



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

FARM TRANSPARENCY INTERNATIONAL LIMITED
Appellant

and

10

THE GAME MEATS COMPANY OF AUSTRALIA PTY LTD
Respondent

RESPONDENT'S SUBMISSIONS

Part I – Certification

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

Part II – Issues Arising

2. In view of the Senior Registrar’s communication of 9 December 2025, and the notice of contention filed 22 December 2025 (CAB 142), the following issues arise:

- (a) *First*, did the Full Court err in the manner alleged by the appellant (**Farm Transparency**) in declaring that a constructive trust arose, by reason of either:
- (i) failing to identify a principled basis for that trust in what is said to be the absence of a legal, equitable or statutory wrong committed by Farm Transparency against the respondent (**Game Meats**); (ii) failing to identify the facts and circumstances that justified the imposition of that trust; or (iii) failing to decide that no lesser form of relief would be adequate to quell the controversy?
- (b) *Second*, is non-monetary relief (whether a constructive trust or otherwise) available to redress the consequences of wrongful conduct, and not only to prevent or undo the wrongful conduct itself, in the circumstances of this case?
- (c) *Third*, is injunctive relief an available and appropriate remedy for Farm Transparency’s trespasses, whether or not a constructive trust also arises?
- (d) *Fourth*, if injunctive relief is otherwise available to Game Meats, is a constructive trust necessary to quell the controversy between the parties?

3. Game Meats addresses the first set of issues in Part V below by reference to Farm Transparency’s grounds of appeal, and the latter three issues in Part VI below by reference to Game Meats’ notice of contention.

Part III – Section 78B Notice

4. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV – Facts

5. Farm Transparency’s summary omits important facts. Critically, the primary judge found that the trespasses engaged in by Farm Transparency against the secured premises of Game Meats, where it lawfully undertook its business, were ‘among the most obvious examples of intentional wrongdoing that one might imagine’ (PJ[249]; CAB 69).

6. Farm Transparency admitted substantial aspects of its own wrongdoing (PJ[19], [81]; CAB 11, 30), including that it repeatedly and illegally trespassed on Game Meats’ premises on

no fewer than seven occasions between 9 January and 13 April 2024; that Game Meats has exclusive possession of its premises, on which it conducts a licensed Halal abattoir; that Game Meats' premises are heavily secured; that at no time was Farm Transparency or any person on its behalf authorised to enter; that while unlawfully on Game Meats' premises, Farm Transparency installed hidden cameras in the ceiling of the abattoir; that the presence of those cameras constituted a trespass; that using those hidden cameras, Farm Transparency covertly obtained video images of various aspects of Game Meats' undertaking; that this invasive activity was done for and on behalf of Farm Transparency and with its authorisation; and that unless restrained, Farm Transparency intends to publish the images.¹

10 7. At trial, the on-plant veterinarian employed by the Commonwealth (not Game Meats), Dr Karl-Heinz Texler, gave evidence that the footage taken by Farm Transparency depicted neither animal cruelty, nor non-compliance with the relevant Australian Standard.² The primary judge did not make — and was told by Farm Transparency that he did not need to make — any finding that animal cruelty in breach of the law or non-compliance with the Australian Standard had occurred (PJ[105]–[110]; CAB 35–6; cf AS[8]fn 1).

8. In addition, the primary judge found, and the Full Court affirmed (FC[8]; CAB 92):

- 20 (a) the principals of Farm Transparency (Mr Delforce and Ms McDonald-Eckersall) were present as trespassers on each of the seven occasions on which Farm Transparency trespassed on Game Meats' premises, and on multiple occasions a third trespasser was also present with them (PJ[44]–[45]; CAB 16–17);
- (b) they drilled or cut holes into Game Meats' premises to install hidden cameras, including one near a 415-volt power cable (PJ[46]; CAB 17);
- (c) they conducted their invasive activity knowing that they did not have Game Meats' permission (PJ[47]; CAB 17); and knowing that the abattoir was vulnerable to biosecurity hazards, against which they took no precautions (PJ[48]; CAB 17–18);
- (d) Farm Transparency's trespasses subjected the abattoir to potentially very serious biosecurity risks (PJ[233]; CAB 65);
- (e) Farm Transparency committed trespass both by its unauthorised entry to Game

¹ Amended Defence at [23](a) (ABFM 27); Affidavit of C Neville of 28 June 2024 at [3]–[4], Exh CWN3, CWN4 and CWN5 (RBFM 71–84); Affidavit of C Delforce of 9 July 2024 at [29] (RBFM 150); T208.19 (Mr Delforce) (RBFM 176).

² T100.5–18 (Dr Texler) (RBFM 157).

Meats' premises and by its installation of hidden cameras (PJ[84]–[85]; CAB 31);

- (f) Game Meats is a sizeable, professional and reputable undertaking, which strives to operate in accordance with the law (PJ[99]; CAB 34), and it was false to suggest that Game Meats condoned or was indifferent towards animal suffering (PJ[95], [99]; CAB 33–4);
- (g) Farm Transparency sought to subject Game Meats to a measure of publicity that it knew could only ever have been harmful to it (PJ[122], [123]; CAB 39);
- 10 (h) Farm Transparency's publications were actuated by a desire to harm Game Meats' business (PJ[128]; CAB 41): its motive in seeking to publish the footage was to visit loss upon Game Meats (PJ[142]; CAB 43), and to do so for Farm Transparency's own advantage and benefit (PJ[187]; CAB 54–5; FC[18]; CAB 96);
- (i) Farm Transparency obtained the footage as trespasser and intends to use it in a way intended to harm Game Meats commercially, and that this was its purpose in effecting the trespasses and creating the footage (PJ[165]; CAB 49–50);
- (j) Farm Transparency intended to subject Game Meats to a public shaming campaign (PJ[179]; CAB 53);
- 20 (k) Farm Transparency believes that its activist purpose licences the deliberate, persistent, repeated and unrepentant invasion of the rights of others; of which notion it must unambiguously be disabused (PJ[249]; CAB 69);
- (l) Game Meats was but one in a long line of victims of Farm Transparency's tortious conduct (PJ[251]; CAB 69);
- (m) general damages would not come remotely close to what the court should hope to achieve by way of deterrence of conduct that is very plainly obnoxious to public conscience (PJ[252]; CAB 70);
- (n) Farm Transparency has never expressed remorse for its conduct, or given any authentic indication that it does not require a deterrent incentive to refrain from repeating it (PJ[258]; CAB 71);
- 30 (o) Farm Transparency's law-breaking is a feature of its operations; and one from which it does not intend to retreat in the future (PJ[258]; CAB 71);
- (p) Farm Transparency could minimise the effect of the award of exemplary

damages by additional fundraising (PJ[263]; CAB 72); and

- (q) Farm Transparency was committed to continuing to engage in unlawful conduct in pursuit of the so-called transparency that is one of its animating objectives (PJ[194]; CAB 56).

Part V – Argument

9. The appeal must be understood in light of the primary judge’s undisturbed finding that the trespasses engaged in by Farm Transparency to Game Meats’ secured premises were ‘among the most obvious examples of intentional wrongdoing that one might imagine’ (PJ[249]; CAB 69).

