

Supreme Court
New South Wales

Case Name: Sethi v The Owners – Strata Plan 93392 (No 8)

Medium Neutral Citation: [2024] NSWSC 213

Hearing Date(s): On the papers

Date of Orders: 06 March 2024

Decision Date: 6 March 2024

Jurisdiction: Common Law

Before: Chen J

Decision: Order, pursuant to s 98(4)(c) of the Civil Procedure Act 2005 (NSW), the plaintiff pay the defendant’s costs of the proceedings, and of the notice of motion filed 17 November 2023, in the gross sum of \$213,000.00.

Catchwords: COSTS – party/party – self-represented litigant – where application made by defendant for gross sum costs orders under s 98(4)(c) of the Civil Procedure Act 2005 (NSW) following summary dismissal of plaintiff’s claim – where conduct of the plaintiff significantly increased costs and disbursements incurred by the defendant – application granted

Legislation Cited: Civil Procedure Act 2005 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: Ahern v Aon Risk Services Australia Ltd (No 2) [2022] NSWCA 39
Beach Petroleum NL v Johnson (No 2) (1995) 57 FCR 119; [1995] FCA 350
Brown v The Stables Perisher Management Pty Ltd (No 2) [2022] NSWSC 902
Hamod v State of New South Wales [2011] NSWCA 375
Hancock v Rinehart (Lump sum costs) [2015] NSWSC 1640
Harrison v Schipp (2002) 54 NSWLR 738; [2002] NSWCA 213

Sethi v The Owners – Strata Plan No 93392 (No 6) [2023] NSWSC 1368
Sethi v The Owners – Strata Plan 93392 (No 7) [2023] NSWSC 1647

Category: Costs

Parties: Akhil Sethi (plaintiff)
The Owners – Strata Plan 93392 (defendant)

Representation: Solicitors:
Plaintiff (self-represented)
Eakin McCaffery Cox (defendant)

File Number(s): 2023/00137553

Publication Restriction: Nil

JUDGMENT

Introduction

- 1 This is an application by the defendant for a gross sum costs order under s 98(4)(c) of the *Civil Procedure Act 2005* (NSW) ('the CPA') arising from orders I made on 13 November 2023, including an order summarily dismissing the plaintiff's proceedings: *Sethi v The Owners – Strata Plan No 93392 (No 6)* [2023] NSWSC 1368 ('the primary judgment').
- 2 At the time I delivered my reasons, the defendant indicated its intent to pursue the current application and, on 17 November 2023, filed a notice of motion seeking orders to that effect.
- 3 The disposition of the defendant's application was delayed by applications made by the plaintiff for me to recuse myself and for the orders made on 13 November 2023 to be set aside. In connection with the plaintiff's applications, orders were made for the filing and service of evidence, and submissions.
- 4 On 22 December 2023, I dismissed the plaintiff's applications: *Sethi v The Owners – Strata Plan 93392 (No 7)* [2023] NSWSC 1647. On that day, I also made orders dealing with the filing and service of evidence and submissions in connection with the defendant's costs application: the defendant was ordered to file and serve evidence and submissions in support by 25 January 2024 (the defendant complied with this order); the plaintiff was to file and serve evidence and submissions in support by 29 February 2024 (the plaintiff did not comply with this order).

- 5 Although, initially, I was disposed to ordering a more compressed timetable, the orders reflected the position of the parties. For the plaintiff, in particular, he requested that any evidence and submissions be filed and served by that time.
- 6 The material relied upon by the defendant includes a considerable number of affidavits that had been served in the proceedings, including in relation to the multiple interlocutory disputes that had arisen, as well as an affidavit of the solicitor for the defendant, Linda Holland, affirmed 25 January 2024 which specifically dealt with the issues arising in the cost application.

