HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA **No. S20 of 2025**

SYDNEY REGISTRY

BETWEEN: HUNT LEATHER PTY LTD ACN 000745960
First Appellant

ANCIO INVESTMENTS PTY LTD ACN 136917041
Second Appellant

and

TRANSPORT FOR NSW
Respondent

No. S21 of 2025

BETWEEN: 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' REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

No free-standing test of reasonableness (ground 1)

2. The respondent's case departs from years of carefully worked through authority, tracing back to *Bamford v Turnley*[1] and recently affirmed in the United Kingdom,[2] to the effect that, subject to any applicable defence, a defendant's use of land will be a nuisance if it substantially interferes with a plaintiff's enjoyment of their land and is not a use which is common or ordinary. The respondent asks this Court to abandon that finely developed doctrine in favour of a generalised enquiry into reasonableness that is "entirely open ended and lacking in content".[3] The respondent does not engage with any of the considered criticisms of that approach articulated in *Fearn*. The effect of the respondent's position is that the appellants are not entitled to <u>any</u> compensation for what was, on any view, a substantial and enduring interference with the amenity of the land from which they conducted their businesses, unless they can prove that the use of that land for a major infrastructure project was, by some unspecified metric, "unreasonable".

3. The submissions at RS [29]-[46] replicate the Court of Appeal's error of elevating context-specific discussions of "reasonableness" appearing in the authorities into a standalone test for a court to apply independently of assessing whether an interference is substantial or whether the use of land is common and ordinary. It is not in contest that notions of reasonableness may inform, for example, whether an interference is substantial. In *Gaunt v Fynney* (1872) 8 Ch App 8 (cited at RS [37]), the question was whether the noise complained of amounted to a substantial interference (described in the headnote as "[t]he amount of annoyance which will induce the Court to interfere"). The proposition for which Lord Selborne cited ***St Helen's Smelting Co*** *v Tipping* (1865) 11 HLC 642 was that "the law does not

[1] (1862) 3 B & S 62 at 83-84; 122 ER 25 at 33 (Bramwell B).
[2] ***Fearn*** *v Board of Trustees of the Tate Gallery* [2024] AC 1 at [20], [24]-[35] (Lord Legatt, Lords Reed and Lloyd-Jones agreeing); *Jalla v Shell International Trading and Shipping Co* [2024] AC 595 at [18] (Lord Burrows; Lords Reed, Briggs, Kitchin and Sales agreeing).
[3] *Fearn* at [20].

regard trifling inconveniences",[4] for which the case was cited in *Fearn* in the context of explaining that an interference must be substantial: cf RS [37]-[39].

4. Nor is it controversial that, where a defendant's use of land is common and ordinary, a defence is available if the land use was "conveniently done" i.e. done with reasonable and proper care and skill: AS [11], [22]. ***Harrison** v Southwark & Vauxhall Water Co*,[5] cited at RS [41], is an example. The defendants having caused a substantial interference through ordinary use, the question became whether the defendants had "a good defence by reason of their reasonable skill and care, and the absence of negligence".[6] The respondent seeks, impermissibly, to extend the availability of that defence to *all* cases, in an effort to overcome the findings below that the construction of the light rail was not a common or ordinary use of land. It also seeks to burden the plaintiff with proving *un*reasonableness.

5. The respondent urges the Court to adopt its proposed test in the interests of flexibility and on the premise that the "common and ordinary usage" standard is unduly "narrow": RS [26], [32], [39], [42], [45], [48]. The respondent has failed to demonstrate, however, how an open-ended enquiry into reasonableness is a more workable standard than "common and ordinary use". It does not explain how, in a claim for the vindication of private rights, courts are to balance the private interests of land-users against the social utility of public works, untethered to any more concrete standard such as common and ordinary usage.[7] Nor does it explain how a plaintiff can in practical terms discharge the onus of proving that a

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[4] *St Helen's Smelting Co* at 653-654 (Lord Wensleydale) ("the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected"), cited in *Gaunt v Fynney* at 11.

[5] [1891] 2 Ch 409.

[6] At 413 (Vaughan Williams J). The pleading precedent relied upon at RS [38] cites the case for the proposition that "[m]ere temporary inconvenience from noise or dust, caused by an occupier or owner of land in the execution of lawful works in the ordinary user of the land, and without negligence, is not a nuisance": *Bullen and Leake's Precedents of Pleadings* (6th ed, Sweet & Maxwell 1905) at 455.

