



## Supreme Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Romani v State of New South Wales [2023] NSWSC 49</b>
<b>Hearing dates:</b>	06 and 07 December 2022
<b>Date of orders:</b>	07 February 2023
<b>Decision date:</b>	07 February 2023
<b>Jurisdiction:</b>	Common Law
<b>Before:</b>	Wright J
<b>Decision:</b>	(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.
<b>Catchwords:</b>	TORT – Trespass to land – Entitlement to sue in trespass - Whether family member of registered proprietor in possession who is permitted to reside at property can sue in trespass – Such a family member is a mere licensee and is not entitled to sue for trespass to land  DAMAGES – Trespass to land – Trespass by police officers – General damages for violation of the right of exclusive possession – Aggravated damages awarded in respect of affront to family members permitted to reside on the property by the registered proprietor in possession – Exemplary damages awarded even though the conduct was not malicious or knowingly unlawful

COSTS – Whether the commencement and continuation of proceedings in the Supreme Court, rather than the District Court, was warranted for the purposes of UCPR r 42.34 – No order as to costs

**Legislation Cited:**

Civil Liability Act 2002 (NSW)  
Civil Procedure Act 2005 (NSW)  
Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW)  
Uniform Civil Procedure Rules NSW 2005

**Cases Cited:**

Brown v Tasmania (2017) 261 CLR 328; [2017] HCA 43  
Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15  
Halliday v Nevill (1984) 155 CLR 1; [1984] HCA 80  
Hunter v Canary Wharf Ltd [1997] AC 655  
Kuru v State of New South Wales (2008) 236 CLR 1; [2008] HCA 26  
Lamb v Cotogno (1987) 164 CLR 1 at 8; [1987] HCA 47  
Murray v Commonwealth of Australia (1986) 5 NSWLR 83  
New South Wales v Ibbett (2006) 229 CLR 638; [2006] HCA 57  
Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388; [2001] HCA 69  
Plenty v. Dillon (1991) 171 CLR 635; [1991] HCA 5  
Sahade v Bischoff [2015] NSWCA 418  
State of New South Wales v Cuthbertson (2018) 99 NSWLR 120; [2018] NSWCA 320  
State of New South Wales v Ibbett (2005) 65 NSWLR 168; [2005] NSWCA 445  
State of New South Wales v Riley (2003) 57 NSWLR 496; [2003] NSWCA 208  
State of New South Wales v Zreika [2012] NSWCA 37  
TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333; [2002] NSWCA 82  
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; [1966] HCA 40  
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448; [1985] HCA 12

**Category:**

Principal judgment

**Parties:**

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

State of New South Wales (Defendant)

**Representation:** In person, unrepresented (First and Second Plaintiff)

Counsel:  
N Newton (Defendant)

Solicitors:  
Makinson d'Apice (Defendant)

**File Number(s):** 2021/00326635

---

## JUDGMENT

### Introduction

- 1 By a summons filed on 17 November 2021, the first and second plaintiffs, who indicated that they preferred for the purposes of these proceedings to be called Sanchia and Maia respectively, claimed damages against two police officers and the New South Wales Commissioner of Police, who were each named as a defendant. The only cause of action identified in the summons was the tort of trespass. No other information was provided as to the alleged trespass in the summons itself but the words “Personal Injury – Other” did appear on the face of the summons. The plaintiffs also served a number of affidavits which made clear that they were claiming damages for trespass to land committed by the two police officers when they entered and remained on land at Warrazambil Creek in Northern New South Wales on 24 August 2021.
- 2 Since these were proceedings on a claim for relief in relation to a tort, they should have been commenced by statement of claim, as required by r 6.3((b) of the Uniform Civil Procedure Rules NSW 2005 (NSW) (UCPR), and not by summons. Nonetheless, by virtue of UCPR r 6.6(1), the proceedings are taken for all purposes to have been duly commenced on the day on which the summons was filed.
- 3 On 28 March 2022, Ierace J ordered that the individual defendants be removed as parties to the proceedings and the State of New South Wales be added as a defendant, for reasons that his Honour gave orally at the time of making the orders. There has been no appeal against these orders. Consequently, the only current defendant in these proceedings is the State. Furthermore, on that same day his Honour ordered, under r 6.6(2) of the UCPR, that the proceedings continue on pleadings.
- 4 Accordingly, on 16 May 2022, the State filed a defence in which it, among other things:
  - (1) admitted that, for the purposes of these proceedings, the State is vicariously liable in respect of torts committed by the two police officers;