10 *Ground 1 – Alleged lack of basis for the trust identified by the Full Court*

10. The first ground of appeal is based on a false premise. Far from it being the case that ‘the making of that video itself constituted no legal, equitable or statutory wrong’ (CAB 154), Farm Transparency’s wrong was straightforwardly its deliberate and knowing breach of the law against trespass. As Farm Transparency itself admitted, the installation of the cameras through which the images were made *itself* constituted a trespass (PJ[84]; CAB 31; FC[5]; CAB 91).³ The legal right with which Farm Transparency deliberately interfered was straightforwardly Game Meats’ right to exclusive possession of its premises, and to exclude others from entering, viewing or exposing what went on there.⁴

11. Contrary to AS[20]–[37], there was no lack of a ‘proper principle’ applied by the Full Court: it correctly applied the principle articulated by this Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.⁵ Consistently with what Farm Transparency itself rightly accepts in AS[17], but contrary to its suggestion in AS[20], the essence of equitable relief is that it ‘involves the application of doctrines themselves sufficiently comprehensive to meet novel cases.’⁶ In Australian law, constructive trusts are a discretionary remedial institution of equity, and ‘a remedial response to the claim to equitable intervention made out by the plaintiff.’⁷ The ‘considerations of principle and pragmatism which can bear on the award or

³ *Hudson v Nicholson* (1839) 5 M & W 437; 151 ER 185; *Konskier v B Goodman Ltd* [1928] 1 KB 421; *Lord v McMahon* [2015] NSWSC 1619.

⁴ *Plenty v Dillon* (1991) 171 CLR 635 at 655 (Gaudron and McHugh JJ); *NSW v Ibbett* (2006) 229 CLR 638 at [29] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

⁵ (2001) 208 CLR 199 at [102] (Gummow and Hayne JJ), [58] (Gaudron J), [309] (Callinan J).

⁶ *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 350 [57] (Gummow J).

⁷ *Muschinski v Dodds* (1985) 160 CLR 583 at 614 (Deane J); *Giumelli v Giumelli* (1999) 196 CLR 101 at 111–12 [3]–[4] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

refusal of a constructive trust are various.⁸ They reflect ‘the cardinal principal of equity that the remedy must be fashioned to fit the nature of the case and the particular facts.’⁹ That is what the Full Court did (FC[9]–[28]; CAB 91–9), consistently with the statements of established principle made by this Court in *Lenah*,¹⁰ and referred to without disapproval by members of this Court thereafter.¹¹ Farm Transparency has not articulated why this Court’s statement of principle in *Lenah* was wrong.

12. Various kinds of intellectual property may be held on constructive trust, including patents,¹² copyright¹³ trademarks,¹⁴ and confidential information.¹⁵ Where property is stolen,¹⁶ procured by fraud,¹⁷ or obtained by mistake,¹⁸ exploitation or other serious wrongdoing,¹⁹ it will be held on constructive trust, because the recipient cannot in good conscience retain it. Equally, where a trespasser gains an additional proprietary benefit by reason of their trespass, they are obliged to account for it.²⁰ As the Full Court rightly observed, the existing categories of constructive trust presuppose neither the existence of a prior consensual relationship between the parties, nor the existence of a prior proprietary interest on the part of the plaintiff (FC[42]; CAB 103–4).²¹

13. This Court explained in *Lenah* that a constructive trust is the appropriate remedial

⁸ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [510] (Finn, Stone and Perram JJ).

⁹ *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

¹⁰ *Lenah* (2001) 208 CLR 199 at [102] (Gummow and Hayne JJ), [58] (Gaudron J), [309] (Callinan J).

¹¹ *Smethurst v Commissioner of Police* (2020) 272 CLR 177 at [84] (Kiefel CJ, Bell and Keane JJ), [129] (Gageler J), [148], [157] (Nettle J), [196] (Gordon J), [243] (Edelman J); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [90] (Gageler J), [163] (Godon J), [199] (Edelman J).

¹² *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 546; *Sterling Engineering Co Ltd v Patchett* [1955] AC 534 at 544, 548.

¹³ *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 at 262–3 (Lord Keith); 276 (Lord Griffiths), 288 (Lord Goff); *Sheldon and Hammond Pty Ltd v Metrokane Inc* (2004) 135 FCR 34 at 52–3 [50]–[54] (Conti J). *Copinger and Skone James on Copyright* (15th ed, 2005) at [5-170]–[5-181]; Laddie et al *The Modern Law of Copyright and Designs* (3rd ed, 2000) at [21.69]–[21.75].

¹⁴ *Edwards v Liquid Engineering 2003 Pty Ltd* (2008) 77 IPR 115 at [65] (Gordon J).

¹⁵ *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 401 (Laddie J).

¹⁶ *Black v S Freedman & Co* (1910) 12 CLR 105.

¹⁷ *Homeward Bound Gold Mining Co v McPherson* (1896) 17 LR (NSW) Eq 281; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716 (Lord Browne-Wilkinson).

¹⁸ *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429 at 437 [42] (White J); *Westdeutsche Landesbank* [1996] AC 669 at 715 (Lord Browne-Wilkinson).

¹⁹ *Rasmanis v Jurewitsch* (1970) 70 SR (NSW) 407.

²⁰ The cases often concern minerals or goods taken from the land: *Bilambil-Terranova Pty Ltd v Tweed Shire Council* [1980] 1 NSWLR 465; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25. Cf *Edwards v. Lee*, 250 Ky. 166, 61 S.W.2d 1049. See also Jackman, *Varieties of Restitution* (2nd ed, 2017), 147–56.

²¹ See also Mohseni, ‘Is the Remedial Constructive Trust Fair Game?’ (2026) 48 *Sydney LR* (forthcoming).

response where intellectual property is obtained through a serious wrong — intentional trespass — committed against the claimant.²² The *Copyright Act* expressly confers on the copyright holder in a cinematograph film — including the beneficial owner of such copyright²³ — the exclusive right to make copies of the film, cause it to be seen in public, or be communicated to the public.²⁴ Those exclusive rights include the right *not* to communicate a work or subject-matter to the public; to control the circumstances under which any such communication occurs; and to prevent unauthorised communications.²⁵ That includes the exclusive right to authorise, or *not* authorise, a person to do an act comprising the copyright.²⁶ ‘A copyright is the exclusive right of multiplying copies of an original work or composition, and consequently preventing others from so doing.’²⁷ The very purpose of copyright is exclusivity. That is why ‘[i]nfringement of copyright is ordinarily restrained by injunction, and this because equity has traditionally considered that damages are not an adequate remedy for infringement.’²⁸

14. Thus, where a film is made ‘in circumstances involving the invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff’, it is ‘inequitable and against good conscience for the maker to assert ownership of the copyright against the plaintiff and to broadcast the film.’ The maker holds the intellectual property on constructive trust for the victim of the invasive conduct, here Game Meats, enforced by (1) a declaration as to the subsistence of the trust; and (2) a mandatory order requiring an assignment of the legal title to the intellectual property in question.²⁹

15. It bears repeating that in *Lenah*, an injunction was indeed granted against the trespassers (Animal Liberation Ltd), which was not disturbed on appeal.³⁰ Here, the unauthorised entry onto Game Meats’ land to place hidden cameras was the very means by which *both* the trespass was committed *and* the relevant copyright was generated. The Full Court thus rightly found

²² *Lenah* (2001) 208 CLR 199 at [102] (Gummow and Hayne JJ), [58] (Gaudron J), [309] (Callinan J).