[7] The respondent's reliance on the passage from *St Helen's Smelting Co* extracted at RS [35] is misplaced. As RS [36] acknowledges, Lord Westbury was there discussing the well-established locality principle (see *Fearn* at [38]-[41]). In the sentence following that extracted, his Lordship gives the example of a man who "lives in a street where there are numerous shops" and complains when "a shop is opened next door to him". The extract should not be read as inviting a court to adjudicate upon whether (using Lord Westbury's language) operations of trade are "actually necessary" for trade and commerce, the enjoyment of property, or the benefit of the township and the public. The same can be said of *Clarke v Clark* (1865) LR 1 Ch App 16 at 18, cited at RS fn 33, which compared the expectations of a plaintiff living in a "large and populous city" to one who "live[s] in the country".

program for the carrying out of major public works was unreasonable, this being a matter a defendant is far better positioned to address.[8]

Unreasonable interference was in any event demonstrated (ground 2)

6. The Entire Period Claim (RS [53]-[58]): That the Court of Appeal ought to have found actionable nuisance for the entire period is a consequence of the respondent's failure to discharge its burden on reasonable precautions. Contrary to RS [54], the appellants did not at first instance "concede" that the Court would "have to conclude when" the interference "became" unreasonable or that the IDP was the "correct benchmark" for that purpose. Rather, the appellants observed that if the respondent's use was found to be common and ordinary, the IDP could be a basis for working out – in that context – a reasonable duration for the interference.[9] If the use was common and ordinary, it might be presumed that some degree of interference had to be tolerated. If, however, the use was *not* common or ordinary (as the primary judge and the Court of Appeal both held), any starting presumption of reasonableness would fall away. Hence, the "Entire Period Claim" now advanced is not a "new" Case C. It rests on the concurrent findings regarding common or ordinary use.

7. The appellants have never taken up the burden on reasonable precautions; the respondent bears that onus.[10] In ***Andreae*** *v Selfridge & Co* [1938] 1 Ch 1 at 9 and *Hiscox Syndicates v The Pinnacle Ltd* [2008] EWHC 145 (Ch) at [30] the burden was expressly and emphatically described as resting with the defendant. That is because "the existence or otherwise of reasonable and proper steps is essentially a matter peculiarly within the knowledge of the person conducting the construction" or other works causing interference.[11] Contrary to RS n70, in *Harrison* the defendants were held to carry the onus (see at 413: "the Defendants have a good defence"). In *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1, the question was whether a claim for noise, dust or vibration was

[8] The submission at RS [51] further underscores the inaptness of seeking to introduce, into a private tort, a test centred on the reasonableness of a public authority in pursuing works in the public interest.
[9] See T2045.39-2046.29 at RBFM p1011-1012. See also the appellants' reply at [48] at RBFM p1009, where it was suggested that "[b]eyond the IDP period, the Court *may* conclude there was an actionable nuisance …" (emphasis added).
[10] The exchange before the Court of Appeal on this point is at RBFM p1020 line 17-48.
[11] *Hiscox* at [30] (Judge Hodge QC).

"actionable at common law": see 12G. That explains the use of "actionable" at 13B; it was not intended to denote that the plaintiff bore the onus. What a plaintiff had to show, according to Lord Hoffmann, was a lack of "reasonable consideration for the neighbours". That is not the same as an onus to prove that reasonable precautions were not taken.

8. As to RS [55], the appellants agree the question is whether the *interference* was reasonable.[12] The respondent posits a two-stage test, whereby the claimant must first make out an unreasonable interference before the defendant's use of reasonable precautions arises for consideration. The true test, however, could only be whether the defendant used reasonable precautions *as part of* assessing whether the interference was unreasonable. It would be absurd to reach a conclusion as to the reasonableness of an interference without examining the precautions taken against that harm. The primary judge adopted a one-stage test (PJ [813]-[814]) and the Court of Appeal agreed with his approach (CA [149]). The appellants alleged below that the interference was substantial from day one[13] and that the question of unreasonableness turned on whether *the respondents* could show[14] the work was conveniently done. The appellants did not bear some additional burden (akin to a plaintiff's in negligence) to show that, "but for" those shortcomings, the occupation would have been for some specific shorter time.