The plaintiff's email sent on 29 February 2024

- 7 The plaintiff, as I indicated, did not comply with the order that I made to file and serve evidence. Instead, the plaintiff emailed my Chambers on 29 February 2024 at 4:26p.m. broadly indicating that he had filed notices of motion on 15 December 2023 and 5, 22 and 28 January 2024 which the plaintiff indicated “require a listing” and were said to be “the interlocutory steps and mandatory considerations for any evidence and submissions by the Plaintiff pursuant to the orders made on 22 December 2023 by Chen J”. The plaintiff, in that email, indicated that, despite following up the Court, the motions that the plaintiff had filed were “still pending”, and the plaintiff requested that they be allocated “to a separate Judge or be dealt with by the Chief Justice (sic) at Common Law”. The plaintiff also suggested that once those motions “are listed and dealt with appropriately, this will also deal with the orders made by Chen J on 22 December 2023 or those orders may become otiose by the superseding orders”.
- 8 The plaintiff also made a request that “Chen J do[es] not take any action and have the court and/or Chief Justice (sic) at Common Law deal with the allocation or the Motions filed by the plaintiff” or, it appears, the plaintiff requested that any evidence in connection with the defendant’s application for a gross sum costs order be filed and served by 29 August 2024 and any submissions in connection with that application be filed and served by 12 September 2024.
- 9 The plaintiff indicated that he has been “involved in the litigation in other jurisdictions which has taken his considerable time and has not even got a chance to review the submissions or evidence” served by the defendant and there was “no urgency to deal with any costs orders” – that was, the plaintiff suggested, particularly so in circumstances where the orders “made by Chen J will get set-aside or may become otiose by any superseded orders and further defendants/co-conspirators will get added to progress the proceedings in an appropriate manner”.
- 10 For completeness, it should be noted that Campbell J, on 11 January 2024, provided a Judicial Direction in connection with the many notices of motion that the plaintiff has sought to file in the proceedings notwithstanding the order that I had made on 13 November 2023. It is, for present purposes, sufficient to set out his Honour’s direction at [6]-[9]:

6. The legal position then is that by the orders of Chen J, the whole proceedings have been dismissed. My orders of 17 July 2023 and 1 August 2023 have merged in Chen J's order dismissing the whole proceedings. My orders are no longer operative. The legal position is that matter number 2023/00137553 is no longer extant and pending. There are no proceedings, other than the outstanding costs application which his Honour, according to the timetabling orders, may decide to deal with in chambers on the papers without the need for any party to attend.

7. As there are no longer any principal proceedings capable of supporting Mr Sethi's notices of motion the subject of this direction, those notices of motion should be removed from the Court file, expunged from JusticeLink and returned by post to Mr Sethi together with any affidavit filed in support.

8. From the contents of the lengthy email correspondence exchanged between the Registrar and other registry officers on the one hand, and Mr Sethi on the other, it is clear that he has formed the baseless and erroneous view that the orders I have referred to are "illegal" and for that reason need not be obeyed by him. This is a complete misconception. The clearly established principle requires no citation of authority: orders and judgments of superior courts of record are presumptively valid and of full legal effect and authority according to their terms unless and until they are set aside on appeal. Mr Sethi has made it equally clear he has no intention of seeking to bring any appeal because he regards that as unnecessary. He did at one stage file a notice of intention to appeal which has now lapsed. Undoubtedly, he will purport to continue to attempt to file such notices of motion as he feels are warranted. For these reasons, any future notice of motion or other document that Mr Sethi purports to file in the proceedings in defiance of the order for summary dismissal should be rejected and returned to him and I so direct.

9. The Registrar is to forward a copy of this direction to Mr Sethi, the solicitors for other interested parties in the dismissed proceedings and the chambers of Chen J.

- 11 Having reviewed the material, I am satisfied that the current application can and should be determined "on the papers" and without the need for a further hearing: ss 56-58 of the CPA. I have also considered the procedural history of the proceedings and the need to eliminate delay (s 59) and for the cost to the parties to be proportionate (s 60).
- 12 Nor do I propose to extend the time, in the way sought, to enable the plaintiff to put on evidence and submissions (the plaintiff sought an extension for around 6 months). My reasons for refusing to do so are as follows.
- 13 In relation to the plaintiff's submission that a reason for granting an extension for this period of time arose from his involvement in "litigation in other jurisdictions", then what this is, or involves, was not explained. To the extent that there was any reference to other litigation when the matter was before me on 8 November 2023, as I recorded in the primary judgment at [10], the plaintiff strongly objected to the defendant advising me about proceedings involving the plaintiff in the Equity Division of this Court. I am not prepared to act on the plaintiff's assertion about other litigation as a basis to defer the matter. In any event, I do not consider that the plaintiff's involvement in other proceedings justifies an adjournment. In this respect, I would simply point out that, when I made the orders on 22 December 2023, the plaintiff specifically asked for until 29 February 2024 to file and serve evidence and submissions (which was longer than I had initially favoured) because of his involvement in some other "litigation". Quite why it requires another six months is simply unexplained and, in the circumstances, unacceptable.

