DISTRICT COURT OF QUEENSLAND

CITATION:	*Barton v Bridgeman & Anor* [2020] QDC 16
PARTIES:	**ANITA BARTON** (Plaintiff) **v** **DONALD BRIDGEMAN** (First defendant) **and** **SHARON BRIDGEMAN** (Second defendant)
FILE NO/S:	3144/2016
DIVISION:	Civil
PROCEEDING:	Brisbane
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	5 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	14 and 15 February 2019
JUDGE:	Sheridan DCJ
ORDER:	**1. Judgment be entered against the defendants in the sum of $39,860.44.** **2. Declare that the property in Dante revested in the defendants as at 16 May 2016.** **3. Within 28 days from the making of these orders, the defendants collect Dante at a time and place to be agreed between the parties, or failing agreement at a time between the hours of 8.00am and 4.00pm on a week day as nominated by the plaintiff from the location as notified by the plaintiff.** **4. Liberty to apply in respect of the working out of paragraph 3 of these orders.** **5. If the parties are able to reach agreement as to costs, a consent order signed by the parties be filed by 4:00pm, Friday, 13 March 2020.** **6. If the parties cannot reach agreement as to costs:** **(a) the plaintiff file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Monday 16 March 2020;**

(b) the defendants file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Monday, 23 March 2020;

(c) the plaintiff file any submissions in reply, of no more than 2 pages in length, by 4:00pm, Wednesday, 25 March 2020.

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – GUARANTEES, CONDITIONS AND WARRANTIES IN CONSUMER TRANSACTIONS – GUARANTEES, CONDITIONS AND WARRANTIES – where defendants supplied a horse represented to be a gelding – where horse found not to be a gelding – whether representation was a breach of statutory guarantees in Part 3-2 *Australian Consumer Law* (ACL) – whether any breach was a major failure under ACL

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – where plaintiff notified defendants of rejection of horse – where horse injured before notification – whether injury meant goods were "damaged after being delivered" – whether plaintiff entitled to reject goods – whether any damage to goods related to state or condition at time of supply – whether property in goods revested in defendants – whether plaintiff's failure to return goods resulted in loss of plaintiff's entitlement to reject

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – where plaintiff claimed for loss and damage suffered following the purchase of a horse – where plaintiff sought refund of purchase price – where defendants refused to refund purchase price – where plaintiff sought compensation orders – whether plaintiff has a right of action for purchase price – whether compensation orders should be made – whether plaintiff failed to mitigate loss or damage

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – PARTICULAR CASES – OTHER CASES – where horse supplied represented to be a gelding – where horse found not to be a gelding – whether representation was false or misleading

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – GENERALLY – APPLICATION OF LEGISLATION – where plaintiff's pleading relied on the ACL not the ACL (Queensland) – where defendants are individuals – where defendants relied on ACL – whether sufficient for plaintiff to plead reliance upon the ACL rather than the ACL (Queensland)

Acts Interpretation Act (Qld), s 14A, s 14B
Australian Consumer Law (Cth) s 2, s 3, s 18, s 29, s 54, s 56, s 59, s 236, s 237, s 259, s 260, s 262, s 263
Civil Liability Act 2003 (Qld), s 28
Competition and Consumer Act 2010 (Cth), s 4, s 4C, s 87CB, s 131
Fair Trading Act 1989 (Qld), s 15, s 16
Fair Trading (Australian Consumer Law) Amendment Act 2010 (Qld), s 18
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 149, r 150

Awad v Twin Creeks Properties Pty Limited [2012] NSWCA 200, considered
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, cited
Ferraro v DBN Holdings Aust Pty Ltd trading as Sports Auto Group [2015] FCA 1127, considered
Glenco Manufacturing Pty Ltd v Ferrari [2005] 2 Qd R 129, considered
HTW Valuers (Central Queensland) Pty Ltd v Astonland (2004) 217 CLR 640, cited
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494, cited
Potts v Miller (1940) 64 CLR 282, cited
Project Blue Sky v ABA (1998) 194 CLR 355, cited
Roberts v Australia and New Zealand Banking Group Limited [2006] 1 Qd R 482, considered
Vautin v By Winddown, Inc. (Formerly Bertram Yachts) (No 4) [2018] FCA 426, considered
Wyzenbeek v Australasian Marine Import Pty Ltd (No 2) [2019] FCAFC 167, considered

COUNSEL: A G Rae for the plaintiff
F G Forde for the defendant

SOLICITORS: Colin Biggers Paisley for the plaintiff
James K Legal for the defendant

[1] The claim by the plaintiff, Ms Barton, a competitive dressage rider, is for loss and damage suffered following the purchase by her from the defendants, Mr and Mrs Bridgeman (the **Bridgemans**), of a horse named "Silk Bridge Dante" (**Dante**) for the purchase price of $17,000.

[2] The Bridgemans carried on a business of supplying, marketing and distributing horses for sale in Australia in partnership under the registered trading name of "Silk Bridge Equine Services".

[3] Ms Barton alleges that Dante was not a gelding, as advertised by the Bridgemans, but instead had testicular matter and behaved like a stallion.

[4] At the end of the trial various issues arose as to the causes of action open to Ms Barton and as to the relief to which she was entitled.

[5] Before dealing with these matters, it is desirable to set out the facts.

Witnesses

[6] At the hearing, Ms Barton gave evidence and called Mr Rowan Sheridan, the horse trainer engaged to perform a behavioural assessment on Dante; Dr David Lovell, an equine veterinarian with 49 years' experience who treated Dante; Dr Natalie Fraser, a specialist at the University of Queensland in veterinary reproduction who performed testing on Dante and Mr Clinton Rich, a horse valuer.

[7] The Bridgemans did not give or call any evidence.

[8] Although each of the witnesses called by Ms Barton were cross-examined, most of the evidence was not seriously in dispute.

[9] The factual issues in dispute were mainly whether Ms Barton relied upon the representation made by the Bridgemans and the reasons why Ms Barton wanted to return the horse. In their final submissions, the Bridgemans attacked the credibility of Ms Barton generally, but particularly in relation to those issues.

[10] It is convenient if the facts are explained, before those submissions are dealt with. It is sufficient for present purposes to state that I found Ms Barton a credible witness and I reject the matters relied upon by the Bridgemans to found their submissions to the contrary. This makes it relatively easy to set out the facts in full.

Representations

[11] Ms Barton was a veterinarian by profession and is currently undertaking an equine related PhD. Ms Barton competed in dressage at the State Grand Prix level and acted as a judge for dressage competitions. Ms Barton had trained dressage horses, although she was not a commercial trainer and did not get paid money for training. While Ms Barton was not actively looking for a new horse at the relevant time, she had in her mind a replacement horse for her current dressage horse by way of a succession plan. At the time, Ms Barton was the owner of six horses.

[12] Dante had been advertised and promoted by the Bridgemans to the public since July 2014 as being for sale and as being, amongst other things:

(a) An unbroken gelding;
(b) The offspring of sire of Donautraum and the dame "Silk Bridge Contessa"; and
(c) Born on 28 September 2011.

[13] The advertisements and promotional material had been published by the Bridgemans in videos on YouTube since 22 July 2014 and on the Bridgemans' Facebook page under the name "Silk Bridge Warmbloods". In oral evidence, Ms Barton confirmed that she had viewed the videos before contacting the defendants through their Facebook website. In their defence, the defendants admit the videos and Facebook page advertised that Dante was, amongst other things, an unbroken gelding.

[14] Ms Barton said that she had become aware that Dante was for sale through friends who knew that there was a particular bloodline that Ms Barton liked because that progeny reliably had quite good temperaments. Her friends had mentioned that they had seen a horse for sale by this particular stallion on the Bridgemans' Facebook page.

[15] After a number of exchanges of Facebook messages on the Bridgemans' Facebook page, on 26 January 2016 Ms Barton went to the Bridgemans' property and had a ride on Dante.

[16] In the following few weeks, Ms Barton visited the property several times, observed Dante at the property and observed Dante being saddled up and ridden by Mr Bridgeman, rode Dante on a number of occasions, had a friend ride Dante, arranged for another veterinarian to come to the property to take a series of x-rays of Dante's joints, listened to Dante's heart and assessed Dante visually for lameness. Ms Barton said she spent about an hour with the horse on each of her visits.

[17] Ms Barton said, in discussions with Mr Bridgeman, she told Mr Bridgeman that she wanted a gelding. She said that she told the Bridgemans that she wanted a horse suitable for dressage training, a horse with a calm temperament and one that would not require riding every day or require a large amount of work to be done on it to bring the horse to a competitive level.

[18] In their defence, the Bridgemans admitted to being informed by Ms Barton that she wanted a gelding and a horse that was suitable for dressage training and a horse with a calm temperament.

[19] In the course of her examination in chief, questions were asked in relation to the time Ms Barton inspected Dante at the Gatton Indoor Arena, while Dante was being trained. A question was asked as to whether, on that occasion, Mr Bridgeman had said anything to her about transporting Dante to shows. Ms Barton said:

> "Not on that particular occasion, but another day at the defendants' property we were talking about taking the horse to shows and he suggested to me that he wouldn't recommend taking the horse on a float with my mare because the horse often bonds to – picks out a female horse at the show and will call out to them a lot. I – I think that may have been the day that I made in jest the comment, "Are you sure that the vet removed both testicles when he castrated him?" and he replied to me, "Absolutely, definitely." They saw the vet take both testicles out."[1]

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[1] Transcript 1-16 ll 9-16.

[20] Ms Barton was then asked why she would make that sort of comment. Ms Barton responded:

> "I just made it in jest. It was, I mean, ironic in hindsight, but it was the comment – I can't remember exactly what it was, but just about the horse particularly attaching to a – to another female horse, a mare, and – and calling out to her a lot, and they had disclosed to me that the horse would squeal and strike at other geldings, which is not an unusual behaviour for horses to – when they make contact to – to squeal and strike with one leg. It turns out Dante's reaction is actually a lot more dramatic than just a squeal and strike, but I hadn't been overly concerned about that comment."[2]

[21] Ms Barton was asked what she would have done if the Bridgemans had said that they were not sure that he's been castrated. Ms Barton responded, "There's no way I would have bought the horse."

[22] In cross-examination, Ms Barton was questioned further in relation to this conversation with Mr Bridgeman. Ms Barton admitted that, prior to that exchange with Mr Bridgeman, she had already been told by the Bridgemans that Dr Scantlebury had been engaged to castrate the horse.

[23] In cross-examination, the following exchange then occurred:

> "So, at that point in time, the representation that the horse was a gelding you knew was a representation that the horse was a gelding because Dr Scantlebury has performed a castration and has removed the two testicles? - - - That's what they believed had happened.
> Well, that's what they told you? - - - Mmm.
> And that's what you say is the representation – well, you say you relied on the representation that the horse was a gelding and the horse had been castrated by Dr Scantlebury? - - - Correct.
> And the two [indistinct] you've been told the horse is a gelding? - - - Mmm.
> The basis for the horse being a gelding, you were told, was because Dr Scantlebury had castrated the horse. You asked for clarification – in jest, but clarification - - -?- - -in jest. Yes.
> - - - nevertheless – that, "Well, did he remove those testicles?" and you were told, "yes, he did" - - - Yes, and I even [clarified] that with Mr Scantlebury after I started having suspicions that there was something wrong."[3]

[24] It is accepted that the clarification Ms Barton obtained from Dr Scantlebury was after Ms Barton had purchased the horse and had taken the horse to her property.

[25] Given the manner in which the exchange occurred and the questions were asked, I do not consider that it can be said that as a result of that exchange, the representation that the horse was a gelding should be interpreted to mean, as submitted by the Bridgemans, that Dr Scantlebury had performed a procedure to remove both testicles when he castrated the horse.

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2 Transcript 1-16 ll 17-25.

3 Transcript 1-46, l 40 – 1-47, l 114.

[26] In giving evidence, Ms Barton said that she would never have entertained a stallion. She said she did not ride stallions and did not have the facilities to house stallions. She said that she really wanted a horse that did not have hormones.

[27] The fact of the horse being a gelding was one of the representations made and relied upon.

[28] Further, Ms Barton's evidence was that everything she had observed of Dante at the property was consistent with Dante being a gelding. In cross-examination, when Ms Barton was asked about that, Ms Barton accepted that, up to that point in time, "the horse wasn't put in any situations where he wouldn't have acted like that."[4]

[29] Ms Barton said that Dante was paddocked on his own at the Bridgemans but she had not thought that was unusual. She said he was paddocked next to a stallion with a laneway in between them. She said, "…in hindsight looking back all of their other horses except for the stallion live in a share paddock situation, and so perhaps for this particular property that was unusual, but I didn't think anything of it."[5] Ms Barton said, in those sorts of stable conditions, you would not expect to see any stallion-like behaviours.

