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

AE
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In the Supreme Court of NSW, Court of Appeal
Trent Smith & Anor v Robert H Jones Investments Pty Ltd
CA No: 2025/00137701

RESPONDENT'S RESPONSE

A. Respondent's Summary of Argument

The judgment below

1 The Applicants operated a business in partnership together taking care of and training horses (J[1]), and in particular horses that competed in cutting competitions (see J[9]-[10]).

2 On 26 May 2018, the First Applicant was transporting horses to a cutting competition at Tamworth by road when the vehicle was involved in a serious accident (J[2], [24]). One of the surviving horses was Moore Metal, owned by the Respondent (J[4]). Moore Metal's front leg was badly injured in the accident (J[26]). Prior to the incident, the Respondent entered the horse in cutting competitions (see J[16]-[22]) and stood it as a breeding stud. While Moore Metal was able to be rehabilitated such that he could, with continuing care (see J[33], [36], [38]), stand as a breeding stud using a phantom mare, he could no longer compete (J[32]).

3 The Respondent claimed damages from the Applicants as a result of the injuries sustained by Moore Metal (J[6]). Liability was conceded at the hearing: the Applicants admitted liability for breach of contract, for breach of duty of care in negligence and as bailee for reward (J[7]).

4 The Respondent put its claim for damages in the alternative (J[86]). Its primary claim was based on the loss of chance (J[87]), which was quantified in a report by Mr Nguyen, a forensic accountant (J[88]).

5 The Trial Judge considered the Respondent's primary claim in accordance with the principles stated in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 (J[173]). The Trial Judge identified that the critical assumption identified by Mr Nguyen, without which there would be no loss, was that if Moore Metal had not been injured in the accident, his breeding services would have been in greater demand, and as such both his servicing charge and number of services from 2018 would have been 38% higher (J[175]). The Trial Judge was not satisfied that the Respondent had established that on

the evidence (J[195]), and was therefore not satisfied that the Respondent had proved on the balance of probabilities that it had sustained some loss or damage, by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value) (J[196]). In those circumstances, the Trial Judge did not accept the primary basis upon which the Respondent put its claim and proceeded to consider the alternative basis (J[205]).

6 In the alternative, the Respondent claimed for past and future veterinary and related expenses and a "buffer" on account of the diminution in market value of Moore Metal.

7 The Trial Judge allowed the Respondent $60,696.54 for past expenses, excluding interest (J[225]).

8 In relation to the claim for future expenses, the Applicants submitted, before the Trial Judge, that there was no basis upon which the Applicants should be held liable for an indeterminate claim for the maintenance of Moore Metal (J[243]). The Trial Judge observed that the ongoing need for 2 items (corrective shoeing and x-rays) was undisputed, and in fact deemed essential, on the veterinary evidence; and there was no issue that the need for them had arisen from the injuries sustained in the accident (J[244]).

9 To calculate the award for future expenses, the Trial Judge first made a finding that it was likely that Moore Metal would continue to provide breeding services until the age of 20 and live to the age of 30 (J[236]). On that basis, the future expenses would be incurred for a further 19 years (J[248]). To calculate the present value of the future expenses claim, the Trial Judge converted the annual total to an average weekly amount, applied the relevant multiplier for the present value of $1 per week for the number of years, and deducted a percentage to allow for vicissitudes or uncertainty (J[249]). This method was entirely conventional (see ***Cullen v Trappell*** (1980) 146 CLR 1 at 12 (per Gibbs J, with whom Stephen and Mason JJ agreed); ***Todorovic*** *v Waller* (1981) 150 CLR 402). The Trial Judge allowed $42,000 for future expenses (J[261]).

10 The Trial Judge awarded $20,000 for diminution in value, in addition to damages for past and future expenses (J[220]).

No failure to mitigate

11 In relation to both ways the Respondent put its claim, the Applicants asserted that the Respondent failed to mitigate its loss by not having Moore Metal euthanised in the days after the accident or by not selling him subsequently (J[92], [132]). The Trial Judge

rejected those contentions (J[144]). As to the assertion that the Respondent failed to mitigate its loss by not selling Moore Metal, the Trial Judge observed that the Applicants had not identified any point in time at which they say it was unreasonable for the Respondent not to have sold Moore Metal. Nor did they identify the circumstances in which any such sale should have taken place or what the sale was likely to have yielded (J[146]). In those circumstances, the Applicants had not established that the Respondent failed to mitigate its loss by not selling Moore Metal subsequently (J[147]).