- 14 In relation to the plaintiff's submission that the other notices of motion the plaintiff has filed in the Court may, in effect, result in any determination on this application to become "otiose", I would simply emphasise that the proceedings in this matter (subject to the outstanding question of costs) have been dismissed and the multiple notices of motion that the plaintiff has filed in the period December 2023 and January 2024, to which reference has been made, have been filed in defiance of the direction made by Campbell J on 11 January 2024. The filing of those notices of motion provides no sound reason why I should accede to what the plaintiff requests.
- 15 In relation to the plaintiff's submissions that there was no "urgency" in dealing with the outstanding costs question, I respectfully disagree. The history of the plaintiff's proceedings in this Court are set out in the primary judgment as well as the judgment of Campbell J that his Honour delivered on 17 July 2023 and the multiple judgments his Honour delivered on 1 August 2023. It is, in my view, fair to say that the plaintiff has pursued the defendant since proceedings were commenced in this Court on 30 April 2023 as part of proceedings that I have concluded are entirely without merit. During the currency of those proceedings, the plaintiff has subjected the defendant (and those that represent it) to conduct in connection with those proceedings that I regard as oppressive, burdensome and harassing. That conduct has continued notwithstanding that I summarily dismissed the plaintiff's claim. Further, given the plaintiff's conduct over the course of the proceedings in this Court, I am unpersuaded that the plaintiff actually intends to adduce any evidence on this application, nor make any submissions. Rather, consistent with what has occurred during the course of the proceedings, the plaintiff will continue to file notices of motion in the misguided attempt to "outflank" the orders made by Campbell J and myself. The fact that the plaintiff continues to file notices of motion after the direction made by Campbell J on 11 January 2024 is the most recent illustration of the conduct to which I refer.
- 16 The just, quick and cheap (and final) resolution of the real issues in the proceedings and the dictates of justice all, in my view, powerfully support refusing the plaintiff's request, and I do so.

Legal principles: gross sum costs orders

- 17 Section 98 of the CPA grants the Court discretion to award costs. By s 98(4)(c), the Court is entitled to make a gross sum costs order in place of assessed costs:

98 Courts powers as to costs

(1) Subject to rules of court and to this or any other Act—

- (a) costs are in the discretion of the court, and
- (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
- (c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

...

(4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to—

- (a) costs up to, or from, a specified stage of the proceedings, or
- (b) a specified proportion of the assessed costs, or
- (c) a specified gross sum instead of assessed costs, or
- (d) such proportion of the assessed costs as does not exceed a specified amount.

18 The guiding principle, in an application for a gross sum costs order, is that the “power should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available”: *Harrison v Schipp* (2002) 54 NSWLR 738; [2002] NSWCA 213 at [22] (*Harrison*). The relevant principles were summarised in *Ahern v Aon Risk Services Australia Ltd (No 2)* [2022] NSWCA 39 at [14]-[18] (*Ahern*) in these terms:

14. The principles relevant to the Court’s exercise of discretion under s 98 were set out in *Hamod v New South Wales* [2011] NSWCA 375 at [813]-[820] (Beazley JA) (***Hamod***). Her Honour noted at [813]:

[813] The discretion thereby conferred upon the court is not confined and may be exercised whenever the circumstances warrant its exercise, having regard to the scope and purpose of the provision: *Harrison & Anor v Schipp* [2002] NSWCA 213; 54 NSWLR 738 per Giles JA at [21]-[22]. In *Harrison v Schipp*, Giles JA considered that the discretion in s 98(4) may be exercised where the assessment of costs would be protracted and expensive and, in particular, if it appeared that a party obliged to pay the costs would not be able to meet a liability of the order likely to result from the assessment. However, his Honour stated, at [22]:

"The power should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available."

