



## HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

BETWEEN: FARM TRANSPARENCY INTERNATIONAL LIMITED  
Appellant

and

THE GAME MEATS COMPANY OF AUSTRALIA PTY LTD  
Respondent

## APPELLANT'S SUBMISSIONS

## Part I: Certification

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

## **Part II: Concise statement of issues**

2. The principal questions that arise on the appeal are these:

- (1) Did the Full Court of the Federal Court err in holding that, in circumstances where the appellant (**FTI**) holds copyright under the *Copyright Act 1968* (Cth) in film footage of an abattoir operated by the respondent (**GMC**), and FTI created that film in circumstances involving trespass to GMC's premises, GMC is entitled to the benefit of the copyright by the declaration of a constructive trust in the exercise of equity's "exclusive" jurisdiction?
- (2) Did the Full Court err in declaring a constructive trust, and granting certain ancillary relief (including injunctive relief), without deciding that no other form of relief would be adequate?
- (3) By GMC's notice of contention: further or alternatively, should the Full Court have granted injunctive relief in equity's "auxiliary" jurisdiction to restrain FTI from publishing images obtained by it so as to "remedy the trespasses (and their continuing effects)"?

**Part III: Section 78B of the *Judiciary Act 1903* (Cth)**

3. FTI does not consider that notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

**Part IV: Citations of the decisions below**

4. The internet citation of the reasons for judgment of the Federal Court of Australia is *The Game Meats Company of Australia v Farm Transparency International Ltd* [2024] FCA 1455 (**PJ**) (CAB 5).
5. The authorised report of the reasons for judgment of the Full Court of the Federal Court of Australia is *The Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 (**J**) (CAB 84).

**Part V: Facts**

6. FTI is a company limited by guarantee, the stated object of which is to prevent or relieve the suffering of animals (**PJ** [36] (CAB 14-15); Mr Christopher Delforce is a director, and Ms Harley McDonald-Eckersall is an employee (**PJ** [37]-[38] (CAB 15). GMC operates a commercial abattoir at premises that it leases in Eurobin, Victoria (**PJ** [5] (CAB 9)), where it slaughters goats and processes their carcasses (**PJ** [33] (CAB 14)).
7. On FTI's behalf, Mr Delforce and Ms McDonald-Eckersall entered the premises without permission at night on seven occasions between 9 January and 13 April 2024 (**PJ** [6], [44]-[45], [47] (CAB 9, 16-17). The premises were enclosed by six-foot-high cyclone metal chain and barbed wire perimeter fence; signage prohibiting unauthorised entry was displayed; and the killing area was located within a large building onsite (**PJ** [39]-[40] (CAB 15)). While inside, Mr Delforce and Ms McDonald-Eckersall installed equipment to capture video footage of the abattoir's operations (**PJ** [6], [46] (CAB 9, 17)).
8. Subsequently, Ms McDonald-Eckersall reviewed and edited the footage captured by the equipment and prepared a 14-minute compilation (**Compilation**) (**PJ** [8], [50] (CAB 10, 18)). The Compilation is "difficult to watch" and includes (for example) images of goats' throats being cut ("sticking") while the goats were

conscious, and of goats being stunned repeatedly after electronic tongs malfunctioned (*PJ* [51] (CAB 18), [64] (CAB 22-23)).<sup>1</sup>

9. On 3 May 2024, FTI provided the Compilation by way of complaint to the Commonwealth Department of Agriculture, Fisheries and Forestry, being a regulator of GMC (*PJ* [8], [53] (CAB 10, 18-19)).<sup>2</sup> On 5 May 2024, the Department forwarded a copy to GMC, which then became aware of FTI's trespassory conduct (*PJ* [8], [57] (CAB 10, 19)).
10. Around the middle of May 2024, FTI sent the Compilation to the broadcast media organisation, Channel 7 (*PJ* [9], [58] (CAB 10, 19-20)). On 17 May 2024, Channel 7 ran a story about the subject in a local Albury news bulletin (*PJ* [9], [61]-[62] (CAB 10, 20-21)); Channel 7 did not show the Compilation in its broadcast, but did describe aspects of what the Compilation revealed (BFM 5). On the same day, FTI published the Compilation through its own website (*PJ* [9], [63]) (CAB 10, 21-22)). That evening, Mr Delforce and Ms McDonald-Eckersall received by email *ex parte* orders in GMC's favour, restraining FTI from publishing video footage that it had obtained (*PJ* [10], [65] (CAB 10, 23)). FTI thereupon removed the video footage and images from its website (*PJ* [10], [65] (CAB 10, 23)).
11. GMC pleaded claims of invasion of privacy (the alleged privacy being that of GMC's contractors and employees shown in the films),<sup>3</sup> trespass to land, the tort of injurious falsehood, and misleading and deceptive conduct contrary to s 18 of the *Australian Consumer Law* (*PJ* [15]-[17] (CAB 11)). FTI also claimed a constructive trust over FTI's copyright in the films on the basis of trespass and

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<sup>1</sup> While the trial judge did not find that the Compilation reveals conduct that involved the commission of a criminal offence under the *Prevention of Cruelty to Animals Act 1986* (Vic) (*PJ* [107] (CAB 35)), the Compilation clearly reveals conduct that (at least) breached an applicable regulatory standard (*PJ* [42], [55], [108]-[109] (CAB 16, 19, 36)). For example, it reveals a breach of the (objective) standard in Art 7.10 of the *Australian Standard AS 4694/2007 Hygienic Production and Transportation of Meat and Meat Products for Human consumption*, compliance with which is a condition of GMC's licence under the *Meat Industry Act 1993* (Vic): "Before sticking commences, animals are stunned in a way that ensures the animals are unconscious and insensible to pain before sticking occurs and do not regain consciousness or sensibility before dying".

