more than 500 people, was not declared until midday on 16 March 2020 (two days after the WTM concert was to be held): see CB3701–3704.

⁴²³ CB3591.

⁴²⁴ Such a construction would lead to absurd results, noting that *force majeure* event is defined as being something ‘any circumstance not within a party’s reasonable control’. It is also inconsistent with internal contractual mechanisms recognising that the WTM’s ‘right to stage World Tour Melbourne’ could be suspended if AGPC received ‘an unequivocal Ministerial Direction’ under cl 2.4 (CB1240).

⁴²⁵ See T112/13-17.



email was the only purported 'notice' relied on. As to this, WTM submits that, contrary to cl 19.4, that email:

- (1) was sent after Mr Westacott's representations in the 2:08pm phone call and after cancellation had been announced;
- (2) the email was not sent 'as soon as practicable' after any of the purported force majeure events relied on (indeed, it was sent after the AGPC had already misrepresented the position to WTM as outlined above and WTM had notified the public and stakeholders that the concert had been cancelled);
- (3) the email identified the *force majeure* event as the Chief Health Officer of the Victorian Government's DHHS having – in effect – advised that all activities within the Declared Area/venue and must be cancelled or run patron free, which was not correct as a matter of fact;
- (4) the email did not describe what impact Dr Sutton's recommendation had on the ability of the AGPC to perform any of its obligations under the LMCA; and
- (5) the email was not sent by AGPC to '[Sam Smith at the designated email address]' (albeit, WTM accepts it came to Ms Smith's attention).

213 Additionally, WTM submits that far from using all reasonable endeavours to mitigate the effect of the claimed *force majeure* event on the performance of its obligations as required by cl 19.4(b), which could have been done by accurately communicating the advice of the Chief Health Officer to WTM, AGPC instead misrepresented the Chief Health Officer's advice and announced that the concert had been cancelled in order to avoid performing its obligations under the LMCA.

214 For the reasons set out in WTM's submissions, it says that the answer to each of agreed issues 12 and 13 is 'No'.

215 AGPC contends that there can be no doubt the Grand Prix was cancelled for a *force majeure* event. It follows, it says, the WHO declared COVID-19 to be a global

SC:



pandemic on 12 March 2020 and the Chief Health Officer’s advice in relation to the Grand Prix was to mitigate against the risk of the spread of COVID-19. Whether or not the Grand Prix itself was cancelled as a result of a *force majeure* event – treating that concept in the most general terms – is not an issue for determination in these proceedings. The question is whether the concert was cancelled as a result of AGPC not allowing it to proceed was a *force majeure* event. As indicated previously in these reasons, it is clear that Dr Sutton’s advice as Chief Health Officer was not that the concert should be cancelled. As indicated previously, there was no restriction against mass gatherings in Victoria until the declaration of the State of Emergency on Monday 16 March 2020 and the only reason why the concert could not proceed is because AGPC did not permit it to proceed. Having found that this is the position on the evidence, there is no *force majeure* event upon which AGPC is able to rely upon by way of defence under the provisions of the LMCA.

216 On this basis, the only matter raised in AGPC’s submissions with respect to *force majeure* contentions⁴²⁶ that requires any attention is the question whether, assuming there was a *force majeure* event upon which AGPC could rely, it complied with the ‘reasonable endeavours’ provisions of cl 19.4(b) of the LMCA. In essence, this is a question whether it properly communicated with WTM in relation to the claimed *force majeure* event. It is clear that there was no formal notice provided to WTM as to any such event.⁴²⁷ In support of its submissions that such notice was effectively provided, AGPC again rehearses the events of 13 March 2020 with respect to the 8:00am call and subsequent events. These events have previously been considered in detail in these reasons and it is sufficient for present purposes to express the view that on no basis could it be said that WTM was given notice of or any detail in a clear and timely manner of a *force majeure* event in the course of that day as now relied upon by AGPC. Again, the submission is made by AGPC that it is clear from the 8:00am call that the Chief Health Officer meant cancellation of the Grand Prix as meaning the entire event, the race and other events within the declared area. For the reasons indicated

⁴²⁶ Defendant’s Outline of Closing Submissions (12 June 2024), [213]-[233].

⁴²⁷ See above [212].



previously, that is not clear at all and, rather, what is clear is that no such advice had been given by the Chief Health Officer either on the 8:00am call or subsequently; a position clarified by Dr Sutton's text message at 2:55pm to the effect that whether or not the concert was to proceed was a matter for its organisers.

217 For these reasons the AGPC's *force majeure* defence fails.

WTM's Loss (Agreed Issue 14)

Causation and Remoteness: WTM's failure to obtain adequate insurance

218 An issue arose in this matter as to whether the loss and damage suffered by WTM was caused (in whole or in part) by what AGPC alleges is a failure by WTM to effect and maintain event cancellation insurance in accordance with cl 14.2 of the LMCA. Clause 14.2 provides as follows:

WTM shall (or shall procure that the Local Partner shall) in respect of each World Tour Melbourne during the Term, effect and maintain:

...

- (b) Event cancellation insurance, covering losses suffered by WTM and/ or the Local Partner if the World Tour Melbourne is cancelled for artist cancellation or venue non availability due to a Force Majeure Event (as defined in clause 19.1). Cover must include losses or claims in connection with, but not limited to the refund of ticket revenue (to the extent not refunded by a ticket agent) from both ticket sales to World Tour Melbourne and 'Bundled Tickets', artists fees, accommodation and travel costs.

219 On 9 March 2020, TEG Dainty provided AGPC with a Confirmation of Cover for Non-Appearance Insurance. It is agreed that this cover excluded loss directly or indirectly arising out of, contributed to by, or resulting from [COVID-19] or any mutation or variation thereof and/or any threat (whether actual or perceived) or fear thereof.

220 WTM submits that the evidence of Mr Grayson, unchallenged, was that insurance policies available at this time did not cover 'cancellation due to coronavirus (as such



coverage was not available)’ and that the insurance market had ‘started to require a specific coronavirus exclusion’.⁴²⁸

221 On this issue, AGPC submits that the Court should find that, if it finds the defendant liable and that its conduct caused the plaintiff loss and damage, this loss and damage was caused by or because of WTM’s own failure to effect and maintain event cancellation insurance in accordance with cl 14.2(b) of the LMCA, or, alternatively, this loss and damage was too remote, such that the plaintiff is not entitled to recover this loss from the defendant.

222 AGPC further submits that cl 14.2(b) reflected the commercial agreement and communicated an understanding between the parties as to the allocation of risk for cancellation of the concert event. It is said this is demonstrated by an email from Mr Rosengarten to Mr Grayson on 12 September 2019, in which he asserted in relation to the required scope of WTM’s insurance that:

‘it’s the costs incurred or spent on the concert that would be lost ... For example, if the venue can’t be delivered and as a result the shows have to be cancelled and Apollo’s costs for artists, flights, accommodation, plant and equipment, lost revenue should be claimable under the cancellation insurance by Apollo not fall onto AGPC.’ AGPC also cited Mr Rosengarten’s further email on the same day: ‘Simply put, both TEG/Dainty and Apollo need to have event cancellation insurance to cover their own losses suffered and expenses incurred, however arising (e.g. artist cancellation, stadium non-delivery etc) ... AGPC will have insurance to cover our own losses.’

AGPC observes that, consistent with that understanding and agreement, it repeatedly followed up WTM to obtain the required event cancellation insurance, including through communications on 30 January, 13 February, 1 March and 2 March 2020.⁴²⁹

223 AGPC says that due to WTM’s failure to obtain such insurance as would cover loss directly or indirectly from COVID-19 in contravention of clause 14.2(b) of the LMCA, there is an inference open to the Court that this express exclusion within WTM’s cancellation insurance is the cause of its inability to recover the loss and damage claimed by WTM in this proceeding through its insurer. It is said that the recovery of

⁴²⁸ Witness statement of Mr Grayson dated 16 September 2022 [29] (CB140) and [36] (CB142); WTM closings [108].

⁴²⁹ CB1491.



this loss and damage was expressly contemplated and required by cl 14.2(b) of the LMCA. In support of its submissions as to this inference, the AGPC cites an ‘Apollo World Touring Board Report’ dated 28 April 2020, in which Mr Butorac and Mr Gow reported that there had been ‘no insurance update since the last report. We do not anticipate being able to draw down on insurance cover given the reason for cancellation. We continue to engage with our broker to seek a refund of fees, but as yet no positive progress has been achieved’.⁴³⁰

224 In its submissions on this issue, WTM draws attention to the nature of the obligation within cl 14.2(b) of the LMCA, being to effect and maintain insurance covering losses suffered if the World Tour Melbourne events ‘are cancelled for artist cancellation or venue non availability due to a Force Majeure Event’. In this regard, WTM highlights that the losses claimed are not for ‘artist cancellation’ or ‘venue non availability’ due to a *force majeure* event; that Robbie Williams did not cancel – to the contrary, he was in Melbourne and ready to perform – and nor was Lakeside Stadium unavailable due to COVID-19 or any *force majeure* event; that no government decision had been made to prohibit non-essential mass gatherings scheduled for 14 March 2020; and that it was the misrepresentations of AGPC that resulted in the cancellation of the concert.

225 In my view, in light of the preceding discussion surrounding AGPC’s *force majeure* defence,⁴³¹ AGPC’s submissions should be rejected. The overwhelming evidence is that the true cause of WTM’s claimed loss and damage was the representation by AGPC that the Chief Health Officer had given a directive for the concert to be cancelled. In my view, any construction of the language of cl 14.2(b) that would extend to the loss and damage suffered by WTM in this case is not open on the basis of its provisions properly construed. Nor is any contention that the cancellation of the concert arose from ‘artist cancellation’ or ‘venue non availability’ due to a *force majeure* event. Notwithstanding my view that AGPC was not entitled to rely on any *force majeure* defence, the evidence clearly demonstrates that the venue was available and the artist was ready to perform as scheduled. Moreover, AGPC’s submissions

⁴³⁰ CB5382.

⁴³¹ See above [209]-[217].



regarding the commercial agreement as understood by the parties and the nature of the understanding of cl 14.2(b) of the LMCA as to the allocation of risk in the event of cancellation of the concert event have no force or application as, in my view, the sub-clause cannot be construed so as to embrace the circumstances and the reason for cancellation of the concert as actually occurred in this case.

226 Additionally, the documents relied upon by AGPC in support of its submissions, namely the emails of Mr Rosengarten describing the required scope of the necessary insurance, further reinforce my view that the kinds of or reasons for cancellation contemplated by the obligation in cl 14.2(b) of the LMCA have no relevance or application to the critical events of 13 March 2020. These emails are directed primarily to setting out the scope of the costs incurred which would not be able to fall on AGPC in the event that, 'for example, the venue can't be delivered and as a result the shows have to be cancelled'. This is not what occurred and the submissions regarding the parties' understanding of allocation of risk and scope of the loss do not bear upon the construction of the threshold event of cancellation under cl 14.2(b). Similarly, the evidence of AGPC 'repeatedly following up' WTM regarding the obtaining of insurance on four occasions between 30 January 2020 and 2 March 2020 are not relevant to the causation issue and, in my view, are merely instances of ordinary 'follow up' or status checking correspondence between commercial parties. Nor is the statement of Messrs Butorac and Gow in an internal WTM report of 28 April 2020 confirming that the parties do not anticipate being able to draw down on insurance of any relevance.

227 Finally, WTM observes that the evidence as to the availability of insurance policies covering loss arising from the COVID-19 pandemic was, at the relevant times, that such coverage was widely unavailable and not possible for WTM to obtain.⁴³²

228 AGPC further submitted that the loss claimed is not recoverable because it is too remote, and that cl 14.2 objectively demonstrates that it was not within the contemplation of the parties that WTM's losses arising from event cancellation would

⁴³² See CB3524 and T172-177.



be recoverable against AGPC. It is said that WTM understood and accepted the risk it bore by proceeding with the concert event on the basis of the event cancellation insurance it obtained which contained an express exclusion for COVID-19. AGPC submits that this acceptance and understanding is recorded in the following email dated 1 March 2020 from Mr Grayson to Ms Smith:

On cancellation insurance covering major risks OTHER THAN coronavirus we need to take a decision by the end of the day on what we are doing ... Have there been daily updates between us, TEGD & AGPC on the corona virus / government risk to the GP? ... The only reason I can see for not taking out the insurances I highlighted in my note of Friday is that we seriously believe that there is going to be a cancellation by the government for coronavirus. Total reporting infections in Oz stand at 24 ... If that's the case then we should be moving now to mitigate the entire show – in particular talking to artists and management ... If this issue is not being addressed then we do need to talk about it today.

229 In oral closing submissions, counsel for WTM submitted that the existence of cl 14.2 of the LMCA demonstrated that the parties had expressly contemplated the sorts of losses in issue in this proceeding and had turned their minds to those questions, which is said by WTM to be the antithesis of something being too remote. Further, and in my view more relevantly, it is said that the parties' allocation of risk as evidenced by cl 14.2 applies only to the extent that the provisions apply to the cancellation in question. In this instance, where the cancellation was not due to venue non availability due to a *force majeure* event, the plaintiff submits the risks lie with the breaching party and it follows that the loss caused is not too remote.⁴³³

230 For these reasons, I accept the submissions of WTM in this regard. In my view, AGPC's submission are afflicted by the same misconception of the nature of the cancellation events or circumstances contemplated by cl 14.2(b) of the LMCA, as discussed in the preceding paragraphs. Any acceptance and understanding by AGPC as to the scope of the damage for which it may be liable in the event of cancellation due to venue non availability due to a *force majeure* event is beside the point, given the actual nature and reasons for cancellation of the concert.

⁴³³ T747:15–T748:7.



Overview of WTM's claim for loss and damage

231 WTM claims approximately \$6,500,000 (plus interest and costs) in loss and damage caused by AGPC's conduct leading to the cancellation of the Robbie Williams concert.

232 In WTM's submission, this is the amount it lost through the costs incurred in preparing for the concert, from loss of revenue from the ticket sales which were refunded on the cancellation of the concert, and from the loss of opportunity to derive revenue from running the event, including in relation to further ticket sales, sponsorship, TV and film content, VIP hospitality, food and beverage sales, and merchandise sales.⁴³⁴

233 In determining this claim, WTM contends the Court must determine whether it suffered loss or damage as a result of AGPC's breaches or contraventions and, if so, the quantum of that loss.⁴³⁵

234 With respect to issues of causation, WTM contends that the evidence establishes that but for AGPC's misrepresentations the concert would have proceeded and that the causation question should therefore be resolved in its favour.⁴³⁶

235 In contrast, AGPC submits that the Court should find that any loss and damage suffered by WTM was caused by, or because of, WTM's failure to effect and maintain event cancellation insurance in accordance with cl 14.2(b) of the LMCA such that WTM is not entitled to recover that loss from AGPC.⁴³⁷ As indicated previously, I reject AGPC's submission in this respect.

236 Alternatively, AGPC contends the Court should find that any loss and damage suffered by WTM was too remote such that WTM is not entitled to recover that loss from AGPC.⁴³⁸ This submission also relies on the Court accepting that, on the basis of the provisions of cl 14.2 of the LMCA, the parties did not contemplate that WTM's

⁴³⁴ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [239].

⁴³⁵ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [239].

⁴³⁶ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [245].

⁴³⁷ *Defendant's Outline of Closing Submissions* (12 June 2024), [371].

⁴³⁸ *Defendant's Outline of Closing Submissions* (12 June 2024), [371].



losses arising from event cancellation would be recoverable against AGPC.⁴³⁹ As indicated previously, I have found the contrary position.

237 Regarding WTM's submissions and claims with respect to loss and damage, AGPC relies on the distinction between causation and remoteness articulated by Gillard J in *Hardchrome Engineering Pty Ltd v Kambrook Distributing Pty Ltd*, where his Honour observed:

Causation is concerned with whether the breach caused the fire and the damage. The principles concerning remoteness of damage in contract are concerned with marking out the boundary of recoverable loss beyond which the plaintiff is not entitled to recover damages.⁴⁴⁰

238 WTM responds, in very summary form, that AGPC's submissions in relation to remoteness should be rejected on the basis that, in accordance with the principles set out in *Hadley v Baxendale*⁴⁴¹ (discussed below), a reasonable person in AGPC's position should, and would, have appreciated that in the event AGPC misled WTM to cancel the concert, losses of the type now claimed by WTM would arise.⁴⁴²

239 As indicated in these reasons, I am satisfied that any loss and damage suffered by WTM through the cancellation of the Robbie Williams concert was caused by, and because of, the misrepresentations made by AGPC.

240 Turning to the assessment of quantum, WTM's overarching contention is that a party who suffers loss as a result of a breach of contract is to be placed in the same position as if the contract had been performed⁴⁴³ and that this principle applies by analogy to remedying contraventions of s 18 of the ACL.

⁴³⁹ *Defendant's Outline of Closing Submissions* (12 June 2024), [371].

⁴⁴⁰ [2000] VSC 359, [429]; see also, for example, *Wenham v Ella* (1972) 127 CLR 454, 471-472 (Gibbs J).
⁴⁴¹ (1854) 156 ER 145, 151.

⁴⁴² *Plaintiff's Outline of Closing Submissions* (5 July 2024), [339]-[340].

⁴⁴³ *Hosking v IpeX Software Services Pty Ltd* [2004] VSC 299, [36] citing *Robinson v Harman* (1948) 1 Ex 850, 855.



Legal principles

241 WTM claims damages for breach of the LMCA and pursuant to ss 236 and 237 of the ACL.⁴⁴⁴

242 Section 236 of the ACL provides in relevant part:

- (1) If:
- (a) a person (the **claimant**) suffers loss or damage because of the conduct of another person; and
 - (b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

243 Section 237 then provides, also in relevant part:

- (1) A court may:
- (a) on application of a person (the **injured person**) who has suffered, or is likely to suffer, loss or damage because another person has engaged in conduct in contravention of a provision of Chapter 2, 3 or 4; or
 - (b) on the application of the regulator made on behalf of, and with the consent in writing of, one or more such injured persons;

make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

Note: The orders that the court may make include all or any of the orders set out in section 243.

- (2) The order must be an order that the court considers will:
- (a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or
 - (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.

244 In applying ss 236 and 237 of the ACL,⁴⁴⁵ the Court is not constrained by common law principles concerning the assessment of damages in contract or tort although, in many cases, the measure of damages in tort – where damages are awarded to put the

⁴⁴⁴ CB58-59.

⁴⁴⁵ Section 18 is located in Chapter 2 of the ACL.



plaintiff in the position they would have been in had the tort not been committed – has been considered an appropriate approach.⁴⁴⁶

245 Similarly, in awarding damages for breach of contract, a party who suffers loss as a result of the breach is to be placed in the same position as if the contract had been performed.⁴⁴⁷ However, the party claiming damages for breach of contract must first establish the defaulting party's breach was causative of their loss, generally through the application of the 'but for' test.⁴⁴⁸

246 As Beach J observed in *Siegwerk Australia Pty Ltd*:⁴⁴⁹

Factual causation is generally resolved through an application of the "but for" test. The "but for" test entails a determination on the balance of probabilities that the particular harm that in fact occurred would not have occurred absent the conduct of the party in breach. The question is whether a particular act or condition was one of the conditions or relations necessary to complete the set of conditions which represent the cause posited. This is the basis of the "but for" test of causation. But the "but for" test is not the exclusive test of factual causation.

247 While in *Hadley v Baxendale*, Alderson B set out the proper approach to the award of damages:⁴⁵⁰

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

248 In this latter regard, 'what was in the contemplation of the parties depends upon a consideration of the terms of the contract in light of the matrix of circumstances in which the contract was made'.⁴⁵¹ And the central question is whether the defaulting

⁴⁴⁶ *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)* [2022] VSC 13, [3913] (Elliot J).

⁴⁴⁷ *Hosking v Ipex Software Services Pty Ltd* [2004] VSC 299, [36] (Habersberger J) citing *Robinson v Harman* (1948) 1 Ex 850, 855.

⁴⁴⁸ *Siegwerk Australia Pty Ltd (in liq) v Nuplex Industries (Aust) Pty Ltd* (2016) 334 ALR 443, [65]-[70] (Beach J) ('*Siegwerk Australia Pty Ltd*').

⁴⁴⁹ (2016) 334 ALR 443, [66].

⁴⁵⁰ (1854) 156 ER 145, 151; see also: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 91-92 (Mason CJ and Dawson J).

⁴⁵¹ *Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd* [2022] NSWCA 65, [101] citing *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 92.



party (or a reasonable person in their position) would have ‘realised the loss in question was a probable result of the breach’.⁴⁵²

249 Further, for loss of opportunity claims, the plaintiff must establish not only that the opportunity existed but also that the opportunity was lost and that the breach caused that loss.⁴⁵³ Importantly in this respect, in *Sellars v Adelaide Petroleum NL*, Mason CJ, Dawson, Toohey and Gaudron JJ said (emphasis in original):⁴⁵⁴

Notwithstanding the observations of this court in *Norwest*, we consider that acceptance of the principle enunciated in *Malec* requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued. The principle recognised in *Malec* was based on a consideration of the peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts. Once that is accepted, there is no secure foundation for confining the principle to cases of any particular kind.

On the other hand, the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. However, in a case such as the present, the applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.

250 In other words, while the fact that there was loss is determined on the balance of probabilities, the assessment of the value of the lost opportunity is determined by reference to the value of the opportunity had it materialised and the degree of probabilities or possibilities that it would have occurred.⁴⁵⁵ Consequently, in loss of opportunity claims, courts commonly apply a discount to the damages awarded – a ‘*Sellars* discount’ – to reflect the risk of the opportunity not being realised.⁴⁵⁶

⁴⁵² *Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd* [2022] NSWCA 65, [102]; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 92.

⁴⁵³ *Winky Pop Pty Ltd v Mobil Refining Australia Pty Ltd* [2016] VSCA 187, [334].

⁴⁵⁴ (1994) 120 ALR 16, 30.

⁴⁵⁵ *ProLearn v Kytect and Telstra* [2022] VSC 5, [523] (Digby J).

⁴⁵⁶ *Masters v North East Solution* (2017) 372 ALR 440, 548 [411].