15. The principal purpose of a specified gross sum costs order under s 98(4)(c) is to avoid the expense, delay and aggravation likely to be involved in a contested costs assessment process: *Hamod* at [816]-[817]. As Basten JA noted in *James v Australia and New Zealand Banking Group Ltd* [2017] NSWCA 84 at [3]:

The power to make such an order is governed by the obligation of the court to give effect to the overriding purpose of the Act, as identified in Pt 6 of the *Civil Procedure Act*. The court is to ensure that the issues between the parties are resolved “in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute” (*Civil Procedure Act*, s 60); that obligation extends to the disposal of disputes as to costs. Although questions of costs undoubtedly play an important practical role in commercial litigation, disputes as to quantification are ancillary to the primary issues in dispute and consequential upon the resolution of the primary issues. Costs provide an opportunity for ongoing litigation about “non-essential issues” which should be resolved with as little technicality and expense as reasonably practicable. [footnotes omitted]

16. Primary considerations relevant to the exercise of the s 98(4)(c) discretion include “the relative responsibility of the parties for the costs incurred; the degree of any disproportion between the issue litigated and the costs claimed; the complexity of proceedings in relation to their cost; and the capacity of the unsuccessful party to satisfy any costs liability”: *Hamod* at [816]; see also *Kostov v Zhang (No 2)* [2016] NSWCA 279 at [22]; *eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd (No 2)* [2015] NSWCA 422 at [30].

17. The power to award a gross sum should only be exercised when the Court considers that it can do so fairly between the parties and where an appropriate sum can be determined from the available materials: *Harrison v Schipp* (2002) 54 NSWLR 734 at 743; [2002] NSWCA 213 at [22].

The power may be exercised where a party's conduct has unnecessarily contributed to the costs of the proceedings, especially where the costs incurred have been disproportionate to the result of the proceedings: *Hamod* at [818].

18. If it considers it appropriate to make the order, the Court may adopt a “broad brush” approach to quantification, as to require the Court to undertake a detailed examination of the kind carried out in a formal costs assessment would defeat the purpose of the order: *Harrison v Schipp* at 743; *Penson v Titan National Pty Ltd (No 3)* [2015] NSWCA 121 at [7]. The costs ordered should be “based on an informed assessment of the actual costs having regard to the information before the court (for example, by relying on costs estimates or bills)”: *Hamod* at [820]. Courts have typically applied a discount when assessing costs on a gross sum basis, though the aptness of a discount primarily depends on the accuracy and reliability of the costs evidence available to the Court: *Hamod* at [814].

- 19 In my view, the following matters demonstrate that this is an appropriate case for the exercise of the Court’s discretion, under s 98(4)(c) of the CPA, to make a gross sum costs order. First, it will avoid the delay, cost and expense of the assessment process. Secondly, there remains some doubt about the plaintiff’s capacity to meet his liability in costs. In relation to this matter (and the first), the evidence from the solicitor for the defendant, in her affidavit of 25 January 2024 at pars 85-92, sets out the basis for her questioning the plaintiff’s ability to pay the costs of an assessment (or costs more generally). In my view, that material supports the doubts that I have. Thirdly, in the event that there was a requirement to have the costs assessed, putting to one side the inevitable delay that would result if that were to eventuate, it is quite likely – given what has occurred in the proceedings to this point (which are sufficiently covered in the judgment delivered on 13 November 2023) – that there would be “aggravation” (in the sense described in the authorities, earlier referred to) involved in such process. Fourthly, the power is appropriately exercised where – as here, I find – “a party's conduct has unnecessarily contributed to the costs of the proceedings”, particularly, “where the costs incurred have been disproportionate to the result of the proceedings”: *Ahern* at [17].

The defendant’s application

Introduction

- 20 The defendant, by notice of motion filed 17 November 2023, seeks two substantive orders: first, a gross sum costs order for the proceedings (order 1); and, secondly, an order that the plaintiff pay the defendant’s costs of this application on a gross sum basis (order 2).
- 21 As I have earlier noted, the defendant relied upon a number of affidavits previously filed in the proceedings, however, it principally relied upon an affidavit from Linda Holland affirmed 25 January 2024 for the making of the gross sum costs orders.