<sup>2</sup> GMC is also regulated by PrimeSafe, being the Victorian regulator under the *Meat Industry Act 1993* (Vic): *PJ* [5] (CAB 9).

<sup>3</sup> Amended Statement of Claim (dated 7 June 2024) (ASOC) [43] (BFM 21).

invasion of privacy<sup>4</sup> and, on the basis that such constructive trust made it the beneficial owner of the copyright.

12. FTI admitted the trespasses (*PJ* [19] (CAB 11)). It denied liability in injurious falsehood and under the ACL (*PJ* [21] (CAB 12)). GMC abandoned the claim of invasion of privacy and proceeded to trial on its claims in trespass, injurious falsehood, misleading and deceptive conduct, and to a constructive trust with respect to FTI's copyright.
13. At trial, his Honour dismissed GMC's claims in injurious falsehood, and in misleading and deceptive conduct. With respect to the admitted trespass, his Honour awarded general damages of \$30,000 plus exemplary damages of \$100,000. However, his Honour rejected GMC's claim for injunctive relief in equity's auxiliary jurisdiction to remedy the trespass (*PJ* [213]-[218] (CAB 60-62)), and refused to impose a constructive trust on the copyright (*PJ* [152]-[182] (CAB 45-54)).
14. On appeal to the Full Court, GMC relied on grounds (1 to 4) contending that the primary judge erred in not awarding injunctive relief in equity's auxiliary jurisdiction to remedy the "continuing" trespass or, alternatively, the "consequences" of FTI's trespasses. The Full Court found it unnecessary to determine those issues. Instead, the Full Court allowed the appeal on GMC's alternative grounds (5 and 6). The Full Court held that a remedial constructive trust should be declared with respect to FTI's copyright, and that certain further relief was appropriate "flowing from" that declaration (*J* [43] (CAB 16)) including a permanent injunction restraining FTI from publishing (except to the Department) any of the images (which injunction was said to be the "natural consequence" of GMC's beneficial ownership of them).

## **Part VI: Argument**

15. The decision below is novel in that no previous case has been identified, in this or comparable foreign common law jurisdictions, in which a constructive trust has been recognised as arising from – or has been imposed to remedy – the tort of trespass to land. Indeed, the case is novel in that equitable relief in respect of torts

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<sup>4</sup> ASOC [45] (BFM 22).

is (with the exception of prohibitory injunctions and equitable relief from fraud) comparatively rare. A case of this kind is nonetheless to be decided in accordance with existing principle. The maxims *ubi ius ibi remedium* and “equity will not suffer a wrong to be without a remedy” form no sufficient guide to such a case,<sup>5</sup> particularly where common law remedies have been granted and are not the subject of appeal to this Court; and other common law and statutory remedies were pursued at trial, and were held to be unavailable.

***Equity’s “exclusive” jurisdiction: error in declaration of constructive trust***

16. In the Full Court, the declaration of a constructive trust over FTI’s copyright in the images was the principal relief. As noted above, the other relief granted – including an injunction permanently enjoining FTI from publishing the videos, and an order requiring FTI to assign the copyright to GMC – was held to “flow from” that declaration rather, than justified on any other basis (*J*[43] (CAB 104)). Accordingly, the relief was issued in the exercise equity’s “exclusive jurisdiction” – wherein equitable doctrines and remedies respond to purely equitable rights and principles, in contrast to equity’s “auxiliary” jurisdiction where equitable doctrines and remedies come in aid of legal rights.
17. The central figure in that analysis, the “constructive trust”, is a varied creature.<sup>6</sup> There exists no unitary type of constructive trust, and no single rule or principle of direct application which determines whether one or another of the various types of constructive trust arise (or may be imposed by the Court). Constructive trusts arise in respect of circumstances as varied as breaches of fiduciary duty, proprietary estoppels, failed joint endeavours, equitable doctrines of tracing, and specifically enforceable agreements. The reasons of principle behind each type of constructive trust differ. Further, the category “constructive trust” is not closed.
18. Yet the incidence of existing categories of constructive trust, while a matter of equity and equitable discretion, is the subject of settled principles and discretion which is to be exercised judicially; any extension of the categories of constructive

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<sup>5</sup> *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177, [70] (Kiefel CJ, Bell and Keane JJ).

<sup>6</sup> *Giumelli v Giumell* (1999) 196 CLR 101, [4].

trust is to proceed in accordance with principle and proper judicial method.<sup>7</sup> Any such development must be coherent with the relevant doctrines and remedies of equity and common law, as well as statute and constitutional principles.<sup>8</sup>

19. Against those measures, the Full Court fell into error in finding that a constructive trust should be imposed on FTI's copyrights in the film recordings.