9. RS [56] misses the point. The point at AS [36] was that the Court of Appeal incorrectly demanded that the appellants prove that the respondent had not taken all reasonable precautions. The Court dismissed the claim on the basis that the Amended IDP – deployed by the appellants for a different purpose[15] – did not prove unreasonableness. The Court did so despite a simultaneous finding that the respondent had not shown that it had taken all reasonable precautions to minimise the impact of the work on the appellants (because the respondent had not shown it had used reasonable care and because as a matter of fact[16] its approach to

[12] Ground 2 is framed by reference to "use" because that reflects the language used by the CA at [96], [120] (reproducing a passage from *Gartner v Kidman* (1962) 108 CLR 12 at 47 referring to "the reasonable use of … lands"), [137] and the CA's conclusion at CA [96] that the appellants had not proved that the conduct of the respondent in its use of the land culminated in an unreasonable interference.
[13] See RBFM p1020 line 21-30; PJ [90].
[14] "[I]t is not for the plaintiff … to indicate to the defendants what steps they should take in order to be reasonable": *Daily Telegraph Company Ltd v Stuart* (1928) 28 SR (NSW) 291 at 295 (Long Innes J).
[15] Namely to prove causation: PJ [58].
[16] See the concurrent findings at PJ [779] and CA [109]-[114].

utilities prolonged the interference). It must follow that it was open to the trial judge to find a lack of "reasonable consideration for the neighbours."

10. Contrary to RS [57], the reference in *Andreae* to "unreasonable hours" is not a finding that the interference as a whole was unreasonable. Those words were used in working out "the question of damage". Similarly, the statement that the quantity of dust and grit was "quite insufferable" is not a finding of unreasonable interference. That is clear from the passage following, dealing with whether it was something the plaintiff was required to endure.

11. There is no risk of "abuse" if the appellants' view is upheld; cf RS [58]. There is nothing unfair in placing on a builder – the person familiar with the work – the burden to show that it has taken all reasonable steps to minimise the interference. That may be contrasted with requiring the innocent neighbour to prove that some other way of doing the work was available and would have reduced the impact to some specific degree.

12. The alternative Partial Period Claim (RS [59]-[63]): It is not accurate to say that the appellants "rely" upon the Amended IDP to "prove the point in time at which the interference … became unreasonable". The question of whether the interference was unreasonable fell to be answered by an evaluation of all the evidence. On that evidence, the primary judge found substantial interference from day one.[17] That finding was not challenged below. Having found the interference was substantial, the trial judge approached the question of reasonableness by weighing various, specified factors in an evaluative assessment: PJ [912]-[915], [918]. That did not involve treating the Amended IDP as establishing *as a matter of fact* the "counter-factual" duration of the works beyond which the interference was unreasonable. In the passage of his judgment considering the question of reasonableness, the primary judge refers to the IDP solely as evidence of "the period of the interference [that] the defendant had assured business owners would occur": PJ [914]. The multi-factorial evaluation adopted by the primary judge is the very approach the respondent now says is required when it urges on this Court

[17] The trial judge said that "The Court hardly needs an expert on noise to understand that the regular use of jackhammers, grinders, diggers and heavy vehicles would create a level of noise and dust that would substantially interfere with the amenity of a shop adjacent to such works" and held that the interference was substantial from the start of construction work: PJ [864], [869].

Lord Sales' broader "flexible" test that takes account of "all the relevant circumstances of the case": cf RS [32].

Notice of contention

13. Not a common or ordinary use of land (NoC grounds 1(a), (c)) (RS [65]-[69]): The Court should not entertain ground 1(a) of the notice of contention, which seeks to overturn the concurrent findings of fact made by the primary judge and the Court of Appeal, that the respondent's use of land was not common and ordinary. As the plurality in *Commonwealth v* ***Sanofi*** [2024] HCA 47; 99 ALJR 213 recently reaffirmed, absent special or exceptional circumstances such as plain injustice or clear error, this Court will not engage in a detailed review of concurrent factual findings of lower courts.[18] That is a "long-standing" principle, which reflects, and is rooted in, the nature of an appeal to this Court as an appeal *strictu sensu*.[19] The function of the Court "is not simply to give a well-resourced litigant a third opportunity to persuade a tribunal to take a view of the facts favourable to that litigant".[20] Concurrent findings "may exist at different levels of particularity — with or without an element of normative judgment", and in the application of the "clear error" principle, "it is immaterial that the concurrent findings of fact were of primary fact or involved conclusions and inferences drawn from primary facts".[21] Overturning concurrent findings is a "high bar"[22] and if the findings of fact made in the courts below *appear* to be correct, the burden will not be discharged.[23] The Court must hold a "clear conviction" that the findings made at trial *and* confirmed by the intermediate appellate court, understood in light of the arguments put by the parties at trial and on appeal, are clearly wrong.[24] It is not enough that an ultimate appellate court

