I certify that the Applicant's Summary of Argument is suitable for publication in accordance with para. 27 of Practice Note SC CA 1.

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Trent Smith & Claudia Smith v Robert H Jones Investments Pty Ltd

Applicants' Summary of Argument

Nature of the Applicants' Case

1. The present case concerns an injury to a 'cutting horse' (see J[9]-[10]) belonging to the Respondent. Liability in negligence and bailment was conceded at trial and the trial concerned quantum only. The Applicants trained competitive cutting horses. That involved training the horses at the Applicants' premises and taking the horses to cutting competitions where they would be ridden, often by Trent Smith, a professional rider. On 26 May 2018, Trent Smith was transporting a number of cutting horses to a competition (including Moore Metal) when he lost control of the vehicle, killing his father, killing a number of cutting horses and injuring Moore Metal: J[2]-[3]. While Moore Metal was able to be rehabilitated such that he could stand as a breeding stud, he could not compete.

2. The Respondent sued for damages alleging negligence and breach of bailment. The Respondent claimed in its Schedule of Damages: diminution of market value ($217,500), financial loss from breeding ($111,771 to $746,611), financial loss from prize money ($92,564), past veterinary expenses ($134,561.93) and future out of pocket expenses ($229,220). It was accepted that insurance proceeds of $44,654.29 received by the Respondent would be deducted from any total. At trial, the Plaintiff put its case on two bases: its primary claim for financial loss, being the lost commercial opportunity of earning competition and breeding income; and its alternative case on the other heads of damage.

3. The Trial Judge rejected the Plaintiff's primary claim for financial loss but awarded damages for past expenses ($60,696.54), diminution in value ($20,000) <u>and</u> future expenses ($42,000). The total award was $78,132.25 after insurance moneys were deducted, being an amount significantly less than what was claimed by the Plaintiff. As to costs, the Trial Judge ordered the Applicants to pay the Respondent's costs, including costs of the trial, on the basis *inter alia* that it was not an *"appropriate or significant consideration"* that the Respondent was not successful on quantum as it is common for a plaintiff to claim more than is awarded and the usual course was to make a settlement offer.

Questions Involved

4. The present application raises two questions of principle.

5. ***First***, is it correct that a tortfeasor or wrongdoer who causes damage to a non-income producing chattel is required to pay the owner of the chattel not only past costs and any diminution in value but also the future costs of maintaining such a chattel for the balance of its service life?

6. ***Second***, is it correct where a trial concerns only the question of quantum that the fact that a plaintiff may have been awarded a sum of damages significantly less than what was claimed is either not appropriate to consider or is not significant in determining the question of costs?

Applicants' Argument

Factual background

7. On 26 May 2018, the accident occurred which led to injury to Moore Metal: J[2]-[3]. Moore Metal's left front leg was badly injured and he was taken to Dubbo Equine Hospital where he remained until discharged on 26 September 2018: J[26]-[27]. From 26 September 2018 onwards, Moore Metal was held at the WestVETS Equine Hospital & Equine Reproductive Centre at Marburg in Queensland where he resumed breeding activities: J[31]-[32]. The opinions in the various veterinarian reports were by and large not controversial: J[33].

8. The primary claim: The plaintiff's claim for financial loss was based on the lost opportunity to earn income from Moore Metal: (a) by winning prize money in cutting and campdrafting competitions; and (b) by earning servicing fees as a breeding stallion: J[87]. That claim relied on the evidence of forensic accountant, Mr Nguyen: J[88]. By the time of closing submissions, the Plaintiff had revised down its claimed amount of financial loss to $314,272 plus interest: J[89], [148]. This claim was said to account for any incurred and future veterinary expenses as it would compensate the Plaintiff for the loss in value of an income-producing asset: J[154].

9. The Trial Judge rejected this primary claim. The Trial Judge was not satisfied that the Plaintiff had, on balance, sustained *some* loss or damage by way of the loss of a commercial opportunity which had *some* value (not being a negligible value): J[174], [194]-[195]. The Trial Judge rejected the claim also because Mr Nguyen's evidence should not be accepted, including that the service fee figures used by Mr Nguyen were wrong and overstated having regard to the concessions made by Mr Jones in cross-examination: J[198]. The Trial Judge found there was

no evidence to support any non-negligible commercial value to win prize money or award a 'buffer' for such an amount: J[199]-[203].

