HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **No. S20 of 2025**

HUNT LEATHER PTY LTD ACN 000745960
First Appellant

ANCIO INVESTMENTS PTY LTD ACN 136917041
Second Appellant

and

TRANSPORT FOR NSW
Respondent

BETWEEN: **No. S21 of 2025**

HUNT LEATHER PTY LTD ABN 46000745960
First Appellant

SOPHIE IRENE HUNT
Second Appellant

ANCIO INVESTMENTS PTY LTD ABN 50319048217
Third Appellant

NICHOLAS ZISTI
Fourth Appellant

and

TRANSPORT FOR NSW ABN 18804239602
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

I. Certification

This outline is in a form suitable for publication on the internet.

II. Propositions to be advanced in oral argument

Ground 1: Actionable Interference for Whole Period – Not Common and Ordinary Use

1. Each of the Appellants suffered a substantial interference with the amenity and use of its property caused by the construction work on the Sydney Light Rail: Hunt: PJ [27]-[30], [91], [92], [587], [588], [835]-[839], [841]-[843], [864], [865], [868], [875] (11/15-12/17); Ancio: PJ [40], [888]-[891], [909] (5/16-2/19) (AS [7], [8]).

2. PJ found there was nuisance for part of the period (AS [8]) and the Respondent was liable because it was responsible for the creation of the state of affairs which led to the nuisance (PJ [939]-[946]). Responsibility finding not challenged (CA [49]-[53]).

3. Appellants' Case A was actionable nuisance for the whole of those periods by reason of non-common and ordinary use PJ [90]-[92], [648] but rejected by the PJ although the use was not common and ordinary PJ [638], [640], [646], [648]-[652], [656]-[657] (AS [7]). Appellants' Case A was rejected by the CA although the use was not common and ordinary: CA [28], [117]-[126] (AS [9], fn 5).

4. The private nuisance principles are those set out in AS [11]. The existence of the defence of inevitable consequence of exercise of statutory authority is not disputed on this appeal and is important.

5. A multifactorial balancing approach under the general rubric of "reasonableness":

   - is not supported by authority;
   - renders superfluous defence of inevitable consequence (AS [23]-[25]; AR [20]);
   - is incapable of providing guidance as to the relative weight of any factor;
   - produces incoherent and unprincipled outcomes such as CA decision.

6. *Fearn* is not new (AS [11]-[16]). Appellants' written and oral closing trial submissions relied on Bramwell B's *Bamford* principle. *Fearn* was handed down post final hearing and was the subject of additional submissions invited by the primary judge. The *Bamford* principle has been consistently applied by English courts.

   Bamford v Turnley [1862] (JBA4/35/987 pdf 54) 122 ER 25 at 33, 34, 29, 30, 31
   St Helens Smelting v Tipping 1865 (JBA6/68/2181 pdf 306) 11 ER 1483 at 1484, 1486, 1487
   Ball v Ray 1873 (JBA4/35/981 pdf 48) 8 Ch App at 469-471
   Andreae v Selfridge 1938 (JBA4/34/969 pdf 36) 1 Ch 1 at 2, 3, 5-12
   Sedleigh-Denfield v O'Callaghan 1940 (JBA6/63/1943 pdf 68) AC 880 at 903
   Cambridge Water v ECL 1994 (JBA4/39/1074 pdf 141) 2 AC 264 at 295, 299-301, 306
   Southwark v Tanner 2001 (JBA6/66/2087 pdf 212) 1 AC 1 at 15-16, 20-21
   Lawrence v Fen 2014 (JBA5/54/1678 pdf 270) AC 822 at [3]-[5], [59], [64], [74], [76]
   Fearn v Tate Gallery 2024 (JBA4/44/1322 pdf 389) AC 1 Lord Leggatt: [18]-[41], [50], [54]-[55], [65], [68], [71]; Lord Sales: [158]-[162], [165]-[167], [211], [225]-[247], [271], [272]

Jalla v Shell 2024 (JBA5/53/1652 pdf 244) AC 595 at [2], [18]

7. The Bramwell principle has been applied consistently by Australian Courts including this Court either expressly or in the same language (AS [18]-[24]):

Clarey v Women's College 1953 (JBA2/19/564 pdf 426) 90 CLR 170 at 174, 175, 176
Gartner v Kidman 1962 (JBA3/24/643 pdf 12) 108 CLR 12 at 22, 30, 38-39, 44-47, 48
Elston v Dore 1982 (JBA2/21/594 pdf 456) 149 CLR 480 at 486, 487-488, 489, 490-491
Gales Holdings v Tweed S.C. 2013 (JBA5/47/1435 pdf 27) at [131]-[132], [137]-[138], [165], [173]-[174], [276], [279], [284]
State of Qld v M V Super 2019 (JBA6/67/2113 pdf 238) at [193], [194], [199], [200]
Woodhouse v Fitzgerald 2021(JBA6/70/2205 pdf 330) 104 NSWLR 475 at [31], [32], [47], [48]

Contra: *Southern Properties* 2012 (JBA6/65/2023 pdf 148) at [118], [119]
Not followed by the majority of a later WASCA in *Marsh v Baxter* (2015) 49 WAR 1 at [767], [770], [779] (McLure P in dissent – see [248]) (extract to be handed up).