²³ See *Copyright Act 1968* (Cth) s 9(3).

²⁴ *Copyright Act 1968* (Cth) s 86.

²⁵ See, e.g. *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [39] (Gleeson CJ; Gummow, Hayne and Heydon JJ); *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* (2005) 145 FCR 35 at [8]–[9] (Finkelstein J; Sundberg J agreeing).

²⁶ *Copyright Act 1968* (Cth) s 13(2). *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42 at [86] (Gummow and Hayne JJ).

²⁷ *Jefferys v Boosey* (1854) 4 HLC 815 at 920; 10 ER 681 at 722 (Parke B).

²⁸ *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 58 (Mason J); *Redbubble Ltd v Hells Angels Motorcycle Corporation (Australia) Pty Ltd* (2024) 303 FCR 100 at [249] (Nicholas, Burley and Rofe JJ); cf [184] (Perram and Downes JJ).

²⁹ *Lenah* (2001) 208 CLR 199 at [102] (Gummow and Hayne JJ), [58] (Gaudron J), [309] (Callinan J).

³⁰ *Lenah* (2001) 208 CLR 199 at 200; at [5] (Gleeson CJ), [70] (Gummow and Hayne JJ), [236] (Callinan J).

that Game Meats had a sufficient equity to recognise a trust over that copyright (FC[42]; CAB 103–4).

16. The trust described in *Lenah* is consistent with principle. Given Australian law’s rejection of a formalistic distinction between ‘institutional’ or ‘remedial’ constructive trusts,³¹ Farm Transparency is wrong now to insist on prior legal ownership as a necessary precondition. Equitable interests are engrafted onto, not carved out of, legal ownership.³² A constructive trust is one that is ‘raised or created by act or construction of law’.³³ The court ‘construes the circumstances in the sense that it explains or interprets them; it does not construct them’;³⁴ but those circumstances may arise as much by reason of an event, as from a prior relationship.³⁵

10 Whether or not they are ‘debatable’ (cf AS[27]), what matters about the *Pallant v Morgan* cases — like cases on mutual wills, or the avoidance of wrongdoers profiting from crime — is that they do not depend on prior ownership by the claimant. Equally, what matters about the cases of mistake, or property acquired by fraud, crime or wrongdoing, is that they do not depend on a prior consensual relationship between the parties (cf AS[28]). As Pomeroy explains, a constructive trust may arise ‘*ex maleficio*’ whenever property ‘has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one’s weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain it and enjoy the beneficial interest’, even though the beneficiary ‘*may never perhaps have had any*

20 *legal estate therein*’.³⁶

17. The same is true in other systems. As Cardozo J has said of the American position, ‘[a] court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief’. Thus, a constructive trust ‘is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the

³¹ *Muschinski v Dodds* (1985) 160 CLR 583 at 614 (Deane J); *Giumelli* (1999) 196 CLR 101 at 111–12 [3]–[4] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

³² See, e.g. *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 518–20 (Hope JA); *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at 311 (McLelland J); *FCT v Carter* (2022) 274 CLR 304 at 321 [41] (Edelman J).

³³ *Cook v Fountain* (1818) 3 Swanst 585 at 581; 36 ER 984 at 987 (Lord Nottingham LC). See Yale (ed.), *Lord Nottingham’s Chancery Cases* (1957) 73 *Selden Society* at 365; McNair, ‘Coke v Fontaine’ in Mitchell and Mitchell (eds) *Landmark Cases in Equity* (2012), 33.

³⁴ *Giumelli* (1999) 196 CLR 101 at 111 [2] (Gleeson CJ, McHugh, Gummow and Callinan JJ), approving Scott on Trusts (4th ed, 1989) vol 5 §462.4.

³⁵ Waters, *The Constructive Trust* (1964), 25, 43–4, 55–7.

³⁶ Pomeroy, *A Treatise on Equity Jurisprudence* (5th ed, 1941) vol 4 §1053 (emphasis added).

beneficial interest, equity converts him into a trustee.³⁷ Canadian law, too, recognises that a constructive trust does not arise *only* from an ‘enrichment’ of the defendant having a ‘corresponding “deprivation” of the plaintiff.’³⁸ Rather, it is ‘an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain.’³⁹ That includes in the absence of a prior fiduciary relationship between the parties.⁴⁰

10 18. The unconscientious assertion of legal rights is a familiar context in which constructive trusts arise, in Australia as elsewhere. Here, there was nothing ambiguous or debatable about the character of Farm Transparency’s conduct: it positively intended to harm Game Meats and visit loss upon it by unlawful and tortious means (PJ[122], [123], [128], [142], [165], [179]; CAB 39, 41, 43, 49–50, 53; FC[8], [18], [31]; CAB 92, 96, 100); and intended to do so for Farm Transparency’s own advantage and benefit (PJ[187]; CAB 54–5; FC[18]; CAB 96). That lies at the heart of equity’s concern to remedy exploitation, sharp practice, deception, intentional wrongdoing, or positively intended harm. Contrary to AS[30], it is the similarity, not the differences, between Farm Transparency’s conduct and that of other wrongdoers that is striking. The Full Court was right to draw a parallel between its behaviour and the unconscientious wrongdoing intentionally committed by a fraudster or thief,⁴¹ and the unconscientious wrongdoing involved in knowingly exploiting another’s mistake.⁴²

20 19. The Full Court’s reference to the ‘moral calibre’ of Farm Transparency’s wrongdoing was unexceptionable (FC[28]; CAB 99; cf AS[32]–[34]). In *Kakavas*, this Court approved the observation of Pomeroy that ‘conscience’ in equity is a ‘metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct

³⁷ *Beatty v Guggenheim Exploration Co*, 225 NY 380 at 386 (Cardozo J) (1919), approved in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 108 (Mason J).

³⁸ *Soulos v Korkontzilas* [1997] 2 SCR 217 at 227 [14] (McLachlin J; La Forest, Gonthier, Cory and Major JJ agreeing).

³⁹ *Soulos* [1997] 2 SCR 217 at 228 [17] (McLachlin J; La Forest, Gonthier, Cory and Major JJ agreeing).

⁴⁰ *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 668–70, 673–9 (La Forest J; Lamer J agreeing), 632 (Wilson J); cf at 615–19 (Sopinka J; McIntyre J agreeing).

⁴¹ See, e.g. *Black v S Freedman and Co* (1910) 12 CLR 105; *Creak v Moore* (1912) 15 CLR 426 at 432 (Griffith CJ).