[18] *Sanofi* at [25] (Gordon A-CJ, Edelman and Steward J).
[19] *Sanofi* at [25]-[26].
[20] *Sanofi* at [26], citing *Roads and Traffic Authority of New South Wales v* ***Dederer*** (2007) 234 CLR 330 at [5] (Gleeson CJ).
[21] *Sanofi* at [27], citing *Louth v Diprose* (1992) 175 CLR 621 at 634 (Deane J).
[22] *Sanofi* at [28], citing *Baffsky v Brewis* (1977) 51 ALJR 170 at 172 (Barwick CJ, with whom Stephen, Mason, Jacobs and Aickin JJ agreed).
[23] At [28], citing *Bridgewater v Leahy* (1998) 194 CLR 457 at [43], [47] (Gleeson CJ and Callinan J).
[24] *Sanofi* at [28], citing *Dederer* at [6] (Gleeson CJ), citing ***Graham Barclay Oysters*** *Pty Ltd v Ryan* (2002) 211 CLR 540 at [53]-[54] (Gleeson CJ), in turn citing *Owners of the "P Caland" and Freight v Glamorgan Steamship Co* [1893] AC 207 at 216 (Lord Watson).

would simply reach a different conclusion of its own.[25] The principle applies no less if there were differences in the reasoning of the primary judge and the intermediate appellate court.[26] The respondent here has neither sought to show, nor shown, special or exceptional circumstances, or that the reasoning below was clearly wrong or plainly unjust.

14. Further and in any event, the respondent has not demonstrated any error in the primary judge's and the Court of Appeal's findings that the respondent's use of the land was not common and ordinary, that being a "matter of impression and evaluation" (PJ [654]). The respondent mischaracterises the findings below, and urges the Court to adopt a presumption of ordinariness unsupported by authority.

15. The summary at RS [66] of the primary judge's reasoning at PJ [653]-[655] is inaccurate and reductionist. The primary judge rejected the respondent's attempt to assimilate the Sydney Light Rail project to ordinary roadworks. The primary judge correctly observed that "roadworks do not normally involve the laying of rail tracks on a road, the excavation of the road surface and the erection of platforms or stations along some of Sydney's busiest streets": PJ [655]. In that context the primary judge observed that the respondent was "not a roads authority" and its powers and functions "included the development and administration of public transport systems": PJ [655]. The respondent's description of laying tram tracks as "unusual" (RS [66]) grossly understates the disruption caused by a major infrastructure project of this kind.

16. Similarly, the Court of Appeal did not find that the use of the land was not common and ordinary merely because it "prevented public access to the road and required planning permission": RS [66]. Instead, the near-ubiquitous nature of planning laws explained why the respondent was not assisted by Lord Leggatt's statement in *Fearn* at [37] that "the right to build (and demolish) structures is fundamental to the common and ordinary use of land"; cf RS [67]. As the Court of Appeal correctly observed, there is no absolute right to build or demolish a structure on one's own land, a point which is underscored by the requirement, in

[25] *Sanofi* at [28], citing *MW v Director-General, Department of Community Services* (2008) 82 ALJR 629 at [184] (Kirby J), in turn citing other authorities.
[26] *Sanofi* at [28], citing *Louth v Diprose* at 634 (Deane J); *Bridgewater v Leahy* [43] (Gleeson CJ and Callinan J); *Graham Barclay Oysters* at [52] (Gleeson CJ).

most cases, for planning permission: CA [123]. Nor did the Court of Appeal suggest that every interference with access to a road, whatever its scale and duration, would constitute a nuisance. The construction of the light rail was not ordinary roadwork: it was an occupation "for the purpose of construction, in part to do work, in part to store equipment and materials, but mostly because it was not possible to complete the works because of other steps which had first to be taken (such as treating thousands of utilities)": CA [122].