Error 1 – no basis in principle identified

20. The first error on the part of the Full Court was to impose a constructive trust without first identifying a proper and sufficient basis in principle do so. There is no recognised category of constructive trusts which arises to remedy a “trespass” or “torts”, and no single category of constructive trusts which arises to remedy “wrongdoing” in general. Any basis in principle to impose a constructive trust in this case must necessarily be found in the extension of some existing category or the recognition of a new category through an application, or perhaps extension, of existing principle. None was properly identified.
21. The Full Court's reasoning included the following components. **First**, the Full Court held that observations of four members of this Court decision in *Australian Broadcasting Corporation v Lenah Game Meats*<sup>9</sup> supported the proposition that “there is no objection in legal principle to the imposition of a constructive trust over the relevant copyright which was created by means of unlawful conduct if the circumstances show that it is inequitable and against good conscience for the maker of the film to assert the copyright conferred by the statute”. **Secondly**, the Full Court sought to rely by analogy on various cases in which the constructive trusts were recognised or their principles discussed. **Thirdly**, in substance, what the Full Court proceeded to do was impose a constructive trust consequent to a moral evaluation of FTI's conduct. Those matters will be discussed in turn.
22. **Lenah Game Meats.** The Full Court held that observations of four members of this Court in *Lenah Game Meats* “recognised the principled nature of the

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<sup>7</sup> *Muschinski v Dodds* (1985) 160 CLR 583, 594-5 (Gibbs CJ), 615-16, 621 (Deane J, Mason J agreeing); see also at 608-09 (Brennan J, dissenting in the result).

<sup>8</sup> See e.g. *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539, [44]-[45]. See also *Farm Transparency International Ltd v State of New South Wales* (2022) 277 CLR 537, [90] (Gageler J).

<sup>9</sup> (2001) 208 CLR 199.

constructive trust over copyright which is sought in the present case” (*J*[36] (CAB 102); see also [9]-[16] (CAB 93-95)). This involved error. *Lenah Game Meats* is not authority for what it did not decide, and it did not decide this.

23. Gummow and Hayne JJ contemplated that, in circumstances where the making of a video involved a trespass to land, it “*may*” be that “principle” would justify the imposition of a constructive trust for the party in possession of the land – but noted that such questions “have not been raised or explored in these proceedings”.<sup>10</sup> Gaudron J (at [58]) “agree[d] with the judgment of Gummow and Hayne JJ and with the orders they propose”.<sup>11</sup> While Callinan J specifically agreed with the relevant passage in the reasons of Gummow and Hayne JJ,<sup>12</sup> his Honour’s reasons were dissenting. In particular, Callinan J expressed the view that equity should regard the relationship between the two parties “as a relationship of a fiduciary kind and of confidence”<sup>13</sup> (noting that no such relationship was found to exist between FTI and GMC here), and observed that his analysis “avoids any need to seek to apply, somewhat uneasily, to circumstances to which it may be applicable ... Pt IV (ss 84-113) of the *Copyright Act* 1968 (Cth) as a basis for holding an infringement of copyright on the part of the appellant”.<sup>14</sup>
24. **The “established cases”.** Next, noting this Court’s caution against “general resort” to notions of unconscionability, the Full Court sought to “reason from the established cases where a constructive trust has been imposed in broadly similar circumstances” (*J*[16] (CAB 95)). Some salient differences between the cases which the Full Court discussed, and this case, will be noticed here.
25. The Full Court discussed cases on constructive trusts over intellectual property, and separately discussed the *Pallant v Morgan* line of cases. There are important differences between those two groups of cases. But for present purposes they may be grouped together – for, in all of them, where a constructive trust was

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<sup>10</sup> (2001) 208 CLR 199, [100]-[102], [103]. As the *dicta* were qualified, and the issue was not the subject of argument, it also ought not to be classified as “seriously considered”: see Herzfeld & Prince, *Interpretation*, 3<sup>rd</sup> ed. (2024) at [33.370]; cf. *Price v Spoor* (2021) 270 CLR 450, [18] (Kiefel CJ and Edelman J).

<sup>11</sup> (2001) 208 CLR 199, [58].

<sup>12</sup> (2001) 208 CLR 199, [309].

<sup>13</sup> (2001) 208 CLR 199, [297].

<sup>14</sup> (2001) 208 CLR 199, [309].

recognised, that was done on the basis of either a contractual or a fiduciary or some other consensual basis; and in none of them was a constructive trust imposed in response to the tort of trespass (or any other tort).