⁴² *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669; *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at [36]–[39] (Leeming JA; Bathurst CJ and Sackville AJA agreeing).

and rights of suitors, – a juridical and not a personal conscience.’⁴³ That has never required any reductive checklist of specific ‘criteria’ (AS[34]). In contrast to a court of law, a court of equity always ‘takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case’.⁴⁴

20. The incomprehension professed in AS[33]–[34] does not withstand scrutiny. Farm Transparency was a deliberate wrongdoer that intentionally violated Game Meats’ rights, intending to do it harm. On any view, that is contrary to good conscience. And to say that constructive trusts arise in equity’s exclusive jurisdiction does not mean that common law principles are irrelevant (cf AS[34]). Equity is not ‘a self-sufficient system’, but ‘at every point it presupposed the existence of common law’.⁴⁵ The existence of the *Black v S Freedman* constructive trust does not mean that the common law says nothing about theft or absence of title. Many constructive trusts involving fiduciaries arise precisely because of an underlying common law contract.⁴⁶ Even in cases of fraud, common law and equity have always been ‘like two dogs over a bone, off which neither side was sufficiently strong to tear all the meat’.⁴⁷ In any event, ‘[t]he days are long past when the common law courts looked with jealousy upon what they thought was a usurpation by the Chancery Court of their jurisdiction.’⁴⁸

The remedial significance of intentional wrongdoing and the unjust acquisition of a proprietary benefit is emphasised in many jurisdictions. The *Restatement of the Law Third: Restitution and Unjust Enrichment* states that (1) ‘[a] person who obtains a benefit by an act of trespass ... is liable in restitution to the victim of the wrong’;⁴⁹ and (2) ‘[i]f a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant’s rights, the defendant may be declared a constructive trustee, for the benefit of the claimant of the property in question and its traceable product.’⁵⁰ The reporter explains that

⁴³ *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [15] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

⁴⁴ *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 119 (Dixon CJ, McTiernan and Kitto JJ), citing *The Juliana* (1822) 2 Dods 504 at 521; 165 ER 1560 at 1567 (Lord Stowell).

⁴⁵ Maitland, *Equity: A Course of Lectures* (rev ed, 1936), 19.

⁴⁶ See, e.g. *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97 (Mason J).

⁴⁷ Hanbury, *Modern Equity* (8th ed, 1962) at 643–4, approved *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 194 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ).

⁴⁸ *Coulls v Bagot’s Executor and Trustee Company Ltd* (1967) 119 CLR 460 at 503 (Windeyer J).

⁴⁹ American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment* (2011) vol 2, §40.

⁵⁰ *Restatement of the Law Third: Restitution and Unjust Enrichment* (2011) vol 2, §55. The connection with Pomeroy’s treatise is explicit: vol 2 p 321, reporter’s note a.

‘the measure of recovery often depends on the blameworthiness of the defendant’s conduct. Consistent with general principle, a conscious wrongdoer will be stripped of gains from unauthorized interference with another’s property’.⁵¹

22. One of the examples given by the reporter is particularly apposite. ‘Finder, equipped with a metal detector, removed buried treasure from land belonging to Neighbor. Finder is a conscious wrongdoer who conducts his searches at night rather than ask his neighbors for permission. Neighbor sues Finder to establish ownership of the treasure. Under local property law, as between a landowner and a nontrespassing finder, title to lost or abandoned property is ordinarily awarded to the finder. Yet Finder as an intentional trespasser, will not be permitted to profit from a conscious wrong. To the extent Finder obtained title at all, he holds the treasure (and its proceeds) in constructive trust for Neighbor.’⁵² It cannot matter that the ‘treasure’ here is intangible rather than tangible property. As one American court has said, the applicability of the constructive trust ‘is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them.’⁵³ That includes property obtained by modern technological means.

23. In turn, AS[35]–[36] raise a false issue. This case has never relevantly involved any third party. Equity acts *in personam*. The (purely hypothetical) liability of a third party would depend on well-established equitable principles (including about notice). This is not a case in which a third-party’s existing proprietary interest might be a reason to decline to declare that a constructive trust arose.⁵⁴ Whether a constructive trust can be enforced against third parties, and to what extent, will always involve factual and discretionary questions, none of which arise here. The law is familiar with distinguishing an innocent recipient with no involvement in wrongdoing, from an active participant in an unconscientious scheme (cf AS[36]).⁵⁵ Among other things, accessory liability in equity is not strict.⁵⁶

Ground 2 – Alleged failure to identify the relevant facts and circumstances

24. There was no lack of identification of the relevant facts and circumstances (cf AS[38]–[39]). They are expressly set out by the Full Court in FC[3]–[8]; CAB 91–2, and the application

⁵¹ *Restatement of the Law Third: Restitution and Unjust Enrichment* (2011) vol 2, §40, comment b.

⁵² *Restatement of the Law Third: Restitution and Unjust Enrichment* (2011) vol 2, §40, illustration 10.

⁵³ *Latham v Father Divine*, 299 NY 22, 27; 85 NE 2d 168, 170 (Desmond J; Loughran CJ, Conway and Fuld JJ agreeing) (1949).

⁵⁴ Cf *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 32 [75], 44–5 [126] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

⁵⁵ See, e.g. *Barnes v Addy* (1874) 9 Ch App 244.

⁵⁶ See, e.g. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

of *Lenah* — in light of the arguments actually pressed by Farm Transparency — is set out in FC[17]–[44]; CAB 96–104. The Full Court rightly emphasised the ‘strong similarities between the present case and a case of fraud or dishonesty’; that Farm Transparency ‘engaged in a surreptitious intrusion onto and within [Game Meats’] property to gain an advantage which was not lawfully available to it, and to cause detriment to’ Game Meats; that Farm Transparency ‘sought to harm [Game Meats’] business by adverse publicity and to gain advantages for itself and its cause’; and that Farm Transparency’s ‘conduct met the standards of conscious and contumelious disregard for [Game Meats’] rights, or high-handed or deliberate conduct’: FC[18]; CAB 96.

10 25. The appellant’s reference to *Windridge Farm Pty Ltd v Grassi*⁵⁷ (AS[39]) emphasises the point. As both the primary judge and the Full Court found (PJ[164]–[166]; CAB 48–50; FC[29]–[31]; CAB 99–100), the facts of this case were different from — because substantially *more grave* than — the facts in *Windridge*. Relevantly, Farm Transparency positively intended to publish the images it obtained through its deliberate trespasses, for the purpose of harming Game Meats, and in the advancement of its own objectives, including fundraising.

26. Farm Transparency’s conduct was on all fours with that of the trespassers in *Lenah*. The nature of its wrongdoing having largely been admitted, the forensic contest was simply whether the principle identified in *Lenah* could be engaged. The rejection of the moral salience of Farm Transparency’s conduct in AS[39] is remarkable. The suggestion that a ‘proper principle’ of
20 ‘direct application’ could only respond to a formalistic, cramped notion of the relevant facts (AS[38]) is antithetical to the contextual approach of equity. Principles of equity ‘have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case’.⁵⁸ That is what the Full Court properly did.

Ground 3 – Alleged failure to consider lesser relief

27. The third ground of appeal is inconsistent with Farm Transparency’s position in the lower courts. No argument was pressed that, if the principle in *Lenah* were engaged, only some lesser form of relief was justified. The very point in *Lenah* is that recognition of a constructive trust is an appropriate remedial response to intentional wrongdoing of the kind perpetrated by
30 Farm Transparency. In view of Farm Transparency’s repeated, knowing and unlawful

⁵⁷ (2011) 254 FLR 87.

