HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ

Matter No S20/2025

HUNT LEATHER PTY LTD & ANOR — APPELLANTS

AND

TRANSPORT FOR NSW — RESPONDENT

Matter No S21/2025

HUNT LEATHER PTY LTD & ORS — APPELLANTS

AND

TRANSPORT FOR NSW — RESPONDENT

Hunt Leather Pty Ltd v Transport for NSW
Hunt Leather Pty Ltd v Transport for NSW
[2025] HCA 53
Date of Hearing: 15 & 16 May 2025
Date of Judgment: 17 December 2025
S20/2025 & S21/2025

ORDER

In Matter No S20/2025

1. *Appeal allowed in part.*

2. *The orders of the Court of Appeal of the Supreme Court of New South Wales made on 18 September 2024 be set aside and, in their place, it be ordered that the appeal and cross-appeal be dismissed with costs.*

3. *The respondent pay the appellants' costs of the appeal.*

In Matter No S21/2025

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3. *The respondent pay the appellants' costs of the appeal.*

On appeal from the Supreme Court of New South Wales

Representation

A J L Bannon SC and A M Hochroth with L D Shipway and C M R Ernst for the appellants in each matter (instructed by Banton Group)

J T Gleeson SC and L G Moretti with B Lambourne for the respondent in each matter (instructed by Lander & Rogers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Hunt Leather Pty Ltd v Transport for NSW
Hunt Leather Pty Ltd v Transport for NSW

Tort – Private nuisance – Where respondent planned and procured construction of Sydney Light Rail – Where appellants claimed to have suffered loss or damage by reason of substantial interference with ordinary enjoyment of land – Whether purpose of respondent's use of land common and ordinary – Whether construction work "conveniently done" – Whether respondent's liability based on exercise of special statutory power within meaning of s 43A of *Civil Liability Act 2002* (NSW) – Whether respondent could rely on defence of statutory authority.

Damages – Assessment – Tort – Whether damages should include reasonable costs incurred in obtaining litigation funding.

Words and phrases – "balance", "based on", "common and ordinary", "construction work", "construction works", "conveniently done", "damages", "defence of statutory authority", "defences", "funding commission", "give and take", "injury to land", "litigation funding costs", "not convenient", "not ordinary", "nuisance", "onus", "ordinary enjoyment of land", "private nuisance", "proper consideration", "public authority", "reasonable", "reasonable expectations of the locality", "reasonableness", "right to land", "social utility", "special statutory power", "statutory authority", "substantial interference", "undue interference", "unlawful interference", "unreasonable", "use of land", "wrongful interference".

Civil Liability Act 2002 (NSW), ss 40, 41, 43, 43A.
Roads Act 1993 (NSW), s 7, Pts 2-4, 7-10.
Transport Administration Act 1988 (NSW), ss 3C, 3E, 104N, 104P, Sch 1, cll 3, 9.
Transport Administration Amendment (RMS Dissolution) Act 2019 (NSW), Sch 1.
Transport Administration (General) Amendment (Light Rail) Regulation 2015 (NSW), Sch 1.
Transport Administration (General) Regulation 2013 (NSW), cl 82A.

1 GAGELER CJ. These appeals concern the liability to neighbouring landholders in private nuisance at common law of a public authority exercising statutory power to procure public works on public lands.

2 The public authority is Transport for NSW ("TfNSW"), a corporation constituted under the *Transport Administration Act 1988* (NSW),[1] a function of which is to facilitate the development of transport infrastructure[2] and a power of which is to enter into contracts in connection with that function.[3] The public works comprise the construction by a private consortium, pursuant to contracts entered into with TfNSW, of the Sydney Light Rail. The construction was along public roads which TfNSW was licensed to occupy. The construction was authorised under the *Roads Act 1993* (NSW)[4] and was the subject of assessment and approval under the *Environmental Planning and Assessment Act 1979* (NSW).[5]

3 The construction was planned to proceed in stages in order to minimise inconvenience to neighbouring landholders. The planned stages of construction, corresponding to proposed fee zones, were publicly announced in advance of the commencement of the construction. In the events which occurred, the construction period for each stage grossly exceeded that which had been planned and announced. This was due in part to the encountering in the course of construction of underground utilities the potential for which had been insufficiently factored into the planning.

4 Each of Hunt Leather Pty Ltd and Ancio Investments Pty Ltd was a lessee of business premises which fronted a road along the route of the Sydney Light Rail. Together with others, Hunt Leather and Ancio commenced representative proceedings against TfNSW in the Supreme Court of New South Wales in which each was found to have suffered substantial interference with the use and enjoyment of its premises, having regard to the noise and dust generated by the construction and to the presence of hoardings and barricades along the roads during the construction.

5 The principal claim of Hunt Leather and Ancio was that TfNSW was liable in private nuisance at common law for the totality of the damage attributable to the substantial interference that each was found to have suffered throughout the entirety of the period of construction on the basis that the construction was not a

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1 Section 3C of the *Transport Administration Act*.

2 Section 3E and Sch 1 of the *Transport Administration Act*.

3 Clause 9 of Sch 1 of the *Transport Administration Act*.

4 Sections 138, 139 and 144C of the *Roads Act*.

5 Part 5.1 of the *Environmental Planning and Assessment Act*.

"common or ordinary use" of the land.[6] The primary judge (Cavanagh J) accepted the factual premise that the construction was not a common or ordinary use of a road[7] but rejected the propounded basis of the principal claim as insufficient to establish liability in private nuisance at common law.[8]

6 The primary judge nevertheless held TfNSW liable in private nuisance at common law for damage attributable to the substantial interference suffered by Hunt Leather and Ancio with the use and enjoyment of their respective premises during part of the period of construction. This was on the basis of the primary judge finding that, although the substantial interference each had suffered had not initially been unreasonable, there came a point "when, despite the importance and complexity of the project, it was no longer reasonable to expect the plaintiffs as adjoining business operators to put up with the construction activity".[9] The primary judge was not satisfied by TfNSW that it had taken reasonable care to protect the interests of business owners along the construction route or that the substantial and unreasonable interference was inevitable, such that TfNSW was unable to escape common law liability by reason of having acted within statutory authority.[10] The outcome at first instance was a judgment in which each of Hunt Leather and Ancio was held to be entitled to recover substantial damages from TfNSW.

7 Allowing an appeal by TfNSW concerning the holding of liability, and dismissing a cross-appeal by Hunt Leather and Ancio concerning the measure of damages, the Court of Appeal (Bell CJ, Leeming and Mitchelmore JJA)[11] held that the primary judge had applied the correct legal test for determining liability in private nuisance at common law.[12] The Court of Appeal concluded, however, that the primary judge had erred in finding that the substantial interference with the use

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6 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 21 [90].

7 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 110 [656].

8 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 109 [651], 110 [657].

9 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 149 [936].

10 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 135 [819]-[820], 137 [832]-[834].

11 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489.

12 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 516-519 [115]-[126].

and enjoyment by Hunt Leather and Ancio of their respective premises had ceased to be reasonable.[13]

8 Pursuant to the first ground of their appeals to this Court, Hunt Leather and Ancio contend that the Court of Appeal and the primary judge were wrong about liability in private nuisance at common law turning on the reasonableness of the interference with their use and enjoyment of their premises and ought instead to have applied the criterion of liability propounded in their principal claim. Pursuant to the second ground, they contend in the alternative that the Court of Appeal was wrong to have overturned the primary judge's finding that the interference with the use and enjoyment of their respective premises was unreasonable during part of the period of construction.

9 For reasons to be explained, I would reject the first ground of the appeals but would uphold the second ground of the appeals. In doing so, I would reject the contention of TfNSW that s 43A of the *Civil Liability Act 2002* (NSW) applied to defeat the liability of TfNSW in private nuisance having regard to a finding of the primary judge[14] that the manner of exercise by TfNSW of its statutory power to contract for the construction was not so unreasonable that no reasonable authority could properly have considered it to have been reasonable.

10 By a final and disparate ground of their appeals, Hunt Leather and Ancio contend that the Court of Appeal and the primary judge were wrong to reject their claim to be entitled to recover as damages from TfNSW commission payable by them to the litigation funder of the representative proceedings. I agree with the reasons given by Gordon and Edelman JJ for rejecting that ground.

11 In the result, I agree with the orders proposed by Gordon and Edelman JJ, the effect of which is to reinstate the judgment of the primary judge.

Private nuisance at common law in Australia

12 The concern of private nuisance at common law is with the protection of proprietary interests in land.[15] The standard description of a private nuisance is accordingly that of an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it".[16] Other descriptions of a

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13 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 510-512 [84]-[97].

14 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 122 [756].

15 *Gartner v Kidman* (1962) 108 CLR 12 at 22.

16 *Gartner v Kidman* (1962) 108 CLR 12 at 22 and *Hargrave v Goldman* (1963) 110 CLR 40 at 59, both quoting Lewis, *Winfield on Tort*, 6th ed (1954) at 536.

private nuisance have described it in terms of an interference with use and enjoyment of land that is "wrongful"[17] or "undue".[18]

13 What do these references to an "unlawful" or "wrongful" or "undue" interference with use and enjoyment of land entail? No doubt, an actionable interference must be substantial: neither trivial[19] nor transient.[20] But what more is required?

14 The first ground of the appeals has been framed to invite a contemporary answer to the question of whether a private nuisance at common law in Australia: is limited to a substantial interference with use and enjoyment of land that is "unreasonable"; or extends to any substantial interference with use and enjoyment of land that results from a use of neighbouring land that is not "common and ordinary". No issue has been raised in the appeals as to whether the law of private nuisance, like the rule in *Rylands v Fletcher*[21] with which it has been closely associated,[22] should be assimilated into the law of negligence either generally or in its application to a public authority.[23]

15 The position that an interference with use and enjoyment of land must be both substantial and unreasonable in order to constitute a private nuisance at common law in Australia was established by the decisions of this Court in *Gartner*

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17 eg *Elston v Dore* (1982) 149 CLR 480 at 487, quoting *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 896-897.

18 eg Jones (ed), *Clerk & Lindsell on Torts*, 22nd ed (2018) at 1378 ("unduly"). See also *Jalla v Shell International Trading and Shipping Co Ltd* [2024] AC 595 at 607 [2]; *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2025] AC 761 at 770 [6].

19 *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 486. See also *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 at 653-654 [11 ER 1483 at 1487-1488].

20 *Hargrave v Goldman* (1963) 110 CLR 40 at 59; *Benning v Wong* (1969) 122 CLR 249 at 297.

21 (1866) LR 1 Ex 265; (1868) LR 3 HL 330. See *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

22 See *Benning v Wong* (1969) 122 CLR 249 at 296-297.

23 cf *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 at 666 [16].

v Kidman[24] and *Elston v Dore*,[25] has since been acted upon in intermediate courts of appeal,[26] and accords with the contemporary understanding of private nuisance in Canada,[27] New Zealand[28] and the United States.[29] At least until recently, the position was accepted by adherents[30] and detractors[31] alike to reflect the "conventional view" in the United Kingdom.

16 The position that a substantial interference with use and enjoyment of land need only result from a use of neighbouring land that is not "common and ordinary" in order to constitute a private nuisance was recently adopted by a narrow majority of the Supreme Court of the United Kingdom in *Fearn v Board of Trustees of the Tate Gallery*,[32] drawing on the reasoning of Baron Bramwell in *Bamford v Turnley*.[33] However, more recent decisions of the Supreme Court of the United Kingdom[34] have continued to describe a private nuisance in terms of a substantial and unreasonable interference with use and enjoyment of land, lending weight to suggestions that it is too soon to assess the significance of *Fearn* to the

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24 (1962) 108 CLR 12.

25 (1982) 149 CLR 480.

26 eg *SJ Weir Ltd v Bijok* (2011) 112 SASR 127 at 135 [33]; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 at 310 [118]; *Marsh v Baxter* (2015) 49 WAR 1 at 42-44 [242]-[257], 126-128 [765]-[774]; *Ammon v Colonial Leisure Group Pty Ltd* (2019) 55 WAR 366 at 391-392 [118]-[121].

27 Linden et al, *Canadian Tort Law*, 12th ed (2022) at 580-583.

28 *Todd on Torts*, 8th ed (2019) at 534-535.

29 American Law Institute, *Restatement of the Law Fourth, Property*, Tentative Draft No 3 (April 2022), vol 2, Div I, Ch 2, §2.1 and §2.2.

30 See Murphy, *The Law of Nuisance* (2010) at 5-6 [1.05], 34 [2.04]; Deakin and Adams, *Markesinis and Deakin's Tort Law*, 8th ed (2019) at 400; Goudkamp and Nolan, *Winfield and Jolowicz on Tort*, 20th ed (2020) at 428.

31 See Beever, *The Law of Private Nuisance* (2013) at 6.

32 [2024] AC 1.

33 (1862) 3 B & S 66 [122 ER 27].

34 See *Jalla v Shell International Trading and Shipping Co Ltd* [2024] AC 595 at 607 [2]; *Davies v Bridgend County Borough Council* [2025] AC 434 at 455 [76].

development of the common law in that country.[35] To engage in prognostication on that topic here would be inappropriate. It would also be redundant. "The common law in Australia is the common law of Australia."[36] The significance of *Fearn* for the potential development of the common law of Australia can rise no higher than the persuasive value of its reasoning.[37]

17 In my opinion, whatever the position in the United Kingdom has or might become, the common law of Australia should not retreat from the position established in *Gartner* and *Elston*. In *Gartner*, Windeyer J (with whom Dixon CJ agreed), whilst acknowledging that some earlier judicial statements had couched liability in private nuisance in absolute terms, said:[38]

> "The idea of reasonableness, that is basic to so much of the common law, is firmly embedded in the law of nuisance to-day. Pronouncements concerning the scope of nuisance as a tort avoid stating rights and duties as absolute. In respect of both what a man may do and what his neighbour must put up with, its criteria are related to the reasonable use of the lands in question."

Adding that "[a] shifting of emphasis has been a characteristic of the way in which Courts administering the common law have in recent times accommodated proprietary rights and modern social interests",[39] his Honour referred with approval to the then recent decision of the Full Court of the Supreme Court of New South Wales in *Bayliss v Lea*.[40] His Honour stressed that the determination of what is reasonable in the context of private nuisance is incapable of abstract definition and turns on a consideration of the totality of the circumstances.[41]

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35 See Nolan, "Private Nuisance after *Fearn v Tate Gallery*" (2024) 5 *Journal of Commonwealth Law* 31 at 32-35, 73-74; Steel, "*Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4: What Is a Private Nuisance?", in Russell and Graham (eds), *Private Law and the UK Supreme Court: Key Cases and Decisions* (2026) 76 at 84.

36 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 539 [9].

37 *Cook v Cook* (1986) 162 CLR 376 at 390.

38 (1962) 108 CLR 12 at 47.

39 (1962) 108 CLR 12 at 47.

40 [1962] SR (NSW) 521.

41 (1962) 108 CLR 12 at 48-49.

18 The reasoning in *Bayliss* is illuminative. There, Owen J, with whom Ferguson J agreed, confessed to having found earlier decisions on private nuisance confusing "not less so because it sometimes appears as though a statement made in relation to a particular set of circumstances has later been treated as if it laid down some rule of general application".[42] His Honour expressed the opinion that the "true position" was "well stated" by Professor Fleming, who had written:[43]

> "The paramount problem in the law of nuisance is ... to strike a tolerable balance between conflicting claims of landowners, each of whom is claiming the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. Reconciliation has to be achieved by compromise, and the basis for adjustment is reasonable user. Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the defendant's convenience, but must equally take into account the interest of the surrounding occupiers. It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he had no neighbour? The question is, Is he using it reasonably, having regard to the fact that he has a neighbour?"

19 Justice Owen noted in *Bayliss*[44] that Lord Wright had expressed the "same idea" when he had said in *Sedleigh-Denfield v O'Callaghan*:[45]

> "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society."

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42 [1962] SR (NSW) 521 at 529.

43 [1962] SR (NSW) 521 at 529, quoting Fleming, *The Law of Torts*, 2nd ed (1961) at 363.

44 [1962] SR (NSW) 521 at 529-530.

45 [1940] AC 880 at 903.

Lord Wright had referred to the "gist" of the action for private nuisance in *Sedleigh-Denfield* as "the unreasonable and unjustified interference by the defendant in the user of his land with the plaintiff's right to enjoy his property".[46]

20 In conformity with the explanations in *Gartner* and in *Bayliss*, Gibbs CJ, Wilson and Brennan JJ expressed the opinion in *Elston* that the explanation given by Lord Wright in *Sedleigh-Denfield* furnishes "the proper test to apply in most cases" of private nuisance.[47] Their Honours said that the deliberate conduct of the defendant in that case (had it interfered with use and enjoyment by the plaintiffs of their property or otherwise invaded their rights) would "only have been wrongful if it was not reasonable in the sense to which Lord Wright refers".[48] In the application of the "proper test", a substantial interference with use and enjoyment of land will therefore be actionable as a private nuisance if, but only if, such interference with the plaintiff's use and enjoyment of land as is attributable to the defendant is demonstrated by the plaintiff to be unreasonable.

21 Because the argument in these appeals has gone so far as to assert, by reference to what might turn out to have been no more than a passing comment in the reasoning of the majority in *Fearn*,[49] that the term "unreasonable" as used in the explanation of private nuisance given by Lord Wright in *Sedleigh-Denfield* "has no explanatory power", it seems necessary for the import of the term to be spelt out. "'Unreasonable' in nuisance law is not like 'unreasonable' in the law of negligence, for it does not refer to risk-creating conduct of the defendant but to the reasonable expectations of a normal person occupying the plaintiff's land."[50] "[T]he proper angle of approach ... is rather from the standpoint of the [plaintiff] than from the standpoint of the [defendant]".[51] "The focus of the reasonableness analysis ... is on the character and extent of the interference with the [plaintiff's] land; the burden on the [plaintiff] is to show that the interference is substantial and unreasonable, not to show that the defendant's use of its own land is unreasonable."[52] "[T]he question is neither what is reasonable in the eyes of the defendant or even the [plaintiff] (for one cannot, by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person [in

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46 [1940] AC 880 at 904.

47 (1982) 149 CLR 480 at 488.

48 (1982) 149 CLR 480 at 488.

49 [2024] AC 1 at 14-15 [18].

50 Dobbs, Hayden and Bublick, *The Law of Torts*, 2nd ed (2011) at 625 (§401).

51 *Watt v Jamieson* 1954 SC 56 at 57-58.

52 *Antrim Truck Centre Ltd v Ontario* [2013] 1 SCR 594 at 609 [28].

the position of the plaintiff] would find it reasonable to have to put up with."[53] Another way of describing an interference with use and enjoyment of land that is "unreasonable" is accordingly as: an interference that is "unacceptable in the sense of being so objectively bothersome to another that the other is not expected to put up with the bother";[54] or an interference that is "greater than he ought to be required to bear under the circumstances, at least without compensation".[55]

22 The requisite inquiry is accordingly into the objective reasonableness or unreasonableness of a normal person in the position of the plaintiff being required to put up with the substantial interference with the use and enjoyment of that plaintiff's land that is found to be attributable to the defendant. The inquiry takes into consideration "both the object and duration of that which is said to constitute the nuisance".[56]

23 It is "no answer" to a nuisance established by demonstration of the objective unreasonableness of a normal person in the position of the plaintiff being required to put up with the substantial interference with the use and enjoyment of that plaintiff's land attributable to the defendant "to say that the defendant is only making a reasonable use of his property".[57] However, the reasonableness or unreasonableness of the use that is made of the defendant's property inevitably bears on the reasonableness or unreasonableness of a normal person in the position of the plaintiff being required to put up with the consequences of that use and so

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53 Weir, *An Introduction to Tort Law*, 2nd ed (2006) at 160, quoted in *Barr v Biffa Waste Services Ltd* [2013] QB 455 at 478 [72] and *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 868 [179].

54 American Law Institute, *Restatement of the Law Fourth, Property*, Tentative Draft No 3 (April 2022) at 6.

55 American Law Institute, *Restatement (First) of Torts* (1939) §822 (comment j), quoted in part in Fleming, *The Law of Torts*, 2nd ed (1961) at 363 and in turn in *Bayliss v Lea* [1962] SR (NSW) 521 at 529; American Law Institute, *Restatement (Second) of Torts* (1979) §822 (comment g), quoted in *Antrim Truck Centre Ltd v Ontario* [2013] 1 SCR 594 at 612 [34] and in Goudkamp and Nolan, *Winfield and Jolowicz on Tort*, 21st ed (2025) at 424. See also *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 487 ("more that the average inhabitant of the district ought reasonably be asked to bear in the circumstances") and at 491 ("an excess to which he could not reasonably be called upon to submit").

56 *Harrison v Southwark and Vauxhall Water Company* [1891] 2 Ch 409 at 414.

57 *Munro v Southern Dairies Ltd* [1955] VLR 332 at 336, quoting *Broder v Saillard* (1876) 2 Ch D 692 at 701.

bears on whether or not the nuisance is established.[58] The determinative consideration in *Clarey v Principal and Council of the Women's College*,[59] for example, was that "[a] landlord who lets a portion of a building for the accommodation of university students can only reasonably expect that such students will keep late hours and in the course of doing so will make [student] noises". More commonplace is the example of building work, in respect of which the point has repeatedly been made that if "temporary operations", such as demolition and construction, "are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, whether from noise, dust, or other reasons, the neighbours must put up with it".[60]

24 The criterion of liability for private nuisance at common law in Australia stated in *Elston*, by reference to the explanation given by Lord Wright in *Sedleigh-Denfield* and conformably with *Gartner* – that a substantial interference with use and enjoyment of land will be actionable as a private nuisance if, but only if, such interference with the plaintiff's use and enjoyment of land as is attributable to the defendant is demonstrated by the plaintiff to be unreasonable – is therefore both principled and workable. It can be no criticism of the criterion that, like much in common law reasoning, the judgement it requires is evaluative and inherently normative.

25 Had the question of whether the position established in private nuisance at common law in Australia by *Gartner* and *Elston* should be altered or maintained been raised in the context of a dispute between private landholders, so as to have been presented as no more than a choice between the reasoning of the majority and the reasoning of the minority in *Fearn*, I would have preferred the reasoning of the minority. As distilled by Jagot J in the present case,[61] that reasoning supports the established position in Australia.

26 Though any common law doctrine can have the pretence of antiquity, the modern doctrine of private nuisance is generally understood to have emerged in

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58 Murphy, *The Law of Nuisance* (2010) at 44 [2.26].

59 (1953) 90 CLR 170 at 175.

60 *Andreae v Selfridge & Co Ltd* [1938] Ch 1 at 5-6, quoted and applied in *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1 at 12-13. See also *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 487; *Harrison v Southwark and Vauxhall Water Company* [1891] 2 Ch 409 at 414.

61 See reasons of Jagot J at [213]-[219].

the second half of the nineteenth century.[62] As Windeyer J pointed out in *Gartner*, in examining the doctrine during its early formative period the reasoning of Baron Bramwell in *Bamford* is a good place to start.[63]

27 To recognise that the focus of private nuisance is properly on whether a substantial interference with use and enjoyment of land is more than is reasonable to expect a normal occupant of that land to have to put up with is to recognise what is wrong with the earlier formulation in *Hole v Barlow*[64] of liability in private nuisance turning on whether the conduct of the defendant amounted to a "reasonable use" of land in a "convenient and proper place". The burden of the reasoning of all members of the majority in *Bamford*, including Baron Bramwell, was to reject that formulation.[65]

28 To maintain that focus is also to avoid the concern raised by Baron Bramwell in *Bamford*, accepted by both the majority and the minority in *Fearn*,[66] that the liability of one landholder to another cannot turn on a calculus of reasonableness which involves weighing the social utility of the land use of one landholder against the social utility of the land use of another. Understood as an inquiry into the reasonableness or unreasonableness of a landholder having to put up with an interference with that landholder's use and enjoyment of land, no simplistic netting of social utility is involved.

29 There can also be no difficulty accepting the "principle" distilled by Baron Bramwell in *Bamford* from earlier cases, that "those acts necessary for the common and ordinary use and occupation of land ... may be done, if conveniently done, without subjecting those who do them to an action",[67] as descriptive of the common outcome of an inquiry into the reasonableness of an interference with use and enjoyment of land which results from an act that can be seen to meet the composite description of being "necessary for the common and ordinary use and occupation of land" and being "conveniently done". The difficulty lies in treating the expression of that "principle", in accordance with the approach of the majority in *Fearn*, as the expression of a criterion of liability which would render actionable

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62 See Brenner, "Nuisance Law and the Industrial Revolution" (1974) 3 *Journal of Legal Studies* 403; McLaren, "Nuisance Law and the Industrial Revolution – Some Lessons from Social History" (1983) 3 *Oxford Journal of Legal Studies* 155.

63 (1962) 108 CLR 12 at 44.

64 (1858) 4 CB (NS) 334 at 335 [140 ER 1113 at 1114].

65 See Bilson, *The Canadian Law of Nuisance* (1991) at 33-34.

66 [2024] AC 1 at 43-45 [120]-[126], 54-55 [162].

67 (1862) 3 B & S 66 at 83 [122 ER 27 at 33].

in private nuisance at common law any substantial interference with a plaintiff's "common and ordinary" use and enjoyment of land that results from a defendant's use of land that is not "common and ordinary".[68]

30 Part of the difficulty is conceptual indeterminacy. The common law is nothing if it does not learn from experience. As again pointed out by Windeyer J in *Gartner*, the concept of "common and ordinary use" of land employed by Baron Bramwell in his formulation in *Bamford* was strikingly similar to the concept of "non-natural" or "not ordinary" use of land employed by Lord Cairns just a few years later in the formulation of the rule in *Rylands v Fletcher*.[69] To be remembered is that one of the main reasons given in *Burnie Port Authority v General Jones Pty Ltd*[70] for assimilating the rule in *Rylands v Fletcher* into the law of negligence within the common law of Australia was that its concept of "non-natural" or "not ordinary" use of land had been shown by experience to be so much lacking in "objective content" that its practical application was "likely to degenerate into an essentially unprincipled and ad hoc subjective determination of whether the particular facts of the case fall within undefined notions of what is 'special' or 'not ordinary'".[71]

31 The greater part of the difficulty in treating the "principle" distilled by Baron Bramwell in *Bamford* as a criterion of liability in accordance with the approach of the majority in *Fearn* lies in its displacement of any inquiry into whether the interference with a plaintiff's "common and ordinary" use and enjoyment of land that results from a defendant's use of land that is not "common and ordinary" is objectively greater than a normal person in the position of the plaintiff ought reasonably have to put up with in the totality of the circumstances.

32 The potential breadth of the requisite inquiry was explained by McLure P in *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*:[72]

> "To constitute a nuisance, the interference must be unreasonable. In making that judgment, regard is had to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant's activity; the hypersensitivity (if any) of the user or use of the

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68 [2024] AC 1 at 20 [35].

69 (1962) 108 CLR 12 at 44.

70 (1994) 179 CLR 520.

71 (1994) 179 CLR 520 at 540.

72 (2012) 42 WAR 287 at 310 [118]. See also Goudkamp and Nolan, *Winfield and Jolowicz on Tort*, 21st ed (2025) at 425-426.

claimant's land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered."

33 There is no novelty in this approach. Historically:[73]

"[C]ourts have insisted that the finding of a nuisance is a contextual, fact-rich, determination dependent on a long list of considerations: the time of the alleged nuisance, its length, its intensity, the neighbourhood in which it takes place, the number of people affected, the respective benefits of the competing activities, and so on. Though these factors can be stated in the abstract, they manifest themselves very differently in different cases and so taking them into account rails against any attempt to conclusively prioritise certain activities as more fundamental than others."

34 On the approach of the majority in *Fearn*, too much is packed into the concept of "common and ordinary" use and too much that is incapable of being packed into that concept is left out of the analysis. By excluding other considerations normatively relevant to the inquiry into whether an interference that results from an uncommon and extraordinary use is objectively greater than a normal person in the position of the plaintiff ought reasonably to have to put up with, the approach "over-simplifies the complex balance between competing interests" and thereby over-extends the appropriate scope of liability.[74]

35 But the question of whether the position established in private nuisance at common law in Australia by *Gartner* and *Elston* should be altered or maintained has not been raised in these appeals in the context of a dispute between private landholders. The question has been raised instead in the context of a public authority exercising statutory power. That context in which the question has arisen shows that a dispute between private landholders is too narrow a frame of reference within which to consider its answer and points to further reasons why the position established in *Gartner* and *Elston* should be maintained.

