



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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#### Important Information

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## Part I: Certification

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

## Part II: Concise reply

### Factual background

2. GMC's assertion that the primary judge was told that he did not need to make any finding that the Compilation revealed breach of the Standard (RS [7]) is false. FTI clearly submitted that the Compilation revealed breaches of the *Standard*; as the judge noted (*J* [107] CAB 35), what FTI said was unnecessary to decide was whether the Compilation revealed an offence under the *POCTA Act*.<sup>1</sup> GMC's selective citation of evidence of Dr Texler (which GMC's own witnesses contradicted<sup>2</sup>) is not to the point. GMC itself repeatedly admitted that the footage revealed conduct that (objectively) involves a breach of Art 7.10 at the least.<sup>3</sup> Moreover, and in any event, the judge's findings (*J* [51] CAB 18), which were not challenged by GMC on its appeal, entailed breach of Art 7.10 at the least.

### FTI's appeal: constructive trust

3. Although GMC decries what it repeatedly calls, not the "trespasses" by FTI, but its "wrongdoing", it must be taken that GMC advances no principle that a remedial constructive trust may be imposed in cases of "wrongdoing" *simpliciter*. For that would deny the enquiry into "the moral salience of [FTI's] conduct" which GMC acknowledges and invites this Court to embrace, and would be

<sup>1</sup> *Prevention of Cruelty to Animals Act 1986* (Vic). See FTI's closing written submissions at trial dated 28 August 2024 (ASBFM 210) at [8] (ASBFM 212), [15] (ASBFM 213), [46(c)] (ASBFM 218-220), [49] (ASBFM 219-221), which were before the Full Court (CAB 135).

<sup>2</sup> Affidavit of Darren Webb (28 June 2024) (ASBFM 128) at [25]-[26] (ASBFM 139) and [38(c)] (ASBFM 144), admitting that the footage revealed instances of "goats escaping the retainer and being slaughtered while conscious"; see also affidavit of Eugene Christopher Tomasoni (28 June 2024) (ASBFM 146) at [26] (ASBFM 156-157); T65.27-36 (Mr Tomasoni) (ASBFM 204); T 149.18-38 (ASBFM 206), 150.34-151.1 (ASBFM 207-208), 159.21-36 (Mr Webb) (ASBFM 209).

<sup>3</sup> See GMC's open written submissions at trial dated 26 July 2024 (ASBFM 162) at [37] (ASBFM 176), which were before the Full Court (CAB 135). See also GMC's opening oral submissions at trial at T2-T25 (ASBFM 180-203), especially: T7.33-40 (admitting that the footage reveals about 17 goats that had been "ineffectively stunned", with "goats showing clear signs of consciousness before they're stuck, including lifting their heads, etcetera") (ASBFM 185); T16.12-16 accepting that FTI's media release of 17 May 2024 "describes what the film shows" (ASBFM 194), which description was: "Footage shows adult goats being wrestled and hit by workers as well as newborn goats left to suffer for hours after being unsuccessfully stunned using painful electronic tongs. Many goats display signs of consciousness, including calling out and blinking even after their throats have been slit." (Exhibit CN8 to the affidavit of Christopher Wyatt Neville of 20 May 2024) (ASBFM 86).

stigmatised as “a formalistic, cramped notion of the relevant facts” which “is antithetical to the contextual approach of equity” (RS [26]).

4. In other words, GMC does not say when, on its case, “wrongdoing” would and would not empower a court to impose a remedial constructive trust on some advantage which a defendant “should not be permitted to retain” (RS [17]). It is inappropriate of GMC to contend for a result without properly articulating a principle which it suggests should be of general application. That GMC articulates no such principle tends to suggest that it does not exist.
5. It is possible, in cases involving common law doctrine as much as cases involving equitable principles, to seek and sometimes to find analogies between the circumstances of a novel case and past – sometimes ancient – decisions. However, any valid analogy must be apt to be transposed from its native situation into the instant situation without disrupting the legal coherence of the receiving system. For example, any American doctrine of “trusts *ex maleficio*” or “*ex delicto*” (RS [16]), which extends “practically without limit” but includes situations of misrepresentation, undue influence and “taking advantage of one’s weakness or necessities”<sup>4</sup> has no counterpart in Australian law. In Australian law, several distinct doctrines respond to such ills. Characterising FTI’s conduct as “serious wrongdoing” and then selecting foreign legal material which describes quite different legal responses to a differently identified problem, employing obviously different legal conceptions, yields no valid analogy to apply in this case.
6. Likewise, there is no true analogy between cases of unconscionable dealing where enquiry is made into “every connected circumstance that ought to influence [the Court’s] determination upon the real justice of the case” (cf RS [19]). In those cases, in Australia, there exist principles<sup>5</sup> by reference to which “circumstances” can be ascertained which are “connected” to (i.e., relevant to) a dispute; without those principles, there could be no “justice of the case” according to law. That identifies the vice of GMC’s position: its case of adjectives against FTI amounts to little more than an expressed moral dislike of FTI’s conduct.