The amounts claimed: a summary

- 22 By way of summary, as outlined in the defendant's written submissions (par 22), the defendant’s costs and disbursements claimed are (Holland affidavit, par 81, exhibit LMH-1, p 131):
- (1) professional costs (excluding GST): \$175,170.50; and,
 - (2) disbursements (excluding GST): \$26,517.24.

- 23 These amounts total \$201,687.74 (excluding GST).
- 24 The defendant, as set out in the written submissions (par 24), seeks 90% of the total professional costs incurred (namely, \$157,653.45), and 100% of the disbursements incurred (namely, \$26,517.24). These amounts total \$184,170.69 (excluding GST).
- 25 In relation to the notice of motion, the defendant's total costs for fees and disbursements are claimed in the amount of \$19,580.00 (excluding GST). The plaintiff, again, seeks 90% of the total professional costs incurred or likely to be incurred (\$16,722.00 excluding GST) plus an estimate for counsel's fees (\$1,000.00 excluding GST). These amounts total \$17,722.00 (excluding GST) (Holland affidavit, par 83).
- 26 In the result, the defendant, applying a "broad brush", sought an order that the plaintiff pay the amount of \$220,000.00 (inclusive of GST) on a gross sum basis to cover for the costs of the proceedings and of the notice of motion (Holland affidavit, par 84; written submissions at [25]).

Consideration and disposition

Introduction

- 27 Although I have found that the circumstances are such that it is appropriate for the Court to give consideration to the exercise of its discretion to make a gross sum costs order under s 98(4)(c) of the CPA, the power "should only be exercised when the Court considers that it can do so fairly between the parties and where an appropriate sum can be determined from the available materials": *Harrison* at [22]; *Ahern* at [17]. I am satisfied as to the existence of both matters.
- 28 I turn now to the quantification of the defendant's costs. This needs to be an informed assessment so as to permit the Court to make a "logical, fair and reasonable" estimate: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119, 123; [1995] FCA 350. In undertaking that assessment, however, the Court applies a "broad brush", mindful that the process is not to take on the characteristics of a formal costs assessment – something that would defeat the purpose of the order: *Ahern* at [18].

The substantive proceedings

- 29 Ms Holland deposed that the total amount of professional costs and disbursements incurred by the solicitors for the defendant in the proceedings were \$234,077.01 (including GST: Holland affidavit, pars 64 and 66, exhibit LMH-1, p 132). Some of these costs were accepted by the defendant not to relate to the current proceeding, but to the defendant "observing" related proceedings between the plaintiff and his landlord (Holland affidavit, par 73). The amount of costs incurred in observing those related proceedings were estimated to be \$11,610.00 (excluding GST: Holland affidavit, par 73, exhibit LMH-1, p 133). I am satisfied those costs should not form part of the costs properly claimed.