[30] Ms Barton said that Mr Bridgeman had recommended to her that Dante not be paddocked with other geldings. She said he had told her that Dante would squeal and strike in that setting. Ms Barton said she asked Mr Bridgeman if Dante would be okay next to a mare, and was told, "He's fine. He just doesn't like when they go away."[6]

Dante at Ms Barton's property

[31] Ms Barton says trouble started soon after Dante arrived at her property. Ms Barton described incidents of when Dante roared at the manure left by a former horse, striking at it with both front feet. Ms Barton said it was more than a squeal. She said at the time she thought that behaviour was very unusual for a gelding. Ms Barton confirmed that she loved the horse and thought the behaviour arose from being in a new paddock and his having previously been stabled near another stallion. She said that that really made no logical sense but she was trying to justify the strange behaviour.

[32] Ms Barton said, following Mr Bridgeman's advice, she decided to paddock Dante on his own next to her mare and not with the other geldings. She said, at her premises, they were her only choices. Ms Barton said that while Dante was in the paddock next to the mare, Dante had gone up and nicked at her. Ms Barton said that she thought it was after that incident that she rang Dr Scantlebury, the veterinarian who had performed the castration, and asked whether anything had gone wrong when he gelded the horse. Ms Barton said that Dr Scantlebury told her that he removed both testicles.

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4 Transcript 1-56 ll 10-11.
5 Transcript 1-16 ll 35-38.
6 Transcript 1-18 ll 26-27.

[33] Ms Barton described her first ride on Dante at home as unusual, with Dante having been unusually distracted by other horses. In a message sent to a friend, Ms Barton had described it as, "just like riding a young stallion."[7]

[34] As time progressed, Dante continued to roar and behave territorially with other horses' manure, remained to have extreme interest in the mare in the next paddock and became more and more belligerent. The farrier who had attended at the property had difficulty picking up Dante's back leg. Ms Barton said that she spoke to the defendant, Mr Bridgeman, about that and that Mr Bridgeman said that the farrier had not had any difficulty previously. Ms Barton said she had to do some work with Dante so as to be able to pick up his legs.

[35] On one day, when Ms Barton was riding Dante and she put Dante into a trot, Dante tipped her off. Ms Barton said that she continued to think something was not quite right; his behaviour were not consistent with a gelding and he was just pushing the boundaries.

Assessment by Mr Sheridan

[36] Ms Barton decided to send Dante to a horse trainer, Rowan Sheridan, for a behaviour assessment. She said she had a lot of respect for Mr Sheridan; he had worked with the trainer who runs the Australian Equine Behaviour Centre, he had written many books and published a thesis on equine behaviours.

[37] In giving evidence, Mr Sheridan confirmed that Dante had been brought to his training establishment, Windsong, to assess his behaviour. He explained that he went through his training regime, looking at the horse's basics responses in hand and on the saddle.

[38] He said he observed "some stallion behaviours."[8] He described the behaviours as conflict behaviours in the paddock and in training; pushing behaviours; spiked arousal levels around other horses, though not all the time; biting type behaviour of the lead and trying to bite his hand when being led and neck rolling and barging of the shoulder. He said, in riding past the mares on the arena, he saw conflict behaviours; Dante had jumped around a little bit and then spun back towards the other horses and, when asked to go on, even had a couple of rears.

[39] Mr Sheridan had a further conversation with Ms Barton and Ms Barton went out to Windsong and collected some blood from Dante and submitted it to the UQ Vets - Equine Specialist Hospital (**UQ Vets**) for hormonal analysis.

[40] Dante remained at Windsong while awaiting the test results. Ms Barton said she could not bring Dante home to her property. She said that with his increasingly bad behaviours she was getting reluctant to keep the horse at home, particularly being paddocked next to her female horses and as she had a small child at home.

Hormonal Analysis

[41] The test results from the UQ Vets were received by Ms Barton on 7 May 2016. The testosterone level was 1.8 which Ms Barton described as being elevated; above that of a castrated horse. She said a castrated horse should be less than 0.15.

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7 Transcript 1-17 l 39.

8 Transcript 2-7 l 44.

In cross-examination, Ms Barton agreed that upon receipt of those results and based on her understanding of those results, she had jumped to the conclusion that this horse was not a gelding.

[42] Ms Barton also received the anti-Mullerian hormone (**AMH**) results. Her evidence was that she needed to discuss those results as she was not familiar with the AMH. Ms Barton said she had not obtained that advice by the time the injury occurred.

[43] Once advice had been obtained, Ms Barton explained that the AMH was an interesting hormone in horses; it is very low in geldings and extremely high in cryptorchidic horses, over 36 picomole per litre and in stallions it is 16 picomole per litre. She said Dante's was greater than 168 picomole, so it was extremely elevated.

Injury suffered by Dante

[44] On 9 May 2016, whilst still at Windsong, Dante received an injury by way of a laceration to the inside of his left pastern. In evidence, Mr Sheridan said that he did not see the injury happen but, as he was riding past, from about 15 metres away, he noticed something was wrong. He said the injury must have happened in a very short time span, as before observing the injury about 10 minutes earlier he been right near him.

[45] Mr Sheridan said that when he observed him, he thought he had a stick or something sticking out of his leg. He said as he got closer he realised it was quite a bit of blood coming out. He said he then noticed that the fence had been stretched. He said, "It wasn't broken… but it had…evidently been pulled." The fence was an electric fence with a plain wire which was plastic coated white over the wire. The damaged section of the fence was one metre 20 or one metre 30 up the fence. When asked what damage he saw to the fence, Mr Sheridan said:

> "..the electric [indistinct] wire had been stretched, not snapped, not stretched right down to the ground – like, it wasn't hanging on the ground, but normally it is [indistinct] tension and it had definitely had a tug."[9]

[46] Ms Barton was contacted by Mr Sheridan. Ms Barton instructed Mr Sheridan to contact Redlands Veterinary Clinic (**Redlands Clinic**) because she considered that they were a well-respected equine clinic.

[47] The injury required immediate attention as the horse had nicked an artery in the process. Mr Sheridan applied a bandage. When the ambulatory veterinarian arrived, the bandage was removed, the wound was dressed and a compression bandage applied to stop the bleeding. Ms Barton attended at Windsong and had a conversation by telephone with Dr Lovell, the Redlands Clinic's principal, and he advised that the horse should be transported to the clinic, given the location of the laceration and so as to ensure that the tendon sheath had not been damaged.

[48] In speaking to Dr Lovell, Ms Barton expressed her concerns as to whether the horse was a cryptorchid and asked Dr Lovell to take some more blood and to send it off for analysis. Ms Barton accepted, in cross-examination, that by that time she

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9 Transcript 2-15 ll 42-45.

had already received some test results; though she said she had not yet had the opportunity to discuss the results.

[49] Dante was transported by Mr Sheridan to the Redlands Clinic where Dr Lovell treated Dante. Dante was able to be loaded on the float and walked off the float. Mr Sheridan said at that time Dante was not showing any signs of lameness. Upon assessment at the clinic, Dr Lovell described him as "moderately lame".[10] Dr Lovell said, he would have rated him 2 out of 5. In cross-examination he accepted that at the time he had noted a lameness of 3 out of 5.

[50] Dante was heavily sedated, anti-inflammatory medication and pain killers were administered, the wound was stitched, bandaged and immobilised in a cast. Dr Lovell said it was a serious laceration, though he also described it as a "typical cut".[11] He said they happen all the time. Dante was kept in a stable at the clinic.

[51] Dr Lovell's evidence was that the morning after the injury, there was no remaining sign of lameness.

Request for return of Dante

[52] Ms Barton wrote to the Bridgemans via Facebook message on 14 May 2016 at 7:42 pm, following receipt of the blood test results. Ms Barton informed the Bridgemans that Dante was a cryptorchid. She explained to the Bridgemans his unusual behaviours, the fact that Dante had been assessed by a horse trainer who specialises in equine behaviour and the fact that hormonal tests had been conducted on him and he had been given the results. In the Facebook message, Ms Barton said:

> "I am very sad, as you know from many discussions with you before I bought him, my 'dream horse' was a small Donatraum Gelding, which is what we believed Dante was. Unfortunately this is not that case. I find this quite ironic given I had actually asked you the question in jest prior to purchase if you were sure the vet had removed both testicles, but it appears the gelding was not complete as you had thought. It is unfortunate that Dante does not match the description of the horse that I thought I was purchasing."

[53] Whilst the Facebook message is consistent with Ms Barton's reliance on the representation that Dante was a gelding, the message was written after the purchase was completed and, as evident from Ms Barton's evidence was written with the assistance of her lawyers. The Facebook message cannot be used to bolster her evidence of reliance.

[54] Ms Barton concluded the Facebook message, "I would like to kindly request a return of the horse and refund of the purchase price given the horse is not a gelding as we had thought."

[55] There was an exchange of messages that evening but, by a message sent at 9:36 pm, the Bridgemans wrote back to Ms Barton saying: "Yes of course bring him back for a refund. Is a bank transfer ok or do you want it in cash?"

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10 Transcript 1-111 l 21.

11 Transcript 1-111 l 32.

[56] In the messages sent on 14 May 2016, Ms Barton did not mention the injury which Dante had sustained on 9 May 2016. When asked in cross-examination, she said that she did not mention it because she had been told by Dr Lovell that Dante would make a complete recovery and it was not relevant to the horse not being castrated properly. In cross-examination, it was put to Ms Barton that she was intentionally deceptive. Ms Barton responded that she was acting on advice that she had received.

[57] By Facebook message dated 16 May 2016, Ms Barton notified the Bridgemans of the injury sustained by Dante to his left fore-pastern while at the trainer's property. She said:

> "It's not a bad cut, and I've had Redlands assess it to be sure nothing important could have been damaged, but it's in an area that comes under tension when he walks. I think it will heal optimally if I can keep him confined and the cut wrapped in the initial stages, so if it's okay with you I would prefer to keep him for another week or so until it's healing well before returning him, Not really what we needed, but I want to do the best thing by him."

[58] The Bridgemans responded on 17 May 2016, asking some further questions. In response, Ms Barton said, "…the injury happened last week while at the trainers (after the hormone tests were done and while I was waiting for feedback and advice)." In the message, Ms Barton said, "Prognosis is excellent. Worst case scenario is a small scar, which is what I'm trying to minimise." She said that the Bridgemans were welcome to go and visit Dante at Redlands Clinic.

[59] Mr Bridgeman visited Dante on 18 May 2016 at the Redlands Clinic. Ms Barton had told Dr Lovell that the Bridgemans were coming for a visit and she said that he had "full disclosure to discuss the case with them."[12]

[60] Mr Bridgeman spoke to Dr Lovell. Mr Bridgeman created typed written notes of his visit which were admitted by consent. The notes record:

> "When questioned if Dante would be fit for the purpose of dressage or show jumping after recovering from the injury. His reply was that Dante would make a full recovery and be sound to compete as a dressage or show jumping horse."

[61] The notes also recorded:

> "[Dr Lovell] suggested that there was a 95% chance Dante would make a full recovery but reserved making a prognosis until the cast was removed on Monday 23rd May. He did also make comment [that] he was 99 to 100% sure the horse would make a full recovery but avoided being confident as it may not be the case. He also believed his treatment strategy was the best for Dante's full recovery."

[62] In oral evidence under cross-examination, Dr Lovell said: "Well, I was very upbeat ... the way this horse was progressing, I would be very optimistic that he would do well."[13] He was asked whether he had a discussion with Mr Bridgeman as to whether the injury would likely affect Dante's use for show jumping or

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12 Transcript 1-25 l 41.

13 Transcript 1-114 ll 38-40.

dressage. While he said he could not remember back then, he could recall that Mr Bridgeman had come while Dante still had the cast on. But he said he would have said that he would be very confident that the horse would return to full function. Dr Lovell explained in his evidence that when he was referring to a return to full function, that included whatever you wanted to do with the horse.

[63] The results of the oestrone sulphate test requested by Dr Lovell were obtained on 19 May 2016. Ms Barton sent a Facebook message to the Bridgemans on that day commenting further on the injury to the horse and providing the oestrone sulphate results. In the message, she said, "Geldings are less than 50 units (ng/ml, I think, the report was meant to be emailed to me this morning and I still don't have it). Dante's is well over 200 units (I think they said 223)." Ms Barton said, "This test also agrees with the other two tests (AMH and testosterone) that testicular tissue, either one or both, has been left behind."

[64] The cast on Dante was removed on 23 May 2016. Dr Lovell confirmed that the Bridgemans did not attend to see Dante after the cast had been removed and he said, he did not recall speaking to the Bridgemans again.

[65] On 24 May 2016, the Bridgemans sent an email to Ms Barton and said, "…we have been advised by our veterinarian and our consulting veterinarian to not proceed with the return of a damaged horse." The Bridgemans said they had discussed their obligations with the Queensland Office of Fair Trading and, it was said, "On these advices we are no longer prepared to accept the return of Dante and will not be providing a refund." On the issue of the failed castration, it was said, "…the Queensland Office of Fair Trading have advised that the owner can [pursue] the veterinarian who provided the failed service. To that end we are attaching the invoice from Dr Scantlebury, so that you as the owner can seek a remedy for the failed castration."