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<sup>4</sup> Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America*, 5<sup>th</sup> ed. (Symons ed.), (1941) vol. IV, § 1053 pp 119-120.

<sup>5</sup> See e.g. *Thorne v Kennedy* (2017) 273 CLR 85, [38].

7. If the imposition of a constructive trust were to be upheld on GMC’s proffered basis, then it would appear apt to apply in situations quite removed from the controversy before the Court and thereby produce uncertainty. It would appear capable of applying to any form of intentional “wrongdoing” (subject only to an undefined range of relevant “circumstances”).<sup>6</sup> Cast as such, the supposed “principle” is unconfined to any particular cause of action: for example, it would appear to apply to economic torts (in which intention is already an element, and the pursuit of gain often motivates the tortfeasor).
8. If the law were that “where a trespasser gains an additional proprietary benefit by reason of their trespass, they are obliged to account for it” through a constructive trust – as GMC’s submission at RS [12] suggests – then FTI’s arguments as to coherence might seem to be misplaced. However, the law in that situation, and in respect of the economic torts and breach of contract, is that damages is the available remedy and the relevance of a defendant’s intention, opportunity to, or actual derivation of gain from their tortious activity, breaches of contractual obligation or statutory misconduct are dealt with through existing rules as to damages and other relief (including personal restitutionary remedies).<sup>7</sup> On GMC’s case, the law of damages and statutory remedial regimes would in many situations become otiose. GMC would assign the constructive trust a function which “render[s] superfluous”, rather than “to reflect and enforce, the principles of the law of equity”,<sup>8</sup> by rendering significant areas of law and statute redundant.
9. GMC’s continuing assertion that *Lenah* establishes a “principle” that supports its trust claim (RS [11]), [13], [24], [26], [27]) is wrong: AS [22]. GMC also says, in support of its constructive trust claim (RS [15]),<sup>9</sup> that in *Lenah* an injunction was granted against the trespassers (Animal Liberation) “which was not disturbed on appeal”. However as no constructive trust issue was pleaded and live, and the

<sup>6</sup> It is difficult to appreciate why such “parallels” as perceived by the Full Court and urged by GMC between FTI’s behaviour and the “unconscientious wrongdoing intentionally committed by a fraudster or thief” or “exploiting another’s mistake” (RS [18]; also [24]) would not, on GMC’s proffered legal position, lead to supposed parallels being perceived in all such situations.

<sup>7</sup> See e.g. *Clark v Macourt* (2013) 253 CLR 1, [9]-[11], [27], [59]-[60]; *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, [157]-[159]; and, generally, Edelman, *McGregor on Damages*, (2024, 22<sup>nd</sup> ed, ch 16.

<sup>8</sup> *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J).

<sup>9</sup> See also RS [26], [28] as to GMC’s injunction claim.

(interim) injunction granted was ordered in default of appearance by Animal Liberation, the order as against it says nothing in support of the supposed principle on which GMC seeks to found its constructive trust claim as final relief.

10. Plainly it was error for the Full Court not to consider the availability of lesser relief. It is trite that the proper exercise of discretion demanded this. GMC bore both the onus of proof and the burden of persuasion to establish that no other remedy would suffice. That is *a fortiori* in circumstances where it sought orders that FTI to assign to GMC its *in rem* copyright, given the obvious impact of such relief on third parties (in particular on Channel 7): AS [35]-[36]; cf. RS [23].