- 30 The costs and disbursements incurred by the defendant – excluding the costs referable to the defendant observing the related proceedings – are \$201,687.74 (excluding GST) or \$221,856.51 (including GST: Holland affidavit, par 81, exhibit LMH-1, p 131; defendant’s submissions at [22]).
- 31 I will deal first with the professional costs claimed (see [22]-[24], above).
- 32 The affidavit sets out the hourly rates that were charged by the solicitors who undertook work on the matter. They are, respectively, \$600.00 per hour plus GST (for a partner); \$510.00 per hour plus GST (for a senior associate); and \$300.00 per hour plus GST (for an employed solicitor). There is nothing to suggest that these rates are, in any respect, unreasonable. In relation to the hourly rate for Ms Holland, I would simply observe that she is a legal practitioner of considerable experience, and I have no hesitation in accepting the reasonableness of the rate that she charged, nor in accepting the other hourly rates as I have identified. Separately, I add: they are in line with the guidelines issued by the Costs Assessment Rule Committee.
- 33 Ms Holland described the activities undertaken, and the costs incurred, in considerable detail in the body of, and the exhibit to, her affidavit – which I accept. I am satisfied that this material enables me to arrive at a conclusion that is logical, fair and reasonable in connection with professional costs and disbursements. The solicitor for the defendant has explained, in her affidavit at par 69, the tasks undertaken by her, and her firm, in dealing with the plaintiff’s proceedings and claims. The detail of the work specifically performed is set out in the respective invoices that were issued by that firm that were annexed to Ms Holland’s affidavit. I accept Ms Holland’s evidence, and am satisfied that the costs incurred, and now claimed, fairly and reasonably represent the work required to be undertaken to deal with the plaintiff’s claim.
- 34 The procedural history of the proceedings is unusual. Whilst, often, in an application such as this (and in an affidavit in support of an application such as this) the breakdown of work is divided into identifiable stages through which the litigation has passed, here, however, the progress of the matter involved steps taken to have the plaintiff’s proceedings the subject of repleading and, in default thereof, struck out and/or summarily dismissed. However, it is the steps taken by the plaintiff, and the manner in which he has sought to conduct the litigation that has caused considerable delay and significantly increased the costs that were required to be incurred by the defendant. This also informs why the evidence adduced to support the application involves attaching (and relying upon) the specific bills issued by the solicitors for the defendant that describe the nature and detail of the work performed.
- 35 As explained by Ms Holland, notably in her affidavit at par 70, the essential reason for the amount of professional costs and disbursements being in the order claimed lies in the *conduct* of the plaintiff: the manner in which the plaintiff has conducted the proceedings has substantially increased the work involved (and thus the costs), including necessitating multiple court appearances; responding or dealing with excessive numbers of emails and/or letters from the plaintiff in connection with his proceedings or his complaints more generally; and

responding or dealing with the multiple numbers of motions that the plaintiff filed during the course of the proceedings, and indeed after they were dismissed. I accept this evidence and, in particular, her explanation about why the costs are of the order claimed. She also explained why she did not delegate some tasks – tasks that ordinarily would be delegated to a junior lawyer: the justification for not doing so, as Ms Holland explained, was because the “serious and personal” allegations made by the plaintiff and the need to shield and protect junior lawyers from accusations and the conduct of the plaintiff. I accept this is an entirely reasonable and justifiable explanation for why certain matters were not delegated to more junior lawyers and were carried out by Ms Holland.

- 36 Consistent with the above, it is important to emphasise a number of matters about the way in which the plaintiff has conducted the litigation in this Court (some of which were the subject of findings made in the primary judgment and inform why an order for indemnity costs was made). They serve to reinforce *why* the costs are at the level they are. It is sufficient to presently note three matters that illustrate this.
- 37 First, the plaintiff has filed in the order of twelve notices of motion seeking various interlocutory orders (usually seeking orders to set aside the orders made by Campbell J and myself) – and, invariably, they were accompanied by voluminous affidavits sworn by the plaintiff.
- 38 To recap: the procedural history of the plaintiff’s claim leading up to the orders made by Campbell J on 17 July 2023 is set out in [11]-[20] of the primary judgment. Thereafter, following delivery of his Honour’s *ex tempore* reasons, the plaintiff filed three notices of motion seeking various orders, including an application that Campbell J disqualify himself and an application to set aside the orders made on 17 July 2023. These developments, and the judgments that Campbell J delivered following the filing of them, are set out in [21]-[26] of the primary judgment. Following delivery of those judgments by Campbell J, the plaintiff attempted to file more notices of motion – on 2 and 31 August and 20 September 2023 – as well as a notice of intention to appeal on 14 August 2023 that identified as respondents to that appeal Campbell J, his Honour’s Associate, the legal representatives for the defendant and the Secretary, NSW Department of Communities and Justice: see the primary judgment at [27]-[28]. Put simply, as I found in the primary judgment, rather than attend to the task of repleading any claim that he wished to advance, the plaintiff attempted to subvert the orders made by Campbell J by filing multiple notices of motion. That pattern and course of conduct continued following the delivery of reasons by me in the primary judgment: see the summary earlier in this judgment at [3] and [4] and the judgment that I delivered on 22 December 2023: *Sethi v The Owners – Strata Plan 93392 (No 7) [2023] NSWSC 1647*.
- 39 I note by way of illustration that, in connection with the solicitors for the defendant being required to deal with the way in which the plaintiff conducted the proceedings (before they were summarily dismissed), Ms Holland was required to attend court on six separate occasions in 13 business days in the period 30 May to 16 June 2023. Thus, even independently of the multiple notices of motion that the plaintiff filed (or sought to file), the conduct of the plaintiff has unjustifiably necessitated the defendant incurring significant legal costs.