10. Past costs and expenses: In relation to the alternative claim the Trial Judge found that past costs or expenses added up to $67,016.79: J[216]. From this the Trial Judge deducted breeding expenses which would have been incurred but for the injury reducing the sum to $60,696.54: J[222]-[225]. While the Trial Judge accepted that, but for the injury, Moore Metal would have been entered in competitions – and thus incurred considerably greater expenses – his Honour did not consider it appropriate to deduct those expenses as the intended use of Moore Metal *"changed as a result of the accidence"*: J[221].

11. Future costs and expenses: The Trial Judge found that Moore Metal would be able to provide breeding services until age 20 and live until age 30: J[236]. His Honour considered that this was subject to vicissitudes which *"are taken into account by applying a percentage discount to the overall allowance for future or ongoing expenses"*: J[236]. The plaintiff claimed future costs for both: (a) costs until the cessation of breeding at age 20; and (b) costs for the 10 years afterwards: J[237], J[246]. The Applicant contended such an approach was unsupported by authority and contrary to principle: J[243].

12. While the Plaintiff did not articulate a basis in principle for allowing both a diminution in value and damages for *"past and future expenses"* (J[266]), the Trial Judge nonetheless found it was consistent with principle by equating future expenses with the *"costs of repair"* in ship cases: J[268]. Without addressing the arguments advanced by the Applicant, the Trial Judge took the approach used in personal injury cases: his Honour converted the annual total into an average weekly amount, applying a multiplier for the present value of $1 per week for the number of years and then deducting a percentage to allow for vicissitudes (said to be 20% based on personal injury cases where 15% is applied): J[249]-[260]. The Trial Judge appeared to use the 3% personal injury tables to ultimately *"allow"* the sum of $42,000 for future expense: J[261].

13. The Trial Judge did not address how these principles applied notwithstanding the rejection of Mr Nguyen's evidence and the finding that the Plaintiff had not suffered a loss of a non-negligible commercial value as a result of the injury. There was no finding that Moore Metal was, in a way comparable to the ship cases relied upon, an income-producing chattel in the sense not simply of earning revenue but earning profit.

14. Costs: The Trial Judge made orders that the Defendants were to pay the Plaintiff's costs: J[276].

By notice of motion, the Applicants sought a variation of that order *inter alia* accounting for the fact that the Plaintiff lost on the primary issue and the hearing concerned only quantum on which the Plaintiff had been largely unsuccessful. The Trial Judge refused to vary the orders made, including as the costs of trial, on the basis *inter alia* that it was not an *"appropriate or significant consideration"* that the Respondent was not successful on quantum as it is common for a plaintiff to claim more than is awarded and that the usual course in such a case was to make a Calderbank offer or offer of compromise: Costs Judgment, 15 May 2025. That was notwithstanding the finding that the principal of the plaintiff had overstated the figures and notwithstanding the Plaintiff recovered only a fraction of what was claimed.

Error in relation to damages

Applicable law

15. The proper assessment of loss in relation to a chattel is the value of the chattel to the owner *"as a going concern at the time and place of the loss"*, having regard to any pending engagements *"either profitable or the reverse"*: *Liesbosch Dredger v S.S. Edison* [1933] AC 499 (***Liesbosch Dredger***) at 463 – 464; *Electricity Trust of South Australia v O'Leary* (1986) 42 SASR 26 (***O'Leary***) at 28. The question is the *"captitalised value of the [chattel] as a profit-earning machine, not in the abstract but view of the actual circumstances"*: *Ibid*. The market value of a horse will capture its chance of being raced at a profit and that it may produce losses as well as gains: *O'Leary* at 29-30; *Bell v Railway Commissioner* (1861) 2 Legge 1398 at 1399.

16. If consequential loss is claimed, the consequential damage must not be too remote from the wrongdoer's act (a question of remoteness): *McGregor on Damages* [8-032]; *Attorney-General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18; [2020] 3 WLR 584 at [26], [29]. The onus in establishing that the loss is not too remote is on the plaintiff (*cf* a failure to mitigate, where it is on the defendant): *Garnac Grain Co v Faure & Fairclough* [1968] AC 1130.