36 The modern doctrine of private nuisance is as much the product of the reconciliation of public and private interests as it is the product of the reconciliation of competing private interests. One of the fundamental and enduring principles to have emerged through the many cases which have considered its application in this context has been the principle of statutory construction that when a statute confers a power on a public authority to undertake, or to procure the undertaking, of an

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73 Priel, "Land Use Priorities and the Law of Nuisance" (2015) 39 *Melbourne University Law Review* 346 at 373.

74 See Hariharan, "The View from the Top: Visual Intrusion as Nuisance in *Fearn v Tate Gallery*" (2024) 87 *Modern Law Review* 697 at 699.

activity on land in the public interest, the public authority "is thereby given a capacity which it would otherwise lack, rather than a legal immunity in relation to what it does, though a grant of power may have this effect when the infliction of damage on others is the inevitable result of its exercise".[75] That is because, against the background of the common law presumption that "the legislature did not intend to authorize what would otherwise have been tortious conduct",[76] the statute is construed to provide lawful justification for an otherwise tortious interference with use and enjoyment of neighbouring land only if and to the extent that the interference can be demonstrated to be the "inevitable result" of the exercise of the power.[77]

37 This want of statutory immunity from common law liability on the part of a public authority for an otherwise tortious interference with use and enjoyment of neighbouring land (absent demonstration of the inevitability of the interference) has been explained in terms of an implicit statutory condition of the conferral of power that the public authority exercise the power without "negligence"[78] (or "in a reasonable way"[79] or "in a careful manner"[80]) having regard to the interests of neighbouring landholders. Consistently with how the term "unreasonable" is used in the context of the law of nuisance, the concept of "negligence" in this explanation is used not in the sense of requiring the public authority to act with due care and diligence to avoid a foreseeable risk of harm in its pursuit of the public interest (although the authority may well be subject to a concurrent general duty of care so to act[81]), but "in a special sense so as to require the [public authority], as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other

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75 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 457.

76 *Coco v The Queen* (1994) 179 CLR 427 at 436.

77 *Benning v Wong* (1969) 122 CLR 249 at 309, quoting *Manchester Corporation v Farnworth* [1930] AC 171 at 183, in turn citing cases including *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430. See also *Fullarton v North Melbourne Electric Tramway and Lighting Co Ltd* (1916) 21 CLR 181 at 192-193, quoting *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193 at 213.

78 *Benning v Wong* (1969) 122 CLR 249 at 322, quoting *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 at 455-456.

79 *Benning v Wong* (1969) 122 CLR 249 at 310.

80 *Benning v Wong* (1969) 122 CLR 249 at 256.

81 See *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 458-459; *Sydney Water Corporation v Turano* (2009) 239 CLR 51 at 69 [44].

persons".[82] That is to say, "negligence" in this context means no more and no less than "adopting a method which in fact results in damage to a ... person, except in a case where there is no other way of [exercising] the statutory [power, such] that it is negligent to carry out work in a manner which results in damage unless it can be shown that that, and that only, was the way in which the [power] could be [exercised]".[83]

38 The present significance of this longstanding explanation of the want of statutory immunity from common law liability on the part of a public authority for an otherwise tortious interference with use and enjoyment of land is that it fits hand in glove with liability in private nuisance at common law arising from an interference with use and enjoyment of land that is unreasonable. Indeed, there has been observed to be "no daylight" between, on the one hand, the expression of the absence of statutory immunity in terms of an absence of reasonable regard and care for the interests of others and, on the other hand, the expression of the common law liability in terms of an interference that is the result of work conducted without reasonable consideration for neighbouring landholders. Except where a public authority can demonstrate it to be the inevitable result of the exercise of the power authorised by the statute, a substantial interference by the public authority with the use and enjoyment of neighbouring land is "either not actionable at common law or else outside the protection of the statute".[84] The criterion of actionability for a substantial interference with use and enjoyment of land caused by conduct attributable to a public authority, as for any other person, is the objective reasonableness or unreasonableness of a normal person in the position of the landholder having to put up with the interference.

39 More must be said at this point about the notion of "reciprocity" or "give and take" or "live and let live" between one owner or occupier of land and another which can be seen to have underpinned the concentration by Baron Bramwell in *Bamford*[85] on the "common and ordinary" use of land and which was said in the reasoning of the majority in *Fearn*[86] to explain "the priority given by the law of

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82 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011, referring to *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 at 455-456.

83 *Provender Millers (Winchester) Ltd v Southampton County Council* [1940] Ch 131 at 138-140, referred to in *Benning v Wong* (1969) 122 CLR 249 at 310. See also Linden, "Strict Liability, Nuisance and Legislative Authorization" (1966) 4 *Osgoode Hall Law Journal* 196 at 201-207.

84 *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1 at 13.

85 (1862) 3 B & S 66 at 84 [122 ER 27 at 33].

86 [2024] AC 1 at 20 [35].

nuisance to the common and ordinary use of land over special and unusual uses". The notion is comprehensible and workable in the context of a dispute between neighbouring private landholders within a particular locality. The notion is not comprehensible or workable in the context of a dispute between a private landholder and a public authority exercising statutory power to undertake public works in the public interest on public land. At least, not without distortion.

40 Rather, as emphasised by Cromwell J in the Supreme Court of Canada in *Antrim Truck Centre Ltd v Ontario*,[87] consideration of the liability in private nuisance of a public authority to a private landholder demands an expansion of the frame of reference set by the notion of reciprocity to one that is readily accommodated within the broader concept of reasonableness. The question within that necessarily expanded frame of reference is whether the interference by the public authority with the private landholder's use and enjoyment of land is or is not "the type of interference that should properly be accepted by an individual as part of the cost of living in organized society"[88] or, in other words, whether that interference can or cannot "reasonably be viewed as more than the claimant's fair share of the costs associated with providing a public benefit".[89]

41 The reasoning of Street J in *Fisher v Codelfa Construction (Australia) Pty Ltd*[90] provides an illustration of this approach. There the plaintiff was a resident of the eastern Sydney suburb of Woollahra. The defendant was contracted by the Commissioner for Railways to construct the Eastern Suburbs railway line. Granting an injunction to restrain the defendant from detonating explosives in a manner that would lead to ejectment of solid debris or to "vibrations or noise to such a degree as to occasion to the plaintiff a nuisance or annoyance", Street J said the following:[91]

> "It must be recognised, in the defendant's favour, that the work being done is of a lawful and proper character. The construction of this railway is authorised by statute. Inevitably that construction will be attended by blasting and by noise. The defendant's conduct is not to be tested by the same standard as that which might be imposed upon a private person who, in the midst of this peaceful residential area, took up a quarrying or blasting activity. The defendant is entitled to have its conduct assessed with due acceptance that it is building a railway under the authority of a statute, and

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87 [2013] 1 SCR 594.

88 [2013] 1 SCR 594 at 614 [38].

89 [2013] 1 SCR 594 at 615 [40].

90 Unreported, Supreme Court of New South Wales, 28 June 1972.

91 Unreported, Supreme Court of New South Wales, 28 June 1972 at 11.

> that the construction work would inevitably occasion noise and disturbance. But even giving to the defendant the full benefit of these considerations in its favour, the degree both of noise and of vibration exceeds that which in my view the plaintiff is compelled to bear. The defendant must take steps to diminish these nuisances."

42 To analyse the liability in private nuisance of a public authority undertaking public work in the public interest in this way is to recognise, in the language of Cromwell J in *Antrim Truck Centre*, that "the focus of the reasonableness analysis is kept on whether it is reasonable for the individual to bear the interference without compensation, not on whether it was reasonable for the [public] authority to undertake the work",[92] as an outworking of the more general proposition to which attention has already been drawn that "the focus in nuisance is on whether the interference suffered by the claimant is unreasonable, not on whether the nature of the defendant's conduct is unreasonable".[93]

43 The inconvenience of a public authority performing public works on public land is a common experience. Rarely could such public works be characterised as a "common and ordinary" use, as distinct from a "special" use, of that land. Yet often will the temporary duration of uncommon and extraordinary use of public land for public works combine with their beneficial nature to make it reasonable to expect occupiers of neighbouring lands to accept substantial interferences with their use and enjoyment of their lands as part of the cost of them living in an organised society. For how long and to what extent it might be reasonable to expect a particular neighbouring landholder to put up with a particular substantial interference with their use and enjoyment of land without compensation cannot be determined through the application of an abstract rule and depends on the totality of the circumstances.

44 Consistently with *Gartner* and *Elston*, the primary judge and the Court of Appeal were correct to proceed on the basis that liability in private nuisance at common law in Australia can arise only from an interference with use and enjoyment of land that is determined to be both substantial and unreasonable.

Substantial and unreasonable interference in the present case

45 Fact-finding in the present case was complicated by the multiplicity of ways in which Hunt Leather and Ancio chose to put their cases that TfNSW was liable to them in private nuisance and by a forensic stand-off between them and TfNSW as to the onus of proof of relevant facts. Without descending into the detail of the potential permutations, it is sufficient in now turning to address the second ground

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92 [2013] 1 SCR 594 at 614 [38].

93 [2013] 1 SCR 594 at 609 [28] (emphasis omitted).

of the appeals to note that the primary judge found that the substantial interference with the use and enjoyment of their premises suffered by each of Hunt Leather and Ancio was substantial from the outset of the construction,[94] but found that substantial interference to have become unreasonable only after the point in time had been reached when "it was no longer reasonable to expect the plaintiffs as adjoining business operators to put up with the construction activity",[95] which "was lengthy and much longer than [TfNSW] had assured business owners would occur".[96]

46 The difficulty which the primary judge faced was how to determine the precise period within which the substantial interference had been unreasonable. For that purpose, the primary judge turned to evidence of a planning and programming expert led by Hunt Leather and Ancio which the primary judge accepted as "some indication of what might have been a reasonable timeframe for the works to have been completed in each fee zone, assuming more knowledge and agreement in respect of utilities at the outset"[97] and therefore as "an appropriate measure for determining the point at which the interference with the land became unreasonable".[98]

47 That evidence of the planning and programming expert, Mr Griffith, was given in the form of an amendment to the "Initial Delivery Program" ("IDP") which had set out the planned stages of construction which TfNSW had proposed at the time of contracting and which had been reflected in the public announcement that had been made in advance of the commencement of construction. The primary judge found that the IDP "was an estimate which the [contracting parties] must have considered to be reasonable and reflective of the way they thought the work could and should be done".[99] Mr Griffith's so-called "amended IDP" set out his assessment of what would have been an achievable timeframe for the works to have been proposed to have been completed in each fee zone at the time of contracting and public announcement had TfNSW done more in advance to manage the risk of encountering underground utilities in the course of construction

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94 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 137-142 [839]-[875], 144-146 [888]-[909].

95 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 149 [936].

96 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 146 [914].

97 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 81 [495].

98 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 149 [936].

99 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 147 [918].

by: undertaking surveys to obtain substantially complete knowledge of those utilities; and reaching concluded agreements with utility providers.[100]

48 On the appeal to the Court of Appeal, the standard of review applicable to the conclusion of the primary judge that it became unreasonable for Hunt Leather and Ancio to have to continue to put up with the construction activity was the correctness standard,[101] according to which it was for the Court of Appeal itself to draw its own inferences and form its own conclusion making due allowances for the advantages of the primary judge.[102] The conclusion reached by the Court of Appeal in the application of that standard of review was to the effect that the evidence was insufficient to support any finding of unreasonableness.[103]

49 The Court of Appeal identified two problems with the primary judge's reliance on the evidence of Mr Griffith. The first was the absence of any basis for considering that substantially complete knowledge of the utilities could have been obtained in advance of the construction and without the survey process itself causing further substantial interference with the use and enjoyment by Hunt Leather and Ancio of their premises.[104] The second was that, even assuming that there was complete knowledge of the utilities and that it was reasonable to complete the construction in the timeframes stated in the amended IDP, "[t]hat does not establish that there was actionable nuisance for every week or month that any [fee] zone was occupied for longer than the time period stated in the amended IDP".[105] Rather, it was said that Hunt Leather and Ancio "did not demonstrate when the time taken for construction became actionable nuisance in light of the

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100 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 80 [487], 81 [495], 135 [819], 149 [936]; *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 501 [41].

101 *Ammon v Colonial Leisure Group Pty Ltd* (2019) 55 WAR 366 at 393-397 [127]-[129], referring to *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 557-563 [35]-[50].

102 *Lee v Lee* (2019) 266 CLR 129 at 148-149 [55]-[56], citing *Warren v Coombes* (1979) 142 CLR 531 at 551 and *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25].

103 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 512 [95]-[96].

104 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 510-512 [86]-[95].

105 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 512 [96].

number of sub-surface utilities that needed to be treated for the purposes of construction".[106]

50 In my opinion, this criticism did not sufficiently account either for the focus or for the inherently normative nature of the inquiry in which the primary judge was properly engaged in determining whether, and if so when, the substantial interference with the use and enjoyment of their premises which Hunt Leather and Ancio were found to have suffered became more than was reasonable to expect normal occupiers of those premises to have to put up with. To conclude that the point in time had been reached when it was no longer reasonable to expect Hunt Leather and Ancio to put up with the construction activity, Hunt Leather and Ancio did not need to demonstrate, and the primary judge did not need to find, that TfNSW had exceeded what would have been a reasonable time for the construction activities to have been completed had it adequately planned for underground utilities. That is because it was perfectly possible for TfNSW to have acted reasonably in the planning of the construction and yet for landholders still to have been subjected to interferences which they could not reasonably be expected to bear in the execution of that construction.

51 The primary judge's reliance on Mr Griffith's evidence as providing "some indication of what might have been a reasonable timeframe" and "an appropriate measure" for determining when the substantial interferences that Hunt Leather and Ancio had been found to have suffered became unreasonable was appropriately circumscribed. In the context of a broad evaluative inquiry into the point at which it became unreasonable for Hunt Leather and Ancio to continue to bear that interference without compensation, in respect of which a range of approaches to determining that point might well have been available, the evidence was open to be relied on and was properly so relied on by the primary judge.

52 The primary judge did not, and did not need to, rely on the evidence to find the counterfactual of what would have occurred had TfNSW done more in advance to manage the risk of encountering underground utilities in the course of construction. Nor, in order to identify the point at which it became unreasonable for Hunt Leather and Ancio to continue to suffer substantial interference with their premises without compensation, did the primary judge find, or need to find, that it was unreasonable for the construction to have continued after that point having regard to the underground utilities in fact encountered.

53 The evaluative conclusion of fact reached by the primary judge was adequately based on the evidence. It was not erroneous for either of the reasons given by the Court of Appeal.

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106 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 512 [96].

Section 43A of the *Civil Liability Act*

54 Part 5 of the *Civil Liability Act* is expressed to apply to "civil liability in tort"[107] and to extend to "any such liability even if the damages are sought in an action for breach of contract or any other action".[108] Within Pt 5, s 43A is expressed to apply to proceedings for civil liability to which Pt 5 applies "to the extent that the liability is based on a public or other authority's exercise of ... a special statutory power conferred on the authority".[109] A "special statutory power" is defined for this purpose to mean a statutory power "that is of a kind that persons generally are not authorised to exercise without specific statutory authority".[110] The section is expressed to operate in proceedings to which it applies to produce the result that "any act ... involving an exercise of ... a special statutory power does not give rise to civil liability unless the act ... was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act ... to be a reasonable exercise of ... its power".[111]

55 Whether an action in private nuisance against a public or other authority at common law is of a nature in respect of which s 43A of the *Civil Liability Act* can have meaningful operation or in respect of which liability can or might in specific circumstances be said to be "based on" the authority's exercise of a special statutory power are large questions. They were not fully argued in the appeals and do not now need to be determined.

56 For the purposes of resolving the appeals, it is sufficient to record my agreement with the analysis of the primary judge that TfNSW did not exercise any special statutory power in planning or contracting for the construction of the Sydney Light Rail. First, the specific power of TfNSW to "develop light rail systems, or facilitate their development by other persons" was not engaged in the absence of the existence at the time of regulations having the effect of bringing the Sydney Light Rail within the statutory definition of a "light rail system".[112] Second, in exercising its power to contract in the performance of its function to facilitate the development of transport infrastructure, TfNSW was not exercising a power of a kind that persons generally are not authorised to exercise without specific

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107 Section 40(1) of the *Civil Liability Act*.

108 Section 40(2) of the *Civil Liability Act*.

109 Section 43A(1) of the *Civil Liability Act*.

110 Section 43A(2) of the *Civil Liability Act*.

111 Section 43A(3) of the *Civil Liability Act*.

112 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 120-121 [739]-[740].

statutory authority.[113] Third, just as "[t]o drive a vehicle on a public street, for the purpose of dealing with a fire or for any other purpose, needs no grant of power",[114] so to plan for the development of transport infrastructure required no specific statutory authority.[115]

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113 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 120 [736].

114 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118.

115 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 121 [743], [745]. See also *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 528 [180].

GORDON AND EDELMAN JJ.

Introduction

57 These appeals primarily concern the tort of private nuisance and the intersection of that tort with the exercise of powers by statutory authorities. In broad terms, the principles of private nuisance balance a plaintiff's right to land with the liberties of a defendant to use other land. This balance is struck by imposing liability for a substantial interference with a plaintiff's right where the interference is with ordinary enjoyment of land if: (i) a defendant uses their land for a purpose that is not common and ordinary; or (ii) the defendant's use of land does not reasonably minimise the extent of the substantial interference with the plaintiff's ordinary enjoyment of land. In either circumstance, a defendant will have a defence of statutory authority if Parliament has authorised the defendant's uncommon use of land or failure reasonably to minimise the substantial interference, as the case may be. That authority will have been based upon a political decision, involving a policy assessment of the political costs and benefits of interferences with the use of land contrary to the reasonable expectations of the locality.

58 The application of these principles arises in these appeals from the construction of the Sydney Light Rail ("the SLR") that runs mostly through public roads in Sydney, including George Street in the Central Business District and Anzac Parade in the suburb of Kensington. The proceedings were brought by the appellants as the lead plaintiffs on behalf of all persons who hold or have held rights to land in the vicinity of the SLR and who claim to have suffered loss or damage by reason of a substantial interference with their enjoyment of land. Two of the four appellants are companies ("Hunt Leather" and "Ancio Investments") whose claims concern premises from which they traded as, respectively, a shop in the Strand Arcade on George Street and a restaurant on Anzac Parade. The other two appellants are Ms Hunt, the Chief Executive Officer of Hunt Leather, and Mr Zisti, who was formerly the sole director of Ancio Investments. The appellants will be referred to collectively as "Hunt Leather and Ancio Investments" in these reasons.

59 The respondent, Transport for New South Wales ("TfNSW"), planned and procured the construction of the SLR, although it did not perform the construction works. The "proposed staging of the construction activities (to minimise disruption to businesses and residents) could only be described as a complete failure".[116]

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116 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 123 [758].

60 The trial judge in the Supreme Court of New South Wales (Cavanagh J) answered nine agreed common questions[117] upholding, in part, claims for private nuisance by Hunt Leather and Ancio Investments. The Court of Appeal of the Supreme Court of New South Wales (Bell CJ, Leeming and Mitchelmore JJA) unanimously allowed an appeal, concluding that no nuisance had been committed by TfNSW.

61 In this Court, when the issues raised in the notices of appeal by Hunt Leather and Ancio Investments are combined with those raised in the notices of contention by TfNSW, there are five broad issues:

(1) Issue 1: For a finding of private nuisance, is it sufficient that a defendant used land for a purpose that was not common and ordinary (being inconsistent with the reasonable expectations of the locality) and that the defendant's use caused a substantial interference with a plaintiff's ordinary enjoyment of land?

(2) Issue 2: If so, was the purpose of the use of land by TfNSW, adjacent to the land possessed by Hunt Leather and Ancio Investments, common and ordinary?

(3) Issue 3: If liability for nuisance is not established in the answers to Issues 1 and 2, is TfNSW liable for a private nuisance because TfNSW did not plan and procure the use of the relevant roads in a manner that reasonably minimised the extent of the substantial interference with the ordinary enjoyment of land by Hunt Leather and Ancio Investments?

(4) Issue 4: If TfNSW committed a private nuisance, was that liability "based on" TfNSW's exercise of a special statutory power such that s 43A of the *Civil Liability Act 2002* (NSW) prevented recovery unless Hunt Leather and Ancio Investments could prove that the conduct of TfNSW was "in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of ... its power"?

(5) Issue 5: If TfNSW committed a private nuisance, does it have a defence of statutory authority?

62 Although the first three issues concern the liability of a statutory public authority, they fall to be considered according to the basic principle that in the absence of any express provision to the contrary in the legislation that establishes

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117 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 173-176 [1121]-[1125].

TfNSW and confers its powers, the actions of TfNSW are to be treated in the same way as those of any private body.[118] The answer to Issue 1 is "yes" and to Issue 2 is "no", giving rise to TfNSW's prima facie liability for private nuisance subject to the answers to Issues 4 and 5. Although it is therefore unnecessary to answer Issue 3, that issue would also have been resolved against TfNSW in circumstances where, in response to evidence supporting claims that it caused a period of unreasonable delay, TfNSW led no evidence to show that for that period it had planned and procured the construction works in a manner that reasonably minimised the extent of the substantial interference with the ordinary enjoyment of land by Hunt Leather and Ancio Investments.

63 The answer to Issue 4 is that s 43A of the *Civil Liability Act* does not apply. Therefore, subject to the defence of statutory authority, a private nuisance was created by the works planned and procured by TfNSW. As to Issue 5, TfNSW had statutory authority to plan and procure the SLR through George Street and Anzac Parade, but in order for TfNSW to establish a defence of statutory authority for procuring a nuisance, TfNSW was also required to show that its actions were consistent with the implied conditions for the exercise of its statutory powers, namely that the powers be exercised: (i) with reasonable care; and (ii) in a reasonable manner with a view to minimising the interference with the enjoyment by others of land for ordinary purposes. TfNSW failed to establish that it exercised its statutory powers in accordance with those implied conditions for part of the period of the nuisance.

64 A separate but consequential issue concerned whether the damages to which Hunt Leather and Ancio Investments were entitled should include the reasonable costs they incurred in obtaining litigation funding. The trial judge and the Court of Appeal properly rejected those claims.

65 With the agreement of Beech-Jones J we can state that the appeals should be allowed and, for different reasons from the trial judge, the orders of the trial judge restored with the only substantive point of difference between our reasons and those of his Honour concerning the application of these principles in Issue 2. We characterise the purpose of the use of land by TfNSW as construction work for a light rail, which we consider not to be common and ordinary in the relevant localities. Beech-Jones J characterises the purpose more generally as construction work, which is common and ordinary in those localities, but finds that the work was not "conveniently done" (as we also find). Beech-Jones J would have found

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118 See *Electricity Networks Corporation v Herridge Parties* (2022) 276 CLR 271 at 287 [32], citing Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 177-178, 215. See also *Robinson v West Yorkshire Chief Constable* [2018] AC 736 at 748 [31]-[33].

the purpose common and ordinary in the relevant localities even if characterised as construction work for a light rail.

Background

The planning works performed and the construction works procured by TfNSW

66 TfNSW is a corporation and NSW Government agency constituted by the *Transport Administration Act 1988* (NSW) ("the TA Act").[119] TfNSW planned and procured the construction works for the SLR in various ways, including obtaining approvals for construction and entering into a "public and private partnership" involving a "Project Deed" in relation to the finance, design, construction, operation and maintenance of the SLR.

67 From 2012, TfNSW entered into agreements with City of Sydney Council, Centennial Park and Moore Park Trust, and Randwick City Council for a licence to enter and occupy, and to sublicense the entry and occupation of, land (including road surfaces and footpaths) owned by those bodies for the purposes of constructing the SLR. Most relevantly to these appeals, from the earliest stages of delivery strategy workshops in February 2013, TfNSW identified the scope of "Early Works" that were required in relation to utilities, recognising that the presence of utilities on the route of the SLR would be a primary area of risk and created a very uncertain environment. TfNSW initially intended to enter into a contract for Early Works which included treatment of utilities. Ultimately, however, TfNSW limited the utilities covered by its contract for Early Works to six key intersections.

68 For nearly two years following the scoping of Early Works, and before TfNSW entered into contracts to procure the construction works, TfNSW consistently recognised the risks for construction associated with the presence of utilities. At one point in the planning, TfNSW recognised the utilities risk as "extreme".

69 On 17 December 2014, TfNSW entered into the Project Deed and a design and construct contract. The essence of those agreements was that the SLR would be constructed by a Spanish infrastructure company and a French rolling stock manufacturer (referred to in the Project Deed as "OpCo") and then would be operated privately for 15 years.

70 Clause 12.3 of the Project Deed provided for the financial liability of OpCo for delay based upon the period of occupying each stage of the construction route (called "fee zones"). That amount was capped at $7.5 million. Importantly, an

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119 *Transport Administration Act 1988* (NSW), s 3C.

extension of time could be claimed for a "Utility Works Event", which included where it was necessary for OpCo to "protect, modify[,] replace, relocate or otherwise deal with" a utility that had not been identified.

71 Schedule A10 to the Project Deed was an "Initial Delivery Program", described as an "IDP". The IDP identified activities that would be undertaken in the various fee zones, the order in which the activities would be undertaken, and the time during which works on each fee zone would be undertaken. The IDP was not contractually binding, although the Project Deed required OpCo to use its "best endeavours" to achieve completion by 16 March 2019 and to "diligently progress the Delivery Activities".

72 In May 2015, TfNSW issued a media release which said that construction of the SLR would commence in September 2015, with works on George Street commencing in October 2015. TfNSW described how the SLR route had been divided into zones and that times for completion of construction in each zone had been estimated. The precise estimates in the IDP for the periods of construction in fee zone 5 (which was where Hunt Leather's George Street store was located) and fee zone 29 (which was where Ancio Investments' business was located) were said to be, respectively, from 15 October 2015 until 21 July 2016 and from 17 November 2016 until 2 June 2017.

73 As it turned out, the occupation for construction works of George Street, where the premises of Hunt Leather was located, was extended by about 500 days and the occupation for construction works of Anzac Parade, where the premises of Ancio Investments was located, was extended by more than 800 days.

The effect of the construction of the SLR on Hunt Leather and Ancio Investments

74 At all stages in this litigation it has been common ground that the construction of the SLR caused substantial interference with the enjoyment by Hunt Leather and Ancio Investments of the George Street and Anzac Parade premises. The interferences with the enjoyment by Hunt Leather of its George Street premises included: (i) "an incredible amount of loud and constant noise" from the operation of heavy machinery such that staff had to raise their voices when talking;[120] (ii) dust and dirt created by the works entering the store, and piles of dirt outside the store at times, with consequences including products being covered daily with dirt and complaints from the store's staff of health effects

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120 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 138 [843], 139 [848].

including nosebleeds, sinus irritation, and asthmatic and allergy symptoms;[121] (iii) works on the footpath opposite the premises which restricted the ability of pedestrians to cross the street to the store;[122] (iv) the entire road (although not the footpath) being blocked for differing periods during construction of the SLR;[123] and (v) the heritage doors to one entrance to the premises being closed during the construction works, further deterring foot traffic from entering the store.[124]

75 The interferences with the enjoyment by Ancio Investments of its restaurant premises in Anzac Parade included: (i) hoardings and barricades outside the restaurant;[125] (ii) a pedestrian crossing adjacent to the restaurant being closed in December 2016;[126] (iii) noise and dust due to the construction activities which took place directly outside the restaurant, which at times included heavy machinery and concrete pouring and often coated its shopfront window in dust;[127] and (iv) the reduction of traffic lanes on Anzac Parade from three to two lanes, with one being a bus lane, and the prohibition of all parking outside the restaurant.[128]

The evidence of Mr Griffith

76 At trial, Hunt Leather and Ancio Investments relied on what was described as "programming expert evidence" from Mr Griffith, a director of a firm of consulting engineers with over 30 years of engineering experience.[129] The application of Mr Griffith's expertise was described by the trial judge as "the

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121 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 138 [843], 139 [848], [853], 139-141 [859]-[860].