8. CA misinterpreted *Gartner v Kidman*, *Gales Holdings*, *Don Brass* (JBA4/42/1286 pdf 353) and omitted reference to *Woodhouse* [119]-[121] (AS [17], [19]).

9. Inaptitude of a multifactorial approach is shown by CA's reliance on single factor: Appellants' purported failure to prove unreasonableness: CA [84]-[97] (AS [23]-[25]). This is despite apparent acceptance of onus on defendant to show the work was done with all reasonable care (CA [149], [151]) and the Respondent's failure to do so (CA [105]; PJ [820]) (AS [34], [35]).

10. Specific responses to RS:

- RS [33] *Sturges*: circumstances referred to are the established uses in a locality; fn 26 *A-G v Sheffield* (1853) 3 De G M & G 304 (extract to be handed up) at 339 adopts ordinary use language; Erle CJ in *Brand* in dissent.
- RS [34] Physical injury to property is a subset of the general principle.
- RS [41] *Harrison v Southwark* (1891) 2 Ch 409 at 413 (JBA5/50/1564) at 1568 pdf 160 "ordinary use of land".
- RS [42] is not supported by the authorities.
- RS [49] no difficulty in the long understood ordinary use concept.
- RS [51] not supported by footnoted cases: *Woodhouse* at [48] (JBA6/70/2205) at 2217 pdf 342; *Munro* at 337 (JBA5/58/1818) at 1823 pdf 415.

Ground 2: Actionable Interference Whole or Partial Period on Multifactorial Approach

11. If, contrary to foregoing, a Lord Sales approach is adopted, Respondent must satisfy objective standard of reasonable conduct in the undertaking of the work which caused the substantial interference. This obtains regardless of whether the work was a common or ordinary use or not (AS [27], [31]-[33]; *Fearn* [240], [165], [166]).

12. The Respondent failed to satisfy that standard (PJ [820], CA [105], [149], [151]) (AS [34]). Actionable nuisance for the entire period is established (AS [36]).

13. Alternatively, PJ's partial period actionable nuisance should be upheld. (1) Griffith's Amended IDP was an expert assessment of what was reasonably achievable if the Respondent had done more to discover utilities and the difference between actual completion and Amended IDP times was the delay caused by that failure (PJ [486]-[489], [495], [522], [556], [559],[819], [936]; CA [109]-[114]). (2) Respondent put forward no countervailing cause or time period (CA [104], [105]). (3) No evidence to support CA supposition that extra utility discovery work may have substantially interfered with amenity and contrary to absence of such evidence re extensive utility discovery work actually done (CA [90]-[94]; PJ [185],[186]; AS [40]-[43]). (4) In a multifactorial inquiry as to "reasonableness", the Griffith evidence is a relevant factor in assessing plaintiffs' reasonable expectations (AS [43]; and see PJ [918]).

Ground 3: Funding Commission

14. The Appellants only agreed to be plaintiffs because of the funding agreements: AS [45]; PJ2 [27]-[30]; AFM 93 (Hunt); AFM 99 (Zisti). The funder acquired a contingent interest in any successful claim: (PJ2 [45]-[53]). The funder only funded on the basis of the commission (PJ2 [31]-[40]). The reasonableness of the rates was not determined by PJ (PJ2 [41]-[44]). Absent the funding agreements, the Appellants would not have prosecuted their claims.

15. The nuisance caused the Appellants the loss of the capacity to generate profits absent the nuisance. That asset was replaced with an asset being a nuisance claim. That asset was not realisable absent the funding agreements. The Appellants were practically obliged to assign to the funder a portion of that asset. That was a consequential loss of the nuisance. A commonsense material cause of the decision to enter into the funding agreements was the state of affairs created by the Respondent, a foreseeable risk of that loss. (AS [49]; PJ [131], [188]). It was not relevantly "voluntary" (AS [51]-[55] contra CA [194]-[195]).

Medlin v SGIC (1995) 182 CLR 1 (JBA3/26/713 pdf 82 at 6-12, 20, 23) (AS [54])
March v Stramare (1991) 171 CLR 506 (JBA3/25/681 pdf 50 at 517-519, 534-535) (AS [54])
Unity (2013) 250 CLR 375 (JBA3/30/862 pdf 231 at [22]-[24], [34], [36]) (AR [33]).

16. The importance of funding arrangements to access to justice in class actions and the reality that funders require a commission to fund is recognised in *Bogan v Estate of Smedley* (2025) 99 ALJR 619 at [77], [104] (AS [53] fn 52) and *Campbell v Fostif* (2006) 229 CLR 386 at [65]. Recognising a reasonable funder's commission as damages provides full access rather than partial access to justice: AS [47]-[50].

17. CA reason (2), no incentivisation (AS [51], [56]; CA [199]-[201]). CA reason (3), litigation funding is not costs (AS [51], [57]; CA [202]-[204]). CA reason (4), accrual after judgment not relevant (AS [51], [58]; CA [205], [206]).

Dated: 15 May 2025

A J L Bannon

Senior Counsel for the Appellants