Orders

12 After deducting the insurance proceeds of $44,564.29, the Trial Judge ordered that there be judgment in favour of the Respondent against the Applicants in the sum of $78,132.25 and ordered that the Applicants pay the respondent's costs (J[276]).

The Costs Judgment

13 By Notice of Motion filed on 28 March 2025, the Applicants applied under r36.16(3A) of the *Uniform Civil Procedure Rules 2005* (NSW) to vary the costs order. (CJ, T pg.3). The Notice of Motion was heard by the Trial Judge on 15 May 2025, following which his Honour delivered an *ex tempore* judgment dismissing the Notice of Motion (CJ, T pg.18).

No error in relation to damages

Applicable law

14 The general principle governing the assessment of compensatory damages, whether in actions of tort or contract, 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: ***Haines v Bendall*** (1991) 172 CLR 60 at 63 per Mason CJ, Dawson, Toohey and Gaudron JJ. Compensation is the "cardinal concept": *Haines v Bendall* at 63. The object of the general principle is to undo, by monetary equivalent, the consequences of the wrong suffered by the injured party so far as is reasonable: ***Arsalan*** *v Rixon* (2021) 274 CLR 606 at [25] per Kiefel CJ, Gageler, Keane, Edelman and Steward JJ.

15 As the Trial Judge observed (J[99]), horses are chattels or personal property of the owner (referring to *Bell v Thompson* (1934) 34 SR (NSW) 431 at 439 per Jordan CJ (Street J agreeing)).

16 The normal measure of damages is the amount by which the value of the goods damage has been diminished: J Edelman, ***McGregor on Damages*** (22nd edition, 2024, Thomson Reuters) at [38.003]. Generally, in cases of damaged goods, the prima facie measure of those damages is the costs of repair and consequential loss: *Arsalan* at [18]; *McGregor on Damages* at [38.003]; *The London Corp* [1935] P. 70 CA at 77 per Greer LJ; *Talacko v Talacko* (2021) 272 CLR 478 at [45], per Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ.

17 If, despite the repairs, the market value of the goods is less than before, the claimant should be entitled to such diminution in value in addition to the cost of repair: *McGregor of Damages* at [38-003] citing *Payton v Brooks* [1974] R.T.R. 169 CA at 176 per Roskill LJ and *The Georgiana v The Anglican* (1873) 21 W.R. 280; *Davidson v J S Gilbert Fabrications Pty Ltd* [1986] 1 Qd R 1 at 5-6 per McPherson J, with whom Andrews ACJ agreed.

18 The cost of repair is appropriate only if in the circumstances it is reasonable for the claimant to effect the repair: *McGregor on Damages* at [38-004]. The cost of repair is expected to reflect the diminution in the value of the chattel, so that, if it can be shown that the diminution in value is below, possibly well below, the cost of repair, then it may be inappropriate to award the cost of repair: *McGregor on Damages* at [38-004]. The test is whether it is reasonable or not for the person whose item of personal property has been damaged to decide to repair it. If so, the cost or repair is recoverable. If not, only the diminution in value is to be awarded: *McGregor on Damages* at [38-004]. Thus, an exception to the prima facie rule of cost of repair arises where "it can be proved that the cost of repair greatly exceeds the value in the market of the damaged article": *Darbishire v Warran* [1963] 1 W.L.R. 1067 CA at 1071 per Harman LJ, cited in *McGregor on Damages* at [38-005].

19 For goods damaged in bailment, it has been said that the measure of damages that is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. In the case of goods or things damaged that are not commonly available, and thus cannot be replaced on the market, compensation may be the cost of repair, unless the cost of that is so great as to be unreasonable: *Palmer on Bailment*, 3rd Ed., 2009 [16–046].

