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Best Solicitors
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Ref: 032457/SL

Dear Best Solicitors,

I refer to your recent letter seeking my opinion regarding the two sets of proceedings in South Australia: *McBrand v Aus Brewing Pty Ltd* (the SA Court case) and *Thirsty Distribution Ltd v Aus Brewing Pty Ltd* (The Federal Court case). Please see below for my response to each of your numbered questions.

[Advice on Evidence – Word Count 2499 words]

Q1 (a)

Purkess v Crittenden[1] outlined that the 'burden of proof' relates to the process of how evidence is introduced, commonly referred to as the 'evidential burden'.[2] In South Australian Civil Proceedings the burden of proof rests on the plaintiff, who must prove their case on the balance of probabilities. Following Lord Simon in *Davies v Taylor*[3], the term 'balance of probabilities' can be interpreted in a mathematical way, 'showing odds of at least 51 to 49 that such-and-such has taken place or will do so'. Here, McBrand will bear the evidential burden of proof in relation to the cause of her illness, and the court

[1] (1965) 114 CLR 164 at 168.
[2] *R v Hunt* [1987]AC 352.
[3] [1974] AC 207 at 219; *Bater v Bater* [1951] p 35 at 37-8.

will need to be satisfied on the balance of probabilities. As APL has denied negligence they will bear the burden in relation to their defence, also to the same standard of proof.

Q1 (b)

McBrand would want to have the telephone conversation evidence admitted for the purpose of proving that she was feeling sick after the game and consumed one of APL's beers prior, which was the likely cause. As this was an out of court statement, in order to ascertain admissibility, it needs to be determined if the evidence constitutes 'hearsay'.

The hearsay rule disallows out of court statements being tendered if its purpose is to establish truth of any facts asserted.[4] The emphasis is on the *purpose* of tendering the evidence. King CJ in *R v Szach (1980)* 23 SASR 504 at 575 held statements are not rendered "inadmissible when they are tendered for some other legitimate purpose."

The evidence is relevant as it implies that McBrand was feeling ill and that the beer was consumed. As the court is being asked to draw an inference from the making of the statement, and using it for its truth-value, it is being used for a hearsay purpose. Here, the evidence is testimonial[5] as it is establishing that McBrand consumed the beer and was feeling unwell. It can be distinguished from *Ratten*[6], as the issue is not that the phone call was made, but whether the assertions made within it are true.

If it can be shown that the statement was made during the event, res gestae may be enlivened, allowing the evidence to be admitted.

Following *Teper v R* [1952] AC 480, *R v Bedingfield* (1879) 14 Cox CC 341 and *Vocisano v Vocisano* (1974) 130 CLR 267, it will not satisfy the exception if the statement is made testimonially and describes a narrative of what has occurred *after* the events have taken place. The statement must be contemporaneous with the res and not mere narrative.[7] It is

[4] *Subramaniam v Public Prosecutor [1956]* 1 WLR 965.
[5] *Ratten v R* [1972] AC 378.
[6] *v R* [1972] AC 378.
[7] *Nalder v Dutch-Australian Contracting Co Pty Ltd* (1960) VR 458.

arguable that the statement was made during the particular events, as she had just consumed the beer, seen the game and was beginning to feel unwell.

The fact scenario can be differentiated from *Adelaide Chemical & Fertilizer Co Ltd v Carlyle* (1940) 64 CLR 514, in that the statement made was contemporaneous with the event of coming down with food poisoning. On appeal, Dixon J held that in order to be admissible, the statement had to be an integral part of the transaction, and that the statement in which the deceased explained what had occurred to his wife minutes after the acid spill was not admissible as it was 'a mere narrative explaining an event that had occurred although only a minute or two before, the event that was complete when the jar broke and spilled acid over the deceased's legs' (at 530). Here, although McBrand had consumed the beer, she was still in the event of beginning to feel ill from its effects, therefore arguable that she was still within the event unfolding as opposed to referencing a past occurrence.