- 251 In determining the question of whether the plaintiff suffered loss of a commercial opportunity, '[a]s a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves'⁴⁵⁷ and provided 'an opportunity provides a substantial and not merely speculative prospect of acquiring a benefit, it can be regarded as of value and therefore loss or damage'.⁴⁵⁸
- 252 Nevertheless, whether a court may award substantial damages depends upon the nature of the loss in the particular case and the evidence led in it.⁴⁵⁹ In this regard, the plaintiff is required to establish the fact of loss and amount of its loss with as much certainty and particularity as is reasonable in the circumstances.⁴⁶⁰
- 253 In *Longden v Kendala Nominees Pty Ltd*, the Court of Appeal held (footnotes omitted):⁴⁶¹
- ... Consequently, where a plaintiff could have produced evidence of loss but has simply failed to do so, it ordinarily means that it has failed to prove its case on damages (so that, where the claim is based on breach of contract, the plaintiff would only recover nominal damages). There are, of course, situations where a plaintiff cannot adduce precise evidence of the amount of loss, in which case the court will do its best in that regard and will estimate the damages and, where appropriate, will engage in a certain amount of guesswork.
- 254 In contrast, in cases where it is not possible for a plaintiff to prove the amount of its loss with precision, the Court is not relieved from estimating the damages, and must do so doing the 'best it can' on the available evidence.⁴⁶² That said, where loss is not capable of precise calculation in circumstances where the plaintiff could have, and did not, lead evidence to permit a considered evaluation of the loss (even if such evaluation would require estimation), the Court is not permitted to simply guess at the damages to be awarded.⁴⁶³ If the evidence adduced fails to provide any rational

⁴⁵⁷ *Sellars v Adelaide Petroleum NL* (1994) 120 ALR 16, 36 (Brennan J).

⁴⁵⁸ *Tabet v Gett* (2010) 265 ALR 227, [124] (Kiefel J).

⁴⁵⁹ *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 242 (Brooking J) ('*Tsiloglou*').

⁴⁶⁰ *Tsiloglou*, 241 (Brooking J); *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257, [37] (Hayne J) ('*Placer (Granny Smith)*'); *Longden v Kendala Nominees Pty Ltd* [2003] VSCA 128, [33] (Chernov JA – Buchanan JA agreeing) ('*Longden*'); *Rozenbilt v Vainer* [2019] VSCA 283, [44] (Beach, Niall and Osborn JJA).

⁴⁶¹ *Longden*, [33] (Chernov JA – Buchanan JA agreeing); See also: *Placer (Granny Smith)*, [38] (Hayne J).

⁴⁶² *Placer (Granny Smith)*, [38] (Hayne J).

⁴⁶³ *Winning Appliances Pty Ltd v Dean Appliances Pty Ltd* (1995) 32 IPR 65, 67-68 (Moore J); *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, [84] (Campbell JA).



foundation for a proper estimate of damages, the authorities support the Court simply declining to make such an estimate.⁴⁶⁴ While, where damages are uncertain for lack of evidence, difficulties of assessment are in general resolved against the party who could, or should, have provided the evidence.⁴⁶⁵

255 Further, there is no general rule that a court ‘must always award substantial damages as opposed to nominal damages, if satisfied that substantial loss has been incurred even though it cannot make any rational assessment of the amount of the loss or any rational assessment of what must have been the minimum loss sustained’.⁴⁶⁶

256 Finally, as a general observation, proving loss of opportunity often requires the plaintiff to adduce evidence and model a counterfactual, which requires the Court to compare the actual position of the plaintiff with the hypothetical position the plaintiff would have been in had the breach or contravening conduct not occurred. This requires consideration of the ‘hypothetical body of human conduct’.⁴⁶⁷

Methodology to assessing quantum

257 As observed previously, the experts broadly agreed as to the methodology to be applied in calculating quantum.⁴⁶⁸

258 In her report, Ms Malcolm adopted an approach whereby she calculated the difference between the financial position WTM would have been in had the concert occurred and the financial position WTM was in as a result of the cancellation of the concert, with that difference being representative of the loss suffered by WTM.⁴⁶⁹ In some of the paragraphs and tables that follow, some of the figures have been rounded up to the nearest \$1,000. Total values have, however, been calculated using the unrounded values.

⁴⁶⁴ *Tsiloglou*, 245 (Brooking J). See also: *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23, 37 (Gibbs J) and 38(Aickin J); *McCrohon v Harith* [2010] NSWCA 67, [120]-[123] (McColl JA – Campbell JA and Handley AJA agreeing).

⁴⁶⁵ *Oran Park Motor Sport Pty Ltd v Fleissig* [2002] NSWCA 371, [54] and [66] (Hodgson JA).

⁴⁶⁶ *Tsiloglou*, 242 (Brooking J).

⁴⁶⁷ *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 282 ALR 464, [130] (Emmett J); *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483, 486 [5] (Allsop P).

⁴⁶⁸ See above, [41].

⁴⁶⁹ Expert Report of Liesl Malcolm dated 13 April 2023, [3.2.1]; CB643.



259 Pursuant to the CPA, Ms Malcolm calculated loss through the lens of four distinct heads of loss: Net Profit, VIP Hospitality, Other Revenue and Other Expenses (see the table set out at [264]).

260 Ms Malcolm assessed the overall loss and damage suffered by WTM as \$8,545,000, comprising of \$4,297,000 in lost profits, and \$4,248,000 of actual costs incurred as a result of the cancellation of the concert.⁴⁷⁰

261 In the course of cross-examination Ms Malcolm made some minor amendments to these figures, which are discussed below.

262 Ms Wright agreed ‘conceptually’ with this methodology, stating that WTM’s loss should be assessed as the difference between the financial position WTM would have been in had the concert gone ahead (‘the but-for scenario’) and the financial position WTM was in as a result of the cancellation of the concert (‘the actual scenario’).⁴⁷¹

263 However, Ms Wright disagreed with a number of the assumptions Ms Malcolm was instructed to apply and with the reliability of documents on which Ms Malcolm was instructed to base her calculations.

264 Noting that Ms Malcolm did not set out a direct comparison of the various heads of revenue and costs in the but-for scenario and the actual scenario, Ms Wright replicated those calculations as follows:⁴⁷²

Wright summary of loss calculated by Ms Malcolm			
\$’000s	But-for	Actual	Difference
50% of Show Net profit/(loss) (ticket sales excluding VIP Tickets)	(2,298)	(3,381)	1,081
90% of Hospitality/VIP Ticket Net profit/(loss)	218	(537)	755
Other Revenue	7,330	300	7,030
Other Expenses	(952)	(629)	(323)
Total Loss	4,297	(4,248)	8,545

⁴⁷⁰ Expert Report of Liesl Malcolm dated 13 April 2023, [3.1.1]; CB643.

⁴⁷¹ Expert Report of Dawna Wright dated 27 June 2023, [2.2.4] and [4.3.1]-[4.3.2]; CB725 and 733.

⁴⁷² Expert Report of Dawna Wright dated 27 June 2023, [6.5.1]; CB742; In cross-examination, Ms Malcolm agreed that Ms Wright’s table was another way of reflecting the calculations at 3.2.2 of her report: T519/14-20.



265 For the sake of convenience, Ms Wright’s approach has been adopted throughout these reasons.

CPA

266 As observed previously,⁴⁷³ the CPA⁴⁷⁴ *inter alia* established a framework for the division of revenue and costs between WTM and TEG Dainty for the purposes of co-promoting the WTM event. It is convenient to briefly elaborate here on the division of revenue and costs under the CPA.

267 In the relevant period and per Event, WTM was entitled to receive from TEG Dainty an Event Licence Fee of \$225,000 (‘the base licence fee’) plus \$4.35 per ticket sold (cl 15.1.1(a)), and a Production Fee up to \$375,000 (cl 15.1.2(a)). TEG Dainty was entitled to receive from WTM a Management Fee of \$200,000 (cl 15.6).

268 Further, WTM and TEG Dainty were each entitled to 50% of the net profits of each Event (cl 16.2). Net Profit was defined in the CPA to mean ‘Revenue less VAT and other sales taxes and duties, less Costs’ (cl 16.3, definition of Net Profits).

269 However, for the purposes of calculating the Net Profit, the following revenue streams were excluded from the definition of Revenue (cl 16.3):

- (a) revenue received by WTM in respect of TV and film content;
- (b) revenue received by WTM from global sponsorship agreements;
- (c) hospitality revenue received by WTM (other than the face value of tickets in cl 10.3);
- (d) local sponsorship commission;
- (e) the WTM sponsorship fee; and
- (f) revenue received by WTM in relation to merchandise.

⁴⁷³ See above, [41].

⁴⁷⁴ CB1294-1338.



270 Correlatively, costs incurred under global sponsorship agreements, in relation to TV and film content, hospitality costs, and merchandise costs were defined to not be Costs for the purposes of calculating Net Profit (cl 16.3, definition of Costs).

271 Further, WTM was entitled to receive:

- (a) 100% of revenue received from any global sponsorship agreement (subject to a 15% agency commission of the gross sponsorship revenue to be paid to TEG Dainty in the event it procured the sponsor) (cl 8.4);
- (b) 100% of revenue received from merchandise (cl 9.2); and
- (c) 100% of revenue received from TV and film content (cl 12.4).

272 TEG Dainty was entitled to receive:

- (a) 75% of the net local sponsorship revenue⁴⁷⁵ (with WTM receiving the remaining 25% as the WTM sponsorship fee⁴⁷⁶) (cl 15.3), and
- (b) 10% of the Hospitality Upsell Net Profit, with WTM entitled to the remaining 90% subject to the payment of a deduction equal to the amount of the face value of the tickets (cls 10.2-10.3).

Net profit / (loss)⁴⁷⁷

273 WTM claims loss in the amount of \$1,179,000⁴⁷⁸ (pre-Sellars discount) under this head of loss, which can be set out as follows (amounts rounded for convenience):

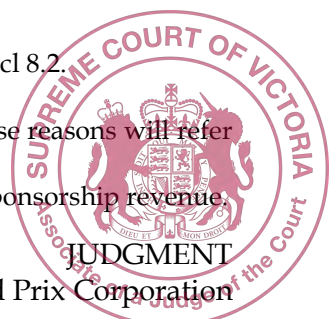
50% Net Profit			
*000s	But-for scenario	Actual scenario	Difference
Revenue			
Tickets actually sold	\$2,383	-	\$2,383
Unsold tickets	\$717	-	\$717

⁴⁷⁵ The procuring party was entitled to a 15% commission of the gross revenue: CPA, cl 8.2.

⁴⁷⁶ CPA, cl 15.1.4.

⁴⁷⁷ Ms Malcolm refers to Show Net Profit in her report but, reflective of the CPA, these reasons will refer to Net Profit.

⁴⁷⁸ This figure is adjusted to reflect WTM does not press its claim in respect of local sponsorship revenue.



75% Local sponsorship ⁴⁷⁹	(not pressed)	-	-
Total Revenue:	\$3,100	-	\$3,100
Expenses			
Show Costs	(\$6,914)	(\$6,263)	(\$651)
Event Licence Fee	(\$203)	(\$113)	(\$90)
Production Fee	(\$188)	(\$188)	-
Management Fee	(\$200)	(\$200)	-
Total Expenses:	(\$7,505)	(\$6,763)	(\$742)
Net Profit Loss:	(\$4,405)	(\$6,763)	(\$2,358)
WTM's 50%	(\$2,202)	(\$3,381)	(\$1,179)

Actual scenario

274 WTM contends generally (not specifically in relation to Net Profit) that Ms Malcolm's assessment of the actual loss suffered by WTM is supported by the evidence of Mr Gow and Mr Dainty and that this loss constitutes costs sunk by reason of the cancellation of the Robbie Williams concert. WTM further submits that AGPC did not contest these costs.⁴⁸⁰

275 AGPC does not make any submissions directed specifically to loss in the actual scenario or, under the actual scenario, to the calculations relied on by WTM insofar as the management fee or the show costs more generally. AGPC accepts Ms Malcolm's assessment of the base licence fee and the production fee on the basis these fees constitute both a revenue and a cost in both the actual and but-for scenarios and therefore do not form an overall loss for WTM.⁴⁸¹ AGPC accepts the event licence fee is exclusive of GST.⁴⁸²

⁴⁷⁹ WTM originally claimed \$56,250 revenue under local sponsorship. As WTM no longer presses this claim, it has been removed from the table.

⁴⁸⁰ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [258].

⁴⁸¹ *Defendant's Outline of Closing Submissions* (12 June 2024), [362].

⁴⁸² *Defendant's Outline of Closing Submissions* (12 June 2024), [364].



- 276 As stated above, Ms Malcolm calculated the total loss suffered by WTM under the Net Profit head of loss in the actual scenario as a loss of \$3,381,000; this being 50% of a total loss of \$6,763,000 (rounded up) comprising of show costs of \$6,263,000, and costs in the form of the base licence fee of \$113,000, the production fee of \$188,000 and the management fee of \$200,000.⁴⁸³
- 277 With respect to the show costs, Ms Malcolm calculated a total amount of \$6,263,000 based on an analysis of the relevant invoices provided by WTM for both the Friday and Saturday concerts in circumstances where she was instructed as to which of those invoices related to the Robbie Williams concert.⁴⁸⁴
- 278 In relation to the other costs, Ms Malcolm calculated the production fee as being 50% of the amount specified in cl 15.1.2(a) of the CPA on the basis that ‘the Event only related to one day’. She adopted the same approach to calculating the base licence fee (cl 15.1.1(a)) and did not include the ‘per ticket’ amount in the calculation as all tickets were refunded on cancellation of the concert. Ms Malcolm attributed the full amount of the management fee (cl 15.6) as costs in the course of calculating the Net Profit.⁴⁸⁵
- 279 No revenue was included in the calculation of the Net Profit for the actual scenario as all tickets were refunded following the cancellation of the concert and no local sponsorship agreement was entered into.
- 280 To the extent Ms Wright expresses any opinion in relation to Ms Malcolm’s calculations of these actual costs, paragraphs 1.6.1 to 1.6.3 of Annexure F state that Ms Malcolm calculated the costs set out in invoices for the concerts (the show costs) and the costs forming the production fee and the management fee, as being the same in both the actual and but-for scenarios meaning there was no difference between the scenarios and, in her opinion, no loss suffered by WTM against these items. Although Ms Wright caveats this by stating that Ms Malcolm will have overstated WTM’s loss to the extent any of the costs were refunded after the concert was cancelled or to the

⁴⁸³ Expert Report of Liesl Malcolm dated 13 April 2023, [8.1]; CB651.

⁴⁸⁴ Expert Report of Liesl Malcolm dated 13 April 2023, [4.3.4(a)]; CB644.

⁴⁸⁵ Expert Report of Liesl Malcolm dated 13 April 2023, [8.1]; CB651.



extent that any costs in the but-for scenario were in fact higher than the actual scenario.⁴⁸⁶

281 Ms Wright's observations in relation to the licence fee more squarely concern Ms Malcolm's calculations in the but-for scenario but are understood as confirming the mathematical accuracy of the calculation of the base licence fee for the purposes of the actual scenario.⁴⁸⁷

282 I accept that the loss suffered by WTM under this head of loss in the actual scenario was a loss of \$3,381,000, being 50% of a total loss of \$6,763,000 (rounded up).

But-for scenario

283 In this but-for scenario, the calculation of loss is 50% of the total revenue (non-VIP ticket sales plus 75% of local sponsorship) less costs. WTM presses its claim, subject to minor concessions, based on the calculations of loss reached by Ms Malcolm.

284 Adopting the assumptions she was instructed to apply, Ms Malcolm calculated WTM's loss as \$2,298,000, being 50% of the total Net Profit loss of \$4,597,000. This figure was reached by calculating a loss of revenue of \$2,907,000 less costs of \$7,504,000.

Revenue - Local sponsorship

285 WTM no longer presses the claim in relation to local sponsorship⁴⁸⁸ in circumstances where Ms Malcolm was instructed to assume local sponsorship agreements worth \$75,000 would have been secured had the concert not been cancelled and, pursuant to the CPA, Ms Malcolm included 75% of this amount, being \$56,250, as revenue in her but-for analysis.⁴⁸⁹ AGPC had contended that this claim should be rejected on the basis there is no evidence that WTM or TEG Dainty had arranged any local sponsorship.⁴⁹⁰

⁴⁸⁶ Expert Report of Dawna Wright dated 27 June 2023, Annexure F, 1.6.1-1.6.2; CB811.

⁴⁸⁷ Expert Report of Dawna Wright dated 27 June 2023, Annexure F, 1.4.7; CB810.

⁴⁸⁸ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [303].

⁴⁸⁹ Expert Report of Liesl Malcolm dated 13 April 2023, [4.3.3]; CB644.

⁴⁹⁰ *Defendant's Outline of Closing Submissions* (12 June 2024), [260]-[263].



Revenue - Ticket sales

286 Ticket sales form the other stream of revenue in the Net Profit calculation. For the purposes of assessing this head of loss, it is necessary to separately consider those tickets which were sold prior to the cancellation of the concert and refunded ('tickets sold') and the tickets which had not sold by the time of the concert's cancellation but which may have sold had the concert proceeded ('unsold tickets').

287 WTM claims approximately \$2,400,000 in loss of revenue from tickets sold and refunded and approximately \$715,000 in loss of revenue from the unsold tickets.⁴⁹¹ Ticket sales under this head of loss only concern those tickets which were not sold as part of VIP ticket packages ('non-VIP tickets'). VIP tickets are dealt with under the VIP Hospitality head of loss.

288 Notwithstanding minor calculation discrepancies, the evidence is that:

- (a) the Lakeside Stadium had a maximum capacity of 28,179;
- (b) the total number of 'sellable tickets' was 20,179, although a number of those tickets were not, in fact, available to be sold;⁴⁹² and
- (c) at 13 March 2020, 13,407 tickets had been sold⁴⁹³ and a further 4,138 were available to be sold by Ticketek.⁴⁹⁴

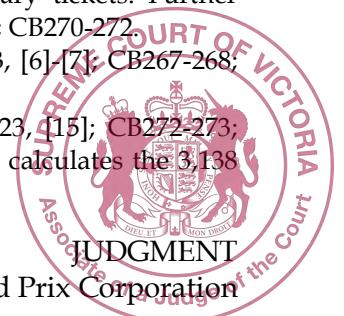
289 I accept this reflects the number of tickets sold, and available to be sold, on 13 March 2020.

⁴⁹¹ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [267].

⁴⁹² For example, they were used as complimentary, venue, artist or media tickets or were 'kills' (seats which are unavailable because of the location of the stage or other equipment. T532/21-24 (XN of Ms Malcolm). Mr Beck's evidence was that 7,481 tickets that were unavailable (although 850 of these tickets were on hold for Platinum VIP, corporate boxes and influencer spaces and could be made available on Ticketek) and that 3,147 tickets had be allocated as complimentary tickets: Further Supplementary Witness Statement of Richard Beck dated 23 March 2023, [12]-[15]; CB270-272.

⁴⁹³ Further Supplementary Witness Statement of Richard Beck dated 23 March 2023, [6]-[7]; CB267-268; *Plaintiff's Outline of Closing Submissions* (5 July 2024), [236].

⁴⁹⁴ Further Supplementary Witness Statement of Richard Beck dated 23 March 2023, [15]; CB272-273; noting Mr Beck erroneously refers to 4,144 unsold tickets in the body of [15] but calculates the 3,138 tickets in the table.



290 The parties are broadly in agreement that WTM suffered loss of revenue in the form of the tickets sold, subject to divergences on issues such as the value of those tickets and GST which I consider below. I therefore accept that WTM suffered a loss of revenue of the 13,407 sold tickets. I consider the quantum of those tickets below.

291 With respect to the unsold tickets, the parties dispute the number of further tickets I should find would have sold had the concert not been cancelled. WTM submits that, in the absence of competing expert evidence from AGPC and in light of the expertise of WTM's witnesses, the evidence of Mr Beck, Mr Morrison and Mr Dainty supports a finding by the Court that WTM lost the commercially valuable opportunity to sell all of the 4,138 tickets.⁴⁹⁵

292 In this regard, WTM relies on Mr Beck's evidence that:

... the marketing campaign was back loaded so that we could capitalise on "walk-up": that is, for people who would buy tickets for the concert on the day. In my experience, it is common for around 25% of all tickets to be sold on the day. We experience that we would sell all tickets for the Robbie concert before it took place. In my opinion, the cancellation of the Grand Prix would not have substantially affected that result, including because the cancellation left hundreds of thousands of people, who would have attended the Grand Prix, in Melbourne and looking for entertainment that weekend.⁴⁹⁶

293 Mr Beck gave further evidence to this effect.⁴⁹⁷ In the course of cross-examination, Mr Beck stated he 'firmly believe[d]' that the remaining 4,138 tickets would have sold between the time of the cancellation and the start of the concert the next day.⁴⁹⁸

294 Further, in re-examination, Mr Beck stated he 'massively' believed the 'back-ended marketing campaign, millions of pounds worth of TV ads' and the fact Robbie Williams' press conference was the number one news story across Australia meant 'it was all geared up along with other - other elements that we had done to sell out those

⁴⁹⁵ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [278].

⁴⁹⁶ Witness Statement of Richard Beck, dated 16 September 2022, [92]; CB167.

⁴⁹⁷ See, for example, Supplementary Witness Statement of Richard Beck dated 14 December 2022, [34]; CB207.

⁴⁹⁸ T227/10-15 (XXN of Mr Beck).



4000 tickets. It really is not an insurmountable amount to sell, with the amount of marketing and the fact that Robbie was in market'.⁴⁹⁹

295 Mr Morrison stated it was his opinion that, had the concert proceeded, it 'would have been a sell-out' for a number of reasons including, by way of example, due to Robbie Williams' popularity in Australia, the fact that in his experience an agent would not book a client into a venue that they considered was too large, and that with the cancellation of the Grand Prix race he believed there would be 'a very large number' of people in Melbourne looking for something to entertain them that weekend.⁵⁰⁰ In the course of being questioned on the number of tickets that remained to be sold in cross-examination, Mr Morrison stated he was 'quite certain' the concert would have sold out.⁵⁰¹

296 Mr Dainty's evidence was that, based on his over 40 years' experience promoting concerts, whilst it was not possible to precisely say how many additional tickets would have been sold, he believed at least a further 2,000 to 3,000 tickets would have sold.⁵⁰²

297 During cross-examination, Mr Dainty was questioned on whether, in circumstances where only 23 tickets had sold on 13 March 2020 up to 3:00pm, it was highly unlikely that a further 2,000 to 3,000 tickets would have sold in the hours leading up to the concert. Mr Dainty agreed it was a 'speculative number', stating:

... look I hear what you are saying but I think if we had announced that the show was proceeding, had ultimately proceeded, with everything that was going on and the thousands of people who had nothing else to do, um, I think we might've got a very big surprise about how many people would've then, at the last minute, bought tickets ...

... look it's a speculative number, it's a projected number using just your, you know, experience from previous shows, previous scenarios. It's - I agree it's speculative but it's projective and I think it's a reasonably conservative educated estimate based on all the facts.⁵⁰³

499 T267/29-30 and T277/1-12 (XN of Mr Beck).

500 Witness Statement of Mr Morrison, dated 20 December 2022, [89]; CB261-262.

501 T285/7-13 (XXN of Mr Morrison).

502 Witness Statement of Mr Dainty dated 21 May 2024, [34]; CB5397.

503 T600/20-31, T601/1-8 (XXN of Mr Dainty).



298 In the context of it being put to Mr Dainty that the cancellation of the Grand Prix meant the concert would not have had the benefit of walk-ups, Mr Dainty further stated:

... I think the audience who had nothing then to do when the Grand Prix race was cancelled would've been very keen to consider attending the concert.⁵⁰⁴

299 In contrast, AGPC contends it is 'fanciful' to argue that a further 4,138 tickets would have sold in the relevant period,⁵⁰⁵ and says the Court should find that WTM would not have sold any, or no more than an insignificant number of, tickets in that period.⁵⁰⁶

300 AGPC submits that the best evidence of the likelihood of the sale of further tickets is the sale of tickets in the period immediately preceding the cancellation of the concert.⁵⁰⁷ In this regard, AGPC points to communications between WTM and TEG Dainty as early as January concerning the slow ticket sales.