[66] Ms Barton did not respond to that message. She said she ceased direct communication with the Bridgemans at that point and communicated entirely through her lawyer. On the basis of the Bridgemans' message, Ms Barton said she could not deliver Dante back to the Bridgemans so Dante remained in the stable at the Redlands Clinic. Ms Barton said she could not bring Dante to her property. Her evidence was that, as a cryptorchid, Dante had to be housed as a stallion and she did not have the facilities to do that.

[67] After leaving Redlands Clinic, Dante was taken to the UQ Vets, Gatton for a valuation of his cryptorchidism and further hormonal tests and subsequently moved to stallion agistment at WestVets and later to Team VanDenBerge at Beaudesert.

Opinion of Dr Lovell about Dante

[68] Dr Lovell's evidence was that as Dante was a cryptorchid, he would "behave exactly like a stallion."[14] Dr Lovell said that "by nature a stallion is much more aggressive, is a leader"[15] and they will seek other horses all the time. Dr Lovell said cryptorchids can often be more aggressive than a regular stallion and nastier animals to deal with than regular stallions. He said there is no scientific basis for

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14 Transcript 1-117 l 30.

15 Transcript 1-117 l 34.

that but confirmed they can turn into very difficult animals to deal with. In cross-examination, he said this happens as they get older, as they mature.

[69] Dr Lovell confirmed that he had observed stallion-like behaviours in Dante. He referred to possession, separation anxiety and seeking out other horses all the time. He said it was noted that if his mate, in the stall next to him, was taken away from him, he would get upset. He described it as behaviour that was just much more re-active to other horses.

[70] Dr Lovell said that, while Dante was a pleasure to handle at the clinic, they took particular caution when bringing him out of the stable to ensure that there were not other horses around; that is, no possibility of him engaging with another horse.

[71] In his report dated 25 May 2016, Dr Lovell referred to the blood samples for Dante which had been submitted for oestrone sulphate analysis, and commented that they, "returned with very high levels". Dr Lovell said, "This confirms the presence of testicular tissue and the horse undoubtedly is a cryptorchid". In his report, Dr Lovell stated that correction would require surgery. Dr Lovell stated, "Palpation of the scrotal area revealed no signs of testicle or cords and so the testicle is almost certainly abdominal". The report then stated:

> "Castration as a young foal introduces some issues for the surgery as we will probably have to investigate both sides and it can be difficult to locate ligaments or landmarks that usually lead us to the testicle. Nevertheless, I would be optimistic for successful surgery and removal of the testicle (or testicles)."

[72] In giving oral evidence, Dr Lovell explained that in performing the procedure of castration in young horses, you can grab the epididymis, emasculate it and think you have removed the testicle but the testicle is still inside. Dr Lovell said, "I've never made the mistake but I've dealt with quite a number of horses over the years where practitioners have removed the epididymis and left the testicle."[16]

[73] Dr Lovell described the corrective procedure as being major surgery, but confirmed that he would offer "excellent prognosis for surgery".[17] Dr Lovell explained what can make the surgery more difficult is the fact that the anatomy has already been destroyed, when the first procedure was undertaken. Dr Lovell said the base range for the standard procedure at his clinic was between $1,500 and $1,800, and it could go up to $2,500, without GST. The horse would be required to be confined for up to three months.

[74] Dr Lovell said that the stallion-like behaviours would continue until the corrective surgery was performed. Dr Lovell said that after the surgery is performed it can take three to twelve months for the horse to loose direct effects of the testosterone. He said that the behavioural traits that the horse had learnt would remain for quite a while as well. During that period, Dr Lovell said that the horse would still need specialised housing.

[75] Ms Barton accepted that Dr Lovell had advised her that the horse should undergo the procedure to correct the cryptorchidism. She said she did not reject that advice but, as she was trying to return the horse, she had been told that once she

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16 Transcript 1-134 ll 40-42.

17 Transcript 1-119 ll 33-34.

performed the procedure on the horse, she would have altered it significantly from what she purchased.

[76] In answering questions in cross-examination, Dr Lovell said that there was obviously some dispute about ownership of the horse, and he said, "I thought that she had to sort that out. So I didn't encourage her to do it."[18]

[77] Following the injury, Dante remained under the care of Dr Lovell from May 2016 until December 2016. Dante was kept bandaged until mid-July 2016. Dr Lovell said that he was being cautious in keeping the wound bandaged and accepted dressing changes could have been managed outside the clinic. He said that the original plan had been that Dante be discharged at the end of May 2016.

[78] In his report dated 25 May 2016, two days after the removal of the cast, Dr Lovell stated, "This wound has completely healed and I am very confident that there will be no long term consequences."

[79] Dr Lovell said there was a time, about six to eight weeks after the injury, when he became a little concerned about a small scab which started to form, no greater than half the size of a one cent coin. Dr Lovell considered the scab could be associated with a bone sequestrum which, he said, could be corrected by surgery; though he did not recommend that as there was no clinical signs or effects. He said x-rays confirmed, in Dr Lovell's opinion, there was a bone reaction. He said, they are "very, very common, and we deal with them all day every day."[19]

[80] Dr Lovell considered that the condition would self-cure. In cross-examination, he agreed that nearly seven months after, "there were still sequelae of the 9 May incident which were continuing",[20] but said it was being managed and would self-cure. He said the scab was only present very intermittently; so you would look at it some days and there would be nothing.

[81] He said at no point was there any continuing lameness. He said they had no special requirements for looking after Dante at the clinic, other than keeping him as a stallion.

Expert Evidence of Dr Fraser

[82] Dr Fraser, a registered specialist in veterinary reproduction employed at the UQ Vets, provided an expert report dated 7 June 2017 regarding an examination she conducted of Dante in February 2017. Dr Fraser conducted a behavioural assessment of Dante, performed an ultrasound examination and submitted a blood sample for analysis. Dante was allowed to interact with an oestrus mare over a fence barrier whilst confined to a small paddock and was observed to be immediately highly interested in the mare, vocalizing, displaying a flehmen response and achieving an erection. Dr Fraser said that Dante had clearly exhibited stallion-like behaviours. Dr Fraser said that, in her experience, it would be very unusual for a gelding to display that degree of stallion-like behaviour, particularly achieving an erection.

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18 Transcript 1-135 ll 24-25.
19 Transcript 1-133 ll 45-46.
20 Transcript 1-134 ll 11-12.

[83] In her report, Dr Fraser stated that, on physical examination, Dante appeared to be a gelding, as there was no evidence of testes descended into the scrotum or palpable in the inguinal region. Dr Fraser refers to a transabdominal ultrasound being performed to identify the presence of testicular tissue in the inguinal region and abdomen but that no testicular tissue was identified. Transrectal palpation and then ultrasonography demonstrated that the architecture of a structure found being consistent with a testis, which Dr Fraser considered was a complete testis. A similar structure was palpable on the right hand side of the abdomen but it was not possible to obtain any images of that structure.

[84] In her report, Dr Fraser stated, "The results of the transrectal ultrasound indicate the presence of testicular tissue, thus Dante is not a gelding." Further, Dr Fraser said the results of the blood tests (oestrone sulfate and AMH), which were provided to Dr Fraser as part of her instructions, indicated that Dante was not a gelding. Dr Fraser said that the repeat hormonal assays (AMH and hCG stimulation test) performed by UQ Vets also indicated that Dante was not a gelding. She concluded in her report, "Therefore, all currently available endocrine diagnostic tests for the diagnosis of cryptorchidism indicate the presence of testicular tissue in this horse."

[85] In cross-examination, Dr Fraser confirmed that the presence of testicular tissue meant that the horse was not a gelding. She said, a gelding is a castrated male horse. She said the word, cryptorchid, means "hidden testes".[21] When asked whether the horse had been castrated, she said:

> "Well, unfortunately, since histopathology was not performed on the tissue that was originally removed from this horse, we have no idea if testicles were ...removed at all."[22]

[86] When questioned as to whether the fact that a procedure was performed meant that it could be said the horse had been castrated, Dr Fraser said:

> "In the extremely unlikely event that a horse had been born with four testicles and someone had removed the two descended ones, then yes, it would be reasonable to assume that the horse had been castrated but I can't stress enough how absolutely unlikely that is actually to occur."[23]

[87] In her report, Dr Fraser was asked to comment on the differences between stallions and geldings. Dr Fraser referred to stallions being innately highly alert to their surroundings, seeking mares and looking for potential threats. Dr Fraser commented that aggressive inter-male behaviours can range from playful, sparring in nature to serious aggression. She said, "Aggressive encounters typically occur because the stallion is trying to protect or maintain the mares he considers to be part of his harem."

[88] Dr Fraser said there was no scientific evidence to document any difference in proneness to injury between geldings and stallions. Dr Fraser said that generally stallions are housed separately and the fencing is typically higher, up to two meters, to reduce the risk of jumping out in search of mares. She said that as the majority of geldings are not as prone to aggression towards other horses, they can

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21 Transcript 1-71 ll 17-18.
22 Transcript 1-68 ll 41-43.
23 Transcript 1-70 ll 40-43.

be housed in groups of mixed sex or with other geldings. Given the characteristics observed in Dante, Dr Fraser said that, whilst she did not consider it likely Dante was still fertile, there was still a risk of injury to him and the mare, if he attempted to breed with a mare and a risk of damage to the mare's reproductive tract.

Evidence of Mr Rich

[89] Mr Rich was called by Ms Barton to give valuation evidence. He had been involved in valuing horses for 12 years and had owned horses for 45 years.

[90] In his report dated 25 July 2018, Mr Rich expressed the view that the difficulty in valuing Dante was that there was no market for cryptorchid horses in Australia and no public sales data on them. Mr Rich considered that if cyrtorchidism was discovered in a male horse, its future will largely depend on its quality, general demeanour and background (including pedigree), cost to breed and natural ability. He stated that surgery might be elected for the better horses, but that others will often find their way into horse auctions and be sold for little money as either rejects or horse meat.

[91] In that report, he stated the Fair Market Value (**FMV**) for Dante as at the date of purchase with full knowledge of his cryptorchidism was $5500 and Dante's current FMV absent any injury was $3500 and with the scar caused by the injury was $2500. In an addendum report dated 13 February 2019, relying on recent 'still' images and a video of Dante, the FMV post injury was revised to $3000.

[92] In cross-examination, Mr Rich admitted that there is no public sales data available for horses of any type, not just cryptorchid horses. In correcting that statement, Mr Rich said that he relied on his own historical data that he had collected over 12 years of valuing. He confirmed he had no data for cryptochid horses on the basis that people would not knowingly purchase such a horse. Mr Rich agreed that that it was possible that cryptorchid horses made up 1% of the horse population.

The Pleadings Prior to Trial

[93] The amended statement of claim filed 16 May 2018 claimed various relief under what the pleading said was "the *Australian Consumer Law* (the **ACL**)".

[94] It was expressly pleaded that the Bridgemans "carried on business in partnership". Importantly, the amended statement of claim said they "carried on a business" within the meaning of s 4 of the *Competition and Consumer Act* 2010 (Cth) (the **CCA**) and were a "supplier" within the meaning of s 4 and s 4C of the CCA and s 2 of the ACL. Those three facts were admitted without qualification in the second further amended defence filed 29 May 2018.

[95] After citing the advertisement and promotion of the horse, inspection of the horse by Ms Barton and subsequent purchase by Ms Barton, it was pleaded that on or about 14 May 2016, Ms Barton notified the Bridgemans of her election to reject the goods pursuant to s 259 of the ACL and to obtain a refund pursuant to s 263(4) of the ACL. In the second further amended defence, the Bridgemans admit the

notification of the rejection, but deny it was a valid election pursuant to s 263(6) because of the exclusion provided by s 262(c) of the ACL.

[96] A similar reliance upon s 263(6) was made in response to the allegation that, upon the notification, property in the horse had revested in the Bridgemans.

[97] Admissions relevant to the statutory claim for misleading or deceptive conduct were made in the defence; namely that the horse was "goods" and "consumer goods" and Ms Barton acquired the horse as a "consumer" within the meaning of the ACL. Contraventions of s 18 and s 29(1)(a) of the ACL were denied, but on the basis that the horse had been castrated by Mr Scantlebury and the Bridgemans had no reason to believe the horse was not a gelding.

[98] Importantly, the second further amended defence contains admissions that there were statutory guarantees under s 54, s 56 and s 59 of the ACL that the horse was of acceptable quality, would correspond with the description by which the horse was supplied and would comply with express warranties given by the Bridgemans. All of those admissions were unqualified. A breach of those guarantees was denied as a matter of fact only.

Third Further Amended Defence

[99] On the morning of the trial, leave was sought to file a third further amended defence. That request was not opposed and leave was granted.

[100] None of the admissions as to the application of the ACL were withdrawn. Neither was any parties' case pursued on the basis that it did not apply. Indeed, the third further amended defence reinforced the application of the ACL by expanding upon the validity of the election to reject by reason of s 263(3), mainly on the grounds that the goods were damaged, and inserting a new defence under s 263 of the ACL that Ms Barton had failed to return the horse to the defendant.