122 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 138 [844].

123 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 138 [845].

124 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 139 [853].

125 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 144 [888].

126 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 144 [889].

127 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 144 [889], [891].

128 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 144-145 [895].

129 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 80 [483]-[484].

assessment of whether there were delays in the completion of the SLR Project and the cause of those delays".[130]

77 The issue addressed by Mr Griffith was alleged unreasonableness in planning by TfNSW. The issue arose because TfNSW had discovered utilities along the route of the SLR that needed to be treated by covering them, replacing them, moving them, or upgrading them in order for construction to proceed. TfNSW had known that there were utilities that it had not discovered but which would be discovered during the course of construction. It turned out that there were nearly as many utilities on the route that were not known to TfNSW prior to entry into the Project Deed as utilities which were known.

78 Mr Griffith formed an opinion, "[b]ased on his own project management experience", that TfNSW had failed to properly manage the delay risk associated with unknown utilities.[131] Mr Griffith identified a number of deficiencies in the IDP which had been produced by TfNSW including, in respect of utilities, that: (i) there was nothing in the IDP which indicated how OpCo intended to address the problem of unknown utilities without delays; and (ii) the IDP for each fee zone did not anticipate the delays that would be caused by discovery of unknown utilities. Mr Griffith observed that the cl 12.3 cap for financial penalties upon OpCo meant that once all fee zones had been delayed for approximately one month the incentive was then for OpCo to open up more fee zones for construction, and thus extend the duration of construction in those fee zones, to assist with resource utilisation. Indeed, it was common ground among the utilities experts at trial that cl 12.3 of the Project Deed was "unique".

79 Mr Griffith produced an "amended IDP" which was said by Mr Griffith "to represent a reasonable baseline against which to assess delay". Mr Griffith relied upon that amended IDP for the conclusion that it was unreasonable for TfNSW to occupy the fee zones beyond the times set out in the amended IDP.

80 Mr Griffith's amended IDP assumed a "complete or substantially complete identification of all utilities along the route before construction commenced".[132] The underlying assumption of Mr Griffith's calculation was therefore that a reasonable person in TfNSW's position would have discovered the unknown utilities, which "would have been allowed for [in the IDP] had they been known at the time of [the Project Deed]". As Mr Griffith said in his report, he "determined the number of Unknown Utilities ... relative to Known Utility Treatments ... and

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130 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 80 [488].

131 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 80 [486].

132 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 501 [41].

extended the Utility Treatment Activities in the IDP proportionately". For example, in fee zone 5, 67 utilities were known to TfNSW at the time of the IDP and a further 55 unknown utilities were later discovered during the construction, an increase of 82% in the number of utilities. Mr Griffith calculated the estimate for occupation of fee zone 5 in the amended IDP by increasing the number of workdays assigned to utilities (28 workdays) by 82% (reaching a total of 51 workdays).

81 In the amended IDP, Mr Griffith concluded that a reasonable timeframe for the occupation of fee zone 5 (George Street) would still have commenced on 15 October 2015 but, with knowledge by TfNSW at the time of the Project Deed of substantially all of the unknown utilities, the completion date for fee zone 5 would have been 1 November 2016, involving 397 fewer days of occupation of the fee zone for construction than actually occurred. In respect of the occupation of fee zone 29 (Anzac Parade), a reasonable timeframe for occupation would have commenced later, on 12 December 2016, and concluded much earlier, on 3 September 2017, involving 762 fewer days of occupation of the fee zone for construction than actually occurred.

The three forms of the private nuisance claims at trial

82 The starting point for the private nuisance claims brought by Hunt Leather and Ancio Investments is that TfNSW developed, planned, procured, and organised, but did not perform, the construction works. Hunt Leather and Ancio Investments therefore alleged that TfNSW committed the tort of private nuisance by: (i) authorising or permitting the construction of the project; and/or (ii) causing the delay in the civil works, thus lengthening the period of substantial interference with the ordinary enjoyment of land by Hunt Leather and Ancio Investments. Based on these acts by TfNSW, Hunt Leather and Ancio Investments put their case for private nuisance in three ways described as "Case A", "Case B", and "Case C" respectively.

83 Case A asserted that TfNSW had committed the tort of private nuisance by: (i) its responsibility for the construction works on the SLR (including hoardings on and along public roads for the purposes of the construction works), which substantially interfered with the enjoyment by Hunt Leather and Ancio Investments of their rights as occupiers of the land on which they conducted their businesses; (ii) the construction of the SLR not being a use of the land for common and ordinary purposes; and (iii) no defence of statutory authority or operation of s 43A of the *Civil Liability Act* being applicable.

84 Case B was an alternative. Case B was put on the same basis as Case A but with the changed element of s 43A of the *Civil Liability Act* being applicable, with the effect assumed to be that claims for private nuisance would also require Hunt Leather and Ancio Investments to prove that the conduct of TfNSW was "so

unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power".[133] In relation to this case, Hunt Leather and Ancio Investments relied upon the evidence of Mr Griffith.

85 Case C was a further alternative. Case C was also put on the same basis as Case A but with the changed element either that the construction of the SLR was a common and ordinary purpose or that it was not sufficient for a private nuisance that the construction was an uncommon or abnormal purpose. Hunt Leather and Ancio Investments alleged that TfNSW had not established that it took reasonable and proper precautions to prevent the disruptions that they suffered. Hunt Leather and Ancio Investments asserted that TfNSW bore the onus of proof to show that reasonable and proper precautions were taken.

The decisions of the trial judge and the Court of Appeal

86 As to Case A, and Issues 1 and 2 above, both the trial judge and the Court of Appeal held that although the purpose of the use of land by TfNSW, being the construction works for the SLR, was not common and ordinary, and although those works caused a substantial interference with Hunt Leather and Ancio Investments' ordinary enjoyment of land, these matters were not sufficient for a finding of private nuisance.[134]

87 As to Case B and Case C, and Issues 3 and 4 above, the trial judge held that TfNSW was responsible for a nuisance caused by OpCo in fee zones 5 and 29. This was because when it entered into the Project Deed TfNSW was aware of the risk of discovery of unknown utilities in the course of construction and was aware that agreements had not been entered into with the utilities providers and that such agreements would take time.[135] The trial judge accepted Mr Griffith's opinion that TfNSW:[136]

> "could have done more to discover unknown utilities and that if it had, the delays in individual fee zones would have been lessened (as the ...

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133 *Civil Liability Act 2002* (NSW), s 43A(3).

134 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 110 [656], 141 [868], 142 [875], 146 [909], 147 [923]; *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 517 [118]-[119], 518 [122], [125].

135 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 147-148 [924]-[927].

136 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 135 [819].

> contractor could have reached agreement on treatments in advance of starting the [construction] ...)".

In particular, the trial judge explained that the agreed terms of the Project Deed—and particularly cl 12.3, which "formed an integral part of [TfNSW's] fee zone strategy"—provided no disincentive for the contractor to overstay in the fee zones and left very little of the utilities risk to the contractor.[137]

88 The trial judge concluded that the substantial interference with the enjoyment by Hunt Leather and Ancio Investments of their land became a nuisance to the extent to which the interferences exceeded the times in Mr Griffith's amended IDP, which reflected what was "reasonably achievable" by TfNSW and what it was reasonable for Hunt Leather and Ancio Investments to expect.[138] The trial judge concluded:[139]

> "Something went wrong. Specifically, [TfNSW] entered into the Project Deed at a time when it did not know the extent of the utilities risk and on terms which offered little deterrence to the ... contractor from overstaying in a fee zone."

89 The trial judge thus accepted Case C because he was "unable to be satisfied that [TfNSW] exercised reasonable care to protect the interests of the business owners along the light rail route".[140] The trial judge held that the unreasonableness did not rise to the heightened standard in s 43A of the *Civil Liability Act*[141] but that s 43A did not apply because that section applied only to actions "based on" the exercise of a special statutory power and the tort of nuisance was based upon the harm experienced by Hunt Leather and Ancio Investments rather than the nature of TfNSW's conduct.[142]

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137 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 132 [801]-[802], 132-133 [804]-[805].

138 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 149 [935]-[936]; *Hunt Leather Pty Ltd v Transport for NSW [No 3]* [2023] NSWSC 1598 at [12].

139 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 150-151 [943].

140 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 135 [820].

141 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 122 [756].

142 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 117-118 [714]-[717].

90 The Court of Appeal accepted the trial judge's finding that the failure to identify and respond to the unknown utilities prior to entry into the Project Deed was a substantial contributing reason for the delay.[143] The Court of Appeal also noted that there had been no challenge to the trial judge's conclusion that the utilities risk had not been allocated to the contractor or that cl 12.3 provided no disincentive for delays, which led to longer occupation of the fee zones.[144] The Court of Appeal also accepted that TfNSW bore the onus of proving that its conduct was not unreasonable.[145] Nevertheless, the Court of Appeal rejected Case C, and allowed TfNSW's appeal.

91 The Court of Appeal held that Mr Griffith's evidence proceeded on an assumption that the unknown utilities would have been discovered prior to entry into the Project Deed if reasonable care had been taken and, consequentially, assumed that agreements would have been entered into with the utility providers. The Court of Appeal held that these assumptions were never proved and that Hunt Leather and Ancio Investments failed to provide "evidence about how long it would have taken to obtain such knowledge [of the unknown utilities], or how disruptive doing so would have been to the occupiers of neighbouring premises".[146] Further, the Court of Appeal held that Mr Griffith's amended IDP did not delineate the period of unreasonable delay by reference to what actually occurred compared with what should have occurred.[147]

92 The Court of Appeal nevertheless agreed with the trial judge that s 43A of the *Civil Liability Act* had no operation for three reasons: (i) s 43A imposes an altered standard of care in tort but the tort of nuisance does not require a plaintiff to show that the defendant failed to take reasonable care; (ii) absent any claim in this case that a special statutory power had been exercised negligently, the claims for nuisance were not "based on" the exercise of a special statutory power; and (iii) the complaints by Hunt Leather and Ancio Investments concerning the conduct of TfNSW were not concerned with the exercise of a special statutory power to plan the construction of a light rail system but were instead complaints about various aspects of the conduct of TfNSW (not insisting on the right terms in

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143 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 515-516 [110]-[114].

144 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 507 [71].

145 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 520-521 [136], 523-524 [151]-[153].

146 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 501 [42].

147 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 501 [44].

a contract or not causing different things to take place before construction began).[148]

93 As for a defence of statutory authority, being Issue 5, the trial judge concluded that the defence failed because the unreasonable interference was not the inevitable consequence of an exercise of statutory power by TfNSW.[149] The Court of Appeal upheld that conclusion.[150] In this Court, however, TfNSW, by notices of contention, contends that if this Court were to find (contrary to the trial judge and to the Court of Appeal) that Case A was satisfied and that there was an actionable nuisance for the entire period of the construction works, then a defence of statutory authority applied for some, or the entirety, of that period.

The test for nuisance

94 The development of the test for the tort of private nuisance, particularly since the nineteenth and early twentieth centuries, has been concerned with balancing the competing interests of occupiers of proximate land, usually neighbours, in their enjoyment of their land.[151] That is why the harm that is the concern of the tort of private nuisance is the diminution in the utility and amenity value of land rather than the personal discomfort of, or personal injury to, those who are occupying the land.[152] As will be seen below, the balance, or "give and take", in the enjoyment of neighbouring land was struck by reference to the ordinary uses of land in the relevant locality, which involves consideration of both the purpose of the use and the means by which the purpose is achieved.

95 From the perspective of a plaintiff, it has been established since *Walter v Selfe*[153] that a claim for interference with the plaintiff's right to land can only be

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148 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 528 [175]-[180].

149 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 137 [832]-[834].

150 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 520 [133]-[134].

151 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903; *Jalla v Shell International Trading and Shipping Co Ltd* [2024] AC 595 at 607 [2]. See also Rolph et al, *Balkin & Davis: Law of Torts*, 6th ed (2021) at 587 [14.19]; Sappideen et al, *Fleming's The Law of Torts*, 11th ed (2024) at 569-571 [19.80].

152 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 696; *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 12-13 [11].

153 (1851) 4 De G & Sm 315 [64 ER 849].

brought for private nuisance if there is "material discomfort and annoyance for the ordinary purposes of life to a [person's] house or ... property".[154] That principle, also well recognised in Australia,[155] requires for a claim for private nuisance that a plaintiff establish a substantial interference with the plaintiff's enjoyment of land for purposes that are ordinary, in the sense that the purposes are consistent with the reasonable expectations of the locality as to the use of that land.

96 From the inception of the modern tort of private nuisance, therefore, the starting point has been that the action requires a substantial interference with the plaintiff's ordinary use of land. Once this has been proved, the focus shifts to whether the defendant has acted with "any lawful ground of justification or excuse".[156]

The defendant's substantial interference must be one that is not ordinary or not convenient

97 If a defendant causes a substantial interference with a plaintiff's enjoyment of land for ordinary purposes, the defendant may have a lawful ground of justification or excuse in an action for private nuisance if they establish that they were using their land for a common and ordinary purpose, by means that involved it being "conveniently done" in the sense of using means that reasonably minimised the extent of the interference.

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154 *Walter v Selfe* (1851) 4 De G & Sm 315 at 322 [64 ER 849 at 852]; *Fleming v Hislop* (1886) 11 App Cas 686 at 691. See also *Fleming v Hislop* (1886) 11 App Cas 686 at 694. See further *Robinson v Kilvert* (1889) 41 Ch D 88 at 94, 97, 97-98; *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381 at 393; *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 17 [25]-[26]; *Jalla v Shell International Trading and Shipping Co Ltd* [2024] AC 595 at 613 [18(iii)].

155 *Haddon v Lynch* [1911] VLR 5 at 9; [1911] VLR 230 at 231; *McKenzie v Powley* [1916] SALR 1 at 13-14; *Ruthning v Ferguson* [1930] St R Qd 325 at 326; *Painter v Reed* [1930] SASR 295 at 301-302; *Dunstan v King* [1948] VLR 269 at 272; *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 486; *Scott v Numurkah Corporation* (1954) 91 CLR 300 at 317; *Platt v Ong* [1972] VR 197 at 198; *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128 at [295]; (2013) 85 NSWLR 514 at 545 [138]; *Hill v Higgins* [2012] NSWSC 270 at [49]-[50]; *Riverman Orchards Pty Ltd v Hayden* [2017] VSC 379 at [178].

156 Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (1887) at 329.

(i) The foundational case in 1862

98 In 1862, in *Bamford v Turnley*,[157] Bramwell B set out the test for the conduct of a defendant which, despite involving a substantial interference with the plaintiff's ordinary use of land, would be justified or excused from liability for nuisance. That test has been described as the "leading",[158] "classic",[159] and "seminal"[160] statement of principle, and said to have been "expressed with a degree of precision and logic".[161]

99 The issue in that case was whether the smells from the burning of bricks on the defendant's land as part of construction works were a nuisance. The trial judge was held to have misdirected the jury by instructing them only in general terms to consider whether the defendant's use of his land was reasonable. Bramwell B set out a test that explained when acts would be "justif[ied] or excuse[d]" from constituting a nuisance despite those acts causing "a sensible diminution of the comfortable enjoyment" of land:[162]

> "There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz, that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural and unusual, but not the common and ordinary use of land."

100 The approach of Bramwell B focused upon two matters: the purpose of a use and the means or manner of a use. The only conduct of a defendant that would be "excepted" from constituting a nuisance was a use of land for a common and ordinary purpose, by means that involved it being "conveniently done". The existence of a use of land by a defendant that was not for a common and ordinary

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157 (1862) 3 B & S 66 [122 ER 27].

158 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 17 [27].

159 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 54 [162].

160 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 44 [123].

161 *Fleming v Hislop* (1886) 11 App Cas 686 at 697. See also *West v Nicholas* (1915) 17 WALR 49 at 51-52.

162 (1862) 3 B & S 66 at 82-83 [122 ER 27 at 32-33].

purpose (or a similar description) was said by writers to be "[t]he criterion of liability" and an "ingredient[] essential to constitute a cause of action".[163] Contemporary writers on private nuisance explained that the effect of this criterion was that "annoyance caused by the unusual use of a house may be a nuisance, when like annoyance from the ordinary use of it would not be".[164] Others added that "a trade was not to be treated as a nuisance if carried on in the ordinary manner in a convenient locality".[165]

101 Bramwell B justified the rule as follows in his decision in *Bamford v Turnley*:[166] "[t]he convenience of such a rule may be indicated by calling it a rule of give and take, live and let live". That justification involves a reciprocal concern with the reasonably expected purposes and means of use in a locality, which in turn are determined by what purposes and means of use are "ordinary" or reasonably expected in the locality in which the plaintiff and defendant reside. A plaintiff will be expected to put up with substantial interference with their enjoyment of land if the purpose of the plaintiff's enjoyment is not common and ordinary. Equally, a defendant will not be liable for a use of land for a purpose that is common and ordinary and by means that are convenient. As Lord Leggatt put the point in *Fearn v Board of Trustees of the Tate Gallery*:[167]

> "This principle of reciprocity explains the priority given by the law of nuisance to the common and ordinary use of land over special and unusual uses. A person who puts his land to a special use cannot justify substantial interference which this causes with the ordinary use of neighbouring land by saying that he is asking no more consideration or forbearance from his neighbour than they (or an average person in their position) can expect from him. Nor can such a person complain on that basis about substantial interference with his special use of his land caused by the ordinary use of neighbouring land. By contrast, a person who is using her land in a common and ordinary way is not seeking any unequal treatment or asking of her neighbours more than they ask of her."

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163 Garrett, *The Law of Nuisances* (1890) at 142-143.

164 Ball, *Leading Cases on the Law of Torts* (1884) at 409.

165 Bigelow, *Elements of the Law of Torts* (1878) at 238.

166 (1862) 3 B & S 66 at 84 [122 ER 27 at 33].

167 [2024] AC 1 at 20 [35].

102 The rule set out by Bramwell B in *Bamford v Turnley* has been consistently recognised or applied in England[168] and Australia[169] for 150 years. In England, one of the earliest applications was by the Court of Appeal in *Ball v Ray*.[170] The issue was whether the keeping of a stable of horses next to a residential premises was a nuisance. The Lord Chancellor held that so long as the defendant had used his property "for the ordinary purposes for which it and all the different parts of it were constructed" there would be no nuisance but that there would be a nuisance if the property were used for "unusual purposes in such a manner as to produce a substantial injury", like the keeping of a stable.[171] Recovery in nuisance was allowed because the keeping of a stable was not a purpose that was common and ordinary for the locality. Mellish LJ added that "we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house".[172]

103 In Australia, the rule expressed by Bramwell B was first adopted by this Court in *Clarey v Principal and Council of the Women's College*.[173] In that case, the landlords of a property used as a women's college commenced an action under residential tenancy legislation, seeking an order for recovery of possession on the basis that the tenants had been "guilty of conduct which was a nuisance or annoyance to adjoining or neighbouring occupiers" by reason of the student residents of the women's college who made considerable noise late at night, which

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168 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 19-20 [31]-[33]. See *Broder v Saillard* (1876) 2 Ch D 692 at 701; *Reinhardt v Mentasti* (1889) 42 Ch D 685 at 690; *Attorney-General v Cole & Son* [1901] 1 Ch 205 at 207; *Southwark London Borough Council v Tanner* [2001] 1 AC 1 at 20-21; *Barr v Biffa Waste Services Ltd* [2013] QB 455 at 476 [64]-[65]. See also *Jalla v Shell International Trading and Shipping Co Ltd* [2024] AC 595 at 607 [2].

169 *West v Nicholas* (1915) 17 WALR 49 at 52-53; *Pittar v Alvarez* (1916) 16 SR (NSW) 618 at 624-625; *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 486-488; *Gartner v Kidman* (1962) 108 CLR 12 at 44; *Lester-Travers v City of Frankston* [1970] VR 2 at 10-11; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [305]-[307]; *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514 at 545 [137]; *Marsh v Baxter* (2015) 49 WAR 1 at 126 [767], 128-129 [779].

170 (1873) LR 8 Ch App 467.

171 *Ball v Ray* (1873) LR 8 Ch App 467 at 469-470.

172 *Ball v Ray* (1873) LR 8 Ch App 467 at 471.

173 (1953) 90 CLR 170.

disturbed the neighbouring landlords in their sleep.[174] This Court unanimously approved the reasoning, discussed above, of the Lord Chancellor in *Ball v Ray*,[175] that a nuisance would arise from the use of property for unusual purposes which produced substantial injury.[176] The students' noises, however, were "only noises of the kind that are incidental to the occupation of premises as a dwelling" within the reasonable expectations of a landlord who let premises to university students.[177]

(ii) The meaning of a "common and ordinary" purpose of use

104 The established effect of Bramwell B's reasoning in *Bamford v Turnley* was that a private nuisance would arise where there was a substantial interference with the plaintiff's enjoyment of land for ordinary purposes, caused by the defendant's use of land for a purpose that was not "common and ordinary". The compound expression, "common and ordinary", sometimes expressed as "normal and usual",[178] was aptly described by Professor Burdick as the expectation that people "must conform to the habits of the community":[179]

> "[T]he very nuisance the one complains of, as the result of the ordinary use of his neighbo[u]r's land, he will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character."

105 This concept of a purpose that is "common and ordinary" has sometimes been described in a general sense as a concern with what is "reasonable". But that language is loose and can encourage the erroneous conclusion that no nuisance will be committed if the defendant acts with reasonable care. As the Court of Appeal rightly held in this case, quoting a decision of Sholl J:[180]

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174 *Clarey v Principal and Council of the Women's College* (1953) 90 CLR 170 at 174.

175 (1873) LR 8 Ch App 467 at 469-470.

176 *Clarey v Principal and Council of the Women's College* (1953) 90 CLR 170 at 176.

177 *Clarey v Principal and Council of the Women's College* (1953) 90 CLR 170 at 175.

178 *Andreae v Selfridge & Co Ltd* [1938] Ch 1 at 9.

179 Burdick, *The Law of Torts: A Concise Treatise on the Civil Liability at Common Law and under Modern Statutes for Actionable Wrongs to Person and Property* (1905) at 404-405.

180 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 521 [138], quoting *Munro v Southern Dairies Ltd* [1955] VLR 332 at 336, in turn quoting *Broder v Saillard* (1876) 2 Ch D 692 at 701.

> "It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants."

106 In other words, where "reasonableness" is used in the context of an enquiry into whether the purpose of a defendant's use of land is common and ordinary, this sense of "reasonable" is shorthand for "what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".[181] That explanation was adopted by Gibbs CJ, Wilson and Brennan JJ (with Murphy J generally agreeing) in *Elston v Dore*,[182] where their Honours said that wrongfulness for the purposes of the law of nuisance will only arise if the defendant's conduct "was not reasonable in the sense to which Lord Wright refers".

107 The identification of whether a purpose is common and ordinary should be made at the proper level of generality by reference to reasonable expectations based upon what is common and ordinary in a locality.[183] The exercise of identifying the purpose at the proper level of generality can sometimes be finely balanced but it will be guided by the conduct that is said to be the infringement.

108 Thus, "where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner", it will not be a nuisance for a plaintiff to experience, in their use of land, the consequences of the defendant's use of land for the purposes of that particular trade or manufacture in that locality.[184] For instance, the noises during the night considered in *Clarey v Principal and Council of the Women's College*[185] were noises for the common and ordinary purpose, consistent with the lease and locality, of residential "accommodation of university students ... [who] keep late hours and in the course of doing so will make such noises". And there was no nuisance in *Southwark London Borough Council v Tanner*[186] from the noises, made for

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181 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903.

182 (1982) 149 CLR 480 at 488, 493.

183 *Sturges v Bridgman* (1879) 11 Ch D 852 at 865.

184 *Sturges v Bridgman* (1879) 11 Ch D 852 at 865. See *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 22 [40].

185 (1953) 90 CLR 170 at 175.

186 [2001] 1 AC 1 at 7. See *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 17-18 [28].

ordinary purposes and heard in neighbouring flats with inadequate sound insulation, of "not only the neighbours' televisions and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making".

109 By contrast, some purposes, characterised at a level of particularity based on the conduct said to amount to the infringement, will be contrary to the reasonable expectations of the locality, and therefore a nuisance, in almost any residential locality. For instance, in 1904, the noises, vibrations, and "noxious or offensive smells" produced for the purposes of running a generating station in a locality with a "high-class boarding school for young ladies" was held "to be not an ordinary use of the defendants' property".[187] So too, loud noises made only for malicious purposes, even if those noises might have been reasonably expected for other purposes,[188] will be contrary to the reasonable expectations of the locality and a private nuisance.[189] And, after finding that there was a substantial interference with the claimants' use of land for ordinary purposes,[190] the defendant's purpose of using land in *Fearn v Board of Trustees of the Tate Gallery*[191] was held to be uncommon because a platform was built not merely for the purpose of being a structure from which to view art, but at the level of particularity of being a platform for the purpose of inviting "members of the public to look out from a viewing gallery".

110 The purpose of a defendant's use of land might fall within the authorised uses of relevant planning laws. But absent statutory authority to commit what would otherwise be a nuisance, the planning permission to engage in an activity does not instantly transform the uncommon or abnormal purpose into a common

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187 *Knight v Isle of Wight Electric Light and Power Co* (1904) 73 LJ Ch 299 at 299, 301.

188 *Keble v Hickringill* (1706) 11 Mod 73 at 75 [88 ER 898 at 898], referred to in *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468 at 473.

189 *Christie v Davey* [1893] 1 Ch 316 at 326; *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468 at 475. See also Stevens, *Torts and Rights* (2007) at 22-23. Compare Holdsworth, "Notes" (1937) 53 *Law Quarterly Review* 1 at 1-2.

190 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 13-14 [12]-[17], 24 [48]. Compare Neyers and McDonagh, "A Defence of the 'Physicalist Heresy': Or Why the Supreme Court of Canada Should Not Follow *Fearn v Tate Gallery*" (2024) 5 *Journal of Commonwealth Law* 75.

191 [2024] AC 1 at 25 [50].

purpose and thereby "cut down private law rights".[192] Instead, planning permission for an activity, like regulatory controls of an activity,[193] plays a limited evidentiary role in identifying the reasonable expectations of a locality.

(iii) The meaning of "conveniently done"

111 Even if a defendant who causes a substantial interference with a plaintiff's enjoyment of land for ordinary purposes does so by using their land in a common and ordinary way, the defendant will still commit a nuisance unless the defendant establishes that they have used their land by actions that Bramwell B described as "conveniently done". Consistently with the treatment by Bramwell B of this aspect of the tort of private nuisance as a lawful ground of "justif[ication] or excuse",[194] it has been held that the defendant bears the onus of proving that their use of land which causes such interference is "conveniently done".[195] Of course, a defendant does not bear an impossible onus of negating every imaginable allegation that the means adopted for the use of land were not conveniently done. A plaintiff bears an evidentiary onus to identify the respects in which the defendant's use of land is not conveniently done.

112 The requirement that a defendant establish that their use of land, for common and ordinary purposes, was "conveniently done" has also been described as a requirement that the defendant's use of land be "necessary for the common and ordinary use"[196] or, perhaps more accurately, as a requirement that the defendant's use of land be "reasonable according to the ordinary usages"[197] or "reasonable in the circumstances".[198] But the use of land by the defendant need not be "necessary" in the sense of "essential". And the concern with the reasonableness of a

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192 *Barr v Biffa Waste Services Ltd* [2013] QB 455 at 472 [46(ii)]. See also *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 849 [92]; *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 41 [110], 66 [201].

193 *Ammon v Colonial Leisure Group Pty Ltd* (2019) 55 WAR 366 at 399 [137]-[138].

194 *Bamford v Turnley* (1862) 3 B & S 66 at 82 [122 ER 27 at 32].

195 See *Andreae v Selfridge & Co Ltd* [1938] Ch 1 at 9; *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 30 [71]. See also at 56 [166].

196 Saunders and Wright, *The Law of Negligence*, 2nd ed (1898) at 25. See also *Woodhouse v Fitzgerald* (2021) 104 NSWLR 475 at 483 [31].

197 *Elston v Dore* (1982) 149 CLR 480 at 488, quoting *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903.

198 *Brown v Tasmania* (2017) 261 CLR 328 at 452 [385].

defendant's use of land is not a test for negligence but a concern that the defendant adopted means for their own ordinary enjoyment of land that reasonably minimised the extent of the substantial interference with the plaintiff's ordinary enjoyment of their land.

