HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S20 of 2025

BETWEEN: HUNT LEATHER PTY LTD ACN 000 745 960
First Appellant

ANCIO INVESTMENTS PTY LTD ACN 136 917 041
Second Appellant

and

TRANSPORT FOR NSW ABN 18 804 239 602
Respondent

No. S21 of 2025

BETWEEN: HUNT LEATHER PTY LTD ACN 000 745 960
First Appellant

SOPHIE IRENE HUNT
Second Appellant

ANCIO INVESTMENTS PTY LTD ACN 136 917 041
Third Appellant

NICHOLAS ZISTI
Fourth Appellant

and

TRANSPORT FOR NSW ABN 18 804 239 602
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of argument

2. ***The statutory framework***: The case in private nuisance against the respondent (**TfNSW**) needed to accommodate: **(1)** TfNSW was sued for exercise of a statutory power of 'development' of a light rail system (the **SLR**). **(2)** The 'development' involving TfNSW negotiating, entering and managing a Project Deed under which the actual construction of the SLR would be done by others. **(3)** Ultimately regulation fixed the route of the SLR upon a public road. **(4)** TfNSW, after extensive public consultation, obtained all necessary statutory approvals; such approvals included conditions directed at minimising interferences with neighbouring properties. **(5)** The public's *general* right of passage along a public road (which includes the footpath) was subject to such approvals. **(6)** The public's right of passage along a public road *in a light rail vehicle* necessitated the construction of the SLR: **RS [4]-[11]**.

3. ***The interferences sued upon***: **(1)** The substantial interferences were by noise, vibration and hoardings, being interferences with the *enjoyment* of the Appellants' property, rather than material damage to the property. **(2)** No case was advanced that it was possible to construct a light rail system upon a public road in Sydney without *any* interferences of this kind occurring and persisting for a substantial period of time. **(3)** No case was advanced that there were any particular steps that TfNSW could have been taken during the life of the Project Deed to reduce the *extent* of the interferences throughout construction. **(4)** No breach of any condition of the approvals was established. **(5)** The allegation failed that TfNSW should have planned and procured the development so as to manage better the utilities risk and thereby reduce the period of the interferences; TfNSW's experts being preferred to the Appellants' experts: **RS [15], [18]**

4. ***Case A — NoA Ground 1***: Case A asserted that: **(1)** it was sufficient to establish an actionable nuisance for the *entirety of the period* in which the construction of the SLR caused a substantial interference with the appellants' enjoyment of their land that such construction was not a 'common' or 'ordinary' use of the public road; **(2)** no further enquiry was permitted (save for a defence of inevitability). Correctly as a matter of law, Case A was rejected by both courts below: **RS [19], [21], [24]**

5. ***Nuisance historically***: The history of the law of nuisance presents a richer picture, and a more factually intense and nuanced enquiry in each case, than the appellants or Lord Leggatt JSC in *Fearn* would allow: (**1**) Origins of nuisance: From at least the point at which claims in nuisance could be brought by way of an action on the case, the common law has recognised the need to engage in an exercise of balancing the competing interests of landowners, particularly where

the nuisance complained of is an interference with the use and enjoyment of land (as opposed to material damage to property). (**2**) Industrial Revolution and the 19th Century cases: conflict between residential use and industrial development was ultimately reconciled by the notion of '*reasonable user*', which served as an early town planning mechanism: **RS [29]**. (**3**) *Bamford*: The ratio is that reasonable use by the defendant of its own land (from its own perspective) is not a complete answer to a nuisance claim because the enquiry is a wider one into all the circumstances, albeit with no onus on the defendant on any issue: **RS [30]-[31]**. Bramwell B takes a subtly different approach, but his words should not be construed as a statute: **RS [32]**. (**4**) Subsequent cases: *St Helens Smelting Co v Tipping* and *Harrison* confirm the enquiry is into all of the circumstances, including time, place, object, duration and benefit of the impugned activity, with the onus remaining on the plaintiff to establish that the interference with their use or enjoyment of land is unreasonable: **RS [33]-[39]**. (**5**) Turn of the century: Texts, precedents and cases confirm the breadth of the test and that the onus rests with the plaintiff: **RS [38]-[41]**. (**6**) Remedy: Equity made an injunction available, based upon the private interest considerations between the parties: *Shelfer* **RS [52]**.