17. The fact that land is used for building and construction does not answer, one way or another, the question of whether its use is common or ordinary. So much is amply demonstrated by the result in *Fearn*: after making the remarks quoted at RS [67], Lord Leggatt went on to find that the viewing platform at the Tate Modern "went far beyond anything that could reasonably be regarded as a necessary or natural consequence of the common and ordinary use and occupation of the Tate's land": *Fearn* at [74].

18. The respondent's hypothesised presumption of ordinariness in the context of construction work is unsupported by authority. It was no part of Sir Wilfrid Greene's reasoning in *Andreae* to say that building and construction work is presumptively ordinary: cf RS [68]. Rather, *Andreae* is authority for the proposition that even *if* a defendant's use of land is common and ordinary, a substantial interference will still be actionable unless the defendant can show that the use was done with "no undue convenience", meaning with reasonable and proper care and skill.[27] That is simply an articulation of Bramwell B's "conveniently done": [28] see AS [11], [35]. The respondent's hypothesised presumption, in contrast, imposes on an adjacent landowner the unworkable burden of proving how a major infrastructure project should have been carried out: cf RS [69].

19. Substantial interference not authorised by statute (NoC ground 1(b)) (RS [70]-[[74]): The Court of Appeal correctly rejected the respondent's submission that the nuisance was an inevitable consequence of statutory authorisation: CA

[27] *Andreae v Selfridge & Co* [1938] 1 Ch 1 at 5-6.
[28] *Bamford v Turnley* (1862) 3 B & S 62 at 83-84; 122 ER 25 at 33.

[127]-[134]. This was a matter in respect of which the respondent bore the onus,[29] and yet was addressed in only three paragraphs of its written submissions below: CA [131]. The Court of Appeal held that the respondent had not made out this defence, because it had not proffered a basis for concluding that the delays constituting the nuisance were inevitable: CA [132]-[133]. Contrary to RS [70], the logic of that reasoning is an answer to the respondent's submissions on this ground. If the *delay* for the course of the "Partial Period Claim" was not inevitable, then it follows that the substantial interference for the whole of the occupation period was also not inevitable.

20. The respondent does not challenge the correctness of the authorities canvassed at CA [128]-[129]. The effect of those authorities is that, where a statute permits but does not require a specific activity to be carried out, the defence of inevitability is only made out if "what the legislation authorised could not be done without creating a nuisance", i.e., the nuisance could not have been avoided by the proper exercise of the statutory power.[30] That is because "Parliament will not be taken to have intended that powers should be exercised, or duties performed, in a way which causes an interference with private rights where such an interference could have been avoided".[31] This reflects the wider principle that "legislation is not construed as depriving individuals of their rights unless it does so expressly or by necessary implication".[32]

21. The respondent seeks to dilute this requirement of inevitability into a more nebulous "'common sense' approach": RS [74]. Such a test is of uncertain parameters and has the potential to substantially undermine the premise of the defence. This is exposed by the suggestion, at RS [74], that it is enough for the respondent to show that it was "clear from the project's earliest stages that construction would be disruptive and lengthy". The respondent accepts it did not

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[29] *Benning v Wong* (1969) 122 CLR 209 at 309 (Windeyer J), quoting *Manchester Corporation v Farnworth* [1930] AC 171 at 183 (Viscount Dunedin).
[30] *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287; [2012] WASCA 79 at [122]-[123].
[31] ***Manchester Ship Canal Company*** *Ltd v United Utilities Water Ltd (No 2)* [2024] UKSC 22 at [18] (Lord Reed PSC and Lord Hodge DPSC).
[32] *Manchester Ship Canal Company* at [20]. See also *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at [43], citing *Clissold v Perry* (1904) 1 CLR 363 at 373 (Griffith CJ).

prove it was powerless to shorten the interference.[33] The respondent's position falls well short of the inevitability that is a necessary component of the inevitable consequence defence.

22. The posited test is not supported by *Truman*.[34] There, there was no challenge to the manner in which the defendants used their land for cattle pens and a dockyard; the only question was whether, as a matter of construction, the relevant legislation authorised the defendants to select the particular site on which the cattle pens were erected.[35] The respondent's position is in any event inconsistent with the more recent authority cited at CA [128]-[129].