113 The assessment of whether a defendant's activity on their land for common and ordinary purposes is "conveniently done" thus requires consideration "not merely of the convenience of the defendant, but also the convenience of the plaintiff".[199] In other words, the assessment involves consideration of the relative interests of each of the parties in all the circumstances. Contrary to the reasons of the Court of Appeal in this case, the decision of Windeyer J in this Court (with whom Dixon CJ agreed) in *Gartner v Kidman*[200] did not suggest that the approach of Bramwell B to whether the activity of a defendant was conveniently done had become a single test for private nuisance, subsuming the anterior questions of whether: (i) the activity of the defendant substantially interfered with the plaintiff's enjoyment of land for ordinary purposes; and (ii) the activity of the defendant was common and ordinary, in the sense of being for purposes consistent with the reasonable expectations of the locality.

114 The decision in *Gartner v Kidman* concerned an artificial drain that had been created to channel and drain surplus water that flowed from a swamp on the boundary of the plaintiff's and defendant's lands to a sandy hollow on the defendant's land. The defendant discovered that the sand on his land was valuable and inserted sandbanks into the drainage channel on his land to protect the sand from the flow of water from the plaintiff's land. This Court rejected the plaintiff's claim that the obstruction of the artificial drain, causing water to build up on the plaintiff's land, was a nuisance. Windeyer J held that "in formulations of the law of nuisance it may be better to start with what Bramwell B said in *Bamford v Turnley*".[201] Although his Honour adapted the language of Bramwell B, preferring to describe the "common and ordinary use of land" as the "natural use" of land, his Honour explained that, in this context, whether it was natural for the proprietor of higher land to increase the flow of surface water:[202]

> "is a question to be determined reasonably having regard to all the circumstances, including the purposes for which the land is being used and the manner in which the flow of water was increased: as for example

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199 *Pittar v Alvarez* (1916) 16 SR (NSW) 618 at 624.

200 (1962) 108 CLR 12.

201 *Gartner v Kidman* (1962) 108 CLR 12 at 44.

202 *Gartner v Kidman* (1962) 108 CLR 12 at 48.

> whether it is agricultural land drained in the ordinary course of agriculture, whether it is timbered land cleared for grazing, whether it is a mining tenement, or is used for buildings and so forth".

In other words, the question of whether the purpose of the use is "natural" (ie, common and ordinary) is determined by reference to the locality of the land and the associated reasonable expectations. Likewise, for the proprietor of lower land: (i) it would be common and ordinary to "put up barriers and pen [the water] back" to the higher land of the upper proprietor (but not a third proprietor), subject to (ii) "us[ing] reasonable care and skill and do[ing] no more than is reasonably necessary to protect his enjoyment of his own land".[203] The exposition of (ii) was a classic explanation of Bramwell B's requirement that the activity be "conveniently done".

A dissenting approach: reasonableness in all of the circumstances

115 Although the approach of Bramwell B has been the dominant approach for 150 years in England and Australia, there is a dissenting approach upon which TfNSW successfully relied in the Court of Appeal below and which it also relied upon in this Court. That approach was taken in the dissenting reasons of McLure P in *Marsh v Baxter*[204] and in the dissenting reasons of Lord Sales (with whom Lord Kitchin agreed) in *Fearn v Board of Trustees of the Tate Gallery*.[205] The dissenting approach rejects the sufficiency of a defendant's uncommon or non-ordinary use, the first part of Bramwell B's test for the tort of private nuisance, in cases where there is a substantial interference with a plaintiff's use of land for ordinary purposes. In other words, the dissenting approach maintains that a private nuisance does not necessarily arise where a defendant substantially interferes with the plaintiff's enjoyment of land by the defendant's use of land for purposes inconsistent with the reasonable expectations of the locality. Instead, those matters are subsumed into an overall instinctive synthesis of the reasonableness of the defendant's interference with the plaintiff's enjoyment of land. Both the trial judge[206] and the Court of Appeal[207] in this case considered that the dissenting

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203 *Gartner v Kidman* (1962) 108 CLR 12 at 49.

204 (2015) 49 WAR 1.

205 [2024] AC 1.

206 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 109 [651]-[652].

207 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 516-519 [115]-[126].

approach represented Australian law. For the reasons above, that is incorrect as a matter of precedent. For the reasons below, it is incorrect as a matter of principle.

116 In *Marsh v Baxter*,[208] McLure P recognised that a plaintiff had no claim for nuisance for an interference with an enjoyment of land that was "abnormally sensitive". And yet, her Honour considered that a test of general reasonableness should apply to determine whether a defendant had committed a nuisance, with the apparent effect that even a use by a defendant for uncommon or abnormal purposes causing a substantial interference with the plaintiff's ordinary use could be reasonable and not a private nuisance. McLure P held that this generalised reasonableness test was capable of taking into account the social utility of the defendant's farming of genetically modified canola in "increasing the yields from arable land",[209] although her Honour ultimately concluded that the defendant's use of land did constitute a nuisance.[210] In the context of a claim of private nuisance by a public authority, this approach comes very close to collapsing the test for private nuisance into the test for negligence by a public authority.[211]

117 The approach of Lord Sales (with Lord Kitchin agreeing) in *Fearn v Board of Trustees of the Tate Gallery*[212] was more coherent than that of McLure P, in that his Lordship did not consider that social utility was a matter that could be taken into account in the assessment of reasonableness.[213] Nevertheless, his Lordship treated any uncommon or abnormal purpose of use by a plaintiff as merely part of an overall reasonableness enquiry, with the onus of proof on the defendant, and with reasonableness including a consideration of any uncommon use by the defendant.[214]

118 The difference between, on the one hand, the test of Bramwell B and, on the other hand, the approach of Lord Sales to "reasonableness in all of the

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208 (2015) 49 WAR 1 at 43 [249], citing *Munro v Southern Dairies Ltd* [1955] VLR 332 at 335.

209 *Marsh v Baxter* (2015) 49 WAR 1 at 48 [288].

210 *Marsh v Baxter* (2015) 49 WAR 1 at 49 [294].

211 See *Electricity Networks Corporation v Herridge Parties* (2022) 276 CLR 271 at 294 [52].

212 [2024] AC 1.

213 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 66 [201], 73 [226].

214 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 56-57 [166]-[167], 73 [226].

circumstances" ultimately reduces to whether a court might refuse a claim for nuisance even if a defendant's use of land was for purposes inconsistent with the reasonable expectations of the locality—that is, it was not for a common and ordinary purpose—and which caused a substantial interference with a plaintiff's enjoyment of land for ordinary purposes. In his dissenting reasons, Lord Sales said that it is not "necessarily" the case that such a use would be a nuisance.[215] One example where such a use would not be a nuisance on Lord Sales' approach is where the uses of land by both the plaintiff and the defendant are uncommon.[216] That was the central basis for the dissent of Lord Sales because his Lordship considered that the claimants were *also* using their land "outside existing standards of common and ordinary use of land in the locale".[217] Yet a claim in such circumstances should also fail on Bramwell B's approach because the claimants would be outside the well-established principle in *Walter v Selfe*[218] requiring the use of land with which they claimed the substantial interference to be for an ordinary purpose.

119 The strongest case for a defendant to have a freedom to use their land inconsistently with the purposes reasonably expected in the locality and in a way that causes a substantial interference with a plaintiff's enjoyment of land for ordinary purposes would be where the defendant's use of their land has substantial social utility. But, as Professor Sir John Baker has explained, early in the seventeenth century[219] "it became clear that if an activity amounted to a nuisance causing damage, it would be actionable regardless of its utility; and this has remained law until the present".[220] As Williams J (with whom Erle CJ, Keating J and Wilde B joined) said in *Bamford v Turnley*,[221] "[a] tan house is necessary, for

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215 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 57 [167].

216 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 74 [227].

217 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 74 [227].

218 (1851) 4 De G & Sm 315 [64 ER 849].

219 *Jones v Powell* (1628) Palm 536 [81 ER 1208]; Hut 135 [123 ER 1155]. See also Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750*, 2nd ed (2010) at 660-664.

220 Baker, *An Introduction to English Legal History*, 5th ed (2019) at 459.

221 (1862) 3 B & S 66 at 75 [122 ER 27 at 30], quoting *Jones v Powell* (1628) Palm 536 at 539 [81 ER 1208 at 1209]. See also Gale and Willes, *A Treatise on the Law of Easements*, 3rd ed (1862) at 406, 410.

all men wear shoes, and nevertheless it may be pulled down if it be erected to the nuisance of another".

120 Where a defendant's activity on land is not common and ordinary, the public utility of that activity has traditionally been treated as irrelevant to questions of liability, since "the plaintiff to the action is suing to protect a private right to enjoy his or her own property".[222] The contrary application of the dissenting approach would require many cases to be revisited. Was it wrong to find a nuisance by the use of land for stables in a residential area in *Rapier v London Tramways Co*[223] in light of the necessity for the horses to assist in laying tracks for a tramway whose construction was authorised by statute? Was it wrong to find a nuisance by the use of land for the construction of a smallpox hospital in the metropolitan area where the plaintiffs resided in *Metropolitan Asylum District v Hill*[224] in light of the important public purpose of that use? Notably, both the majority and the minority in *Fearn v Board of Trustees of the Tate Gallery*[225] rejected any relevance for the public utility of a defendant's use of land in determining whether the conduct of the defendant is a nuisance. As Professor Penner has explained:[226]

> "If reciprocality is taken to mean compromise between incompatible uses of neighbouring land, then the scope of competing rights could, and presumably would, extend to uses which have nothing to do with the ordinary use and occupation of land. The use of a cement factory which emits dust and smoke competes with the nearby residents' use of their gardens. Perhaps there ought to be some compromise regarding these uses based on the value of the cement factory as against the value of a smoke- and dust-free residence. This is a compromise, but one that has nothing in common with the reciprocality that Bra[m]well B's words evoke."

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222 Rolph et al, *Balkin & Davis: Law of Torts*, 6th ed (2021) at 588 [14.22]. See also Garrett, *The Law of Nuisances* (1890) at 12-14; Burdick, *The Law of Torts: A Concise Treatise on the Civil Liability at Common Law and under Modern Statutes for Actionable Wrongs to Person and Property* (1905) at 399-400; Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (1907) at 189.

223 [1893] 2 Ch 588.

224 (1881) 6 App Cas 193.

225 [2024] AC 1 at 43-45 [120]-[126], 66 [201].

226 Penner, "Nuisance and the Character of the Neighbourhood" (1993) 5 *Journal of Environmental Law* 1 at 7.

121 TfNSW sought to find support for the dissenting approach in the *Restatement (Second) of Torts*, which defines private nuisance in the broadest of terms as "a nontrespassory invasion of another's interest in the private use and enjoyment of land" which for both intentional and negligent conduct must be "unreasonable".[227] The Reporter for the *Restatement (Second) of Torts* framed the approach to nuisance by reference to the curious view that "private nuisance" contained no independent standard of conduct and merely borrowed from other torts.[228] The *Restatement (Second) of Torts* then treated unreasonableness as determined by a test, very closely associated with the test for breach of a duty of care in the tort of negligence,[229] involving "balancing the gravity of the harm against the utility of the conduct", or balancing the magnitude of the risk and gravity of the harm against the utility of the conduct.[230]

122 Even with an approach that aligned the tort of private nuisance with that of negligence (an approach not advocated by any party to these appeals), the *Restatement (Second) of Torts* nevertheless recognised that conduct will be "unreasonable" if the conduct that involves a significant interference with the ordinary enjoyment of land is conduct that is uncommon or abnormal:[231]

> "[W]hen it is found in a particular case that conduct that is unsuitable to the locality is causing significant harm through invasion of another's use or enjoyment of land that is suitable to the locality, the invasion is unreasonable although the conduct has social value and although the actor is taking all practicable measures to avoid the harm."

123 The nuisance provisions of the *Restatement (Second) of Torts* are in the process of revision in the drafts of the *Restatement (Fourth) Property*. The drafts of that *Restatement* offer a "revised account of the 'unreasonable interference'

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227 American Law Institute, *Restatement (Second) of Torts* (1979) at 100, §821D, 108, §822.

228 Goldberg, "On Being a Nuisance" (2024) 99 *New York University Law Review* 864 at 887-888.

229 See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

230 American Law Institute, *Restatement (Second) of Torts* (1979) at 114, §822, comment k.

231 American Law Institute, *Restatement (Second) of Torts* (1979) at 139, §831, comment b.

element that aims to provide courts with a clearer framework of analysis".[232] The relevant subsection, as approved in 2022, provides, amongst other separately sufficient criteria, that there will be a substantial and unreasonable (nontrespassory) interference with the use and enjoyment of land for the purposes of private nuisance if an activity or condition attributable to an actor:[233]

> "effectively renders the land, or a significant portion of it, unavailable or insecure for ordinary use or enjoyment by the possessor, and ... does not comport with customs or expectations in the locality concerning appropriate activities or conditions on land".

124 In discussing this liability for nuisance, the following draft commentary is given on the relevant subsection, in terms which provide a very close echo of Bramwell B's test of "common and ordinary":[234]

> "Subsection 1(b) identifies as unreasonable those interferences with use and enjoyment that result from activities or conditions that are inappropriate to the location in which they take place or violate settled expectations among persons in the locality.
>
> As has long been emphasized by the courts, an activity or condition can amount to an unreasonable interference if the activity or condition is out of place in the locality in which it occurs ... The character of the locality—whether it is urban or rural, industrial or residential—is relevant largely because it sets reasonable expectations for possessors of land in that locality. In other words, a court should assess the nature and extent of the burden imposed on a nuisance plaintiff in light of prevailing norms or expectations in the locality as to the sort of burdens one is expected to endure without legal recourse ... Courts sometimes express the locality rule by ruling that a 'normal' use of land will not give rise to liability for nuisance."

125 TfNSW also submitted that the dissenting approach should be applied in Australia because the concept of a "common or ordinary" use had a resonance with the concept of non-natural use in the doctrine developed from *Rylands v*

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232 American Law Institute, *Restatement of the Law (Fourth) Property, Tentative Draft No 3* (2022) at xxi.

233 American Law Institute, *Restatement of the Law (Fourth) Property, Tentative Draft No 5* (2024), vol 2, Div I, Ch 2, §§2.1, 2.2.

234 American Law Institute, *Restatement of the Law (Fourth) Property, Tentative Draft No 3* (2022) at 23-24, §2.2, comment f.

Fletcher,[235] which has been subsumed in Australia into the law of negligence.[236] But, although there is a "certain similarity" between private nuisance and the rule that derived from *Rylands v Fletcher*, "[t]here are indeed well marked differences between the two juristic concepts".[237] Thus, in *Gartner v Kidman*,[238] Windeyer J pointed out that in the law of nuisance the better place to start is not with the "difficult" concept of a non-natural use but with the formulation of Bramwell B in *Bamford v Turnley*, which exempted from constituting a nuisance those uses that were for "common and ordinary" purposes and which were "conveniently done".

The actions of TfNSW were a nuisance

A substantial interference with Hunt Leather and Ancio Investments' enjoyment of land

126 In these appeals there was no dispute that the acts of TfNSW, in planning and procuring the construction of the SLR, and therefore being responsible for it, involved a substantial interference with the enjoyment by Hunt Leather and Ancio Investments of their liberties in relation to the land upon which they conducted their businesses on George Street and Anzac Parade, which businesses were ordinary purposes of the use of land in the relevant localities.

The construction procured by TfNSW for the purpose of a light rail was not common and ordinary

127 Over the century and a half in which Bramwell B's test for nuisance has been applied, many of the cases in which the "common and ordinary" test was applied involved building and construction. No special rule existed for building and construction cases. Where the purpose for the use of land was properly characterised in general terms as "building and construction" it was often held that "temporary operations, such as demolition and re-building", were "part of the normal use of land" provided that those operations were done "in view of the developments of the day".[239] As Jordan CJ expressed the point: "in a residential locality the pulling down or erection of a building almost inevitably causes a

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235 (1868) LR 3 HL 330.

236 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 555-557.

237 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903.

238 (1962) 108 CLR 12 at 44.

239 *Andreae v Selfridge & Co Ltd* [1938] Ch 1 at 5-6.

considerable amount of temporary annoyance to neighbours, but this must be put up with so long as the work is done reasonably".[240]

128 Those cases of construction involved work done for a "lawful and ordinary purpose",[241] consistent with the reasonable expectations of a residential, or mixed residential and industrial, locality. The work would only amount to a "residential nuisance[]"[242] if the manner of construction was not convenient in the sense that the construction was not performed in a reasonable and proper manner having regard to any interference with the plaintiff's enjoyment of land for ordinary purposes.[243] Those cases contrast, for example, with the construction considered in *Fearn v Board of Trustees of the Tate Gallery*[244] for the uncommon purpose of creating a viewing gallery from which members of the public were invited to look out of the building, or the construction considered in *Hill v Managers of Metropolitan Asylum District*[245] for the uncommon purpose of "erection and maintenance of an asylum" for smallpox patients (found by the jury to be a nuisance "per se").

129 Hunt Leather's commercial premises on George Street in the Central Business District of Sydney was located in an area "densely populated by buildings, both new and old, retail shops, apartments, department stores, restaurants and food stores".[246] Ancio Investments' commercial premises on Anzac Parade in Kensington was on a main road in a mostly residential area and easily accessible to the public.[247] Kensington is a suburb of Sydney described in a report before the trial judge as having "a high prevalence of apartments, which are primarily located close to Anzac Parade ... These are home to many students, young singles and couples. Kensington also has grand Victorian and Federation style family homes." Anzac Parade was described as "a unifying feature of ...

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240 *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 487.

241 *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 at 413.

242 *Husey v Bailey* (1895) 11 TLR 221 at 222.

243 *Gort v Clark* (1868) 16 WR 569; *Goose v Bedford* (1873) 21 WR 449; *Webb v Barker* [1881] WN 158.

244 [2024] AC 1.

245 (1879) 4 QBD 433 at 434. Affirmed in *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193.

246 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 12 [29].

247 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 50 [281].

Kensington and home to many types of businesses and facilities". This case has been conducted throughout on the assumption that the same answer should be given to the questions of whether the purpose of the use of land by TfNSW was common and ordinary in George Street and in Anzac Parade.

130 At trial, the interferences with the enjoyment of Hunt Leather and Ancio Investments' rights to land were characterised by TfNSW as being for the purpose of "carrying out construction activity on a road".[248] If the purpose of the interfering use of land were properly characterised at that level of generality, then the purpose would be common and ordinary. Construction works on roads are a common and reasonably expected occurrence in high traffic areas that are either commercial or a mix of residential and commercial.

131 The trial judge rejected TfNSW's characterisation of its purpose effectively as being too general, describing the impugned use as being instead "for the purposes of constructing the light rail".[249] The Court of Appeal appeared to take a similar approach, referring to the purpose of the use of the roadway and footpaths as "construction, in part to do work, in part to store equipment and materials, but mostly because it was not possible to complete the works because of other steps which had first to be taken (such as treating thousands of utilities)".[250]

132 The best characterisation of the purpose of the use by TfNSW of George Street and Anzac Parade is for the construction of a light rail. That characterisation—more particular than the general purpose of "construction"—appropriately reflects the infringements about which Hunt Leather and Ancio Investments complain being consequences that are not associated with construction generally, including the restricted access to George Street and Anzac Parade for a lengthy period of time. That characterisation also reflects the complaints by Hunt Leather and Ancio Investments that the construction works were not conveniently done because they were not shown to be completed within a reasonable time for construction of a light rail and the defence raised, which was statutory authorisation for construction of a light rail.

133 The nature of TfNSW, as the statutory authority with responsibility for planning and procuring the SLR, says little about whether the purpose of the works to construct a light rail was common and ordinary having regard to the reasonable expectations of the locality. Whether the purpose of the construction works was

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248 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 109 [655].

249 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 109-110 [655]-[656].

250 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 518 [122].

common and ordinary does not depend upon whether the works were procured by a statutory authority or by a local landowner who decided to demolish buildings on their land and replace them with a light rail. In either case, the question is whether the purpose was common and ordinary, consistent with the reasonable expectations of the locality concerning the purposes for use of the land (where roads were situated). Indeed, the nature of TfNSW as an entity charged with developing critical State significant infrastructure, separate from the relevant roads authority which was normally responsible for the construction and repair of roads,[251] is a strong indicator that the construction works procured by TfNSW for a light rail were not common and ordinary.

134 The trial judge and the Court of Appeal concluded that the use of George Street, Anzac Parade, and the other roads comprising the SLR route for the purposes of constructing a light rail was not a common and ordinary use of land dedicated as a road.[252] That conclusion is correct. Construction works on a road for the purposes of repair or upgrading the road are works for purposes that are common and ordinary. Construction works on a road for the purposes of expansion or diversion of the road, or to insert speed bumps or roundabouts, are works for purposes that are common and ordinary. But construction works for the purpose of installing a light rail in place of a road are not consistent with the reasonable expectations of the locality about the purposes for which the land, comprising the road, would be used. The purpose of installing a light rail is not a common and ordinary purpose.

Whether the light rail construction works procured by TfNSW were conveniently done

135 For the reasons above, and subject to defences, a nuisance was committed by TfNSW in procuring the construction works, which: (i) involved a substantial interference with the enjoyment of land by Hunt Leather and Ancio Investments for ordinary purposes in the relevant localities; and (ii) were for the purpose of installing the SLR, which was not common and ordinary. It is strictly unnecessary, therefore, to consider Issue 3 and whether TfNSW satisfied its onus of establishing that the construction works, or any part of them, were conveniently done. As will be seen, however, the same issue, with the same onus, arises in relation to the defence of statutory authority raised by TfNSW.

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251 See *Roads Act 1993* (NSW), s 7, Pts 2-4, 7-10; *Transport Administration Amendment (RMS Dissolution) Act 2019* (NSW), Sch 1 [35].

252 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 110 [656]; *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 518 [122], [125].

136 It suffices to say that this issue was raised as separate claims for private nuisance, Case C, by Hunt Leather and Ancio Investments, who asserted that even if the works procured by TfNSW were common and ordinary, the conduct of TfNSW caused a nuisance for part of the period. The nuisance for the part of the period identified by Mr Griffith as exceeding the reasonable timeframes for occupation of the fee zones adjacent to the land of Hunt Leather and Ancio Investments, as set out in the amended IDP, was said to arise due to the failures by TfNSW to: (i) identify unknown utilities and enter into agreements with utility providers prior to entry into the Project Deed; and (ii) ensure that the terms of the Project Deed would disincentivise delay by the contractor.

137 As explained above,[253] even if the construction of a light rail was a common and ordinary purpose, once Hunt Leather and Ancio Investments had identified by reference to some evidence an asserted unreasonable delay caused by TfNSW, the onus was on TfNSW to establish that it had used the relevant roads in a manner that reasonably minimised the extent of the substantial interference with the ordinary enjoyment of land by Hunt Leather and Ancio Investments. That onus could not have been discharged by leading no evidence on the issue and instead relying upon alleged deficiencies in the evidence of Mr Griffith.

Two "defences" to nuisance

138 Liability for nuisance is not absolute. In particular, TfNSW relied at trial, on appeal to the Court of Appeal, and in this Court upon two "defences" to liability. The first is not strictly a defence but a heightened obligation for a plaintiff that is imposed by s 43A of the *Civil Liability Act*. The second is a defence of statutory authority.

Civil Liability Act, s 43A

139 Part 5 of the *Civil Liability Act* is entitled "Liability of public and other authorities". A "public or other authority" is relevantly defined in s 41 as "any public or local authority constituted by or under an Act".[254] That includes TfNSW, which, as earlier explained, is constituted under the TA Act.

140 Sections 43 and 43A of the *Civil Liability Act* are complementary provisions which, respectively, involve liability based on breach of statutory duty

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253 At [111].

254 *Civil Liability Act 2002* (NSW), s 41 (definition of "public or other authority", para (e)).

and liability based on exercise or failure to exercise a special statutory power. Section 43A relevantly provides:

> "(1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.
>
> (2) A ***special statutory power*** is a power:
>
> (a) that is conferred by or under a statute, and
>
> (b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.
>
> (3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power."

141 Section 43A is only loosely described as a "defence" in the sense that a defendant must plead the facts that engage the operation of s 43A.[255] Once s 43A is engaged, it operates to transform the plaintiff's cause of action into one that requires proof of the heightened standard of unreasonableness described in s 43A(3) before the plaintiff can establish liability based upon the exercise of (or failure to exercise) the special statutory power.

142 There may be doubt about whether s 43A applies to claims for private nuisance. On the one hand, the text of s 43A is not confined to actions in the law of torts for negligence. Unlike s 5A, which provides that Pt 1A of the *Civil Liability Act* "applies to any claim for damages for harm resulting from negligence", s 40(1) provides that Pt 5 "applies to civil liability in tort" and s 40(2) provides that Pt 5 "extends to any such liability even if the damages are sought in an action for breach of contract or any other action". On the other hand, the extrinsic materials suggest that s 43A was enacted in response to a claim for negligence in relation to the provision of health services,[256] and the focus of s 43A is on an exercise of, or

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255 *Curtis v Harden Shire Council* (2014) 88 NSWLR 10 at 64 [244].

256 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 December 2003 at 5835-5836; *Doyle's Farm Produce Pty Ltd v Murray-Darling*

failure to exercise, a particular statutory power rather than the relative uses of land which are the focus of the law of private nuisance.

143 In any event, it was properly common ground in these appeals that an assessment of whether liability is based on a breach of statutory duty (s 43) or based on the "exercise of, or failure to exercise, a special statutory power" (s 43A) requires characterisation of the plaintiff's claim.[257] In particular, the alleged conduct of the defendant must be characterised to determine, as a matter of substance, whether or not the plaintiff's claim is "based on" conduct which involves the exercise of a power that is of a kind that persons generally are not authorised to exercise without specific statutory authority.[258]

Civil Liability Act, s 43A does not apply

144 There may be doubt about whether s 43A applies to a claim for private nuisance. But that issue need not be resolved on these appeals because even if s 43A were applied to a claim for private nuisance, it would not be engaged by the conduct of TfNSW.

145 TfNSW submitted that the proper characterisation of the claims for nuisance against it involved two elements: (i) the relevant interference with the interest of Hunt Leather and Ancio Investments in their land; and (ii) TfNSW's responsibility for that interference because it developed, planned, procured, and organised the works that caused the interference. The second element was said to involve the entry by TfNSW into the Project Deed by exercise of the power in s 104O ("Development and operation of light rail systems") of the TA Act and the general powers conferred to give effect to the functions of TfNSW in s 3E(1).[259]

146 Every public authority that is not a natural person can only be directly liable for the torts of others by attribution of the conduct of those others to the public

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Basin Authority [No 2] (2021) 106 NSWLR 41 at 45 [9], 64 [80]. See *Presland v Hunter Area Health Service* [2003] NSWSC 754.

257 *Bankstown City Council v Zraika* (2016) 94 NSWLR 159 at 177 [90]-[91]. See also *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 582-583 [14]-[16].

258 See Aronson, "Government Liability in Negligence" (2008) 32 *Melbourne University Law Review* 44 at 78-79.

259 Read with *Transport Administration Act 1988* (NSW), Sch 1, cll 3, 9(1).

authority.[260] The submission of TfNSW treats the acts of TfNSW, which procured the construction works and were therefore the basis for an attribution of responsibility for nuisance to TfNSW, as the acts upon which "the liability is based" for the purposes of s 43A of the *Civil Liability Act*. The Court of Appeal correctly rejected such an argument. The Court of Appeal reasoned that any relevant acts upon which liability in private nuisance was based were the acts of doing the construction works themselves, rather than the acts of TfNSW, under a statutory power, of procuring those works. The liability in private nuisance was based on the physical acts not on the reason (ie, procurement) that those acts were attributed to TfNSW.[261] Section 43A does not apply a heightened unreasonableness standard to the reason for attributing to a party the acts upon which tortious liability is based.