20 The fact that the repairs have not yet been executed before the hearing of the action, or will never be executed at all, does not prevent the normal recovery. Since damages may on general principles be given for prospective loss, it is immaterial that the repairs are not yet executed: *McGregor on Damages* at [38-007].

There was no error in awarding damages to include future expenses

21 The Applicants raise three contentions in support of the proposition that the Trial Judge erred in awarding damages to include future expenses of $42,000.

22 ***First***, the Applicants contend that an award of damages that included future expenses and diminution in value doubly compensated the Respondent. That is not correct. The Trial Judge's reasoning makes it plain that the award for past expenses and diminution in value would not have put the Respondent in the same position it would have been in if the contract had been performed or the tort had not been committed. Plainly, in awarding $20,000 for diminution in value, the Trial Judge did not take into account, for a second time, the future expenses that would be incurred (which, on a discounted basis, the Trial Judge calculated at $42,000).

23 The Trial Judge awarded future expenses in circumstances where the ongoing need for those items was undisputed, and in fact deemed essential on the veterinary evidence; and there was no issue that the need for them had arisen from the injuries sustained in the accident (J[244]). This is a form of consequential loss, independent of value. It is uncontroversial that damages may be given for prospective loss.

24 The Trial Judge awarded an additional sum on account of diminution in value in circumstances where the Trial Judge held that even with the incurrence of the past and future expenses, Moore Metal was unable to return to competition and his breeding services must be obtained with the use of phantom mare (J[268]). From this the Trial Judge inferred that as a result his market value is less than before the damage was done. The Applicants do not suggest that this inference was not reasonably available to the Trial Judge on the evidence.

25 ***Secondly***, the Applicants contend that 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. That contention is contrary to well established principle.

26 As noted, the general principle governing the assessment of compensatory damages, whether in actions of tort or contract, 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: *Haines v Bendall* at 63. In the present case, that equated to past expenses, future expenses (the ongoing need for which was not disputed, nor that the need arose from the injuries suffered in the accident) and, in circumstances where the Trial Judge found that market value of Moore Metal was less than before, an award on account of the diminution in market value.

27 Market value may be the appropriate measure if it is shown that the cost of repair greatly exceeds the value in the market of the damaged article: *McGregor on Damages* at [38-005]. There was no evidence of the market value, or diminution in market value, of Moore Metal before the Trial Judge (J[263]). In the premise, there is no evidential foundation upon which the Applicants can now contend that market value is the appropriate measure.

28 The Court ought to reject the Applicants' submission that damages on account for future expenses would be too remote or would engage failure to mitigate principles for two reasons: *First*, the ongoing need for corrective shoeing and x-rays was undisputed, and in fact deemed essential, on the veterinary evidence; and there was no issue that the need for them arose from the injuries sustained in the accident (J[244]); and *Secondly*, the Trial Judge rejected the Applicants' contention that the Respondent failed to mitigate its loss (J[144], [147]). As it was not established that it was unreasonable for the Respondent to not sell the horse so as to mitigate its (future losses), and that finding is not challenged, it follows that the Respondent is entitled to compensation for those losses.

29 ***Thirdly***, the Applicants contend that if there could ever be an award for future loss, it cannot be approached by analogy with personal injury cases. The Trial Judge did not award future loss by analogy with personal injury cases, either expressly or implicitly. The Trial Judge approached the claim for future expenses upon the premise that it was undisputed, and in fact deemed essential on the veterinary evidence, that corrective shoeing and the related cost of x-rays would be required for the balance of Moore Metal's life (J[244]). These are the ongoing (increased) costs of maintaining the chattel. There was no issue that the need for them arose from the injuries sustained in the accident (J[244]). Again, if was not unreasonable to keep Moore Metal, damages for these costs

are necessary to restore the Respondent to the position it would have been in had the contract been performed – it would still have been the owner, but incurring less cost. Had it felt compelled to sell a chattel it would have otherwise kept, presumably this would have given rise to a right to damages for loss of amenity of use of the chattel: *Arsalan* at [25]-[27]. The Trial Judge then adopted an entirely conventional approach of determining the present value of those recurring expenses (J[249]): see *Cullen v Trappell* at 12 and *Todorovic*.