[101] The issues in dispute were accordingly confined to a factual dispute as to whether there were the five breaches of the ACL alleged.

[102] That was the position until the closing address of counsel for the Bridgemans. At that time, Mr Forde submitted, for the first time, that Ms Barton's claim must be dismissed because the ACL does not apply to the Bridgemans because it does not apply to individuals, like the Bridgemans.

The ACL and the FTA

[103] The submission was made in reliance on s 131 of the CCA which provided that the ACL applied only to corporations. Counsel conceded that similar conduct of individuals is covered, but only as part of the *Fair Trading Act* 1989 (Qld) (the **FTA**).

[104] Sections 15 and 16 of the FTA provide as follows:

> "**15 The Australian Consumer Law text**
>
> The Australian Consumer Law text consists of—
>
> (a) schedule 2 to the *Competition and Consumer Act 2010* of the Commonwealth; and
>
> (b) the regulations under section 139G of that Act.

> **16 Application of Australian Consumer Law**
>
> (1) The Australian Consumer Law text, as in force from time to time—
>
> (a) applies as a law of this jurisdiction; and
>
> (b) as so applying may be referred to as the Australian Consumer Law (Queensland); and
>
> (c) as so applying is a part of this Act.
>
> (2) This section has effect subject to sections 17, 18 and 19."

[105] In short, the submission was that if Ms Barton wished to rely upon the ACL she should have described it as the "Australian Consumer Law (Queensland)". That submission emphasises paragraph (b) of sub-section (1) of s 16. In doing so, however, it treats the word "may" as mandatory, or at least more than a matter of discretion or permission. Moreover, it does not give any effect to paragraph (a) which provides that the ACL text applies as a law of this jurisdiction.

[106] It is true that sub-paragraph (c) makes the ACL part of the FTA, but that does not, in my view, derogate from the important effect of sub-paragraph (a) which is to make the ACL a law of this jurisdiction.

[107] Sections 15 and 16 were introduced into the FTA by the *Fair Trading (Australian Consumer Law) Amendment Act* 2010 (Qld). The explanatory notes to the Bill explain that the amendments gave effect to an agreement at the Council of Australian Governments that all jurisdictions would adopt the ACL as a single instrument of generic consumer protection legislation. The reform, said to be largely based on the Productivity Commissions' Review of Australian Consumer Policy Framework, was designed to provide a nationally consistent and enhanced consumer law for all Australians. Similar statements appeared in the Second Reading Speech made on 31 August 2010. The explanatory note described s 16 as the operative clause which "applies the Australian Consumer Law text as the law of Queensland."

[108] A court is entitled to have regard to these extrinsic materials if the provision of an act is ambiguous or obscure, to provide an interpretation of it or, if the ordinary meaning of the provision leads to a result that is manifestly absurd or unreasonable, to produce an interpretation of it that avoids that result; see s 14B of the *Acts Interpretation Act* (Qld) (**Queensland Act**). This provision complements the requirement that in the interpretation of an act, the interpretation that will best achieve the purpose of the act is to be preferred to any other interpretation: s 14A of the Queensland Act.

[109] These provisions of the Queensland Act do not apply to the Australian Consumer Law (Queensland) by virtue of s 19 of the FTA. Section 19 provides that the *Acts Interpretation Act* 1901 (Cth) (**Commonwealth Act**) applies to the *Australian Consumer Law* (Queensland). Section 19 does not say that the Commonwealth Act, however, applies to the interpretation of the FTA. If necessary, resort could therefore be had by reason of the Queensland Act to these extrinsic materials in the interpretation of s 16.

[110] Alternatively, resort might be made to the common law regarding statutory construction; as explained in such cases as *Project Blue Sky v ABA*[24] and *CIC Insurance Ltd v Bankstown Football Club Ltd*.[25] (The Commonwealth Act contains similar, though slightly differently worded, provisions to the Queensland Act (s 15AA and s 15AB), but the reference to extrinsic material in the Commonwealth Act, as one would expect, is limited to the parliament of the Commonwealth.)

[111] The language, however, in my view is clear and unambiguous. Section 16 has the effect of making the ACL part of the law of Queensland. The ACL makes a "person", not just a corporation, liable for various contraventions of its provisions. Whilst it might have been preferable to have described the route by which this is achieved, it was sufficient for Ms Barton in this case to plead reliance upon the ACL.

Examination of the Pleadings

[112] That it was sufficient for the statement of claim to refer only to the ACL for both parties to be clear about the legal issues in dispute is clear from an examination of the pleadings. Indeed, this examination reveals that the submission made at the end of the trial by the Bridgemans was little more than a pleading point.

[113] No reference was made in the statement of claim to the FTA or the means by which the ACL was able to be adopted as a cause of action against the Bridgemans. Equally no allegation was ever made in the defence that the ACL did not apply, or that it should have been described as the Australian Consumer Law (Queensland).

[114] No application was ever threatened or made for summary judgment or to strike out the statement of claim on the basis that Ms Barton could not possibly succeed in a claim based on the ACL.

[115] This was clearly because both parties proceeded on the basis that, by whatever route was taken, the ACL founded a basis for the claim.

[116] The Bridgemans argued that the ACL did not apply and that they could not be estopped from relying upon an erroneous view of the law that it did apply; referring to *Glenco Manufacturing Pty Ltd v Ferrari*[26] and *Roberts v Australia and New Zealand Banking Group Limited*.[27] Those were cases where the plaintiff and the defendant proceeded upon false legal assumptions as to the validity of certain conduct under the relevant statutes under consideration.

[117] This, however, is not a case where the parties have proceeded on the basis of an erroneous view of the law. This is simply a case where both parties proceeded on the basis that the law was sufficiently pleaded.

[118] It was argued that the admissions made in the defence relating to the ACL were admissions as to law and that therefore they did not have the effect of admissions as to fact. However, the facts upon which Ms Barton relied to found the

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24 (1998) 194 CLR 355.
25 (1997) 187 CLR 384.
26 [2005] 2 Qd R 129.
27 [2006] 1 Qd R 482.

allegations "carried on business", "supplier", "consumer", "goods" and "trade and commerce", were all admitted. These terms have particular meanings under the ACL. Those meanings are probably more expansive than the meanings given to those words at common law. Although it is true that a court is not bound by erroneous admissions of law, at no time did the Bridgemans seek to withdraw the admissions. Admissions, whether of fact or law, enable the court to proceed on the basis that those matters were not in issue: Ms Barton was a consumer, the Bridgemans carried on a business and were a supplier, the horse was a good and the transaction was in trade or commerce within the meaning of the ACL.

[119] The admissions also raise another issue. If the ACL had no application, the fact that Ms Barton was a consumer, the horse was a good or that the events happened in trade or commerce had no relevance and should not have been alleged or admitted. The defence took no point that any of these allegations was irrelevant.

[120] In addition, as mentioned, the defence contained positive admissions that the three guarantees applied. Those guarantees apply if a person supplies, in trade or commerce, goods to the consumer in the circumstances set out in those guarantees. If the allegations were not understood by the Bridgemans to apply to them, there would be no basis for making those admissions.

[121] There would also be no basis for the defence to advance a positive case regarding the ability of Ms Barton to return the goods; either in the second further amended defence or the defence filed at the commencement of the trial. Importantly, if the ACL was not understood to apply, there would be no basis for the positive (albeit, as closer examination later revealed, erroneous) claim in the second further amended defence that the Bridgemans' liability was limited under the proportionate liability provisions of the CCA.

[122] In any event, the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) not only require pleadings to contain the facts upon which a party relies, but also to "state specifically any matter that if not stated specifically may take another party by surprise"; see rule 149(1)(c). Rule 150(4)(c) is in similar terms. Those rules are not limited to statements of fact. In addition, rule 150(4)(a) requires a party to specifically plead a matter that the party alleges makes a claim not maintainable. That rule is equally not limited to facts. If the Bridgemans truly considered that the case was not maintainable as a matter of law (not fact), there was clear non-compliance with these rules.

[123] Rule 5 requires the court to apply the rules with the objective of facilitating the just and expeditious resolution of the real issues and the parties to proceed in an expeditious way. The failure of the Bridgemans to plead that the ACL only applied by virtue of the FTA, or did not apply without it, if either were required, is also inconsistent with this rule and the modern approach to litigation.

[124] It is clear that the submission made at the end of the trial that Ms Barton could not succeed in her claim because of the nature of her pleaded case took Ms Barton and her lawyers by surprise. If the allegation had been made earlier and no doubt, equally consistent with rule 5, it could have been quite simply solved by an amendment.

Correspondence Immediately before trial

[125] The Bridgemans rely in response to these matters upon a letter sent by the solicitors for the Bridgemans to the solicitors for Ms Barton on 5 February 2019 (seven business days before the trial was due to begin). In that letter, the solicitors for the Bridgemans forecasted an amendment to their pleading and raised the issue of the FTA. Because of the very subtle nature of the letter it is necessary to quote the relevant part:

> "Upon further reviewing the pleadings in anticipation of the trial, we note that your client has not pleaded any reference to the *Fair Trading Act 1989* (Qld). We note that your client has sought relief pursuant to various sections of the *Australian Consumer Law*, which is schedule 2 of the Competition and Consumer Act 2010 (Cth). We further note that our clients are individuals and not corporations. It would therefore appear to us that the *Competition and Consumer Act 2010* (Cth) and Schedule 2 to that Act being the *Australian Consumer Law*, does not apply to conduct by our clients as individuals.
>
> In order to obtain the relief that your clients seek, it would appear to us that your clients will need to rely upon s 16 *Fair Trading Act* 1989 (Qld) so as to have the *Australian Consumer Law* text apply as part of the *Fair-Trading Act* 1989 (Qld) and therefore, be applicable to the conduct of our clients.
>
> In the circumstances, we request that you advise us as to whether your clients intend to rely upon the provisions of the Fair Trading Act.
>
> If you do not, then we reserve our clients rights in respect of this issue and in particular, the fact that the *Competition and Consumer Act* 2010 (Cth) does not apply to our clients."

[126] It will be noted that the letter says that "the *Australian Consumer Law* does not apply". It does not say that the plaintiff cannot succeed on its pleaded claim. The draft amended defence enclosed with the letter did not allege that either. Indeed, it contained the same admissions and positive cases based upon the ACL contained in their existing defence. Furthermore, that defence still relied upon the proportionate liability provisions of the CCA which applied to claims under s 236 of the ACL; see s 87CB.

[127] The only addition in the draft amended defence was to add a defence that the defendant's liability was also limited by the proportionate liability provisions of the *Civil Liability Act* 2003 (Qld) (**Civil Liability Act**) which, by s 28 of the Civil Liability Act, applied to claims under s 18 of the ACL (Queensland).

[128] The only real issue raised by the letter was that if Ms Barton proposed to rely upon the FTA the Bridgemans proposed to amend to include, as an alternative, reference to the proportionate liability provisions of the Civil Liability Act.

[129] It was perhaps unsurprising that the solicitors for Ms Barton in these circumstances, and bearing in mind the purpose of the amendments made across

Australia in 2010 to Australian consumer law, evidently missed the point being made and simply responded:

> "Our client does not intend to amend her Amended Statement of Claim in the manner you suggest. In those circumstances, the proposed amendments to your clients' Defence are unnecessary and the Plaintiff does not consent to them."

[130] In their letter dated 5 February 2019, the solicitors for the Bridgemans had stated that their clients reserved their rights, but they took no steps to advance the issue, until as stated earlier, in closing submissions at the end of the trial.

[131] In my view, correspondence is not a substitute for pleadings. The Bridgemans cannot have it both ways: meeting Ms Barton's case in documents filed in court on the basis that it properly pleaded the ACL and the claim was maintainable, and then contending at the end of a trial that it had by subtle correspondence between the parties stated that the claim was not maintainable.

Amendments made at trial by the Bridgemans

[132] The conduct of the Bridgemans in not properly stating their position in their pleadings or by correspondence was compounded by their conduct (through their lawyers) at the start of the trial.

[133] No mention of the issue was raised when the amendments were sought to be made to the defence on the morning of the trial. Counsel simply stated:

> "This has come about as a result of the plaintiffs confirming that they're not relying on the *Fair Trading Act*. They're relying solely on the…*Competition and Consumer Act* and, therefore, we're withdrawing the proportion[ate] liability arguments – claims. They're no longer pursued."[28]

[134] By the amendment, the Bridgemans withdrew any reliance upon the proportionate liability provisions of the CCA. This was not significant because, as counsel for the Bridgemans submitted at the end of the trial, those provisions only applied to a claim for damages under s 236 of the ACL, and no damages were claimed in reliance upon that section. The claim made by Ms Barton was only made in reliance upon s 237, which contains more extensive provisions for compensation and other orders than those available under s 236; which is solely concerned with damages for a contravention.

[135] The significant matter for present purposes is that the amended defence did not contain, as the foreshadowed one had, any reliance upon the proportionate liability provisions available under the Civil Liability Act. When the trial resumed for the purpose of hearing argument about the issue concerning the ACL, counsel for the Bridgemans stated that, as a consequence of the letter in reply from the solicitors for Ms Barton, the Bridgemans did not make this claim.

