HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S20/2025
File Title:	Hunt Leather Pty Ltd ACN 000745960 & Anor v. Transport fo
Registry:	Sydney
Document filed:	Form 27A - Appellants' Joint submissions (S20/2025; S21/202
Filing party:	Appellants
Date filed:	13 Mar 2025

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S20 of 2025

BETWEEN: HUNT LEATHER PTY LTD ACN 000745960
First Appellant

ANCIO INVESTMENTS PTY LTD ACN 136917041
Second Appellant

- and -

TRANSPORT FOR NSW
Respondent

No. S21 of 2025

BETWEEN: HUNT LEATHER PTY LTD ABN 46000745960
First Appellant

SOPHIE IRENE HUNT
Second Appellant

ANCIO INVESTMENTS PTY LTD ABN 50319048217
Third Appellant

NICHOLAS ZISTI
Fourth Appellant

- and -

TRANSPORT FOR NSW ABN 18804239602
Respondent

APPELLANTS' SUBMISSIONS

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PART I: CERTIFICATION

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

PART II: ISSUES

2. The issues arising on the appeals are:

   (a) whether, to make out a claim in private nuisance, it was sufficient for the appellants to show a substantial interference with the use and enjoyment of their land, by a use of land by the respondent that was not common or ordinary;

   (b) if the appellants were required also to demonstrate that the defendant's use of the land was "unreasonable", whether that requirement was satisfied;

   (c) whether a litigation-funded plaintiff can recover reasonable litigation funding costs from a defendant by way of damages in tort.

PART III: SECTION 78B NOTICE

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

PART IV: DECISIONS BELOW

4. The main decision of the primary judge is *Hunt Leather Pty Ltd v Transport for NSW* [2023] NSWSC 840 (**PJ**). A set of reasons amending the primary reasons under the slip rule is *Hunt Leather Pty Ltd v Transport for NSW (No 3)* [2023] NSWSC 1598. A third set of reasons, relevant to ground 3 of the appeals, is *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140 (**PJ2**).[1] The decision of the Court of Appeal is *Transport for NSW v Hunt Leather Pty Ltd* [2024] NSWCA 227 (**CA**).

[1] The primary judge delivered a fourth set of reasons, *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 776, allowing the appellants only a portion of their trial costs. This was the subject of a separate appeal to the Court of Appeal but not determined in the light of the outcome on appeal.

PART V: RELEVANT FACTS

5. The appellants operated businesses along the route of the Sydney Light Rail. **Hunt Leather** Pty Ltd, whose Chief Executive Officer was Ms Sophie Hunt, operated two retail stores along George Street in the Sydney CBD, relevantly including one in leased premises facing George Street in the Strand Arcade. **Ancio** Investments Pty Ltd, whose sole director was Mr Nicholas Zisti, was the trustee of a trading trust that operated various restaurants from premises leased on Anzac Parade in Kensington: CA [2]-[3]; PJ [11].

6. The primary judge upheld the appellants' claims in private nuisance. His Honour found that the construction of the light rail was not a common and ordinary use of land (PJ [656]) and caused a substantial interference with the amenity and use of the land from which the appellants operated their businesses, having regard to the noise and dust generated by the regular use of jackhammers, grinders, diggers and heavy vehicles adjacent to the store, and to the presence of hoardings and barricades: PJ [839], [864], [868], [909].

7. The primary judge found that the respondent's occupation of the rail corridor was not tortious from the outset, but became a nuisance at the point at which delays in the project meant that the interference ceased to be reasonable: PJ [919]. That finding was based on the opinion of the appellants' programming expert, Mr Griffith: PJ [495]. The primary judge accepted Mr Griffith's evidence that insufficient pre-contract utility surveys had been undertaken by the respondent, and that if undertaken the occupation would have been for the shorter periods reflected in an "amended IDP" prepared by Mr Griffith: PJ [487], [495], [819], [936]. The Initial Delivery Program (**IDP**) was the programme provided by the head contractor under its Project Deed with the Respondent which set out start and finish dates for work in each zone along the light rail route by reference to approximately 4,600 activities identified in extensive detail: PJ [229], [247]-[250]. The amended IDP was Mr Griffith's expert assessment, after analysis of the individual activities in the IDP, of the reasonable duration of those activities had additional precontract utility surveys been undertaken: PJ [495]. The primary judge also found that the respondent had not demonstrated that the substantial

interference was an inevitable consequence of the exercise of a permissive statutory authority (PJ [834]) or that it acted with reasonable care (PJ [820]).

8. The primary judge found that Hunt Leather suffered a substantial interference for 25 months (PJ [875]) and Ancio for 33 months (PJ [909]). Those findings were not challenged on appeal. However, the primary judge awarded damages to the appellants for the lesser periods of 1 November 2015 to 3 December 2017 (for Hunt Leather) and 27 January 2017 to 28 February 2019 (for Ancio): PJ [875], [909].[2] These periods, his Honour found, were consistent with the amended IDP and reflected "the 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": PJ [936]. The primary judge awarded damages to Hunt Leather in the amount of $3,693,164[3] and to Ancio in the amount of $317,713.[4] Those awards did not allow for the litigation funder's commission, which the primary judge found was not recoverable as damages (PJ2 [90]-[123]).