- 40 Secondly, the way that the plaintiff has conducted himself, during the course of (and indeed even following the dismissal of) the proceedings that he sought to pursue in this Court, has resulted in the need for the solicitor for the defendant to send “in excess of 230 emails and letters...just between the plaintiff, [the solicitor for the defendant] and the Court”, and the (double sided) printouts of those emails and letters (without attachments) extend to 3 lever arch folders. The exhibit to the affidavit of Ms Holland provides multiple examples.
- 41 Thirdly, the plaintiff’s conduct during the course of the proceedings (and indeed after they were dismissed) has involved the making of scandalous allegations against those having some “involvement” with the plaintiff’s claim and that conduct has also contributed to the significantly increased costs. I set out some examples of this conduct in the primary judgment at [73]-[79]. It has included, as I there pointed out, the plaintiff serving letters of demand upon senior counsel for the defendant and the solicitor for the defendant. It has extended beyond those representing the defendant, and has included judicial officers and Court staff.
- 42 The defendant also claims an amount for disbursements. These may conveniently be divided into two types: counsel’s fees and other disbursements.
- 43 In relation to counsel’s fees, these total \$19,887.50. The invoices rendered by senior and junior counsel (except in one respect – relating to fees for the current notice of motion) are annexed to Ms Holland’s affidavit and summarised in exhibit LMH-1, p 132. The fees are principally those relating to the involvement of senior counsel. The explanation for retaining senior counsel is contained in Ms Holland’s affidavit, par 74. In short, because of the amount of damages claimed, and the outlandish allegations, she considered the retention of senior counsel to be justified. In my view, for the reasons Ms Holland gave, it was appropriate to retain senior counsel and junior counsel. I am satisfied, as well, that the rates charged by senior counsel and junior counsel are fair and reasonable. Separately, in this last respect, I would observe that they are in line with the guidelines issued by the Costs Assessment Rule Committee.
- 44 Ms Holland described the nature of the disbursements that were incurred in her affidavit at par 79. They are set out, and identified, in exhibit LMH-1, p 132, and relate to matters such as court filing and transcript fees, courier charges and copying. They total \$6,629.74. I accept these disbursements were incurred, and reasonably so.
- 45 Ms Holland’s evidence was that, based upon her experience, when an order for indemnity costs is made, the party seeking the costs would “usually” recover 90% of its professional fees on assessment, and that a party would “usually” recover 100% of counsel’s fees and disbursements incurred on assessment: Holland affidavit, par 80. I accept that evidence.
- 46 In relation to the evidence about the extent to which claimed costs and disbursements are recovered on an assessment of costs ordered to be paid on an indemnity basis, two matters should be noted. The first is that when an order for indemnity costs is made, “all costs (other than those that appear to have been unreasonably incurred or appear to be of an unreasonable amount) are to be allowed”: r 42.5(b) of the

Uniform Civil Procedure Rules 2005 (NSW). The second is that, generally speaking, courts have applied a discount when assessing costs on a gross sum basis: *Ahern* at [18] and [42]ff. Nevertheless, it should be emphasised that although discounting is *sometimes* undertaken, even in a case involving an order for indemnity costs, it does not follow that discounting *must* occur: see *Hancock v Rinehart (Lump sum costs)* [2015] NSWSC 1640; *Brown v The Stables Perisher Management Pty Ltd (No 2)* [2022] NSWSC 902 at [37]. The “aptness of a discount primarily depends on the accuracy and reliability of the costs evidence available to the Court”: *Ahern* at [18].

47 Given the defendant’s evidence (which, I emphasise, I have no reason to think is other than accurate and reliable) and the guidance given by the above authorities as to whether, and if so to what extent, there should be a discounting in connection with a gross sum for costs assessed on an indemnity basis, I consider it appropriate to discount the total amount claimed by 10% – which is essentially in line with what the defendant submitted should occur.