[136] It is unclear what the Bridgemans lost by reason of the absence of that claim.

[137] At one time the veterinarian, who performed the operation, was a party to the proceedings; having been made a third party by the Bridgemans. Those

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28 Transcript 1-2 ll 32-35.

proceedings were discontinued on 1 June 2018. The basis or reasons for the discontinuance were not explained. Obviously, there were a number of possibilities; including that the Bridgemans agreed that the veterinarian had no case to answer or that some commercial monetary settlement occurred between the parties. If there was a negotiated settlement, it may have dealt with the possibility of future proceedings against the veterinarian by Ms Barton or the veterinarian co-operating with the Bridgemans in the proceedings.

[138] The responsibility of the veterinarian for the events that happened is unclear. There is no doubt that the horse underwent an operation. Ordinarily that fact may be of great significance in determining whether a statement based upon that operation was misleading or deceptive. In this case, however, there is evidence that certainly Mr Bridgeman knew that the horse had certain characteristics that suggested he was not a gelding and there is also evidence that these types of operations are not always successful and that the only way to determine success is by blood tests. Against those facts, the Bridgemans made a number of unqualified representations that the horse was a gelding.

[139] The defence under the Civil Liability Act is available, as Mr Forde submitted, in relation to claims made under s 18 of the ACL (Queensland). The defence, however, is not available against a claim made by a consumer; see s 28(3)(b) of the Civil Liability Act. A "consumer" means an individual whose claim is based on rights relating to goods where the goods are being acquired for personal, domestic or household use or consumption; see s 29. The horse was acquired in the present case for the purposes of being ridden by Ms Barton in dressage events. No submissions were made on s 28(3)(b), but the Bridgemans had admitted in their defence that Ms Barton acquired the horse as a consumer within the meaning of s 3 of the ACL in that the horse was of a kind ordinarily acquired for personal, domestic or household use. In short, the defence may not have been applicable as a matter of law in any event.

[140] Leaving aside the question whether it was necessary to plead the FTA, or the ACL (Queensland), the obvious answer to the issue was for Ms Barton to be allowed to amend the statement of claim to make clear her reliance upon the ACL (Queensland), and for the Bridgemans, if they sought fit, to be allowed to amend to add a proportionate liability claim.

[141] When asked why Ms Barton should not be allowed to make the amendment at the end of trial, counsel for the Bridgemans responded that he would have to get instructions on whether the Bridgemans would reinsert the proportionate liability clauses, or call Dr Scantlebury and other witnesses, and submitted that there would be two more days of hearing, all over what could just be $10,000. He submitted that the amendment should not be allowed on that basis.

[142] Mr Forde also submitted that the response by the solicitors in their letter amounted to a tactical decision and that there will be a need for cross-examination of those who participated in that decision. Mr Forde did not state what tactical decision he alleged had been made or why.

[143] As it turned out, during argument, counsel for Ms Barton submitted that rather than Ms Barton being allowed to amend to change the reference from ACL to the ACL (Queensland) and, if the Bridgemans wished, for the Bridgemans to amend

to re-enliven their proportionate liability case, Ms Barton would abandon the claim based on s 18; leaving in place the claims based on s 259 and s 29.

[144] This appeared to satisfy counsel for the Bridgemans; though unstated was the precise position that would prevail if I concluded that the ACL was not the law of Queensland applicable to individuals, and that the only legislation under which a plaintiff could proceed in the circumstances was the ACL (Queensland) and that the intended claim had not been properly pleaded.

[145] Presumably I was to proceed on the basis that, in the light of the concession and all the other circumstances, there was no need for Ms Barton to amend the statement of claim by pleading the route by which she was entitled to make a claim under s 259 and s 29. That has the advantage of being consistent with rule 5 and the submissions made on behalf of the Bridgemans, apparently accepted by Ms Barton, that further costs should not be incurred on the prosecution and defence of this case.

[146] Had a formal request for a formal amendment been made it would have been granted.

[147] In the result, I will proceed as apparently intended by the parties to consider whether the plaintiff has proved her case under s 259 of the ACL, and in the alternative s 18 and s 29.

Credit Issues

[148] In referring to the facts, as previously noted, the Bridgemans' counsel submitted that Ms Barton was not a credible witness and her evidence should not be accepted unless supported by independent evidence. Mr Forde submitted that aspects of the evidence from Ms Barton was self-serving, non-responsive, absent of appropriate concessions, and some evidence of a hearsay nature was given by her, despite her being warned not to give that type of evidence.

[149] There were a few occasions when those criticisms could be justified. On the whole, however, Ms Barton gave her evidence in an honest and forthright way and there is nothing in her answers or her demeanour generally which would cause me to reject her evidence. Ms Barton appeared to be a lay witness doing her best to tell the truth and, in my view, did so.

[150] It is true that Ms Barton did not inform the Bridgemans at the time of her rejection of the horse that it had been injured, but she said that this was done on legal advice. I accept that evidence. In those circumstances, it would not be fair or reasonable to draw any adverse inferences.

[151] Finally, it was submitted that Ms Barton was driven by an improper motive causing her to wish to reject the horse. The Bridgemans submitted she had a difficult pregnancy and financial issues and suggested that it was this that led to her no longer wanting the horse. I do not accept that submission. I find that Ms Barton was acting on the basis that Dante was not a gelding and that she specifically wanted a horse that was a gelding.

[152] The result is that the attack on the credit of Ms Barton fails. This has the consequence that I accept Ms Barton relied on the representation that Dante was a

gelding. The exchanges which occurred, particularly in cross-examination, clearly and expressly confirmed reliance.

Section 259 claim

[153] The primary claim is made under s 259 of the ACL. Section 259(1) provides:

> "(1) A consumer may take action under this section if:
>
> (a) a **person** (the ***supplier***) **supplies**, in trade or commerce, **goods** to the **consumer**; and
>
> (b) a **guarantee** that applies to the supply under Subdivision A of Division 1 of Part 3-2 (other than sections 58 and 59(1)) is **not complied with**." (emphasis added)

[154] In the further amended defence, the Bridgemans admit Dante was "goods" within the meaning of s 2 of the ACL, Dante was "consumer goods" within the meaning of s 2 of the ACL and Mr Barton acquired Dante as a "consumer" within the meaning of s 3 of the ACL, in that:

> "(a) the amount paid to acquire Dante did not exceed $40,000; or
>
> (b) Dante was of a kind ordinarily acquired for personal, domestic of household use."

[155] In making this claim, Ms Barton relied on three statutory guarantees contained in Subdivision A of Division 1 of Part 3-2 (Sections 57-68).

Section 54 "Acceptable Quality"

[156] The first was a guarantee under s 54 that the goods are of "acceptable quality". Section 54(2) provides:

> "Goods are of "***acceptable quality***" if they are as:
>
> (a) **fit for all the purposes for which goods of that kind are commonly supplied**; and
>
> (b) acceptable in appearance and finish; and
>
> (c) **free from defects**; and
>
> (d) safe; and
>
> (e) durable;
>
> as a **reasonable consumer** fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the **matters** in subsection (3)." (emphasis added)

[157] Subsection (3) then provides that:

> "The **matters** for the purposes of subsection (2) are:
>
> (a) the nature of the goods; and
>
> (b) the price of the goods (if relevant); and
>
> (c) any statements made about the goods on any packaging or label on the goods; and
>
> (d) any **representation made** about the goods by the supplier or manufacturer of the goods; and
>
> (e) any other relevant circumstance relating to the supply of the goods." (emphasis added)

[158] In making any assessment as to whether the goods are of "acceptable quality", Ms Barton alleged that Dante, contrary to the obligation in s 54, failed to comply with the guarantee in that Dante was "not" fit for all the purposes for which goods of that kind are commonly supplied or "free from defects" because Dante:

(a) acts and behaves, and will act and behave, like a stallion rather than acting and behaving like a gelding;

(b) further or alternatively, possessed a defect which meant that Dante would not act or behave like a gelding.

[159] The evidence of Dr Fraser, relying on the results of the pathology tests and the ultrasound examination, is that Dante has testicular tissue and is therefore not a gelding. It was not suggested that the test results were unreliable. Relying on the test results, Dr Lovell agreed with the conclusions of Dr Fraser.

[160] The defendants admitted that they had represented to Ms Barton that Dante was a gelding and admitted that Ms Barton had informed them that she wanted a horse that was a gelding, was suitable for dressage training and had a calm temperament.

[161] Dr Fraser stated that castration was performed to improve tractability of male horses and was commonly performed in companion, riding and performance horses. Dr Fraser stated that the vast majority of male dressage horses were castrated.

[162] In her report, Dr Fraser stated that "Most geldings are more 'mellow' than stallions" and are easier to train as they are less distracted by other horses; albeit "castration does not eliminate general misbehaviour."

[163] Doctors Fraser and Lovell stated that Dante exhibited stallion-like behaviours and needed to be housed separated from mares and other stallions.

[164] The evidence was that Dante did not always have a calm temperament; in training he had bucked off Ms Barton and had reared when being ridden by Mr Sheridan and was more distracted by other horses including squealing and striking with one leg at other horses.

[165] The evidence does not support the denial by the Bridgemans of the allegation that the horse failed to comply with the guarantee and the allegation by them that Dante is not affected by the alleged castration failure, does not act like a stallion, and is not defective.

[166] Given that Dante was represented to be a gelding and was being purchased as a gelding for use as a dressage horse, based on the evidence of Drs Fraser and Lovell, the presence of the testicular tissue must be regarded as a defect and is such that Dante is not fit for the purpose for which he was acquired.

[167] In my view, as Dante is not a gelding, the guarantee as to "acceptable quality" was not complied with.

Section 56 "Correspond with description"

[168] The second guarantee relied upon is the guarantee, imposed by s 56 of the ACL, that goods supplied by description "correspond with the description."

[169] The Bridgemans admit that Dante was sold as a gelding, but again deny that the quality of the horse is affected by the castration failure. Contrary to the evidence, the Bridgemans assert that the horse does not act like a stallion and, on that basis, is not defective. For the reasons already stated, that position is not accepted. Clearly, Dante did not correspond with the description of being a gelding.

Section 59 "Express Warranty"

[170] Lastly, the plaintiff relies on the giving of an express warranty in accordance with s 59 of the ACL. Section 59(2) provides:

> "If:
> (a) a person supplies, in trade or commerce, goods to a consumer; and
> (b) the supply does not occur by way of sale by auction;
> there is a guarantee that the manufacturer of the goods will comply with any express warranty given or made by the supplier in relation to the goods."

[171] The Bridgemans admit that they warranted that Dante was a gelding but do not admit that they failed to comply with the warranty. For the reasons already stated, Dante is not a gelding and clearly did not comply with the warranty given.

Major Failure

[172] Having found that the three guarantees have not been complied with, it is necessary to consider the relief to which Ms Barton is entitled.

[173] The remedial provisions applicable if there is a failure to comply with a consumer guarantee are found in Part 5-4 (Sections 259-277) of the ACL. The remedies available to a consumer in respect of a failure to comply with a guarantee depend on whether the failure is a "major failure".

[174] Section 260 defines a "major failure" as follows:

> "A failure to comply with a guarantee referred to in section 259(1)(b) that applies to a supply of goods is a ***major failure*** if:
> (a) the goods would not have been acquired by **a reasonable consumer fully acquainted** with the nature and extent of the failure; or
> (b) the goods **depart in one or more significant respects**:
> (i) if they were **supplied by description**—from that description; or
> (ii) if they were supplied by reference to a sample or demonstration model—from that sample or demonstration model; or
> (c) the goods are **substantially unfit** for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
> (d) the goods are **unfit for a disclosed purpose** that was made known to:
> (i) the supplier of the goods; or
> (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made;
> and they cannot, easily and within a reasonable time, be

remedied to make them fit for such a purpose; or

(e) the goods are not of acceptable quality because they are unsafe." (emphasis added)

[175] If the failure is a "major failure", then s 259 provides:

"(3) If the failure to comply with the guarantee cannot be remedied or is **a major failure**, the consumer may:

(a) subject to section 262, notify the supplier that the consumer **rejects** the goods **and** of the ground or **grounds for the rejection**; or

(b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(4) The **consumer may**, by action against the supplier, **recover damages** for any loss or damage suffered by the consumer because of the **failure to comply with the guarantee** if it was **reasonably foreseeable** that the consumer would suffer such loss or damage as a result of such a failure." (emphasis added)

[176] On the basis of the expert evidence, Dante is not a gelding and departs significantly from the description by which Dante was sold and is substantially unfit for the purpose for which he was sold, and that could not easily be remedied.

[177] Further, the evidence of Ms Barton, which evidence I accept, is that she would not have acquired Dante if she had known Dante was not a gelding, and a reasonable consumer fully acquainted with the fact that Dante was not a gelding would not have acquired the horse either.