26. For example, in each of *Adamson v Kenworthy*<sup>15</sup> and *Sterling Engineering Co Ltd v Patchett*<sup>16</sup> a wrongdoing employee was found to hold a patent on trust for his employer on the basis of incidents of the (consensual) employment relationship. Indeed, in *Sterling*, the House of Lords treated that incident as brought into the parties' relationship by a contractual term implied in law.<sup>17</sup> Similarly, the comments of Williams J in his dissent in *Federal Commissioner of Taxation v United Aircraft Corp*<sup>18</sup> recognise that, by reason of rights which "arise out of contractual or fiduciary relations between individuals",<sup>19</sup> a constructive trust over a patent can arise where patentable information was disclosed to that person for specific purposes only.<sup>20</sup>
27. It is debatable on what principle, or principles, the *Pallant v Morgan* cases stand. The case itself concerned two neighbours who proposed to bid at auction to buy nearby land and agreed to an arrangement whereby the defendant alone was to bid while the plaintiff was to be entitled to some part of the land if the bid be successful. After the defendant's bid succeeded, he decided to retain the whole of the land. The orders of Harman J treated the defendant purchaser as holding the land on trust for himself and the plaintiff jointly. It seems clear that the basis of decision was fiduciary doctrine,<sup>21</sup> albeit some later cases in the *Pallant v Morgan* "line" of authority proceed from some different broader principle.<sup>22</sup> But even on a broader principle, there must be "some agreement, arrangement or shared understanding about the way in which some interest in land will be acquired or

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<sup>15</sup> (1931) 49 RPC 57.

<sup>16</sup> [1955] AC 434.

<sup>17</sup> *Sterling* [1955] AC 434, 543-4 (Viscount Simonds), 547-8 (Lord Reid), 549 (Lord Tucker).

<sup>18</sup> (1943) 68 CLR 525.

<sup>19</sup> *United* (1943) 68 CLR 525, 548.

<sup>20</sup> *United* (1943) 68 CLR 525, 546.

<sup>21</sup> Finn, *Fiduciary Obligations* (1977), §544; *Crossco No. 4 Unlimited v Jolan Ltd* [2012] 2 All ER 754n at [88] (Etherton LJ, in the minority on this point).

<sup>22</sup> For example, *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372.

dealt with”<sup>23</sup> There is no suggestion in the *Pallant v Morgan* line of cases that the constructive trust there arises in response to a trespass (or other tort), and in the absence of a consensual relationship of some sort.

28. The other cases considered by the Full Court were, respectively, cases in which a constructive trust has been held to arise over assets acquired by theft or fraud, or over moneys paid by mistake. For example, the High Court held in *Black v S Freedman & Co*<sup>24</sup> that moneys stolen by a husband from his employer while he was in their employment were “trust money” in his hands and in the hands of his (volunteer) wife, into whose hands they were followed. However, there was no employment or other fiduciary relationship between FTI and GMC; and no theft or fraud committed by FTI or its personnel.
29. This Court has not considered whether a constructive trust arises over a mistaken payment. The cases, at first instance and intermediate appellate level, have decided that: where the recipient of a mistaken payment had no knowledge of the mistake at the time of receipt, but afterwards gained knowledge of the mistake (at the minimum, knowledge of circumstances which would indicate the facts to an honest and reasonable person), a constructive trust then arises over the mistakenly paid money;<sup>25</sup> while, where a mistaken payment was made under a fundamental mistake and the payee and the recipient knew that the payor bank never intended to transfer the money to him, “in the eyes of the law, he was to be regarded substantially as if he had stolen the money” immediately upon receipt.<sup>26</sup> But no mistaken payment of money, or mistaken transfer of any other asset, by GMC to FTI exists in this case.
30. There are wide differences between the facts of those cases and the facts of this case. They, and the principles applied in them, are neither applicable in terms in

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<sup>23</sup> *Seyffer v Anderson* [2001] NSWSC 1132; (2001) 10 BPR 19,349, [21]. See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, [68]-[69].

<sup>24</sup> (1910) 12 CLR 105.

<sup>25</sup> *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589; (2007) 63 ACSR 429, [44] (White J).

<sup>26</sup> *Shields v Westpac Banking Corp* [2008] NSWCA 268, [18] (Hodgson JA, with whom Spigelman CJ and Macfarlan JA agreed). Contrast the remarks of Gummow J in *Roxburgh v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, [57], to the effect that as an action for money had and received (upon a failure of consideration) was available to the appellants at common law, it was unnecessary to consider whether a constructive trust arose in the appellants’ favour.

this case, nor do they supply any relevant analogy capable of application in this case. To repeat: there was no consensual relationship between FTI and GMC (contractual, fiduciary or otherwise); and FTI committed no theft or fraud on GMC; and no payment was made (or, for that matter, other property transferred) by GMC to FTI by mistake.

31. **Moral evaluation.** The Full Court then proceeded to impose a constructive trust in this case following a moral evaluation of FTI's conduct, which the Full Court identified in posing the question of whether a situation a constructive trust may be imposed "in light of the nature of the defendant's wrongdoing by which the relevant asset has been obtained" (*J*[16] (CAB 95)), where that matter is such that "it would be inequitable for the maker [of a work] to claim copyright over the intellectual property" (*J*[11] (CAB 93-94)).
32. But the Full Court did not identify a principle by which to determine what kind of "moral calibre" would enable it to impose a constructive trust. The Court evidently considered that the exercise of making the determination differed from an evaluation (which it had purported to disclaim) of "unconscionability" in the sense of an at-large assessment, in the Court's discretion, of the morality of FTI's conduct. But the Full Court did not explain or demonstrate any such difference. The evaluation of "moral calibre" can only be understood as evaluation by reference to one or more personal moral norms held by the judges of the Full Court, and contestable personal perceptions of the morals of FTI. Such matters and perceptions are subjective in nature, and lack the objective quality of standards appropriate to the adjudication of persons' substantive legal rights.<sup>27</sup>
33. The most favourable available reading of the Full Court's reasoning is that the Full Court imposed a constructive trust on the basis that: "FTI engaged in a surreptitious intrusion onto and within GMC's property to gain an advantage which was not lawfully available to it [*semble* the opportunity to make the video recordings], and to cause detriment to GMC [*semble* harm to GMC's commercial interests]" (*J*[18] (CAB 96)); in publishing the [Compilation], FTI sought to harm

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<sup>27</sup> GMC had invited this approach: T24.36-25.22 (1 August 2025) (BFM 43-45).