301 On about 15 January 2020, one day after tickets went on pre-sale, an email exchange occurred between Mr Beck and Ms Leah Hutchinson, at TEG Dainty, where Mr Beck queried whether the ticket sales 'seems slow for day 1 of pre-sale or is this about right?' and Ms Hutchinson replied that it was '[a] bit lighter than what we would have liked but I think we will have a better judgment on where we are at after the next pre-sale'.⁵⁰⁸

302 On 31 January 2020, Mr Beck emailed Mr Ian Huffman, Robbie Williams' booking agent, seeking approval to create two new categories of cheaper ticketing, which also had the effect of reducing the overall seating capacity by approximately 7,000 tickets, to 'bring them back on track' in light of the 'slower than anticipated' sales of tickets.⁵⁰⁹ When questioned on this email in cross-examination, Mr Beck stated that he felt the ticket sales were 'slightly lower and we wanted to fix it and from this point, we did fix it and sales increased'.⁵¹⁰

504 T602/10-19 (XXN of Mr Dainty).

505 *Defendant's Outline of Closing Submissions* (12 June 2024), [246].

506 *Defendant's Outline of Closing Submissions* (12 June 2024), [238] and [255].

507 *Defendant's Outline of Closing Submissions* (12 June 2024), [255].

508 CB4520.

509 CB4718.

510 T244/1-8 (XXN of Mr Beck).



303 In re-examination, Mr Beck was asked about his view of the ticket sales at the time he sent the 31 January 2020 email and stated:

So, my view of the ticket sales when I wrote this was that they were good. I always try to believe, Your Honour, that they can be better. I try and maximise them, that's what myself and Mr Dainty do. And I believe that that paragraph shows that there is a real appetite out for there a cheap – for ticket pricing, and scaling, and that we would definitely benefit from switching the configuration around, ah, and it did, it resulted in improved sales for us after making that minor change.⁵¹¹

304 On 27 February 2020, Ms Laura Fennell, a member of Mr Williams' team, emailed Mr Beck and Ms Hutchinson asking '[h]ow do you intend to fill / make the arena look full please?'. Ms Fennell sent a further email on 2 March 2020, asking for clarification on what the 'total expected attendance is (including comps etc)'. Mr Beck replied on 2 March 2020 that they were 'certainly hoping to get to 15,000 in sales and ideally in 20,000 in numbers' before setting out the planned TV campaign and sales initiatives before concluding '[w]e are also about to set up a system to paper⁵¹² the show early next week ... The market is depressed with bushfires and of course the nervousness around Corona Virus. To state anything less would be untrue. But we shall keep on pushing sales hard and introducing all the above mentioned sales initiatives right up to show day.'⁵¹³

305 By 2 March 2020, a total of 10,895 tickets had sold.⁵¹⁴ That day, Ms Hannah Partridge, from Apollo, sent an email update regarding a call with TEG Dainty that morning where ways to 'drive sales and a need to do that as quickly as possible this week' had been discussed, along with a range of suggested mechanisms to do so including offering discounts and special pricing options.⁵¹⁵

306 Mr Beck replied to that email on 3 March 2020, outlining the sales drive that had been agreed to and concluding (punctuation unchanged): '[t]he key as I've stressed to TEGD is to get these up and running in the next 48-72 hours. It simply wont shift

511 T276/8-20 (RE-XN of Mr Beck).

512 "Papering" involves giving away complimentary tickets to increase crowd numbers at a venue. T288/8-23 (XXN of Mr Morrison).

513 CB2792 to 2793.

514 CB2809.

515 CB2800.



enough before we have to start looking at papering early next week, unless we get them all live now. So thats the priority. Get it up!'.⁵¹⁶

307 On March 2020, WTM announced the Miley Cyrus concert was cancelled and offered ticketholders a full refund to the concert together with an offer for 50% Robbie Williams' concert tickets.⁵¹⁷

308 AGPC contends that the evidence shows that despite a concerted sales drive, ticket sales for the concert slowed in the days leading up to the cancellation.⁵¹⁸ On 12 March 2020, 167 tickets were sold and on 13 March 2020, 23 ticket were sold.⁵¹⁹ On AGPC's calculations, from 2 March 2020, 2,512 tickets were sold at an average of 209 tickets per day and from 10 March 2020, 503 tickets were sold at an average of 168 tickets per day.⁵²⁰

309 AGPC submits the Court should reject Mr Beck's evidence that a significant number of tickets would have been sold to walk-up patrons on the day of the concert because of the backloaded marketing strategy. AGPC says this evidence is not supported by the contemporaneous documentation, which does not mention walk-ups or backloaded marketing, and that the documentary evidence shows WTM and TEG Dainty in communication from as early as February 2020 regarding the need to drive up sales and potentially 'paper' the stadium.⁵²¹

310 AGPC specifically contends that Mr Beck's evidence in relation to back-ended marketing should be rejected and that his evidence in re-examination that WTM had a back-ended marketing campaign with 'millions of pounds worth of TV ads' was false.⁵²² AGPC says this evidence was contradicted by Mr Morrison's evidence that would have been 'commercially suicide' to have spent millions of pounds of

⁵¹⁶ CB2799 to 2800.

⁵¹⁷ CB3194 and 2338.

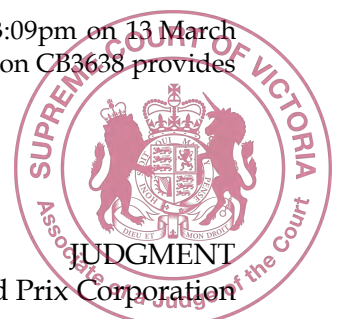
⁵¹⁸ *Defendant's Outline of Closing Submissions* (12 June 2024), [239] and [245].

⁵¹⁹ CB3635 to 3638. This being a Sales Summary and Reconciliation timestamped 3:09pm on 13 March 2020. The columns for 'tickets - yesterday' and 'tickets - today' in sales summary on CB3638 provides the relevant data.

⁵²⁰ *Defendant's Outline of Closing Submissions* (12 June 2024), [245].

⁵²¹ *Defendant's Outline of Closing Submissions* (12 June 2024), [248].

⁵²² *Defendant's Outline of Closing Submissions* (12 June 2024), [249].



advertising on Robbie Williams⁵²³ and by invoices received by WTM in relation to TV advertising.⁵²⁴

311 In this regard, documents from around 20 February 2020 containing a proposed schedule for the TV advertising across various free-to-air television stations show the campaign was proposed to commence in the week commencing 23 February 2020 and run through to the week commencing 8 March 2020.⁵²⁵

312 AGPC separately contends that the evidence is that the source of ‘walk-ups’ ticket sales would have been people leaving the Grand Prix,⁵²⁶ and in circumstances where the Grand Prix was cancelled, the proposition that there would have been a significant number of walk up tickets sold on the day of the concert should be rejected. Further, it says that there is no evidence, beyond speculative assertion, that there were people who planned only to attend the concert, and not the Grand Prix, such as to justify WTM’s claims regarding ticket sales. According to AGPC, this is particularly the case in circumstances where Mr Dainty accepted that anyone who wished to attend the concert would first need to pass through the gates for the Formula 1 Grand Prix Area.⁵²⁷

313 As explained above, in summary, WTM submits that I should find that they lost the opportunity to sell the 4,138 tickets but, properly, concedes that a ‘*Sellars* discount’ should be applied to reflect the risk inherent in that opportunity materialising. This reference to a ‘*Sellars* discount’ is a reference to the observations of Mason CJ, Dawson, Toohey and Gaudron JJ in *Sellars v Adelaide Petroleum NL* that:

...damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court’s assessment of the prospects of success of that opportunity had it been pursued.⁵²⁸

⁵²³ T288/4-7 (XXN of Mr Morrison).

⁵²⁴ Witness Statement of James Gow dated 28 March 2023, [35]; CB298, 3898-3900 and 5372.

⁵²⁵ CB1807-1821.

⁵²⁶ See T286/24-29 (XXN of Mr Morrison).

⁵²⁷ See T582/23-26 (XXN of Mr Dainty).

⁵²⁸ (1994) 120 ALR 16, 30 (Mason CJ, Dawson, Toohey and Gaudron JJ).



314 *Sellars* discounts, and their role in the assessment of damages for loss of commercial opportunity, have also been described by the Court of Appeal as follows (footnotes omitted, emphasis in original):

In considering damages for loss of a commercial opportunity, the court asks first whether there was a commercial opportunity of *some* value (which is more than speculative or negligible); that is, was there a chance? Secondly, the court looks to whether that opportunity has been lost; that is, would the plaintiff have pursued the opportunity? The third step is to consider what amount should be awarded having regard to the prospects of success if the opportunity had been pursued. In taking this third step, the courts' task is to apply a discount which reflects the prospects of success. This is sometimes referred to as a *Sellars* discount.⁵²⁹

315 WTM contends a 25% *Sellars* discount would be appropriate, bringing down the total number of tickets from 4,138 to 3,104 tickets, which would be approximately within the range given by Mr Dainty in his evidence detailed below.⁵³⁰ AGPC contends I should find no further tickets, or very few tickets, would have sold. In other words, a discount of 100%, or near to, should be applied.

316 It is uncontroversial to find that there was a commercial opportunity of value, in the form of further ticket sales from the remaining 4,138 unsold tickets, which was lost to WTM by the cancellation of the concert. Less clear is the quantum I should award to that loss through the application of a *Sellars* discount.

317 In summary, I am not willing to accept that no further tickets would have sold, however nor am I satisfied that a *Sellars* discount of 25% is appropriate in light of the evidence that has been adduced.

318 I accept that Mr Beck, Mr Dainty and Mr Morrison have decades of industry experience and, in the case of Mr Beck and Mr Morrison, it was their evidence that they believed the concert would have sold-out. In contrast, Mr Dainty gave evidence that he believed a further 2,000 to 3,000 tickets would have sold.

319 However, in circumstances where WTM and TEG Dainty were expressing concerns about the ticket sales for the Robbie Williams concert as early as late January 2020 and

⁵²⁹ *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd* (2017) 372 ALR 440, 548 [411].

⁵³⁰ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [326].



where only 167 tickets sold on 12 March 2020 (plus a further 23 tickets up to the time the concert was cancelled on 13 March 2020), I accept AGPC's submissions that it would be fanciful to find that the remaining 4,138 available for sale on Ticketek would have sold had the concert gone ahead.

320 Further, in a context where WTM acknowledged to Mr Williams' team on 2 March 2020 that community concern about COVID-19 was impacting ticket sales and where, had the concert proceeded, there would not have been the attendees of the Grand Prix to provide a in-built source for walk-up sales, I am not satisfied there would have been any meaningful number of walk-up sales.

321 I reach this conclusion accepting that Mr Beck was incorrect when he said that millions of pounds had been spent on TV advertising back-ending the marketing campaign but also accepting there was a concerted marketing campaign and sales drive implemented by WTM and TEG Dainty, which would have continued had the concert not been cancelled.

322 As explained above, the assessment of the value of lost opportunity is determined by reference to the value of the opportunity had it materialised and the degree of probabilities or possibilities that it would have occurred.⁵³¹ In loss of opportunity cases, the plaintiff is required to establish the fact of its loss and the quantum of this loss with as much certainty and particularity as is reasonable in the circumstances.⁵³² However, where it is not possible for the plaintiff to prove its loss precisely, a court may make a judicial estimation of damages, doing the best it can on the evidence available.⁵³³

323 Having considered the totality of the evidence, noting it was not possible for WTM to precisely quantify its loss with respect to future ticket sales, and doing the best I can, based on the probability and possibility of the remaining tickets being sold, I estimate

⁵³¹ *ProLearn v Kytect and Telstra* [2022] VSC 5, [523].

⁵³² *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 241 (Brooking J); *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257, [37] (Hayne J); *Longden v Kenalda Nominees Pty Ltd* [2003] VSCA 128, [33] (Phillips, Buchanan and Chernov JJA); *Rozenbilt v Vainer* [2019] VSCA 283, [44] (Beach, Niall and Osborn JJA).

⁵³³ *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257, [38] (Hayne J).



that a discount of 90% is appropriate to reflect the significant risk that the opportunity would not have materialised.

324 In order to perform the Net Profit calculation, it is appropriate to reflect this discount in the form of the number of tickets which WTM lost the opportunity to realise revenue from. Therefore, applying the 90% discount, the 4,138 tickets is reduced to approximately 414 tickets (rounded up).

325 Having found WTM lost the revenue from the 13,407 tickets sold, plus the opportunity to sell the unsold tickets, which following the application of the *Sellars* discount I calculated to be 414 tickets, it is necessary to calculate quantum of this lost revenue in order to determine WTM's 50% share of the overall Net Profit (loss).

326 In order to do so, there are two further issues arising from the expert evidence of Ms Malcolm and Ms Wright which I must address. The first relates to whether the revenue derived from the ticket sales is to be calculated inclusive or exclusive of GST.

327 In her report, Ms Malcolm treated the revenue from ticket sales as exclusive of GST. Ms Wright's evidence was that the evidence from which revenue from ticket sales was calculated was inclusive of GST.⁵³⁴ In cross-examination, Ms Malcolm stated she treated the ticket sales revenue as exclusive of GST because she was instructed to do so but conceded that Mr Beck's evidence, on which she relied for her calculations, were inclusive of GST.⁵³⁵

328 WTM contends that because ticket revenue was to be paid in accordance with the CPA, pursuant to cl 15.12, that payment was 'exclusive of VAT or applicable local taxes which will be payable by the payer where applicable'.⁵³⁶ I understand the thrust of WTM's submission to be that the ticket prices contained in Mr Beck's evidence, and relied on by Ms Malcolm, reflected the amount Ticketek would have remitted to TEG

⁵³⁴ Expert Report of Dawna Wright dated 27 June 2023, [5.3.3]; CB735.

⁵³⁵ T523/27-31-T524/1-2 (XXN of Ms Malcolm & Ms Wright).

⁵³⁶ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [273].



Dainty/ WTM for each ticket after GST had been accounted for as, pursuant to cl 15.12, Ticketek was responsible for the payment of GST from the ticket sales.

329 AGPC submits that cl 15.12 does not mean that the revenue claimed was not inclusive of GST but simply that GST was to be paid before the Net Profit distribution was made under the CPA. Further, AGPC contends that the ticket prices relied on by Ms Malcolm and Mr Beck were inclusive of GST. That GST would have needed to be remitted to the Australian Tax Office by either Ticketek, TEG Dainty or WTM prior to the distribution of the Net Profit and should not be included as part of the loss awarded to WTM under the Net Profit head of loss.⁵³⁷

330 At paragraph 9 of his Further Supplementary Witness Statement, dated 23 March 2023, Mr Beck set out a table listing each category of ticket and the 'Ticketek price' and a higher 'Public Sale Price' for the corresponding category. At paragraph 10, Mr Beck's evidence was that to the best of his knowledge GST was included in each ticket's price and the difference between the Ticketek price and the public sale price was Ticketek's profit as the ticketing provider.⁵³⁸ Further, the Sales Summary and Reconciliation document Ms Wright was taken to in examination also states that the prices therein are inclusive of GST, with the prices listed in that document appearing to match the prices in the 'Ticketek price' column of Mr Beck's table.⁵³⁹

331 I am satisfied the Ticketek price in the table of Mr Beck's witness statement, on which Mr Beck and Ms Malcolm based their calculations, was inclusive the GST, with the difference in that price and the public sale price column being Ticketek's profit on that ticket.

332 To the extent this was WTM's submission, I do not accept the 'Ticketek price' reflects the money that was to be remitted to WTM and TEG Dainty exclusive of GST.

333 Pursuant to the CPA, Net Profit was defined as Revenue less GST (and other sales taxes) less Costs: cl 16.3. Ms Malcolm and Mr Beck's calculation are inclusive of GST.

⁵³⁷ *Defendant's Outline of Closing Submissions* (12 June 2024), [257]-[259].

⁵³⁸ Further Supplementary Witness Statement of Richard Beck dated 23 March 2023, [9]-[10]; CB269-270.

⁵³⁹ CB3635.



As such, without accounting for the GST included in the Ticketek price, the Net Profit will be overstated. The total value of the ticket sales should be reduced by 10%.

334 The second issue concerns the price attributed to the category 2 tickets. The breakdown of the 4,138 tickets available for sale on Ticketek is as follows:⁵⁴⁰

Category	No. of tickets available on 13 March 2020
Price Category 1	239
Price Category 2	608
Price Category 3	4
Price Category 4	302
Price Category 5	4
Price Category 6	(not included in table)
Price Category 7	0
Price Category 8	261
Price Category 9	569
Price Category 10	400
Price Category 11	311
Price Category 12	1400
Total	4,138

335 Relying on Mr Beck's evidence of the relevant price point for each category of ticket, Ms Malcolm attributed the price of the category 2 tickets as \$285 per ticket. The correct price for category 2 tickets was \$258. The difference between these two prices for the 608 category 2 tickets available is a total of \$16,416. The parties accept that the lower \$258 price is correct and Ms Malcolm's calculations are therefore overstated by \$16,416.⁵⁴¹

336 Turning to the calculation of the overall revenue, Mr Beck's evidence was that the value of the tickets sold, and refunded, was \$2,383,114.25.⁵⁴² Ms Malcolm adopted this figure⁵⁴³ and Ms Wright replicated Mr Beck's calculations and verified its mathematical accuracy.⁵⁴⁴ Mr Beck's evidence was that this figure was exclusive of

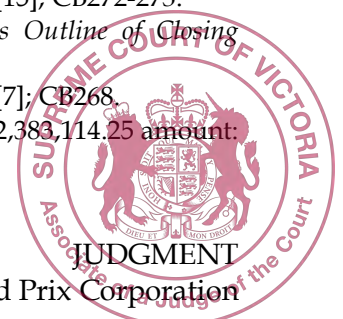
⁵⁴⁰ Further Supplementary Witness Statement of Richard Beck dated 23 March 2023, [15]; CB272-273.

⁵⁴¹ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [272(2)] and *Defendant's Outline of Closing Submissions* (12 June 2024), [256].

⁵⁴² Further Supplementary Witness Statement of Richard Beck dated 23 March 2023, [7]; CB268.

⁵⁴³ Ms Malcolm adopts the overall value calculated by Mr Beck which included the \$2,383,114.25 amount: Expert Report of Liesl Malcolm dated 13 April 2023, [4.3.1]; CB644.

⁵⁴⁴ Expert Report of Dawna Wright dated 27 June 2023, [5.3.1]; CB735.



GST.⁵⁴⁵ However, Ms Wright's calculations show that Mr Beck appears to have used the GST inclusive ticket prices when performing his calculations.⁵⁴⁶

337 For the reasons I set out above, I am satisfied that the \$2,383,114.25 figure is inclusive of GST and should be adjusted accordingly. The GST exclusive value of the refunded tickets is \$2,166,468 (rounded up).⁵⁴⁷ As WTM submits, no *Sellars* discount should be applied to this figure as this is the value of tickets actually sold.⁵⁴⁸

338 Mr Beck calculated the value of the total 4,138 unsold tickets as \$717,757. Again, Ms Malcolm adopted this figure⁵⁴⁹ and when Ms Wright replicated the calculations, her result had a variance of \$365 from Mr Beck's figure,⁵⁵⁰ which I do not consider to be of any significance.

339 To calculate the revenue that from the 414 tickets I have found WTM is entitled to include as revenue in the Net Profit calculation, I have deducted \$16,416 from the total \$717,757 to adjust for the agreed miscalculation in the category 2 tickets. I have then deducted 10% from this total to reflect that the revenue is GST exclusive and, finally, deducted 90% off that total to reach the value of the 414 tickets.

340 The total revenue of the 414 tickets is therefore \$63,758.

341 In turn, this brings overall total revenue for inclusion in the Net Profit calculation to \$2,230,226. For the avoidance of doubt, I confirm this constitutes the Revenue less sales tax portion of the Net Profit calculation.

Costs – show costs

342 In the but-for scenario, the show costs are comprised of the actual costs incurred in preparing for the concert and additional costs which would have been incurred had the concert proceeded.

⁵⁴⁵ Further Supplementary Witness Statement of Richard Beck dated 23 March 2023, [7]; CB268.

⁵⁴⁶ Expert Report of Dawna Wright dated 27 June 2023, [5.3.3]; CB736.

⁵⁴⁷ Expert Report of Dawna Wright dated 27 June 2023, [5.3.3(a)]; CB736.

⁵⁴⁸ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [235].

⁵⁴⁹ Expert Report of Liesl Malcolm dated 13 April 2023, [4.3.1]; CB644.

⁵⁵⁰ Expert Report of Dawna Wright dated 27 June 2023, [5.2.2]; CB734 to 735.



343 The show costs actually incurred are also reflected in the actual scenario and are not in dispute. As set out above, Ms Malcolm calculated the total show costs incurred as \$6,263,000 based on an analysis of the relevant invoices.⁵⁵¹

344 Ms Malcolm calculated a further \$651,459 in show costs which would have been incurred had the concert proceeded. Ms Malcolm calculated these costs based on the most recent budget available to her and her assessment of how those costs should be apportioned between the Robbie Williams concert and the Miley Cyrus concert. She apportioned approximately 75% of the costs to the Robbie Williams concert.⁵⁵²

345 Ms Wright was unable to form an opinion on the accuracy or reasonableness of Ms Malcolm's assessment of the additional show costs on the information available to her.⁵⁵³

346 Neither party made any submissions directed to amount Ms Malcolm attributed to additional show costs. In these circumstances, I am satisfied that WTM would have incurred an additional \$651,459 in show costs had the concert proceeded, bringing the total show costs to \$6,914,459.

Event Licence fee

347 In the but-for scenario, the Event Licence fee which forms a cost in the Net Profit calculation is made up of a base licence fee plus the per ticket sold licence fee.

348 There is no dispute with regards to the base licence fee of \$113,000 which was also counted as a cost in the actual scenario.

349 With respect to the per ticket sold licence fee, pursuant to the CPA a licence fee of \$4.35 per ticket sold was to be paid to WTM: cl 15.1.1(a). Ms Malcolm calculated the per ticket sold fee as \$90,036 based on the assumption that the maximum 20,698 tickets would have sold.⁵⁵⁴

⁵⁵¹ Expert Report of Liesl Malcolm dated 13 April 2023, [4.3.4(a)]; CB644.

⁵⁵² Expert Report of Liesl Malcolm dated 13 April 2023, [4.3.4(b)]; CB645.