[178] Accordingly, within the provisions of s 260, Ms Barton has satisfied her onus of establishing that Dante's condition of not being a gelding is a "major failure".

Notification of rejection

[179] In the event that a guarantee cannot be remedied and is a major failure, s 259(3) allows a consumer to, subject to s 262, notify the supplier that the consumer rejects the goods, or, by action recover compensation for any reduction in the value of the goods below the price paid by the consumer.

[180] By Facebook message on 14 May 2016, Ms Barton notified the Bridgemans of her wish to return the horse and obtain a refund. Ms Barton referred to the results of the hormone testing of Dante and of the fact that Dante was a cryptorchid and not a gelding.

[181] By Facebook message on 14 May 2016, that rejection was initially accepted by the Bridgemans. Ms Barton was told to bring Dante back for a refund and was asked whether she wanted a bank transfer or cash.

[182] Subsequently, by Facebook message from Ms Barton on 16 May 2016, Ms Barton notified the Bridgemans that Dante had been injured while at the trainers. By email dated 24 May 2016, the Bridgemans withdrew their agreement for the return of Dante stating that Dante had been injured and was damaged and said they were not obliged to provide a refund.

Entitlement to reject the goods

[183] The consequences of electing to reject the goods under s 259(3) of the ACL are set out in s 263 of the ACL. That section provides as follows:

> "(1) This section applies if, under section 259, a consumer notifies a supplier of goods that the consumer rejects the goods.
>
> (2) The consumer must return the goods to the supplier unless:
>
> (a) the goods have already been returned to, or retrieved by, the supplier; or
>
> (b) the goods cannot be returned, removed or transported without significant cost to the consumer because of:
>
> (i) the nature of the failure to comply with the guarantee to which the rejection relates; or
>
> (ii) the size or height, or method of attachment, of the goods.
>
> (3) If subsection (2)(b) applies, the supplier must, within a reasonable time, collect the goods at the supplier's expense.
>
> (4) The supplier must, in accordance with an election made by the consumer:
>
> (a) refund:
>
> (i) any money paid by the consumer for the goods; and
>
> (ii) an amount that is equal to the value of any other consideration provided by the consumer for the goods; or
>
> (b) replace the rejected goods with goods of the same type, and of similar value, if such goods are reasonably available to the supplier.
>
> (5) The supplier cannot satisfy subsection (4)(a) by permitting the consumer to acquire goods from the supplier.
>
> (6) If the property in the rejected goods had passed to the consumer before the rejection was notified, the property in those goods revests in the supplier on the notification of the rejection."

[184] In reliance on sub-section (6), Ms Barton says that property in the horse revested in the Bridgemans when she gave notification of her rejection of the horse; that is on 14 May 2016.

[185] In the further amended defence, in reliance on s 262 and s 263, the Bridgemans maintained that Ms Barton had lost any entitlement to reject the goods and that her purported rejection was invalid and of no effect. In his submissions, Mr Forde contended that the onus was upon Ms Barton to prove that she had not lost any entitlement to reject the goods. No authority was cited in support of that submission, and it ignores the possibility of shifting burdens of legal and evidentiary proof which often occurs in statutory causes of actions.

[186] In *Vautin v By Winddown, Inc*, Derrington J held that the onus was on the defendants to prove the facts in one or more of s 262(1)(a) to (d) which is said to

give rise to the loss of the entitlement to reject.[29] Derrington J commented that it does not appear that it is an essential element of the consumer's cause of action under the ACL to negate the existence of the matters in s 262(1). There is no reason to depart from that view, and, in any event, for reasons which will appear, the evidence is clear enough to reach a conclusion without resort to the onus of proof.

Damaged after delivery for reasons not related to state or condition at time of supply

[187] As to s 262, it was said by the Bridgemans that the injury Dante suffered at Windsong meant that Dante was "damaged after being delivered" within the meaning of s 262(1)(c) of the ACL. Section 262(1) provides:

> "(1) A consumer is not entitled, under s 259, to notify a supplier of goods that the consumer rejects the goods if:
>
> (a) the rejection period for the goods has ended; or
>
> (b) the goods have been lost, destroyed or disposed of by the consumer; or
>
> (c) the goods were **damaged after being delivered** to the consumer **for reasons not related to their state or condition at the time of supply**; or
>
> (d) the goods had been attached to, or incorporated in, any real or personal property and they cannot be detached or isolated without damaging them." (emphasis added)

[188] In the reply, Ms Barton pleads, that even if the horse was damaged, if Dante had been a gelding, he would not have been at the trainers and further that he would not have exhibited stallion-like behaviours and would not have suffered injury. In support of that pleading, Ms Barton relied on the reports of Dr Lovell dated 25 May 2016 and Dr Fraser dated 7 June 2017.

[189] In submissions, counsel for the Bridgemans submitted, relying on s 259(3), that the "damage" to Dante was not related to his state or condition at the time of supply.

Was Dante damaged?

[190] As apparent from the evidence, there is no doubt Dante suffered an injury after being delivered to Ms Barton. That injury occurred on 9 May 2016, five days prior to Ms Barton notifying the Bridgemans of her decision to reject the horse under s 259(3).

[191] On the day of sending the notification of rejection, Dante was being kept at the Redlands Clinic, was in a cast and was not able to be ridden. Dante's condition was such that Ms Barton told the Bridgemans that she would prefer to keep Dante for another week or so before returning him to allow the cut time to heal.

[192] In a discussion between Dr Lovell, as the treating veterinarian, and Mr Bridgeman on 18 May 2016, Dr Lovell had indicated to Mr Bridgeman that Dante would make a full recovery and be sound to compete as a dressage or show jumping

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29 *Vautin v By Winddown, Inc. (Formerly Bertram Yachts) (No 4)* [2018] FCA 426, [278]; (2018) 62 ALR 702, 764.

horse, but reserved making a full prognosis until the cast was removed on Monday, 23 May 2016.

[193] Dr Lovell's evidence was that, upon removal of the cast on 23 May 2016, he was in a position to confirm definitely that the horse would make a complete recovery. By his report dated 25 May 2016, and confirmed at trial, the evidence of Dr Lovell was that the horse had made a full recovery and had returned to being fully functional and was able to be used for any purpose for which warm blooded horses are used.

[194] Notice of the Bridgemans' refusal to accept Ms Barton's rejection was given on 24 May 2016, the day after the cast was removed and the day after Dr Lovell had concluded that the horse would make a full recovery.

[195] Dr Lovell's subsequent reports refer to a minor complication in Dante's recovery which was caused by a bone spur and the fact that Dante has been left with a small scar.

[196] The fact is that as at the date of Ms Barton's notification of rejection on 14 May 2016, Dante had been injured and was still injured, such that Ms Barton was not, at that date, in a position to return Dante to the Bridgemans.

[197] In submissions on behalf of Ms Barton, it is said that, despite that, as Dante has made a complete recovery, for the purposes of s 259(4), Dante was never "damaged". It was submitted there is a difference between a living being suffering an injury and being damaged. No authorities were provided in support of such a distinction between "injury" and "damage".

[198] The position remains, therefore, that, as at the date of notification, the horse had been damaged after delivery.

Was the 'damage' related to the condition at the time of supply?

[199] The further consideration, under s 262(1), is whether the horse was "damaged" "for reasons not related to their state or condition at the time of supply".

[200] The evidence is that the horse, at the time of supply, was not a gelding and, as a result, had stallion like behaviours. Further, shortly after arrival at Ms Barton's property, Dante began displaying those behaviours to her. Ms Barton's evidence was that Dante began vocalising like a stallion, roaring at manure left by a former horse and striking at the manure with both front feet. Dante showed a keen interest in other horses, nicking at the mare in the adjoining paddock, had a stoic stallion like approach to training and was generally stallion like in his manners. On one occasion in training, Dante tipped Ms Barton off. Ms Barton described needing to manage stallions with greater force.

[201] Mr Sheridan gave evidence of Dante having reared while he was riding him and of having observed stallion behaviours in Dante.

[202] Dr Lovell said that by nature a stallion is much more aggressive, is a leader, seeks out other horses all the time and requires extra care when other horses are around. Dr Lovell, whilst saying Dante was not otherwise difficult to manage, stated that there was a need to manage Dante carefully when moving him out of the stable and of the need to stable Dante separately.

[203] Both experts agreed that stallions are required to be stabled separately and in paddocks with higher fences. Dr Fraser was more focused on Dante's sexual behaviour, but confirmed the presence of stallion like behaviours.

[204] While Dr Fraser said there was no scientific evidence that a stallion was more likely to be injured than a gelding, their behavioural characteristics including increased aggressive behaviour, the need for increased care in their management, their increased alertness to their surroundings and the requirement for higher fencing are all suggestive of an increased likelihood of a stallion striking at a fence.

[205] No evidence was led by the Bridgemans to suggest that Dante did not behave like a stallion.

[206] While there is no direct evidence as to how the injury at Windsong occurred, the inference is that the injury occurred as a result of the horse striking with some force at the fence.

[207] The inference is that such an injury is more likely to occur in a stallion, or a horse with stallion like behaviours.

[208] I find that, on the balance of probabilities, the damage to Dante after delivery was as a result of his state or condition at the time of supply. If it were necessary to resort to the onus of proof, I would have found that the onus of proof on the issue was on the Bridgemans and that the Bridgemans certainly did not prove to the contrary.

[209] Accordingly, I am not satisfied that Ms Barton is disentitled by the existence of any matters in s 262 from rejecting the horse under s 259.

Failure to return

[210] As to s 263, by the further amended defence, the Bridgemans plead that Ms Barton's failure to return Dante resulted in the loss of Ms Barton's entitlement to reject Dante and they deny that the property in Dante has revested in them.

[211] The Bridgemans maintain that, under s 263(2), the consumer must return the goods unless they have already been returned or unless they cannot be returned without significant expense. The Bridgemans maintain that neither of those two exclusions apply and Ms Barton does not suggest otherwise.

[212] If one of those exclusions had applied, then s 263(3) states that the supplier must, within a reasonable time, collect the goods at the supplier's expense.

[213] Pursuant to s 262, the buyer loses the right to reject the goods if notification is not given before the rejection period has ended.

[214] Section 263, on the other hand, does not impose a time period by which the buyer must return the goods to the supplier. A failure to return the goods is not listed in s 262 as a ground for the consumer losing the right to reject the goods.

[215] Section 263 also does not provide what consequences flow from a consumer's failure to return the goods to the supplier. There is no provision suggesting that

the entitlement to a refund for any money paid by the consumer for the goods, pursuant to s 263(4), is lost by a failure to return the goods.

[216] Ordinarily, it would be expected that the goods would be returned. In this case, however, given the nature of the goods, absent an agreement by the Bridgemans to accept the return of Dante, it is impossible to see how Dante could be returned. It is absurd to suggest, as submitted by counsel for the Bridgemans, that Ms Barton could have simply delivered Dante to the Bridgemans' property and tied Dante to a fence or tree at that property.

[217] Nevertheless, the fact is that the horse was not returned as required by s 263(2) and the provisions contained in s 262 for excusing a failure to return are not very wide and certainly not wide enough to cover a living animal; particularly a horse.

[218] What follows as to the property in Dante from the inability to comply with s 263(2) is not clearly dealt with in the section.

[219] One possibility is that the right in s 263(6) stands independently of the obligation to return the goods, with the consequence that the right to revest the property referred to in s 263(6) is not lost to a consumer merely by reason of the failure to return the goods. The other possibility is that the section should be read as one provision: one that entitles a consumer to return the goods but only revests the property on the return of the goods; albeit from the date of notification of rejection, not the date on which the goods are returned.

[220] Neither party made submissions on the effect of s 263(6) and how that operated with the rest of s 263 in circumstances where the horse had not been returned as s 263(2) required.

[221] There is no justification in my view for reading down the plain words of s 259 (which allows a consumer to reject goods in the event of a major failure) and s 263(6) (which provides the consequences of rejecting the goods). Section 263 certainly is not worded in such a way as to indicate that any of its rights or obligations are dependent on each other. Section 263(6) is plainly capable of existing as a statement as to the consequence of a rejection of the goods; and not dependant on return of the goods or refund of the purchase price. Indeed, revestiture is clearly not dependant on return of the goods: the subsection specifically states that property revests on the rejection (not return of the goods).

[222] The consequence is that this defence fails.

[223] That leaves to be decided what relief is to be granted.

Section 263(4)

[224] Ms Barton sought a refund of the purchase price, her expenses incurred on Dante and a declaration as to property in Dante. Ms Barton relied upon s 263(4), s 237 and in the alternative s 259.

[225] Pursuant to s 263(4), upon the giving of a valid notification of rejection, if the consumer elects, the supplier must refund any money paid by the consumer for the goods. Section 263 does not, however, expressly establish the mechanism by which a consumer can enforce the supplier's obligation to refund the money paid for goods under s 263(4).

[226] In my view, it is unlikely that it gives a consumer a right of action; as Ms Barton contends. It is more likely that any relief for a refund is to be dealt with under the specific sections of the ACL that explicitly provide for relief against any breach; such as s 237.