6. ***20th Century Australian authorities***: A wide-ranging assessment is required into whether there has been '*a material interference, beyond what is reasonable in the circumstances, with the Plaintiff's use or enjoyment of the land*': *Brown v Tasmania* at [385] (Gordon J), see: (**1**) *Don Brass Foundry Pty Ltd v Stead* [1948]. (**2**) *Gartner v Kidman* [1962]. (**3**) *Fisher v Codelfa Construction (Australia) Pty Ltd* [1972]. (**4**) *Elston v Dore* [1982]: **RS [42]-[46]**.

7. ***The majority in Fearn should not be adopted***: (**1**) A 'common' or 'ordinary' use standard cannot provide a one-size-fits-all solution for the multitude of situations that arise in the modern environment of detailed planning regimes, whether neighbouring properties are under the same or differing zoning requirements. **(2)** It suffers similar flaws to 'non-natural' use under *Rylands v Fletcher*. **(3)** It cannot explain why major construction developments have *not* been held to be actionable merely by causing substantial interference: see *Harrison, Selfridge, Codelfa.* **(4)** It fails to accommodate the body of cases on statutory authority for what would otherwise be a nuisance. **(5)** It is unsatisfactory in de-coupling the remedies of injunction and damages and deferring all considerations of the public interest to the remedy stage: **RS [25]-[51]**.

8. ***If Fearn is adopted — NoC Grounds 1(a)-(c)***: Alternatively, the courts below erred in a matter of mixed fact and law in failing to find: **(1)** That a major construction project, duly authorised by statute, with the object of enabling the public to exercise its right of passage upon a public road by a light rail vehicle, constitutes a 'common' and 'ordinary' use of land (and thus is not actionable *per se* merely because it causes substantial interference with the enjoyment of

neighbouring land): **RS [65]-[69]**. **(2)** The statutory framework and approvals, by authorising the construction of the SLR along the prescribed route, necessarily authorised substantial interferences of the kind sued upon for a lengthy period (even if the precise period was not inevitable). This is a complete answer to Case A: see *Truman* and *Fullarton*. There is no onus on the defendant to prove there was no absence of care taken: see *Cox Brothers*, *Benning v Wong* and *Bankstown City Council v Alamdo Holdings Pty Ltd*: **RS [70]-[74]**.

9. ***Case B — NoC Ground 4***: **(1)** If s 43A of the CL Act applied, the unchallenged factual findings made against the appellants and their experts are such that their appeal must fail. **(2)** Section 43A *did* apply because: **(a)** the appellants' case was "based upon" TfNSW's exercise of its power of development under s 104O(1) of the TA Act (and associated powers); **(b)** such powers were *'special'* within s 43A(2); **(c)** Section 43A is not limited to causes of action which require a failure to exercise reasonable care: **RS [87]-[91]**.

10. ***Case C — NoA Ground 2***: **(1)** No error is demonstrated in the CoA's careful examination and rejection of the primary judge's finding that the Amended IDP provided a sound basis for identifying a point in time at which further construction turned into an unreasonable interference: **RS [59]-[63]**. **(2)** The appellants' attempt to distance Case C from the Amended IDP (**AR [12]**) leaves them with no basis to support that case.

11. ***Additional answers — NoC Grounds 1(d), 2 and 3***: Additional matters of principle, onus and application are relied upon in answer to any or all of the appellants' cases: **RS [75]-[84]**.

12. ***The Appellants' variant on the entire period claim***: (**1**) This case, as explained at **AR [6]-[11]**, is a softer version of the *Fearn* argument, placing an onus on the defendant who is carrying out construction work that is not 'common' or 'ordinary' to prove it has taken all reasonable steps to minimise the interference. **(2)** It was not run as such below and should not be permitted. (**3**) If permitted, it would be an error of law to place a legal onus on the defendant (as opposed to a shifting evidentiary onus) on what is at most one possible part of the larger enquiry **(4)** it depends on cherry-picking and mischaracterising findings made below for different purposes, and which in any event could provide no foundation for an entire period claim: **RS [53]-[58]**.

13. ***Funder's Commission is not recoverable as damages — NoA Ground 3***: Recovery of the Funder's Commission was correctly denied in circumstances where any award of damages must be directed at reversing the consequences of an interference with the amenity of land. No error has been shown in the findings below that TfNSW's conduct: **(1)** was not the legally significant cause of the appellants incurring liability to pay the Funder's Commission; and **(2)** any loss suffered by funded group members was too remote: **RS [92]-[101]**.

Dated: 15 May 2025

Justin Gleeson

Justin Gleeson SC