9. The Court of Appeal confirmed the primary judge's findings that it was not a common and ordinary use of the land (CA [122]) and that the Respondent failed to prove either inevitable consequence (CA [134]) or that it acted with reasonable care (CA [105]), but upheld the respondent's appeal against the decision of the primary judge that the appellants had made out a case in nuisance. Like the primary judge, the Court of Appeal considered that under Australian law, unlike in the United Kingdom, it was not sufficient for a plaintiff in a nuisance claim to demonstrate substantial interference with their enjoyment of their land by a use that was neither common nor ordinary; the appellants also needed to show that the respondent's use of the land was unreasonable: CA [118]-[119].[5] Unlike the primary judge, however, the Court of Appeal found that no actionable nuisance had been established. That is because, on the Court of Appeal's reasoning, it was

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[2] As amended under the slip rule in *Hunt Leather Pty Ltd v Transport for NSW (No 3)* [2023] NSWSC 1598 at [9]-[12].

[3] Orders made on 15 December 2023.

[4] Orders made on 8 February 2024.

[5] Although the reasons at CA [107]-[126] are directed to a ground of the appeal to that Court, they must also be read as its reasons for dismissing ground 1 of the appellants' appeal based on the *Bamford* principle (which appeal the Court of Appeal referred to as the "cross-appeal" and dismissed in whole without specifically addressing ground 1: CA [211], order 2).

not open to the primary judge to use Mr Griffith's evidence to inform the point in time at which the interference became unreasonable: CA [92]-[96].

10. The proceedings come to this court by way of two appeals. The first (S20 of 2025) is an appeal against the Court of Appeal's decision to dismiss the appellants' appeal against the primary judge's findings that: (i) there was not an actionable nuisance for the whole of the period of substantial interference, but only from the point at which the delay rendered the use of the land unreasonable; and (ii) the litigation funder's commission was not recoverable as damages. The second (S21 of 2025) is an appeal against the decision below allowing the respondent's appeal against the primary judge's finding that there was an actionable nuisance for the lesser periods of interference.

PART VI: ARGUMENT

Substantial interference with the enjoyment of land by a use not common or ordinary (ground 1)

11. The following relevant principles of private nuisance are established by a long line of authority. First, a substantial interference with a plaintiff's enjoyment of land caused by a use of land by a defendant which is not common or ordinary, gives rise to an actionable nuisance without more for the whole of the period of the substantial interference. There is no separate onus on the plaintiff to demonstrate that the use of land is unreasonable. Second, where the substantial interference is in the exercise of a permissive statutory authority, it is a partial or complete defence to the extent that the defendant can prove that part or the whole of the period of the interference was the inevitable consequence of that exercise.[6] Third, a common and ordinary use of land causing a substantial interference will also be actionable nuisance unless the defendant can show that it was "conveniently done".[7]

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[6] PJ [824], [825]; *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319 at [49]-[50]; *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391 at 397-398; *Benning v Wong* (1969) 122 CLR 249 at 325; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 at [123].

[7] ***Bamford*** *v Turnley* (1862) 3 B & S 62 at 83-84; 122 ER 25 at 33; ***Andreae*** *v Selfridge & Co* [1938] 1 Ch 1 at 5.8-6.3; 6.5-7.1; 9.4-10.6; *Gartner v Kidman* (1962) 108 CLR 12 at 44; ***Southwark*** *London*

12. The Court of Appeal departed from settled authority tracing back to Bramwell B's seminal statement of the law in ***Bamford*** *v Turnley* (1862) 3 B & S 62 at 83-84; 122 ER 25 at 33, recently re-endorsed by the Supreme Court of the United Kingdom in ***Fearn*** *v Board of Trustees of the Tate Gallery* [2024] AC 1; [2023] 2 All ER 1. The test for private nuisance was stated by Bramwell B as follows:

> 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 not comprehend the present [case], where what was being done was not the using of the land in a common and ordinary way, but in an exceptional manner – not unnatural nor unusual, but not the common and ordinary use of land ... The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.[8]

13. Private nuisance is concerned with balancing the competing interests of occupiers of adjoining land.[9] Its governing principle is reciprocity, as an element of good neighbourliness: "a landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him".[10] The tort is committed where an occupier or owner causes a substantial interference by putting land to "unusual purposes", as distinct from "the ordinary purposes for which [the land] and all the different parts of it were constructed".[11]

14. For that reason, "it is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land".[12] A use of land may be reasonable but nonetheless interfere with the "live and let live" principle that the law of nuisance protects. "[T]here 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".[13] That is why it may be a nuisance to keep horses in stables

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Borough Council v Tanner [2001] AC 1 at 16C-D, 21A-B; ***Fearn*** *v Board of Trustees of the Tate Gallery* [2024] AC 1 at [28].

[8] *Bamford* (1862) 3 B & S 62 at 83-84; 122 ER 25 at 33.

[9] *Southwark* [2001] 1 AC 1 at 20 (Lord Millett). See also *Ball v Ray* (1873) LR 8 Ch App 467 at 469 (Lord Selborne) ("there are always two things to be considered, the right of the Plaintiff and the right of the Defendant") and *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 (Lord Wright) ("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").

[10] *Southwark* [2001] 1 AC 1 at 20 (Lord Millett).

[11] *Ball v Ray* (1873) LR 8 Ch App 467 at 469-470 (Lord Selborne).

[12] *Southwark* [2001] 1 AC 1 at 20 (Lord Millett).