Section 237

[227] Section 237 entitles a court on the application of a person who suffered loss because of the conduct of another in contravention of the ACL to make such orders as it thinks appropriate against a person who engaged in that conduct.

[228] Section 237 provides:

> "(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** of the conduct of another person that:
>
> (i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or
>
> (ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under section 250 to be an unfair term; or
>
> (b) on the application of the regulator made on behalf 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.
>
> **…**
>
> (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." (emphasis added)

[229] An example of an order made under s 237 was the one made by the Federal Court in *Ferraro v DBN Holdings Aust Pty Ltd trading as Sports Auto Group*;[30] a case to which I was referred by counsel for Ms Barton.

[230] In *Ferraro*, the court was asked to make an order giving judgment for the payment of a sum which comprised a refund of the monies paid for a defective vehicle pursuant to s 263(4) together with compensatory damages under s 259(4). In addition, counsel for the applicant sought orders that the applicant retain the vehicle in safe keeping and the respondent collect the vehicle within seven days of payment of the judgement debt.

[231] In that case, the applicant had given notice that he rejected the vehicle pursuant to s 259(3) and advised that he elected for a complete refund of the purchase price. As at the date of hearing, the vehicle had not been returned, given the expense involved in transporting the vehicle. It was also contended that to part with possession would be in breach of the terms of the finance conditions obtained by the buyer for the purchase of the vehicle and there was the possibility of the

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30 [2015] FCA 1127 (**Ferraro**).

vehicle being returned and the judgment sum being unsatisfied with the respondent going into liquidation.

[232] Besanko J was satisfied the applicant was entitled to a refund and damages under s 263(4)(a)(i) and s 259(4), but was evidently concerned whether he had power to make the order sought given the terms of s 263.

[233] Counsel submitted that an order delaying the return of the vehicle until judgment monies were paid could be made under s 237. In considering the submission, in his reasons for judgement, his Honour referred to the authorities on the interpretation of s 87 of the *Trade Practices Act* 1974 (Cth), the predecessor to s 237 of the ACL, and commented that the authorities indicated that the section was to be given a broad interpretation. His Honour referred to the decision of *Awad v Twin Creeks Properties Pty Limited*.[31] In *Awad,* Allsop P (as his Honour then was) said:

> "Relief under the TPA, s 87, should be viewed not by reference to general law analogues but by reference to the rule of responsibility in the statute that is directed against misleading and deceptive conduct….Involved in that rule of responsibility is the public policy of protection of people in trade and commerce from being misled, and the width of the powers given by the TPA that are apt to be employed in a manner conformable with the just compensation or protection of the representee. Whether or not to grant a form of rescission under s 87, or to limit a plaintiff to damages under s 82, is a question in the nature of the discretion to be approached by reference to the facts of a particular case, the policy and underpinning of the TPA and the evaluative assessment of what is the appropriate relief to compensate for, or to prevent the likely suffering of, loss or damage "by" the conduct….An approach that is limited mechanically around a but for causation enquiry will be likely not to involve a full evaluative assessment of the appropriate relief."

[234] Besanko J commented that despite the breadth of the section, he was limited to determining rights between the applicant and the respondent and he could not make an order having regard to the rights of the applicant's financier, so as to give the applicant greater rights on the liquidation of the respondent, nor should that occur.

[235] Nevertheless, Besanko J indicated that, if the applicant agreed, he would make orders as sought to be without prejudice to any rights or obligations which might arise or accrue or exist on the liquidation of the respondent (should that occur). Accordingly, his Honour gave judgment for the applicant in the sum claimed and ordered that the applicant retain possession of the vehicle until the respondent had satisfied payment of the judgment debt in full on the applicant's undertaking not to use the vehicle, to keep the vehicle stored under lock at his residence, to continue to keep the vehicle comprehensively insured and to apply any payment for the judgment debt in the first priority towards discharging the vehicle finance advanced by the bank and an order that the respondent collect the vehicle.

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31 [2012] NSWCA 200.

Appropriate Orders for relief

[236] The monetary compensation sought by Ms Barton includes the entire consideration paid to acquire Dante and expenses to:

(a) identify any defects in Dante;
(b) reject and return Dante to the defendants;
(c) care for and provide for Dante until the defendants comply with their obligations under the ACL, including the cost of agistment.

[237] The expenses to the date of filing was particularised in the Amended Statement of Claim as follows:

"1. Cost of cryptorchidism testing at UQ Equine Clinic: $995.00;
2. Cost of cryptorchid diagnostics, agistment and care at Redlands Veterinary Clinic: $8,765.00;
3. Stallion agistment of WestVets Animal Hospital: $9,341.50;
4. Medications and veterinary expenses: $1,138.00; and
5. Insurance (3 years at $729.33/year): $2,187.99."

[238] No proof was provided as to the costs paid for insuring Dante. The Statement of Loss and Damage tendered at trial did not include any amount for insurance.

[239] Of the amounts in the Statement of Loss and Damage tendered at trial, the invoices tendered at trial proves:

1. A total amount of $1,277.29 paid to UQ Vets, being an invoice for an amount of $282.59 paid for the cost of cryptorchidism testing performed on 6 May 2016, and an invoice for an amount of $994.70 paid for cryptorchidism testing assessments performed between 28 February 2017 and 3 March 2017;
2. A total amount of $8,765.00 paid to Redlands Clinic;
3. A total amount of $10,994.50 paid to West Vets;
4. An amount of $275.00 paid to Horse Courier Pty Ltd for transport from West Vets to Team VanDenBerge;
5. A total amount of $2,035.00 paid to Team VanDenBerge for agistment; and
6. An amount of $508.35 paid to Lyppard Australia Pty Ltd for medications, (not $1,138).

[240] Of the amounts paid to the UQ Vets, the invoice dated 4 March 2017 in an amount of $994.70 was in respect of procedures performed in the period between 28 February and 3 March 2017. Mr Forde submitted that, when asked, Ms Barton was unable to say what the services on that invoice were for and submitted that the payment for that invoice is not recoverable as damages. I do not accept that it was not clear as to what the services on that invoice related to. The services included on the invoice all related to the cryptorchidism testing. However, they were all provided after proceedings had commenced. In those circumstances, those costs are more properly litigation expenses and not recoverable as damages.

[241] Therefore, on the evidence, the total of the damages is $22,860.44.

[242] Mr Forde submitted, on behalf of the Bridgemans, that in the exercise of the discretionary power given to the court under s 237, it would be unjust for the court to order the return of the horse and a refund of the purchase price. He submitted that as the horse had been damaged after delivery, Ms Barton had lost any entitlement to damages under s 259, and the court should not give under s 237

something to which the plaintiff was not entitled under s 259. It would seem that submission extended to all loss and damage claimed as a consequence of the breach.

[243] That is an unlikely construction of the ACL, and no authority, either dealing with the ACL or statutory construction in general, was cited in support of it. Section 259 was inserted in 2010, along with other consumer protection provisions, to give a new right of rejection of the goods. Even if the consumer does not have that right, the consumer would still have a right to damages under s 259(4) for a failure to comply with a guarantee which was not a major failure under s 259(2).

[244] There is certainly no basis to read down the rights granted in s 237.

[245] In any event, in this case, for reasons which will become apparent, I have found that Ms Barton was entitled to exercise the power granted under s 259(3).

[246] The Bridgemans supplied a horse in breach of the various guarantees stated in the ACL. Ms Barton has a horse which has a defect, which she cannot use for the purpose which such horses are commonly supplied, which is not reasonably fit for the purpose for which it was purchased and which is inconsistent with the description provided of the horse by the suppliers. Because of the conduct of the Bridgemans, Ms Barton has suffered loss and damage.

[247] Section 237 requires that an order made under it compensate Ms Barton for that loss or damage. The compensation should include not only recovery of the expenses incurred by Ms Barton in caring for the horse after its purchase, but also the purchase price; given that the Bridgemans have supplied and left Ms Barton with a horse which has no value to her. Indeed, as I will elaborate later, the evidence suggests that this horse has no value at all.

[248] Orders should be made so as to compensate Ms Barton in an amount $17,000 being the purchase price paid to acquire Dante and an amount of $22,860.44 for loss and damage suffered as a result of the failure of the guarantees.

[249] That leaves for consideration the position regarding the horse.

[250] By s 263(6), property in Dante has revested in the Bridgemans upon the notice of rejection. Although the Bridgemans maintain the making of any declaration is unnecessary and was sought by Ms Barton so as to bring the proceedings in this Court, the Bridgemans have continued to dispute the right of Ms Barton to reject Dante and necessarily all the rights and obligations consequent upon it.

[251] In those circumstances, it is appropriate to include a declaration that the Bridgemans are Dante's rightful owners.

[252] That leaves for consideration physical possession of Dante. Section 263 would appear to anticipate that upon the rejection of the goods, a consumer would be able to simply return the goods; and the supplier would refund the purchase price. It does not provide a mechanism for enforcement of those rights and obligations. That presumably is to be found in s 237; which was the vehicle adopted by the Federal Court in *Ferraro*.

[253] The order made in *Ferraro* enabled the plaintiff to retain possession of the defective motor vehicle until the plaintiff was paid the judgement sum. The order

made was essentially, though not entirely, the order sought by the plaintiff. I am not asked to make such an order in this case. Indeed, the orders sought by Ms Barton do not deal with the issue of possession; presumably on the basis that once ownership was determined possession would follow. That is not clear to me; given the refusal of the Bridgemans to accept the return of Dante nearly four years ago and the evidence which points to the difficult nature of Dante and the absence of a market for his sale (about which more will be said later).

[254] An order of the type made in *Ferraro* would, moreover, impose a considerable burden upon Ms Barton and one that would be inconsistent with the ownership of Dante which the ACL provides occurs upon rejection and which this court will declare. It is also inconsistent with the object of s 263, namely that the supplier would have title and possession of the goods rejected.

[255] Section 263 provides that the consumer must return the goods or, if the goods cannot be returned, removed or transported without considerable cost to the consumer, the supplier must collect the goods. The present case involves a horse which needs to be treated with caution; at least around other horses. Obviously, Dante cannot simply be left somewhere. The Bridgemans will have to look after him. Ms Barton was originally going to return Dante, but that was eventually rejected by the Bridgemans; for reasons which I have found were unjustified. The appropriate order is accordingly that the Bridgemans collect Dante. In the circumstances, included in the order will be an order for the collection of Dante.

[256] It should be stated that if I am wrong about the existence of a major failure or the loss of the right to reject for a failure to return, then I would not have made the order for the return of Dante or a declaration as to the property in Dante. However, the amount of compensation would remain the same.

Loss and Damage

[257] In the alternative to the claim for compensation under s 237 of the ACL, Ms Barton claims damages under s 259. The amount claimed is the same amount as that claimed under s 237.

[258] In addition to the return of the purchase price, Ms Barton seeks to claim damages under s 259(4). Under s 259(4), by action against a supplier, the consumer may recover any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was **reasonably foreseeable** the consumer would suffer such loss and damage as a result of such failure.

[259] In considering the issue of reasonable foreseeability in terms of the heads of damage as pleaded by Ms Barton:

1. If the horse purchased appeared to be something other than a gelding, it was reasonably foreseeable that the purchaser of the horse would take steps to determine whether or not the horse was a gelding, including having independent tests performed;
2. It was reasonably foreseeable that if the horse was not a gelding it might injure itself and require treatment;
3. It was reasonably foreseeable that if the horse was not a gelding, the purchaser might have to find and pay for facilities to house the horse and that there would be agistment costs incurred; and

4. It was reasonably foreseeable that costs would be incurred in caring for the horse, if the supplier has refused to accept the return of the horse.

[260] If an order had not been made under s 237, Ms Barton would be entitled to compensatory damages under s 259(4) in the amount of $22,860.44.

Misleading or deceptive claim

[261] The claims under s 18 and s 29 are pleaded in the alternative to the claim under s 259.

[262] Section 18(1) 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.

[263] Section 29, so far as relevant, provides:

> "(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
>
> (a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; …"

[264] The representation, forming the basis of the misleading conduct, and/or false or misleading representation, is pleaded as, "the defendants advertised, promoted, supplied and dealt with Dante as a horse that was a gelding and capable of being used as a gelding and was represented to the Plaintiff that Dante was a gelding."

[265] In addition, it was pleaded that the defendants made a representation that "Dante has been castrated at approximately six months of age."

[266] The Bridgemans admitted all the alleged representations were made.

[267] The Bridgemans denied, however, that:

(a) the plaintiff purchased Dante in reliance on the representation;
(b) the representation was false and misleading;
(c) they had engaged in conduct that was misleading or deceptive (or likely to mislead or deceive).

Reliance

[268] The Bridgemans plead that Ms Barton did not rely on the representation but rather relied on her own assessment of the horse. In particular, reference was made to the fact that she is a veterinarian, is an accomplished rider, is a Grand Prix dressage rider and judge, is an accomplished dressage horse trainer, had observed Mr Bridgeman on the horse, rode the horse herself, had at least one other friend ride the horse and had previously purchased horses.

