



**Common Law Division
Supreme Court
New South Wales**

Case Name: **Romani v State of New South Wales (No 2)**

Medium Neutral Citation: [2023] NSWSC 1044

Hearing Date(s): 26 July 2023

Date of Orders: 31 August 2023

Date of Decision: 31 August 2023

Jurisdiction: Common Law

Before: Wright J

Decision: (1) The defendant's notice of motion filed on 12 May 2023 is dismissed.

(2) The defendant is to pay the plaintiffs' costs of and incidental to the motion.

Catchwords: COSTS – whether court should determine gross sum costs order – whether costs should be set-off against judgment sum – whether stay of execution of judgment debt should be granted – motion dismissed

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 67, 98(4), 101(1) and (3), 135
Uniform Civil Procedure Rules 2005 (NSW), r 42.34

Cases Cited: Ahern v Aon Risk Services Australia Ltd (No 2) [2022] NSWCA 39
Al Maha Pty Limited v Coplin [2018] NSWSC 1623
Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd [2006] NSWSC 560
Chaina v Presbyterian Church (NSW) Property Trust (No. 26) [2014] NSWSC 1009
Hamod v New South Wales [2011] NSWCA 375
Harrison v Schipp (2002) 54 NSWLR 738; [2002] NSWCA 213
Lahoud v Lahoud [2012] NSWSC 284
Miller v DPP [2004] NSWCA 249
Riva NSW Pty Ltd v Key Nominees Pty Ltd [2023] NSWSC 711

Romani v State of New South Wales [2023] NSWSC
49
Zepinic v Chateau Constructions (Aust) Ltd [2014]
NSWCA 99

Texts Cited:

Category: Costs

Parties: Sanchia Romani (First Plaintiff)
Maia Huxtable (Second Plaintiff)

State of New South Wales (Defendant)

Representation: Plaintiffs in Person

Counsel:
N Newton (Defendant)

Solicitors:
Makinson d'Apice (Defendant)

File Number(s): 2021/00326635

Publication Restriction:

JUDGMENT

1 On 12 May 2023, the defendant, the State of New South Wales, filed a notice of motion seeking the following orders:

“1. The execution of the judgment debt in the sum of \$18,334.69 against the defendant in favour of the first plaintiff be stayed until further order by the Court pursuant to section 67 of the *Civil Procedure Act 2005* (NSW).

2. Further, or in the alternative, the execution of the judgment debt and the sum of \$18,334.69 against the defendant in favour of the first plaintiff be stayed until further order by the Court pursuant to rule [sic] 135 of the *Civil Procedure Act 2005* (NSW).

3. A gross sum determination of costs be made pursuant to section 98(4) of the *Civil Procedure Act 1995* [sic].

4. Upon the making of a lump sum costs order, or alternatively upon an assessment of the costs, such costs be set off against the judgment sum.

5. Costs of the Motion be costs in the cause.”

Background

2 The background to the orders sought in this notice of motion is set out in the paragraphs which follow.

3 The plaintiffs, Sanchia and Maia, brought proceedings against the State for damages for trespass to land committed by two police officers. The State admitted that the officers had trespassed on the land.

4 The plaintiffs were, however, self-represented and were either unaware of, or did not fully understand, aspects of the technical requirements of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) as they applied to their proceedings. Furthermore, it appeared to me that the plaintiffs did not have an appreciation of all the consequences of some of their choices as to how they sought to have the proceedings formulated or dealt with.

5 On 7 February 2023, I delivered judgment in the proceedings. The first plaintiff, Sanchia, was successful, and she was awarded general damages, aggravated damages and exemplary damages, for the reasons set out in *Romani v State*

of *New South Wales* [2023] NSWSC 49. The particular orders made on 7 February 2023 disposing of the proceedings were as follows:

“(1) Judgment for the first plaintiff against the defendant in the sum of \$18,334.69.

(2) Judgment for the defendant against the second plaintiff.

(3) There is no order as to costs to the intent that each party is to pay her or its own costs.”

- 6 The State did not pay the amount of the judgment within 28 days after the date of judgment and, by virtue of s 101(1) and (3) of the *Civil Procedure Act 2005* (NSW) (CP Act), interest then became payable on the amount of the judgment that was from time to time unpaid. The State has not subsequently paid the amount of the judgment and interest continues to accrue.
- 7 Despite judgment being delivered on 7 February 2023, it was more than three months later on 12 May 2023 that the State filed its notice of motion seeking a stay of execution of the judgment debt, a gross sum costs determination in respect of previous costs orders and an order that the costs be set off against the judgment sum.
- 8 At this point it is necessary to review what has occurred in relation to costs in these proceedings in more detail.