[13] *Broder v Saillard* (1876) 2 Ch D 692 at 701 (Jessel MR).

adjacent to a residential property, "although the horses may be ordinarily quiet" and "not … uncommon horses in any way"; the tort occurs because immediate proximity to dwelling-houses "is not a proper place to keep horses".[14] If land adjacent to a house is turned into a stable, "we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of neighbour's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with".[15] Similarly, "it may in one sense be quite reasonable to burn bricks in the vicinity of convenient deposits of clay but unreasonable to inflict the consequences upon the occupants of nearby houses".[16]

15. That reasoning underpinned the finding in *Bamford* that the trial judge had misdirected the jury by directing them to return a verdict for the defendant if satisfied that the interference caused to the plaintiff was "a reasonable use by the defendant of his own land". Though the use of land for brick-kilns was not itself unreasonable, there was an action in nuisance because the use rendered the plaintiff's house "unfit for health or comfortable occupation" and "was not the using of land in a common or ordinary way".[17]

16. The *Bamford* test has been applied on many occasions, including recently by the Supreme Court of the United Kingdom in *Fearn*. The Court of Appeal expressly departed from the approach of the Supreme Court in *Fearn* and instead favoured the dissenting reasons of Lord Sales (CA [118]-[119]). In *Fearn*, a public viewing gallery in the Tate Modern enabled visitors to see straight into the nearby residential flats of the plaintiffs. The viewing gallery was found not to be a common and ordinary use and to cause a substantial interference with the plaintiffs' use of their property. Private nuisance was made out on that basis. A multifactorial approach based on reasonableness was rejected by the majority as

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[14] *Broder v Saillard* (1876) 2 Ch D 692 at 701-702 (Jessel MR).
[15] *Ball v Ray* (1873) LR 8 Ch App 467 at 470 (Mellish LJ).
[16] *Southwark* [2001] 1 AC 1 at 15-16 (Lord Hoffman).
[17] See *Bamford* (1862) 3 B & S 62 at 73-74; 122 ER 25 at 29 (Williams J).

unprincipled, "entirely open ended and lacking in content" and contrary to the long-standing authority of *Bamford* endorsed by numerous cases.[18]

17. The Court of Appeal and the primary judge considered that the law as it had developed in Australia was more consistent with the multifactorial approach taken by Lord Sales in dissent. The Court of Appeal fixed upon particular references to reasonableness in the case law. Each of those references, however, referred to reasonableness as the policy underpinning the law of nuisance, rather than a test independent of whether the use of land was common or ordinary.

18. ***Gartner*** *v Kidman* (1962) 108 CLR 12 (cited at (CA [119]-[121])) concerned riparian rights of drainage. After a careful review of the authorities dealing with those rights, Windeyer J (with whom Dixon CJ agreed[19]) held that a landowner was entitled to block the natural passage of surface water from neighbouring land such that a greater quantity of water remained on the upper land. That conclusion was said to "accord[ ] with the broad principles of the law of nuisance" (at 46). Far from rejecting the *Bamford* principle, Windeyer J cited with approval Bramwell B's "formulation[ ] of the law of nuisance" (at 44). His Honour took Bramwell B's reference to acts "conveniently done" to be a reference to acts done in a "reasonable and proper manner", in contrast to use that was not a common and ordinary use of land (at 44). It is in that context that his Windeyer J's references to reasonable care and necessity must be read. Windeyer J's statement that the "idea of reasonableness … is firmly embedded in the law of nuisance to-day" (quoted at CA [120]) was a distillation of the *Bamford* principle, not an articulation of some other, super-added test.[20]

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[18] *Fearn* at [20], [24]-[35] (Lord Leggatt, Lords Reed and Lloyd-Jones agreeing). Those cases include ***Cambridge Water Co*** *v Eastern Counties Leather plc* [1994] 2 AC 264 at 299E, 299H-300A (Lord Goff, the other Lords agreeing); *Southwark* [2001] AC 1 at 15D-16G (Lord Hoffmann), at 20C-21G (Lord Millett), with both of whom the other Lords agreed at 7, 16; *Lawrence v* ***Fen Tigers*** *Ltd* [2014] AC 822 at [5] (Lord Neuberger, with whom Lords Sumption at [154], Mance at [162] and Clarke at [169] agreed); *Jalla v Shell International Trading and Shipping Co* [2024] AC 595 at [18].

[19] Indeed, the summary of the law concerning the flow of surface water was "written after the advantage of discussion with the Chief Justice": at 47.

[20] Similarly, in ***Gales Holdings*** *Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514, Emmett JA at [137] cited *Gartner* at 44 for the proposition that acts for the ordinary use and occupation of land "must be done in a reasonable and proper manner and not involve an unnatural or unusual use" (Leeming JA agreeing at [276]; Sackville AJA at [284]). Leeming JA's description at [279] of reasonableness as "a restricting element in nuisance" was in the context of discussing whether reasonable foreseeability should remain the test for remoteness.

19. The Court of Appeal considered that the "examples given" by Jordan CJ in the earlier case of *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 486-487 "illustrate the role played by 'reasonableness' as a restricting element in nuisance": CA [121]. The case does not, however, suggest that reasonableness is a standalone requirement. To the contrary, Jordan CJ's reasoning was a conventional application of *Bamford*: "in considering whether unreasonable inconvenience has been caused, allowance must be made for reasonable give and take" (at 487). Thus, "[a] person dwelling in a locality which is mainly occupied for the carrying on of trades which are inevitably noisy or smoke-producing cannot reasonably expect the same standards of immunity from noise or smoke" as a person living in a residential locality (at 486-487). The examples his Honour gives are referable to what a person can reasonably be expected to endure, in the sense of what constitutes a common and ordinary use of adjacent land.