147 The submission of TfNSW, if accepted, would require s 43A to operate in a very different manner from the cognate provision in s 43 of the *Civil Liability Act*. The heightened unreasonableness standard for a claim based on breach of statutory duty under s 43 necessarily focuses upon the acts or omissions themselves. By contrast, the submission of TfNSW treats the heightened unreasonableness standard in s 43A as concerned with both the acts or omissions that cause the nuisance *and* the process by which the statutory authority authorises its employees or contractors to act. The latter is not a natural understanding of the basis of liability. In any event, and reinforcing the same point, the power in ss 104O and 3E of the TA Act (read with cl 9(1) of Sch 1 in particular) to enter into a contract is a power of a kind that persons generally are authorised to exercise without specific statutory authority.[262]

Defence of statutory authority

148 There is in England a long-standing defence of statutory authority where, despite the absence of any express statutory authority to create a nuisance, an implied authority was found to exist if the creation of a nuisance was shown by the

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260 See *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1358 [31]; 419 ALR 552 at 560.

261 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 528 [177]-[179].

262 *Civil Liability Act 2002* (NSW), s 43A(2)(b).

defendant to be the "inevitable consequence" of the exercise of a statutory power.[263]

149 This form of the defence of statutory authority based on "inevitable consequences" is sometimes also expressed as justifying or excusing all consequences that are shown by the defendant to be "necessarily arising" from the defendant's actions.[264] In this context, "inevitable consequences" or the consequences "necessarily arising" are not concerned with "what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense".[265]

150 The same form of the defence of statutory authority has long been recognised in Australia. In New South Wales, from 1915, s 3 of the *City and Suburban Electric Railways Act 1915* (NSW) created a power to perform certain railway works, listed in a schedule to that Act. But the legislation did not exclude liability for nuisance beyond the terms upon which the activity had been authorised.[266] Indeed, many years later, in the decision in *Fisher v Codelfa Construction (Australia) Pty Ltd*,[267] upon which TfNSW relied, a private nuisance was held to arise because the conduct of the defendant was not within the conditions of statutory authority under that Act. The defence of statutory authority was explained by Griffith CJ in *Fullarton v North Melbourne Electric Tramway and Lighting Co Ltd*:[268]

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263 *Manchester Corporation v Farnworth* [1930] AC 171 at 183; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1017-1018; *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2025] AC 761 at 799 [94]. See Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (1907) at 207. See also Wood, *A Practical Treatise on the Law of Nuisances in their Various Forms* (1875) at 782-783; Garrett, *The Law of Nuisances* (1890) at 198-202.

264 *Howard v Bega Municipal Council* (1916) 16 SR (NSW) 138 at 141. See also *Benning v Wong* (1969) 122 CLR 249 at 256.

265 *Manchester Corporation v Farnworth* [1930] AC 171 at 183; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1018.

266 *City and Suburban Electric Railways Act 1915* (NSW), s 3, read with *Public Works Act 1912* (NSW), s 82(3).

267 Unreported, Supreme Court of New South Wales, 28 June 1972.

268 (1916) 21 CLR 181 at 188.

> "In the case of undertakings such as railways, tramways, telegraphs or telephones, it is obvious that the authorized works cannot be carried out without doing many things that are nuisances at common law, such as the erection of posts and laying of rails on highways and stretching wires above them. Such nuisances must be taken to be authorized."

151 In *Benning v Wong*,[269] Windeyer J (expressing a view that his Honour said accorded with that of Barwick CJ[270]) described it as "well settled" that there is a defence of statutory authority where a defendant discharges an onus of showing that the consequence complained of was inevitable.[271] Windeyer J gave the example of "emission of sparks from coal-burning steam locomotives" as "an unavoidable incident of their normal use".[272] Although Barwick CJ and Windeyer J were in dissent in that case, the only member of the Court in the majority to address the defence of statutory authority based on inevitability was Owen J, who said that he did "not think it has ever been doubted, at least since *Metropolitan Asylum District v Hill*,[273] that where a body purporting to act under statutory authority is sued for committing what is prima facie a nuisance, it is for it to show that its statutory authority could not be carried out without creating that nuisance".[274] Owen J later added that in order to prove inevitability it was necessary for the defendant to establish that they "had taken all reasonable precautions to avoid creating a nuisance".[275]

152 In *Benning v Wong*,[276] Windeyer J recognised another manner in which a defence of statutory authority could arise. Even if the nuisance is not shown to have been inevitable, his Honour held that a defendant will have a defence of statutory authority "in a case where the work or activity authorized by statute can, by the exercise of due care and skill by the undertaker be performed without

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269 (1969) 122 CLR 249 at 309, quoting *Manchester Corporation v Farnworth* [1930] AC 171 at 183.

270 *Benning v Wong* (1969) 122 CLR 249 at 308.

271 Subject to reply by the plaintiff as to the extent of "inevitability": *Benning v Wong* (1969) 122 CLR 249 at 308, 312.

272 *Benning v Wong* (1969) 122 CLR 249 at 312.

273 (1881) 6 App Cas 193.

274 *Benning v Wong* (1969) 122 CLR 249 at 325.

275 *Benning v Wong* (1969) 122 CLR 249 at 334.

276 (1969) 122 CLR 249 at 310.

creating a nuisance or doing other harm" but the statutory undertaker can show that they have "done the work properly, in a reasonable way and not negligently—the word 'negligence' being used here in a special sense". The "special sense" of a lack of "negligence" in this context requires the undertaker "to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons".[277]

153 For this manner of establishing the defence of statutory authority, the onus of proof is upon the defendant (undertaker) who "relies upon a statute to exonerate" themselves to establish that the work has been conducted with such reasonable regard and care for the interests of others or, as the usual implied conditions for the exercise of a statutory power have been put in this Court, to show that they have not "acted negligently, so as to do unnecessary damage".[278] These usual implied conditions are: (i) that the statutory power be exercised with reasonable care;[279] and (ii) that the statutory power be exercised reasonably with a view to minimising or eliminating the defendant's interference with the enjoyment of land by others for ordinary purposes.[280] In either case, the defendant is not required to negate every imaginable allegation of failure to comply with these implied requirements. The plaintiff must bear an evidentiary onus to identify the basis upon which it is said that the defendant did not exercise power consistently with the requirements of the statute.

154 Whether or not the defence of statutory authority is best conceived of as being separated into the two forms described by Windeyer J, in all cases the

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277 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011, referring to *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 at 455-456. See also *Metropolitan Water, Sewerage and Drainage Board v O K Elliott Ltd* (1934) 52 CLR 134 at 143-144.

278 *Metropolitan Gas Co v Melbourne Corporation* (1924) 35 CLR 186 at 197; *Benning v Wong* (1969) 122 CLR 249 at 310, 326; *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 at 666 [16]. See also *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319 at 332 [44], 334-335 [52]-[54].

279 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 458.

280 See *Kannuluik v Mayor etc of Hawthorn* (1903) 29 VLR 308 at 318-319, approved by the Privy Council in *Hawthorn Corporation v Kannuluik* [1906] AC 105; *Metropolitan Water, Sewerage and Drainage Board v O K Elliott Ltd* (1934) 52 CLR 134 at 143-144; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011. See also Dodd and Chitty, *Bullen and Leake's Precedents of Pleadings in Actions in the King's Bench Division of the High Court of Justice*, 6th ed (1905) at 454.

defence of statutory authority is ultimately based upon the defendant establishing that their actions were "done in the due exercise of ... statutory powers".[281] In other words, in every case the question is "[h]as the [statutory] power been exceeded?"[282] Of course, it is possible for Parliament, by clear terms, to provide a complete defence to a claim for nuisance in respect of a particular activity or conduct, irrespective of whether the nuisance was inevitable or occurred as a result of a failure to comply with an implied condition. A modern example is s 19A(1) of the *Luna Park Site Act 1990* (NSW), the background to which was considered in *Hearne v Street*.[283] But absent a clear legislative extinguishment of a claim for nuisance, the usual implication in legislation will be that powers conferred by Parliament do not otherwise authorise the commission of a tort.[284]

The statutory scheme

155 TfNSW was established as a corporation under s 3C of the TA Act with objectives, under s 3D, including "to plan for a transport system that meets the needs and expectations of the public" and "to promote the safe and reliable delivery of public transport and freight services". The functions given to TfNSW under the TA Act include developing transport infrastructure on behalf of the State, which includes "carrying out development for the purposes of or incidental to transport infrastructure", "facilitating, managing, financing or maintaining any such development", and "carrying out any function ancillary to any such development". An ancillary function is to "enter into contracts or arrangements with any person in connection with the exercise of TfNSW's functions".[285]

156 Section 104O(1) of the TA Act provides that "TfNSW may develop light rail systems, or facilitate their development by other persons." A "light rail system" is relevantly defined as "a system for the provision of light rail services along a route declared"[286] and provision is made for regulations to "declare a route along

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281 *Benning v Wong* (1969) 122 CLR 249 at 311, citing *Vaughan v The Taff Vale Railway Co* (1860) 5 H & N 679 [157 ER 1351] and *Canadian Pacific Railway Co v Roy* [1902] AC 220.

282 *East Fremantle Corporation v Annois* [1902] AC 213 at 218.

283 (2008) 235 CLR 125 at 148-149 [70]-[75].

284 *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2025] AC 761 at 774-775 [18]-[20].

285 See *Transport Administration Act 1988* (NSW), s 3E(1), read with Sch 1, cll 3, 9.

286 *Transport Administration Act 1988* (NSW), s 104N(1).

a road or through other land to be the route of a light rail system".[287] "Development" for the purposes of a light rail system includes "anything that is incidental to the carrying out of any such development"[288] and does not require development consent under Pt 4 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act").[289]

157 On 11 September 2015, the *Transport Administration (General) Amendment (Light Rail) Regulation 2015* (NSW) ("the TA Regulation"), consistently with s 104N(2) of the TA Act, declared the route for the SLR. The route declared by the TA Regulation included George Street and Anzac Parade.[290]

158 The SLR also required ministerial approval as "critical State significant infrastructure"[291] within the meaning of the EPA Act.[292] Following an application by TfNSW, which identified effects such as increased noise and vibration and loss of access to private property, and a report by the Secretary of the New South Wales Department of Planning and Environment, approval was granted by the Minister, subject to conditions.[293]

159 Other approvals were required by TfNSW. For instance, at the relevant time, s 144C of the *Roads Act 1993* (NSW) required consent for the SLR from the (then) New South Wales government agency of Roads and Maritime Services. That consent was obtained subject to conditions, which were considered by the trial judge as part of the (unsuccessful) public nuisance claims, including "carrying out the activities with skill and care consistent with best industry practice,

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287 *Transport Administration Act 1988* (NSW), s 104N(2).

288 *Transport Administration Act 1988* (NSW), s 104P(4).

289 *Transport Administration Act 1988* (NSW), s 104P(2).

290 *Transport Administration (General) Amendment (Light Rail) Regulation 2015* (NSW), Sch 1, inserting cl 82A(1) note 1 into the *Transport Administration (General) Regulation 2013* (NSW).

291 See *Environmental Planning and Assessment Amendment (Light Rail Project) Order 2013* (NSW), inserting cl 2(2) into Sch 5 to the *State Environmental Planning Policy (State and Regional Development) 2011* (NSW).

292 See *Environmental Planning and Assessment Act 1979* (NSW), ss 115U, 115V, 115W, 115ZB.

293 See *Environmental Planning and Assessment Act 1979* (NSW), s115ZB.

completing the construction as soon as reasonably practicable and minimising obstruction and any inconvenience to the public".[294]

TfNSW has a partial defence of statutory authority

160 Neither at trial, nor on appeal to the Court of Appeal, did TfNSW assert that the EPA Act or the *Roads Act* impliedly conferred upon it any defence to the tort of private nuisance. Nor was it suggested that either statute contributed to any change in the character of the locality of George Street, in the Central Business District, or of Anzac Parade in Kensington. On appeal to this Court, that legislation was relied upon only as a vague factor of indeterminate weight which might, in all of the circumstances, demonstrate that the planning and procuring of the SLR involved social utility relevant to a reasonable balancing of the relative interests of the parties. For the reasons already explained, the test for a private nuisance does not permit legislation to be used in that way, separately from its relevance as a defence of statutory authority, as a factor in a broad instinctive synthesis of reasonableness.[295]

161 The defence of statutory authority in this case therefore depends upon the interpretation of ss 3E (read with Sch 1) and 104O(1) of the TA Act, and the TA Regulation, which empowered TfNSW to engage in preliminary work, enter into the Project Deed, and procure the construction of the SLR over the declared route in the manner which caused a substantial interference with Hunt Leather's and Ancio Investments' enjoyment of land for ordinary purposes in the relevant localities.

162 TfNSW argued that it was under a duty to perform its functions (including the function in cl 3 of Sch 1 to the TA Act to develop transport infrastructure), and to exercise the power in s 104O(1), by planning and procuring the SLR and that, as a result, the required test to make out the defence of statutory authority effectively became a question of breach of statutory duty by the negligence of TfNSW. The effect of this submission would seem to be that the duty to perform a statutory power necessarily provides a complete defence to a claim for private nuisance, leaving a plaintiff to assert a separate claim for breach of statutory duty, such as by negligence in the exercise of the power. It is unnecessary to consider this submission because its premise is not correct. In the TA Act, both s 104O(1), and the function in cl 3 of Sch 1, use the permissive "may". They are part of a

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294 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 154 [972]-[973], 155 [979]-[981].

295 See above at [119]-[120].

broad range of widely expressed statutory powers. Neither power is accompanied by a duty upon TfNSW to plan or procure a light rail.

163 Nevertheless, the powers to plan and procure a light rail in the TA Act, coupled with the declaration of the route of the light rail in the TA Regulation, impliedly authorised any private nuisance that would be committed merely by a substantial interference arising from the departure from the reasonable expectations of the locality in establishing a light rail on that route (being a use of land for an uncommon or abnormal purpose). In other words, the authority for the SLR, and the approval of the route, under the TA Act and the TA Regulation, necessarily provided a defence to any claim for private nuisance based on the works not being common and ordinary. A similar point was made in *Benning v Wong*,[296] when Windeyer J gave the example of the defence of statutory authority applying to a company that was authorised by statute to carry on a railway undertaking "and it does so in the place and by the means authorized". The company "is not liable for harm done, not caused by negligence but in the ordinary and normal use of the railway ... in the due exercise of its statutory powers".

164 The issue arising from the defence of statutory authority thus reduces to whether TfNSW proved that it had exercised its statutory powers with reasonable care and reasonably with a view to minimising or eliminating the interference with the enjoyment of land by others, for ordinary purposes. Once Hunt Leather and Ancio Investments had identified the period and manner of asserted unreasonableness of the conduct of TfNSW, TfNSW bore the onus of proof to establish that its conduct was reasonable in these respects. For the same reasons that it failed to establish that its conduct was "conveniently done" for this period, TfNSW failed to establish a defence of statutory authority for the period of unreasonable delay asserted by Mr Griffith and found by the trial judge to be a private nuisance.

165 The defence of statutory authority relied upon by TfNSW succeeds only in part; TfNSW failed to establish statutory authority for the period of nuisance found by the trial judge.

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296 (1969) 122 CLR 249 at 311.

Do damages include reasonable litigation funding costs?

166 A further question[297] that arose before the trial judge, and which was the subject of a separate judgment,[298] was whether group members to whom TfNSW was liable for private nuisance, and who had entered into a litigation funding agreement in connection with the proceedings, were entitled to claim as damages their reasonable litigation funding costs without needing to show: (i) that the nuisance of TfNSW rendered them impecunious so as to require litigation funding; (ii) that they would have pursued their claims against TfNSW without litigation funding if they had the means to do so; or (iii) that they negotiated over the terms of the litigation funding agreement. It seems that this issue had never been decided prior to this case, although related claims have been held to be reasonably arguable.[299] Both the trial judge[300] and the Court of Appeal[301] held, more generally, that litigation funding costs were not recoverable as damages. That conclusion was correct.

167 The context in which this question arose was the litigation funding agreement entered into by various group members, by which the funder, International Litigation Partners No 16 Pte Ltd, undertook to pay all reasonable legal costs and disbursements associated with the litigation, to meet any adverse costs orders and provide security for costs, and to provide litigation management services. There was evidence that without the litigation funding agreement Hunt Leather and Ancio Investments would not have the financial resources to pay the legal costs of the proceedings or to take on the risk of adverse costs orders. In exchange for the funder's undertakings, the group members agreed to reimburse the funder for its costs and to pay a funding commission that ranged between 25% and 40% of any settlement or judgment sum. In the case of Hunt Leather and Ancio Investments, the commission was 40%. The amount of the litigation funding

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297 See common question 10: *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 174 [1121(10)].

298 *Hunt Leather Pty Ltd v Transport for NSW [No 4]* [2024] NSWSC 140.

299 *Landoro (Qld) Pty Ltd (Administrator Appointed) v Jensen International Pty Ltd* [1999] QCA 318 at [11]-[12] (Davies JA).

300 *Hunt Leather Pty Ltd v Transport for NSW [No 4]* [2024] NSWSC 140 at [121]-[123].

301 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 534 [209].

costs claimed by Hunt Leather and Ancio Investments as damages was that 40% commission.[302]

168 Hunt Leather and Ancio Investments submitted that they suffered loss by incurring the funding commission as a cost of vindicating their claims for private nuisance for the benefit of eliminating: their exposure to costs; their liability for adverse costs orders; and their liability to give security for costs. Hunt Leather and Ancio Investments also argued that the 40% commission was a loss that Hunt Leather and Ancio Investments would not have incurred but for the private nuisance of TfNSW. They argued that, despite the doubts expressed by the Court of Appeal,[303] that loss was reasonably foreseeable.

169 Even if all the submissions above by Hunt Leather and Ancio Investments were accepted, the funding commission still would not be recoverable as damages because any such loss was not "the kind of damage ... which [TfNSW was] under a duty to prevent".[304] The tort of private nuisance, as a tort against land, permits recovery of damages which reflect the decreased value of land and any losses that are "consequential upon the injury to the land".[305] The 40% commission is neither an injury to land nor a loss that is consequential upon the injury to land. As the Court of Appeal rightly said, the funding commission is not "a consequence of any actionable nuisance".[306]

170 Many of the reasons given by the Court of Appeal for rejecting this part of the cross-appeal by Hunt Leather and Ancio Investments reinforce the basic point that the funding commission was not a consequence of an injury to land:[307] that different damages would be payable for the same private nuisance to different plaintiffs depending upon the voluntary arrangements that each entered into with a litigation funder; that an analogy can be drawn with the exclusion from damages

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302 *Hunt Leather Pty Ltd v Transport for NSW [No 4]* [2024] NSWSC 140 at [56], [111].

303 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 534 [207].

304 *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 429 [33], citing *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191. See also at 431 [35].

305 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 706. See also *Brown v Tasmania* (2017) 261 CLR 328 at 452 [385].

306 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 534 [209].

307 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 531-534 [194]-[207].

of irrecoverable legal costs incurred in the same litigation[308] (and a similar analogy can also be drawn with the exclusion from damages of additional expenses to manage a damages award where the intellectual abilities of the plaintiff were not impaired by the tort[309]); and that the entitlement of the litigation funder to its commission only crystallises upon settlement or entry of judgment.

171 This ground of the appeals should be dismissed.

Conclusion and orders

172 Hunt Leather and Ancio Investments have succeeded in part in their appeals, in effect restoring the result reached by the trial judge. The trial judge made orders for costs which apportioned the costs between Hunt Leather and Ancio Investments and TfNSW, based upon matters including the unsuccessful claims brought for public nuisance and the similarly unsuccessful arguments by Hunt Leather and Ancio Investments that the damages award should include reasonable litigation funding costs.[310] There is no basis to disturb those costs orders.

173 In each appeal, orders should be made as follows:

(1) Appeal allowed in part.

(2) The orders of the Court of Appeal of the Supreme Court of New South Wales made on 18 September 2024 be set aside and, in their place, it be ordered that the appeal and cross-appeal be dismissed with costs.

(3) The respondent pay the appellants' costs of the appeal.

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308 *Anderson v Bowles* (1951) 84 CLR 310 at 323; *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1 at 9 [15].

309 *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 52; *Gray v Richards* (2014) 253 CLR 660 at 665-666 [2]-[4].

310 *Hunt Leather Pty Ltd v Transport for NSW [No 5]* [2024] NSWSC 776 at [20]-[33].

JAGOT J.

Overview

174 Transport for NSW ("TfNSW") is a statutory corporation defined as a government agency constituted under the *Transport Administration Act 1988* (NSW).[311] In accordance with its statutory authority to do so, TfNSW planned and procured the construction of the CBD and South East light rail system in Sydney along public roads declared to be the route of that system ("the Sydney Light Rail").[312] TfNSW intended, believed it had agreed, and publicly announced a construction program which, if implemented, it considered would minimise the disruption caused by the construction of the Sydney Light Rail, particularly to the occupiers of the properties adjoining the public roads forming the declared route, including by staging the construction and limiting the time of occupation by the design and construction contractor ("D&C Contractor") carrying out the construction works of areas along the route known as fee zones.

175 However, the D&C Contractor carrying out the construction works occupied the fee zones for periods that, on any view, far exceeded the periods TfNSW had intended, believed it had agreed, and publicly announced. As a result, the occupiers of properties adjoining these fee zones suffered the consequences of major construction activities immediately adjacent to their properties (noise, dust, vibration, hoardings, and restrictions of pedestrian and vehicular access) for far longer than TfNSW had intended, believed it had agreed, and publicly announced.

176 Beyond this, and subject to two points, it is convenient to observe that the reasons for judgment of Gordon and Edelman JJ identify the relevant circumstances in which the primary judge in the Supreme Court of New South Wales held TfNSW liable for the tort of private nuisance for the periods of time which the primary judge found TfNSW's D&C Contractor occupied the fee zones beyond that which the primary judge accepted to be reasonable,[313] and the relevant circumstances in which the Court of Appeal of the Supreme Court of New South Wales allowed TfNSW's appeal from the orders of the primary judge awarding damages to the representative plaintiffs.[314]

177 The two points further to the circumstances disclosed in the reasoning of Gordon and Edelman JJ must be understood in the context of principle. To amount

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311 *Transport Administration Act 1988* (NSW), s 3C(1) and (2).

312 *Transport Administration Act*, ss 104N and 104O and *Transport Administration (General) Amendment (Light Rail) Regulation 2015* (NSW), Sch 1.

313 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1.

314 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489.

to a private nuisance an interference with the use and amenity of other land must be "unlawful",[315] unlawfulness depending on the interference being objectively both substantial and unreasonable.[316] Both aspects, objective substantiality and unreasonableness, are questions of fact about the character of *the interference* with the use and amenity of the plaintiff's land in all the circumstances, which include the nature of and reasons for the uses of the land of both the plaintiff and defendant.

178 A conclusion about the objective unreasonableness of an interference with the use and amenity of land cannot be reached in isolation from the context. But proving objective unreasonableness of an interference does not involve an onus on a plaintiff to prove that a defendant did not exercise all reasonable care and skill in doing the act causing the interference. In the discharge of a plaintiff's onus of proof no more is required than proof that, in all the circumstances, the interference, assessed objectively, is of a nature, extent and degree that is more than a plaintiff should be reasonably expected to bear or, from another perspective, that a defendant has acted "without reasonable consideration for the neighbours".[317] If the nature, extent and degree of an interference is of a kind which ordinary human experience confirms is able to be sufficiently ameliorated or avoided in urban environments in Australia so as to make daily urban life bearable but the interference has not in fact been so ameliorated or avoided, the onus on a plaintiff to prove an objectively substantial and unreasonable interference sufficient to constitute actionable nuisance is satisfied.[318]

179 The concept of "reasonableness" was over-complicated in this case by the competing arguments of the parties. On the representative plaintiffs' primary case, because the end, object or purpose of the construction was the Sydney Light Rail, which was not a common and ordinary use in the locality,[319] they did not have to prove that the interferences were unreasonable in any sense. According to the representative plaintiffs, they had to prove only that the interferences were

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315 eg, *Hargrave v Goldman* (1963) 110 CLR 40 at 59.

316 eg, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 507; *Hargrave v Goldman* (1963) 110 CLR 40 at 59, quoting *Winfield on Tort*, 6th ed (1954) at 536; *Halsbury's Laws of Australia* (online) at [415-635], [415-655], [415-675]; *Luntz & Hambly's Torts: Cases, Legislation and Commentary*, 9th ed (2021) at 849 [15.1.1]; *Fleming's The Law of Torts*, 11th ed (2024) at 569-571 [19.80]; *Balkin & Davis Law of Torts*, 6th ed (2021) at 587-588 [14.19]-[14.20].

317 *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1 at 13.

318 See, eg, *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 at 413; *Andreae v Selfridge & Co Ltd* [1938] Ch 1 at 9.

319 See *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1.

substantial and then the onus moved to TfNSW to prove that the interferences were reasonable and not the result of a lack of reasonable care and skill on TfNSW's part or, insofar as TfNSW had statutory authority to do the acts it did, were inevitable and unavoidable by the exercise of all reasonable care and skill.

180 According to TfNSW, the representative plaintiffs had to prove that the interferences were substantial and unreasonable, the latter requirement extending to an onus on the representative plaintiffs to prove that TfNSW, in planning and procuring the construction of the Sydney Light Rail, did not exercise all reasonable care and skill. According to this argument, moreover, as the representative plaintiffs had confined the period of their claim to the so-called "prolonged" occupation of the fee zones for the construction works, to prove such unreasonableness they bore at least an evidentiary onus to "lead some evidence from which a court could identify ... [the] point in time ... when an actionable nuisance arose", which the representative plaintiffs had not done.

181 Against this background, the first point to be made is one of emphasis. As Gordon and Edelman JJ record, the primary judge made findings of fact about the nature, extent and degree of the interferences with the use and amenity of the representative plaintiffs' premises.[320] It is important to the proper resolution of the appeals to appreciate that these interferences, on the primary judge's findings, occurred throughout the entirety of the construction in the fee zones in which the premises of the representative plaintiffs were located.[321] It is not that the effects of the construction works on the premises were insubstantial and reasonable on one day and then became substantial and unreasonable on another or vice versa. Rather, the representative plaintiffs proved facts sufficient to establish that TfNSW's planning and procuring of the construction of the Sydney Light Rail caused objectively substantial and unreasonable interferences with the use and amenity of the representative plaintiffs' premises for the entirety of the period in which construction occurred in the fee zones in which their premises were located.

182 The second, related, point is that this is not the whole of the story of the litigation. At all times, TfNSW claimed that it was immune from liability by reason of its statutory authority to plan and procure the construction of the Sydney Light Rail. It is neither necessary nor possible to speculate as to the reasons but, no doubt, TfNSW's claim of statutory immunity was relevant to the representative plaintiffs' conduct of the case both before the primary judge and on appeal. It is sufficient to say that, despite the best efforts of the representative plaintiffs to the contrary, the primary judge and the Court of Appeal did not err in treating the case as one in which, if the representative plaintiffs' arguments based on a principle of common

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320 See [74]-[75].

321 eg, *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 138 [841], [843], 139 [855], 146 [909].

and ordinary use were rejected, their claims for TfNSW's liability were confined to the periods of time for which the primary judge found TfNSW's D&C Contractor occupied the fee zones beyond that which the primary judge accepted to be reasonable (based on the Initial Delivery Program ("IDP")[322] as amended in accordance with the evidence of Mr Griffith – the so-called "amended IDP").[323]

183 What is important about this second point, however, is that the extent to which the representative plaintiffs conceded that TfNSW's liability was so confined was only that, if the Sydney Light Rail was a common and ordinary use of land in the locality (that is, if their argument about the Sydney Light Rail being an uncommon and out of the ordinary use and its alleged consequences was rejected), then, to the extent that the fee zones were occupied by the D&C Contractor for construction in accordance with the amended IDP, it might be inferred that the interferences for those periods were not objectively unreasonable. In that event, nevertheless, it remained the representative plaintiffs' case that it was TfNSW's onus to prove that the interferences were not avoidable by TfNSW having exercised all reasonable care and skill or, if the defence of statutory authority applied, that the interferences outside of those periods were an inevitable consequence of TfNSW's exercises of statutory power and which were not avoidable by TfNSW exercising all reasonable care and skill.