⁵⁸ *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 393 (Gibbs J), quoting *Boardman v Phipps* [1967] 2 AC 46 at 123 (Lord Upjohn).

trespasses (PJ[6], [45]–[48], [84], [242], [249]; CAB 9, 17, 31, 67, 69; FC[5]; CAB 91), positive intention to harm Game Meats’ business (PJ[123], [128], [142], [165]; CAB 39, 41, 43, 49–50; FC[8], [18], [31]; CAB 92, 96, 100), desire to do so for its own advantage (PJ[187]; CAB 54–5; FC[18]; CAB 96), and unrepentant desire to continue trespassing in the future (PJ[242], [258]; CAB 67, 71; FC[48]–[50]; CAB 105–7), damages — or any remedy falling short of injunctive relief — would not be an adequate remedy. To repeat: the primary judge found that Farm Transparency’s conduct was ‘among the most obvious examples of intentional wrongdoing that one might imagine’ (PJ[249]; CAB 69). Injunctive relief was justly ordered by the Full Court. No lesser order would suffice.

10 28. The primary judge found that, if injunctive relief were available, there were no discretionary reasons to decline to award it: PJ[183]–[188]; CAB 54–5. Farm Transparency did not challenge that finding on appeal, and does not now identify any circumstance weighing against relief to justify a different outcome than in *Lenah* (where injunctive relief was indeed granted against the trespassers, but not the ABC).⁵⁹ In this Court, Farm Transparency does not suggest any lesser relief in equity that ought to have been considered; save, apparently, to reject the availability of *any* remedy except damages, on the basis that Game Meats’ interests are said to be ‘commercial ones’ (AS[42]). That is unsustainable. Equitable relief is often granted to parties having commercial interests. They are no less able to be protected than parties whose interests are personal or altruistic.⁶⁰

20 29. The deliberate nature of Farm Transparency’s wrongdoing, coupled with its positive intention to harm Game Meats to its own advantage, meant that any relief that left Farm Transparency free to misuse its copyright in the images would be inadequate. Precisely because an interlocutory injunction was granted, the worst of Farm Transparency’s intended harm has not yet befallen Game Meats.⁶¹ But in the absence of equitable relief, and in light of Farm Transparency’s stated intentions, the evidence showed a genuine likelihood of harm — including disruption of Game Meats’ business operations, and harm to its reputation, value and

⁵⁹ See *Lenah* (2001) 208 CLR 199 at 200.

⁶⁰ See, e.g. *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1; *Warman International Ltd v Dwyer* (1995) 182 CLR 544; *Hospital Products* (1984) 156 CLR 41; *Birchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384; *Meinhard v Salmon* 249 NY 458, 164 NE 545 (1928); *Lac Minerals* [1989] 2 SCR 574; Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 LQR 238; Millett, ‘Equity’s Place in the World of Commerce’ (1998) 114 LQR 214.

⁶¹ The interim and interlocutory orders are at RBFM 6–18.

goodwill — for which damages would manifestly be an inadequate remedy.⁶² The relief ordered by the Full Court was thus entirely appropriate.

Part VI – Notice of Contention

30. The Full Court should also have granted injunctive relief against publication of the images obtained or captured by the appellant at the respondent’s premises, in equity’s auxiliary jurisdiction to remedy the trespasses (and their continuing effects) committed by the appellant against the respondent. Given the purpose of the law of trespass, the occupier’s fundamental property rights ‘must be supported by an effective sanction otherwise the term will be just meaningless rhetoric’.⁶³ That is why an injunction ‘is the prima facie remedy for trespass’, and the alternative remedy of damages ‘will be ordered exceptionally.’⁶⁴ Critically, ‘[i]n determining whether a substitution of damages for in specie relief is just, the interests of the parties are not of broadly equivalent weight. It will not suffice that the hardship entailed to the defendant by an injunction marginally outweighs the relief that the plaintiff will obtain thereby.’⁶⁵

31. The tort of trespass protects ‘the possession of property and the privacy and security of its occupier’,⁶⁶ and upholds the interest of the occupant in maintaining their ‘right to exclusive possession ... free from uninvited physical intrusion by strangers’.⁶⁷ The policy is not unique to residential premises: ‘[p]ersons conducting business on private property are entitled to do so without others intruding for purposes unrelated to the business activities they are conducting. This includes those who wish to enter with a view to publicly exposing aspects of their business.’⁶⁸ The tort of trespass is thus one of the longstanding means by which the law protects

⁶² Affidavit of E Tomasoni, 28 June 2024, [27]–[38], Exh ECT6, ECT7, ECT8 and ECT9 (RBFM 131–43); Affidavit of E Tomasoni, 16 May 2024, at [32]–[37] (RBFM 27-8); T83.10–45, T119.16–34, T120.10–120.43 (Mr Tomasoni) (RBFM 164–6); Affidavit of C Neville, 20 May 2024, Exh CN8 (RBFM 40–50); Affidavit of C Neville, 28 June 2024, at [6], Exh CWN7, CWN8 (RBFM 72, 85–119); Affidavit of C Delforce, 9 July 2024 at [9] (RBFM 148).

⁶³ *Plenty v Dillon* (1991) 171 CLR 635 at 655 (Gaudron and McHugh JJ); *Smethurst* (2020) 272 CLR 177 at [127] (Gageler J).

⁶⁴ *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 311 at [135] (Dodds-Streeton JA; Ashley JA and Cavanough AJA agreeing); *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

⁶⁵ *Break Fast Investments* (2007) 20 VR 311 at [47] (Dodds-Streeton JA; Ashley JA and Cavanough AJA agreeing).

⁶⁶ *Plenty v Dillon* (1991) 171 CLR 635 at 647 (Gaudron and McHugh JJ).

⁶⁷ *NSW v Ibbett* (2006) 229 CLR 638 at [29] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

⁶⁸ *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [58] (Spigelman CJ; Mason P and Grove J agreeing).

rights to privacy.⁶⁹ The right to exclude, in particular, helps create a ‘realm of private freedom ... where [one] can make decisions about what to do and how to do it, justifying these decisions if at all only to [one]self.’⁷⁰

32. Contrary to AS[46]–[48] the point is not whether, for limitation purposes, there was a continuing trespass ‘*de die in diem*’.⁷¹ Rather, even a trespass that is complete in itself (and hence accruing as a cause of action) may have ongoing *consequences* that the law will remedy.⁷² An example is of a trespasser who digs a pit on one’s land, but then leaves. While the continued existence of the pit is not a ‘continuing trespass’ for limitation purposes, the trespasser is nonetheless liable to remedy the past and future consequence of their actions in digging the pit.⁷³ At common law, the remedy is of course damages, which include consequential damages;⁷⁴ but both by statute⁷⁵ and in equity⁷⁶ injunctive relief is available against the consequences of trespass, whether of a prohibitory or mandatory kind.⁷⁷ Thus, the Court may grant a mandatory injunction even ‘where the injury sought to be restrained has been completed before the commencement of the action’.⁷⁸ The jurisdiction to grant an injunction where a trespass ‘is *continuing in its effects*’ is undoubted.⁷⁹

33. The remarkable assertion in AS[49] underscores the insidious nature of Farm Transparency’s wrongdoing. The very point was that its cameras were hidden from view, and were installed and removed without Game Meats’ knowledge or permission. Evidence is always ‘to be weighed according to the proof which it is in the power of one side to have produced and

⁶⁹ *Clerk & Lindsell on Torts* (24th ed, 2023) at [1-45]; *Fleming’s The Law of Torts* (11th ed, 2024) at [3.10]; *Balkin & Davis Law of Torts* (6th ed, 2021) at [5.1].