17. In assessing damages, the damages must be of a kind within the scope of the duty that has been breached. That requires a consideration of the interest protected by the duty. In negligent damage to property, damage will not extend to financial loss beyond the physically damaged property: *McGregor on Damages* [8-041]. Similarly, where the interest depends on an undertaking, whether a person has assumed responsibility for damage arising from a transaction will depend on the terms of the undertaking: *McGregor on Damages* [8-049]; *South Australian*

Asset Management Corporation v York Montague Ltd [1997] AC 191 at 212C; *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627 at 1638. The guiding principle is to determine whether the loss flows from the feature which made the conduct wrongful: *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] AC 599 at [38].

18. Remoteness and mitigation can be difficult to distinguish and may overlap: *McGregor on Damages*, [6-019]. Where a claimant's conduct subsequent to the wrong *"increases the original damage as opposed to failing to reduce the future loss which would flow from the original damage"*, the damage may be too remote: *McGregor on Damages*, [6-020] and [8-121]. Thus in *The Glendinning* (1943) 76 Ll L Rep 86, no recovery was allowed for further damage to a ship in a collision due to the mismanagement of the ship following collision.

19. In damage to goods cases generally, it has been held that the cost of repair is appropriate *only if it is reasonable to effect the repair as opposed to buying a replacement or selling the damaged item*: *McGregor on Damages* [37-004]; *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Limited* [2020] EWCA Civ 308 at [61]-[62]. The question of reasonableness is a question of fact and depends on the particular circumstances of a given case: *Clark v Tull* [2002] EWCA Civ 510 at 132. The burden is on the plaintiff to show which of the two is reasonable in the circumstances: *Murphy v Brown* (1985) 1 NSWLR 131 at 135.

20. The Courts expect that the costs of repair would reflect the diminution in value of the chattel such that it may not be appropriate to award the costs of repair where *"the diminution in value of the [chattel] is below, possibly well below, the cost of repair"*: *McGregor on Damages* [37-004]. The test is whether it is reasonable or not for the person to decide to repair the item: *Ibid.* The cost of repair will not be allowed where *"the cost of repair greatly exceeds the value in the market of the damaged article"*: *Darbishire v Warren* [1963] 1 WLR 1067 CA (***Darbishire***) at 1071; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344: at [65].

21. A party cannot recover losses to the extent that such losses arose from a failure to take reasonable steps to mitigate their damages. Whether there has been a failure to mitigate is a question of fact: *McGregor on Damages* [9-016]. A claimant may be as extravagant as he pleases but not at the expense of the defendant: *Darbshire* at 1075: see also at 1072, 1076-1079 and *Chand v Commonwealth Bank of Australia* [2015] NSWCA 181 at [105]-[106]. The focus of reasonableness is on what is considered to be *commercially* reasonable: *Ibid* and *Georgopoulos v Normetals Pty Ltd* [2020] SASC 18, at [59]-[60]. It is thus unsurprising that

the US has developed a principle that the plaintiff's recovery cannot, in the aggregate (i.e. including any allowance for depreciation of value) exceed the value of the animal injured: *Atlanta & W P R Co v Hudson* (1879) 62 GA 679; *Douglass v Seattle Electric Co* (1913) 73 Wash 561; 132 P 229; *Louisville & N R Co v Schweitzer* (1889) 11 Ky LR 310; *Monroe v Latin* (1881) 25 Kan 351; *Miller v Economy Hog & Cattle Powder Co* (1940) 228 Iowa 626; 293 NW 4; *Telfair County v Webb* (1904) 119 GA 916; 47 SE 218.

22. While the onus is on the defendant, the claimants in possession of information about how loss should have been avoided will have a heavy evidentiary onus: *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24.

Application in the present case

23. The award of damages to include future expenses of $42,000 was wrong.

24. ***First***, it doubly-compensated the Plaintiff. Having awarded damages capturing past expenses of rehabilitating Moore Metal and a diminution in value occasioned by the injury to Moore Metal, there was no basis in principle to award an additional sum for future costs and expenses. The market value of a chattel is the chattel as a going concern and is reflective of future costs and future expenses. To award the diminution in value *and* the future costs is to compensate the Plaintiff both on the basis that they are disposing of *and* retaining the chattel.