184 That this formulation of the representative plaintiffs' case may appear to impose a greater onus on TfNSW in the case of the defence of statutory authority calls for explanation. It undoubtedly reflects a degree of overlap (even redundancy) in the concepts of an interference being unavoidable by the exercise of all reasonable care and skill and an interference being inevitable, proof of each of which is generally necessary for a defence of statutory authority and consequent immunity from liability to be established. There is more to it than that, however. It also reflects that, *without statutory authority*, an objectively substantial and unreasonable interference is not rendered non-actionable in every case merely because a defendant proves it has exercised all reasonable care and skill to avoid or ameliorate the interference. A defendant may exercise all reasonable care and skill yet still be liable in nuisance at common law because, ultimately, proof of that exercise may not make the interference with the use and amenity of other land objectively reasonable in all the circumstances.[324] This is so even for the activity

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322 The IDP attached to the Project Deed. See *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 495-496 [14]-[18].

323 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 497-498 [24]-[28].

324 eg, *Ball v Ray* (1873) LR 8 Ch App 467 at 470, 471; *Broder v Saillard* (1876) 2 Ch D 692 at 701-702.

of construction, which is generally characterised as objectively reasonable provided it is carried out with all reasonable care and skill.

185 In contrast, *with statutory authority*, if the person causing the interference establishes that they exercised or are exercising all reasonable care and skill to avoid the interference and that the interference was or is an inevitable result of the exercise of the statutory power, that the interference remains objectively substantial and unreasonable is immaterial. The defence of statutory authority prevails over the private rights the subject of the interference.

186 This is why the outcome in this case always depended on TfNSW's defence of statutory authority (subject to TfNSW's reliance on s 43A of the *Civil Liability Act 2002* (NSW)). But for the statutory authority of TfNSW to develop or facilitate the development of the Sydney Light Rail, TfNSW could have proved that it had exercised all reasonable care and skill to avoid the interferences in planning and procuring the development yet still have been liable for the tort of nuisance because the interferences remained objectively substantial and unreasonable in all the circumstances. Only the defence of statutory authority enabled TfNSW to argue that if it proved that it had taken all reasonable care and skill in the exercise of its statutory powers and the interferences were an inevitable result of that exercise it could not be liable even if the interferences were nevertheless objectively substantial and unreasonable.

187 The potential for confusion (which, as to be discussed, caused the reasoning of the Court of Appeal to miscarry) inhered in the arguments as invoked by the parties, both straying from proper principles in several respects.

188 TfNSW succeeded before the Court of Appeal because of the conceptual confusion inherent in the competing cases of the parties. The Court of Appeal reasoned that, as the representative plaintiffs' evidence to establish that the period of occupation for construction in the fee zones was prolonged depended on all subsurface utilities having been identified before construction commenced and that evidence, for example, "made no allowance for inclement weather ... the discovery of unknown utilities and their treatment ... [or] various other contingencies",[325] the representative plaintiffs had not in fact proved any prolongation of such occupation for construction so that their claims failed in their entirety. As the Court of Appeal reasoned, the representative plaintiffs had to answer two questions, "first, that it was possible in some rational way to obtain complete knowledge of the utilities prior to construction; and secondly, assuming it were possible to do so, how much interference would that investigation cause",[326] but had failed to do so. It followed that the Court of Appeal concluded that "(a) there was no evidence for a critical

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325 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 510 [85].

326 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 511 [92].

element of the plaintiffs' case for damages based on the occupation of fee zones for times extending longer than the amended IDP, and (b) it is far from self-evident that there was a form of pre-construction investigation which would have reduced the interference with the plaintiffs' enjoyment of their land",[327] which was held to be dispositive of the appeal.[328]

189 This reasoning, however, assumed that the interferences with the use and amenity of their premises that the representative plaintiffs had proved throughout the entire period of occupation of the relevant fee zones were not objectively unreasonable in the sense required to establish prima facie actionable nuisance. The concession of the representative plaintiffs in respect of the possible objective reasonableness of the interferences during the periods identified in the amended IDP did not have the effect of altering either the findings of the primary judge about the interferences or the onus of TfNSW to prove that, for the defence of statutory authority to apply, it had exercised its statutory powers with all reasonable care and skill to avoid the interferences and that the interferences were an inevitable result of TfNSW so exercising its statutory powers.

190 As will be explained, while the representative plaintiffs were wrong in their reliance on the Sydney Light Rail being an uncommon and out of the ordinary use of the declared route along which it had to run, they were right that once they had proved the nature, extent and degree of the interferences with the use and amenity of their land (which were objectively substantial and unreasonable in the required sense to establish actionable nuisance for so long as they occurred), it was for TfNSW relying on statutory authority as a defence to prove that those interferences, for the period claimed, were an inevitable result of TfNSW doing the acts that the statute authorised and could not be avoided by, in the doing of those acts, the exercise of all reasonable care and skill. As Lord Hoffmann said in *Wildtree Hotels Ltd v Harrow London Borough Council*:[329]

> "Actionability at common law therefore depends upon showing that the building works were conducted without reasonable consideration for the neighbours. On the other hand, immunity from liability arising out of the construction of works authorised by statute is subject to a condition that the undertaker will 'carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons': per Lord Wilberforce in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1011."

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327 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 512 [95].

328 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 512 [97].

329 [2001] 2 AC 1 at 13.

191 Within this principled framework, Mr Griffith's evidence relating to the prolongation of the occupation of the fee zones was not evidence that the representative plaintiffs had to adduce and was not critical to their case. That they chose to adduce that evidence and confined their claims for damages to the period of the so-called prolonged occupation of the construction zones compared to that which TfNSW had intended, believed it had agreed, and publicly announced did not mean that they had (wrongly) accepted the burden of proving that the interferences were not an inevitable result of TfNSW doing the acts that the statute authorised and could have been avoided by the exercise of all reasonable care and skill in the doing of those acts. No complexity or error in the pleaded case or the way in which it was conducted by the parties in the courts below justifies an inversion of the onus of proof.

192 This said, another issue of principle, in respect of which I agree with the primary judge[330] and the Court of Appeal,[331] is the irrelevance of the character of the use of the roads by the Sydney Light Rail being common and ordinary in the locality or uncommon and out of the ordinary in the locality. I consider it contrary to the law of nuisance as it exists and as it ought to remain in Australia for the distinction between a common and ordinary use in a locality or an uncommon and out of the ordinary use in a locality to play a determinative function in ascertaining liability for nuisance outside the scope of the concept of objective reasonableness.

193 On this basis, much of what follows explains my view that the distinction between a common and ordinary use in a locality or an uncommon and out of the ordinary use in a locality has no role to play in this case both as a matter of principle and in the circumstances where TfNSW was authorised by statute to develop or facilitate the development of a light rail service along the declared route and why, on the facts and evidence, TfNSW cannot succeed in its defence of statutory authority.[332] Otherwise, I agree with the reasons of Gordon and Edelman JJ on the inapplicability of s 43A of the *Civil Liability Act*, on which TfNSW also relied, and their reasons explaining why damages for the cost of obtaining litigation funding, as claimed by the representative plaintiffs, are not recoverable in the award of damages.

194 As will become apparent, the necessary question in this case should be understood to be (and always to have been) whether the NSW Parliament, by statute, authorised TfNSW to develop or facilitate the development of the Sydney

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330 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 108-109 [647]-[652].

331 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 516-519 [115]-[126].

332 *Transport Administration Act*, s 104O(1).

Light Rail so as to cause, by its construction, what would otherwise be unlawful interferences with private proprietary rights of other occupiers of land without compensation for such unlawful interferences. The answer to that question, as a matter of proper statutory construction, is "no". The statutory immunity conferred by the NSW Parliament on TfNSW was qualified and not absolute. To be within the scope of its statutory immunity in the development or facilitation of the development of the Sydney Light Rail, it was for TfNSW to prove that the prima facie unlawful interferences were inevitable and could not be avoided by any exercise of reasonable care and skill on its part. This TfNSW did not prove. If the NSW Parliament had wished to provide TfNSW with an absolute immunity from liability in nuisance, it needed to do so in clear and unambiguous language. This the NSW Parliament did not do. Accordingly, the representative plaintiffs' appeals must succeed at least in part.

"Common and ordinary use"

195 This case exposes the limits of the utility of attempting to distinguish between what is a common and ordinary use in a locality or an uncommon and out of the ordinary use in a locality. The declared route for the Sydney Light Rail consists of public roads. George Street and Anzac Parade, the public roads which the land of the representative plaintiffs fronted, are major urban public thoroughfares in or close to the Central Business District ("CBD") of Sydney. The Sydney Light Rail is a tram service. A "tram" is a form of train designed to run on a "tramway" and a "tramway" is "a system of grooved tracks laid in urban streets, forming routes for the conveyance of passengers in trams".[333] To my mind it seems somewhat incredible to suggest that the use of major public thoroughfares in or close to a major CBD for any conventional form of land-based public passenger transport service is an uncommon and out of the ordinary use when it is common knowledge that public transport options in many cities, in Australia (such as Melbourne) and throughout the world, include trams.

196 Other considerations also expose the limits of the utility of attempting to distinguish between a common and ordinary use in a locality or an uncommon and out of the ordinary use in a locality. In some cases, the identification of the relevant locality may be obvious. But even an obvious relevant locality has boundaries and what is a common and ordinary use on one side of a boundary may be an uncommon and out of the ordinary use on the other side of the boundary. And even an obvious relevant locality may have within its boundaries areas which have evolved from one prevailing kind of common and ordinary use into another prevailing kind of common and ordinary use or, at least, not an uncommon and out of the ordinary use. In the evolution of a locality, it may be difficult to determine the point at which a new use is uncommon and out of the ordinary or has become common and ordinary in that locality. Take as an example a low-density residential

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333 *Macquarie Dictionary* (online), "tram" (def 3), "tramway" (def 1).

locality in which the only common and ordinary use is single-storey dwellings. Due to the need for more affordable housing, that locality may be rezoned to permit and encourage multi-storey residential towers. Is the first multi-storey residential tower to be developed in the locality an uncommon and out of the ordinary use and the tenth a common and ordinary use?

197 A locality also may be subject to a radical change in planning laws to discourage the then prevailing common and ordinary uses and encourage new uncommon and out of the ordinary uses. Mere compliance with environmental and planning laws, including conditions imposed on environmental and planning authorisations, has never been a defence to a nuisance.[334] Similarly, benefit to the public from the carrying out of the impugned activity is of little if any significance,[335] reflecting a principle that the private proprietary rights of one person (in the use and enjoyment of the amenity of their land) are not to be subjugated to notions of general public interest, at least not without clear and unambiguous statutory language to that effect. Is the implementation of governmental policy to increase the residential density of a residential area, with consequential major construction activities, to be thwarted because the ultimate end use (such as a high-density residential tower) is uncommon and out of the ordinary in the locality?

198 The utility of the distinction seems particularly limited in this case, where the Sydney Light Rail could not be constructed or operated along the declared route without the statutory authority conferred by the *Transport Administration Act*. As Lord Wilberforce observed in *Allen v Gulf Oil Refining Ltd*,[336] the scope of an authority conferred by statute may extend to "a change in the environment and an alteration of [the] standard" of amenity and comfort that might reasonably be expected in a locality.[337] On this basis, the question whether the very thing said to be authorised by statute is a common and ordinary use of land becomes beside the point by reason of the operation of the statute.

199 It may be accepted that the concept of the common and ordinary use of land in a locality has greater capacity to be a determinative factor in the evaluation of the objective reasonableness of an interference in the context of the occupiers of land for private purposes in sufficient proximity to one another where the use of

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334 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 848-849 [89]-[94]; *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 40-41 [109]-[110], 66 [201].

335 *Barr v Biffa Waste Services Ltd* [2013] QB 455 at 467 [31], 469 [36(vi)]; *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 42 [114], 43-44 [120]-[121].

336 [1981] AC 1001.

337 [1981] AC 1001 at 1013-1014.

one parcel may affect the potential use and amenity of another parcel and vice versa. That capacity has long been recognised to derive from the reciprocal interests of all such occupiers, on the one hand, to be able to use and enjoy their land and, on the other hand, not to use and enjoy their land in a way that undermines the capacity of the other occupiers to use and enjoy their land. In that context, the focus on whether the uses are common and ordinary in the locality should be understood to function as a proxy for the question whether the interference with the use and amenity of land is objectively reasonable in the circumstances. As Bramwell B put it in the seminal case of *Bamford v Turnley*,[338] the "convenience of such a rule may be indicated by calling it a rule of give and take, live and let live".[339] The real determinant of that rule is objective reasonableness in all the circumstances.

200 Both before and after *Bamford v Turnley*, the concept of the common and ordinary use of land functioned as an aspect of, a proxy for, or a means of calibrating a broader inquiry focusing on the objective reasonableness of the interference in the circumstances of the case. For example, the nature and extent of the interference with the use and amenity of a plaintiff's land in England had to be evaluated by reference to "plain and sober and simple notions among the English people" and not by reference to "elegant or dainty modes and habits of living".[340] This indicates that the standard of objective reasonableness may and often will reflect the existing uses and amenity of the locality. This is why it could be said that "what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey*", Belgrave Square being a well-known exclusive residential district in central London and Bermondsey being an area devoted to tanneries.[341] The criterion of objective reasonableness in all the circumstances also explains why a common and ordinary use in a locality, such as use of a dwelling house in a residential suburb, may nevertheless result in an actionable nuisance if an aspect of the use is for "unusual purposes" (such as horse stables on the ground floor)[342] or is done with malice (such as deliberately banging trays against a wall in objecting to the sounds of music from a neighbour's house or deliberately firing shots to make breeding silver foxes miscarry).[343] Horses being stabled near a dwelling are the nineteenth century version of the garaging of cars. Of itself,

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338 (1862) 3 B & S 66 [122 ER 27].

339 (1862) 3 B & S 66 at 84 [122 ER 27 at 33].

340 *Walter v Selfe* (1851) 4 De G & Sm 315 at 322 [64 ER 849 at 852].

341 *Sturges v Bridgman* (1879) 11 Ch D 852 at 865.

342 *Ball v Ray* (1873) LR 8 Ch App 467 at 470-471.

343 *Christie v Davey* [1893] 1 Ch 316 at 326; *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468.

stabling horses near a dwelling was neither uncommon nor out of the ordinary but it could nevertheless be actionable because of the objective unreasonableness of the use in the particular circumstances. Banging trays in a house is also a common and ordinary occurrence, differentiated from common and ordinary domestic noise only by the intentions of the actor.

201 Other decisions early in the evolution of the principles also expose the concept of a common and ordinary use being a proxy for objective reasonableness as a criterion of liability. For example, it might be thought that in a building used for industrial and warehouse purposes, use for the purpose of storage of paper would be common and ordinary. Apparently not, however, where the paper so stored was unusually sensitive to the heat generated by the manufacturing activity occurring on the floor below the paper storage area.[344] The sensitivity of the paper stored was said to transform an ordinary and common use (of a warehouse for storage) into "an exceptionally delicate trade".[345] The logic of this transformation, of course, depended on the particular nature of the interference. The paper was sensitive to heat whereas, on the facts found, other paper would not have been so sensitive. It may be inferred that if the interference had been, for example, damp and not heat, the paper stored would have been no more sensitive than any other type of paper. On that basis the trade of storing paper in a warehouse, it seems, would have been common and ordinary. In other words, if a common and ordinary use is a criterion of liability, it is one which can change depending on the nature of the interference. The better explanation, however, is that the common and ordinary use criterion is functioning as a proxy for the objective reasonableness of the interference in all the circumstances.

202 Further, it is apparent that the character of a use as common and ordinary might be affected not only by the nature of the interference but also by the ease or difficulty of protecting the use from the interference. For example, a submarine cable which was sensitive to minute escapes of electricity from a tramway was a "special" use by reason of the "peculiar liability" of the cable to electrical effects, a conclusion reinforced by the fact that the "peculiar liability" was readily remediable and the claim was principally for the remediation costs.[346] Query, however, if the submarine cable use could have been classed as "special" and not common and ordinary if the electrical escapes would have interfered with even the most robust system of submarine cabling then available – by what criterion then could it be said that a submarine cable running along the floor of the ocean was

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344 *Robinson v Kilvert* (1889) 41 Ch D 88.

345 *Robinson v Kilvert* (1889) 41 Ch D 88 at 97.

346 *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381 at 389, 393.

not a use "in the ordinary enjoyment of property"?[347] Again, an unspoken criterion of objective reasonableness is in play.

203 Construction works also test the utility of the distinction between a common and ordinary use and an uncommon and out of the ordinary use as a criterion for liability in nuisance. It has long been accepted that "the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance".[348] Accordingly:[349]

> "[A] man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust."

204 In other words, a person can demolish and erect a dwelling house on residential land without being liable for what might otherwise be a nuisance if they do the work with "all reasonable skill and care to avoid annoyance" to the use and amenity of other land. Precisely the same annoyance may be actionable nuisance, however, if the cause is "sheer wantonness" (such as demolishing structures as a hobby or intending to annoy others in their use and enjoyment of their land) or the purpose is to construct something other than a dwelling house. Taken literally, this latter example is baffling. So too is part of the reasoning in *Andreae v Selfridge & Co Ltd*,[350] at least to the extent that it says that "it is part of the normal use of land, to make use, upon your land, in the matter of construction, of what particular type and what particular depth of foundations and particular height of building may be reasonable, in the circumstances, and in view of the developments of the day".[351]

205 For one thing, the reasoning does not enable account to be taken of construction of a dwelling house that involves interferences that, on any view, are

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347 *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381 at 393.

348 *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 at 414.

349 *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 at 413-414.

350 [1938] Ch 1.

351 [1938] Ch 1 at 6.

objectively substantial and unreasonable despite the taking of all reasonable care, such as perhaps a dwelling house requiring deep excavation or heavy equipment. Nor does the reasoning account for a case in which the thing to be constructed is not common and ordinary in the locality (for example, a scientific observatory in a residential area) but the interference from the demolition and construction is no greater than that which would be caused if the building to be constructed was a dwelling house. By what criterion is the interference from the demolition and construction then to be judged, particularly if the uncommon and out of the ordinary use, once constructed, will cause less interference with the neighbouring land than might be expected from a dwelling house?

206 Two things *Andreae v Selfridge & Co Ltd* does make clear, however, are, first, that whatever role the concept of the common and ordinary use of land is playing it "does not mean that the methods of using land and building on it are in some way to be stabilized for ever"[352] and, secondly, that "[t]hose who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty, if they wish to make good that defence, to use that reasonable and proper care and skill".[353] As discussed, the better view of these cases is that they are using the concept of the common and ordinary use of land in a locality as a proxy for assessing the objective reasonableness of the use.

207 Contrasts to this reasoning are available. For example, in deciding that constructing the Eastern Suburbs railway line in Sydney was creating a nuisance by blasting causing rocks to land on other properties, vibrations and noise, Street J found no occasion to refer to the use being common and ordinary or otherwise.[354] His Honour's focus was on the nature and the extent of the interference caused by the blasting. His Honour: found no need to "discuss the careful investigation during the course of evidence into what was or what might have been done by the defendant to preclude the emission of stones", it being self-evident that what was done was insufficient and that a more modest blasting program could ameliorate the impacts;[355] rejected the notion that mere compliance with the applicable code

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352 [1938] Ch 1 at 6.

353 [1938] Ch 1 at 9.

354 *Fisher v Codelfa Construction (Australia) Pty Ltd* (unreported, Supreme Court of New South Wales, 28 June 1972).

355 *Fisher v Codelfa Construction (Australia) Pty Ltd* (unreported, Supreme Court of New South Wales, 28 June 1972) at 8.

defeated the claim in nuisance;[356] gave the defendant the "full benefit" of its statutory authority to construct the railway;[357] yet still concluded that the vibrations and noise exceeded that which the plaintiff could reasonably be expected to bear.[358]

208 It should also be said that there is common ground between Lord Leggatt (with whom Lords Reed and Lloyd-Jones agreed) and Lord Sales (with whom Lord Kitchin agreed) in *Fearn v Board of Trustees of the Tate Gallery*.[359] One aspect of the common ground is that "the harm from which the law protects a claimant is diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it".[360] Another aspect is Lord Leggatt's statement that:[361]

> "The right to build (and demolish) structures is fundamental to the common and ordinary use of land, involving as it does the basic freedom to decide whether and how to occupy the space comprising the property. It follows that interference resulting from construction (or demolition) works will not be actionable provided it is, in Bramwell B's phrase, 'conveniently done', that is to say, in so far as all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours."

209 If demolition or construction works are "conveniently done", in the requisite sense of the taking of "all reasonable and proper steps ... to ensure that no undue inconvenience is caused to neighbours", what function does the concept of the common and ordinary use of land then perform other than potentially to defeat the objective reasonableness of the interference? It must also be doubtful that demolition can take its character from a proposed replacement use. Demolition is simply demolition irrespective of the proposed replacement use. And while the character of the proposed replacement use may influence the character of the construction (such as construction methods used and the duration of the construction), there is no necessary correlation between the character of a proposed replacement use and the nature or extent of any interference caused by the

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356 *Fisher v Codelfa Construction (Australia) Pty Ltd* (unreported, Supreme Court of New South Wales, 28 June 1972) at 10.

357 *Fisher v Codelfa Construction (Australia) Pty Ltd* (unreported, Supreme Court of New South Wales, 28 June 1972) at 11.

358 *Fisher v Codelfa Construction (Australia) Pty Ltd* (unreported, Supreme Court of New South Wales, 28 June 1972) at 11.

359 [2024] AC 1.

360 [2024] AC 1 at 12-13 [11], 53 [157].

361 [2024] AC 1 at 21 [37].

construction for that use. These considerations all point in the one direction – the common and ordinary use of land is a factor that may be relevant, even determinative, in answering the question whether an interference with the use and amenity of other land is objectively reasonable.

210 In the context of the present case, moreover, what function does the reciprocity involved in the "rule of give and take, live and let live"[362] in the ordinary and common uses of land have? From the perspective of the representative plaintiffs, the construction of the Sydney Light Rail could have been only all "give" and no "take".

211 That a person may take all reasonable care to avoid interfering with the use and amenity of other land and yet still be liable in nuisance does not mean that objective reasonableness lacks explanatory capacity in this field of liability. This principle derives from the observation in *Broder v Saillard*[363] that "[i]t is no answer to say that the Defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants".[364] The distinction being drawn here is between abstract and contextualised objective reasonableness, abstract reasonableness being always immaterial.[365]

212 As the Court of Appeal in this case recognised, this reasoning also unhelpfully conflates the conduct of the defendant with the nature of the interference when in reality, as Lord Sales put it in *Fearn v Board of Trustees of the Tate Gallery*, the cases expose that the relevant criterion of liability is better described as depending on "the issue of reasonableness as between the two parties located in a particular locality, not on the reasonableness of the defendant's use in the abstract".[366]

213 Other cases decided by this Court are not to the contrary. *Clarey v Principal and Council of the Women's College*[367] involved two private residential uses of a

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362 *Bamford v Turnley* (1862) 3 B & S 66 at 84 [122 ER 27 at 33].

363 (1876) 2 Ch D 692.

364 (1876) 2 Ch D 692 at 701.

365 *Ball v Ray* (1873) LR 8 Ch App 467 at 470, 471.

366 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 522 [145], quoting *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 56 [165].

367 (1953) 90 CLR 170.

dwelling house, part having been let in lodgings to a Women's College. The case could be and was resolved by a straightforward application of the reasoning in *Ball v Ray*.[368] The noise from young women in an area let in lodgings to a Women's College was in no way unusual or out of the ordinary in a residential context. Accordingly, the interference with the balance of the dwelling house was not unreasonable in the circumstances.[369] Again, common and ordinary use in this reasoning was a tool to reach a conclusion of the objective reasonableness of the interference.

214 *Gartner v Kidman*,[370] the decision by which the Court of Appeal considered it was bound in this matter,[371] involved private works to or affecting watercourses by owners of higher and lower-lying land. While Windeyer J said that "in formulations of the law of nuisance it may be better to start with what Bramwell B said in *Bamford v Turnley*, that 'acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action'",[372] that is not where the analysis ended. As Windeyer J put it:[373]

> "Pronouncements concerning the scope of nuisance as a tort avoid stating rights and duties as absolute. In respect of both what a man may do and what his neighbour must put up with, its criteria are related to the reasonable use of the lands in question. ...
>
> It is not possible to define what is reasonable or unreasonable in the abstract. Each case depends upon its own circumstances."

215 The same approach was taken in *Elston v Dore*,[374] in which Gibbs CJ, Wilson and Brennan JJ approved Lord Wright's statement in *Sedleigh-Denfield v O'Callaghan* that "it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more

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368 (1873) LR 8 Ch App 467.

369 (1953) 90 CLR 170 at 176.

370 (1962) 108 CLR 12.

371 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 517-518 [119]-[121].

372 (1962) 108 CLR 12 at 44, quoting (1862) 3 B & S 66 at 83 [122 ER 27 at 33].

373 (1962) 108 CLR 12 at 47-49. See also at 15, Dixon CJ agreeing.

374 (1982) 149 CLR 480 at 488. See also at 493, Murphy J agreeing.

correctly in a particular society".[375] The concept of the ordinary usages of a particular society is not as narrow and inflexible as a common and ordinary use in a locality. It is not confined to the nature of the defendant's or the plaintiff's use. It is, rather, a concept embracing the nature and extent of the interference with the use and amenity of the plaintiff's land in its full context for the purpose of determining objective reasonableness of an interference.

216 Accordingly, *Gartner v Kidman* and *Elston v Dore* are authoritative and binding statements of the law in Australia that private nuisance requires a substantial and unreasonable interference with the use and amenity of land to be proved by a plaintiff, not a mere substantial interference if the defendant's use can be characterised as other than common and ordinary in the locality. The Court of Appeal was correct to reject the arguments of the representative plaintiffs to the latter effect.[376]

217 The reasoning of Lord Sales in *Fearn v Board of Trustees of the Tate Gallery*[377] identifies several compelling reasons why a focus on objective reasonableness as a criterion of liability for private nuisance (leaving aside statutory authority cases) is to be preferred. This criterion: (a) does not stultify the evolution of land uses but still protects the use and amenity value of other land from interference which should be treated as unlawful; (b) avoids the arbitrariness that otherwise may be involved in considering first or new uses in an area; (c) enables the nature of the interference with the use and amenity value of other land to be considered, including the vulnerability of that use and amenity to interference, without the need to purport to categorise any such use as itself uncommon and extraordinary, and thereby logically reflects the necessary reciprocity as between land used for private purposes; (d) avoids the courts making unprincipled choices between one kind of uncommon and extraordinary use of land (a defendant's) and another kind of uncommon and extraordinary use of land (a plaintiff's); (e) explains why malicious acts causing a substantial interference are actionable regardless of the nature of the uses or the locality; (f) brings demolition and construction works under the rubric of a general principle without distorting them into examples of the ultimate use; and (g) reflects the common

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375 [1940] AC 880 at 903.

376 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 517-518 [119]-[121], 521 [137].

377 [2024] AC 1 at 76-80 [240]-[252].

law's general permissive rather than prohibitive approach to the use of land, albeit subject to the rights of other occupiers to the use and amenity value of their land.[378]

218 The complaint that this approach lacks "explanatory power"[379] was also effectively answered by Lord Sales in *Fearn v Board of Trustees of the Tate Gallery*.[380] To similar effect to that answer is that it has been said that the concept of "reasonableness" is "the great workhorse of the common law", which, while drawing "its determinative force from the circumstances of each action on the case, yet has perhaps the most significant determinative role of all the general concepts which underpin common law doctrines".[381] There is no reason for the law of nuisance to now abandon the great workhorse of reasonableness by an overly literal approach to the authorities which refer to the criterion of the common and ordinary use of land in a locality. No doubt objective reasonableness has been and can be determined in some cases by reference to no more than the concept of the common and ordinary use of land in a locality. The overarching requirement, however, remains that the interference be objectively substantial and unreasonable.

219 In any event, each of the cases, *Clarey v Principal and Council of the Women's College*, *Gartner v Kidman* and *Elston v Dore*, as well as *Fearn v Board of Trustees of the Tate Gallery*, involved private uses of land. This case is different. As Lord Hoffmann noted in *Marcic v Thames Water Utilities Ltd*,[382] cases such as *Sedleigh-Denfield v O'Callaghan* "were dealing with disputes between neighbouring land owners simply in their capacity as individual land owners. In such cases it is fair and efficient to impose reciprocal duties upon each landowner to take whatever steps are reasonable to prevent his land becoming a source of injury to his neighbour."[383]

220 For these reasons ground 1 of the appeals of the representative plaintiffs to this Court (that the Court of Appeal erred in holding that the substantial interference to the representative plaintiffs caused by TfNSW's uncommon and extraordinary use of land along the light rail route was not sufficient to establish actionable private nuisance) must be rejected. So too must ground 1 of TfNSW's

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378 See, generally, *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 73-75 [226]-[232].