10 **GMC’s notice of contention: injunction in auxiliary jurisdiction**

11. While GMC disavows reliance on the doctrine of continuing trespass (RS [32]), in reality it relies on notions peculiar to that doctrine and confounds two distinct types of cases of mandatory injunctions: those to restrain the continuance of a continuing trespass, and those to remedy consequences of a concluded trespass. At the same time, while GMC purports to rely on authorities as to mandatory injunctive relief to remedy *consequences* of tortious conduct, in truth GMC seeks prohibitory injunctive relief as if FTI’s trespasses were *ongoing*. The evident reason is that, on the ordinary position as to mandatory injunctive relief where tortious conduct has concluded, GMC cannot meet the high standard to establish the inadequacy of damages (AS [56]-[58]). Rather than join issue with FTI’s contentions that FTI’s publication of images in exercise of copyright is incapable of satisfying that test (AS [57]-[58]), GMC seeks to reframe the enquiry as though an anticipated or continuing trespass were in issue.

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12. That produces artifice; indeed, fiction. It is wrong to say that, “without a permanent injunction, the ‘privacy and security’ of [GMC] as occupier in exclusive possession of its premises *continues to be* undermined, as does its right to exclude persons ‘who wish to enter with a view to publicly exposing aspects of their business’” (RS [10]). There is, for the reasons given in AS [48]-[49], no continuing trespass.<sup>10</sup> GMC cannot now escape the consequence of its failure *plead and prove* a case of continuing trespass at trial by an appeal to principles as

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<sup>10</sup> The attempt at RS [32] to dismiss those reasons as confined to “limitation purposes”, when they in fact relate to whether the tortious liability exists and is recurring, is to be rejected.

to the *weighing* of evidence in respect of pleaded claims and defences: cf RS [33].<sup>11</sup> Further, to point (RS [20]-[31], [39]-[40]) to statements of principle as to the merit of injunctive relief to restrain *an anticipated trespass* is irrelevant: such statements are not directed to the issue here, which is whether and why injunctive relief should issue to restrain activity which is lawful: AS [50]-[51], [55]-[58]. Moreover, the primary judge did not “find” that, “if injunctive relief were available, there were no discretionary reasons to decline to award it” (cf RS [28]). As no such finding was made there is no basis for the submission that FTI “did not challenge that finding on appeal” (RS [28]).

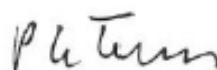
- 10 13. FTI’s apprehended conduct being lawful, and GMC’s only interests being commercial,<sup>12</sup> there is no basis for the injunctive relief sought by GMC in equity’s auxiliary jurisdiction. Furthermore, this Court ought not exercise its discretion to grant such relief: the Court is not well placed to determine that such relief should issue, when this Court does not have the benefit of the complete record of evidence. Further or alternatively, discretion should be exercised *against* the grant of relief on the bases that: the Compilation does reveal iniquity, in the form of unlawful conduct by GMC (see [1] above);<sup>13</sup> and, in any event, revelation of the conduct depicted therein is of legitimate public interest.<sup>14</sup>

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<sup>11</sup> *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, [37]-[38]; also at [102].

<sup>12</sup> There is no fiduciary relationship here, let alone a fiduciary relationship protective of GMC’s commercial interests, such as to justify the submission that GMC’s commercial interests are not adequately vindicated by the damages awards made and upheld on appeal below: cf RS [28] and fn 60 (all of the authorities cited by GMC concern fiduciary obligations).

<sup>13</sup> *A v Hayden* (1984) 156 CLR 532, 544-545 (Gibbs CJ). See also, e.g., *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177, [99] (Kiefel CJ, Bell and Keane JJ). The concept of “iniquity” is flexible: see Dal Pont, *Law of Confidentiality* (2015), [11.25]. It may apply where “there is shown to have been some impropriety which is of such a nature that it ought, in the public interest, be exposed”: *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341, 382 (Powell J).

<sup>14</sup> See, e.g., *Farm Transparency International Ltd v State of New South Wales* (2022) 277 CLR 537, [90] (Gageler J) and the cases cited therein including *ABC v O’Neill* (2006) 227 CLR 57, [31]-[32] (Gleeson CJ and Crennan J).