GMC’s business by adverse publicity … and to gain advantages for itself and its cause” (*J* [18] (CAB 96)); also *J* [31] (CAB 100).

34. But if those were the criteria which led the Full Court to impose the constructive trust, they disclose no principle; and raise large questions as to whether such conduct properly engages equity’s concerns – here, in the exclusive jurisdiction of equity – where the conduct is conduct which may or may not be actionable in tort. If such conduct *is* actionable in tort, then it is difficult to see what peculiarly equitable principle such conduct can engage. If such conduct *is not* actionable in tort, then it is difficult to appreciate what different equitable principle such conduct can engage.
35. **Third parties.** Important to notice is that, rather than being restorative, the effect of the Full Court’s declaration of a constructive trust is transformative – not only of the legal relations between FTI (in becoming a constructive trustee) and GMC (in becoming a constructive beneficiary), but of the relations between those persons and others. As equitable owner of FTI’s copyright, for example, GMC can seek interlocutory restraint against publication by a third party, such as Channel 7, without even joining FTI to the proceeding (at that stage).<sup>28</sup> There hitherto existed no basis in law upon which Channel 7 could be enjoined from publishing the Compilation, having not been complicit in any tort,<sup>29</sup> even if Channel 7 “probably realised, when it received the [Compilation], that it had been made in a clandestine manner”.<sup>30</sup> The result is to confer on GMC a proprietary right that it never hitherto had, with respect to a recording that it never made, to prohibit all other persons from communicating the Compilation to the public.<sup>31</sup>
36. Further, if the copyright in the Compilation is trust property, then equitable pecuniary liabilities such as those associated with *Barnes v Addy*<sup>32</sup> could arise where a third party who receives the Compilation or a copy thereof, or – like

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<sup>28</sup> *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1; *Lenah* (2001) 208 CLR 199, [103] (Gummow and Hayne JJ).

<sup>29</sup> *Lenah* (2001) 208 CLR 199, [46] (Gleeson CJ).

<sup>30</sup> *Lenah* (2001) 208 CLR 199, [1] (Gleeson CJ); *Farm Transparency* (2022) 277 CLR 537, [85] (Gageler J).

<sup>31</sup> *Farm Transparency* (2022) 277 CLR 537, [90] (Gageler J).

<sup>32</sup> (1874) LR 9 Ch App 244. See also *Lenah* (2001) 208 CLR 199, [137] (and authorities there referred to).

Channel 7 in this case<sup>33</sup> – communicates to the public information gained from viewing the Compilation. That such liabilities might, at base, depend on the uncertainty of the outcome of a curial moral evaluation of conduct tends only to accentuate the problems which the Full Court’s decision entails for third parties.

37. **Conclusion on ground 1.** Taking the abovementioned aspects of the Full Court’s reasoning together, the Full Court’s position amounts to this: because (it was said) the absence of a pre-existing fiduciary or contractual relationship between the parties formed no obstacle to the grant of constructive trust relief, the Court was free – consequent upon an evaluation of the “moral calibre” of FTI’s conduct – to impose a constructive trust that is transformative of legal relations not just between the parties but the world if the Court is satisfied, in its subjective evaluation, that FTI’s conduct is worthy of condemnation. In short, the Full Court articulated no sound principle which it then proceeded to apply to hold that a constructive trust should be imposed on FTI’s copyright. The imposition of a constructive trust was attended with legal error. It further follows that the ancillary relief, including injunctive relief, also cannot be sustained on this basis.

Error 2 – facts sufficient to justify constructive trust not identified

38. That being the case, the Full Court’s second error can be stated briefly: the Full Court failed properly to identify facts and circumstances which, had a valid principle of direct application been identified and taken up, would have enabled the Court to determine whether FTI’s copyrights should be subjected to a constructive trust in GMC’s favour. This necessarily follows from error 1: in failing to identify a proper principle of direct application, the Full Court *could not* identify facts and circumstances which, under the requirements of some proper principle of direct application, might justify imposing a constructive trust in this case. It follows, on this ground too, that the ancillary relief, including injunctive relief, cannot be sustained on this basis.
39. Indeed, even if a “moral evaluation” of FTI’s conduct is an acceptable yardstick for adjudication (which it is not), the Full Court failed to identify with any particularity the conduct which was supposed to raise a constructive trust. It is true

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<sup>33</sup> See exhibit CN-7 to the unredacted affidavit of Christopher Neville dated 20 May 2024 (BFM 5).

that that, at *J* [18] (CAB 96), the Full Court spoke with disapproval of particular facts and circumstances relating to the admitted trespasses (see above); and that, at *J* [30]-[31] (CAB 100), the Full Court identified certain facts and circumstances to distinguish the analogous case of *Windridge Farm Pty Ltd v Grassi*.<sup>34</sup> But those observations, if anything, suggest that facts and circumstances were at play in the Court’s thinking which were not spelt out appropriately.