[269] Those pleadings, ignore the evidence of Dr Fraser that on physical examination, Dante appears to be a gelding. It also ignores the evidence of Ms Barton that she did not observe, prior to purchase, any stallion-like behaviours.

[270] Further, it is not suggested that Ms Barton should have, prior to purchase, performed blood tests to confirm that Dante was a gelding.

[271] Most significantly, it ignores the evidence, which I accept, of Ms Barton's reliance on the representation that Dante was a gelding and, when a statement was made by Mr Bridgeman, which raised a concern, Ms Barton asked a question, admittedly in jest, but was given an answer indicating that Dante was definitely a gelding.

[272] The Court does not accept that the reference to the horse being a gelding should be interpreted to mean that Dr Scantlebury had performed a procedure with the aim of removing both testicles when he castrated the horse.

[273] The Bridgemans submit that Ms Barton proceeded on that basis and that any representation being made that the horse was a "gelding' was understood on that basis and that representation was true.

[274] There is simply no evidence to support that submission. In her discussions with Mr Bridgeman, Ms Barton was clearly seeking assurance that Dante was truly a gelding. The representation made to Ms Barton, and acted upon by Ms Barton, was that Dante's testes had been successfully removed and Dante was a gelding.

False or misleading

[275] The Bridgemans deny that the representations were misleading or false because they had the horse castrated by Mr Scantlebury, a qualified veterinarian. They did not call Mr Scantlebury to give evidence about the operation.

[276] The expert evidence given by Dr Fraser referred to the ultrasound examination which showed the horse had testicular tissue (probably a complete testes) and levels of testosterone (and other pathology results) consistent with that fact. Further, Dante achieved an erection during interplay with a mare.

[277] The castration operation involved the surgical opening of the scrotum and the removal of the two testes. In this case, there was no evidence that the tissue removed from the scrotum were testes. Dr Fraser considered that it was very unlikely that Dante had three testicles and considered it more likely that the two testicles had not descended into the scrotum by the time of the operation. The inevitable conclusion is that Dante was not castrated and is not a gelding.

[278] Mr Bridgman did more than request that Dante be castrated. He was an enthusiastic supporter of the fact that the operation had been performed and performed properly. Yet, no tests were done on the flesh or structures removed and it would not seem uncommon for these operations not to be successful. The Bridgemans were in the business of supplying, marketing and distributing horses and at no time did they seek to qualify any representation by reference to what they were simply told. In any event, by the time Mr Bridgman was talking to Ms Barton he had evidently noticed some behaviours inconsistent with that of Dante being a gelding.

[279] The representations made by the Bridgmans were clearly false and misleading.

Relief

[280] The plaintiff's claim for damages for the contravention of s 18 and s 29 is made under s 237; not s 236 of the ACL.

[281] Its terms are similar to the terms of its predecessor, s 87, with the only difference being the adoption of the use of the expression "because" of the conduct of another person, rather than the expression "by" the conduct of another person. It is not suggested that the change in expression makes any practical difference.

[282] The expression "by" has been considered on a number of occasions in the High Court of Australia. In each case it has been emphasised that the obvious intent of the legislature was to broaden the scope of the remedy, and that it was not to be limited by comparisons with the common law. It was accepted that the enquiry was to identify a causal connection between the loss and damage alleged to be suffered and the contravening conduct. Once the causal connection was established, it has been held that there was nothing in either of the previous sections (s 82 and s 87 of the TPA) which suggested that the amount to be recovered, or the order that could be made, were limited by drawing some analogy with the law of contract, tort or equitable remedies.[32]

[283] In the present case, counsel for the Bridgemans submitted that damages were to be assessed by either adopting the approach of the High Court in *Potts v Miller,*[33] or the approach adopted in *HTW Valuers (Central Queensland) Pty Ltd v Astonland*.[34] Counsel submitted that in this case, the court should adopt the approach in *Potts*; and relied upon the judgment of Derrington J in *Wyzenbeek v Australasian Marine Import Pty Ltd (No 2)*,[35] to support that submission. Mr Forde submitted that under that approach, which compared the purchase price paid and the true value of the asset acquired at the date of the transaction, Ms Barton must fail as she had not proven the value of the (presumably defective) horse at the date of the transaction. In his written submissions, Mr Forde dealt at length with the reasons given by Derrington J for adopting that approach and the reason why it was applicable in this case.

[284] The plaintiff in *Wyzenbeek No 2* appealed to the Full Court of the Federal Court of Australia against the decision of Derrington J. Since the hearing in this matter, the Full Court of the Federal Court has reversed both the reasons and the decision of Derrington J.[36] In its decision the Full Court emphasised that the court is not limited to the two approaches. The Full Court also emphasised the wide language of s 82 and stated that a court was not constrained by analogies with the common law. The Full Court held that the enquiry was whether a claimant had established it suffered a loss by conduct which contravenes the act.

[285] The consequences of the approach in *Wyzenbeek No 2* was that the plaintiffs were awarded damages consisting of the total sum expended on the purchase of the vessel which was found not to be an ocean going vessel (contrary to the representation made by the seller) less its depreciated value at the time of judgment plus the additional costs incurred in owning and operating the vessel (including repair of defects, maintenance and associated work).

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32 *Marks v GIO Australia Holdings Ltd* [1998] HCA 69, 183-184*;* (1998) 196 CLR 494.
33 (1940) 64 CLR 282 (***Potts***).
34 (2004) 217 CLR 640 (***Astonland***).
35 [2018] FCA 1517 (***Wyzenbeek***).
36 [2019] FCAFC 167 (***Wyzenbeek No 2***).

[286] Consistent with that approach, in this case, for the false and misleading claim Ms Barton would be entitled to an award of damages consisting of the amount paid for Dante less the value of Dante at the time of judgment plus the additional costs incurred in owning the horse. Because of the representations, Ms Barton purchased Dante and incurred expenses on Dante as a result.

[287] The purchase price was $17,000 and the amount of the expenses incurred was $22,860.44.

[288] As to the value of Dante, evidence was given by Mr Rich. It is apparent from Mr Rich's evidence that purchasers would not knowingly purchase a cryptorchid. Mr Rich's evidence is that there is no market for cryptorchids. The giving of any current value to Dante, with or without a scar, is therefore somewhat artificial, as Dante is a cryptorchid. Dante has no value to Ms Barton, and is only a source of continuing expense. There is no basis for reducing Ms Barton's damages claim for her continuing possession and ownership of the horse under this cause of action.

[289] It should be stated, however, that in *Wyzenbeek* the claim was for damages under the equivalent of s 236 and not for orders under s 237. Nevertheless, the same issues as to construction arise; the claimant must have suffered damages "by" or "because" of the conduct of the defendant. Orders under s 237, however, are specifically required to be those which compensate the injured person for the loss and damage suffered. The same object is no doubt to be achieved by an order for the payment of damages under s 236, though that is not articulated in the section.

[290] In the present case, in my view, the same orders should be made as if relief had been sought under s 236; namely an order for the payment of the sum of $39,585.94.

[291] Although possession and ownership of Dante would no doubt be a burden for Ms Barton (if she had not or had been held not able to exercise her rights under the statutory guarantee provisions of the ACL), no claim for future economic loss or for collection of Dante was made, nor was a request for his return made by the Bridgemans. No statutory issue arises under this claim as to property in Dante; which presumably passed on delivery and sale. Absent a specific claim that Dante should either be delivered to or collected by the Bridgemans, in the circumstances, under this head of claim, I would not order the return or collection of Dante.

[292] Given the claim for relief for contravention of s 18 and s 29 is pleaded in the alternative, no formal order will be made. If the position were otherwise, under s 237 I would have awarded Ms Barton damages of $39,860.44.

Failure to Mitigate

[293] In the further amended defence, the Bridgemans plead that if it is held that Ms Barton has suffered any loss and damage, which was denied, Ms Barton failed to take any, or any reasonable steps to mitigate such loss or damage. The particulars of the failure are pleaded as:

(a) the plaintiff's rejection of the defendant veterinarian's offer to operate on the horse again; and

(b) the plaintiff's failure to sell the horse so as to recoup the capital outlay and cease any ongoing holding and maintenance costs.

[294] As to the rejection of the offer of the veterinarian to operate again, reliance was placed on an email exchange between the Bridgemans and Michael Scantlebury,[37] the veterinarian who performed the original surgery. The final email in the exchange was an email from Mr and Mrs Bridgman to Mr Scantlebury dated 14 July 2016. This email was copied to Ms Barton. The terms of the email provided:

> "Thank you for your response in regards to Dante.
> As Anita Barton has had the test for cryptorchidism completed for Dante, it would be appreciated if you could proceed with your consultation and surgical correction as required at her direction."

[295] That email attached the earlier emails in the chain. The first email was one sent from Mr and Mrs Bridgeman to Mr Scantlebury dated 22 May 2016, which provided:

> "This is a courtesy email to advise that Silkbridge Dante, a colt castrated in April 2012 by you, and sold to Dr Barton on 23 March 2016, has been tested as a crytorchid.
>
> The results from the tests undertaken by Dr Barton for Testosterone, Anti-Mullerin hormone and Oestrone Sulphate levels are attached.
>
> Whilst Dr Barton seeks to return Dante for failing to be a gelding, his cryptorchidism status needs to be resolved so that he in fact tests as a gelding.
>
> Please contact us to advise how we proceed from here."

[296] The second email was a response from Mr Scantlebury to Mr and Mrs Bridgeman on 5 July 2016, which stated:

> "The invoice attached for the gelding of two horses on 16/04/12 shows that both were routine and therefore no complications such as failure to remove a testes is possible.
>
> I do not at the moment have access to my records, but I will refer to my clinical notes in the next week.
>
> I am happy to arrange a consultation and surgical correction if required."

[297] The Bridgemans rely on that email exchange as constituting an offer to Ms Barton which offer it is said Ms Barton rejected.

[298] It is impossible to regard the effect of that email exchange as being an offer made by the veterinarian to Ms Barton. The email from Mr Scantlebury sent on 5 July 2016 is capable of being understood as a willingness by Mr Scantlebury to arrange a consultation and surgical correction, "if required". It does not make any admission as to fault, nor does it contain any statement as to who would pay for the consultation and surgical correction, "if required".

[299] The email sent back to Mr Scantlebury by the Bridgemans may be taken as a request by them that Mr Scantlebury proceed, but it is similarly silent as to payment for the "correction". In any event, it is not sent to Ms Barton. No offer was made to her by the Bridgemans to pay for the consultation or surgery. It is

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37 Email sent to the email address for Michael Scantlebury at msvet@ipstarmail.com.au.

capable of being understood as a start to resolving the dispute, but it is no more than that.

[300] In a letter sent by the Bridgemans' lawyers to Ms Barton's lawyers dated 13 September 2016 enclosing the defence, the solicitors say that an offer was made for the castration to be redone, if it is the case that the original castration failed. The solicitors for the Bridgemans said that Ms Barton rejected that offer. They asserted that if the offer had been accepted Ms Barton would not have any loss. By that letter, the "offer" is not re-opened. That communication gives no greater clarity to the terms of the "offer" or the email exchange.

[301] Finally, even if it were an offer, given the evidence of Dr Lovell, the failure to agree to have the operation performed cannot be regarded as a failure to take reasonable steps to mitigate loss. It is clear from the evidence of Dr Lovell that the surgery is not without complication and that post-surgery the horse may still continue to exhibit stallion like behaviour for quite some time.

[302] Dr Lovell considered that whilst there was a dispute as to ownership, he would not encourage Ms Barton to have the surgery performed.

[303] The dispute as to ownership is also relevant to the allegation that Ms Barton failed to mitigate her loss by not selling the horse. On her case, ownership of the horse had re-vested, and the horse was not the property of Ms Barton to sell. The ACL makes no provision for withdrawal of a rejection and s 263(6) takes effect on the notification of the rejection. Absent an agreed final position on the subject, it was reasonable that Ms Barton did not take any steps to sell the horse.

Orders

[304] Accordingly, I make orders under s 237 of the ACL in respect of the claim for breach of guarantees as follows:

1. Judgment be entered against the defendants in the sum of $39,860.44.
2. Declare that the property in Dante revested in the defendants as at 16 May 2016.
3. Within 28 days from the making of these orders, the defendants collect Dante at a time and place to be agreed between the parties, or failing agreement at a time between the hours of 8.00am and 4.00pm on a week day as nominated by the plaintiff from the location as notified by the plaintiff.
4. Liberty to apply in respect of the working out of paragraph 3 of these orders.

[305] In terms of the issue of costs, I direct that:

(a) If the parties are able to reach agreement as to costs, a consent order signed by the parties be filed by 4:00pm, Friday, 13 March 2020.

(b) If the parties cannot reach agreement as to costs:

(i) the plaintiff file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Monday, 16 March 2020;

(ii) the defendants file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Monday, 23 March 2020; and

(iii) the plaintiff file any submissions in reply, of no more than 2 pages in length, by 4:00pm, Wednesday, 25 March 2020.