⁵⁵³ Expert Report of Dawna Wright dated 27 June 2023, Annexure F, 1.3.4(c)-1.3.5; CB807 to 808.

⁵⁵⁴ Expert Report of Liesl Malcolm dated 13 April 2023, [4.3.5(b)]; CB645.



350 The parties accept this figure must be adjusted depending on the number of tickets sold; with each party making submissions in line with what they say the findings should be with respect to ticket sales. The parties also accept this fee is GST exclusive.⁵⁵⁵

351 As I found a further 414 tickets would have sold, I have calculated the per ticket sold fee as \$60,121; this being \$4.35 x 13,821 (the 13,407 tickets sold plus the additional 414 tickets).

352 As such, I find the total Event Licence fee to be included as a cost is \$173,121.

Management Fee and Production Fee

353 The Production Fee and Management Fee calculated by Ms Malcolm in the actual scenario are also included in the but-for scenario. The parties did not dispute these costs. The costs therefore include a Production Fee of \$188,000 and the Management Fee of \$200,000.⁵⁵⁶

Calculation of WTM's 50% of Net Profit

354 WTM's 50% share the Net Profit loss is therefore \$759,000. The breakdown of this calculation is follows (rounded up and including the *Sellars* discount):

50% Net Profit			
\$'000s	But-for scenario	Actual scenario	Difference
Revenue			
Tickets actually sold	\$2,166	-	\$2,166
Unsold tickets	\$64	-	\$64
75% Local sponsorship	-	-	-
Total Revenue:	\$2,230	-	\$2,230
Expenses			
Show Costs	(\$6,914)	(\$6,263)	(\$651)
Event Licence Fee	(\$173)	(\$113)	(\$60)
Production Fee	(\$188)	(\$188)	-
Management Fee	(\$200)	(\$200)	-

⁵⁵⁵ Plaintiff's Outline of Closing Submissions (5 July 2024), [320]-[321] and Defendant's Outline of Closing Submissions (12 June 2024), [363].

⁵⁵⁶ Expert Report of Liesl Malcolm dated 13 April 2023, [4.3.6], [4.3.7] and [8.1]; CB651 and 645.



Total Expenses:	(\$7,475)	(\$6,763)	(\$712)
Net Profit Loss:	(\$5,245)	(\$6,763)	\$1,518
WTM's 50%	(\$2,623)	(\$3,381)	\$759

90% VIP Hospitality

355 Relying on Ms Malcolm's evidence, WTM claims approximately \$756,000 (before any *Sellars* discounts) in loss of hospitality (and VIP) related revenue less expenses which are excluded from the Net Profit analysis.

356 The claimed loss can be broken down as follows:

90% VIP Hospitality			
\$'000s	But-for scenario	Actual scenario	Difference
Revenue			
VIP Tickets	\$552	-	\$552
VIP Hospitality revenue	\$370	-	\$370
Food and Beverage revenue	\$168	-	\$168
Total Revenue:	\$1,089	-	\$1,089
Less			
Face value of VIP tickets	(\$250)	-	(\$250)
Hospitality costs	(\$597)	(\$597)	-
Total deductions/costs:	(\$847)	(\$597)	(\$250)
Overall:	\$243	(\$597)	\$840
WTM's 90%	\$218	(\$537)	\$756

357 Under the CPA, hospitality revenue and costs (including, in effect, VIP tickets) were excluded from the Net Profit calculation. Pursuant to cl 10, TEG Danity was entitled to 10% of the 'Hospitality Upsell Net Profit', and WTM was entitled to retain for its own benefit the remaining 90% of hospitality revenue, subject to a 'deduction of an amount equal to the face value of the ticket' which was to be treated as Revenue in the



Net Profit calculation. WTM was the contracting party with respect to any third party agreements relating to hospitality.⁵⁵⁷

358 Pursuant to the CPA, WTM managed the VIP ticket packages by internally buying tickets from two categories of general admission tickets (therefore decreasing the number of general admission tickets available) and then ‘upselling’ those tickets as with an accompanying suite of hospitality and other benefits (the ‘VIP tickets’).⁵⁵⁸

359 Relevantly, as part of their package, all VIP ticketholders would have had access to a ‘VIP village’ built outside of the stadium which had its own hospitality offerings. Further, for some, but not all, categories of VIP tickets, food and beverages were to be provided as part of the ticket price.⁵⁵⁹

360 Hospitality revenue therefore comprised of the food and beverage sales from the non-VIP ticket holders, the VIP ticket sales, and additional hospitality sales by VIP ticket holders. In this regard, WTM contracted a third party, A-Live Events Agency (‘A-Live Events’), to provide event management services at the World Tour Melbourne.⁵⁶⁰ Gema Group Holdings Pty Ltd (‘Gema’) was contracted to provide non-VIP food and beverage services and, through A-Live Events, Damn Fine Food (‘DFF’) was contracted to supply, manage and service the VIP hospitality areas.⁵⁶¹

Actual scenario

361 Under the actual scenario, Ms Malcolm attributed a loss of \$537,000 in hospitality costs, being 90% of total costs of \$597,000.

362 These costs were calculated from invoices provided to Ms Malcolm which, as per her instructions, she apportioned 58% to the Robbie Williams concert (to reflect the split between the two concerts). Ms Malcolm notes in her report that costs were also associated with the Gold Beverage Package with Gema but that the documents

⁵⁵⁷ CB1310.

⁵⁵⁸ Witness Statement of Mr Drese dated 26 March 2023, [32]; CB285.

⁵⁵⁹ Witness Statement of Mr Drese dated 26 March 2023, [27]-[29]; CB284.

⁵⁶⁰ Witness Statement of Mr Drese dated 26 March 2023, [10]; CB281.

⁵⁶¹ Witness Statement of Mr Drese dated 26 March 2023, [10] and [22]-[23]; CB281 and 283.



provided to her did not allow her to accurately calculate any additional costs with that package.⁵⁶²

363 In cross-examination, Ms Malcolm accepted that these were the costs attributable to the earning of the VIP hospitality revenue (being the \$370,000 claimed in the but-for scenario) and that she had calculated the hospitality costs based on invoices that related to both nights' concert and on instruction had apportioned 58% to those costs to the Robbie Williams concert. When questioned on whether all of the costs should be attributed to the Robbie Williams concert if the revenue was only to be received with respect of that concert, Ms Malcolm disagreed on the basis she was instructed to apportion the costs as 58% towards the Robbie Williams concert.⁵⁶³

364 Ms Wright did not give any evidence in relation to these costs and, despite the line of questioning directed to Ms Malcolm in cross-examination, nor did either of the parties make any substantive submissions on these costs.

365 I accept, therefore, that WTM incurred a loss of \$537,000 in hospitality costs.

But-for scenario

VIP tickets

366 WTM presses its claim for the \$552,000 Ms Malcolm attributed to VIP ticket sales.⁵⁶⁴ WTM explains that the VIP tickets were publicly available category 7 and 8 tickets which had been internally purchased by WTM and upsold. Based on the evidence of Mr Beck, Ms Malcolm calculated the total value of all VIP tickets based on 191 category 7 tickets at a price of \$740 per ticket, totalling \$141,340, and 746 category 8 tickets at a price of \$550, totalling \$410,300.⁵⁶⁵

367 Separately, to ensure that there was no double counting of revenue across the Net Profit and VIP Hospitality heads of loss, and as required by the CPA, Ms Malcolm deducted the 'face value' (public sale price) of the VIP tickets from the overall

⁵⁶² Expert Report of Liesl Malcolm dated 13 April 2023, [5.3.6] and [9.3.3]; CB647 and 653.

⁵⁶³ T530/11-31 and 531/1-7 (XXN of Ms Malcolm and Ms Wright).

⁵⁶⁴ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [283] and [286].

⁵⁶⁵ Expert Report of Liesl Malcolm dated 13 April 2023, [5.3.1]; CB646.



Hospitality VIP revenue, calculating this as \$249,808, being 937 tickets x \$266.60⁵⁶⁶ (the public sale price of those tickets) (the 'face value deduction').⁵⁶⁷

368 Insofar as it relates to revenue, WTM submits that no *Sellars* discount should be applied to those VIP tickets which were sold and refunded but that a discount of 25% is appropriate for the unsold VIP tickets.⁵⁶⁸

369 AGPC contends that the amount claimed by WTM as VIP ticket revenue is overstated to the extent it includes VIP tickets which were given away as complimentary tickets or were unsold at the time the concert was cancelled and, further, to the extent the revenue claimed is inclusive of GST, rather than exclusive.⁵⁶⁹ To the extent it relates to the unsold VIP tickets, I understand AGPC's submission to be, in line with their submissions on non-VIP tickets, that I should find that no further VIP tickets would have sold had the concert proceeded. AGPC accepts that the face value deduction should be adjusted to remove the unsold and complimentary tickets and to reflect the GST exclusive total.⁵⁷⁰

370 On my assessment of Mr Beck's evidence, as at 13 March 2020, of a total of 191 category 7 tickets, 183 had been sold and 8 had been given away as complimentary tickets. There were no remaining category 7 tickets. Of a total of 746 category 8 tickets, 423 had sold, 62 had been given away as complimentary tickets, and 261 remained unsold.⁵⁷¹

371 WTM would not have received revenue from tickets given away as complimentary tickets. As such, I accept AGPC's submission that WTM's claim is overstated in this regard.

⁵⁶⁶ Despite some inconsistencies in Mr Beck's evidence, the parties agree the public sale correct price of these tickets was \$266.60: *Plaintiff's Outline of Closing Submissions* (5 July 2024), [284] and *Defendant's Outline of Closing Submissions* (12 June 2024), footnote 264, [269].

⁵⁶⁷ Expert Report of Liesl Malcolm dated 13 April 2023, [5.3.6]; CB647.

⁵⁶⁸ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [327].

⁵⁶⁹ *Defendant's Outline of Closing Submissions* (12 June 2024), [266]- [268].

⁵⁷⁰ *Defendant's Outline of Closing Submissions* (12 June 2024), [269].

⁵⁷¹ Further Supplementary Witness Statement of Mr Beck, dated 23 March 2023, [6], [12] and [13]; CB268-272.



372 I also accept that WTM lost revenue from the VIP tickets that were sold and refunded in the amount of \$368,070. I calculate this as:

(a) Category 7 – 183 tickets x \$740 = \$135,420.

(b) Category 8 – 423 tickets x \$550 = \$232,650.

373 As these tickets were sold, no *Sellars* discount need be applied to this total.

374 Consistently with my findings with respect to the non-VIP tickets, and for the same reasons, I find there was a commercial opportunity available to WTM to sell the unsold VIP tickets, and that opportunity was lost, but that it is appropriate to apply a *Sellars* discount of 90% to the unsold VIP tickets to reflect the possibility that opportunity would not have been realised. This decreases the number of unsold tickets from 261 to 26 tickets (rounded down) with a value of \$14,300.

375 Further, and again for the reasons I give above regarding the non-VIP tickets, revenue calculated from the VIP tickets should be exclusive of GST. Adjusting the above figures, this brings the total loss of revenue from the VIP tickets to \$347,609.

376 However, notwithstanding AGPC's concession in this regard, I consider that the face-value deduction should be GST inclusive, as this reflects the amount WTM would have paid to Ticketek to purchase the category 7 and 8 tickets, which would have included GST.

377 Therefore, I calculate the face-value ticket deduction to be: \$168,491 (\$266.60 ticket price x 632 tickets).

VIP Hospitality revenue

378 Under this head of loss, WTM claims, prior to any *Sellars* discount, loss of opportunity to derive the \$369,000 that Ms Malcolm attributed to VIP Hospitality revenue, being the additional hospitality revenue that would have been generated in the VIP areas.



379 With respect to her calculations, Ms Malcolm stated in her report:

Hospitality VIP revenue - as per the most recent available budget (WTM_0027514), \$369,000 of Hospitality VIP revenue was expected to be received. I note that I was not provided with additional support regarding the background to this figure. However, I did not exclude this revenue amount from the calculation of Net Hospitality Profit, as removing it would have resulted in a Net Hospitality Loss, which I would consider to be uncommercial. Further, I note that in the most recent available budget (WTM_0027514), the \$369,000 of Hospitality VIP revenue was to be provided in addition to both ticket sales and food and beverage revenue.⁵⁷²

380 The document ('the TEG Dainty Budget') referred to by Ms Malcolm is a document titled 'World Tour Melbourne - Revenue Projection'.⁵⁷³ Under 'Budgeted Revenue', \$369,000 is allocated to the row for 'Hospitality VIP sponsorship'. That amount is replicated in two columns titled 'Total All Shows' and 'Melbourne Lakeside Stadium'.⁵⁷⁴ Those terms are not explained or defined.

381 Mr Dainty's evidence with respect to the budget was that he believed that it had been 'prepared by Mr Beck of WTM with the assistance of the finance teams at TEG Dainty and WTM. The documents would have been shown to and approved by me.'⁵⁷⁵

382 Mr Beck's evidence was, on or around 24 April 2020, WTM and TEG Dainty together produced a spreadsheet which 'recorded, amongst other things, the revenue that TEG Dainty and WTM estimated would have been earned' had the Robbie Williams concert proceeded. Mr Beck further said that '[b]ased on my 32 years in the industry and the extent of public interest in the concert, I consider that estimate was reasonable'.⁵⁷⁶ The footnote to that paragraph of Mr Beck's witness statement cited, among other documents, the TEG Dainty Budget.⁵⁷⁷

383 WTM submits that the opportunity to derive VIP hospitality revenue existed, that WTM would have pursued realising that revenue, and relies on Ms Malcolm's

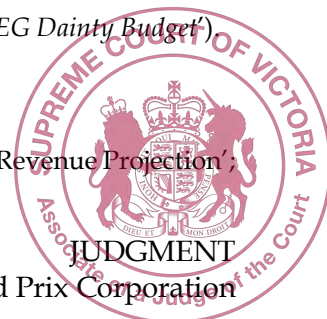
⁵⁷² Expert Report of Liesl Malcolm dated 13 April 2023, [5.3.2]; CB646.

⁵⁷³ TEG Dainty World Tour Budget dated 24 April 2020 (WTM_0027514), CB4010, ('TEG Dainty Budget')
⁵⁷⁴ CB4010.

⁵⁷⁵ Witness Statement of Mr Dainty, dated 21 May 2024, [31]; CB5397.

⁵⁷⁶ Witness Statement of Mr Beck, dated 16 September 2022, [93]; CB167.

⁵⁷⁷ WTM_0027514 being the budget referred to above, titled 'World Tour Melbourne - Revenue Projection'; see: CB4010.



evidence as to the value of that loss. However, WTM accepts 'there is some uncertainty in the evidence as to the prospects of obtaining the full amount' and submits that a *Sellars* discount of 25% is appropriate. WTM contends this would bring WTM's share of the VIP Hospitality revenue to approximately \$240,000.⁵⁷⁸

384 AGPC contends that no loss should be awarded under this head of loss on the basis that Ms Malcolm's calculation is taken from the budget in circumstances where that document records an unexplained sum for 'Hospitality VIP Sponsorship', where there is no evidence as to what the sponsorship referred to was or how it was to be earned, and where the \$369,000 figure appears to be relate to both the Friday and Saturday concerts.⁵⁷⁹

385 AGPC also contends generally, albeit not specifically in its submissions in relation to this head of loss, that:

- (a) if the evidence fails to provide any rational foundation for a proper estimate of loss then the Court should simply decline to make an estimate;⁵⁸⁰
- (b) where the plaintiff's loss is not capable of precise calculation, but the plaintiff could have, but did not, lead evidence to permit a considered evaluation of the loss (even if such evaluation would require estimation), the Court is not permitted to simply guess at the damages to be awarded;⁵⁸¹ and
- (c) where damages are uncertain for lack of evidence, difficulties of assessment are in general resolved against the party who could or should have provided the evidence.⁵⁸²

⁵⁷⁸ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [287] and [328].

⁵⁷⁹ *Defendant's Outline of Closing Submissions* (12 June 2024), [271].

⁵⁸⁰ *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 245; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23, 37 (Gibbs J); 38 (Aickin J); *McCrohon v Harith* [2010] NSWCA 67, [120]-[123] (McColl JA – Campbell and Handley JA agreeing).

⁵⁸¹ *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, [84] (Campbell JA); *Winning Appliances Pty Ltd v Dean Appliances Pty Ltd* (1995) 32 IPR 65, 68 (Moore J).

⁵⁸² *Oran Park Motor Sport Pty Ltd v Fleissig* [2002] NSWCA 371, [54] and [66] (Hodgson JA).



386 Further, Hayne J (Gleeson CJ, McHugh and Kirby JJ agreeing) observed:⁵⁸³

Placer undoubtedly bore the burden of proving not only that it had suffered damage as a result of Thiess Contractors' breach of contract, but also the amount of the loss it had sustained. It goes without saying that it had to prove these matters on the balance of probabilities and with as much precision as the subject matter reasonably permitted.

It may be that, in at least some cases, it is necessary or desirable to distinguish between a case where a plaintiff cannot adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff has not adduced such evidence. In the former kind of case it may be that estimation, if not guesswork, may be necessary in assessing the damages to be allowed. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their most apt application in cases of the former rather than the latter kind. This case did not invite attention to such questions. Placer sought to calculate its damages precisely.

387 I am satisfied that through the cancellation of the concert WTM lost the commercially valuable opportunity to obtain VIP Hospitality revenue and that WTM would have otherwise pursued this opportunity.

388 However, I have reached the view that the evidence relied on by WTM, being Ms Malcolm's calculation based on a single item in the budget prepared by WTM and TEG Dainty in April 2020 – approximately one month after the concert had been cancelled – does not provide a rational foundation for me to estimate loss of VIP Hospitality revenue and, as such, that I should decline to award damages under this head of loss.

389 In reaching this conclusion, I accept Mr Beck's evidence that he was satisfied that the estimates reached were 'reasonable' based on his many years of industry experience. However, that must be balanced against the document itself which attributes the \$369,000 to 'Hospitality VIP Sponsorship'. As AGPC contends, it is unclear from the document what sponsorship that is or where it would come from; WTM has not suggested that any part of the VIP Hospitality revenue would have been derived from sponsorship. I note that WTM's submission on this point is that 'Hospitality VIP Sponsorship' simply meant VIP Hospitality revenue,⁵⁸⁴ however in circumstances

⁵⁸³ *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257 (*Placer (Granny Smith)*), [37]–[38] observed (footnotes omitted, emphasis added).

⁵⁸⁴ See *Plaintiff's Outline of Closing Submissions* (5 July 2024), [287] and [328].



where WTM claims a significant sum of lost revenue from lost sponsorship opportunities, I am not satisfied the budget should be read in that manner.

390 Further, there were agreements in place with A-Live Events and DFF regarding the organisation of the VIP village and the supply of VIP Hospitality. In this context, I consider it was open to WTM to adduce, and rely on, evidence (such as that adduced in relation to loss of food and beverage revenue and merchandise revenue) that would permit a proper estimate of loss to be made. In this regard, I consider this head of loss falls into the latter category of case described by Hayne J in *Placer (Granny Smith)*.

391 Accordingly, I award no loss under this head of loss.

Food and beverage revenue

392 In relation to non-VIP food and beverage revenue, WTM claims (pre-*Sellars* discount) a loss of the commercially valuable opportunity to realise revenue of a maximum amount of \$167,738.⁵⁸⁵ This is the amount calculated by Ms Malcolm on the basis of a \$30.75 spend per head multiplied by 27,242 people (the maximum capacity of the stadium less the VIP tickets) x 20% commission on food and beverage revenue.⁵⁸⁶

393 As set out above, Gema was engaged to provide the non-VIP food and beverage catering at the concert. Under the agreement with Gema, WTM was to receive 20% of the gross revenue for food and beverage sales.⁵⁸⁷

394 The Gema Letter of Offer provided the following with respects to spend per head:

Spend per Head

Gema Group have worked on the assumption that all patrons attending the concert will have not attended the Australian Grand Prix Formula 1, and that crowd figures will be approximately 35,000, and with the current Bar footprint; we anticipate the spend per head being \$26.50.

Dependant upon the artist and style of music and the crowd figure, Gema Group would see this SPH increasing to between \$33.00 and \$35.00.

⁵⁸⁵ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [288]-[289] and [291].

⁵⁸⁶ Expert Report of Liesl Malcolm dated 13 April 2023, [5.3.3] CB646. CB.

⁵⁸⁷ Witness Statement of Henrik Drese dated 26 March 2023, [17] and [21] CB282 and 283; CB1163.



Gema Group would love to explore options with World Tour Group and Alive Events Agency for placing bars elsewhere within the concert precinct to help attain the higher of these two figures.⁵⁸⁸

395 Based on this information, Ms Malcolm calculated the spend per head as \$30.75, this being the 'mid-point of the expected "spend per head" detailed in the GEMA Group Letter of Offer'.⁵⁸⁹ In cross-examination, Ms Malcolm accepted this 'mid-point' figure was not reached on the basis of any assumption she was instructed to adopt, or any information she had been given regarding the style of music, but that 'given that there was commentary in that ... document here that the costs would be increasing, we thought it would be - I thought it would be appropriate to take ... the midpoint between those two amounts'.⁵⁹⁰

396 WTM contends, in the context of making submissions on a *Sellars* discount, that although the opportunity to obtain the revenue claimed existed, and WTM would have pursued that opportunity, there is 'some uncertainty in the evidence as to the prospects of obtaining the full amount'. Unlike with other heads of loss, WTM does not suggest a percentage that it says would be an appropriate discount. Instead, it sets out the following calculation: \$90,000 = 16,511 tickets sold x \$30.75 spend per head x 20% commission x 90% WTM's share with TEG Dainty.⁵⁹¹

397 It is unclear whether the decrease in ticket numbers is intended to reflect WTM's submissions on the appropriate *Sellars* discount or is a concession that the correct calculation should reflect the tickets sold and not the maximum capacity less VIP tickets.