Error 3 – no consideration of other means available to quell the controversy

40. If (contrary to FTI’s principal case) the declaration of a constructive trust over FTI’s copyright is a potentially available remedy, the Full Court nonetheless erred in declaring it here. Principle and doctrine required the Full Court, before it took that step, to consider whether there were other means available to quell the controversy.<sup>35</sup> But the Full Court’s reasons embody no such consideration.
41. The primary judge awarded general damages of \$30,000, and exemplary damages of \$100,000. In particular, as to general damages, his Honour held that \$30,000 was appropriate to “vindicat[e] GMC’s right to exclusive occupation of the Eurobin Premises” (*PJ* [234] (CAB 65)). The relief granted by the primary judge was adequate. In any event, any complaint about the adequacy of the award of damages given by the primary judge should have been directed to quantification; yet GMC did not appeal the award of damages.<sup>36</sup>
42. Further, GMC is a trading corporation. The activity which the video footage records is conduct of GMC’s commercial activity of an abattoir operation on premises which it leases for the commercial purpose of conducting that operation. The only interests of GMC’s which might be affected by FTI publishing the videos in which it holds the copyright are commercial ones.<sup>37</sup> Damages are sufficient to

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<sup>34</sup> (2011) 254 FLR 87.

<sup>35</sup> *Bathurst City Council* (1998) 195 CLR 566, [42]-[43].

<sup>36</sup> At trial, GMC submitted that the Court should award general damages in a significantly higher sum than was ultimately awarded – in the range of \$125,000 to \$150,000: see *PJ* [228] (CAB 64). FTI cross-appealed the quantification of exemplary damages, but the cross-appeal was dismissed, and that is the not subject of appeal.

<sup>37</sup> Contrast the discussion (in the context of constructive trust) of value at *J* [32] (CAB 100-1) (“it does not matter whether the advantage which is sought to be (and actually is) obtained by the defendant arises because the asset in question is intrinsically valuable, or if its value is derived only from the particular use to which it is intended to be put by the defendant in accordance with the defendant’s own individual objectives”).

remedy damage to a merely commercial interest. Accordingly, the present case is quite unlike the situation of the individual plaintiff in *Smethurst*<sup>38</sup>—all the more so given that GMC abandoned its privacy claim before trial.

***Equity's "auxiliary" jurisdiction: availability of injunctive relief***

43. By its notice of contention, GMC appears to seek to uphold the permanent injunction issued by the Full Court restraining FTI from publishing (except to one of GMC's regulators) any of the images captured by it,<sup>39</sup> but on a different basis to that given by the Full Court.
44. As noted above, the Full Court only granted that order as ancillary relief – i.e., “flowing from the declaration of a constructive trust” (*J* [43] (CAB 104)). But GMC contends (presumably in the alternative, in the event that this Court upholds one of FTI's grounds of appeal and thereby finds error in the declaration of a constructive trust) that the Full Court should have granted that relief “in equity's auxiliary jurisdiction to remedy the trespasses (and their continuing effects)”.
45. In circumstances where the GMC was the (unsuccessful) moving party for this relief at trial and on appeal to the Full Court, GMC has the burden of proof and persuasion here. FTI will reply to what is put by GMC. However, the following general submissions may be made at this stage.

**No “continuing” trespass**

46. Prohibitory injunctive relief is available, in a proper case, to restrain the continuation of a trespass. Trespassory conduct is “continuing” which carries on from day to day for the duration of the trespass; a fresh cause of action accrues on each day.<sup>40</sup> Any of the three kinds of trespass (to land, goods or the person) can be committed so as to be continuing. Only trespass to land is here relevant. A continuing trespass to land occurs if, without permission, a person entered a

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<sup>38</sup> Cf. *Smethurst* (2020) 272 CLR 177, [122] (Gageler J).

<sup>39</sup> Order 5: “The respondent be permanently restrained from publishing (other than to the Commonwealth Department of Agriculture, Fisheries and Forestry) any of the images (and copies thereof) obtained or captured by the respondent between 9 January 2024 and 13 April 2024 at the Premises (including the 14-minute Footage as defined in the reasons for judgment).”

<sup>40</sup> *Goodson v Richardson* (1874) LR 9 Ch App 221 at 255 (“[A] continuing trespass ... is in law a series of trespasses from time to time ...” (Lord Selborne LC)).

plaintiff's premises and the person who so entered either (a) remains there without permission,<sup>41</sup> or (b) placed there chattels which remain without permission.<sup>42</sup>

