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

Solicitor, Murphy's Lawyers, for the Applicants.

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PO
SUPREME COURT OF NEW SOUTH WALES

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

NSW Supreme Court, Court of Appeal Case No. 2025/137701

Applicants' Reply Submissions

Proposed ground 1 – damages for future expenses

1. In answer to the Respondent's submissions with respect to proposed ground 1, the Applicants contend as follows.

2. ***First***, the method used to calculate future expenses associated with Moore Metal was not, as the Respondent contends, *"entirely conventional"*: *cf* **Response [9], [29]**. The authorities cited by the Respondent concern personal injury cases. The Respondent has not cited any authority where such an approach has been adopted in a case of damage to chattels. The assessment of damages consequent upon personal injury to human beings involve different principles to the assessment of damage to chattels. The Respondent similarly asserts that it is *"uncontroversial that damages may be given for a prospective loss"* (**Response [23]**) but, again, cites no authority in a damage to chattels context.

3. ***Second***, the Respondent appears to accept that it would be wrong in law for the Trial Judge to have awarded both a diminution in market value *and* future costs of maintaining Moore Metal if the award for diminished market value took into account the future costs. The Respondent instead appears to defend the Trial Judge's reasoning by saying that the Trial Judge's award of damages for $20,000 for diminution in value *"did not take into account"* the fact that future expenses would be incurred: **Response [22]**. There is nothing in the reasons, in principle or in the submissions or evidence that supports that submission.

4. ***Third***, perhaps because of the premise adopted in relation to the first argument, the Respondent does not engage in the critical point of principle flowing from the authorities such as *Electricity Trust of South Australia v O'Leary* (1986) 42 SASR 26 (***O'Leary***) and *Darbishire v Warren* [1963] 1 WLR 1067 (CA), namely, as to why an award based on diminution in market value is not appropriate. The onus is on the plaintiff to satisfy the court based on the whole of the evidence as to the correct method of assessing damages (*Jansen v Dewhurst* [1969] VR 421 at 426) and to satisfy the court that any loss is not too remote (*Garnac Grain Co v Faure & Fairclough* [1968] AC 1130).

5. The Respondent has not demonstrated that an award for diminution in market value does not appropriately compensate a plaintiff with a damaged chattel (either in general or in this

particular case) in a more appropriate manner than an award for future expenses. Diminution in market value should in principle take into account the chattel as a going concern which includes both any prospect of profit and any prospect of loss, which will include any additional future expenses by reason of the damage. The Respondent has not demonstrated why an award of future stream of costs – considered in a manner unrelated to the chattel as a going concern – would be at all appropriate either generally or in the present case.

6. The submission at **Response [27]** that diminution of market value is not the *"appropriate measure"* as there is no *"evidentiary foundation"* should be rejected. It is a matter for a plaintiff to substantiate its loss. The Respondent served no admissible evidence on market value of Moore Metal and otherwise relied on its accounting evidence, which was rejected. Further and in any event, the Trial Judge did in fact award damages for the diminution of market value of $20,000. The Trial Judge did so based *"on the evidence"*: J[270]. While the expert opinion of Mr Inglis (the Applicants' expert) was not accepted by the Trial Judge (see J[73]-[85]), the Trial Judge's award for diminution in value was nonetheless at least broadly consistent with the conclusion of Mr Inglis, who said that Moore Metal was worth around $40,000 if not injured and around $10,000 to $30,000 once injured: Inglis Supplementary Report, 19 February 2024 [6], [12].

7. The submission at **Response [28]** that an award for future costs is appropriate because the issues of causation and quantum of future costs might be *"undisputed"* is not sound in principle. The question of the appropriate measure of damages is a different question to causation and quantum. The Applicants' position at trial was that much of causation and quantum of future costs was not in dispute. What was in dispute was the appropriateness of an award of such future costs when any future costs would be accommodated in the diminution of market value of the horse.

8. The submission at **Response [28]** that an award of future costs is appropriate because the trial judge rejected a defence of failure to mitigate is also not sound in principle. The question of a failure to mitigate concerns what a defendant has done in the past and is a matter on which evidence may be adduced about what in fact occurred. The present appeal concerns the very different question of future expenses where the relevant facts have not yet occurred.

9. There was no case advanced by the Respondent that there was some peculiar use to be made of Moore Metal that would not be accommodated in the market price of Moore Metal: *cf*

O'Leary, where the owners contended they intended to put the horse to the peculiar use of gambling on the horse when it was competing.

10. There was no factual finding that the Respondent was resolved to never sell the horse or that the owner had some kind of personal or sentimental reason for maintaining the horse beyond the date of judgment. Nor based on authority could there be a finding based on sentimentality: see *Darbishire* at [59]-[60] (a finding adopted in the US cases on horses in particular: see Missouri, *K & T R Co v Crews* (1909) 54 Tex Civ App 548; 120 SW 1110; *Canadian v Guthrie* (1935), Tex Civ App); 87 SW2d 316; *Crawford v International & G N R Co* (1894, Tex Civ App); 27 SW 263).