48 I therefore propose to allow 90% of the professional costs, but to allow 100% of the disbursements (to be clear, including counsel’s fees) – being, \$184, 170.74 (excluding GST). As I later explain, there will be some slight adjustment to this in the final orders to be made.

The notice of motion

49 Consistent with the purpose of making a claim for a gross sum costs order in the substantive proceedings, the defendant also sought an order that costs payable on the notice of motion be assessed as a gross sum.

50 In my view, it is appropriate that the defendant have its costs of the notice of motion, and that they be assessed on a gross sum basis. In relation to this assessment, I am satisfied I can assess costs on a gross sum basis fairly and appropriately from the material: *Harrison* at [22]; *Ahern* at [17].

51 The solicitor for the defendant provided an estimate of legal costs – an estimate that took into account costs and disbursements incurred up to the date of filing of its evidence and submissions and an estimate in connection with the application after that time. This is set out in her affidavit at pars 82-83. The claim was based upon the mid-point of that assessment (\$18,580.00 exclusive of GST).

52 In relation to professional costs, they were estimated to be between \$14,600.00-\$23,100.00 (excluding GST – there was a transcription error in the total of the lower end: it was said to be \$14,060.00 but the correct amount is \$14,600.00). In my view, subject to three matters, the evidence given by Ms Holland fairly and reasonably represents the work required to be undertaken to deal with this application and I accept both the estimate of time required, as well as the costs involved. The three exceptions are as follows.

- (1) First, given the plaintiff did not serve any evidence or submissions on the application, I will therefore not allow any amount for “[r]eview evidence and submissions relied upon by Plaintiff with respect to application”. The amount claimed for this projected work was between \$600.00 and \$1,200.00.

- (2) Secondly, the defendant was also not required to “[p]repare any evidence and submissions in reply (including liaising with counsel to settle)”. The amount claimed for this projected work was between \$1,800.00 and \$3,000.00.
- (3) Thirdly, I will also not allow any amount for what was described as “[p]reparation for and attendance at hearing of application (if required) (assume half day hearing)”, simply because I have determined this application on the papers. The amount claimed for this projected work was between \$4,800.00 and \$7,200.00.

53 When the amounts claimed are adjusted to reflect what I have not allowed, the estimate reduces to between \$7,400.00-\$11,700.00. The mid-point of the revised assessment is \$9,550.00 (exclusive of GST).

54 The defendant also claims for the fees – which are yet to be received – from junior counsel which relate to settling the evidence and submissions in support of the defendant’s application. Ms Holland has estimated those fees do not exceed \$1,000.00 (excluding GST). In my view, given the nature of the evidence, and the submissions provided in support, that assessment impresses as being an entirely fair and reasonable one, and I accept it.

55 Consistent with the approach in relation to the costs and disbursements claimed in connection with the substantive proceedings, the defendant seeks to recover 90% of the mid-point of estimated legal fees, but the full amount for counsel’s fees. The overall amount claimed was \$19,580.00 (excluding GST) and when the professional fees are adjusted, the amount claimed was \$17,722.00 (excluding GST).

56 However, the mid-point, as I have allowed it, is \$9,550.00 (excluding GST). As the defendant seeks to recover 90% of the estimated legal fees, this amount reduces to \$8,595.00 (excluding GST). To this should be added counsel’s fees (\$1,000.00 excluding GST). I therefore assess the defendant’s costs of the notice of motion on a gross sum basis in the amount of \$9,595.00 (excluding GST).

Orders

57 For the reasons set out above, the defendant is entitled to gross sum costs orders in connection with the proceedings and its notice of motion filed 17 November 2023. Adjusted to allow for GST, the gross sum costs that I have assessed for the proceedings are \$202,587.81 and for the notice of motion are \$10,554.50. These amounts total \$213,142.31.

58 The defendant, in its submissions, invited the Court to make, in its final orders, adjustments to reflect a slight rounding down. I have accepted this invitation, and slightly adjusted the combined amounts that I have assessed to \$213,000.00.

59 Accordingly, I make the following order:

- (1) Order, pursuant to s 98(4)(c) of the *Civil Procedure Act 2005* (NSW), the plaintiff pay the defendant’s costs of the proceedings, and of the notice of motion filed 17 November 2023, in the gross sum of \$213,000.00.