23. The respondent's "further reasons" (NOC grounds 1(d), 2 and 3): There is an obvious irony in the respondent urging on this Court a "wide-ranging" test involving a consideration of "all of the circumstances" (see RS [26(b)]) whilst also submitting at RS [76]-[84] that after a trial that lasted almost six weeks (CA [3]) and the tender of an "extraordinary" volume of material (PJ [60]) the primary judge did not have sufficient evidence to decide whether the interference caused by the construction project was unreasonable.

24. The submission that the appellants "failed … to prove that [the interference] could and should have been made shorter by TfNSW not making identifiable planning or contracting errors" is simply wrong: cf RS [83]-[84]. As explained, there are concurrent findings that the contracting conduct caused occupation to have been longer than it would otherwise have been.[36] There cannot be a need for the precise period of prolongation to have been foreseen or foreseeable.[37] As to RS [77]-[82], planning authorities may have regard to a range of considerations and objects in determining whether to grant planning permission; it is not the role of a planning

[33] The respondent rightly attributes solely to its witness the opinion that the time to deal with utilities would always have "had a similar effect on … overall completion"; the CA was incorrect when it said at CA [43] that that evidence was agreed between the experts.
[34] *London, Bright and South Coast Railway Company v Truman* (1885) 11 App C 45.
[35] The case pre-dates the modern law of negligence, and the use of the word "negligence" must be understood in that context (e.g. Lord Halsbury LC's statement that "[n]either the statement of claim nor any finding by the learned judge suggests that the defendants were guilty of any negligence in the use of the cattle pens and dockyard, as distinguished from the selection of its site").
[36] See fn 18 above.
[37] See PJ [663]; CA [49]-[53].

authority to determine a neighbour's common law rights.[38] The interplay between statutory permission and nuisance is instead worked out through the application of the inevitable consequence principle (see [19]-[22] above).

Section 43A of the *Civil Liability Act 2002* (NSW) (NOC ground 4)

25. **No application to a nuisance claim.** The respondent cannot succeed on ground 4 without asking this Court to depart from settled intermediate appellate authority which holds that s 43A of the ***Civil Liability Act*** *2002* (NSW) does not apply to a claim in nuisance. It is well-established in New South Wales that s 43A "assumes the existence of a duty of care and identifies the standard to be applied in determining whether that duty has been breached".[39] It has been described as "plain that the drafter of s 43A was attempting to ameliorate the rigours of the law of negligence".[40] It is in that context that the Court of Appeal (CA [175]) and the primary judge (PJ [175]) observed, correctly, that s 43A does not strictly provide a "defence", but rather imposes an attenuated standard of care,[41] akin to the standard of *Wednesbury* unreasonableness.[42]

26. That s 43A has this limited operation is reflected in its legislative history. As the respondent acknowledges (RS [91]), s 43A was enacted in response to *Presland v Hunter Area Health Service* [2003] NSWSC 754. There, a trial judge awarded damages to a mentally ill patient who, having killed his brother's fiancée, sued the hospital for having negligently discharged him, and was awarded damages for his pain and suffering and economic loss. The extrinsic material makes it clear that the purpose of s 43A was "to ensure that there will not be a repeat of the kind

[38] The respondent accepts that its position diverges from that of the English courts (RS [78]). See *Lawrence v Fen Tigers* [2014] AC 822 at [95] ("a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action") and [92] ("[s]hort of express or implied statutory authorisation to commit a nuisance… there is no basis… for using such a scheme to cut down private law rights"); and *Fearn* at [109]-[110].

[39] *Roads and Maritime Services v Zraika* (2016) 94 NSWLR 159 at [109] (Leeming JA; Gleeson and Simpson JJA agreeing). See also *MM Constructions (Aust) Pty Ltd v Port Stephens Council* [2012] NSWCA 417 at [213] (Basten JA, Bergin CJ in Eq agreeing at [229]).

[40] *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102 at [177] (Allsop P; Beazley JA agreeing at [199] and McColl JA agreeing at [200]).

[41] See *Della Franca v Lorenzato* [2021] NSWCA 321; 250 LGERA 136 at [8] (Basten JA), [107] (Macfarlan JA) and [147] (Brereton JA).