379 *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at 15 [18].

380 [2024] AC 1 at 76-80 [240]-[252].

381 *Thomas v Mowbray* (2007) 233 CLR 307 at 352-353 [100]. See also at 331-333 [20]-[26].

382 [2004] 2 AC 42.

383 [2004] 2 AC 42 at 64 [62].

notices of contention to the effect that the construction of the Sydney Light Rail, because it was authorised by statute, was a common and ordinary use of the land. The concept of common and ordinary use of land is immaterial in this case, as the Court of Appeal concluded.

221 Otherwise, even in terms of inner-city construction works, the severity of the interferences with the use and amenity of the representative plaintiffs' premises found by the primary judge amply supports the conclusion that the interferences were objectively substantial and unreasonable. To the extent that the notion of the construction works being "conveniently done" might have arisen at this stage of the analysis, the pragmatic approach Street J took in *Fisher v Codelfa Construction (Australia) Pty Ltd* that "[a]ll I need state is my conclusion that whatever was done was insufficient" has much to commend it.[384] Such pragmatism, on the facts his Honour found, is principled. "In relation to private nuisance, there seems no reason why the maxim res ipsa loquitur should not apply in appropriate cases to require the defendant to show that he was not at fault and was not negligent."[385] The extreme severity of the noise, dust and vibration interferences in this case justifies the same approach. In summary, no matter the "give and take" of inner-city construction works, no-one should reasonably be expected to put up with interferences of the proved degree of severity for anything more than the short term; or, more to the point, no-one should be expected to do so unless their private proprietary rights to the reasonable use and amenity of their land have been removed by statute without compensation. As noted, to achieve that end, clear statutory language is required.

222 Accordingly, the application of the principles of statutory authority in this case must start from the factual position as found by the primary judge. The construction of the Sydney Light Rail caused interferences with the use and amenity of the land of the representative plaintiffs which were objectively substantial and unreasonable throughout the period of occupation of the relevant fee zones for construction. That, in the construction process, the contractor complied with all relevant conditions and standards, as in *Fisher v Codelfa Construction (Australia) Pty Ltd*,[386] does not mean that the interferences as proved were other than objectively substantial and unreasonable.

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384 Unreported, Supreme Court of New South Wales, 28 June 1972 at 8.

385 *Clerk & Lindsell on Torts*, 24th ed (2023) at 1412 [19-33]. See *Marcic v Thames Water Utilities Ltd* [2002] QB 929 (overturned on appeal, *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42) at 994 [85], quoting *Clerk & Lindsell on Torts*, 18th ed (2000) at 991 [19-32].

386 Unreported, Supreme Court of New South Wales, 28 June 1972.

Defence of statutory authority

223 The *Constitution Act 1902* (NSW) does not prevent the State from making laws authorising the acquisition or injurious affection of property without payment of compensation. Accordingly, provided it does so in language of sufficient clarity, a law of the State may authorise conduct that would otherwise constitute an unlawful interference with land and may also exclude or expropriate a cause of action for damages a person otherwise might have because of the acquisition or injurious affection.

224 Despite the assimilation of the rule in *Rylands v Fletcher*[387] into the general law of negligence and the different conclusions reached,[388] many of the relevant principles may be distilled from the reasoning in *Benning v Wong*.[389] The principles should be understood as follows.

225 First, the question whether a statute authorises a person or body to commit a tort, including the tort of nuisance, is one of statutory construction.[390]

226 Second, in construing the statute, the "cardinal rule[]" to be applied is that for a statute to authorise an interference with common law rights without compensation, "unambiguous and compelling language" is required.[391] This is because it is "in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness".[392] Consequences of this precept of statutory construction include, for example, that "the absence of compensation clauses from an Act conferring powers affords an important [but not conclusive] indication that the Act was not intended to authorise interference with private rights".[393] Similarly, that a statute merely permits rather than requires an act to be done is also seen as an indication that the statute confers no immunity

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387 (1868) LR 3 HL 330.

388 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

389 (1969) 122 CLR 249.

390 *Benning v Wong* (1969) 122 CLR 249 at 307.

391 *Benning v Wong* (1969) 122 CLR 249 at 256.

392 *Bropho v Western Australia* (1990) 171 CLR 1 at 18, quoting *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *Coco v The Queen* (1994) 179 CLR 427 at 435-438.

393 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1016. See also *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2025] AC 761 at 773-775 [15]-[20].

from liability but, rather, means that "the powers conferred must be exercised in strict conformity with private rights".[394] While it has also been said that in a case where a statute requires an act to be done, proof of the interference being inevitable as a condition of immunity from liability falls away, the only requirement being that the act be done with all reasonable care and skill,[395] it is, as explained below, difficult to distinguish between an interference which is inevitable and an interference which is unavoidable by the exercise of all reasonable care and skill. Unless the standard of inevitability is pitched at the level of the theoretical and not the practical, there should be no difference between an interference proved to be inevitable and an interference proved to be unavoidable by the exercise of all reasonable care and skill.

227 Third, and in further consequence, the fact that, properly construed, a statute authorises a person or body to do an act constituting a tort, including the tort of nuisance, does not mean that the statute also excludes or expropriates a cause of action for liability for the commission of all tortious conduct.[396] Rather, the questions to be answered are: (a) "what on its proper construction has the statute relevantly authorized"; and (b) "is the authority which [the statute] gives absolute or qualified".[397]

228 Fourth, in answering the former question ("what on its proper construction has the statute relevantly authorized"), "a statute only authorizes those acts which it expressly nominates and those acts and matters which are necessarily incidental to the acts so expressly authorized or to their execution".[398] In answering the latter question ("is the authority which [the statute] gives absolute or qualified"), "a statute which authorizes the doing of an act or the performance of a work in general only authorizes it to be done in a careful manner. If the authority is to extend to a careless execution of an authorized act, the plainest of language must be used."[399] This follows from "the one basic proposition that in general a statute in authorizing the doing of an act requires as a condition of the grant of the authority, the exercise of due care in performing the authorized work".[400] Putting it another way, there is

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394 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011.

395 *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 at 311 [122].

396 *Benning v Wong* (1969) 122 CLR 249 at 307, see also at 262-263.

397 *Benning v Wong* (1969) 122 CLR 249 at 255.

398 *Benning v Wong* (1969) 122 CLR 249 at 256.

399 *Benning v Wong* (1969) 122 CLR 249 at 256.

400 *Benning v Wong* (1969) 122 CLR 249 at 261.

a difference between a statute which requires conduct that cannot be carried out without necessarily and inevitably interfering with private rights and a statute which merely authorises conduct where, "by the exercise of due skill and care", such interference can be avoided.[401] In the case of a statute not requiring but merely authorising an act to be done the question whether the interference was an inevitable consequence of the doing of the act "focuses attention, not on the execution of the specified activity, but on the decisions relating to whether, when or how to undertake the authorised activity".[402]

229 Fifth, while the condition for immunity of the exercise of all due or reasonable care and skill is often referred to as a lack of "negligence", in the context of the defence of statutory authority "negligence" is "used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons".[403]

230 Sixth, the question whether the conduct authorised by the statute would inevitably interfere with private rights is to be determined not by what is "theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense".[404]

231 Seventh, the onus of proving that the conduct authorised by the statute would inevitably interfere with private rights lies on the person or body carrying out or responsible for the conduct.[405]

232 Eighth, if a defendant proves that the conduct authorised by the statute would inevitably interfere with private rights, the immunity from liability applies only to that interference, in its nature, extent and degree, which the defendant has

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401 *Benning v Wong* (1969) 122 CLR 249 at 309.

402 *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 at 311 [123]. See also *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319 at 333-335 [48]-[57].

403 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011.

404 *Benning v Wong* (1969) 122 CLR 249 at 309, quoting *Manchester Corporation v Farnworth* [1930] AC 171 at 183.

405 *Benning v Wong* (1969) 122 CLR 249 at 256, 266, 308, 309-312, 325, 334. See also, for example, *Manchester Corporation v Farnworth* [1930] AC 171 at 183; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1013-1014.

proved was an inevitable concomitant of the authorised conduct. Embedded within this issue of inevitability remain the questions whether the acts constituting the interference have been done with all reasonable care and skill, and the location of the onus of proof in that regard.[406] As noted, if a defendant has proved that the interference, in its nature, extent and degree, is an inevitable consequence of the doing of the authorised acts, it would seem to follow that the defendant has also proved that it has done the acts with all reasonable care and skill. Be this as it may, to identify as a separate consideration that a defendant relying on the defence of statutory authority may nevertheless be liable for interferences with private rights even if such interference is authorised or an inevitable concomitant of the doing of the authorised act, if the defendant has not taken all reasonable care and skill in the doing of the act, reflects the care with which the common law protects private rights attaching to land.

233 From this it follows that the statement in *Bankstown City Council v Alamdo Holdings Pty Ltd*[407] that a body "is not, without negligence on its part, liable for a nuisance attributable to the exercise of, or failure to exercise, its statutory powers"[408] must be understood in its proper context. A premise of this proposition is that the body is authorised by statute to do the very act which interferes with the private right. As Owen J said in *Benning v Wong*, the preliminary question in this field of inquiry is always one of "legislative intention"[409] (meaning the proper construction of the statute authorising the act). His Honour said that he did not "think it has ever been doubted ... that where a body purporting to act under statutory authority is sued for committing what is prima facie a nuisance, it is for it to show that its statutory authority could not be carried out without creating that nuisance".[410] His Honour also referred to the task thereafter as involving "an endeavour to discover whether ... the legislative intention was that [the defendant] should be liable only if [the interference the subject of complaint] was shown to have resulted from a failure by [the defendant] to exercise due care or whether it was sufficient for the injured party to show merely that [the interference the subject of complaint] had occurred, the onus then being on [the defendant] to establish that

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406 *Benning v Wong* (1969) 122 CLR 249 at 311-312.

407 (2005) 223 CLR 660.

408 (2005) 223 CLR 660 at 666 [16], referring to *Marcic v Thames Water Utilities Ltd* [2002] QB 929 (overturned on appeal, *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42), *Hawthorn Corporation v Kannuluik* [1906] AC 105, *Metropolitan Gas Co v Melbourne Corporation* (1924) 35 CLR 186 and *Benning v Wong* (1969) 122 CLR 249 at 324-337.

409 (1969) 122 CLR 249 at 323.

410 (1969) 122 CLR 249 at 325.

[the interference the subject of complaint] had occurred notwithstanding the fact that [the defendant] had exercised its powers with all due care".[411] Accordingly, as his Honour explained, statutory construction underlay the numerous earlier authorities thereafter considered.[412]

234 It also follows that, as Windeyer J held in *Benning v Wong*, the person or body doing or responsible for the doing of work authorised by statute is immune from liability to the extent that that person or body proves that the otherwise unlawful interference with private rights which has occurred was an inevitable consequence of the doing of that work.[413] However, "except where Parliament has prescribed the place where and the method by which the work is to be done", the person or body will be immune from liability only if and to the extent it proves that "in choosing the place, time, manner, method, equipment and appliances for the conduct of [the] operations", the person or body has used "due skill and care and act[ed] reasonably to avoid avoidable harm".[414]

Statutory construction

235 The route for the light rail system was declared on 11 September 2015.[415] Because s 104N(1) of the *Transport Administration Act* provided that for the purposes of the Act "a light rail system is a system for the provision of light rail services along a route declared ...", TfNSW's power under s 104O(1) of the Act to "develop light rail systems, or facilitate their development by other persons" was confined to the route so declared.[416] That declaration provided that the light rail system had to run along the public roads, road related areas and other land specified in the declaration, which included a map. The terms of the declaration did not provide TfNSW with any choice as to the route of the light rail system.

236 By s 3C(2) of the *Transport Administration Act*, TfNSW was a government agency. By s 3C(3) the affairs of TfNSW were to be managed and controlled by the Director-General, meaning the Director-General of the Department of Transport. By s 3B(1) the Director-General and the chief executive of TfNSW

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411 (1969) 122 CLR 249 at 323.

412 (1969) 122 CLR 249 at 324-337.

413 (1969) 122 CLR 249 at 308.

414 (1969) 122 CLR 249 at 308.

415 *Transport Administration (General) Amendment (Light Rail) Regulation 2015*, Sch 1.

416 But the power was not, as the representative plaintiffs contended, non-existent until the time of the declaration.

were, in the exercise of their functions, subject to the control and direction of the Minister. This subordination to government control accords with the objects of the *Transport Administration Act*, which included to achieve an efficient, integrated, effective, and co-ordinated transport system. TfNSW's general functions as set out in Sch 1 required a high degree of integration with other agencies of the NSW Government. To the same end of whole of government integration and co-ordination, by s 3G, TfNSW "for the purpose of exercising its functions" could give directions to a range of other NSW Government transport related agencies and bodies in respect of the exercise of their functions. This included Roads and Maritime Services, the relevant roads authority which provided approval for the construction of the Sydney Light Rail along the public roads as necessary under the *Roads Act 1993* (NSW).

237 Nevertheless, the key provision, s 104O(1) of the *Transport Administration Act* ("TfNSW may develop light rail systems, or facilitate their development by other persons"), is expressed in unequivocally permissive rather than mandatory terms. That is, the NSW Parliament did not subject TfNSW to a statutory duty to ensure the development of the Sydney Light Rail. Accordingly, the principle on which *Marcic v Thames Water Utilities Ltd*[417] was ultimately decided, that "if a duty is imposed by statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy",[418] is inapplicable. Equally inapplicable is any principle that a statute which requires an act to be done generally is to be construed as conferring immunity for that act subject only to the exercise of all reasonable care and skill to protect those whose private rights would otherwise be infringed.[419]

238 Further, nothing in the *Transport Administration Act* prescribed the form which a light rail system had to take other than it involved "light rail vehicles" to provide "railway passenger services" including "any rolling stock".[420] TfNSW was free to decide on the kind of rolling stock, tracks and incidental structures which would be the subject of its applications for approval. Given also that the declared route of the light rail system included "the stratum above and below the surface area of land as shown on [the] map", "the area of any bridge, viaduct or other support over which the route passes", "the area of any tunnel through which the route passes", and "any light rail structure in a tunnel through which the route

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417 [2004] 2 AC 42.

418 [2004] 2 AC 42 at 56 [30], quoting *Robinson v Workington Corporation* [1897] 1 QB 619 at 621.

419 *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 at 311 [122].

420 *Transport Administration Act*, ss 104L, 104M.

passes",[421] it was for TfNSW to decide if the proposed light rail system could or should pass on, above or below any public road forming part of the route. Equally, it was for TfNSW to decide if the proposed light rail system could or should involve subsurface excavation to provide power and to decide other features of the system and whether they could or should be carried out in a way that avoided or minimised interference.

239 The extent of choice provided to TfNSW in the *Transport Administration Act* as to all matters other than the development of a light rail service along the declared route indicates that, as a matter of statutory construction: first, the statutory authority to develop or facilitate the development of a light rail system had to be exercised with all reasonable care and skill to avoid reasonably avoidable interference with the use and amenity of other land in proximity to the declared route; and, secondly, immunity from liability for interferences with private rights, including in the tort of private nuisance, was conferred only to the extent that any such interference was an inevitable consequence of the authorised development or facilitation of the development of a light rail system along the declared route despite TfNSW exercising all reasonable care and skill in the exercise of its powers to avoid the interference.

240 That the *Transport Administration Act* is to be so construed is supported by several other considerations. It must be taken that in amending the *Transport Administration Act* to enable TfNSW to develop or facilitate the development of light rail systems along declared routes it was known that the routes would be within urban areas given the nature of a light rail service. That is, the potential for serious interference with the use and amenity of other land in proximity to the declared route must have been obvious. Despite that obvious potential there is no provision in the *Transport Administration Act* which expressly excludes TfNSW from any common law liability in developing or facilitating the development of a light rail system. This silence about common law liability, moreover, may be contrasted with the express provisions excluding TfNSW from having to pay compensation for any acquisition of land as specified in s 104R(3) and (4), as well as from liability to pay State rates and land taxes and duty as specified in ss 104S and 104T.

241 It must be concluded, therefore, that the *Transport Administration Act* is not to be construed as providing TfNSW with absolute immunity from common law liability in developing or facilitating the development of the Sydney Light Rail. Such immunity, on the proper construction of that Act, was qualified. It was confined to an immunity from common law liability arising from matters that were an inevitable consequence of the construction of a light rail system along the declared route. Further, any interferences avoidable by TfNSW exercising all

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421 *Transport Administration (General) Amendment (Light Rail) Regulation 2015*, Sch 1.

reasonable care and skill in developing or facilitating the development of a light rail system along the declared route were outside the scope of the statutory immunity because such interferences could not be an inevitable consequence of the construction of that system.

242 Moreover, once the objectively substantial and unreasonable interferences with the use and amenity of other land were proved to have been caused by TfNSW developing or facilitating the development of the light rail system (as the facts found by the primary judge supported in terms of TfNSW's planning and procurement process), it was for TfNSW to prove that such interferences were inevitable and therefore unavoidable by the exercise of all reasonable care and skill in developing or facilitating the development of the system. Of course, in discharging that burden of proof, TfNSW would have been bound to show only inevitability in the sense of unavoidability of the interferences by the exercise of all *reasonable* care and skill in the circumstances as they existed at the time (that is, not by reference to what is "theoretically possible" but by reference to "a certain common sense appreciation ... of practical feasibility in view of situation and of expense").[422] But it was never for the representative plaintiffs to prove that TfNSW acted with a lack of all reasonable care and skill.

243 That this burden of proof lies on the person claiming statutory authority as a defence rather than on the person claiming nuisance also accords with common sense notions of justice. A plaintiff cannot be expected to know or prove anything more than that the interference with the use and amenity of their land was substantial and unreasonable. The person claiming a defence of statutory authority alone will be aware of all the circumstances which informed its decision-making. That person alone will be able to prove those circumstances. That person alone will be able to identify why it should be concluded that all reasonable care and skill to avoid avoidable interferences with private rights was taken if indeed that was so.[423]

Course of hearings below

244 The primary judge said that the question whether TfNSW had failed to exercise reasonable care in developing and facilitating the development of the Sydney Light Rail was difficult in circumstances where both parties disavowed any need to prove the exercise or non-exercise of reasonable care.[424] The primary judge also said the issue was difficult to resolve as the failures the representative

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422 *Benning v Wong* (1969) 122 CLR 249 at 309, quoting *Manchester Corporation v Farnworth* [1930] AC 171 at 183.

423 cf *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

424 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 134 [812].

plaintiffs pleaded were "particularised in the context of the delay, rather than a breach of any duty of care".[425]

245 To the extent his Honour referred to the need to plead a duty of care, the observation is misconceived. As explained above, "negligence" in the tort of nuisance is a shorthand reference to the failure of a defendant to exercise all reasonable care and skill to avoid interfering with the use and amenity of another's land. The relevant point otherwise is his Honour's observation that insofar as the representative plaintiffs pleaded a failure to take reasonable care, they did so by particulars only of delay. This was correct in respect of the alternative claim referred to as the "Civil Works Delay". The alleged nuisance in "authorising or permitting the construction of the Project", however, was separately particularised in para 15 of the pleading by reference to "excessive noise", "excessive vibration" and "excessive dirt and dust".

246 On several occasions during the hearing before the primary judge, however, the representative plaintiffs confined their claims to the period by which occupation of the fee zones for construction was prolonged beyond that agreed to and published by TfNSW, adjusted as provided for in the amended IDP. While the representative plaintiffs did not formally abandon their whole of period claim based on "excessive noise", "excessive vibration" and "excessive dirt and dust", the confining of the period of their claims in this way no doubt explains why the primary judge did not deal with the case of alleged nuisance in "authorising or permitting the construction of the Project" as pleaded by the representative plaintiffs. Rather, the primary judge confined consideration of the "unreasonable" aspect of TfNSW's conduct in developing and facilitating the development of the Sydney Light Rail to the alleged period of prolonged occupation of the relevant fee zones.

247 In the Court of Appeal, the representative plaintiffs contended that the primary judge erred in finding that "an actionable nuisance would only arise and subsist whilst [TfNSW's] use of its land was unreasonable, even if that use was not a common and ordinary use of the land" and consequently in "holding that the substantial interference caused to the [representative plaintiffs'] land during the time that construction was planned to take in each Fee Zone according to the amended IDP did not constitute an actionable nuisance". According to the representative plaintiffs, the primary judge should have held that, as the use of the land was "exceptional" and not "common and ordinary", "the construction without more constituted an actionable nuisance in respect of any substantial interference with the use and enjoyment of land by the [representative plaintiffs]", so that the period of the actionable nuisance was the entirety of the occupation of each such fee zone.

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425 *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1 at 134 [815].

248 While not free from ambiguity, the representative plaintiffs' claims for liability over the entire period were tied to the characterisation of the use of the land as being not common and ordinary in the locality. That said, what the representative plaintiffs never conceded or accepted was any suggestion that they had to prove that the interferences or their duration were not the inevitable consequences of TfNSW exercising statutory power or were the result of TfNSW having failed to exercise all reasonable care and skill in exercising those powers.

249 Those forensic decisions having been made, the representative plaintiffs should not in this Court be permitted to reinstate their pleaded claims of TfNSW being liable for nuisance for the entire period of occupation of the fee zones for construction by reason of excessive noise, vibration, dirt and dust. It is not to the point that the representative plaintiffs never formally abandoned this claim or that the second ground of appeal in this Court is broad enough to encompass this claim. In circumstances where the primary judge did not make findings as required in respect of this claim for good reason and the Court of Appeal could not and did not review the lack of such findings for equally good reason, it is not now for this Court to make the findings that could have been made had this claim been prosecuted and those findings therefore sought.

Consequences for these appeals

250 It follows that ground 2 of the representative plaintiffs' appeals to this Court (that the Court of Appeal erred in holding that the representative plaintiffs had not established that TfNSW's use of the land was unreasonable so as to make TfNSW liable for either the entirety of the period of the construction or part of that period as held by the primary judge) must be confined to the period of liability as determined by the primary judge.

251 As foreshadowed, in dealing with the primary judge's conclusions about that period, the Court of Appeal, in effect, reversed the onus of proof. The representative plaintiffs had proved objectively substantial and unreasonable interferences with the use and amenity of their premises from the construction works for the entire period of occupation of the fee zones for construction. They had also proved that TfNSW's acts in developing and facilitating the development of the Sydney Light Rail, principally by the terms of the Project Deed, were a material cause of the interferences. Having proved those facts, it was for TfNSW to prove that: (a) the nature, extent and degree of the interferences with the use and amenity of the premises of the representative plaintiffs and their duration were an inevitable consequence of the development and the facilitation of the development of the Sydney Light Rail, on the basis that it was TfNSW which was in control of the decision-making process, but for the declared route and the nature of the use as a light rail system; and (b) TfNSW had exercised all reasonable care and skill in developing and facilitating the development of the Sydney Light Rail to avoid reasonably avoidable interferences in terms of their nature, extent and degree.

252 Instead, the Court of Appeal reasoned that:[426]

> "The IDP could not on its face be regarded as anything like a reasonable estimate of construction time in any particular fee zone. It made no allowance for inclement weather. It made no allowance for the discovery of unknown utilities and their treatment. It made no allowance for various other contingencies. It may well have been the basis for the media release, but if so it was not a reasonable basis for any estimate of construction time in any particular fee zone."

253 In the circumstances described above, it was for TfNSW to prove, not the Court of Appeal to surmise, that the nature, extent and degree of the proved interferences and their duration were inevitable and unavoidable by TfNSW having exercised all reasonable care and skill in exercising its powers in developing and facilitating the development of the Sydney Light Rail.

254 The Court of Appeal's observation that the "amended IDP proceeded on the basis that no construction would commence until there was complete knowledge of the thousands of sub-surface utilities along the route" and it "was not established that it was possible, and if so how long it would take and whether that too would amount to a substantial interference with the enjoyment of the plaintiffs' land, to obtain complete knowledge of the unknown utilities"[427] exposes the same kind of error. It was not for the representative plaintiffs to establish that the objectively substantial and unreasonable interferences with the use and amenity of their land which the construction caused could have been reduced in nature, extent and degree. That the representative plaintiffs confined their claims for TfNSW's liability to the period they contended was prolonged never meant that the onus was on the representative plaintiffs to prove a lack of inevitability of the interferences or a lack of reasonable care and skill by TfNSW.

255 That the Court of Appeal's reasons venture far into surmise (such as that it "seems most unlikely" the subsurface utilities could have been discovered "by a series of night works, with temporary resurfacing in time for the road to be reopened the following day"[428]) is indicative of the error in its approach. Where the private rights of an individual have been prima facie infringed by an exercise of statutory power as opposed to the performance of a statutory duty (as by TfNSW planning and procuring the construction of the Sydney Light Rail in a manner which caused objectively substantial and unreasonable interferences with the use

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426 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 510 [85].

427 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 510 [86], 511 [87].

428 *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489 at 512 [93].

and amenity of other premises) then, unless the statute provides in clear and unambiguous terms to the contrary, it will be for the body which exercised the power to prove that the infringement was an inevitable consequence of an exercise of the power and was unavoidable by the exercise of that power being undertaken with all reasonable care and skill. Both concepts, inevitability and unavoidability, are to be evaluated on the evidence by reference to considerations of objective reasonableness at the time of the exercises of the power. Not only is the onus of proof in this regard on the body exercising the power; as is always the case, the evidence "is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted".[429] In the present case, proceeding from a suppressed assumption that the proved interferences were not objectively unreasonable, the Court of Appeal erred in proceeding as if it was for the representative plaintiffs to prove a lack of inevitability and a lack of reasonable care and skill.

256 As noted, TfNSW also relied on s 43A of the *Civil Liability Act*. As explained in the reasons of Gordon and Edelman JJ,[430] if it applies to claims for private nuisance, s 43A depends on TfNSW having exercised a special statutory power when doing the acts by which it developed and facilitated the development of the Sydney Light Rail. As those acts comprised, in effect, the planning and procuring of the construction of the Sydney Light Rail, those acts cannot be characterised as an exercise of or a failure to exercise a power "that is of a kind that persons generally are not authorised to exercise without specific statutory authority" as required by s 43A(2)(b). Persons generally have capacity to apply for approvals to construct any development (even if their application may be required to be refused) and persons generally have capacity to agree a design and construction contract. In so doing, TfNSW was not doing anything which persons generally cannot do without specific statutory authority. As such the standard of "so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power" in s 43A(3) of the *Civil Liability Act* does not apply to TfNSW's acts.

257 Similarly, the reasons of Gordon and Edelman JJ, with which I agree, explain why it is that any award of damages could not extend to the reasonable litigation funding costs enabling the proceedings to be maintained.[431]

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429 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

430 See [139]-[147].

431 See [166]-[171].

258 For these reasons, the orders which Gordon and Edelman JJ propose should be made, in effect allowing the appeals and reinstating the orders of the primary judge.[432]

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432 See [173].

259 BEECH-JONES J. The circumstances of these appeals are set out in the judgment of Gordon and Edelman JJ. Subject to what follows I agree with their Honours.

260 The question of principle raised by the appeals is: what are the elements of a cause of action in private nuisance? On that issue, I agree with Gordon and Edelman JJ that, subject to any statutory modification or the establishment of any defences, a private nuisance is established if the defendant's use of the land has caused a substantial interference with the claimant's ordinary use of land and the defendant's use was either not a common and ordinary use or, if it was, that use was not "conveniently done" – that is, undertaken with a proper consideration for the interests of the claimant.

261 So far as this case is concerned, I respectfully disagree with their Honours' conclusion that the respondent's use of land previously used for roads in the central area of Sydney to construct the Sydney Light Rail ("the SLR") was not a common and ordinary use of land in that area. However, even so, the respondent did not establish that the construction works were "conveniently done" so far as the period of that work extended beyond the periods for the relevant "fee zones" put forward by the appellants at trial in the Amended Initial Delivery Program ("the Amended IDP").[433] As the balance of the issues in relation to liability should be resolved in the appellants' favour it follows that the appeals against the Court of Appeal of the Supreme Court of New South Wales' dismissal of their claims should be allowed and the orders proposed by Gordon and Edelman JJ should be made.