⁷⁰ Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 295; Bell and Parchomovsky, ‘The Privacy Interest in Property’ (2019) 167 *University of Pennsylvania Law Review* 869.

⁷¹ *Clegg v Dearden* (1848) 12 QB 576; 116 ER 986.

⁷² See *Hudson v Nicholson* (1839) 5 M & W 437; 151 ER 185.

⁷³ The example may have originated in Salmond’s *Law of Torts* (1st ed, 1907), 162. See, by way of subsequent repetition, *Fleming’s The Law of Torts* (11th ed, 2024) at [3.40].

⁷⁴ *Anning* (2002) 54 NSWLR 333 at 351–5 (Spigelman CJ; Mason P and Grove J agreeing); *Fleming’s The Law of Torts* (11th ed, 2024) at [3.80].

⁷⁵ *Common Law Procedure Act 1854*, 17 & 18 Vict c 125, s 82, first enacted in Victoria as the *Common Law Procedure Statute 1865* (Vic) s 242. The same powers exist in the Federal Court: *Federal Court of Australia Act 1976* (Cth) ss 22, 23.

⁷⁶ See *Mitchell v Dors* (1801) 6 Ves 147; 31 ER 984, and the other cases cited in *Meagher, Gummow and Lehane’s Equity: Doctrine and Remedies* (5th ed, 2015) at [21-110].

⁷⁷ *Kerr on Injunctions* (6th ed, 1927), 93–7.

⁷⁸ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [33] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

⁷⁹ *Smethurst* (2020) 272 CLR 177 at [68] (Kiefel CJ, Bell and Keane JJ), [149], [157] (Nettle J), [117], [122]–[130] (Gageler J), [165], [177], [183] (Gordon J), and [248]–[262] (Edelman J); *Patrick Stevedores* (1998) 195 CLR 1 at [33] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

the power of the other to have contradicted’;⁸⁰ and Game Meats was *not* the party with the relevant knowledge. Farm Transparency’s principal, Mr Delforce, admitted that cameras were present for a three-month period, and took some 14 days of footage.⁸¹

34. Here, the continuing effects of Farm Transparency’s trespass arose from the fundamental nature of the right it infringed: namely, Game Meats’ right to exclusive possession of its premises, and in particular its right to exclude others from viewing or exposing what occurred therein. By its trespass, and by its surreptitiously placed cameras, Farm Transparency obtained the one thing the law of trespass most directly prevented it from obtaining: access to, and being able to see and then publicise to the world at large, what goes on in the private and heavily-secured premises of Game Meats, which it was not otherwise authorised or able to see. For so long as Farm Transparency retains, and intends to publish, the unlawfully captured images, the injurious consequences of its trespass against Game Meats will continue. Put another way, without a permanent injunction, the ‘privacy and security’ of Game Meats as occupier in exclusive possession of its premises continues to be undermined,⁸² as does its right to exclude persons ‘who wish to enter with a view to publicly exposing aspects of their business.’⁸³ To repeat: contrary to the suggestion in AS[57]–[58], the prospect of serious harm to the operations, reputation and value of Game Meats’ business is real,⁸⁴ and has been forestalled to date only by the existence of interlocutory relief.

35. Importantly, four members of the this Court in *Smethurst v Commissioner of Police* — each of Gageler, Nettle, Gordon and Edelman JJ — expressly confirmed that an injunction *can* be granted to restrain the use of information obtained by trespass; and that the underlying legal right is that protected by the law of trespass.⁸⁵ A majority of this Court has thus confirmed that there is no jurisdictional impediment to granting an injunction in the circumstances of this case: namely, to restrain the use by the trespasser itself (unlike a third party broadcaster, such as the ABC in *Lenah*)⁸⁶ of non-confidential information obtained unlawfully and by deliberate trespass. Thus, nothing said in *Smethurst* casts doubt on the principle that injunctive relief is

⁸⁰ *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970 (Lord Mansfield).

⁸¹ T187.4–24, T200.6–T202.4 (RBFM 167–9). See also T253.19–254.19, T258.42–261.39 (Ms McDonald-Eckersall) (RBFM 207–210).

⁸² *Plenty v Dillon* (1991) 171 CLR 635 at 647 (Gaudron and McHugh JJ).

⁸³ *Anning* (2002) 54 NSWLR 333 at [58] (Spigelman CJ; Mason P and Grove J agreeing).

⁸⁴ See above paragraph 29 and the evidence there cited.

⁸⁵ *Smethurst* (2020) 272 CLR 177 at [117], [122]–[130] (Gageler J), [149], [157] (Nettle J), [165], [177], [183] (Gordon J), and [248]–[262] (Edelman J).

⁸⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [51]–[52] (Gleeson CJ), [67], [100] (Gummow and Hayne JJ), [145] (Kirby J), [303]–[305] (Callinan J).

available as the usual remedy for trespass and its consequences, and for the unconscientious assertion of legal rights.⁸⁷

36. Farm Transparency is exactly the kind of ‘technologically adept scoundrel’ referred to by Gageler J, against whom injunctive relief is rightly available to compel the return of wrongfully-obtained data.⁸⁸ As Nettle J explained, in cases involving ‘a deliberate flouting of the law’ (unlike *Smethurst* itself) where a person obtains information ‘knowing, or recklessly indifferent as to whether, they had no lawful authority to do so’, the unlawful ‘retention and use of the information’ can be seen ‘as raising an equity for restorative injunction’.⁸⁹ Similarly, as Gordon J put it, where equity intervenes ‘against the trespasser, in order to address harm flowing from the trespass’, it is not necessary ‘to identify a further right or a continuing trespass’: the existence of harm and the ‘right not to suffer a trespass’ is enough.⁹⁰ Likewise, this is the kind of case where, as Edelman J said, mandatory injunctive relief is ‘most easily justified’, because ‘the consequences are ongoing and serious, the interference with the defendant’s liberty is trivial and, compared with an injunction, damages are an inadequate means to “undo the consequences of a wrong”’.⁹¹

37 Even for the other members of the Court in *Smethurst* (Kiefel CJ, Bell and Keane JJ), the rejection of injunctive relief was expressly predicated on, among other things, (1) the absence of any claim for compensatory damages;⁹² (2) the ‘effects’ of the trespass being said only to be the prospect of furthering the investigation by public authorities of alleged criminal offending, consistently with their statutory duties;⁹³ (3) the absence of any damage recognised by the law;⁹⁴ and (4) the absence of ‘untoward conduct’ by the police.⁹⁵ With the greatest respect, the suggestion that injunctive relief was unavailable to a journalist who was the victim of unlawful trespassory conduct by the police was wrong; but it would be even more disturbing, however, if injunctive relief were unavailable in a case like the present, which involves

⁸⁷ See, e.g. *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 311 at [135] (Dodds-Streton JA; Ashley JA and Cavanough AJA agreeing); *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

⁸⁸ *Smethurst* (2020) 272 CLR 177 at 230 [123] (Gageler J).