398 AGPC contends that the Court does not have reliable evidence from which it can make any findings regarding a probable spend per head at the Robbie Williams concert. According to AGPC's submissions, the Gema Letter of Offer does not provide a specific spend per head estimate for the Robbie Williams concert, or a basis for Ms Malcolm's mid-point figure. Instead, the figures in the letter were of a preliminary

588 CB1161.

589 Expert Report of Liesl Malcolm dated 13 April 2023, [5.3.3] CB646.

590 T532/5-17 (XXN of Ms Malcolm and Ms Wright).

591 *Plaintiff's Outline of Closing Submissions* (5 July 2024), [329].



nature and subject to multiple factors that were not yet known.⁵⁹² In this regard, AGPC relies on the covering email to the Letter of Offer, from Mr Paul Valenti, Managing Director of Gema, which noted he was happy to ‘make some changes based on both our understanding of the event and the available areas ... I think it is a real moving puzzle and will [definitely] change as we move forward.’⁵⁹³

399 Moreover, AGPC says that the Court also cannot be satisfied of the reliability of the \$26.50 spend per head in the Gema Letter of Offer. This is because:

- (a) that figure was predicated on a crowd of approximately 35,000 which is an assumption that, considering the ticket sales at 13 March 2020, could not have been borne out had the concert proceeded. In this respect, AGPC repeats its submissions about further ticket sales under the Net Profit calculation;
- (b) the Court should infer that some of the ticketholders who had already purchased tickets would have decided not to attend the concert due to the risk of coronavirus; and
- (c) the \$26.50 spend per head was based on ‘the current bar footprint’ which was outside of the Lakeside Stadium and there was no evidence that this bar footprint had been accepted for the Robbie Williams concert.⁵⁹⁴

400 With respect to the higher spend per head figures included in the Gema Letter of Offer, AGPC contends that:

- (a) the letter stated Gema would like to ‘explore options with World Tour Group and Alive Events Agency for placing bars elsewhere within the concert precinct to help attain the higher of these two figures’ but there is no evidence the bar footprint was increased and the Court should infer that WTM would have sought to do so to maximise its revenue but there is no evidence of it doing so; and

⁵⁹² *Defendant’s Outline of Closing Submissions* (12 June 2024), [274]-[278].

⁵⁹³ CB4297.

⁵⁹⁴ *Defendant’s Outline of Closing Submissions* (12 June 2024), [279].



(b) the letter stated that '[d]ependant upon the artist and style of music and the crowd figure, Gema Group would see this SPH increasing to between \$33.00 and \$35.00' but there is no evidence that Robbie Williams' style of music would increase the spend per head nor is there any evidence about what sort of artist would do so from which the Court could make an inference.⁵⁹⁵

401 In summary, AGPC contends that it was within the power of WTM to adduce evidence which would provide a rational basis for an estimate of loss to have been made with respect to a likely spend per head and, as it did not do so, the uncertainty should be resolved against WTM.⁵⁹⁶ Finally, AGPC submits that the assumed crowd numbers by Ms Malcolm was overstated and, for the reasons given with respect to the other heads of loss, should have been calculated as no more than about 12,500.⁵⁹⁷

402 Taking into account the totality of AGPC's (and WTM's) submissions, I am not satisfied that there is no rational basis from which to calculate loss with respect to food and beverage revenue. WTM has adduced evidence from Gema, the catering company engaged to provide the food and beverage services, and that evidence sets out a range of potential spend per head options. The starting point of that analysis is a spend per head of \$26.50. Although I accept a number of relevant variables were not known at the time the Letter of Offer was sent, and that a number of the assumptions relied on would not have eventuated in actuality, I consider these are factors more appropriately considered as part of my quantum analysis, rather than as a basis to award no loss under this head of loss.

403 I do accept, however, that the spend per head should be calculated by the ticket sales (less VIP tickets) and not by the maximum crowd capacity.

404 Further, I consider that Ms Malcolm's decision to adopt the 'mid-point' spend per head, rather than the \$26.50 contained in the Letter of Offer, was misplaced. Although

⁵⁹⁵ *Defendant's Outline of Closing Submissions* (12 June 2024), [280]-[281].

⁵⁹⁶ *Defendant's Outline of Closing Submissions* (12 June 2024), [282] citing *Oran Park Motor Sport Pty Ltd v Fleissig* [2002] NSWCA 371, [54] and [66] (Hodgson JA).

⁵⁹⁷ *Defendant's Outline of Closing Submissions* (12 June 2024), [283].



imperfect, as the base spend per head provided by Gema, I consider it is appropriate to adopt the \$26.50 spend per head figure.

405 Based on the other matters raised in AGPC's submission, and for those reasons, I consider a significant *Sellars* discount is still required to reflect the not insubstantial possibility that the food and beverage revenue would not have been realised had the concert proceeded. As such, on balance, I will apply a discount of 30%.

406 The base calculation becomes: spend per head x ticket sales (less VIP tickets) x 20% commission. That is: $\$26.50 \times (13,821 - 632) \times 20\% = \$69,902$ (rounded up).

407 Applying the 30% *Sellars* discount, the total loss in food and beverage revenue becomes: \$48,931.

Hospitality costs

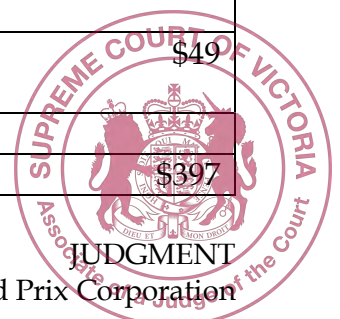
408 For the reasons set out in relation to the actual scenario, I accept that WTM incurred \$537,000 in hospitality costs.

90% of VIP Hospitality

409 WTM's 90% share of the VIP hospitality revenue is therefore \$206,000. I recognise that, on my calculation in the but-for scenario, WTM would have run at a loss with respect to VIP Hospitality even had the concert proceeded. This is due to my findings regarding the low ticket sales and the fact I was unable to award any damages for VIP Hospitality revenue.

410 The breakdown of this calculation is follows (rounded and including the relevant *Sellars* discounts):

90% VIP Hospitality			
\$'000s	But-for scenario	Actual scenario	Difference
Revenue			
VIP Tickets	\$348	-	\$348
VIP Hospitality revenue	\$0	-	\$0
Food and Beverage revenue	\$49	-	\$49
Total Revenue:	\$397	-	\$397



Less			
Face value of VIP tickets	(\$168)	-	(\$168)
Hospitality costs	(\$597)	(\$597)	-
Total deductions/costs:	(\$765)	(\$597)	(\$168)
Overall Loss:	(\$368)	(\$597)	\$229
WTM's 90%	(\$331)	(\$537)	\$206

Other revenue / expenses

411 WTM claims approximately a further \$6,675,000⁵⁹⁸ in loss (rounded up and pre-Sellers discount) under various heads of loss which are collectively treated as other revenue and expenses by Ms Malcolm on the basis that they were excluded from inclusion in the Net Profit.

412 WTM's claim under this head of loss can be set as follows (some figures rounded):

Other Revenue / Expenses			
\$'000	But-for scenario	Actual scenario	Difference
Revenue			
Global sponsorship	\$4,048	-	\$4,048
TV and Film content	\$2,732	-	\$2,732
Event Licence Fee	\$203	\$113	\$90
Production Fee	\$188	\$188	-
Merchandise	\$128	-	\$128
WTM Sponsorship Fee	(not pressed)	(not pressed)	-
Total Revenue:	\$7,299	\$301	\$6,998
Expenses			
TV and Film content	(\$563)	(\$563)	-
Merchandise	(\$56)	(\$56)	-
Global Sponsorship	(\$11)	(\$11)	-
Additional Expenditure	(\$323)	-	(\$323)
Total Expenses:	(\$953)	(\$630)	(\$323)
100% WTM Share of Revenue less Expenses	\$6,346	(\$329)	\$6,675

⁵⁹⁸ This number has been adjusted to reflect WTM's concessions in relation to merchandise revenue and the WTM sponsorship fee.



413 The most significant streams of claimed revenue under this head of loss is \$4,048,000 in global sponsorship revenue and \$2,732,000 in TV and film content.

Actual scenario

414 Under the actual scenario, WTM claims a loss of \$329,000 comprising of expenses of \$629,000 (flowing from TV and film content, merchandise, global sponsorship and other expenses) less revenue in the sum of approximately \$300,000 (flowing from the Event Licence Fee and Production Fee).

415 The Event Licence fee and Production Fee are addressed in the Net Profit above, as these fees form Costs for the purposes of the Net Profit analysis. In contrast, they form revenue under this head of loss.

416 In the actual scenario, the base Event Licence Fee and Production Fee are not in dispute. Accordingly, I find that WTM obtained revenue to the value of \$300,000 (rounded). As set out above, WTM's submissions with respect to the expenses incurred are framed generally and are not directed to specific expenses or specific heads of loss. In summary, WTM simply contends that Ms Malcolm's calculations of the costs actually incurred are supported by the evidence of Mr Dainty and Mr Gow and that these were sunk costs by reason of the cancellation of the concert.⁵⁹⁹ AGPC does not make any submissions directed to the \$11,000 claimed as expenses against global sponsorship or the \$563,000 claimed as expenses against TV and film content. In the course of making submissions with respect to WTM's claim for loss of merchandise revenue, AGPC accepts the \$56,000 claimed as expenses with relation to merchandise.⁶⁰⁰

417 Ms Malcolm deemed that expenses relating to TV and film content, merchandise, and Global Sponsorship were excluded from inclusion in the Net Profit calculation, with WTM bearing 100% of these expenses. The quantum allocated to these expenses by Ms Malcolm was based on her analysis of the invoices provided for both concerts and her instructions in relation to the allocation of those expenses, apportioning

⁵⁹⁹ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [258].

⁶⁰⁰ *Defendant's Outline of Closing Submissions* (12 June 2024), [368].



approximately 58% of the expenses to the Robbie Williams concert.⁶⁰¹ Ms Wright's report does not make any substantive comments with respect to these expenses.⁶⁰²

418 As there is no dispute with respect of these expenses, I am satisfied that WTM incurred expenses of \$629,000. Deducting the \$300,000 in revenue from the overall expenses, I accept WTM suffered a total loss of \$329,000 in the actual scenario under this head of loss.

But-for scenario

Global Sponsorship

419 WTM claims \$4,048,000 (pre-*Sellars* discount) relating to loss from global sponsorship revenue. WTM presses this as a loss of opportunity claim.⁶⁰³

420 As with the actual scenario, WTM also claims \$11,000 in expenses against this head of loss. These expenses are not in dispute and I accept they were also incurred in the but-for scenario.

421 There was only one prospective source of global sponsorship for the Robbie Williams concert, being AgBioEn. It is not in dispute between the parties that Apollo and AgBioEn entered into a sponsorship agreement in February 2020 which covered various proposed World Tour events, the most significant of which was to be the Friday charity concert with Miley Cyrus. However, WTM contends, and AGPC disputes, that it is entitled to claim loss in the form of loss of opportunity to realise global sponsorship revenue from AgBioEn on the basis that when the Miley Cyrus concert was cancelled, AgBioEn verbally agreed to provide a portion of the money that would have gone towards the Miley Cyrus concert as sponsorship to the Robbie Williams concert.

⁶⁰¹ Expert Report of Liesl Malcolm dated 13 April 2023, [7.3.1] and [11.2.1]-[11.3.1]; CB650 and 655.

⁶⁰² See Expert Report of Dawna Wright dated 27 June 2023, Annexure F, 1.6.1- 1.6.3; CB811.

⁶⁰³ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [292]-[293].



422 It is therefore useful context to set out the background to the February 2020 sponsorship agreement, and the evidence of relevant conversations between Apollo and AgBioEn, in some detail.

423 On 6 February 2020, Apollo entered into a sponsorship agreement with AgBioEn, for a term of five years ('the sponsorship agreement'). Under cl 4.1 of the sponsorship agreement, in exchange for a number of sponsorship rights set out in cl 2.1, AgBioEn agreed to pay the sponsorship fees set out in schedule 2 to the agreement. Pursuant to cl 4.2, all amounts payable to Apollo under the agreement were 'to be paid free and clear of currency control restrictions, bank charges, fees, duties, taxes or other transactional costs, the payment of which shall be the sole responsibility of [AgBioEn]'.⁶⁰⁴ Clause 25⁶⁰⁵ of the agreement then provided that no variation of the agreement would be effective unless in writing and signed by the parties or their authorised representatives.⁶⁰⁶

424 Under cl 1 of sch 2 of the agreement, in 2020 AgBioEn was to pay USD\$1,680,000 to Apollo in Event Rights Fees.⁶⁰⁷ Separately, under cl 2.1 of sch 2, it was agreed the World Tour Melbourne 2020 Friday Night (being the Miley Cyrus concert) was 'intended to be a fund-raising event for charity. This is an exceptional approach due to the Australian bushfires in 2019/20. It shall be conducted as set out below'.⁶⁰⁸

425 Clause 2.2 and 2.5 of sch 2 provided that AgBioEn would fund Apollo for hosting the Friday night concert (the 'hosting costs') 'which is currently estimated to be approximately US\$5,000,000'. Net Income generated from the concert would then be given as donations to agreed charities and be described as being donated by 'AgBioEn

⁶⁰⁴ CB1590 to 1598.

⁶⁰⁵ *Defendant's Outline of Closing Submissions* (12 June 2024), [299] appear to mistakenly refer to cl 22 of LMCA.

⁶⁰⁶ CB1609.

⁶⁰⁷ This was calculated as USD\$240,000 multiplied by 7 events in that year, with USD\$1,080,000 payable within 15 days of the commencement of the agreement, \$300,000 payable by 30 June 2020, and \$300,000 payable by 31 October 2020; CB1613.

⁶⁰⁸ CB1613.



World Tour Friday Melbourne 2020'.⁶⁰⁹ An estimated budget of the hosting costs and charitable donations were exhibited to the agreement.⁶¹⁰

426 WTM relies on the evidence of Ms Artmonsky and Mr Morrison to establish their claim for loss of opportunity. Ms Artmonsky gave evidence of two meetings that she attended on around 10 March and 11 March 2020 with Mr Morrison, Mr Dainty and Mr Charles Hunting from AgBioEn Pty Ltd. With respect to the meeting on around 10 March 2020, Ms Artmonsky's evidence is that:

We discussed Miley Cyrus' cancellation and other ways AgBioEn could remain involved in the event. During that meeting, Charles Hunting said words to the effect that "can AgBioEn allocate some of the sponsorship for Friday night into the event [on 14 March 2020] to support the program which World Tour is launching?". Charles also said words to the effect that he still wanted exposure for AgBioEn, especially because this was his home market in Melbourne. We said that it could. Both Paul Morrison and Paul Dainty said words to the effect they were extremely grateful for AgBioEn agreeing to sponsor the Saturday night event.⁶¹¹

427 Ms Artmonsky's evidence in relation to the meeting on around 11 March 2020 was that:

During that meeting we discussed the original benefits that had been intended for AgBioEn in relation to the Miley Cyrus concert. Paul and I said words to the effect that we could deliver those benefits and assets to AgBioEn. At this point. we had already obtained confirmation from Robbie Williams' team that we were permitted to film and provide content.

...

Charles again said words to the effect that AgBioEn was happy to sponsor the event. He said words to the effect that AgBioEn still wanted to show its support for WTM and TEG Dainty, particularly as this was to be the first event in our global 5-year sponsor partnership. He said that AgBioEn would pay USD\$2,500,000 to sponsor the Robbie Williams concert on the basis that it represented approximately half of the total value of the initial sponsorship for the 2020 World Tour Melbourne. Paul Dainty, Paul Morrison I said we agreed. At the conclusion of this meeting, we shook hands.⁶¹²

⁶⁰⁹ CB1614.

⁶¹⁰ CB1614.

⁶¹¹ Supplementary Witness Statement of Rebecca Artmonsky, dated 15 December 2022, [8]; CB212.

⁶¹² Supplementary Witness Statement of Rebecca Artmonsky, dated 15 December 2022, [9]-[10]; CB212.



428 In cross-examination of Ms Artmonsky, *inter alia* the following exchange took place:

Now, as a director of the plaintiff you are obviously aware of the claim that's being made in this case by the plaintiff? --- Yes.

You're aware of the detail of it. And you understand that part of the claim is in respect of global sponsorship that you say you lost the opportunity to obtain from AgBioEn, is that right? --- Yes.

And that amounts to a little over \$4m? --- Yes.

And it's the most substantial part of your claim? ---- Yes.

And the reason it's a little over \$4m is that it's based upon US\$2.5m, is that right? --- Correct, yeah.⁶¹³

429 Mr Morrison's evidence was that:

Between 10 and 12 March 2020, Becky Artmonsky, Paul Dainty and I met with Charles Hunting to discuss AgBioEn's potential sponsorship of the 2020 World Tour Melbourne event following Miley Cyrus' cancellation. We also had a number of teleconferences. I recall meeting Charles at the Crystal lounge in Crown Towers on 10 March 2020, and at a coffee shop in St Kilda on 12 March 2020. Becky Artmonsky and Paul Dainty also attended. During one of those meetings, Charles said words to the effect that AgBioEn would allocate 50% of the USD5 million in sponsorship that it had initially allocated to the concert on 13 March 2020 to the concert on 14 March 2020. I said words that the effect that "thank you" for that sponsorship and we discussed an ongoing partnership.⁶¹⁴

430 WTM submits the evidence above supports its claim for various reasons, however before considering those submissions it is necessary to deal with a pleadings issue raised by AGPC.

431 AGPC contends WTM cannot rely on its claim for loss of opportunity to obtain revenue from global sponsorship because it failed to properly plead this head of loss and should be held to its case as pleaded.

432 Paragraph 12 of WTM's Amended Statement of Claim provides that, by reason of AGPC's breaches of the LMCA and/or its contravention of s 18 of the ACL, WTM has suffered loss and damage. The sole particular of that paragraph states:

⁶¹³ T203/3-13 (XXN of Ms Artmonsky).

⁶¹⁴ Witness Statement of Paul Morrison dated 20 December 2022, [64]; CB254-255.



Further particulars as to the loss and damages suffered by WTM will be provided in advance of trial in the form of evidence in the proceeding.⁶¹⁵

433 On 14 June 2023, AGPC wrote to WTM's solicitors stating that this was not the proper way to particularise loss and seeking proper particulars.⁶¹⁶ On 22 June 2023, WTM's solicitors responded by letter, stating in relevant part:

Our client served the expert report of Leisl Malcolm quantifying that loss on 17 April 2023. It cannot sensibly be said that your client does not understand the case it must meet in relation to paragraph 12 of the amended statement of claim.

...

... to avoid further unnecessary correspondence the question, our client gives the following particulars of loss and damage:

- (a) Our client's loss and damage of revenue resulting from the cancellation of the 2020 World Tour Melbourne scheduled to occur on 14 March 2020 is estimated to be \$8.545 million. See the expert report of Liesl Malcolm filed 17 April 2023 at pg 10 [3.1.1].⁶¹⁷

434 As such, AGPC submits the case as pleaded is that the loss claimed by WTM is that which is set out in Ms Malcolm's report and that the relevant parts of the report state she was instructed to assume that 'AgBioEn agreed to pay USD\$2.5 million to WTM as sponsorship of the Event, and this amount would have been received had the Event not been cancelled'.⁶¹⁸

435 That is, WTM's case as pleaded and particularised is that there was an agreement between WTM and AgBioEn Pty Ltd for the payment of the approximate \$4,000,000.

436 AGPC submits that in its opening WTM introduced an unpleaded allegation, this being that it was not claiming a sum which had been promised by AgBioEn but rather was claiming the lost opportunity to conclude an agreement with AgBioEn to receive that sum.⁶¹⁹

⁶¹⁵ CB67.

⁶¹⁶ CB5655.

⁶¹⁷ CB5657.

⁶¹⁸ Witness Statement of Paul Morrison dated 20 December 2022, [1.2.1(c)]; CB639.

⁶¹⁹ *Defendant's Outline of Closing Submissions* (12 June 2024), [286]-[293].



437 AGPC contends this is a fundamentally different position to the pleadings as, instead of having to establish on the balance of probabilities that it had an entitlement to the money promised by AgBioEn, WTM is only required to establish on the balance of probabilities that there was a valuable commercial opportunity that was lost and then to prove the value of the loss on probability and possibilities.⁶²⁰

438 Citing *Barnes v Forty Two International Pty Ltd*,⁶²¹ AGPC submits that the authorities make clear that claims for damages for loss of opportunity must be clearly and properly pleaded and, further, that the present proceeding is not a case where the trial was conducted in such a way that would permit a departure from the pleadings. Instead, AGPC says WTM's evidence was directed to establishing an oral agreement existed between WTM and AgBioEn, and did not include evidence that the relevant discussions were only a valuable commercial opportunity that required further steps to being perfected.⁶²²

439 As a result, AGPC submits it would suffer significant prejudice if WTM were to be permitted to depart from the pleadings. AGPC contends that if WTM had pleaded an alternative case, then AGPC would have led evidence to try to establish that the opportunity would not have crystallised or would not have been of the value claimed. For example, AGPC raises questions of whether AgBioGen was in liquidation at relevant times by mid-2020 and asserts, had the loss of opportunity claim been properly pleaded, such matters would have been investigated in preparation for trial.⁶²³ In this regard, for the limited use for the question of whether WTM should not be permitted to depart from the pleaded case, AGPC tendered a liquidator's report.⁶²⁴

440 In response, WTM says AGPC's submission on pleadings should be rejected. WTM submits that AGPC only raised the pleadings issue on 6 June 2024 in circumstances where it has always been WTM's case was that the concert was cancelled as a result of

⁶²⁰ *Defendant's Outline of Closing Submissions* (12 June 2024), [293]; T548/9-23.

⁶²¹ (2014) 316 ALR 408, [119]-[122] (Beach J – Siopis and Flick JJ agreeing).

⁶²² *Defendant's Outline of Closing Submissions* (12 June 2024), [294]-[295].

⁶²³ *Defendant's Outline of Closing Submissions* (12 June 2024), [296].

⁶²⁴ T781/26-31, T782/1-31 and T783/1-14.



AGPC's conduct and as a result WTM lost both the revenue from the sold tickets that were refunded and, separately, the revenue it would have earned from further ticket sales, sponsorship, broadcasting, merchandise, and food and beverages sales – which, WTM says, can only be described as the loss of a commercial opportunity.⁶²⁵

441 In this regard, WTM says AGPC was on notice that WTM was claiming loss arising from the lost opportunity to derive revenue from global sponsorship and that the nature of this claim had been clearly raised, including in opening submissions. In any case, WTM contends AGPC should have raised any objections well before 6 June 2024.⁶²⁶ Further, WTM submits that, to a limited extent, AGPC cross-examined Ms Artmonsky on the basis that WTM was claiming loss of opportunity with respect of global sponsorship and any forensic choices made by AGPC regarding evidence were of its own making.⁶²⁷

442 On balance, I reject AGPC's submissions that it was not put on notice that WTM sought to run a loss of opportunity claim with respect to the global sponsorship, that the trial was not conducted in a manner which permits any departure from the claim as pleaded, and that, in these circumstances, AGPC would suffer significant prejudice if WTM were permitted to press the loss of opportunity claim.

443 In reaching this conclusion, I accept AGPC's submissions in relation to the form of the pleadings and the communications between the solicitors leading to the letter of 22 June 2023.

444 However, I accept the force of WTM's submissions that it was readily apparent that WTM's claim loss of global sponsorship revenue was a loss of opportunity claim, that this was how WTM sought to, and did conduct, the trial and that AGPC was on notice this was the case most likely from, at a conservative estimate, November 2023 but, at the very latest, from 27 May 2024. In that regard, the Plaintiff's Outline of Opening

⁶²⁵ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [299] to [300].

⁶²⁶ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [301]-[302].

⁶²⁷ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [302].