47. It should be emphasised that in speaking of “continuing” trespasses, one speaks of a situation in which the elements of an action in trespass are fulfilled on each day on which the trespass occurs and continues. Thus, in speaking of equitable relief to remedy a “continuing” trespass, one is speaking of relief to bring the trespass to an end. Such relief is in substance preventative – though it may consist both of prohibitory relief in the form of negative injunction, and positive relief in the form of ancillary orders for delivery up and destruction.
48. There were only two conceivable ways in which a trespass might have been continuing as of 5 August 2024, when the trial commenced in this case: by Mr Delforce and Ms McDonald-Eckersall without permission remaining on GMC's premises from day to day, or by goods which they had placed there (the video recording equipment) remaining on GMC's premises from day to day. However, there was no issue that such trespasses continued as of the trial.<sup>43</sup>
49. Hence, while Mr Delforce's and Ms McDonald-Eckersall's evidence addressed their entry and *placement* of the recording equipment in GMC's premises without GMC's permission,<sup>44</sup> it did not address whether the recording equipment *remained* there; and GMC – which would have borne the onus had the point been in issue – adduced no evidence of that. Further, it was common ground (and obvious) that Mr Delforce and Ms McDonald-Eckersall were no longer upon GMC's premises without permission.
50. Nonetheless, GMC contended in the Full Court that, by “retain[ing], and intend[ing] to publish, the unlawfully captured images”<sup>45</sup> from January-April 2024, “FTI's conduct was tortious and involved an infringement with GMC's

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<sup>41</sup> Sappideen *et al*, *Fleming's The Law of Torts*, 11<sup>th</sup> ed (2024), [3.40] pp 60-2.

<sup>42</sup> *Holmes v Wilson* (1839) 10 A & E 503; Edelman, *McGregor on Damages*, 22<sup>nd</sup> ed (2024), [12-012] p 427.

<sup>43</sup> The latest day of the “continuing trespass” that GMC alleged was 13 April 2024: ASOC [21] (BFM 14). See Amended Defence [24(a)] (BFM 16), alleging that no continuing trespass could be established by GMC.

<sup>44</sup> Delforce T199.4-199.8 and T200.7–202.3 (7 August 2024) (BFM 34, 35-37); McDonald-Eckersall T258.42-259.18 (8 August 2024) (BFM 39-40).

<sup>45</sup> Applicant's annotated written submissions dated 1 August 2025, [11] (BFM 51).

legal rights (i.e., its entitlement to exclude people from entering its premises, including FTI, who wished unlawfully to expose its private business to public view)”.<sup>46</sup> Those contentions lacked a proper foundation.

51. A trespass to land requires a physical intrusion onto the plaintiff’s land,<sup>47</sup> which is neither manifested by FTI’s retention of the images it previously recorded, nor by FTI’s publication of such images. Further:

- (1) as for **retention**, the prohibitory injunction issued by the Full Court that GMC seeks to uphold (order 5) would not affect FTI’s lawful ability to retain the images. Accordingly, unlike the plaintiffs in *Smethurst*, GMC is not seeking orders directed to restoring the “status quo ante”;<sup>48</sup> and
- (2) as for **publication**, FTI is the owner of any copyright subsisting in film, and holds a statutory right to cause the film to be seen and heard in public: Copyright Act, ss 86, 90 and 98. The necessary implication of those provisions is that a copyright holder commits no wrong merely<sup>49</sup> by exercising that statutory right. It further follows that the final injunction sought would not only fail to protect a legal right of GMC,<sup>50</sup> but would conflict with statute, and is therefore unavailable.<sup>51</sup>

#### Continuing “effects” of concluded trespass

52. Also unclear is how GMC could be entitled to prohibitory injunctive relief in the absence of any continuing trespasses. GMC has no property in the information

<sup>46</sup> Applicant’s annotated written submissions dated 1 August 2025, [14] (BFM 52).

<sup>47</sup> *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 706 (Young J); *Robson v Leischke* (2008) 72 NSWLR 98, [40] (Preston CJ).

<sup>48</sup> Cf. *Smethurst* (2020) 272 CLR 177, [154] (Nettle J). Further, as the primary judge correctly stated at *PJ* [215] (CAB 61): “There is a distinction that must be drawn between the commission of the tort – that is to say, the unauthorised entrance by FTI’s agents onto the Eurobin Premises and the installation there of the covert recording equipment that was thereupon installed – and the publishing of information obtained as a result thereof. The injury that inheres to GMC’s prejudice as a result of the trespasses is, at most, FTI’s possession of the footage; not its publication.”

<sup>49</sup> Of course, FTI’s copyright does not confer an absolute legal right to publish. It is subject, for example, to the law of defamation, breach of confidence and so forth: cf. *Lenah Game Meats* (2001) 208 CLR 199, [46] (Gleeson CJ). But without more the act of publication of its copyright cannot be unlawful, given its statutory right to do so.

<sup>50</sup> Cf. *Smethurst* (2020) 272 CLR 177, [77] (Kiefel CJ, Bell and Keane JJ).

<sup>51</sup> Cf. *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486, [33]-[46] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

revealed by the FTI's recordings (including the Compilation). In effect, GMC seeks to protect its "privacy" in information as to the operation of its abattoir (but only by restraining FTI from such information in a particular form, being in the form of the images recorded by FTI, including the Compilation). How should that attempt be viewed (merely) through the prism of GMC's right to the exclusive possession of GMC's premises?