20. There are other examples of this Court applying the *Bamford* principle. In *Clarey v Principal and Council of the Women's College* (1953) 90 CLR 170, this Court rejected a claim for nuisance arising from the noise emanating from rooms of a boarding house let to students, because "the noises made by the students were only noises of the kind that are incidental to the occupation of premises as a dwelling" (at 175). The Court quoted the reasoning of Lord Selborne in ***Ball v Ray*** (1873) LR 8 Ch App 467 to the effect that "if either party turns his house … to unusual purposes in such a manner as to produce a substantial injury to his neighbour … that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection".[21] Conversely, "[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 such noise" (at 175).[22] The Court's reasoning is consistent with the observation in *Fearn* that

[21] Williams ACJ, Webb, Kitto and Taylor JJ at 176, quoting *Ball v Ray* at 470 (emphasis added).

[22] See also at 176, where the Court quoted *Pollock on Torts*, 15th ed (1951): "The use of a dwelling-house in a street of dwelling-houses, in an ordinary and accustomed manner, is not a nuisance though it may produce more or less noise and inconvenience to a neighbour".

"[f]undamental to the common law of private nuisance is the priority accorded to the general and ordinary use of land over more particular and uncommon uses".[23]

21. In *Elston v Dore* (1982) 149 CLR 480, Gibbs CJ, Wilson and Brennan JJ cited with approval the observation of Lord Atkin in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 that, in determining where the balance is to be struck between the rights of adjoining landowners, "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". Their Honours observed (at 488) that the action of the respondent will only have amounted to a nuisance if it "was not reasonable in the sense to which Lord Wright refers". Reasonableness, in that context, was a compendious reference to the well-understood notion that ordinary uses of land do not amount to a nuisance.

22. This has been explained in other cases by reference to the notion of the "reasonable user – the principle of give and take as between neighbouring occupiers of land, under which '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'".[24] The use of the word "reasonable" in that connection is not to the effect that there is no nuisance if a defendant is only making reasonable use of his land.[25] Rather, it is a shorthand expression of the notion of give and take embedded in the *Bamford* principle.[26]

23. By superimposing on to the law of private nuisance a free-standing requirement of "unreasonableness", the courts below applied a new test of uncertain scope. A generalised enquiry into reasonableness risks blurring the boundaries between nuisance and negligence.[27] It also risks subsuming other limiting principles that have been carefully worked through in the case law. In *Fearn*, the primary judge

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[23] *Fearn* at [24] (Lord Leggatt), citing *Ball v Ray*.

[24] *Cambridge Water Co* [1994] 2 AC 64 at 299 (Lord Goff), quoting *Bamford* (1862) 3 B & S 62 at 83. See also *Woodhouse v Fitzgerald* (2021) 104 NSWLR 475 at [31] (Basten JA), describing "the principle of reasonable user" as "acceptance of those acts necessary for the common and ordinary use and occupation of the particular land".

[25] *Southwark* [2001] 1 AC 1 at 20 (Lord Millett); *Fearn* at [29]. See also *Kraemers v Attorney-General* [1966] TSR 113 at 118 (Burbury CJ) and *Corbett v Pallas* (1995) 86 LGERA 312 at 317 (Priestley JA, with whom Mahoney and Meagher JJA agreed).

[26] ***Barr v Biffa Waste*** *Services Ltd* [2013] QB 455 at [64]-[72] (Carnwath LJ).

[27] As to which, see *Hargrave v Goldman* (1963) 110 CLR 40 at 62 (Windeyer J).

had treated as relevant the fact that the residents of the apartments adjoining the Tate could take remedial steps to avoid the intrusion upon their privacy.[28] Lord Leggatt explained that this reasoning was in error, because it is no defence to an action for invasion of property rights (such as nuisance or trespass) to say that the proprietor could have taken steps to avoid that invasion e.g. by erecting a fence.[29]

24. Another illustration of the capacity for a generalised test of unreasonableness to erode the carefully developed parameters of the cause of action is the primary judge's reasoning in the present case on public benefit. The primary judge found that the construction of the light rail was for the public benefit: PJ [171]-[174], [809]. While recognising that this was not a defence to nuisance, his Honour nonetheless treated it as "an important factor to consider in assessing the issue of reasonableness": PJ [810]. The primary judge reasoned that the public benefit of the Sydney Light Rail "tend[ed] to suggest that the period during which construction activity should be permitted without giving rise to an actionable nuisance should be extensive", though not "never-ending": PJ [916]. That impermissibly treated public benefit as relevant to liability as distinct from remedy. Private nuisance being concerned with the protection of property rights, it is no answer to the interference with those rights that the interference benefits more people than it affects adversely. There is a public benefit to many uses of land for which an adjacent landholder ought properly to be compensated.[30] The public benefit, or otherwise, of a nuisance is a matter that is relevant only to whether an injunction should issue instead of compensation.[31]

25. To superimpose on the *Bamford* test an additional, free-standing requirement of "reasonableness" requires a plaintiff to shoulder a burden that, in many cases, will be impossibly onerous. A person who wishes to restrain or be compensated for a nuisance emanating from a neighbour's land typically is not in a position to lead evidence on the factors that might inform an open-ended assessment of

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[28] The primary judge found that "[l]ooking at the overall balance which has to be achieved, the availability and reasonableness of such measures is another reason why I consider there to be no nuisance in this case": *Fearn v Board of Trustees of the Tate Gallery* [2019] 2 WLR 1335 at [215] (Mann J).