⁸⁹ *Smethurst* (2020) 272 CLR 177 at 243 [158] (Nettle J).

⁹⁰ *Smethurst* (2020) 272 CLR 177 at 257 [196] (Gordon J).

⁹¹ *Smethurst* (2020) 272 CLR 177 at 276 [253] (Edelman J), citing Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (2019), 271.

⁹² *Smethurst* (2020) 272 CLR 177 at 206 [46], 211 [67] (Kiefel CJ, Bell and Keane JJ).

⁹³ *Smethurst* (2020) 272 CLR 177 at 207 [48] (Kiefel CJ, Bell and Keane JJ).

⁹⁴ *Smethurst* (2020) 272 CLR 177 at 213 [72]–[73] (Kiefel CJ, Bell and Keane JJ).

⁹⁵ *Smethurst* (2020) 272 CLR 177 at 215 [79] (Kiefel CJ, Bell and Keane JJ).

deliberate wrongdoing by private parties having no statutory authority or justification, and which is positively intended by them to cause — and has already caused — economic, reputational and other harm to the victim of their intentional trespasses.⁹⁶

38. The availability of injunctive relief in such circumstances accords with both authority and principle. There has never been any rule that injunctive relief must be refused ‘upon the mere ground that the damage had been completed before the bill was filed.’⁹⁷ To the contrary, every case ‘must depend on its own circumstances’, and the court *can* grant mandatory injunctive relief ‘in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld.’⁹⁸ That is true here. As Kerr explains, if ‘the conduct of the defendant has been fraudulent, vexatious or oppressive, and the trespass is of so serious a nature that the parties cannot be placed in the position to which they were before the acts were committed, without the interference of the Court, the Court will interfere, even though the act complained of has been completed.’⁹⁹ Trespass is in this respect no different from tortious conspiracy, in which injunctive relief can be granted *both* to forestall future damage and to remedy the consequences of the wrong.¹⁰⁰

39. Intentional wrongdoing on the part of the defendant, or an intention positively to cause harm, has always weighed in favour of injunctive relief. Judges are ‘entitled to consider the defendant’s conduct in the round’, which includes ‘everything that had preceded the commencement of the action’.¹⁰¹ Injunctive relief can rightly be seen as a ‘preventive remedy, that is, prohibition of further damage *or an intended damage*’.¹⁰² Injunctive relief is in that and other respects ‘rather preventive than restorative’.¹⁰³ In *Goodson v Richardson* (a case of threatened continuing trespass) Lord Selborne LC emphasised that ‘a deliberate and unlawful invasion by one man of another man’s land ... to the gain and profit of the trespasser, without

⁹⁶ Given the involvement of public authorities in *Smethurst*, considerations relating to the rule of law were of obvious importance. However, even in cases involving private parties, the availability of discretionary equitable relief can have an important function in dissuading lawlessness and upholding the rule of law: see Harding, ‘Equity and the Rule of Law’ (2016) 132 LQR 278, 297–302.

⁹⁷ *Durell v Pritchard* (1865) LR 1 Ch App 244 at 250 (Turner LJ; Knight Bruce LJ agreeing).

⁹⁸ *Durell v Pritchard* (1865) LR 1 Ch App 244 at 250 (Turner LJ; Knight Bruce LJ agreeing).

⁹⁹ *Kerr on Injunctions* (6th ed, 1927), 93.

¹⁰⁰ See, e.g. *Patrick Stevedores* (1998) 195 CLR 1 at [33] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ); *British Motor Traders Association v Salvadori* [1948] Ch 556 at 572 (Roxburgh J); *Gulf Oil (Great Britain) Ltd v Page* [1987] Ch 327; *Femis-Bank (Anguilla) Ltd v Lazar* [1991] Ch 391.

¹⁰¹ *Ottercroft Ltd v Scandia Care Ltd* [2016] EWCA Civ 867 at [14] (Lewison LJ; Laws and Tomlinson LJ agreeing).

¹⁰² *Isenberg v The East India House Estate Co Ltd* (1863) 3 De GJ & S 263 at 272; 46 ER 637 2 at 641 (Lord Westbury LC) (emphasis added).

¹⁰³ *Daniell’s Chancery Practice* (8th ed, 1914) vol 2 at 1369. See also at 1418–22.

the consent of the owner of the land’ is ‘a proper subject for an injunction.’¹⁰⁴ In granting a mandatory injunction in *Smith v Smith*, Jessel MR emphasised that ‘all the circumstances of the case must be taken into consideration’ and ‘[w]ithout laying down any absolute rule, in the first place it is of great importance to see if the Defendant knew he was doing wrong, and was taking his chance about being disturbed in doing it.’¹⁰⁵

40. As Lord Macnaghten said in *Colls v Home and Colonial Stores Ltd*, ‘[i]n some cases, of course, an injunction is necessary – if, for instance, the injury cannot fairly be compensated by money – if the defendant has acted in a high-handed manner – if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others.’¹⁰⁶ Adapting these words, Kerr emphasises that where the defendant ‘has been guilty of sharp practices or unfair conduct, or has shown a desire to steal a march upon the plaintiff, or to evade the jurisdiction of the Court, the injunction will issue, notwithstanding the amount of inconvenience to the other party’.¹⁰⁷ That was true in this case.

41. There is also an important parallel to the equitable jurisdiction to order delivery up of fraudulent or invalid documents; forgeries, counterfeits or passed off goods; and the fruits of the infringement of trade secrets or intellectual property.¹⁰⁸ Such orders express the ‘general jurisdiction of the Court to order delivery up for destruction of all articles which have been created in violation of the Plaintiffs’ rights.’¹⁰⁹ It is irrelevant that the material was not previously owned by the plaintiff: what matters is that the thing to be delivered up is the fruit — or the means — of an infringement of their legal rights.¹¹⁰

42. Such orders for delivery up are often described as being in aid of the injunction

¹⁰⁴ *Goodson v Richardson* (1874) LR 9 Ch App 221 at 224–5 (Lord Selborne LC).

¹⁰⁵ (1875) LR 20 Eq 500 at 505 (Jessel MR).

¹⁰⁶ *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 193 (Lord Macnaghten).

¹⁰⁷ *Kerr on Injunctions* (6th ed, 1927), 42.

¹⁰⁸ See, e.g. *Ogilvie v Jeaffreson* (1860) 2 Giff 353; 66 ER 147; *Hole v Bradbury* (1879) 12 Ch D 886; *Mergenthaler Linotype Co v Intertype Ltd* (1926) 43 RPC 381; *Smethurst* (2020) 272 CLR 177 at 279–80 (Edelman J); Young, Croft and Smith, *On Equity* (2009) at [11.530]–[11.600]; *Meagher, Gummow and Lehane’s Equity: Doctrine and Remedies* (5th ed, 2015) ch 28. See too *Federal Court of Australia Act 1976* (Cth) s 22, empowering the Court to grant ‘all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined’; and s 23, empowering the Court ‘to make orders of such kinds ... as the Court thinks appropriate.’

¹⁰⁹ *Hole v Bradbury* (1879) 12 Ch D 886 at 903 (Fry J).