Submissions, dated 17 November 2023, at paragraph [30] state in full in relation to quantum (footnote omitted):

As a result of that cancellation, the Plaintiff, refunded approximately \$2.4 million in ticket sales and lost the commercially valuable opportunity to run the WTM concert, including to earn revenue from further ticket sales, sponsorship, broadcast (TV and film) rights as well as food, beverage, and merchandise sales. WTM will adduce a very substantial amount of evidence in support [of] this claim.

445 The claim for loss in relation to sponsorship revenue was clearly framed as a loss of opportunity claim.

446 Further, that WTM was pressing a loss of opportunity claim is also clear from the transcript on 27 May 2024 where senior counsel for WTM stated:

... As to quantum, had the concert proceeded that night; like for instance, the New Order concert did at the Myer Music Bowl, the plaintiff would've retained the 2.4m in tickets that it in fact refunded.

And in addition, would have had the opportunity to earn further revenue from running the concert, including revenue from running the concert, including revenue from further ticket sales, sponsorship, merchandise sales, food and beverage sales and last but certainly not least TV and film content ...

...

... The final additional revenue is for a global sponsorship deal quantified at approximately 4.048 million with a company who had agreed to provide sponsorship for the Miley Cyrus concert, which occurred on the Friday night.

The company's name is AgBioEn, and what is claimed here and supported by evidence which Your Honour will receive, is a loss of an opt to move that sponsorship from the Miley Cyrus concert on the Friday night which was off, across to the Robbie Williams concert on the Saturday night, and there had been discussions between the plaintiff's representative and the representative of AgBioEn about that and there had been, on our case on the evidence, an oral grandmother reached about that but as things of course transpired with the cancellation of the Robbie Williams concert, that agreement never got documented and we do acknowledge, Your Honour, in seller's case that that final item, the \$4.08 million is attended with a seller's uncertainty.

Again, I repeat I am not seeking to diminish it by saying that but just to acknowledge the realist of the facts that are before the court ...⁶²⁸

⁶²⁸ T68/18-31, T69/29-31, and T70/1-10.



447 Notwithstanding the transcript erroneously referring to a 'seller's discount', it is abundantly clear that counsel for WTM was referring to a 'Sellers discount'.

448 In these circumstances, AGPC had ample opportunity to make different forensic choices with respect to how it ran its case and I am not satisfied that AGPC will suffer significant prejudice from WTM being permitted to run a loss of opportunity claim. I therefore find WTM may press its claim for global sponsorship as a loss of opportunity claim.

449 AGPC's remaining submissions under the global sponsorship head of loss are directed toward establishing that there was no agreement between WTM and AgBioEn, and not specifically towards the loss of opportunity claim. In very summary form, as it is not strictly necessary to address each of these submissions in light of my findings in relation to the pleadings issue, AGPC submits:⁶²⁹

- (a) it was Apollo, and not WTM, which entered into the sponsorship agreement on 6 February 2020 and that agreement required variations to the agreement to be made writing;
- (b) there is no contemporaneous document (or any document) that refers to the oral agreement;
- (c) that while the absence of an oral variation clause in the sponsorship agreement is not a bar to the proof of an oral agreement, it does have evidentiary value against the proposition that the parties intended to be bound by an oral discussion;
- (d) for an alleged oral variation to be contractually effective, notwithstanding non-compliance with a written modification requirement, the oral variation must satisfy the requirements of a valid contract in that the terms of the

⁶²⁹ *Defendant's Outline of Closing Submissions* (12 June 2024), [298]-[331].



- arrangement must be certain and there must generally be real consideration for the agreement;⁶³⁰
- (e) that the Court, in determining whether communications between parties constitutes a contract, is not confined to the terms or manner of the communications and must interpret the communications by reference to the subject matter and surrounding circumstances;⁶³¹
- (f) that there were a number⁶³² of communications between Apollo and AgBioEn Pty Ltd after the sponsorship agreement was entered into, including:
- (i) an email from Mr Hunting to Ms Artmonsky and Mr Morrison on 9 March 2020 where Mr Hunting stated *inter alia* ‘while AgBioEn’s shareholders have been somewhat difficult through this process, they are also committed to our long term’, and
- (ii) an email from Mr Hunting to Ms Artmonsky and Mr Morrison on 10 March 2020, noting that ‘I am aware you and the investors are concerned ... I recognise this leaves you and the investors exposed to the risk that if a force majeure event occurs after MC flies but before she performs, MC may still retain her fee even though AgBio will not be liable to cover it. This is not my intention...’;⁶³³
- (g) that the evidence does not establish there was an enforceable agreement because the evidence does not establish the required certainty of essential terms or intention to create legal relations, which are matters to be determined objectively from the relevant conversations;⁶³⁴

⁶³⁰ Citing *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 187 ALR 92, 99.

⁶³¹ Citing *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9251, 9255 (McLelland J).

⁶³² See, for example, CB1776, 1806 and 2795-2796.

⁶³³ CB3207.

⁶³⁴ Citing *Scientific Management Associates Pty Ltd, Re* (2019) 141 ACSR 115, [215].



- (h) that the evidence of the meeting on 10 March 2020 was of a general discussion that does not identify the essential terms of the agreement, with respect to either the amount of the sponsorship or the sponsorship rights to be obtained;
- (i) that Ms Artmonsky's evidence of the meeting on 11 March 2020 is insufficient to identify what benefits AgBioEn would have received through the oral agreement, as the references to 'original benefits' and 'the benefits and assets to AgBioEn' do not establish what these were; and, that the evidence of Mr Morrison does not provide a basis from which it can be found that the agreement was concluded or what the essential terms of the agreement were;
- (j) that the Court should infer from WTM's decision not to lead evidence from Mr Dainty in relation to the 10 and 11 March 2020 meetings that his evidence would not have assisted WTM's case and, further, should infer that WTM did not call Mr Hunting, and resisted the invitation to tender his witness statement, because Mr Hunting's evidence would not have assisted WTM;
- (k) to the extent that the unidentified sponsorship, original benefits, or 'assets and benefits' might be ascertained from other evidence, they are inconsistent with the alleged oral agreement reached between WTM and AgBioEn;
- (l) in particular, the evidence of the oral agreement makes no mention of the fact that a key element of the sponsorship agreement was that the Friday night concert (which AgBioEn agreed to provide the hosting costs for) was to be for charity, with proceeds donated to bushfire related causes, and the evidence does not address how sponsorship of the Robbie Williams concert would address this aspect of the original benefits meant for AgBioEn;
- (m) that subsequent communications between, and the conduct of, parties is relevant to determining whether an agreement was entered into;



- (n) that a finding that no agreement was concluded between WTM and AgBioEn is supported by:
- (i) the absence of any communication between WTM and AgBioEn after the meetings on 10 March and 11 March 2020 which referred to the oral agreement (including in the communication which did take place⁶³⁵);
 - (ii) the absence of any evidence that WTM or AgBioEn took any steps referable to such an agreement; and
 - (iii) the absence of any communication between WTM and Robbie Williams' team to secure his consent to AgBioEn sponsoring his concert, as was required by cl 15 of the agreement with Robbie Williams; and
- (o) that in April 2020 WTM wrote to Apollo attaching a budget 'including projected total revenues and actual costs' in a context where it was their 'understanding here that you would like us to articulate our claim not just in terms of the costs incurred, but in terms of lost opportunity', and that budget did not make any mention of the lost global sponsorship revenue now claimed.

450 In contrast, WTM contends that the Court, having regard to the evidence, should find that there was a commercially valuable opportunity to obtain global sponsorship revenue from AgBioEn in relation to the Robbie Williams concert and that opportunity was lost as a result of the cancellation of the concert on the basis that:

- (a) Ms Artmonsky and Mr Morrison were generally witnesses of credit who gave evidence about the oral agreement with Mr Hunting and their anticipation of the amount that would have been paid. It was not put to them in cross-examination that this agreement did not exist. Mr Dainty, who was also at the meetings with Mr Hunting, was not cross-examined about his recollection of those meetings;

⁶³⁵ See CB3312.



- (b) there is evidence that the further sponsorship deal was agreed to between Ms Artmonsky, Mr Morrison and Mr Hunting shortly before the concert was to take place;
- (c) the fact there was insufficient time to put the agreement into writing is not a reason to deny the claim; the parties to the agreement were sophisticated and had a pre-existing written sponsorship agreement. In addition, the cancellation of the Miley Cyrus concert had taken place only a few days before that concert was to occur;
- (d) there was a commercial benefit to both WTM and AgBioEn in AgBioEn sponsoring the Robbie Williams concert, in addition to the other amounts it had agreed to pay to WTM. The benefit to AgBioEn was apparent on the face of the sponsorship agreement;
- (e) the claim for \$4,040,000 is substantial in the context of the overall claim for loss in these proceedings but is relatively modest when compared to the value of the initial agreement with AgBioEn; and
- (f) Ms Artmonsky's evidence, and contemporaneous documents, show that AgBioEn paid significant amounts to Apollo/WTM in 2020. In the absence of other evidence this supports a conclusion AgBioEn had the funds to pay the global sponsorship money for the Robbie Williams concert.⁶³⁶

451 WTM concedes that there is 'some risk' on the evidence that WTM would not have obtained the global sponsorship revenue and thus a *Sellars* discount is appropriate. However, based on the evidence that AgBioEn did, in fact, pay Apollo/WTM a significant amount of money after the cancellation of the concert and that none of Ms Artmonsky, Mr Dainty or Mr Morrison were cross-examined on this issue, WTM submits a discount of 25% is appropriate, taking the total to \$3,070,000 (rounded down).⁶³⁷

⁶³⁶ Plaintiff's Outline of Closing Submissions (5 July 2024), [297].

⁶³⁷ Plaintiff's Outline of Closing Submissions (5 July 2024), [220].



452 Having found that WTM may proceed on the basis its claim for global sponsorship revenue is a loss of opportunity claim, I am satisfied on the basis of the evidence of Ms Artmonsky and Mr Morrison that on or around 10 March and 11 March 2020, Mr Hunting of AgBioEn met with Ms Artmonsky, Mr Dainty and Mr Morrison where they discussed the prospect of AgBioEn sponsoring the Robbie Williams concert. These meetings occurred in a context where the Miley Cyrus concert had been cancelled.

453 I accept the evidence of Ms Artmonsky and Mr Morrison as to the content of those discussions. As set out previously,⁶³⁸ I note in this regard that I consider Ms Artmonsky and Mr Morrison were witnesses of credit. Further, as stated,⁶³⁹ I decline to make the inferences sought by AGPC with respect to WTM's failure to call Mr Hunting as a witness or to tender his witness statement. I also decline to make any inferences in relation to WTM failing to lead any evidence from Mr Dainty in relation to the meetings.

454 On the basis of these findings, I am satisfied, on the balance of probabilities, that there was a valuable commercial opportunity available to WTM, being the opportunity to realise global sponsorship revenue from AgBioEn, which was lost through the cancellation of the Robbie Williams concert; and that WTM would have pursued this opportunity.

455 It is not necessary for me to reach a concluded view on whether there was an enforceable oral agreement reached between WTM and AgBioEn on 10 March or 11 March 2020. The only matter I need to be satisfied of is whether a commercial opportunity of a not negligible value existed and was lost, and I am so satisfied. In this way, many (if not most) of AGPC's submissions directed towards the existence of an enforceable agreement fall away.

⁶³⁸ See above, [21] and [23].

⁶³⁹ See above, [46].



456 Having formed the view there was an opportunity which was lost, I must assess the quantum of that loss and, if appropriate, apply a *Sellars* discount that reflects the risk that the opportunity would not have been realised.

457 As I have accepted Ms Artmonsky's and Mr Morrison's evidence in relation to the meetings on 10 March and 11 March 2020, I accept the loss of opportunity to derive global sponsorship revenue from AgBioEn was in the amount of USD\$2,500,000, which converted to AUD is \$4,048,000.

458 However, in light of the evidence before me, I do not accept WTM's submissions that there was 'some risk' the opportunity would not be realised and a *Sellars* discount of 25% is sufficient. I would put the risk as much higher.

459 On the evidence available to me, and as summarised in the submissions of AGPC (albeit in relation to whether there was an enforceable agreement), there is significant doubt in my mind as to whether WTM would have realised the global sponsorship revenue had the concert proceeded.

460 For example, and without being exhaustive, I place weight on the lack of evidence communications from AgBioEn to WTM regarding sponsorship of the Robbie Williams concert in the days following their meetings, and the lack of any contemporaneous documents referring to an agreement (or potential agreement) with AgBioEn regarding sponsorship. For the avoidance of doubt, I confirm I have placed no weight on the capacity of AgBioEn to pay the sponsorship.

461 As such, on the totality of the evidence, I consider a *Sellars* discount of 50% is appropriate. This brings the total loss of global sponsorship revenue to \$2,024,000. I am willing to accept WTM's submissions, in line with cl 4 of the original sponsorship agreement which provided the sponsor would pay the sponsorship fee plus taxes, that global sponsorship revenue derived from AgBioEn would have been received exclusive of GST.⁶⁴⁰

⁶⁴⁰ Plaintiff's Outline of Closing Submissions (5 July 2024), [295]; CB1598.



TV and film content

462 WTM claims a loss of \$2,732,000 (pre-Sellars discount) in revenue which they claim would have resulted from filming the Robbie Williams concert and the production of related content ('TV and film content').

463 WTM also claims \$563,000 in expenses against this head of loss, which is addressed in the actual scenario and which I accept was also incurred for the purposes of the but-for scenario.

464 Pursuant to cl 8.1(b) of the LMCA, WTM warranted to AGPC that it would not film, record, or otherwise broadcast the World Tour Melbourne without procuring the requisite rights for footage, recordings and filming from Formula 1. Under cl 13.2, WTM was *inter alia* required to obtain all rights for footage, recording and filming from Formula 1 at its own cost and was required to comply with the terms of the rights granted by Formula 1 in respect of the World Tour Melbourne.⁶⁴¹

465 In pressing its claim for the lost TV and film content revenue, WTM accepts it had not acquired the rights required under the LMCA at the time the concert was cancelled,⁶⁴² but contends that the evidence establishes that negotiations with Formula 1 were well progressed and would likely have been concluded had the concert proceeded and, further, that the film crews and equipment were already in place to film the concert.⁶⁴³

466 In contrast, AGPC submits that WTM did not have the right to film the content and that the contemporaneous evidence shows that Formula 1 was proceeding on the basis WTM was still required to obtain filming rights even in circumstances where the Grand Prix was cancelled. As AGPC also contends there is no evidence of monetary value of the very limited rights WTM had secured from Formula 1, it is argued that WTM therefore cannot establish any loss or damage in respect of TV and film content for the Robbie Williams concert.⁶⁴⁴

⁶⁴¹ CB1243 and 1246.

⁶⁴² *Plaintiff's Outline of Closing Submissions* (5 July 2024), [305].

⁶⁴³ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [317](1)-(2).

⁶⁴⁴ *Defendant's Outline of Closing Submissions* (12 June 2024), [333] and [346]-[348].



467 The evidence shows negotiations with Formula 1 in regards to securing filming rights commencing in around January 2020. On 31 January 2020, Ms Smith emailed Mr Ian Holmes, Director of Media Rights at Formula 1. In that email Ms Smith set out various proposals for filmed content and stated: '[i]n return of the provision of these rights we were looking at a broadcast fee of 50K. (This of course would apply to 2020 only - due to the charity element reduction).'⁶⁴⁵ In response, Mr Holmes counter-proposed a fee of US\$150,000 in return for the rights to the Saturday concert, with Formula 1 providing the rights for the Friday concert for free on the basis it was for charity.⁶⁴⁶

468 A month later, in an email dated 25 February 2020, in response to a query from a colleague as to whether there would be no filming at all on Saturday because of the broadcast fee, Mr Beck replied (punctuation unchanged): 'Yes. Because of the F1 punishment charge and because we havent got the right to film for broadcast. We wont get the rights without a confirmed broadcast plan in play either'.⁶⁴⁷

469 Negotiations continued with Formula 1 after this date, with an email chain between staff members of Formula 1 and WTM/Apollo between 10 March and 13 March 2020 of particular significance.

470 At 6:12am on 10 March 2020, Mr Chris Murray, Director of Partnerships at Apollo, sent an email to Formula 1 staff regarding the cancellation of the Miley Cyrus concert in which he raised filming rights, stating in relevant part:

We had previously discussed the scope of any filming agreement being limited to the creation of social content on Friday and Saturday with broadcast content capture being limited to the Friday charity event. Today's news obviously changes our requirement and we would like to ask for your consideration to allow us to capture both broadcast and social content from the Saturday evening event ...⁶⁴⁸

⁶⁴⁵ CB1630.

⁶⁴⁶ CB1629.

⁶⁴⁷ CB1829.

⁶⁴⁸ CB3275.



471 Ms Lyndsay Parker, Head of Ancillary Media Rights at Formula 1, replied by email at 10:52am that day, stating in relevant part:

Having regard to the Saturday night concert, just to be clear, whilst you mention below that we had agreed filming at the Saturday concert for social media purposes, we had made clear in our email of 4 March that this was not permitted under any circumstances unless Apollo was agreeing to the financial proposal previously put to you by Ian. As such, we haven't agreed to grant you any rights for filming at the Saturday night concert for social media or otherwise at this stage.

With respect to your request to now film at the Saturday night concert with Robbie, we would be happy to consider granting rights for filming at this concert for social media purposes only but we cannot grant you the full all media, worldwide in perpetuity broadcast rights. We would propose to grant social media filming rights on the following basis:

- for you to film for social media purposes only with an agreed number of filming personnel using handheld mobile devices and/or DSLR cameras only - no other filming and/or types of cameras to be used;
- for you to produce social media edits of a maximum of two minutes (2') duration which shall only be posted on a delayed basis, never live; And
- for such social media edits to be posted on official World Tour Melbourne social media channels and Robbie Williams personal social media channels only (all URLs to be provided by Apollo to F1 in advance).

In return for the above rights grant, World Touring Melbourne would undertake to provide F1 the following deliverables/opportunities with Robbie Williams ...⁶⁴⁹

472 Ms Parker went on to list a series of events and content Robbie Williams would need to participate in before concluding:

Chris, if you could let me know whether you wish to proceed on the basis outlined above at your earliest opportunity that would be great. We will then organise for the relevant paperwork to be drawn up from our side for review and signature. Just in terms of filming personnel, we will require a revised list of proposed names of filming personnel from you together with the number of mobile phones and/or DSLR cameras being used (which should be maximum 1 per camera person) and the name of the production company that they work for so that we can make provision for filming consents. To be clear, none of the other cameras/personnel previously requested will be permitted.⁶⁵⁰

⁶⁴⁹ CB3272 to 3274.

⁶⁵⁰ CB3274.



473 In a response later that day, Mr Murray agreed to Ms Parker's offer provided that Formula 1 could 'confirm we are able to post content on Westbrook and Smith family channels. For the avoidance of doubt, this is perceived to be a significant benefit to F1'.⁶⁵¹

474 At 9:37am on 11 March 2020, Ms Tanya Wilkinson, Head of Partnership Marketing at Formula 1 replied, stating in relevant part (emphasis in original):

We are happy to allow Westbrook and Smith family social, but we need all of the following information by return email:

- the URLs for all of the social media channels (i.e. the ones for Westbrook and all of the Smith family accounts and the ones for World Tour Melbourne and Robbie William); and
- the names of all of the individual filming personnel and whether they are using a handheld mobile phone or DSLR camera (1 device only per person) to film during the concert and which production company they work for.

We will allow content to be posted on social media channels for 14 days after the end of the concert. That 14 day period applies to all social media channels including World Tour Melbourne, Robbie Williams and those as per above ...⁶⁵²

475 That night, Ms Parker sent Mr Murray an email attaching a Letter of Agreement outlining the terms on which Formula 1 was willing to allow WTM to film the Robbie Williams concert. Ms Parker noted that the Apollo legal team would need to review the Letter of Agreement but expressed her hope that they would 'take a pragmatic approach to such a review as there's little time to enter into protracted negotiation at this stage' and that '[i]f we are too far part on the terms of the agreement then I fear this project may well not go ahead from our side'. Ms Parker also attached an Event Accreditation and Assignment of Copyright Agreement to the email, and noted that Formula 1 would 'require this document back in full from all parties and their respective filming crew members prior to any filming and it remains that all filming personnel are subject to F1 approval'.⁶⁵³

⁶⁵¹ CB3273.

⁶⁵² CB3272 to 3273.

⁶⁵³ CB3272.



476 Mr Murray replied to Ms Parker, agreeing to provide the documents as soon as possible and noting that there were already a number of crews in Melbourne due to the original plans for the Friday concert and 'as such we will be seeking accreditation for all of them to capture content in line with your guidance below'.⁶⁵⁴

477 Ms Parker replied, in relevant part:

In view of the limited scope of filming rights now being granted, we're not in a position to agree anything like the original proposed allocation and certainly not any cameras other than as previously mentioned/outlined in the agreement i.e. mobile phone/DSLR devices.

Suggest that you send across a sensible list of personnel and associated filming device information which I suggest would be a very maximum of 10 people.⁶⁵⁵

478 A follow-up email from Ms Parker clarified Formula 1 would not be allowing all personnel to film with DSLRs and would expect at least half to be using mobile phones.⁶⁵⁶

479 There are two emails on 13 March 2020, the day of the cancellation, which are relevant. In an email timestamped 8:58am to Mr Murray and Ms Smith, copying in Ms Parker, Ms Wilkinson wrote:

Hi Chris and Sam,

Hope you and the Apollo and Westbrook teams are all ok.

Today has been unprecedented, so I wanted to message to say we're just waiting at the moment while we wait for the official statement.

Let us know if there is any update from your side re the concert, or if you'd like to continue the discussions for the scenario that it goes ahead. Sure you will have a lot of discussions happening, so not to worry if no updates as yet ...⁶⁵⁷

480 Then, at 9:51am, Ms Parker replied to an email from Mr Murray the day prior where he had sought clarification regarding one of the terms of the Letter of Agreement. In

654 CB3271.

655 CB3271.

656 CB3271.

657 CB3263.



her email, Ms Parker confirmed the relevant clause had been amended and attaches an updated final letter of agreement for signing and return.⁶⁵⁸

481 WTM contends this email chain shows an agreement was close to being finalised at the time the concert was cancelled and, further, that WTM expected to negotiate further rights with Formula 1 to commercialise the content after the fact. In this regard, WTM pointed to evidence from Mr Morrison in cross-examination where he recalled the negotiations with Formula 1 regarding filming rights:

Um, but I - I don't think we came to a deal, I believe - like again, I've not thought for four years, from memory I think I probably said to Sam to push it as hard as you can, either it will be a very high number, it will be a much lower number, I don't know how many tracks we will end up using. Um, I, I'll deal with Ian post the event there when we've got the full team excited about it and ah, very confident as I've done with Ian many times in the past, we've had to deal with him.⁶⁵⁹

482 Mr Morrison clarified that 'Ian' is Ian Holmes, Director of Media Rights at Formula 1.⁶⁶⁰

483 WTM also relied on evidence given from Ms Smith that by the time the concert had been cancelled, WTM had arrangements in place with two content producers, JA Films and Westbrook, to film content.⁶⁶¹ Westbrook were to be responsible for capturing short film content using portable devices while JA Films were to be responsible for 'big camera' content.⁶⁶²

484 AGPC contends the email chain, and particularly the 8:58am email from Ms Wilkinson and 9:51am email from Ms Parker on 13 March 2020, demonstrates that WTM had not obtained filming rights. Further, the 8:58am email was sent at a time where Formula 1 had decided the Grand Prix could not proceed but Ms Wilkinson's email makes clear that Formula 1 would nonetheless require WTM to comply with the terms agreed to film the Robbie Williams concert. AGPC says it can be inferred that Ms Parker and

⁶⁵⁸ CB3270 to 3271.