[29] *Fearn* at [83]-[84].

[30] *Bamford v Turnley* (1862) 3 B & S 62 at 84; 122 ER 25 at 33 (Bramwell B).

[31] *Fearn* at [114], [121] (Lord Leggatt); *Fen Tigers* at [124], [193]. The appellants in the present proceedings did not seek injunctive relief. See also *Barr v Biffa Waste* at [36(vi)] (Carnwath LJ).

reasonableness (which, on the primary judge's view, include what steps could reasonably have been taken to avoid the interference, and the benefit of the activities to the public: PJ [915]). The problem is compounded in cases where, as here, an appellate court disagrees with a primary judge's assessment of some aspect of the evidence going to reasonableness but does not itself engage in any independent evaluation, thereby ossifying into elements to be proven the particular evaluative factors weighed by the primary judge.

26. For the foregoing reasons, appeal ground 1 should be allowed. The matter should be remitted to the primary judge for quantification of damages on the basis that there was a nuisance for the duration of the substantial interference, not merely the period for which the primary judge found the interference was unreasonable. Costs of the trial without apportionment should also be ordered in that event.

Even if common and ordinary, the respondent's use was unreasonable (ground 2)

27. The second ground of appeal is relied upon in the alternative to ground 1. This ground proceeds on the assumption (denied by the appellants) that the Court of Appeal was correct to hold that liability in nuisance turns on the "broader test of objective reasonableness" favoured by Lord Sales in *Fearn*. On that test, properly applied, (a) it was for the respondent to demonstrate that it had taken all reasonable precautions to minimise any interference from its use of the land, and there are concurrent findings that it did not do so and (b) in any event, the uncontradicted expert evidence led by the appellants established that the respondent's use of the land became unreasonable when the periods of interference shown in the amended IDP were exceeded.

28. The appellants' primary case before the primary judge ("Case A": PJ [90]-[92]) was that the respondent was liable for the whole of the period of the interference because its use was not common or ordinary and it had established no defence (such as inevitable consequence by statutory authority). This is ground 1 above.

29. The appellants' alternative case ("Case C": PJ [98]-[99]) was that if the respondent's use *was* common or ordinary, the respondent had not shown that it had taken reasonable and proper precautions to minimise the interference. The appellants' position was that the respondent bore the onus on that issue: PJ [98].

On the question of causation, the appellants relied on the evidence adduced through Mr Griffith as to the impact of the inadequacies in the utilities investigations: see PJ [98]-[99].

30. The respondent's case was that the appellants had to prove negligence on its part and therefore bore an onus to establish the "counterfactual" – that is, what would have occurred had the project been procured differently (after more thorough utilities investigations). The respondent led no evidence at all as to whether the construction work was done reasonably or whether the period of interference was an inevitable consequence of the exercise of a statutory power.[32]

31. The broader test of objective reasonableness favoured by Lord Sales in *Fearn* involved an enquiry not just into whether the defendant's use of its land was common or ordinary, but also into other matters that Lord Sales considered ought to be weighed in the evaluative scales. They included, importantly, whether "the [defendant's] use is 'conveniently done' ie reasonably and with proper regard to the interests of the other party".[33]

32. In this context, as Lord Sales pointed out, "reasonableness" does not mean reasonableness of the defendant's use "in the abstract".[34] Rather, the underlying principle was one of "overall reasonableness, involving reciprocity and compromise, taking account of the competing interests of both landowners".[35] Lord Sales said the test's application was exemplified by Lord Hoffmann's discussion in *Southwark* at 16 of use of a terrace causing an actionable nuisance because suitable soundproofing would have showed reasonable consideration for the occupant of the flat beneath:[36]

> "… [H]aving regard to the construction of the premises, walking on the roof over the plaintiff's flat was not a use of the flat above which showed reasonable consideration for the occupant of the flat beneath. It was not, in Baron Bramwell's phrase, 'conveniently done'"; suitable soundproofing was required; conversely, if there had been normal and ordinary user "in a way

[32] PJ [67], [774], [832], [1128]-[1129]; CA [47], [103], [112]-[113], [132]- [133].

[33] *Fearn* at [240]. Other factors might include "the duration and extent of the interference, whether the interference was reasonably foreseeable … and whether the claimant's own use of its land had the effect of aggravating the conflict between the parties' respective uses of their land": [167].

[34] *Fearn* at [165].

[35] *Fearn* at [164].

[36] *Fearn* at [240].

which shows as much consideration for the neighbours as can reasonably be expected", there would not have been an actionable nuisance.

33. Lord Sales plainly considered that if the defendant wished to argue that it had acted reasonably and with proper regard to the interests of the plaintiff, it carried the burden of demonstrating that. At [166], he said that where a defendant can show that its use was common and ordinary and what it did was conveniently done, "the defendant will clearly have made out a defence."[37] Consistently with *Bamford,* the Lord Sales approach puts the onus on *the defendant* to demonstrate that its use is reasonable, that is, that reasonable steps have been taken with proper regard for the plaintiff's interests. The onus to prove the contrary is not borne by the plaintiff.