11. There was no factual finding that it was profitable to operate Moore Metal as a going concern. To the contrary, there was a finding that the injury had not caused the Respondent to lose any commercial opportunity having at least some non-negligible value: J[174], [194]-[195], [199]-[203].

12. ***Fourth***, on the question of leave, the Respondent contends that the present appeal does not give rise to an important question of principle or some clear injustice yet does not refer to any clear authority that would support the Trial Judge's approach in the damage to chattel case or explain persuasively how the Respondent is not being doubly or unfairly compensated by reason of the future costs award.

Proposed ground 2 – costs

13. The Applicants makes the following reply submissions in relation to proposed ground 2.

14. ***First***, there is no inaccuracy or mischaracterisation of the Trial Judge's considerations on costs: *cf* **Response [36]**. The relevant reasoning of the Trial Judge is at T14-T15 of the costs judgment.

15. ***Second***, the Respondent contends that there was *"no misapplication of principle"* in this approach (**Response [36]**) yet refers to no authority that would support the rigid approach adopted by the Trial Judge. Indeed, the Respondent cites no authority which that clearly sets out the proper approach to determining costs following a trial as to quantum only. It is not correct to say that it is never appropriate to fashion a costs order having regard to the fact that a plaintiff was unsuccessful as to the quantum it claimed unless a *Calderbank* or offer of compromise was made – again, at least in a case where the dispute is to quantum only. The cases repeatedly state that the discretion as to costs is broad, principled, and must depend on the circumstances of the case.

16. The Applicants contend that when determining costs following a trial on quantum only, a relevant and potentially significant factor will be the whether and to what extent the parties succeeded on the issues of quantum litigated at trial.

17. ***Third***, the Respondent is not assisted by any opinion of the factual complexity of the trial by the Trial Judge: **Response [38]**. The Applicants allege a discrete *House v The King* error was made in the costs judgment, namely, that in determining costs following a trial as to quantum only, the Trial Judge misstated the relevant and applicable principles to determining such an application.

18. ***Fourth***, to the extent that the Respondent's submissions are taken to be saying that, were the proper principles to be applied, the Court would not make a different order (e.g. **Response [39]-[40]**), the Court should not accept those submissions. The Court would consider the entirety of the relevant matters including those matters not considered appropriate or significant by the Trial Judge as to the respective contentions of quantum at trial. For instance, the Respondent claimed in excess of $1m in the lead up to the proceeding in the face of the Applicants raising concerns about the costs being potentially disproportionate to the quantum (Wrench Affidavit [24]-[46]). The Respondent claimed a similarly large amount in its schedule of damages and in opening[1] and claimed some $314,272 in closing. They may be contrasted with what was put by the Applicants[2], and what was ultimately awarded by the Trial Judge ($78,132). That figure would be reduced to $36,132 if the Applicants are correct on their proposed ground 1.

19. ***Fifth***, as to leave, the Respondents contend the matter does not give rise to a question of legal principle or demonstrate a reasonably clear injustice (**Response [42]**) yet do not point to a case which sets out clearly the applicable principles when determining costs following a trial as to quantum only. The question clearly has broader application. Nor do the Respondents engage with the fact that the result of the present decision is that the legal

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[1] In Opening Submissions at [87], the Plaintiff put its loss as follows (and accepting the insurance proceeds would be deducted from any award): *"(a) Diminution in market value: $117,562; (b) Financial loss (loss of value) - breeding: $111,771 to $746,611; (c) Financial loss (loss of value) - prize money: $92,546; (d) Veterinary and related expenses from the date of the Accident to 26 March 2024: $98,419.64; and (e) Ongoing veterinary and related expenses: $229,220."*. The Schedule of Damages was the same but for it claimed a higher amount for diminution in market value: $217,500.

[2] The Defendant's Schedule of Damages stated: *"(1) Diminution of fair market value: between nil and $30,000. (2) Financial loss - breeding: nil. (3) Financial loss - prize money: nil. (4) Past veterinary expense: between nil and $55,722.14. (5) Future: between nil and $40,000."* The Defendants stated *"At the conclusion of the evidence, the defendants will be contending that the plaintiffs have vastly overstated their claim for damages. What is left over and above what the plaintiffs have already been compensated for is not clear. It is certainly nowhere near the unreasonable sums claimed by the plaintiffs."*

costs will be vastly disproportionate to the quantum in dispute. If that costs order has been made on an incorrect basis, the unjust effect on the Applicants is plain.

David Lloyd

12 Wentworth Selborne

Matthew Kalyk

12 Wentworth Selborne

Counsel for the Applicants

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