- (2) admitted that “on 24 August 2021 the officers trespassed upon the land at ... Warrazambil Creek in the State of New South Wales for a period of no more than three minutes”; and
- (3) denied that either of the plaintiffs “suffered a personal injury as a result of the 24 August 2021 interaction with the officers”.

5 In light of what was pleaded in the defence, there was in effect no dispute that the two police officers had trespassed on the land at Warrazambil Creek.

6 Furthermore, during the hearing, the parties agreed that Sanchia was the registered proprietor of the Warrazambil Creek property and the State accepted that Sanchia was entitled to exclusive possession of the land and was, accordingly, able to maintain an action in trespass to land. In relation to Maia, however, there remained a dispute as to whether she was entitled to bring proceedings for trespass.

### The issues

7 The principal issues in dispute in these proceedings were, therefore:

- (1) whether Maia was relevantly in possession of the Warrazambil Creek land and thus entitled to sue in trespass;
- (2) whether the trespass lasted for no more than three minutes as the State contended, or longer as the plaintiffs contended; and
- (3) the nature and extent of any damages to be awarded.

### The evidence

8 The plaintiffs relied on evidence from both Sanchia and Maia, as well as the NSW Police Force Crime Prevention publication “Protect your property from Trespass, Rural Crime”. In my assessment, the two plaintiffs were both honest witnesses who were attempting to give truthful evidence as to the events and circumstances as they perceived them.

9 The defendant’s evidence included that of the two police officers who attended the Warrazambil Creek property on 24 August 2021, Sen Const Fahey and Sen Const Rankin, together with the evidence of Det Insp Greenwood, who tasked Sen Const Fahey with making enquiries concerning Sanchia’s intentions, as well as the Richmond Police District Changeover Form dated 24 August 2021 relating to the incident. Once again, I formed the view that these three witnesses gave their evidence honestly and were trying to tell the truth as to their recollections of what occurred and what they were doing.

10

In large measure, the evidence of all the witness about the specific incident on 24 August 2021 was consistent. The differences were generally of a minor nature relating, for example, to varying estimates of time or distance, where these had not been precisely measured or recorded at the time. There were also some slight differences in what Maia and the police officers recalled was said during their conversation. This did not suggest to me that one or the other witness was not telling the truth. Rather, the differences, in my view, merely reflected different but honest recollections of what occurred. Furthermore, it appeared to me that nothing significant turned on the differences.

- 11 Based on the evidence considered as a whole, my findings are set out in the paragraphs which follow.

### **The background and circumstances of the incident on 24 August 2021**

- 12 On 20 August 2021, during the COVID-19 pandemic, information was received at Lismore Police Station which suggested that Sanchia might be seeking to have pamphlets printed in relation to organising a public gathering or protest on 31 August 2021.
- 13 On 23 August 2021, Det Insp Greenwood became aware of an email dated 21 August 2021 sent to him forwarding an email concerning the possible involvement of Sanchia in having these pamphlets printed. The email identified Sanchia's address at Warrazambil Creek. Det Insp Greenwood was concerned that if a public gathering or protest were held as suggested by the pamphlets it would be in breach of the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW), which was in force at that time. Attempts to contact Sanchia on her mobile telephone were not successful. As a result, Det Insp Greenwood telephoned Sen Const Fahey and tasked him with paying Sanchia a visit at the Warrazambil Creek property to attempt to get further information about any intentions she might have of organising a public gathering or protest. This was confirmed in an email sent to Sen Const Fahey that day.
- 14 As at 24 August 2021, Sanchia was the registered proprietor of the Warrazambil Creek land and she resided there and let two of her children: Maia, who was 19 years old at that time; and her son, who was 14 years old, live there in the family home. The property was a rural landholding with a house situated approximately 100 to 200 m from the road. Along the road, there was a fence with a gate which opened onto a driveway leading towards the house. The gate was shut and secured with a chain and a locked padlock. On the gate was a sign which contained, among other things, the following wording:

**“PRIVATE PROPERTY****TRESPASS NOTICE**

- TRESPASS APPLIES WITHOUT PRIOR CONSENT OR PRIOR INVITATION.
- ADMITTANCE TO THIS PROPERTY IS STRICTLY BY INVITATION OR APPOINTMENT ONLY OR TRESPASS APPLIES.
- ADMITTANCE TO THIS PROPERTY IS CONSENT TO THIS NOTICE.
- PENALTIES FOR TRESPASS START AT 330 OZ OF SILVER.

...”.

- 15 In addition, approximately 2 m inside the property near the gate was another sign which contained, among other things, the following:

“LEGAL NOTICE

NO TRESPASSING

**ADMITTANCE BY INVITATION ONLY**

Exclusion Notice – Private Property

To all men, women, persons and entities including

**POLICE/GOVERNMENT /SHERIFF/ BAILIFF/ PROCESS SERVER/ COUNCIL/  
RSPCA/ PRIVATE INVESTIGATORS/ CORPORATIONS**

**TRESPASS DAMAGES shall apply upon one step onto land property**

**Minimum Penalty: Ten Thousand Australian Dollars**

**(AUD \$10,000)**

Per Person, Per Entry - ...”.

- 16 On 24 August 2021, Sen Const Fahey was the Acting Sergeant at Kyogle police station for the shift from 7 am to 5 pm and he informed Sen Const Rankin of the conversation he had had with Det Insp Greenwood concerning Sanchia. Sen Const Fahey understood that he and Sen Const Rankin were to attend the Warrazambil Creek property with a view to making enquiries concerning any intentions Sanchia might have in relation to organising a public gathering or protest which might be prohibited under the applicable COVID public health order.
- 17 On the morning of 24 August 2021, Sanchia was not at the Warrazambil Creek property but her son and Maia were home.
- 18 The two police officers drove to the Warrazambil Creek property in a fully marked police Ford Ranger with a pod on the back arriving at about 9.15 am. They parked the vehicle near the gate. Sen Const Fahey and Sen Const Rankin were both in uniform with full appointments and wearing COVID-19 face masks. Sen Const Fahey was wearing a police issued vest and Sen Const Rankin was wearing a police issued polo shirt and jumper. Both were wearing nameplates displaying their names.

19

Both Sen Const Fahey and Sen Const Rankin noticed that the gate was locked with a chain and padlock and observed near the gate the no trespassing sign which made explicit reference to police. Notwithstanding the locked gate, the sign on the gate and the no trespassing sign near the gate, the two police officers jumped over the gate, without touching the padlock, and walked up the driveway towards the house. The police officers did not have any warrant that would have entitled them to enter the property. Their evidence was to the effect that they thought that, because they were making enquiries concerning the possible organisation of a public gathering or protest which might contravene the COVID-19 public health order, they were lawfully entitled to enter the Warrazambil Creek property notwithstanding the locked gate, the sign on the gate and the no trespassing sign near the gate. Indeed, Sen Const Fahey said<sup>[1]</sup> that he attended the property in good faith to make inquiries and did not think that the no trespass notice applied to him at the time and Sen Const Rankin said in his evidence<sup>[2]</sup> that he believed it was “common law that police can enter a property to speak to the resident and make inquiries regarding an unlawful act” and that “common law gives us the right to enter a property to speak to the resident”.