262 So far as the ground of appeal against the rejection of the recovery of litigation funding costs is concerned, I agree with Gordon and Edelman JJ that they are not recoverable by the appellants for the reasons their Honours state.[434]

Elements of private nuisance

263 It will be rare that a determination of the content of the common law of Australia in the present day, especially so far as concerns a tort, will be as dependent as this case is on the common law of England and Wales. That this is so in this case is because the common law of this country and that of England and Wales in relation to private nuisance are both derived from the influential judgment of Bramwell B in *Bamford v Turnley*.[435] Bramwell B's judgment has been

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433 Reasons of Gordon and Edelman JJ at [137].

434 Reasons of Gordon and Edelman JJ at [166]-[171].

435 (1862) 3 B & S 66 [122 ER 27].

repeatedly cited and applied over many years in England and Wales[436] as well as by this Court.[437] Thus the scope of the debate in this Court concerned the meaning and effect of *Bamford* and the cases that have applied that decision. Neither party submitted that any social or other factors prevailing in this country or any development in Australian law warranted any approach other than determining what *Bamford* stands for and how it has been interpreted. This Court was not invited to reformulate the principles applicable to private nuisance by, for example, subsuming them into the law of negligence as occurred with the rule in *Rylands v Fletcher*.[438]

Bamford *and* Fearn

264 In *Bamford*, Bramwell B described the applicable principle as being that "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action".[439] His Lordship described this as a "rule of give and take, live and let live".[440] In *Bamford*, the Court found that the defendant's use of his land as a brick kiln to burn bricks to build his house was not a common and ordinary use of the land (although it was "not unnatural nor unusual") and that such a "not unnatural use" could not be justified even if it was only temporary or for the public benefit.[441] The plaintiff's action in private nuisance succeeded.[442]

265 The debate in this Court, and to an extent in the Courts below, about the effect of the case law that has developed from *Bamford* is broadly reflected in the recent competing judgments of Lord Leggatt (for the majority) and Lord Sales (for

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436 See, eg, *Grosvenor Hotel Company v Hamilton* [1894] 2 QB 836 at 841; *West v Bristol Tramways Company* [1908] 2 KB 14; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 299; *Southwark London Borough Council v Tanner* [2001] 1 AC 1 at 15-16; *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 831 [5]; *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1.

437 *Gartner v Kidman* (1962) 108 CLR 12 at 44.

438 (1868) LR 3 HL 330; cf *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

439 *Bamford v Turnley* (1862) 3 B & S 66 at 83 [122 ER 27 at 33].

440 *Bamford* (1862) 3 B & S 66 at 84 [122 ER 27 at 33].

441 *Bamford* (1862) 3 B & S 66 at 83-84 [122 ER 27 at 33].

442 *Bamford* (1862) 3 B & S 66 at 88 [122 ER 27 at 34].

the minority) in *Fearn v Board of Trustees of the Tate Gallery*.[443] Lord Leggatt's distillation of the cases was to the same effect as that of Gordon and Edelman JJ – namely, that to be a private nuisance the defendant's use of land must have caused a substantial interference with the claimant's ordinary use of land[444] *and* either: (a) the activity complained of was not a common and ordinary use of the relevant land;[445] or (b) even if it was a common and ordinary use, it was not "conveniently done".[446] In this context, "conveniently done" means "done with proper consideration for the interests of the" claimant.[447] It is for the person carrying out the activity that causes the substantial interference to demonstrate that it was "conveniently done".

266 Both Lord Leggatt and Lord Sales agreed that the fundamental principle was one of "give and take" as between neighbouring occupiers of land.[448] However, Lord Sales treated the statement of Bramwell B in *Bamford* as a statement of a "simple form of defence"[449] so that, even if a substantial interference with the claimant's land arose out of the common and ordinary use by the defendant of land, the defendant will not be liable if he or she establishes that the use of land was "conveniently done".[450]

267 According to Lord Sales, beyond that "defence", the liability of the defendant turns on an assessment of reasonableness – not of the reasonableness of the defendant's use of the property in the abstract, but of reasonableness as between the two parties located in a particular locality.[451] In making that assessment, the circumstance that the defendant's use was not common and ordinary is not determinative but the parties' respective uses are still "important factor[s]".[452] According to his Lordship, the other factors bearing on the assessment of

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443 [2024] AC 1.

444 *Fearn* [2024] AC 1 at 15 [21].

445 *Fearn* [2024] AC 1 at 17-18 [27], [29].

446 *Fearn* [2024] AC 1 at 17-18 [27]-[28].

447 *Fearn* [2024] AC 1 at 18 [28].

448 *Fearn* [2024] AC 1 at 20 [34] per Lord Leggatt, 53 [158] per Lord Sales.

449 *Fearn* [2024] AC 1 at 56 [166], 75 [233].

450 *Fearn* [2024] AC 1 at 56-57 [166], 75 [233].

451 *Fearn* [2024] AC 1 at 56 [165].

452 *Fearn* [2024] AC 1 at 77 [241].

reasonableness in this context are, or at least include, the duration and extent of the interference, whether the interference was reasonably foreseeable, whether the claimant's own use of land aggravated the conflict between the parties' respective uses of their land[453] and the self-help measures available to the claimant to abate the interference.[454]

268 Unlike the approach adopted in some Australian cases,[455] his Lordship's approach did not involve an assessment of the social utility of the respective uses.[456] Bramwell B in *Bamford*[457] and Lord Leggatt in *Fearn*[458] reiterated that the social utility of the defendant's use is irrelevant to liability (save insofar as it may concern whether the use is common and ordinary) although Lord Leggatt observed that it may be relevant to the appropriate remedy to grant if a private nuisance is established.[459]

Unreasonableness and onus of proof

269 Read in isolation, the "principle" stated by Bramwell B in *Bamford* could be construed as only specifying the circumstances in which defendants will not be liable in private nuisance and does not otherwise address the circumstances in which they will be liable. However, such an approach reads Bramwell B's statement out of context and is inconsistent with the result in *Bamford*, where the uncommon character of the defendant's use that occasioned the substantial interference was determinative in the holding that the plaintiff succeeded in private nuisance. I otherwise agree with the analysis of Gordon and Edelman JJ of the authorities both in England and Wales and in this country that have considered *Bamford*.

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453 *Fearn* [2024] AC 1 at 57 [167].

454 *Fearn* [2024] AC 1 at 69-70 [214]-[215].

455 See *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 at 310 [118]; *Marsh v Baxter* (2015) 49 WAR 1 at 48 [288].

456 *Fearn* [2024] AC 1 at 73 [226].

457 (1862) 3 B & S 66 at 82 [122 ER 27 at 32].

458 [2024] AC 1 at 43-44 [121]-[122].

459 *Fearn* [2024] AC 1 at 43-44 [121]-[122].

270 While "[t]he idea of reasonableness" has been (accurately) described as being "firmly embedded in the law of nuisance",[460] the relevant questions are at what point and how is "reasonableness" to be applied in this context? To adopt an approach of simply balancing various factors under the rubric of "reasonableness" or, as Lord Sales described it, the application of an "open-textured objective reasonableness standard"[461] risks turning even the simplest of private nuisance cases into a broad-ranging, prolonged and expensive inquiry out of all proportion to the interests at stake and the capacity of the parties to litigate. The position will only be worse if, at the point of determining whether there is a private nuisance, courts are required to undertake some normative assessment of the social utility of the parties' respective uses, especially if one party is a public authority and the other is a private citizen or corporation. Common law tests that impose such obligations on courts warrant particular scrutiny.

271 True it is that assessments of "reasonableness" inform many elements of various torts.[462] However, such assessments of reasonableness are usually undertaken within confined parameters[463] and in circumstances where it is clear which party bears the legal or evidential onus of proof to establish the reasonableness of certain matters or conduct.[464] In this case no clear parameters guiding the assessment of "reasonableness" were suggested or are otherwise apparent. While Lord Sales' approach would appear to accept that whether the substantial interference with the plaintiff's use or enjoyment of the land arose out of something other than a common and ordinary use of the defendant's land is an "important factor" in the assessment of reasonableness,[465] that factor did not enjoy

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460 *Gartner* (1962) 108 CLR 12 at 47.

461 *Fearn* [2024] AC 1 at 78 [242].

462 For example, the concept of "reasonableness" in the tort of negligence (see, eg, *Tame v New South Wales* (2002) 211 CLR 317 at 330 [8], 379 [185]; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 333 [2], 337-338 [18], 345 [43], 371-372 [136], 406 [271]), the role of reasonableness in assessing damages (see *Stewart v Metro North Hospital and Health Service* (2025) 99 ALJR 1348 at 1354-1355 [24]-[28]; 424 ALR 468 at 475-476) and the concept that, to raise successfully a defence of self-defence to an alleged tort of battery, the defendant can have used no more than "reasonable" force (see, eg, *Fontin v Katapodis* (1962) 108 CLR 177).

463 See, eg, *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

464 See, eg, *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200 at 218; *Watts v Rake* (1960) 108 CLR 158 at 159; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 22.

465 *Fearn* [2024] AC 1 at 77 [241].

that status in the Court of Appeal in this case.[466] While both the concept of reasonableness and many of the factors identified by Lord Sales that bear on that assessment of reasonableness are also applicable to the approach stated by Gordon and Edelman JJ (and Lord Leggatt), the latter approach provides a more structured framework in which that assessment is to be undertaken.

272 Moreover, as the course of these proceedings illustrated, if establishing a cause of action in private nuisance requires an open-textured assessment of "reasonableness" then there is a real risk of uncertainty as to who is required to prove what in undertaking that assessment. As explained below,[467] the Court of Appeal proceeded as if the appellants bore the onus of proving what was a reasonable period in which to construct the SLR. A similar assumption appears to have informed the respondent's approach at trial.

273 If it were an element of private nuisance that a claimant, such as the appellants, had to prove what would have been a reasonable time in which to complete the alleged wrongdoer's construction activity, the tort of private nuisance would not serve to vindicate rights attaching to ownership of, or the claimant's ability to use or enjoy, land, much less would it conform with the principle of give and take. Instead, it would mean that private nuisance would become a cause of action that was generally only available to a select few and would yield a principle of take and then take some more. Such an approach would mean that the larger the interference with a claimant's land and the more expansive the undertaking on the defendant's land, the greater the financial and other burdens imposed on the claimant in demonstrating that the defendant's undertaking was not being conducted reasonably or being completed in a reasonable time, even though the party in the best position to adduce evidence on that topic is the defendant and not the claimant. The possible availability of litigation funding to a select class of claimants whose claims involve interferences with the property interests of a large class of persons would not obviate that problem.

274 The approach of Gordon and Edelman JJ, with which I agree, places the burden of proof on the claimant to establish that there was a substantial interference with the common and ordinary use of the claimant's land arising out of the defendant's use of his or her land. If the claimant establishes such an interference, the defendant bears the legal onus of proof of establishing that his or her use was common and ordinary and was conveniently done; ie, that it was undertaken with a proper consideration for the interests of the claimant (although there is an evidentiary onus on the claimant to identify the respects in which the defendant's

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466 See below at [283]-[289].

467 See below at [284]-[287].

use of land is not conveniently done[468]). This approach to the onus of proof accords with what can be reasonably expected of the party undertaking the activity that occasions the substantial interference with the other's use and enjoyment of the land. That party is in the best position to demonstrate that what he or she was doing was "conveniently done". If that party asserts that the impugned acts were carried out with appropriate expedition and by taking reasonable steps to minimise the inconvenience to the claimant, then that party ought to be the one to prove it. If it is said that there are reasonable steps available to the claimant, consistent with the claimant's common and ordinary use of the land, to mitigate the effects of the defendant's conduct then the defendant must demonstrate what those steps are and their effect.

Stultifying land development

275 One of the concerns raised by Lord Sales in *Fearn* about treating the principle stated by Bramwell B in *Bamford* as specifying the elements of a cause of action in private nuisance was that the principle does not address the circumstance where neither party uses the land in a manner that is common and ordinary.[469] However, parties who use their own land in a manner that is not common and ordinary do not become outlaws so far as the protection of the law of private nuisance is concerned. Instead they merely do not gain protection for a substantial interference with that particular use of the land at the expense of their neighbours' right to use their property as they see fit. The protection for common and ordinary uses of their land still subsists.

276 In *Fearn*, Lord Sales was also concerned that to treat the principle stated by Bramwell B in *Bamford* as specifying the elements of a cause of action in private nuisance risked the unjustified stultification of land development and conflicted with the policy of the law that people who own land are free to use that land as they wish.[470] There is force in that concern. However, that concern is best accommodated by the approach of Lord Leggatt and that of Gordon and Edelman JJ, and by recognising that assessments of the nature of the locale as well as what is a common and ordinary use take place at the appropriate level of abstraction so that providing protection against substantial interferences with common and ordinary uses of land within a particular locale does not mandate uniformity in the use of that land. Otherwise, the approach of Gordon and Edelman JJ accommodates changes in land use in that uses of land that are unusual within a particular locality that do not occasion a substantial interference with the common and ordinary uses of the land of other persons are not actionable. Over

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468 Reasons of Gordon and Edelman JJ at [111].

469 *Fearn* [2024] AC 1 at 74 [229].

470 *Fearn* [2024] AC 1 at 74 [230].

time the manifestation of such unusual uses in a locality may result in their becoming common and ordinary uses in that locality in their own right. While planning permission is not decisive, the forms of use permitted by planning controls can form part of the assessment of common and ordinary uses within a particular locality.[471]

The cases below and the grounds of appeal

277 As Gordon and Edelman JJ note, at trial the appellants identified three bases for the respondent's liability in private nuisance: Case A, Case B and Case C. Case B can be put aside, as it failed on the facts before the primary judge and that finding was not challenged in the Court of Appeal.[472]

278 Case A relevantly asserted that: (i) the respondent was responsible for the construction works, which substantially interfered with the enjoyment by the appellants of their rights as occupiers of the land on which they conducted their businesses; (ii) the construction works did not constitute a common and ordinary use of the land; (iii) s 43A of the *Civil Liability Act 2002* (NSW) was not applicable; and (iv) a defence of statutory authority was not made out. Case A contended that there was a private nuisance for the entire period that there was a substantial interference with the appellants' common and ordinary use of the land.

279 Case C was similar to Case A except that Case C was put on the basis that, assuming it was found that the construction works constituted a common and ordinary use of the land, then the respondent failed to discharge its onus of proving that it took reasonable and proper precautions to prevent disruption to the appellants (and other group members). As part of Case C, the appellants submitted to the primary judge that, if the construction works constituted a common and ordinary use of the land, the Court should find that the continuation of the construction of the SLR was not reasonable beyond a certain duration. The appellants submitted that the only available guide before the Court as to the period for which the construction works were reasonable was the original Initial Delivery Program as reformulated in the Amended IDP.

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471 See reasons of Gordon and Edelman JJ at [110].

472 Case B was put on the basis that s 43A of the *Civil Liability Act 2002* (NSW) ("CLA") was engaged and thus the appellants had to prove (in addition to the elements of private nuisance) that the conduct of the respondent was "in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of ... its power": CLA, s 43A(3). The primary judge did not accept that contention and that finding was not challenged on appeal. Case B would only be relevant in this Court if s 43A of the CLA were engaged. It is not engaged.

280 Thus, by closing submissions at the trial Case C appears to have been confined to a claim for private nuisance in respect of only part of the period during which the construction works, according to the appellants, created a substantial interference with the appellants' ordinary use of the land, being that period for which the continuation of the construction works was not reasonable. Further, both Case A and Case C were put on the basis that the elements of a private nuisance accorded with what was stated by Lord Leggatt in *Fearn*[473] and identified in this Court by Gordon and Edelman JJ.

The primary judge's findings and approach

281 The primary judge found that there was a substantial interference with the store of the first appellant in each appeal in the Strand Arcade on George Street between November 2015 and December 2017 and the restaurant of the second appellant in the first appeal (being also the third appellant in the second appeal) on Anzac Parade in Kensington between May 2016 and February 2019 for which the respondent was responsible. There is no challenge to those findings. The primary judge also found that the use of George Street and other roads comprising the SLR route for the purpose of constructing the SLR was not a common and ordinary use of those roads.

282 However, the primary judge did not accept that the law of private nuisance in Australia accorded with that stated by Lord Leggatt in *Fearn*. Instead, his Honour adopted an approach similar to that of Lord Sales save that his Honour considered that one factor bearing on the assessment of reasonableness is "the benefit of the [defendant's] activities to the public" – a factor not addressed by Lord Sales in *Fearn*.[474] The primary judge accepted that the "[respondent] must have been entitled to arrange for the construction of the SLR along the specified route" because "[n]ot all interferences or impacts will give rise to an actionable nuisance" and that "[t]he principle of give and take permits landowners to use their land reasonably". However, his Honour was not satisfied that the respondent exercised reasonable care to protect the interests of business owners along the light rail route. His Honour concluded that the Amended IDP put forward by the appellants represented an appropriate measure for determining the point at which the continuation of the interference with the land became unreasonable.

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473 In this Court, the appellants sought to mount a variant on Case C which reflected the approach of Lord Sales in *Fearn* [2024] AC 1. In light of the view I take of the elements of private nuisance, that issue need not be resolved.

474 [2024] AC 1 at 73 [226]. See also above at [268].

The Court of Appeal's judgment

283 The Court of Appeal agreed with the primary judge's conclusion that the approach of Lord Sales in *Fearn* is more consistent with the law of private nuisance as developed in this country and rejected a challenge to the primary judge's conclusion that the construction works were not a common and ordinary use of the roads. However, the Court of Appeal upheld the challenge to the finding that, to the extent that the construction of the light rail took longer than the timeframes identified in the Amended IDP, there was actionable private nuisance.

284 The Court of Appeal considered that "the premise of the reasoning advanced by the [appellants in this Court] and adopted by the primary judge was that the occupation of the fee zones became tortious after the expiry of the times in the [A]mended IDP, with those times being based upon complete knowledge of the utilities prior to construction commencing". The Court of Appeal reasoned that, if that were to be the basis of liability, then the appellants had to establish two propositions: "first, that it was possible in some rational way to obtain complete knowledge of the utilities prior to construction"; and secondly, if that were possible, "how much interference would that investigation cause". The Court of Appeal considered that the first of those propositions was not established, and that it was "far from self-evident" that any pre-construction investigation would have reduced the interference with the appellants' enjoyment of the land. Further, the Court of Appeal reasoned that, even if those propositions were established, Case C failed because the appellants "did not demonstrate when the time taken for construction became actionable nuisance in light of the number of sub-surface utilities that needed to be treated for the purposes of construction. Whether the time in fact taken [in the construction of the SLR] in light of that universe of practical issues and challenges was unreasonable was not the subject of evidence or analysis."

Difficulties with the Court of Appeal's approach

285 Even if one accepts the primary judge's analysis of the law of private nuisance as stated by Lord Sales in *Fearn*, as the Court of Appeal said it did, the appellants did not have to establish any of the matters just noted to make out either Case A or Case C. Those propositions would only be necessary to establish a private nuisance if an essential integer of the appellants' case was that they had to prove that the time taken to construct the SLR was unreasonable. The appellants never purported to assume such a burden and the primary judge did not find that any such burden was imposed on the appellants.

286 Consistent with the primary judge's embrace of Lord Sales' reasoning in *Fearn*, his Honour's findings represented an assessment that, in all of the circumstances of the case, including the relationship between the appellants and respondent, the interference with the appellants' use and enjoyment of the land for the period beyond that specified in the Amended IDP was unreasonable. However,

the primary judge neither assumed nor found that the time periods in the Amended IDP represented a reasonable period to construct the SLR.

287 On the primary judge's and Lord Sales' approach the reasonable time it would take to construct the SLR is at most only a factor in the assessment of what is "reasonable".[475] Let it be supposed that it was affirmatively demonstrated that the minimum reasonable time to construct the SLR was 20 years. It could not be seriously doubted that, even though that was the minimum reasonable time it would take to construct the SLR, a substantial interference with the appellants' properties for that period as a result of the construction of the SLR would still amount to a private nuisance given that it would effectively destroy those properties of any utility whatsoever.

288 Ground 1 of the appeals contends that the Court of Appeal erred in holding that the substantial interference to the appellants caused by the respondent's uncommon and extraordinary use of land along the SLR route was not sufficient to establish actionable private nuisance. It follows that, subject to the issues raised by the respondent's notices of contention, this ground should be upheld and the appeals allowed.

289 Ground 2 contends in the alternative that the Court of Appeal erred in holding that the appellants had not established that the respondent's use of the land was unreasonable. This ground is predicated on an acceptance of the approach of Lord Sales in *Fearn*. As explained, the Court of Appeal appeared to accept that approach, but failed to apply it. However, as that predicate is not established this ground does not arise.

Notices of contention – common and ordinary use

290 One ground of the respondent's notices of contention is that the Court of Appeal's orders should be sustained on the basis that the "construction" of the SLR, "being duly authorised by statute and development approvals", amounted to a common and ordinary use of the land.

291 In addressing this contention it is important to note that what constituted the interference with the appellants' use of their land was neither the infrastructure of the SLR as finally constructed nor the operation of the SLR but the construction activities undertaken to build the SLR.

292 As noted, the primary judge found that the use of George Street and other roads comprising the SLR route "for the purposes of constructing the light rail" was not a "common and ordinary use of those roads". The Court of Appeal's conclusion was arguably wider in that their Honours noted that the "roadway and

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475 *Fearn* [2024] AC 1 at 57 [167].

footpath were occupied for the purpose of construction, in part to do work, in part to store equipment and materials, but mostly because it was not possible to complete the works [to construct the SLR] because of other steps which had first to be taken (such as treating thousands of utilities)". Their Honours concluded "[t]hat was not an ordinary use of the land dedicated as a road" because the "essential aspect of land being a road is that there be a right of public passage". On one reading of those findings, the use of land dedicated as a road for construction per se is not a common and ordinary use of that land, at least where rights of public passage are obstructed.

293 The respondent's challenge to this aspect of the primary judge's and the Court of Appeal's findings accepted that some restraint was required before such (concurrent) findings are interfered with, but submitted that was less so where those findings were described by the respective Courts as being of "relative insignificance" or not having "the significance that the [appellants] suggest", whereas that characterisation now assumes a much greater significance in this Court. That can be accepted. Further, if the Court of Appeal is to be taken as having found that the use of land dedicated as a public road for any construction the effect of which is to obstruct the public's right of way is not a common and ordinary use of such land, then their Honours erred as a matter of principle.

294 The statement by Lord Leggatt in *Fearn* that the "right to build (and demolish) structures is fundamental to the common and ordinary use of land"[476] is as valid in this country[477] as it is in England and Wales.[478] Leaving aside any consideration of the particular locale, the position is no different for land being used as a road as opposed to a dwelling. If anything, more allowance and not less should be afforded for give and take in relation to construction on a road even where that construction obstructs the public's use of the road. Of their nature roads will incur wear and tear and may need to be upgraded or have facilities like footpaths, lights and footbridges erected on or near them. Construction work on land dedicated for a road is very much a common and ordinary use of such land.

295 Given the lack of significance the Court of Appeal attributed to its findings of common and ordinary use it may be that their Honours did not intend to do anything other than affirm the primary judge's finding that the relevant use was "constructing the SLR" rather than construction per se. Even so, in circumstances

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476 *Fearn* [2024] AC 1 at 21 [37].

477 *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 487; *Fisher v Codelfa Construction (Australia) Pty Ltd* (unreported, Supreme Court of New South Wales, 28 June 1972) at 11-12.

478 *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 at 413-414; *Andreae v Selfridge & Co* [1938] Ch 1 at 6-7.

where the substantial interference with the use of the land arises from the process of construction it is far from clear that the authorities support an approach to characterisation of the relevant use that looks beyond the construction activity to what is being constructed. I am inclined to the view that, where the substantial interference arises from the activity of demolition and building, the relevance of what is being constructed and the time taken to undertake the construction are matters that form part of the assessment of whether the construction activity is being "conveniently done" rather than whether or not the use of the land for construction of that thing is common and ordinary.[479] This is especially so in a case such as this where the operation of the infrastructure that is being constructed (ie, the SLR) is the subject of statutory authorisation.[480]

296 However, even if the relevant use of the land was to be characterised as the construction of the SLR, I would still regard that as an ordinary and common use of the land in question, especially when regard is had to its locality.

297 According to the primary judge, the SLR "commences at Circular Quay and runs through the heart of Sydney via one of Sydney's main streets, George Street" and then proceeds up through "dense and busy areas such as Surry Hills and along one of Sydney's south-eastern thoroughfares, Anzac Parade, before branching off into two lanes, one from Centennial Park to Randwick along Alison Road and the other from Moore Park to Kingsford (via the University of New South Wales) along Anzac Parade". Anzac Parade has multiple lanes. The primary judge found that the northern part of George Street "near The Rocks" was the first road built in Australia by European settlers and, over a period of more than 200 years, "it has been modified and developed to become one of the busiest (if not, the busiest) street in Australia". Trams operated along George Street until 1958 when the tram tracks were removed. After that time, it was open for exclusive use by vehicular and pedestrian traffic, including buses. The buildings lining this part of George Street are multi-storey. George Street attracts international tourists, although the construction works impacted tourism on the street.

298 I have already referred to the necessity to characterise both the locale and the common and ordinary use of land within that locale at the appropriate level of abstraction to accommodate an owner's right to enjoy their property and the flexible development of land overall. The characterisation of locale can often be

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479 See, eg, *Andreae* [1938] Ch 1 at 6-7. See also *Harrison* [1891] 2 Ch 409 at 413-414; *Don Brass Foundry* (1948) 48 SR (NSW) 482 at 487; *Fisher* (unreported, Supreme Court of New South Wales, 28 June 1972) at 11-12.

480 *Transport Administration Act 1988* (NSW), ss 3C, 3D, 3E(1), read with Sch 1, cll 3, 9.

no more specific than "agricultural",[481] "residential"[482] (including "closely populated"[483]) or "industrial".[484] The locale of the route of the SLR is appropriately described as a mixture of densely urban, commercial and concentrated retail. So far as land dedicated as a road in that locale is concerned, its significance is as a land corridor to facilitate the movement of large numbers of people for work, entertainment, shopping and tourism. Even absent statutory authorisation, I would not regard what is effectively the operation of something akin to a tram on a road in such a locale as an uncommon use of land previously used as a road. Similarly, I would not regard the activity of constructing something akin to a tram on a road in such a locale as an uncommon use where the activity of construction of a new and substantially improved road on that land would not be such a use either.

299 Accordingly, I would uphold this ground of the respondent's notices of contention. As I do not accept that either s 43A of the *Civil Liability Act* applies to this proceeding, or the statutory authorisation aspect of the respondent's case is made out, the effect of the above is that Case C as articulated at trial is made out subject to the respondent discharging the onus it bore of proving that such use was "conveniently done". As I have explained, the forensic contest at the trial in relation to Case C concerned interference with the appellants' use of the land beyond the periods identified in the Amended IDP. As noted by Gordon and Edelman JJ,[485] the respondent did not discharge that onus in relation to those periods.

Balance of issues raised by the notices of contention

300 I agree with Gordon and Edelman JJ in relation to the operation and application of s 43A of the *Civil Liability Act* and the respondent's defence of statutory authority.

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481 *Gartner* (1962) 108 CLR 12 at 48; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [311].

482 *Husey v Bailey* (1895) 11 TLR 221 at 222; *Don Brass Foundry* (1948) 48 SR (NSW) 482 at 484; *Fisher* (unreported, Supreme Court of New South Wales, 28 June 1972) at 1.

483 *Pittar v Alvarez* (1916) 16 SR (NSW) 618 at 625.

484 *Dunstan v King* [1948] VLR 269 at 272.

485 Reasons of Gordon and Edelman JJ at [135]-[137].

Appeal and litigation funding costs

301 As noted, I agree with Gordon and Edelman JJ that the ground of appeal in relation to the recoverability of litigation funding costs should be rejected for the reasons their Honours give.

Orders

302 I agree with the orders proposed by Gordon and Edelman JJ.