The facts are analogous to the decision in *Ramsay v Watson*[8], which held that statements regarding bodily symptoms and sensations are considered as a spontaneous and natural expression of suffering forming part of the res gestae. McBrand's state of mind of feeling unwell will also be considered in terms of reliability.[9] Analogous to the reasoning provided by Lord Ackner in *R v Andrews* [1987] AC 281, it is likely that her utterances were not concocted, but rather 'a distinct reaction to that event, thus giving no real opportunity for reasoned reflection.' Based on this spontaneity due to the pressure of the events being in force, res gestae is likely to be successful.[10]

It is important to note that the court may take into consideration the truth of McBrand's implied assertion based on the fact that McBrand and Grain had a falling out and therefore may have 'concocted' the statement. This argument is weak though and is unlikely to affect the decision.

[8] (1961) 108 CLR 642.
[9] *R v Fragomeli* [2008] SASC 96 per Vanstone J
[10] Ibid.

Q2

The main purpose and relevance of submitting the records would be to show that no one else was reported on that date as having contracted Campylobacter as a result of the beer they were served, which would be strong evidence considering they sold out of beer that day. APL would use this evidence to argue that McBrand is wrong regarding the source of her illness, as if it were from the beer there would have been more reports made at the time. This is due to the fact that on the day McBrand claims she was infected, the beer sold out, which would have caused more people to get infected if it was the cause. Another purpose would be to show that another (unknown) person had the same infection from a different source, a chicken burrito from 'Amazin' chicken Burritos' in Adelaide, which is what their defence claims McBrand contracted Campylobacter from.

As the relevant issue is whether McBrand's source of Campylobacter was from the beer or the chicken burrito, as opposed to the SA Health department notification document simply existing, there is a hearsay issue, as the evidence relies on assertions made in the document as opposed to original evidence.[11] It would not be possible to cross-examine the report on the facts contained within it, therefore not admissible under the hearsay rule unless an exception applies.

Under the SAEA it is likely s 45A 'Admission of business records in evidence' may satisfy an exception to the hearsay rule.

Following s 45A(4)(a), this is a 'document prepared or used in the ordinary course of business for the purpose of recording any matter relating to the business' therefore likely to be considered as a 'business record'.[12] Bleby J in *Southern Equities v Arthur Anderson (No 10)* [2002] SASC 128 at [17], held that the document does not need to be strictly authenticated, however s 45A(2)(a) provides a discretion that whoever made the document can and should be called. It would be advisable for counsel to bring evidence regarding the circumstances in which the document was made as opposed to simply

[11] Above, n 4.
[12] Cox J in *R v Perry* (No 3) (1981) 28 SASR 112 took a liberal view of the notion of business records, including medical records kept at a hospital and an analyst's report found in police records within s 45A.

relying on the document's 'apparent genuineness'. It may be necessary to call the author of the document from the SA Health Department to authenticate it. Other considerations that will be taken into account by the court include the evidentiary weight of the document (s 45A(2)(b)) and whether admitting it would be contrary to the interests of justice (s 45A(2)(c)). There is a strong argument to be made for the evidentiary weight of the document, particularly in relation to the few reports of the infection from that day, in relation to the high volume of beer sold. In addition to this, it may be considered of little weight that the doctor recorded McBrand's illness as being derived from the beer as he or she likely did this in relation to her assertion as opposed to specifically testing the beer and being sure that it was the cause. It is likely the evidence will be allowed to be admitted, however I would recommend that APL also provide the creator of the document in order to verify it.

As an alternative, the document may be admitted under s 45B of the SAEA, however this requires 'personal knowledge' which the health authority would not have as they were simply relayed the information from McBrand's GP.[13]

Q3 (a)

Ms Jurm's evidence is relevant as it relates to the breach of contract, which APL claims is due to the yeast supplied not being fit for the purpose of micro-brewing in Australia due to water hardness. This evidence asserts the fact that the breach of contract was not due to the yeast being unfit for purpose, but rather APL was in financial difficulty and could not afford to fulfil the contract. Therefore it is an express statement, which the court is being asked to use testimonially for its truth-value.[14] Based on this, it is likely to be regarded as hearsay and inadmissible unless an exception applies.