Costs orders

- 9 As to the substantive proceedings, the costs order was order (3) made on 7 February 2023, namely that there should be “no order as to costs to the intent that each party is to pay her or its own costs”. My reasons for making this order in respect of the costs of the first plaintiff, Sanchia, and the second plaintiff, Maia, were set out at [102]-[108] of the judgment of 7 February 2023.
- 10 In relation to Sanchia, although she had been successful, in light of r 42.34 of the UCPR and my finding that commencement and continuation of the proceedings in the Supreme Court rather than the District or Local Court was

not warranted, I determined that no order for costs in her favour should be made, for the reasons given at [102]–[107].

11 In relation to Maia, although the State had been successful in defending Maia’s claim, I found that her claim and Sanchia’s claim were inextricably linked and there was little additional time and effort expended in the determination of Maia’s claim that was not also relevant to Sanchia’s claim.

12 My overall conclusion, at [108], was that:

“In all the circumstances, it appears to me that the most appropriate and fairest outcome is for there to be no order as to costs in respect of Maia’s claim, as well as in respect of Sanchia’s claim.”

13 In making the costs order, my intention was, as expressly stated in order (3), that each party should pay her or its own costs of the proceedings.

14 At the time of reaching those conclusions and making order (3), my attention was not drawn, and I did not have regard, to the fact that costs orders had apparently been made by two other judges in relation to two previous notices of motion in this matter in favour of the State against Sanchia and Maia.

15 The first of these relevant costs orders was made on 28 March 2022. On that day, the Court heard a notice of motion, which was filed by the State on 28 January 2022 (the first notice of motion), and made orders regularising the position in relation to the identification of the proper defendant and the fact that the proceedings had been commenced by summons and not by statement of claim. The plaintiffs were ordered to pay the State’s costs of the first notice of motion. The Court’s *ex tempore* reasons dealt with the question of costs as follows:

“The matter having been determined in favour of the State, it falls to me to also determine the issue of costs”.

16 It is not clear from those reasons what was actually determined in respect of the issue of costs, although the order made indicates that costs followed the event:

“(4) The plaintiff to pay the State of New South Wales’ costs of and incidental to this motion” .

17 The circumstances in which the second relevant costs order was made were somewhat confusing. On 29 July and 11 August 2022, the Court heard a second notice of motion filed by the State seeking to have most of the paragraphs in two notices to produce filed by the plaintiffs set aside and, in effect, one paragraph, par 13, redrafted (the second Notice of Motion).

18 On 29 July 2022, orders were made setting aside various paragraphs of the two notices to produce and amending par 13 as well as making directions for the filing of evidence and listing the matter for directions. On that date, a costs order was made but the record indicates that there was some confusion as to what that order actually was. On the coversheet of the form of judgment delivered on 15 August 2022 (certified by the Associate on that date),¹ which was in evidence before me, the costs order made on 29 July 2022 was:

“(7) Each party to bear its own costs of the Notice of Motion.”

19 It can be noted, however, that in the reasons for judgment the order proposed at [37] was:

“(7) Costs of the Notice of Motion are reserved.”

20 As to what occurred after 29 July 2022, at [3] of the judgment, it was stated that:

“On 11 August 2022 [the Court] heard further from the parties regarding the wording of paragraph 13 and this led to some further orders set out in par 38 of this judgment. My reasons for making those additional orders are set out at pars 16, 17, 35 and 36 of this judgment.”

21 It is not clear whether some or all of the “further orders” were made on 11 or 15 August 2022. In any event, no costs order was set out in [38] and paragraphs 16, 17, 35 and 36 did not deal with costs. Furthermore, the orders at [38]

¹ The form of judgment indicated that it had a medium neutral citation of [2022] NSWSC 1086 but it did not appear that it has been published on NSW Caselaw.

apparently related to only one of the notices to produce, unlike the orders made on 29 July 2022.

- 22 Costs were, however, considered by the Court at [39]-[42] of the reasons for judgment delivered on 15 August 2022 and at [43] it was stated:

“In those circumstances the plaintiffs should pay the defendant’s costs of the Notice of Motion.”

- 23 The cover sheet of the judgment indicated that the “Additional orders” made included:

“(11) The plaintiffs are to pay the defendant’s costs of the Notice of Motion.”

- 24 Based on the coversheet to the judgment, the formal orders dealing with costs made in respect of the second notice of motion appeared to be only order (7) under the heading “Orders made on 29 July 2022” that each party was to bear its own costs and order (11) under the heading “Additional orders” which was order (11) quoted in the preceding paragraph.

- 25 It may be that it was intended that each party should bear the costs of the first day of hearing in relation to both notices to produce, and that the plaintiffs pay the defendant’s costs of the later day’s hearing in relation to only one of the notices to produce. Alternatively, order (11) of the Additional orders may have been intended implicitly to vacate the earlier order (7) dealing with the costs of the notice of motion up to 29 July 2022, although this is difficult to reconcile with the fact that only one of the notices to produce was apparently affected by the orders made on 11 August 2022, unlike the orders made on 29 July 2022.