34. The Court of Appeal expressly approved the primary judge's findings that (1) whether the respondent exercised reasonable care was a relevant factor in assessing "unreasonableness" (CA [149]), (2) it was the respondent's onus on that issue (CA [149]) and (3) the respondent had failed to demonstrate that it acted with reasonable care (PJ [820]; CA [105]). That was entirely correct.

35. The Court of Appeal also expressly approved the approach to onus in ***Andreae*** *v Selfridge & Co* [1938] 1 Ch 1, where it was held those who assert that their construction works are an ordinary use of land and conducted with proper care bear the onus to prove it (CA [151]). In *Andreae*, the construction work was held to be a normal use of land but the constructor had to show it was "conveniently done" and did not discharge that onus.[38]

36. Having found that the respondent had not established it had taken all reasonable precautions to minimise any interference with businesses and residents along the Light Rail route, the Court of Appeal should have found, consistently with the Lord Sales approach it had earlier endorsed, actionable nuisance for the entire period. Instead, the Court of Appeal incorrectly demanded in effect that the appellants prove that the respondent had not taken all reasonable precautions. That is akin to the approach to onus in a negligence case; but as the Court of

[37] And see *Fearn* at [233]. Conversely, Lord Sales said it is not "generally a defence that the defendant has taken utmost care in carrying on their activity": [224].

[38] *Andreae* at 5.8-6.3; 6.5-7.1; 9.4-10.6.

Appeal itself recognised, "it is no part of a claim for nuisance to show that the defendant failed to take reasonable care": CA [40]. In shifting the burden to the appellants, the Court of Appeal effectively overlooked the exposition by Lord Sales in *Fearn* of the application of the objective standard of reasonableness he had in mind.

37. The respondent having failed to establish it had taken all reasonable precautions, the Court of Appeal ought to have found nuisance for the whole of the construction period. Alternatively, at least the primary judge's finding of nuisance for part of the period ought to have been upheld. As has been noted, the primary judge found actionable nuisance for the period that the substantial interference extended beyond the estimated periods identified by Mr Griffiths in the amended IDP. The actionable periods were found to be 13 months for Hunt Leather and 25 months for Ancio (PJ [875], [937], [909], [938] (as amended by the later slip rule judgment)).

38. The Court of Appeal upheld the primary judge's finding that the discovery of underground utilities which had not been identified by the respondent's pre-contract investigations were a cause of the delay in completing the works in Fee Zone 5 and Fee Zone 29 (PJ [779]; CA [109]-[114]).

39. The primary judge accepted Mr Griffith's evidence that insufficient pre-contract utility surveys had been undertaken by the respondent and that if undertaken, the occupation of Fee Zones 5 and 29 would have been the shorter periods identified in the amended IDP (PJ [487], [495], [819], [936]).

40. The Court of Appeal rejected the appellants' Case C for two reasons. **First**, it found that Case C required demonstrating that practically all the utilities could have been identified pre-construction. While accepting that was possible, the appellants were required to prove, but had failed to prove, that such additional survey work would not have caused further substantial interference with the occupiers' enjoyment of their property (CA [92]-[94]). **Second**, the Court of Appeal reasoned that "it cannot be the law that construction authorised by statute becomes actionable nuisance if it takes a month or two months or three months longer than scheduled"; that even if it was reasonable to complete construction in the timeframes stated in the amended IDP, it was not actionable nuisance to take

longer; and the appellants had not demonstrated when the time taken became actionable in light of the number of utilities that needed treatment (CA [96]).

41. The **first** reason reverses the very onus which the Court of Appeal itself approved at CA [149] and [151] and fails to adopt the objective standard endorsed by Lord Sales. Moreover, the nuisance claim was based on the interference caused by the construction works, not the pre-contract surveys. A workable objective standard must put the onus to demonstrate the impact of increased survey work on the respondent, which undertook the surveys, rather than on the appellants. The respondent's position was that not even the construction works caused any substantial interference (PJ [57(1)]). There was no evidence that the actual pre-contract surveys (which involved trenching and then resurfacing the roads and identified "thousands of utilities" (CA [90])) caused any substantial interference to anyone; indeed, work to treat utilities at a number of key intersections had been done at night so as not to disrupt traffic (PJ [185]-[186]).

42. As to the **second** reason, Mr Griffith's expert assessment accepted by the primary judge opined as to how long the construction works would have taken with the additional surveys. It is thus unclear what the Court of Appeal required further. The second reason suggests that there can be no nuisance in the case of overly long construction works. That is contrary to those cases that assume a defendant may answer a construction nuisance claim by proving it took all reasonable precautions.

43. Finally, the amended IDP was an objective standard of reasonableness unanswered by any evidence from the respondent. The primary judge found that the IDP "was an estimate which the parties [to the head contract] must have considered to be reasonable and reflective of the way they thought the work could and should be done" (PJ [918]; CA [74]-[75]). The IDP timeframes were reflected in the respondent's public statements about the projected construction timeframes (CA [16]). The respondent's considered statements as to the construction times land users should reasonably expect based on the IDP ought to inform any broader "reasonableness" assessment. The amended IDP was Mr Griffith's expert assessment of what was achievable (PJ [495]). There were concurrent findings that, as a matter of fact, work in Fee Zone 5 and 29 was

prolonged "substantially" by having to deal with underground utilities not identified by the respondent's investigations (PJ [779]; CA [109]-[114]). If a "give and take" approach is to be deployed other than as identified in *Bamford,* or by Lord Sales, then the amended IDP was an available benchmark against which to assess reasonableness.