30 The Applicants' submission that the injury to Moore Metal in fact led to the Respondent 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*" is unsupported by any factual finding made by the Trial Judge and should be rejected.

No error in relation to costs

Applicable principles

31 In addition to the applicable principles set out in the Applicants' Summary of Argument, the respondent adds the following.

32 While a successful party may be deprived of costs, either in part or in whole for misconducting litigation, generally it would not be appropriate to deprive a successful party of costs of claims or defences which were not unreasonably maintained, even if not made good: ***Michael Hill*** *Jeweller (Australia) Pty Ltd v Gispac Pty Ltd (No 2)* [2024] NSWCA 274 at [22] per Bell CJ, Payne JA and Basten AJA. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case: *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16; *Access Training Group Ltd v Jane* [2024] NSWCA 204 at [188] (Ward P, Payne JA agreeing).

33 As an award of costs is discretionary, any challenge to such a costs order must seek to establish an error of the kind described in *House v R* (1936) 55 CLR 499 at 505: ***John Anthony Arena*** *Pty Ltd v Franpina Developments Pty Ltd* [2022] NSWCA 139 at [17], per Kirk JA, with whom Macfarlan JA agreed.

34 Costs fall within the category of matter of practice and procedure and hence there is the 'added restraint' and 'particular caution' which an appellate court should exercise in reviewing judgment on such matters: *re Will of F B Gilbert (dec'd)* (1946) 46 SR (NSW) 318 at 323 per Jordan CJ; *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 at 644 per

Kirby P, Priestley and Glass JJA agreeing; *McInnes v Rheem Australia Pty Ltd* [2021] NSWCA 89 at [23] per Gleeson JA, Bell P and Payne JA agreeing.

35 Trial judges are generally best placed to weigh up the interests involved in awarding costs: *John Anthony Arena* at [18]; *Makowska v St George Community Housing Ltd* [2025] NSWCA 61 at [6] per Stern and McHugh JJA.

No error

36 The Applicants contend that the Trial Judge's discretion as to costs miscarried as his Honour proceeded on the erroneous basis that it was not an "*appropriate or significant consideration*" that the respondent was not successful on quantum as it was common for a plaintiff to claim more than was awarded, and that the usual course in such a case was to make a Calderbank offer or offer of compromise. That contention inaccurately describes the way in which the Trial Judge considered, and ultimately disposed of, the Applicants' submission that there should be a variation to the costs order because the Respondent was not successful in terms of monetary judgment by a very significant amount (CJ, T at p14). His Honour held that the monetary difference was not an appropriate consideration, or if it was, his Honour did not consider it significant in this case (CJ, T at p14). There was no misapplication of principle in that approach. The Trial Judge was best placed to weigh up the interests involved in awarding costs.

37 In any event, the Trial Judge's discretion did not miscarry in considering, as relevant, that the Applicants had not made an Offer of Compromise, or *Calderbank* offer, that was better than the judgment sum.

38 More generally, in considering the Trial Judge's costs order, it is important to recognise the Trial Judge's observations about the complexity of the case, in terms of the evidence and the issues it presented (see CJ, T p1-2). The Trial Judge also observed (relevant to order 3(b) of the proposed Notice of Appeal) that the nature of this case, the complexity of the factual issues and the legal issues warranted bringing the case in the District Court over and above the Local Court, even if the judgment amount was less than $40,000 (CJ, T p16).

39 Moreover, as the Trial Judge observed (CJ, T pp16-17), in considering costs of the proceedings the Applicants late admission of liability was highly relevant. There were a number of liability issues that were in play, brought up to the very opening addresses for counsel and no good reason has been put forward for depriving the Respondent of its

costs of the proceedings on that basis. As his Honour observed, liability could have been admitted earlier, when the matter was fixed for hearing. At the commencement of the hearing, liability and quantum were in issue (CJ, T p17).

40 It is incorrect for the Applicants to assert that "the Plaintiff failed in comparison to the defendant on each of the heads of damage in question". The Applicants' case on quantum was that the Respondent was not entitled to any damages (CJ, T p15). In any event, whilst the Respondent did not succeed in obtaining the full quantum it claimed, it has not been suggested, and there would be no basis for suggesting, that any of its claims were unreasonably maintained – as such, it would not be appropriate to deprive the Respondent of costs: *Michael Hill* at [22].