[42] As to which, see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [28], [68] (Hayne, Kiefel and Bell JJ), [88] and [108] (Gageler J).

of decision made in the *Presland* case"[43]; cf RS [91]. The Second Reading Speech to the Bill which introduced s 43A explained that the case highlighted:

> the difficulties faced by people who have statutory decision-making powers— such as doctors or psychiatrists. On the one hand, the law gives them a broad discretion to exercise their decision making powers. However, despite those people having a broad discretion, negligence laws can constrain the exercise of those powers. This was highlighted in the Presland case, where a doctor was found to be negligent for the way he exercised the discretion given to him under the Mental Health Act.[44]

27. Section 43A was introduced in this "very specific context" and was not designed to confer, "by a statutory sidewind, large and significant protections which never previously existed".[45] Its purpose was "to ensure that a defence framed in terms of *Wednesbury* unreasonableness was available to public or other authorities in answer to a claim in negligence (as opposed to breach of statutory duty").[46]

28. **No liability 'based on' the exercise, or non-exercise, of a special statutory power.** Even if s 43A were capable of applying to a nuisance claim, the appellants' claim in the proceedings below was not based on the exercise, or failure to exercise, a special statutory power. Section 43A, in terms, applies only "to the extent that" a defendant's liability is "based on" the exercise of, or failure to exercise, a statutory power, as distinct from merely "involving" it.[47] The distinction is important, because s 43A requires an applicant to identify a specific statutory power that it contends was exercised, or not exercised, negligently. As the primary judge observed, in nuisance the "basis of liability is the harm experienced by the plaintiffs, not the nature of the defendant's conduct": PJ [717]. The distinction is another reason why s 43A does not apply to a nuisance claim.[48]

29. The putative "special statutory power" on which the respondent relies is s 104O(1) of the ***Transport Administration Act*** *1988* (NSW), as previously in force: RS [89]. Section 104O(1) empowered the respondent to "develop light rail

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[43] **Second Reading Speech for the Civil Liability Amendment Bill 2003** (NSW), Hansard, NSW Legislative Assembly, 13 November 2003, p. 4992.
[44] Second Reading Speech for the Civil Liability Amendment Bill 2003, p. 4993 (emphasis added).
[45] ***Doyle's Farm Produce*** *Pty Ltd v Murray-Darling Basin Authority (No 2)* (2021) 106 NSWLR 41 at [9] (Bell P).
[46] *Doyle's Farm Produce* at [80] (Leeming JA).
[47] ***Gales Holdings*** *Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514 at [196]-[197] (Emmett JA) and [283] (Leeming JA).
[48] *Gales Holdings* at [196]-[197] (Emmett JA) and [283] (Leeming JA).

systems, or facilitate their development by other persons". That power is said to have founded an assortment of construction and procurement activities which, together, form the basis of the respondent's liability: RS [88].

30. Section 104O(1) is expressed at too high a level of generality to be a "special" statutory power. As the primary judge correctly recognised, what demarcates a statutory power as "special" is that it is of a kind that requires specific authorisation; it is not exercisable under a provision that is generally expressed: PJ [744]. The extrinsic materials reveal a specific intention that s 43A "not affect the exercise of 'operational' functions of agencies, for example, where they are given general functions to provide particular services".[49] That is consistent with the wider legislative scheme, under which a public authority is not shielded from liability in negligence merely because the function it performs is statutory.[50]

31. The acts referred to by the respondent at RS [88] – construction and procurement activities – are not acts of a kind which "persons generally are not authorised" to do. Professor Aronson has suggested that s 43A(2)(b) "distinguish[es] statutory authority per se (such as a statutory corporation's authority to operate a recreational facility) from statutes permitting coercive acts or non-consensual rights-depriving acts", such that to engage the provision a defendant "must have received statutory authority to act in a way that changes, creates or alters people's legal status or rights or obligations without their consent".[51] On any view, a public authority that engages in ordinary operational functions, such as entering into contracts, does not take the benefit of s 43A, which was introduced to address the specific mischief described at [26]-[27], above. It is beside the point that "persons generally are not authorised to develop a light rail system on public roads": cf RS [89]. It will almost always be the case that a statute confers on a statutory officer or body power that it would not otherwise have in its capacity as an individual or corporation; that is what marks the power as statutory. That does not make it "special", as required by paragraph (b) of s 43A.