Quantification of costs claimed by the State

- 26 At this point, it can be noted that the State made submissions, based on the evidence of the amounts of costs and charges actually incurred by the State, that a reasonable assessment of the costs of the two notices of motions on a

gross sum basis² totalled \$20,738.49, assuming (favourably to the State) that the only operative order in relation to the second notice of motion was order (11) of the Additional orders made on 11 or 15 August 2022.

27 Consequently, if the State's assumption and quantification of costs were accepted and the orders sought by the State were made, the first plaintiff would not receive any benefit from the judgment in her favour since the amount of costs to be set off would exceed the amount of the judgment debt by \$2,403.80.

Consideration

28 There are in essence three issues raised by the State's notice of motion filed on 12 May 2023:

- (1) Whether the Court should determine the quantum of a gross sum costs order in respect of the costs ordered in relation to the first and second notices of motion;
- (2) Whether an order should be made that the amount of any gross sum costs order be set off against the judgment sum of \$18,334.69; and
- (3) Whether a stay of execution of the judgment debt should be granted.

29 I shall deal with each issue in turn.

Determination of gross sum costs

30 The Court has power to make a gross sum costs order under s 98(4) of the CP Act which relevantly provides:

“... 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—

...

² After applying what was contended to be a “conservative mid-range discount” of 20% to solicitors' fees and 10% to counsel's fees.

(c) a specified gross sum instead of assessed costs ...”.

- 31 There was no suggestion that costs in the present case had been referred for assessment and, accordingly, the discretion to order that the State is entitled to a specified gross sum instead of assessed costs is enlivened.
- 32 This discretion is not confined and may be exercised whenever the circumstances warrant its exercise, having regard to the scope and purpose of the provision: *Ahern v Aon Risk Services Australia Ltd (No 2)* [2022] NSWCA 39 at [14] (Meagher, White and Brereton JJA) citing *Hamod v New South Wales* [2011] NSWCA 375 (*Hamod*) at [813] (Beazley JA, Giles and Whealy JJA agreeing).
- 33 The circumstances in which a gross sum costs order have been held to be appropriate include:
- (1) where the subject matter/litigation concerns modest sums of money: *Zepinic v Chateau Constructions (Aust) Ltd* [2014] NSWCA 99 at [31];
 - (2) where the costs assessment would be protracted and expensive: *Harrison v Schipp* (2002) 54 NSWLR 738; [2002] NSWCA 213 (*Harrison*) at [21]-[22];
 - (3) where the evidence reveals that the party against whom costs are awarded is unlikely, due to their financial position, to be able to pay those costs and, accordingly, the party in whose favour the costs were awarded would be unlikely to be able to recover costs in due course: *Harrison* at [21] ;
 - (4) where the expense and delay of assessment is disproportionate to the amount of costs recoverable: *Hamod* at [819]; and
 - (5) where the party liable for costs was unrepresented and was likely to remain unrepresented through any costs assessment process: *Chaina v*

Presbyterian Church (NSW) Property Trust (No. 26) [2014] NSWSC 1009 (*Chaina*) at [50(c)].

- 34 There is also one fundamental consideration which must be borne in mind, namely, the power under s 98(4)(c) should only be exercised when the Court considers that it can do so fairly between the parties: *Harrison* at [22]; *Hamod* at [813].
- 35 In the present case, a consideration of the circumstances in which a gross sum costs order may appropriate do not point clearly in favour of making such an order. Only a modest amount was awarded in damages, but given the very limited nature of the costs in question, a costs assessment is unlikely to be protracted, expensive or disproportionate. Furthermore, there was no evidence that the plaintiffs would not be able to meet any costs liability after assessment. While the plaintiffs are unrepresented, the circumstances in the present case are vastly different from the circumstances in *Chaina* where extremely lengthy and complex proceedings led to the defendant incurring costs quantified by Davies J at \$8,300,000 in defending claims found to result in damages of only \$529,131.³
- 36 In summary, there are no particularly powerful considerations weighing in favour of making a gross sum costs order and the fact that there is nothing to suggest that the plaintiffs could not pay any costs that might be assessed tends more strongly in favour of not making the order as sought. Perhaps more importantly, however, there was considerable confusion as to what costs order or orders were actually made in respect of costs of the second notice of motion and it is these costs which account for the majority of the costs sought by the State. In my view, this confusion means that, in all the circumstances, it would not be fair to the plaintiffs to determine the quantum of costs on the assumption relied upon by the State, namely that the plaintiffs were ordered to pay all of the costs of the second notice of motion. If the State wishes to enforce the costs

³ *Chaina* at [64]-[67].

orders in the present proceedings, it is incumbent upon it and not the plaintiffs to establish what costs orders were actually made.