44. The Court of Appeal wrongly, and contrary to the minority decision in *Fearn*, placed the onus of proving a failure to take reasonable precautions on the appellants. Further, the appellants through unanswered evidence proved a failure to take reasonable precautions. That evidence was disregarded by the Court of Appeal without any proper basis for doing so. On either basis, the appellants were entitled to damages for nuisance, for the whole period or the lesser periods found by the primary judge. The outstanding costs of the trial issue should be referred to the Court of Appeal.

Reasonable litigation funding costs are recoverable as damages in tort (ground 3)

45. Ground 3 of the appeal arises if the appellants are successful on either of grounds 1 or 2. The appellants below entered into litigation funding agreements by which they assigned 40% of the proceeds of any judgment in their favour to a litigation funder: CA [183]. The funder agreed to pay all legal costs and disbursements (also to be reimbursed from any judgment), meet adverse costs and pay security for costs: CA [183]. There was unchallenged evidence accepted by the primary judge to the effect that Hunt Leather and Ancio could not have acted as lead plaintiffs without the litigation funding agreements, because they could not afford the legal costs or to take on adverse costs risk: PJ2 [27]-[30].[39]

46. The appellants sought to recover as damages their reasonable litigation expenses. They led unchallenged expert evidence to the effect that in the context of the proceedings below, 40% was a reasonable commission: PJ2 [41]-[44]. The primary judge did not determine the amount of a reasonable commission for the purposes of a damages award. This question would be referred to the primary judge if ground 3 is otherwise successful.

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[39] Statement of Nicholas Zisti dated 25 October 2022, [7] (AFM 99 - 100); Statement of Sophie Hunt dated 25 October 2022, [8] (AFM 94).

47. The issue had never been squarely addressed prior to the decisions below.[40] It should be approached from first principles. The purpose of an award of damages in tort is to compensate the plaintiff for the loss they have suffered by reason of the tort.[41] "Compensation is the cardinal concept".[42] The "settled principle"[43] is that "the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed".[44]

48. That "general principle has the basic goal to undo, by monetary equivalent, the consequences of the wrong experienced by the plaintiff so far as is reasonable".[45] How a plaintiff who has suffered an unlawful interference with the use or enjoyment of their property is to be restored to the same position as if the tort had not been committed must be assessed by reference to the circumstances of each case; the overriding requirement is what is reasonable.[46] "In assessing what is reasonable compensation to the particular claimant the court must bear in mind 'what he was, what he now is, and how he is likely to meet his [injury]'".[47]

49. Where a plaintiff suffers loss from a nuisance, "[t]he plaintiff is entitled to full restitution for the loss".[48] "The damages are whatever loss results to the injured party as a natural consequence of the wrongful act of the defendant".[49] The loss for which damages are sought to be recovered must be causally connected to the tortious conduct and be loss *of a kind* which was reasonably foreseeable; the

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[40] One court at appellate level has refused to strike out a claim for litigation funding costs as damages: *Landoro (Qld) Pty Ltd v Jensen International Pty Ltd* [1999] QCA 318 at [11] (Davies JA, McMurdo P relevantly agreeing).

[41] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 (Lord Blackburn); *Registrar of Titles v Spencer* (1909) 9 CLR 641at 645 (Griffith CJ); *State of South Australia v Johnson* (1982) 42 ALR 161 at 169-170 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 13 (Mason, Wilson and Dawson JJ); *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Deane, Toohey and Gaudron JJ).

[42] *Haines v Bendall* at 63.

[43] ***Roberts** v Goodwin Street Developments Pty Ltd* (2023) 110 NSWLR 557 at [90] (Kirk JA and Griffiths AJA).

[44] *Haines v Bendall* at 63.

[45] ***Arsalan v Rixon*** (2021) 274 CLR 606 at [25].

[46] *Roberts* at [92]-[93]; *Arsalan v Rixon* at [25]; *Evans v Balog* at 39; *Philips v Ward* [1956] 1 WLR 471 at 473 (Denning LJ).

[47] *Roberts* at [93] (quoting *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 656 (Barwick CJ)).

[48] Balkin & Davis, *Law of Torts* (6th ed) at [14.49].

[49] *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836 at 840 (Lindley LJ).

particular injury need not be foreseen.[50] In the present case, the evidence was that a nuisance class action was not only foreseeable but in fact foreseen by the respondent.[51] By 2014, litigation funding was a well-established feature of the class action landscape, and thus foreseeable.

50. Applying these basic principles, the appellants' reasonable litigation funding costs ought to have been held to be recoverable damages. Anything less would significantly undercompensate the appellants for the wrongs they suffered.

51. The Court of Appeal dismissed this aspect of the appellants' claims for four reasons. **First**, the Court characterised the appellants' actions in entering the funding agreements as voluntary acts which broke the chain of causation between the respondent's conduct and the loss suffered: CA [194]-[198]. **Second**, the Court held that a result of the appellants' position would be to incentivise group members to enter into litigation funding agreements and not to bargain for a smaller fee: CA [199]-[201]. **Third**, the Court held that a litigation funding commission is recoverable, if at all, as costs not damages: CA [202]-[204]. **Fourth**, the Court considered it paradoxical that the loss would not accrue until the entry of judgment or settlement: CA [205]-[206].