[49] Second Reading Speech for the Civil Liability Amendment Bill 2003, p. 4993.
[50] See David Ipp et all, *Final Report into the Law of Negligence*, September 2002 at [10.21], giving the example of a public servant who drives negligently in the course of performing a statutory duty.
[51] Mark Aronson, "Government Liability in Negligence" (2008) 32(1) *MULR* 44 at 78-79.

32. Even if s 104O(1) of the *Transport Administration Act* were capable of being a "special statutory power", the respondent seeks to shoehorn into that provision a much wider range of acts than the provision authorises. Precisely how the "construction activities" later carried out by contractors were a "manifestation" (RS [88]) of the respondent's power under s 104O(1) is not fully developed. Further, the respondent has no satisfactory answer to the primary judge's finding (at PJ [739]-[740]) that s 104O(1) could not have authorised planning and procurement activities prior to 11 September 2015, because prior to that date the Sydney Light Rail was not a "light rail system" within the meaning of s 104N(1). A light rail system is "a system for the provision of light rail services along a route declared under subsection (2)". Until a route is declared, a proposed system is not a "light rail system". The respondent's submission to the contrary ignores the text of s 104N(1) and the obvious intention that the statutory authority's powers be confined to those routes that had been specifically designated for development, on the recommendation of the Ministers referred to in s 104N(3).

Reasonable litigation funding costs are recoverable as damages in tort (ground 3)

33. The following reply points arise from the respondent's submissions on ground 3. **First**, there is no neat conceptual distinction between, on the one hand, a "loss", and on the other hand, consideration flowing under a contract (RS [95]). A defendant whose tort causes a person to enter into a contract which they otherwise would not have had to enter into, may be held liable for the loss thereby incurred through the consideration passing under the contract. One example is a tort (or breach of contract) which causes the innocent party to face a third party claim which is then settled; whether the settlement sum can be recovered from the wrongdoer depends on ordinary principles of causation and remoteness.[52]

34. **Second**, neither the fact that group members' decisions to enter into funding agreements was "free and informed" nor the fact that this would cause some group members to recover more than others is a persuasive reason to hold that the causal chain has been broken (RS [96]-[98]). The respondent entirely misses the context of a mass tort; inherently most if not all persons affected will be unable practically to vindicate their rights in an individual action. There is no suggestion in the

[52] *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at [34] (McHugh J).

evidence that any group member entered a litigation funding agreement to "inflate" its damages; rather they did so because without those agreements there could be no action at all. For that reason, it is not contrary to "common sense" to say that the respondent's interference with the appellants' use and enjoyment of their land caused a need for them to enter into the litigation funding agreements.

35. **Third**, the respondent's submission as to moral hazard (RS [99]) is baseless. Restricting recovery of any funding commission to what is reasonable is not a matter of discretion, but rather proceeds from the basis that only a reasonable funding commission could amount to reasonably foreseeable loss. To the extent that group members agreed to pay an unreasonable commission, they would not be able to recover. There is no evidence or other basis for the Court to conclude (and the Court of Appeal did not conclude) that to allow recovery of a funder's fee as damages would "distort the market's assessment" of what a reasonable funding commission may be.

36. **Fourth**, RS [100] seeks to put a gloss on CA [202], and does not reflect the actual reasoning of the Court of Appeal. In so doing, it implicitly concedes the error. Either litigation funding costs are correctly characterised as legal costs or they are not. The correct characterisation is that they are not legal costs. As such, questions as to the "evasion" of the supervisory costs jurisdiction do not arise.

37. **Fifth**, the submission at RS [101] does not reflect the proper construction of the litigation funding agreements. The funding agreements provide for each claimant to pay the funder its pro rata share of the "Funder's Commission" (cl 7.1, RBFM 894), which is (here) 40% (RBFM 913) of any "Resolution Sum" (Sch 1, item 1.58 RBFM 909). The proper analysis is that when judgment is given for a claimant on their personal claim, the funder receives 40% of that amount. The funder's entitlement is thus satisfied. If the claimant then recovers the commission itself as damages, the funder has no further entitlement; this would be a perverse outcome not contemplated by reasonable contracting parties.

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