¹¹⁰ See, e.g. *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 at 52 (Gowans J); *Ormonoid Roofing and Asphalts Ltd v Bitumenoids Ltd* (1930) 31 SR (NSW) 347 at 362 (Harvey CJ in Eq).

restraining the defendant from infringing the plaintiff's rights. For so long as the fruits remain in their possession, the wrongdoer 'may be subject to too serious and grave a temptation and may therefore be tempted to commit a breach of the injunction which he would otherwise not commit. Accordingly, in order to assist the plaintiff and as a relief ancillary to the injunction he has obtained, the Court may in its discretion make an order for destruction or delivery up'.¹¹¹ As the authors of *Meagher Gummow and Lehane* note, this Court's decision in *Expense Reduction* illustrates that the things to be delivered up may well include materials in electronic form.¹¹² The same is true of injunctive relief: that the fruits of a deliberate wrong are in electronic form is no barrier to an injunction being granted to prevent their misuse.

10 43. Ultimately, independently of whether a constructive trust arose, Farm Transparency's flagrant wrongdoing provided a sufficient basis to justify injunctive relief, especially having regard to having regard to:

- (a) its deliberate flouting of the law in invading Game Meats' premises and committing the trespasses (PJ[249]; CAB 69);¹¹³
- (b) the contumacy and gravity of its trespasses (PJ[242]–[258]; CAB 67–71);¹¹⁴
- (c) its intention to publish the images and visit further loss on Game Meats (PJ[142]; CAB 43);¹¹⁵

¹¹¹ *Mergenthaler Linotype Co v Intertype Ltd* (1926) 43 RPC 381 at 382 (Russell J).

¹¹² *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (5th ed, 2015) at [28-030], referring to *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [68]–[70]. See also *Fairstar Heavy Transport NV v Adkins* [2014] FSR 8 at [54]–[55] (Mummery LJ).

¹¹³ T208.19, T209.20–27, T210.24, T211.1–24 (Mr Delforce) (RBFM 176–9); T260.5–261.1 (Ms McDonald-Eckersall) (RBFM 209–210).

¹¹⁴ Among other matters, the trespasses involved (1) repeated wrongful entries on seven separate occasions (PJ[44]; CAB 16–17); (2) multiple trespassers, each authorised by Farm Transparency (PJ[44]–[45]; CAB 16–17); (3) entries of a significant duration, between one and three hours (PJ[44], [232]; CAB 16–17, 65); (4) incursion into secure premises, actively knowing they did not have Game Meats' permission (PJ[47]; CAB 17); (5) installation, on multiple occasions, of multiple hidden cameras (PJ[46], [84]–[85]; CAB 17, 31); (6) actual physical damage to Game Meats' land (PJ[46], [233]; CAB 17, 65); (7) a real risk to biosecurity; to the integrity of Game Meats' operations; and to the health and safety of the trespassers themselves (PJ[48], [233]; CAB 17–18, 65) (8) Farm Transparency's trespasses, and use of unauthorised surveillance devices, were knowingly in disregard of the law (PJ[249], [258]; CAB 69, 71) T222.22–T224.45 (Mr Delforce) (RBFM 189–91); T277.29–T278.1 (Ms McDonald-Eckersall) (RBFM 219–220); (9) Farm Transparency repeatedly having trespassed before (PJ[251]; CAB 69–70) T204.7–T206.42, T208.15 (Mr Delforce) (RBFM 172–6); (10) Farm Transparency intending to continue its knowing disregard of the law (PJ[258]; CAB 71); (11) Farm Transparency unapologetically intending to trespass in future (PJ[194], [242], [251]; CAB 56, 67, 71); and (12) Farm Transparency being unrepentant in its desire to publish the unlawfully-obtained footage and continue its campaign (PJ[249], [258]; CAB 69, 71).

¹¹⁵ Amended Defence at [23](a) (ABFM 27); Affidavit of C Neville of 28 June 2024, at [3]–[4], Exh CWN3, CWN4 and CWN5 (RBFM 71–84); Affidavit of C Delforce, 9 July 2024, at [8]–[9], [29] (RBFM 148, 150); T225.16–40 (Mr Delforce) (RBFM 193); T266.36–267.20 (Ms McDonald-Eckersall) (RBFM 215–

- (d) the inadequacy of damages when Game Meats is yet to suffer the most substantial foreseeable loss and damage (given the interim injunction and Farm Transparency’s subsequent undertakings not to publish the images) and where the inconvenience and disruption to Game Meats’ business is difficult to quantify in monetary terms (PJ[139], [214]; CAB 42–3, 61);¹¹⁶ and
- (e) Game Meats’ legal entitlement to exclude the respondent from its premises, when Farm Transparency was seeking unlawfully to ‘publicly expose aspects of [Game Meats’] business’, and intended to keep trespassing irrespective of the legal consequences (PJ[251]; CAB 69–70).¹¹⁷

10 44. This is a case where injunctive relief for ‘the restoring of things to their former condition’ — relevantly, before the trespassory installation of the hidden cameras by Farm Transparency — ‘is the only remedy which will meet the requirements of the case’.¹¹⁸ That can be achieved by injunctive relief preventing publication, and compelling delivery up, of the offending images. If injunctive relief of that kind is granted, then it may not be necessary also to declare that a constructive trust has arisen over the copyright in the images. As one leading Canadian text observes, ‘[i]f all that the plaintiff wants is the transfer of a specific asset, then it may not be necessary to establish that the asset is held in trust for the plaintiff. Instead a plaintiff might seek a mandatory injunction requiring transfer of the asset. If the claim is successful, the outcome will be the same without the need to invoke a trust.’¹¹⁹ Accordingly, if — *but only if*

20 — injunctive relief is otherwise available to Game Meats, then a constructive trust would be an *available*, but not a *necessary*, means to quell the controversy between the parties.

Part VII – Time Estimate

It is estimated that up to 2 hours will be required for the respondent’s oral argument (including submissions on the notice of contention).

Dated 5 March 2025



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6), Farm Transparency website (McDonald-Eckersall Bio) (RBFM 152–3); T275.29–32 (Ms McDonald-Eckersall) (RBFM 217).

¹¹⁶ Affidavit of E Tomasoni, 28 June 2024, [27]–[38], Exh ECT6, ECT7, ECT8 and ECT9 (RBFM 131–43); Affidavit of E Tomasoni, 16 May 2024, at [32]–[37] (RBFM 27–8).

¹¹⁷ T208.14–37 (Mr Delforce) (RBFM 176).

¹¹⁸ *Kerr on Injunctions* (6th ed, 1927), 41.

¹¹⁹ *Waters’ Law of Trusts in Canada* (3rd ed, 2005), 485–6.

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	<i>Common Law Procedure Act 1854</i> , 17 & 18 Vict c 125 (UK)	As enacted	s 82	Illustrative	N/A
2.	<i>Common Law Procedure Statute 1865</i> (Vic)	As enacted	s 242	Illustrative	N/A
3.	<i>Copyright Act 1968</i> (Cth)	Compilation C64	s 9(3), 13(2), 86.	Current version, and in force at time of Full Court judgment	13 August 2025
4.	<i>Federal Court of Australia Act 1976</i> (Cth)	Compilation C59	ss 22, 23	Current version, and in force at time of Full Court judgment	13 August 2025