52. Each of these involves error. As to the **first** reason, the appellants' actions were not aptly characterised as voluntary. The respondent engaged in a mass tort whose effects were most likely to fall hardest on small businesses ill-placed to absorb them. The losses of those businesses would always be uneconomic to recover individually. It is precisely for that reason that the class action regime (in NSW, found in Part 10 of the *Civil Procedure Act 2005* (**CPA**)) exists. Under that regime, as in others, group members but not lead plaintiffs are shielded from adverse costs risk: CPA s 181. It is usually economically irrational for a lead plaintiff to take on such risk and the burden of the legal costs, which will be disproportionate to the benefit to the lead plaintiff personally but will advance the

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[50] *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388 at 426; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 390 (Barwick CJ), 402 (Windeyer J), 413-414 (Walsh J); *Gales Holdings* at [280]-[281] (Leeming JA, Sackville AJA agreeing); Balkin & Davis, *Law of Torts* (6th ed) at [27.20].

[51] Transport for NSW Risk Register, July 2013 (AFM 4 - 41); Transport for NSW Risk Register, January 2014 (AFM 42 - 54); Transport for NSW Risk Register, July 2014 (AFM 55 - 90); PJ [131], [188].

interests of the broader class. It is for that reason that a funding model is required, if the class action is to be brought at all, which manages adverse costs risk. In the present case, prior to the commencement of the proceedings, 50 to 70 potential group members entered into funding agreements, by which they promised to pay up to 40% of any damages award or settlement to the funder, in consideration for the Funder's promise to pay legal costs and any adverse costs, and provide security for costs: PJ2 [38]-[40] .

53. In that context, entry into a funding agreement is not voluntary in the sense that the appellants had other options to vindicate their rights. The funding agreements were the only way the appellants could seek justice for themselves and the class.[52]

54. Moreover, to label the appellants' conduct 'voluntary' does not establish that the causal chain was broken. A deliberate and voluntary act, even if tortious or criminal, will not break the causal chain where it is the very thing likely to occur as a result of the defendant's tort, and is not unreasonable.[53] The range of factors to be taken account in assessing voluntariness is broad and value-laden.[54]

55. It does not matter, as the Court of Appeal alluded to at CA [195], that some class members may have been able to fund the litigation themselves (not that there is any evidence that such class members exist). That some victims of a mass tort may be able to recover more than others is entirely unsurprising; tortfeasors take their victims as they find them.[55]

56. As to the **second** reason, the Court of Appeal ignored entirely that the appellants sought only the recovery of *reasonable* litigation funding costs. They adduced expert evidence as to the reasonableness of the costs under the agreements they in fact entered into. A plaintiff who entered into a litigation funding agreement with unreasonably high charges would do so at their peril.

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[52] Compare *Bogan v Estate of Smedley (dec'd)* [2025] HCA 7 at [77] (Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ), [104] (Edelman J).

[53] ***March v Stramare*** *(E & M H) Pty Ltd* (1991) 171 CLR 506 at 517-18 (Mason CJ; Toohey J and Gaudron J agreeing); *The Oropesa* [1943] P 32 at 37, 39 (Lord Wright); *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7 (Deane, Dawson, Toohey and Gaudron JJ), 20-23 (McHugh J).

[54] *March v Stramare* at 534-535 (McHugh J), citing Hart and Honoré, *Causation in the Law* (2nd ed. 1985) at 142-156.

[55] *Watts v Rake* (1960) 108 CLR 158 at 164 (Menzies J; Dixon CJ and Windeyer J agreeing).

57. As to the **third** reason, the Court of Appeal erred in characterising litigation funding costs as legal costs. They do not fall within the ordinary meaning of 'legal costs'.[56] That the funding commission was the 'quid pro quo' for the funder meeting costs, adverse costs and security for costs, is no reason to hold that the funding commission was costs, or subject to similar recoverability principles as costs. None of the authorities at CA [202]-[204] concern funding.

58. As to the **fourth** reason, the matters at CA [205]-[206] are no reason to deny a plaintiff the recovery of litigation funding charges. Damages awards for lost income are grossed up to compensate the plaintiff for income tax, even though the plaintiff's liability to income tax does not crystallise until the award is made. From the moment the appellants entered the litigation funding agreements, they had assigned away their right to a portion of whatever they might ultimately recover.

PART VII: ORDERS SOUGHT

59. The appellants seek the orders set out in the notices of appeal (CAB 667, 676).

PART VIII: ESTIMATE OF TIME

60. The appellants estimate that approximately 2.25 hours will be required for the presentation of oral argument on the appeal, and reserve their position with respect to the time required for oral argument on the notice of contention.

Dated: 13 March 2025

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[56] *Cachia v Haynes* (1994) 179 CLR 403 at 410 (Mason CJ, Brennan, Deane, Dawson and McHugh JJ); *Bell v Pentelow* (2019) 269 CLR 333 at [22] (Kiefel CJ, Bell, Keane and Gordon JJ).

ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2024*, the Appellants set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
1.	*Civil Procedure Act 2005* (NSW)	Compilation No 28, 30 June 2018 to 22 March 2020	Part 10; s 181	Version in force when the proceedings were commenced	28 August 2018