20 From the veranda of the house, Maia observed the police officers’ actions and she went to meet them. They met when the police officers were about half way up the drive way.

21 Maia said “Hi” and asked the officers to hop back over the fence and said they could talk from there. Sen Const Fahey asked “Why is that?” and Maia responded “I don’t feel comfortable with you being on the property.” She asked if they could please stay on the other side of the fence. The police officers did not go back to the other side of the fence at that time. After establishing that Maia was not Sanchia, Sen Const Fahey asked if Sanchia was home and Maia said that she was not at that moment. He then asked when Sanchia would be home and Maia said that she was not comfortable answering his questions. Maia had her hands behind her back and was holding her mobile phone. Sen Const Fahey asked “Are you hiding something?” This question made her feel intimidated and uncomfortable but Maia showed him her mobile phone. She then asked if the police officers minded her starting to record the conversation. At this point, Sen Const Fahey said “If she’s not here, then we’ll come back another time.” Maia said that they were not to come back onto the property next time. Sen Const Rankin asked whether there was a phone number they could contact Sanchia on or could she come to the police station if they did not want them on the property and Maia said that she was not comfortable answering that question. Sen Const Fahey then said “We’ll keep coming back until we speak to her.” As a result of that last comment, Maia felt very uneasy, uncomfortable and distressed because she perceived it to be intimidating. Maia indicated that Sanchia could telephone them but Sen Const Fahey said that she would

have to come into the police station so that he would know to whom he was talking. Sen Const Fahey said that they would need to come back and the two police officer then walked back to gate, climbed over it and left. While on the Warrazambil Creek property, the police officers did not at any point draw or point their service revolvers or any other weapons nor did they give any indication that they considered using them.

- 22 After the police officers left, Maia returned to her younger brother who had been watching what occurred from the veranda. She understood that he felt anxious and worried by the events and she herself felt mentally and physically shaken, especially when the officers initially ignored her request to leave the property, as well as intimidated and disrespected in what should have been the safety of her family's home and property.
- 23 Maia then contacted her mother by telephone and informed her of what had occurred and how she felt. Maia gave evidence that, as she understood it, the police officers' actions caused her to react as she did, in part at least, because of the past experiences which she and her family had suffered as a result of a violent home invasion in 2016 when Sanchia, and Maia's elder sister and younger brother were chased by an intruder who came into their house and tried to kill them and shot one of their animals.
- 24 Sanchia understood that the police officers' actions had caused her children what she described as "great anxiety, distress, worry and trauma" and she herself felt that her and her family's privacy had been "grossly invaded" and "their liberties to abide peacefully within [their] own property and home was grossly infringed". In addition, Sanchia felt that the conduct of the officers was "intrusive", that they acted in "a disturbing manner" and that "they used their powers to intimidate". She was perplexed as to why police officers would jump her padlocked gate when "no trespass" signs were clearly displayed or would see this as acceptable or lawful.
- 25 After returning to their vehicle, Sen Const Fahey and Sen Const Rankin drove to Kyogle police station. Sen Const Fahey telephoned Det Insp Greenwood and informed him of their unsuccessful attempt to speak to Sanchia. Sen Const Fahey said that they would have to try again. Det Insp Greenwood told him not to worry about going back to the Warrazambil Creek property at that stage. Sen Const Fahey and Sen Const Rankin did not return to the property and did not have any further contact with Sanchia or Maia.
- 26 Det Insp Greenwood recorded what he understood to have occurred in the Richmond Police District Changeover Form for the shift commencing at 6 am on 24 August 2021 as follows:

"Kyogle: Follow-up of information relating to POI [person of interest]: Sanchia ... possibly organising a protest on Tuesday the 31/08/202. On the 20/08/2021 Constable CLAMOVSKI received a pamphlet at the front desk of Lismore Police Station in relation to a POI in Casino attempting to have protest pamphlets printed at