⁶⁵⁹ T290/4-12 (XXN of Mr Morrison).

⁶⁶⁰ T289/16-19 (XXN of Mr Morrison); CB1629.

⁶⁶¹ Witness Statement of Samantha Smith, dated 30 March 2023, [33]; CB315.

⁶⁶² T386/1-5 (XXN of Ms Smith).



Ms Wilkinson were aware the Grand Prix had been cancelled at the point in times they sent their emails on 13 March 2020.⁶⁶³

485 As AGPC contends, and WTM properly concedes, at the time of the concert was cancelled WTM did not have the broadcasting rights required under the LMCA. However, I am satisfied on the balance of probabilities that there was a commercial opportunity of some (not negligible) value available to WTM in relation to TV and film content which was lost as a result of the cancellation of the concert, and that WTM would have pursued this opportunity had the concert proceeded.

486 As WTM set out in its submissions, '[a]s a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves'⁶⁶⁴ and provided 'an opportunity provides a substantial and not merely speculative prospect of acquiring a benefit, it can be regarded as of value and therefore loss or damage'.⁶⁶⁵

487 Having regard to the evidence, I am satisfied that there were ongoing negotiations between Formula 1 and Apollo regarding filming rights which would have likely continued had the concert not been cancelled. This was an opportunity that provided, using the language Kiefel J (as Her Honour then was) in *Tabet v Gett*, 'a substantial and not merely speculative prospect' of affording WTM a benefit.

488 In particular, in the 8:58am email on 13 March 2020, Ms Wilkinson wrote to Mr Murray and Ms Smith expressing Formula 1's willingness 'to continue discussions for the scenario if it goes ahead', and then at 9:51am Ms Parker sent Mr Murray an amended Letter of Agreement in a form ready to be signed by Apollo. These emails, taken together with the evidence of Ms Smith that WTM had film crews on the ground in Melbourne available to produce TV and film content had the concert proceeded, support a finding that a commercial opportunity was available to WTM which was lost by the cancellation of the concert.

⁶⁶³ *Defendant's Outline of Closing Submissions* (12 June 2024), [333] and [345]-[346].

⁶⁶⁴ *Sellars v Adelaide Petroleum NL* (1994) 120 ALR 16, 36 (Brennan J).

⁶⁶⁵ *Tabet v Gett* (2010) 265 ALR 227, [124] (Kiefel J) (*'Tabet v Gett'*).



489 Alternatively, WTM also submits that had the concert proceeded, it would have been in circumstances where the Grand Prix was not taking place and therefore no licence would have been required from Formula 1 to film the concert.⁶⁶⁶ In this regard, WTM relies on evidence given by Ms Smith in re-examination that once the Grand Prix had been cancelled no approvals were needed from Formula 1 to film the Robbie Williams concert.⁶⁶⁷

490 AGPC contends that Ms Smith's evidence should be rejected as her answer was provided without elaboration as to why permission was no longer required and is inconsistent with the contemporaneous emails between WTM and Formula 1 which, AGPC says, clearly contemplate that WTM would still need to obtain filming rights notwithstanding that the Grand Prix had been cancelled.⁶⁶⁸ Further, AGPC contends that the LMCA remained in force regardless of whether the Grand Prix was cancelled and therefore WTM remained bound by the obligations in cl 8.1(b).

491 In this regard, I accept the submissions of AGPC. Ms Smith's bald assertion that no approvals were required from Formula 1 once the Grand Prix had been cancelled is contradicted by the tenor of Ms Wilkinson's and Ms Parker's emails on the morning of 13 March 2020, both which clearly demonstrate that Formula 1 intended to continue to enforce the rights under the LMCA at a time when Formula 1 had been aware by no later than 2:34am⁶⁶⁹ on 13 March 2020 that FIA had cancelled (or was considering cancelling) the Grand Prix. I accept, as submitted by AGPC, that an inference can be made that Ms Parker and Ms Wilkinson, as senior staff members of Formula 1, were aware of the Grand Prix's cancellation when they sent their respective emails.

492 In the absence of any other evidence in support of WTM's contention, I am unwilling to make a finding that, had the concert proceeded in circumstances where the Grand Prix was cancelled, WTM would not have been required to obtain the filming rights

⁶⁶⁶ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [317](3).

⁶⁶⁷ T416/30-31 and T417/1 (RE-XN of Ms Smith). WTM also relies on the cancellation notice provided by Formula to AGPC; CB3554.

⁶⁶⁸ *Defendant's Outline of Closing Submissions* (12 June 2024), [344].

⁶⁶⁹ See CB356 [95] and CB5472.



for the concert from Formula 1 under the LMCA. No submissions were led by WTM that a proper construction of the LMCA required such a finding.

493 With respect to the second limb of the loss of opportunity claim, WTM submits that the production of TV and film content had commercial value and that the evidence adduced supports the quantum of that loss reached by Ms Malcolm.⁶⁷⁰

494 AGPC contends that even if the Court is satisfied WTM did suffer some loss, it cannot award any damages because WTM failed to adduce any evidence to provide a rational basis for a proper estimate of that loss.⁶⁷¹ As discussed above, as a matter of principle, AGPC contends that if the evidence fails to provide any rational foundation for a proper estimate of damages then the Court should simply decline to make one.⁶⁷² The evidence as to quantum is as follows.

495 In around late October 2019, WTM/Apollo engaged Precious Media to provide a valuation of potential revenue which could be derived from TV and film content produced as part of the World Tour Melbourne.⁶⁷³ In doing so, Precious Media produced a Content Output Assessment (the 'Precious Media Valuation document')⁶⁷⁴ and Content Cashflow Assessment.⁶⁷⁵

496 The Precious Media Valuation document contained various forms of content and attributed, among other things, a potential audience, a market, 'potential revenue' and 'potential media value' to each category of content. Relevantly, that document defined 'potential revenue' as 'potential licence fee revenue in \$USD that could be generated by sale of the content to media worldwide' and defined 'potential media value' as 'the potential on-air media value that a brand could earn from title partnership exposure through the content'.⁶⁷⁶

⁶⁷⁰ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [309] and [316].

⁶⁷¹ *Defendant's Outline of Closing Submissions* (12 June 2024), [349].

⁶⁷² *Tsiloglou*, 245; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23, 37 (Gibbs J); 38 (Aickin J); *McCrohon v Harith* [2010] NSWCA 67, [120]-[123] (McColl JA – Campbell and Handley JA agreeing).

⁶⁷³ Witness Statement of Samantha Smith dated 30 March 2023, [18]-[22]; CB312-313.

⁶⁷⁴ CB947.

⁶⁷⁵ CB948.

⁶⁷⁶ CB947.



497 In a covering email sent to Apollo on 24 October 2019, attaching the Precious Media Valuation document and Content Cashflow Assessment, Mr Will Saunders, Account Director at Precious Media, provided a summary of the methodology and key assumptions in those documents. Mr Saunders' email stated, in relevant part:

- These figures are in the main based on past experience selling and valuing similar concepts - this has not been worked through yet on a granular market-by-market/ media partner specific basis.
- Therefore, these numbers are guideline benchmarks, rather than definitive projections.
- We have assumed a conservative midpoint for all figures, but can stretch the figures either way to meet specific target benchmarks as needed.
- The license fee figure of \$350k per F1 Guestlist show assumes that the content is a reasonable success and that the IP is launching from a base line of zero. For reference, we recently sold a Sgt. Pepper's 50th anniversary documentary on behalf of the world's most valuable music/ entertainment IP, The Beatles, for \$600k globally.
- We have benchmarked a media value ROI of 8-10:1, which is consistent with how brands are typically integrated on a title partnership level into these kinds of entertainment platforms on a global basis.

That being said, we are confident that the assumptions and totals would stand up to scrutiny from investors and media agencies, and we would be happy to join you in those conversations.⁶⁷⁷

498 Separately, Ms Artmonsky prepared a document titled 'Content Revenue: World Tour Melbourne' (the 'Content Revenue document')⁶⁷⁸ with a secondary heading stating it was a reconciliation of the Precious Media revenue estimate.⁶⁷⁹ This document attributed revenue to long-form content, short-form content, digital content and other content. In cross-examination, Ms Artmonsky accepted that she prepared the Content Revenue document in 2023 for the purposes of these proceedings.⁶⁸⁰

499 In her report, Ms Malcolm attributed \$2,732,000 in loss to WTM for TV and film content revenue based the Content Revenue document. This figure was reached by calculating \$5,730,000 x 50% (as the concert only ran for one day) less \$135,000 for

⁶⁷⁷ CB958.

⁶⁷⁸ CB4050.

⁶⁷⁹ T208/24-31 and T209/1-16 (XXN of Ms Artmonsky).

⁶⁸⁰ T209/17-20 (XXN of Ms Artmonsky).



unavailable talent. Ms Malcolm had been instructed the Concert Revenue document contained 'the basis for the claimed amount of revenue for TV and Film content'.⁶⁸¹

500 Ms Malcolm also stated that, despite her instructions, she did not rely on the evidence of Ms Smith at paragraph [23] of her Witness Statement, which set out revenue projections for TV and film content, as that evidence dealt with revenue on a yearly basis and did not apportion revenue across the two concerts.⁶⁸² In examination, Ms Malcolm clarified that she had considered Ms Smith's witness statement, and attached annexures, but considered it was prudent to adopt the amount in the Content Revenue document as it contained a lower amount.⁶⁸³

501 In relevant part, Ms Smith's evidence was that on 2 March 2020 she emailed Ms Artmonsky and Mr Morrison a business plan which contained revenue projections for eight categories of TV and film content for 2020⁶⁸⁴ totalling \$USD3,830,500, these being:⁶⁸⁵

Category	Anticipated revenue
Superstar DJ	\$60,000
Live performance - daily (long)	\$600,000
Bespoke Clips	\$72,000
Live Performance - tracks (short)	\$216,000
Short-form Viral 'Carpool Karaoke'	\$900,000
Daily Music and Entertainment	\$182,500
Imax products	\$1,800,000
Total	\$3,830,500

502 Ms Smith stated the anticipated revenue figures were based on the estimates provided by Precious Media but that the figures in the business plan were ultimately more conservative. Further, Ms Smith explained that the Short-form Viral 'Carpool Karaoke' and Imax products were to be produced after the World Tour Melbourne and did not relate to the event.⁶⁸⁶

⁶⁸¹ Expert Report of Liesl Malcolm dated 13 April 2023, [6.3.2] and Appendix F; CB648 and 702.

⁶⁸² Expert Report of Liesl Malcolm dated 13 April 2023, [6.3.2]; CB648.

⁶⁸³ T516/19-31 and T517/1-5 (XN of Ms Malcolm and Ms Wright).

⁶⁸⁴ WTM accepts this figure was not limited to the Robbie Williams concert: *Plaintiff's Outline of Closing Submissions* (5 July 2024), [314].

⁶⁸⁵ Witness Statement of Samantha Smith dated 30 March 2023, [23]; CB313.

⁶⁸⁶ Witness Statement of Samantha Smith dated 30 March 2023, [24]-[25]; CB313-314; T384/4-27 (XN of Ms Smith).



- 503 In her report, Ms Wright observed that the Content Revenue document used figures taken from the Precious Media Valuation document, albeit with two errors in calculation.⁶⁸⁷ The parties accept the Content Revenue document appears to have been drawn from the Precious Media Valuation document.⁶⁸⁸
- 504 With respect to Ms Malcolm's calculations on TV and film content, Ms Wright stated that the Content Revenue document did not contain the figure of \$2,732,000 adopted by Ms Malcolm, or any of the assumptions which formed the basis of her calculation. Ms Wright considered that she did not have sufficient information to assess the reliability or reasonableness of the amounts adopted by Ms Malcolm, particularly in regards to whether the projections relied on from October 2019 (when the Content Revenue document was produced) were reflective of forecasts at March 2020.⁶⁸⁹
- 505 In contending that Ms Malcolm's calculation of loss is established by the evidence, WTM relies on the fact that AGPC did not lead evidence to contradict the projected revenue WTM expected to obtain. Rather, WTM says, AGPC's cross-examination in this respect was directed only towards whether WTM had a licence from Formula 1 to film the concert.⁶⁹⁰ WTM accepts that it is appropriate for the Court to apply a *Sellars* discount to any loss awarded under this head of loss and, on the basis that the estimates adopted by WTM were conservative, benchmark figures, contends 15% as an appropriate discount, which would bring the total loss to \$2,322,000 (rounded down).⁶⁹¹
- 506 In submitting that WTM did not adduce any rational evidence for their claimed loss, AGPC particularly contends that the Content Revenue document prepared by Ms Artmonsky, and relied on by Ms Malcolm, has no evidentiary value. AGPC says WTM's claim is derived from the Content Revenue document, which in turn was

⁶⁸⁷ Expert Report of Dawna Wright dated 27 June 2023, [6.7.6] – [6.7.8] and [6.7.10]; CB744 to 745. These errors include a typo in the Content Revenue document which transposed 1.178 million rather than 1.7184 million, and a currency conversion error, whereby USD\$4.071 was multiplied by 0.71 rather than divided by 0.71.

⁶⁸⁸ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [312]; *Defendant's Outline of Closing Submissions* (12 June 2024), [351].

⁶⁸⁹ Expert Report of Dawna Wright dated 27 June 2023, [6.7.5] and [6.7.11]; CB744 and 745.

⁶⁹⁰ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [316].

⁶⁹¹ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [331].



derived from the Precious Media Valuation document, and that Mr Saunders' email shows those figures were intended as benchmarks only and had not been worked through on a market-by-market partner specific basis. In such circumstances, AGPC contends the figures cannot form a reliable basis for estimating loss.

507 Further, AGPC points to the lack of evidence as to what was captured by the categories of content in the Precious Media Valuation document, and adopted elsewhere, and a lack of evidence of the source of revenue that would flow from this content or how it would benefit WTM. AGPC contends that it was within the power of WTM to adduce such evidence and the failure to do so means the Court should decline to award damages under this head of loss.⁶⁹²

508 In the alternative, AGPC submits that if the Court finds there is a foundation from which to assess damages, WTM's claim is overstated. This is because it is premised on all 18 categories of content identified in the Precious Media Valuation document being produced and the potential media value attributed to that content. However, Ms Smith's evidence is that only five of those categories would have been produced in respect to the World Tour Melbourne event. Further, AGPC contends the correct value to be attributed to those categories of content is the potential revenue value in the Precious Media Valuation document, and not the potential media value, on the basis the potential revenue value reflects the licence fee that WTM would generate through the content whereas the potential media value reflects the revenue that could be derived by sponsors from the content.⁶⁹³

509 AGPC says the true revenue lost by WTM is therefore \$241,197, being the potential revenue of Superstar DJ, Live Performance – Daily, Bespoke Clips, Live Performance Tracks (Short), and Daily Music Entertainment categories of content, multiplied by 50% to reflect the one concert, divided⁶⁹⁴ by 0.71 to convert USD to AUD. I do not

⁶⁹² *Defendant's Outline of Closing Submissions* (12 June 2024), [353]-[354].

⁶⁹³ *Defendant's Outline of Closing Submissions* (12 June 2024), [355]-[358].

⁶⁹⁴ The submissions incorrectly refer to multiplying by 0.71; see: Expert Report of Dawna Wright dated 27 June 2023, [6.7.8]; CB745.



understand this to be a submission directed as to the appropriate *Sellars* discount but rather the base loss from which a *Sellars* discount could be applied.

510 On balance, I do not accept that the evidence adduced by WTM in relation to TV and film content has ‘no rational basis’ such that I should decline to award any damages under this head of loss.⁶⁹⁵ However, the nature of the evidence is also such that I consider WTM’s claim for \$2,732,000, based on Ms Malcolm’s calculations, cannot be sustained, nor can the contention that a *Sellars* discount of 15% is appropriate.

511 It is accepted by the parties that the Content Revenue document prepared by Ms Artmonsky, and relied on by Ms Malcolm, derived its figures from the Precious Media Valuation document. More generally, so did Ms Smith’s projected revenue estimates in her witness statement.⁶⁹⁶

512 Mr Saunders explained the methodology behind that Precious Media Valuation document as ‘in the main based on past experience and selling and valuing similar concerts – this has not been worked through yet on a granular market-by-market / media partner specific basis’ and ‘[t]herefore, these numbers are guideline benchmarks, rather than definitive projections’ and further that ‘[w]e have assumed a conservative midpoint for all figures’.⁶⁹⁷

513 The parties rely on these statements to different effect. AGPC contends these statements show that the Precious Media Valuation document, and thus the estimates of loss derived from it, are just ‘numbers on a page’⁶⁹⁸ and provide no basis for quantifying loss. In contrast, WTM relies on these statements to justify a claim that a *Sellars* discount of 15% is appropriate on the basis that the estimates relied on were conservative, benchmarked figures.⁶⁹⁹

⁶⁹⁵ C.f. *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23, 37 (Gibbs J); 38 (Aickin J); *McCrohon v Harith* [2010] NSWCA 67, [120]-[123] (McColl JA).

⁶⁹⁶ See Witness Statement of Samantha Smith dated 30 March 2023, [24]-[25]; CB313-314.

⁶⁹⁷ CB958.

⁶⁹⁸ T685/10-19.

⁶⁹⁹ *Plaintiff’s Outline of Closing Submissions* (5 July 2024), [331].



514 Although the figures in Precious Media Valuation document were benchmarks and not precise projections of revenue for TV and film content, they were produced by Precious Media who WTM had presumably engaged on the basis of their experience of the industry. As such, I am satisfied these figures have evidentiary value. Where the cancellation of the concert means WTM are unable to precisely quantify their loss in terms of TV and film revenue and, where WTM did adduce some evidence as to loss, I do not consider that estimating loss in such circumstances, and as on the evidence available,⁷⁰⁰ would be impermissible guesswork on my part.⁷⁰¹

515 However, I agree with AGPC's submission that Ms Smith's evidence is that only five categories of content in the Precious Media Valuation document were to be produced in relation to World Tour Melbourne 2020⁷⁰² and, as such, WTM's claim is overstated to the extent it relies on calculations of loss that include the full package of proposed content options.

516 In this regard, the breakdown of content in the Content Revenue document does not directly correspond with each of categories of content in the Precious Media Valuation document and, as such, the Content Revenue document does not provide a useful basis from which to calculate loss.

517 Instead, I find that WTM's loss of opportunity (pre-Sellars discount) should be calculated on the basis that WTM lost the opportunity to realise revenue from the production of the following categories of content: Superstar DJ, Live performance - daily, Bespoke Clips, Live performance - tracks, and Daily Music and Entertainment.

518 As set out above, AGPC further contends that the value attributed to each form of content should be the 'potential revenue' value in the Precious Media Valuation document, as this reflects the revenue WTM would have derived in licence fees, and not the 'potential media value', which reflects the value that a brand could expect to

⁷⁰⁰ For example, contrary to the submissions of AGPC at [353], the Precious Media Valuation document provides a description of each category of content in that document: CB947.

⁷⁰¹ Cf *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, [84] (Campbell JA).

⁷⁰² See Witness Statement of Samantha Smith dated 30 March 2023 dated 30 March 2023, [23] and [25]; CB313-314.



derive from partnership exposure through the content. For the reasons submitted by AGPC, I accept this is correct.

519 On that basis, and accepting it is necessary to adjust the figures in the Precious Media Valuation document to reflect the concert was one day, not two, and to convert from USD to AUD, I calculate WTM's loss as follows:

Category	Anticipated revenue (USD, both nights)	Anticipated revenue (AUD, one night)
Superstar DJ	\$30,000	\$21,127
Live performance - daily (long)	\$100,000	\$70,423
Bespoke Clips	\$12,000	\$8,451
Live Performance - tracks (short)	\$18,000	\$12,676
Daily Music and Entertainment	\$182,500	\$128,521
Total	\$342,000	\$241,198

520 Turning to the *Sellars* discount, WTM's contention that a discount of 15% is appropriate cannot be sustained in circumstances where the ongoing negotiations between Formula 1 and Apollo had resulted in an offer from Formula 1 for a maximum of 10 people on mobile phones or DSLR cameras filming for social media purposes only, with edits of no more than two minutes in duration, to be posted on a delay.⁷⁰³

521 From the descriptions of the relevant five categories of content in the Precious Media Valuation document, it is not apparent that all, or even most, of those forms of content would have fit within the parameters set by Formula 1 as at 13 March 2020. I accept that Mr Morrison's evidence was that he anticipated, based on prior experience, being able to negotiate further rights with Formula 1 'post the event'⁷⁰⁴ but there is also a high degree of uncertainty in this proposition.

522 Further, while not determinative, I accept the force of AGPC's contentions that the fact Apollo/ WTM had balked at paying the 'punishment charge' of \$150,000 suggests that

⁷⁰³ CB3271 to 3274.

⁷⁰⁴ T290/4-12 (XXN of Mr Morrison).



WTM did not anticipate generating TV and film content revenue in the amounts claimed, otherwise they would have simply paid the fee asked by Formula 1.⁷⁰⁵

523 Taking these factors in their totality, I consider the degree of possibility that the revenue from the TV and film content would not have been realised means that a *Sellars* discount of 75% is appropriate, bringing the total loss of revenue awarded under this head of loss to \$60,300 (rounded up).

Event Licence Fee and Production Fee

524 Under the but-for scenario, the Event Licence Fee (consisting of the base licence fee and the per-ticket sold licence fee) and the Production Fee form the correlative revenue of the equivalent costs in the but-for Net Profit analysis. As such, the parties' submissions with respect to the Event Licence Fee and the Production Fee are the same for both heads of loss. My findings with respect to the value of the Event Licence Fee in the Net Profit analysis, as well as the Production Fee, equally apply to this head of loss.

525 Accordingly, notwithstanding WTM's submissions that the loss of revenue for the Event Licence Fee was \$203,000 in the but-for scenario, I find it is \$173,000. The Production Fee is \$188,000. I do not consider it necessary to apply any further *Sellars* discount to these figures.

WTM Sponsorship

526 Under cl 15.1.4 of the CPA, 'WTM sponsorship' is defined as the remaining 25% of local sponsorship revenue which is not counted towards revenue in the Net Profit calculation.