The evidence may be admissible following that it is an admission, a common exception to the hearsay rule. An admission is a previous representation made by someone who is a party to the proceeding. This is the case here as Grain (who made the statement) owns

[13] Note: s 34C(1)(a)(ii) will not apply as personal knowledge is required and the GP did not test the beer as a cause.
[14] Above, n 4.

and operates APL. Section 81(1) of the UEA states that the hearsay rule will not apply to evidence of an admission.

Following s 87 of the UEA, it needs to be determined if Grain, who made the admission, had the authority to do so. Specifically, if Grain is an agent of the company, and if so, whether he had personal knowledge of the admitted facts. Following *Pomery v Rural Hotels Pty Ltd and Ellison*[15], as Grain owns and operates APL he is likely to be considered as an agent of the company with direct or personal knowledge of the events, thus having the authority to hold the assertion which binds APL. In *Pomery*, Justice Sangster held that the admissions made by the manageress of the hotel were admissible against the defendant, as 'the manager is the alter ego of the company' as opposed to a mere employee.[16] However it would need to be satisfied that Grain was involved with the day-to-day management of the company, or at least had some management duties that the court could attach the requisite authority to make the admission.[17] If this can be satisfied, it is likely that the statutory exception of s 81 of the UEA will apply and the evidence will be admissible.

Q3 (b)

Ms Jurm's prior convictions may be used to challenge her credit. Section 102 of the UEA renders evidence of prior misconduct inadmissible unless it could substantially affect the credibility of the witness, outlined in s 103(1) of the UEA. It may be assumed that a prior conviction is sufficiently relevant to the determination of her credit, yet strict liability summary offences are generally not as relevant.[18] Following the rule in *Browne v Dunn*[19] and s 106 of the UEA, counsel could put the prior convictions to her during the cross-examination, and if denied, the previous convictions may be proved under s 103(2)(b) of the UEA. It may be argued that her prior convictions are relevant on the facts of this case as it shows a capacity for dishonesty. However it should be determined whether Ms Jurm's prior convictions probatively affect *this* case. Simply being convicted of drug trafficking does not necessarily mean she would be dishonest here as there is little

[15] (1973) 5 SASR 191.
[16] At 194.
[17] *TPC v Allied Mills Industries Pty Ltd (No 3)* (1981) 55 FLR 174.
[18] *Bugg v Day* (1949) 79 CLR 442.
[19] (1894).

connection with the offence. Unlike in *Palmer v R*,[20] there is no apparent motivation for her to lie.

Q4

The evidence of Zen Strong is relevant to the case as it bears on the issue of whether the yeast was suitable for the South Australian water conditions, which is a key fact in issue. The testimony is evidence of opinion, as it is based on Zen's opinion of suitability. Following s 76 of the UEA, evidence of opinion is not admissible yet exceptions apply. The testimony is evidence of opinion as it is drawn from an analysis and experimentation of yeast supplied by TDL using water of diverse hardness as well as observational analysis of data. As she is not involved in the chain of events, the lay witness exception (s 78 of UEA) outlined by Kirby J in *Smith v The Queen* (2001) 206 CLR 250 does not apply.

Following s 76 of the UEA, opinion evidence is inadmissible unless the criteria in s 79 UEA can be satisfied (*Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588).

It first needs to be determined whether Zen is an expert with specialised knowledge based on her study, training or experience (s 79(1) of UEA). Although Zen has no formal qualifications, this is likely to be satisfied as she has worked for 45 years in breweries in China and won dozens of awards. It may be argued that China is not analogous to the conditions in SA and the awards for purity of beer do not relate to the facts in issue, however this argument is weak as SA water conditions are equivalent to those in China. Also, purity of beer is a major fact in issue, as in order to achieve this yeast suitability in relation to water hardness is of significant importance.

Finally, in order to be admissible and satisfy s 79 of the UEA, the opinion needs to wholly or substantially relate to the specialised knowledge.[21] This is likely to be satisfied as Zen is giving an opinion on the yeast, which directly relates to her qualifications in brewing techniques. Although she is not an expert in water, she would have deep knowledge

[20] (1998) 193 CLR 1.
[21] *Makita* (2001) 52 NSLWR 705.

regarding how it affects beer-brewing techniques and the data has been tendered without objection so unlikely to be an issue.

Feel free to call me on 08 82234455 if you have any queries in relation to this letter of advice.

Yours faithfully,
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