- 37 In all these circumstances, I am not persuaded that a gross sum costs order should be made in the present case as sought by the State.

Setting off costs against the damages awarded

- 38 The Court in its inherent jurisdiction has a discretionary power to order a set off between costs and damages awarded: *Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd* [2006] NSWSC 560 at [68]-[70] (White J); *Miller v DPP* [2004] NSWCA 249 (*Miller*) at [27] (per Young CJ in Equity).

- 39 Exercise of the discretion is informed by factors similar to those taken into account in respect of costs orders generally including: the public interest; the efficient administration of justice; the conduct of the parties; the solvency of the parties; and, fairness: *Al Maha Pty Limited v Coplin* [2018] NSWSC 1623 at [60(5)] (Kunc J) citing *Miller* at [24] and *Lahoud v Lahoud* [2012] NSWSC 284 at [70]-[93] (Ward J, as her Honour then was). In *Miller* at [27] it was said that the discretion is to be exercised according to what is equitable in the particular circumstances of each case, and at [28] it was observed that:

“A common reason for making an order for set-off is that because of insolvency, an unfair result will be reached unless an order for set-off is made.”

- 40 In the present case, there is a public interest in ensuring that infringements of citizen’s rights by officers entrusted with upholding the law are vindicated and seen to be vindicated. Sanchia was awarded not only general damages for the admitted trespass to her land by the two police officers but also aggravated and exemplary damages in the circumstances and for the reasons explained in my judgment in the substantive proceedings. If costs, as claimed by the State on the assumption that it was entitled to costs in respect of the whole of the second notion of motion, were set off against the damages awarded to Sanchia, the judgment in her favour would be effectively wiped out. In my view, this would be contrary to the public interest which has been identified.

- 41 It does not appear to me that the efficient administration of justice has been served by the State's not paying the judgment amount while the present motion was prepared, filed and heard. Nor does the efficient administration of justice require that the costs as claimed by the State be set off against the judgment amount, especially in light of the confusion as to what costs order or orders were actually made in respect of the second notice of motion.
- 42 There has been no conduct on the part of Sanchia in relation to the judgment or costs which would provide some independent justification for the costs as claimed being set off against the judgment sum. By way of contrast, despite the judgment of the Court, the plaintiff failed or refused to pay the amount of the judgment awarded to Sanchia for three months without any apparent justification and has subsequently continued to refuse to pay, presumably on the basis of the present application. If the State seeks to refuse to pay a judgment of the Court on the basis of an application for a costs set off and a gross sum costs order, a reasonable expectation would be that such an application is made within the 28 days referred to in s 101(3) of the CP Act. In my view, the State's refusal to pay the judgment sum and delay in making its application tell against ordering a set off.
- 43 It is not suggested that Sanchia is insolvent or unable to meet any costs after assessment such that a set off would be required in order to avoid unfairness of some sort to the State.
- 44 Finally, considerations of fairness and equity, in all the circumstances of the present case, do not require or substantially favour setting off whatever costs the State might be entitled to recover against the judgment awarded in Sanchia's favour. In light of the admission by the State that the police officers had trespassed on Sanchia's land, the circumstances which justified the awarding of aggravated and exemplary damages and the delay in filing the notice of motion, it appears to me that considerations of fairness and good conscience also militate in favour of a set off not being ordered.

45 For all of these reasons, I would refuse to order that the State's costs should be set off against the judgment in favour of Sanchia.

Stay of execution in respect of the judgement

46 The Court may stay the execution of a judgment in order to allow costs, which have been ordered to be set off, to be quantified: *Riva NSW Pty Ltd v Key Nominees Pty Ltd* [2023] NSWSC 711 at [224] (Meek J) and the authorities there cited.

47 In the present case, however, since I have decided that it is not appropriate to order that the costs be set off, whether they are determined by a gross sum costs order or by assessment, it is also not necessary to stay any proceedings on the judgment in Sanchia's favour.

Orders

48 For all these reasons, I do not accept that any of the orders sought in the State's notice of motion should be made.

49 The State has been entirely unsuccessful and there do not appear to me to be any reasons why costs should not follow the event.

50 Accordingly, the orders of the Court are:

- (1) The defendant's notice of motion filed on 12 May 2023 is dismissed.
- (2) The defendant is to pay the plaintiffs' costs of and incidental to the motion.

I certify that this and the **13** preceding pages are a true copy of the reasons for judgment delivered herein by the Honourable Justice Wright and of the Court.

A handwritten signature in blue ink, appearing to read 'J. Wright', written in a cursive style.

Associate to Justice Wright

31 August 2023