25. ***Second***, an award of future costs would never be appropriate either because market value is the appropriate measure of damage (coupled with any past losses if appropriate) or at least where the chattel is not, or is not proven to be, profitable. Unlike in a personal injury case, a chattel may be sold and expenses need not be incurred. If a chattel is not profitable, a claimant cannot at the expense of the defendant incur the costs of maintaining the chattel. Such damage would be too remote or would engage failure to mitigate principles. These principles are not undermined because the horse is 'damaged' rather than 'destroyed': *cf* J[105]-[106].

26. ***Third***, if there could ever be such an award of future loss, it cannot be approached by analogy with personal injury cases. The focus must be on the impairment of any future profit stream (if any) to the claimant. As found by the Trial Judge, there was no impairment in the present case. Indeed, the true (and somewhat odd) position is that the injury in fact led to the Plaintiff saving a very great amount of additional costs and expenses that were necessary to have a horse compete at competitive events as opposed to merely standing at stud.

Error in relation to costs

Applicable principles

27. The starting position is s 98 of the *Civil Procedure Act 2005* (NSW) (**CPA**) which provides that, subject to the rules of court, costs are in the discretion of the Court including, by whom, to whom, and to what extent costs are to be paid: *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 (***Doppstadt***) at [14].

28. Rule 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) provides that, if the Court makes any order as to costs, it should be in terms that costs follow the event unless the circumstances justify some other order: Ibid. The *"event"* generally refers to the result of the claim or counterclaim, as the case may be, but must be understood as referring to the practical result of a particular claim: *Doppstadt* at [15]. The discretion to depart from the general rule must be exercised judicially and in accordance with principle: *Williams v Lewer* [1974] 2 NSWLR 91 at 95; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22]. The apportionment of costs where a party did not succeed on a clearly dominant or separable issue is one principle (e.g. *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]), but does not purport to be an exhaustive statement of principle.

29. Despite this rule and the practices of courts, the discretion as to costs under s 98 of the CPA remains a wide one and costs orders are to be appropriate to the particular facts of a case: *G R Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSSWCA 263 at [16]-[17]; *Council of the City of Ryde v Azizi* [2019] NSWSC 1605 at [176].

30. The amount of the damages recovered may affect the question of costs: *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685. That includes: (a) where a plaintiff recovers only a fraction of what was claimed (*Brit Inns Ltd v BDW Trading Ltd (Costs)* [2012] EWHC 2489; *AMC Caterers Pty Ltd v Stavropoulos* [2005] NSWCA 79); (b) where the legal costs are out of proportion to the small amount of (*Jones v Sutton (No 2)* [2005] NSWCA 203 at [81]); and (c) where the claim of an excessively large claim can be said to be conduct which has occasioned unnecessary expense (*Lollis v Loulatzis (No 2)* [2008] VSC 35 at [28]-[29].

31. Where it is appropriate to apportion costs, in general, such an exercise will be carried out on a relatively broad brush basis, and largely as a matter of impression and evaluation by the Court: *Doppstadt* at [19]; *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [36];

Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (No 3) (1998) 30 ACSR 20 at 22.

Application in the present case

32. The Trial Judge's discretion as to costs miscarried as his Honour proceeded on the erroneous basis that it was an *"appropriate or significant consideration"* that the Respondent was not successful on quantum as it was common for a plaintiff to claim more than is awarded and that the usual course in such a case was to make a Calderbank offer or offer of compromise. The question of quantum is relevant and potentially significant in cases, not limited to where offers have been exchanged.

33. The present hearing was on the sole issue of quantum. It cannot be said in those circumstances that the *"event"* is simply an award of damages or, if it was the event, that the quantum was not relevant or potentially significant to an otherwise order. A relevant and potentially significant factor must be the extent to which the plaintiff is successful on the critical question at trial, which was quantum. On that case, the Plaintiff failed in comparison to the Defendant on each of the heads of damage in question. In opening, the Plaintiff's primary claim was financial loss as high as $839,175. The ultimate damages award was only a small fraction of this claim. The legal costs claimed by the Respondent were said to be in excess of $224,908 (including GST) shortly before the hearing commenced. Presumably the legal costs after an 8 day hearing and a further day in relation to costs would be a great deal higher.