527 WTM initially claimed approximately \$19,000 in WTM Sponsorship revenue, this being the remaining 25% of the \$75,000 local sponsorship that Ms Malcolm was instructed to assume would have been obtained.⁷⁰⁶ WTM no longer presses this claim and, accordingly, it has been removed from the table above.

⁷⁰⁵ *Defendant's Outline of Closing Submissions* (12 June 2024), [355].

⁷⁰⁶ Expert Report of Liesl Malcolm dated 13 April 2023, [6.3.5]; CB648-649.



Merchandise

- 528 WTM claims a loss of \$128,000 (rounded up and pre-*Sellars* discount⁷⁰⁷) in lost opportunity to derive merchandise revenue as a result of the cancellation of the concert and \$56,000 in merchandise related expenses.
- 529 The expenses claimed reflect the expenses claimed in the actual scenario and I accept these expenses were also incurred for the purposes of the but-for scenario.
- 530 WTM contends that it entered into an agreement with Omniverse Holdings to sell merchandise at the Robbie Williams concert, with profits to be split 50/50 between WTM and Omniverse Holdings.⁷⁰⁸ Further, merchandise had been designed, ordered and freighted by the time the concert was cancelled.⁷⁰⁹ WTM submits it therefore would have derived revenue from merchandise sales had the concert not been cancelled.⁷¹⁰
- 531 WTM explains that Ms Malcolm's calculations were based on the 50/50 profit split and a document called 'World Tour Financial Model: World Tour Product Pro-Forma - Melbourne' (the 'Financial Model') prepared by Omniverse Holdings that contemplated a \$10 spend per head on merchandise.⁷¹¹ Assuming the concert was sold out and the \$10 spend per head, Ms Malcolm calculated WTM lost \$141,895 in merchandise revenue.⁷¹² WTM concedes that figure should be reduced to reflect the GST that would have been payable,⁷¹³ reducing the claim to \$128,000.
- 532 WTM further accepts that while it is appropriate to apply a *Sellars* discount to this figure, a discount of only 10% is appropriate in light of the 'strong' evidence as to the merchandise arrangements in place, including the types and quantity of merchandise

⁷⁰⁷ WTM claims \$74,000 after the application of a *Sellars* discount: *Plaintiff's Outline of Closing Submissions* (5 July 2024), [332].

⁷⁰⁸ Witness Statement of Samantha Smith dated 30 March 2023, [40]-[44]; CB316-317; Product and Marketing Proposal dated 1 February 2020, cl 10; CB1544.

⁷⁰⁹ By around 9 March 2020, the merchandise including t-shirts, hats, jackets, bags and hoodies, had been freighted to Melbourne and stored in warehouses: Witness Statement of Samantha Smith dated 30 March 2023, [51]; CB319.

⁷¹⁰ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [318].

⁷¹¹ CB1520.

⁷¹² Expert Report of Liesl Malcolm dated 13 April 2023, [6.3.4]; CB648.

⁷¹³ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [319]; CB1544.



items that had been shipped to Australia. WTM also separately accepts that the spend per head should be multiplied against the number of ticket sales, not the maximum capacity of the stadium.⁷¹⁴

533 In contrast, AGPC submits that no amount should be awarded as loss of revenue from merchandise sales⁷¹⁵ on the basis that there is no reliable evidence with respect to what is a reasonable spend per head in merchandise sales. AGPC make this submission arguing that the \$10 spend per head figure included in the Financial Model was qualified by a note that that figure '[a]ssumes rights to artist name/likeness on product, and limited artist product',⁷¹⁶ and that, pursuant to cl 16 of their contract, WTM was prohibited from using Robbie Williams' likeness on merchandise in the absence of a separate agreement,⁷¹⁷ and, finally, that was no evidence adduced of any such agreement.

534 As with many of the other heads of loss, AGPC contends where a plaintiff's loss is not capable of precise calculation, but the plaintiff could have, and did not, lead evidence to permit a considered evaluation of the loss (even if such evaluation would require estimation), the Court is not permitted to simply guess at the damages to be awarded.⁷¹⁸ And that, where damages are uncertain for lack of evidence, difficulties of assessment are in general resolved against the party who could or should have provided the evidence.⁷¹⁹

535 Further, AGPC submits that Ms Malcolm's calculation, which assumed full capacity at the stadium, is incorrect and contends the revenue should be calculated on the basis of a crowd no more than about 12,500.⁷²⁰

536 Consistently with my findings with regards to TV and film content revenue and food and beverage revenue, I am unwilling to accept AGPC's submission that WTM failed

⁷¹⁴ *Plaintiff's Outline of Closing Submissions* (5 July 2024), [332].

⁷¹⁵ *Defendant's Outline of Closing Submissions* (12 June 2024), [368].

⁷¹⁶ CB1520.

⁷¹⁷ CB1173.

⁷¹⁸ *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, [84] (Campbell JA); *Winning Appliances Pty Ltd v Dean Appliances Pty Ltd* (1995) 32 IPR 65, 68 (Moore J).

⁷¹⁹ *Oran Park Motor Sport Pty Ltd v Fleissig* [2002] NSWCA 371, [54] and [66] (Hodgson JA).

⁷²⁰ *Defendant's Outline of Closing Submissions* (12 June 2024), [368].



to adduce any reliable evidence with respect to this head of loss. As with those heads of loss, here WTM adduced evidence which provided the supplier's projected spend per head. While the projection has limitations, it is not the case that I have been provided with no basis from which to undertake a reasoning process to make an estimation of loss. As Hayne J observed in *Placer (Granny Smith)*, my role is to do the best I can on the evidence before me to make a judicial estimation of loss.

537 I do not consider, as AGPC invites me to find, that this requires me to find that the absence of evidence of a separate agreement by Robbie Williams for the use of his likeness on the merchandise means I cannot make an estimation.

538 Additionally, in any case, my understanding of the evidence⁷²¹ is that at least some of the merchandise that would have been sold at the concert would have branded as World Tour specific merchandise and not included Robbie Williams' likeness and thus would not have required an agreement from Robbie Williams.

539 In the circumstances, I am satisfied on the balance of probabilities that there was a commercially valuable opportunity available to WTM to sell merchandise which was lost through the cancellation of the concert. I am also satisfied that it is appropriate to calculate the loss on the basis of a \$10 spend per head.

540 I also agree that the spend per head should be multiplied against the ticket sales and not the maximum crowd capacity. For the reasons submitted by WTM, I also accept that a *Sellars* discount of 10% is appropriate, and that the total should be adjusted to remove GST.

541 The base calculation is therefore \$10 spend per head x 13,821 tickets less GST x 50% commission totalling \$62,823 (rounded). Reduced by the 10% *Sellars* discount, the total merchandise revenue loss is \$56,540 (rounded).

⁷²¹ Witness Statement of Samantha Smith dated 30 March 2023, [39](b); CB316; CB1521.



Additional expenses

542 In her report, Ms Malcolm attributed a further \$323,000 in ‘additional expenses’ that would have been incurred by WTM had the concert had proceeded. She calculated this amount based on the budget available to her and her assessment of the appropriate apportionment of these additional expenses between the Friday and Saturday concerts. Consistent with her approach to the expenses in fact incurred, she apportioned approximately 58% of the expenses to the Robbie Williams concert.⁷²²

543 By adopting Ms Malcolm’s overall figure of \$4,248,000 in costs sunk by way of the concert being cancelled, WTM presses the claim for \$323,000 in additional expenses. However, no submissions were made directly on this expense.⁷²³ AGPC’s closing submissions note that WTM makes the claim for additional expenses but otherwise does not make any submissions.⁷²⁴ Ms Wright found, based on the information available to her, she was unable to form an opinion on the accuracy or reasonableness of Ms Malcolm’s treatment of the additional expenses.⁷²⁵ In the absence of any dispute between the parties, I accept that WTM would have incurred a further \$323,000 in additional expenses had the concert proceeded.

Calculation of profit/loss under Other Revenue and Expenses

544 WTM’s loss with respect to other revenue and expenses is therefore \$1,874,000. The breakdown of this calculation is follows (rounded and including the relevant *Sellars* discounts):

Other Revenue / Expenses			
\$’000	But-for scenario	Actual scenario	Difference
Revenue			
Global sponsorship	\$2,020	-	\$2,020
TV and Film content	\$60	-	\$60
Event Licence Fee	\$173	\$113	\$60
Production Fee	\$188	\$188	-
Merchandise	\$57	-	\$57
WTM Sponsorship Fee	(not pressed)	(not pressed)	-

⁷²² Expert Report of Liesl Malcolm dated 13 April 2023, [7.3.2]; CB650.

⁷²³ *Plaintiff’s Outline of Closing Submissions* (5 July 2024), [258].

⁷²⁴ *Defendant’s Outline of Closing Submissions* (12 June 2024), [284].

⁷²⁵ Expert report of Dawna Wright dated 27 June 2023, Annexure F, [1.5.3]; CB810.



Total Revenue:	\$2,498	\$300	\$2,197
Expenses			
TV and Film content	(\$563)	(\$563)	-
Merchandise	(\$56)	(\$56)	-
Global Sponsorship	(\$11)	(\$11)	-
Additional Expenditure	(\$323)	-	(\$323)
Total Expenses:	(\$952)	(\$629)	(\$323)

Global *Sellars* discount

545 WTM says that there is little or no real risk that the concert would not have proceeded had the concert not been cancelled. However, out of an abundance of caution, WTM submits a small global *Sellars* discount could be applied to the total profit in the but-for scenario to reflect the risk the concert would not have proceeded in any event and other generalised risks. WTM contends a discount of no more than 5% would be appropriate.⁷²⁶ AGPC did not make any submissions directed towards any global *Sellars* discount.

546 In light of AGPC's lack of submissions on this point, and my findings in relation to *Sellars* discount in relation to the individual heads of loss, I do not consider it necessary to apply any global discount.

Damages

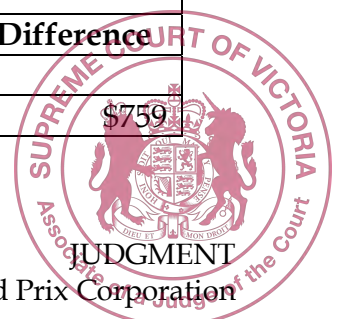
547 Based on my findings above, I award damages to WTM in the amount of \$2,840,000.

548 Following the methodology agreed by the experts, this is the difference in the overall loss that WTM suffered through the cancellation of the concert (\$4,248,000) and the lesser amount of loss that I found WTM would had suffered had the concert proceeded (\$1,408,000).

549 The breakdown each head of loss is as follows (final figures rounded up):

Head of loss			
*\$'000s	But-for	Actual	Difference
50% Net Profit	(\$2,623)	(\$3,381)	\$759

⁷²⁶ Plaintiff's Outline of Closing Submissions (5 July 2024), [336].



90% VIP Hospitality	(\$331)	(\$537)	\$206
Other Revenue	\$2,498	\$300	\$2,197
Other Expenses	(\$952)	(\$629)	(\$323)
Total	(\$1,408)	(\$4,248)	\$2,840

550 In this regard, I note that due to my findings in relation to each head of loss, and in particular global sponsorship and TV and film revenue, I found the Robbie Williams concert would have run at a loss even in the but-for scenario. The only head of loss which WTM would have made a profit under the but-for scenario was ‘Other Revenue’ which comprised the global sponsorship revenue.

551 WTM seeks to be heard separately on orders as to interest and costs.

Change in the Plaintiff’s Case and Conduct of the Proceeding

552 AGPC seeks to rely upon 95 communications (which are referred to in Annexure A of its written closing submissions), 72 of which were not addressed in the Plaintiff’s witness statements.⁷²⁷ It contends that these communications form a contemporaneous part of the documentary record that is critical to an assessment of WTM’s knowledge and decision making leading up to the cancellation of the concert. It says that the documents ‘show clearly the inner workings of an organisation aware of and dealing with the inevitable cancellation of the concert because of the COVID-19 pandemic’.⁷²⁸ Finally, AGPC takes issue with the Plaintiff’s discovery of these documents, alleging amongst other things, that it was unduly slow and non-compliant with Court orders and overarching obligations in the providing discovery.⁷²⁹

553 These communications, in my view, are not helpful; either generally or with respect to AGPC’s case. Aside from providing brief summaries as to their contents,⁷³⁰ AGPC has not advanced any submissions as to the relevance of the documents cited in this table, or provided any indication in the table as to their application or relevance to the case of either party. Nor has WTM raised any objection in support of the non-production or reference to these documents in the course of the trial; so, as possibly, to provide some basis for the preparation of such a table. AGPC’s reliance

⁷²⁷ Defendant’s Outline of Closing Submissions (12 June 2024), [225], Annexure A.

⁷²⁸ Defendant’s Outline of Closing Submissions (12 June 2024), [226].

⁷²⁹ Defendant’s Outline of Closing Submissions (12 June 2024), [228]–[229].

⁷³⁰ Defendant’s Outline of Closing Submissions (12 June 2024) [224]–[231].



on these documents seems to be directed to and to cover the same matters with respect to its submissions as to statements such as Mr Beck's that 'it's not happening'; being a reference to the concert. As indicated previously, in my view, these and similar materials and such evidence indicates nothing more than great uncertainty on the part of WTM and TEG Dainty as to whether the concert would be permitted to proceed.⁷³¹

554 In this context, it is important to note the overarching obligation applicable to litigants under the *Civil Procedure Act 2010* to use reasonable endeavours to narrow the issues in dispute,⁷³² and to ensure that legal and other costs incurred in connection with the civil proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute.⁷³³ The following observations of the Court of Appeal in *Yara Australia Pty Ltd v Oswal* about the scope of s 24 of the *Civil Procedure Act* are helpful:⁷³⁴

Overly voluminous application material strains the administrative resources of the Court and the time of judges themselves. Where a large volume of material is provided to a court that is unnecessary and excessive, there will be a prima facie case that the overriding obligation has been breached.

It is difficult to see how the production and apparent reliance on the contents of Annexure A sit well with the requirements of the *Civil Procedure Act*.

555 Moreover, AGPC takes issue with the Plaintiff's conduct of the proceeding by pointing to changes in the way the case was pleaded. It says that the Plaintiff has sought to embrace or deny the written record as necessary to suit its changing case.⁷³⁵ First, AGPC points to the email correspondence from Ms Artmonsky to Mr Westacott on 26 April 2020, the critical aspect of which it submits is the following statement: 'In fact, we were told by AGPC on a call at 1:15pm on Friday 13th March that our event could go ahead as the government position was only advisory but this was subsequently reversed in the call which you joined shortly thereafter'.⁷³⁶ It also points to a letter sent by WTM's solicitors to AGPC on 17 August 2020, alleging that AGPC represented

⁷³¹ See above [160].

⁷³² *Civil Procedure Act 2010*, s 23.

⁷³³ *Civil Procedure Act 2010*, s 24.

⁷³⁴ 41 VR 302 [40] (Redlich and Priest JJA and Macaulay AJA).

⁷³⁵ *Defendant's Outline of Closing Submissions* (12 June 2024) [230].

⁷³⁶ *Defendant's Outline of Closing Submissions* (12 June 2024) [230](a), citing CB4014. See above [110].



without reasonable basis that the Grand Prix and the 2020 World Tour Melbourne concert would proceed, and thereby engaged in misleading and deceptive conduct.⁷³⁷ It says that WTM's prior position, expressed in the two instances of correspondence, is inconsistent with its current position, expressed in the Amended Statement of Claim dated 28 October 2022. In the Amended Statement of Claim, WTM contends that during a call at around 1:30pm, AGPC misled WTM by representing that both the Grand Prix and the 2020 World Tour Melbourne had been cancelled because the CHO had determined that both events could not proceed and that, but for this conduct, WTM would have proceeded with the concert.⁷³⁸ AGPC argues that WTM's witnesses have changed their position for the purpose of establishing the necessary causative element of WTM's claim by seeking to evidence an intention to proceed with the concert.⁷³⁹

556 I do not accept this submission. As I have indicated previously,⁷⁴⁰ the email communication between Ms Artmonsky and Mr Westacott on 26 April 2020 merely evidences the concern of WTM, and also TEG Dainty, at the lack of clear and definitive response by AGPC to the question whether or not the concert could proceed. As to the letter sent through WTM's solicitors, the document was drafted and sent before the commencement of this proceeding, and was likely informed by a less comprehensive understanding of the events on 13 March 2020. As is often the case in the preliminary stages of commercial litigation, WTM's solicitors were likely to have been working with relatively sparse information concerning the ambiguous events in the 1:15pm call when drafting the 17 August 2020 letter, less than six months after the cancellation. With the passage of time, and evolution of the dispute, WTM's legal team is likely to have reached a better understanding of the 1:15pm call following more extensive discovery and further engagement with WTM's witnesses. This may explain the change in position expressed in the Amended Statement of Claim filed by WTM more than two years later.

⁷³⁷ *Defendant's Outline of Closing Submissions* (12 June 2024) [230], citing CB5650 [26](g).

⁷³⁸ *Defendant's Outline of Closing Submissions* (12 June 2024) [231]; Amended Statement of Claim [11](F)(B).

⁷³⁹ *Defendant's Outline of Closing Submissions* (12 June 2024) [231].

⁷⁴⁰ See above [110].



Disposition

557 The parties agreed that the issues arising to be determined in this proceeding are those listed in the consolidated List of Issues under paragraph 16 of the orders made by Connock J on 17 July 2023. This list is now set out together with findings with respect to each issue on the basis of the preceding reasons.

Question	Court Findings
During the oral conversation that took place between AGPC and WTM on 13 March 2020 from around 2:08pm, did AGPC represent, as alleged by WTM, that both the 2020 Grand Prix and the 2020 World Tour Melbourne had been cancelled because the Chief Health Officer of Victoria had determined that both events could not proceed (First Representation)? (ASOC, [11A]; Defence to Amended Statement of Claim filed 16 November 2022 (DASOC), [11A])	Yes: see [150]-[151].
If the answer to question 1 is 'yes', was the First Representation misleading or deceptive or likely to mislead or deceive? (ASOC, [11B] and [11H]; DASOC, [11B] and [11H])	Yes: see [114]-[115] and [152]-[155].
If the answer to each of questions 1 and 2 is 'yes', did WTM rely on the First Representation in the ways alleged? (ASOC [11C] and/or [11G], DASOC, [11C] and [11G])	Yes: see [109] and [164]-[165].
Was the representation made in the email from AGPC to WTM sent at 4:25pm on 13 March 2020 (Second Representation) misleading or deceptive or likely to mislead or deceive? (ASOC, [11D]-[11E] and [11H]; DASOC, [11D]-[11E] and [11H])	Yes: see [166]-[169].
If the answer to question 4 is 'yes', did WTM rely on the Second Representation in the ways alleged? (ASOC [11G], DASOC [11G])	Yes: see [126]-[127] and [172]-[175].



<p>Did cl 2.1 of the LMCA oblige AGPC to allow WTM to stage the 2020 World Tour Melbourne event? If so, did AGPC breach that obligation by reason of the matters alleged in particulars (B) to (I) of paragraph 11 of the ASOC? (ASOC, [6(j)] and [11(e)]; DASOC, [6(b)(ii)] and [11(e)])?</p>	<p>Yes, cl 2.1 of the LMCA conferred a right on WTM to stage the event and a corresponding obligation on AGPC to allow it to do so: see [179]-[185]. Yes, by reason of the matters alleged in particulars (B) to (I) of paragraph 11 of the ASOC, AGPC breached that obligation: see [190].</p>
<p>Did AGPC breach an implied duty to do all things reasonably necessary to enable WTM to enjoy the full benefit of the LMCA and to not hinder or prevent the fulfilment of the purpose of the express promises made in the LMCA by reason of the matters alleged in particulars (B) to (I) of paragraph 11 of the ASOC? (ASOC, [11(b)]; DASOC, [11(b)])?</p>	<p>Yes: see [190].</p>
<p>Did cl 5.1(a) of the LMCA oblige AGPC to co-operate in good faith with WTM to enable WTM to hold the 2020 World Tour Melbourne event? If so, did AGPC breach that obligation by reason of the matters alleged in particulars (B) to (I) of paragraph 11 of the ASOC? (ASOC, [6(n)(i)] and [11(a)]; DASOC, [11(a)])?</p>	<p>There is insufficient evidence to find lack of good faith on the part of AGPC or Mr Westacott such as to found a breach of cl 5.1(a): see [194].</p>
<p>Did cl 5.1(b) of the LMCA oblige AGPC to:</p> <p>provide WTM with a copy of the Recommendation, the Request and/or the Response from the Chief Health Officer prior to making the First Representation to WTM and/or cancelling the 2020 World Tour Melbourne event; and/or</p> <p>provide WTM with an accurate account of the Recommendation or the Response of the Chief Health Officer prior to making the First Representation to WTM and/or cancelling the 2020 World Tour Melbourne event,</p> <p>in the manner alleged? (ASOC, [6(n)(iii)] and [11(e)] and [(G)] and [(H)] of the particulars thereto; DASOC, [11(e)])</p>	<p>Yes: see [198].</p>
<p>If the answer to either of questions 9(a) or (b) is 'yes', did AGPC breach that obligation?</p>	<p>Yes: see [198].</p>



Did AGPC breach an obligation under cl 5.1(d) of the LMCA requiring it to provide a venue that was fit for purpose during the Term by reason of the matters alleged in particulars (B) to (I) of paragraph 11 of the ASOC? (ASOC, [6(n)(iv)] and [11(f)]; DASOC, [11(f)])?	Yes: see [199]-[201].
Did any of the matters alleged in paragraphs 10D, 10E(aa), 10E(a), 10E(b), 10E(c)(i), 10E(d) and 10E(h) of the DASOC constitute a <i>force majeure</i> event (within the meaning of cl 19.1(b) or 19.1(e) of the LMCA) which prevented, hindered or delayed its performance of that obligation? (DASOC, [11(e)(iii)]; Amended Reply filed 13 April 2023 (AR), [11(a)])	No: see [209]-[217].
If the answer to question 12 is 'yes', did the email sent from Craig Fletcher of AGPC to WTM at 4:25pm on 13 March 2020 satisfy the requirements of cl 19.4 of the LMCA (DASOC, [11(e)(iv)] and [11(f)(iv)]; AR, [11])?	No: see [216].
If AGPC did breach the LMCA and/or contravene s 18 of the ACL as alleged by WTM:	
Did WTM suffer loss and damage as a result of that breach(es) or contravention(s)?	Yes: see [231]-[239].
If so, what was the quantum of loss and damage suffered?	\$2,840,000: see [547]-[551].
Was the loss and damage suffered by WTM caused (in whole or in part) by a failure to effect and maintain event cancellation insurance in accordance with cl 14.2 of the LMCA?	No: see [225]-[227].
Was the loss and damage suffered by WTM (in whole or in part) too remote and not within the contemplation of the parties?	No: see [230].



CERTIFICATE

I certify that this and the 198 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Croft of the Supreme Court of Victoria delivered on 30 August 2024.

DATED this Thirtieth day of August 2024.



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Associate