53. The enjoyment and assertion of a person's right to the exclusive possession of premises is capable of affording protection to the person's privacy incidentally to its right to exclude physical intrusion of persons on their property.<sup>52</sup> But that does not equate to any more general right to privacy in information itself, or to a right to prevent publication of a film (to which copyright attaches) that would reveal such information (which is an incident of FTI's copyright).
54. Relying solely as it does on the commission of the tort of trespass – and not on any tort of privacy or breach of equitable obligations as to confidential information, GMC could not enjoin (and indeed does not seek by its notice of contention to enjoin) FTI from communicating to the public information as to GMC's abattoir operations of which it is aware as a consequence of having recorded the footage.<sup>53</sup>
55. And the fact that GMC could, in theory, have obtained an injunction to restrain FTI's trespasses before they were committed – to protect GMC's property rights – does not mean that it is now entitled to relief to protect an interest in information which, as a trading corporation and leasehold tenant of lands for purely

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<sup>52</sup> Cf. *Smethurst* (2020) 272 CLR 177, [120] (Gageler J), citing *Plenty v Dillon* (1991) 171 CLR 635, 647, 654-655.

<sup>53</sup> As the primary judge correctly stated at *PJ* [217] (CAB 61): "If Mr Delforce or Ms McDonald-Eckersall had, by reason of their trespasses, simply observed what is depicted in the footage, could it seriously be suggested that they might be prevented by injunction granted as a remedy *in tort* from discussing with others what they saw? I do not consider that it could. Perhaps, as I have explored, there might be a basis *in equity* for an injunction in those (or other) circumstances; but not for an injunction ancillary to the tort." See also *Lenah* (2001) 208 CLR 199, [29] (Gleeson CJ).

commercial purposes, it does not have;<sup>54</sup> or (more precisely) in publication of information in a particular form (the recordings protected by copyright).

56. The ordinary position applies, as stated by the Court in *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia*<sup>55</sup> and accepted by all members of the Court in *Smethurst* (save Gordon J<sup>56</sup>): where tortious conduct has concluded, the plaintiff is ordinarily limited to the recovery of damages; but that where the damage caused by the tortious conduct is ongoing is extreme, or at all events very serious, a mandatory injunction may issue to compel the wrongdoer to prevent the conduct of further damage.<sup>57</sup>
57. Under those principles, GMC must point to relevant ongoing *damage* if it is to engage the Court’s power to grant injunctive relief absent a continuing trespass. However, if this Court finds that the Full Court erred in declaring a constructive trust with respect to FTI’s copyright, then (as noted above) it is difficult to see how FTI could be characterised as causing GMC a legally cognisable harm (from which it can or should be enjoined) merely by exercising its statutory right as copyright holder. And the undisputed premise of the Full Court’s judgment was that FTI was (at least) the holder of copyright in the Compilation (if not also other video footage recorded by it): *PJ* [7] (CAB 10); *J* [42] (CAB 103-04).
58. Furthermore, where the supposed ongoing “damage” is the potential future publication of images that would disclose information about a commercial abattoir operation that is not itself protected (or sought by GMC to be protected) as such, it could not be said that GMC would experience ongoing damage of that level of seriousness or extremity that could justify the prohibitory injunction.

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<sup>54</sup> *Smethurst* (2020) 272 CLR 177, [77]-[85] (Kiefel CJ, Keane and Bell JJ); *Farm Transparency* (2022) 277 CLR 537, [42] (Kiefel CJ and Keane J, Steward J agreeing). See also *Lenah Game Meats* (2001) 208 CLR 199, [52]-[55] (Gleeson CJ).

<sup>55</sup> *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, [33].

<sup>56</sup> *Smethurst* (2020) 272 CLR 177, [196]-[197].

<sup>57</sup> *Smethurst* (2020) 272 CLR 177, [68] (Kiefel CJ, Bell and Keane JJ), [122] (Gageler J: “the direct of the infringement of [Ms Smethurst’s] rights to possession of her home and her mobile phone are serious and ongoing”), [156] (Nettle J), [251] (Edelman J).

**Part VII: Orders sought**

59. In accordance with its proposed amended notice of appeal,<sup>58</sup> FTI seeks these orders:

- (1) The appeal be allowed.
- (2) Orders 1, 2, 4, 5, 6, 7 and 8 made on 13 August 2025 be set aside and, in their place, it be ordered that the appeal be dismissed.
- (3) The order made on 25 September 2025 be set aside and the question of the costs of the proceedings in the Federal Court of Australia be remitted to the Federal Court of Australia.
- (4) The respondent pay the appellant's costs of and incidental to the appeal.

**Part VIII: Estimate of time**

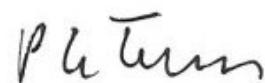
60. FTI estimates that it requires two hours for the presentation of its oral argument.

Dated: 5 February 2026



**Nick Wood**

Owen Dixon Chambers West  
03 9225 6392  
nick.wood@vicbar.com.au



**Peter Turner**

Ninian Stephen Chambers  
03 9225 7999  
peter.turner@vicbar.com.au

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<sup>58</sup> CAB 153.

### ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	<i>Copyright Act 1968</i> (Cth)	Compilation no. 62 (20 March 2024 to 13 October 2024)	Sections 86, 90, 98.	Compilation no. 62 is provided for illustrative purposes.  The relevant provisions were in force in identical terms throughout the relevant period.	9 January 2024 to not later than 3 May 2024.