Reasons Why Leave Should be Granted

34. The general principles on leave to appeal are well-established: e.g. *The Age Company Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13]. Here, they justify a grant of leave.

35. ***First***, the application involves two issues of principle identified above.

36. ***Second***, the application involves an issue of general importance. In relation to damages, the Trial Judge acknowledged that there is limited authority addressing the proper approach to damage to a chattel, let alone a horse: J[103]. In relation to costs, the question has broader application to any hearings on quantum alone.

37. ***Third***, there is a reasonably clear injustice to the Applicants. Despite: (a) the Respondent being largely unsuccessful at the hearing on quantum; and (b) the Respondent having been awarded damage for past costs and diminution in market value, the Respondent will have its future costs

of maintaining an unprofitable chattel and vastly disproportionate legal costs of the hearing. The effect of the present litigation on persons of modest means is plain.

Costs

38. Costs should follow the event if the application is refused.

Absence of the Public

39. The Applicant consents to the application for leave being dealt with in the absence of the public.

Concurrent Hearing

40. The application should be heard with argument on the appeal. The issues are primarily legal. Argument on any appeal would be short – in the order of 2 hours – and not materially longer than argument on the leave application. It is efficient to have a concurrent hearing.

Authorities

41. The Applicant has referred above to the following authorities on the question as to damages: *Liesbosch Dredger v S.S. Edison* [1933] AC 499 at 463 – 464; *Electricity Trust of South Australia v O'Leary* (1986) 42 SASR 26 at 28; *Bell v Railway Commissioner* (1861) 2 Legge 1398 at 1399; *Attorney-General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18; [2020] 3 WLR 584 at [26], [29]; *Garnac Grain Co v Faure & Fairclough* [1968] AC 1130; *South Australian Asset Management Corporation v York Montague Ltd* [1997] AC 191 at 212C; *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627 at 1638; *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] AC 599 at [38]; *The Glendinning* (1943) 76 Ll L Rep 86; *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Limited* [2020] EWCA Civ 308 at [61]-[62]; *Clark v Tull* [2002] EWCA Civ 510 at 132; *Murphy v Brown* (1985) 1 NSWLR 131 at 135; *Darbishire v Warren* [1963] 1 WLR 1067 CA at 1071-1072, 1076-1079; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344: at [65]; *Chand v Commonwealth Bank of Australia* [2015] NSWCA 181 at [105]-[106]; *Georgopoulos v Normetals Pty Ltd* [2020] SASC 18, at [59]-[60]; *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24; *Atlanta & W P R Co v Hudson* (1879) 62 GA 679; *Douglass v Seattle Electric Co* (1913) 73 Wash 561; 132 P 229; *Louisville & N R Co*

v Schweitzer (1889) 11 Ky LR 310; *Monroe v Latin* (1881) 25 Kan 351; *Miller v Economy Hog & Cattle Powder Co* (1940) 228 Iowa 626; 293 NW 4; *Telfair County v Webb* (1904) 119 GA 916; 47 SE 218.

42. The Applicant has referred above to the following authorities on the question as to costs: *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [14]; *Williams v Lewer* [1974] 2 NSWLR 91 at 95; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22]; *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]); *G R Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263 at [16]-[17]; *Council of the City of Ryde v Azizi* [2019] NSWSC 1605 at [176]; *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685; *Brit Inns Ltd v BDW Trading Ltd (Costs)* [2012] EWHC 2489; *AMC Caterers Pty Ltd v Stavropoulos* [2005] NSWCA 79); *Jones v Sutton (No 2)* [2005] NSWCA 203 at [81]; *Lollis v Loulatzis (No 2)* [2008] VSC 35 at [28]-[29]; *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [36]; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (No 3)* (1998) 30 ACSR 20 at 22.

43. The legislation relevant to the question of costs is s 98 of the *Civil Procedure Act 2005* (NSW) and Rule 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW).

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