B. Reasons why leave should not be granted

41 Leave is required for both aspects of the appeal; the sum involved in the damages point is less than $100,000, and the other limb relates purely to costs. A grant of leave generally requires the identification of an issue of principle, a question of public importance, or a reasonably clear injustice going beyond something that is merely arguable: *Carolan v AMF Bowling Pty Ltd* [1995] NSWCA 69; *Jaycar v Lombardo* [2011] NSWCA 284 at [46] per Campbell JA; ***Cheng v Motor Yacht Sales*** *Australia Pty Ltd t/as The Boutique Boat Company* (2022) 108 NSWLR 342 at [15] per Bell CJ, Ward P and Basten AJA agreeing

42 Leave should be refused for the following reasons. ***First***, the application does not involve any issue of principle, on either limb. Rather, it involves the application of well-established principles to the facts that were before the Court. ***Secondly***, the application does not involve an issue of general importance, on either limb. As identified above, the principles to be applied in relation to damage to a chattel caused by a breach of duty or breach of contract are well-established. Costs principles are very well settled. ***Thirdly***, the Applicants have not demonstrated a reasonably clear injustice. Contrary to the submission advanced by the Applicants, it was the Applicants, who, in contending that the Respondent was not entitled to any damages, were the unsuccessful party. ***Fourthly***, in relation to costs, the Applicants have not identified any *House v R* error. ***Fifthly***, in relation to the damages claim, the small amount in issue militates against a grant of leave: see *Rock v Henderson (No 2)* [2025] NSWCA 47 at [203] per Kirk, Adamson and Ball JJA; *Cheng v Motor Yacht Sales* at [16], [20]. The fact that costs claimed are in excess of

$100,000 does not militate in favour of a grant of leave in the absence of other factors warranting a grant: *John Anthony Arena* at [19].

C. Authorities

43 The Respondent has referred to the following authorities on the question of damages: *Arsalan v Rixon* (2021) 274 CLR 606 at [18], [25]; *Bell v Thompson* (1934) 34 SR (NSW) 431 at 439; *Cullen v Trappell* (1980) 146 CLR 1 at 12; *Darbishire v Warran* [1963] 1 W.L.R. 1067 CA at 1071; *Davidson v J S Gilbert Fabrications Pty Ltd* [1986] 1 Qd R 1 at 5-6; *Haines v Bendall* (1991) 172 CLR 60 at 63; *Payton v Brooks* [1974] R.T.R. 169 CA at 176; *The Georgiana v The Anglican* (1873) 21 W.R. 280; *The London Corp* [1935] P. 70 CA at 77; *Talacko v Talacko* (2021) 272 CLR 478 at [45]; *Todorovic v Waller* (1981) 150 CLR 402; J Edelman, *McGregor on Damages* (22nd edition, 2024, Thomson Reuters) at [38.003], [38-004], [38-005].

44 The Respondent has referred to the following authorities on the question of costs: *House v R* (1936) 55 CLR 499 at 505; *John Anthony Arena Pty Ltd v Franpina Developments Pty Ltd* [2022] NSWCA 139 at [17], [18], [19]; *Makowska v St George Community Housing Ltd* [2025] NSWCA 61 at [6]; *McInnes v Rheem Australia Pty Ltd* [2021] NSWCA 89 at [23]; *Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd (No 2)* [2024] NSWCA 274 at [22]; *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 at 644; *re Will of F B Gilbert (dec'd)* (1946) 46 SR (NSW) 318 at 323; *Cretazzo v Lombardi* (1975) 13 SASR 4; *Access Training Group Ltd v Jane* [2024] NSWCA 204 .

45 The Respondent has referred to the following authorities on the question of leave to appeal: *Carolan v AMF Bowling Pty Ltd* [1995] NSWCA 69; *Jaycar v Lombardo* [2011] NSWCA 284; *Cheng v Motor Yacht Sales Australia Pty Ltd t/as The Boutique Boat Company* (2022) 108 NSWLR 342 at [16], [20]; *Rock v Henderson (No 2)* [2025] NSWCA 47 at [203].

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