Ron Howard Print in Casino. He only had limited information on the POI, however enquiries identified in the above POI to be residing at ... Warrazambil Creek. Attempts to contact the POI on her mobile ... have not been successful. Kyogle police attended at 9:15 am the address this date where the gate was padlocked and a number of signs denying access to Government, police or Sheriff to the property. They were met by female, believed to be the Daughter of the POI who was uncooperative. Further attempts to contact POI in the coming days. It appears that the organisation is through pamphlet only as I cannot find anything on social media. See attached pamphlet, very broad and no specific locations.”

### Subsequent events

- 27 On 25 August 2021, Sanchia sent an email to the Police Complaints/Customer Assistance Unit explaining what had occurred and seeking the names, badge numbers and contact details for the two officers who attended the Warrazambil Creek property the previous day. She also requested that there be no “further repeats and visitations of the like”.
- 28 On 2 September 2021, the Customer Assistance Unit responded to Sanchia’s email, stating that it had been referred to the Northern Regional Professional Standards Manager and
- “[a]fter some initial assessment, someone from that unit will normally contact you within 7 working days.
- If you have an urgent inquiry or you are not contacted within this time, you can contact the Northern Regional Professional Standards Manager on 02 4929 0801.”
- 29 Sanchia was not contacted by 13 September 2021, that is seven working days after 2 September 2021, but she did not telephone the Northern Regional Professional Standards Manager on the number provided at that time.
- 30 On 13 September 2021, Sanchia again emailed seeking the information referred to in her 25 August 2021 email.
- 31 On 20 September 2021, Sanchia telephoned Kyogle police station and was transferred to Ballina police station where the person to whom she spoke gave her the rank and surnames of the two officers on duty at Kyogle on 24 August 2021 but could not find any record or information regarding their visit to the Warrazambil Creek property on that day. When the person asked Sanchia who and why the officers were at her property, she felt that that this “appeared inferring, belittling and condescending”. On the same day, Sanchia telephoned the Northern Regional Professional Standards Manager’s office and spoke to a person who said she would look into the matter.
- 32 On 21 September 2021, the Customer Assistance Unit sent a further email in essentially the same terms as their email of 2 September 2021.
- 33 On 22 September 2021, Sanchia made a follow up call to the Northern Regional Professional Standards Manager’s office and later that day received an email indicating that the District Inspector would be reviewing the correspondence and would be in

contact.

34 On 24 September 2021, the District Inspector emailed Sanchia identifying the two officers who attended the Warrazambil Creek property on 24 August 2021 and stating:

“Police had received information that you may have attempted to print a large number of pamphlets with information regarding a proposed protest ‘Enough is Enough our governments are abusive.’ Police attended your address to speak to you about the proposed protest.”

35 The police responses to Sanchia’s complaint or enquiry appear to me to have been relatively prompt and not unreasonable in all the circumstances. They did not exacerbate any injury or hurt to Sanchia as a result of the trespass on 24 August 2021.

36 Further, however, even though Det Insp Greenwood’s record of the incident included the comments that “the gate was padlocked and a number of signs denying access to Government, police or Sheriff to the property”, it does not appear that he informed Sen Const Fahey that he had no right to enter the property without a warrant or other lawful authority. Moreover, there was no evidence indicating that the two police officers were given, after the incident on 24 August 2021, any training or instruction in relation to trespass or the limits on the rights of police officers to enter a property the entrance gate to which was locked and where no trespassing signs were displayed.

## Trespass

37 As noted above, the State admitted that the conduct of the two officers in going onto the Warrazambil Creek property by climbing over the locked gate and remaining there for a time constituted trespass to land. This admission was correctly made.

38 The tort of trespass is committed whenever there is interference with possession of land, including physical entry onto and remaining on the land, without the licence or consent of the person in possession or without other lawful authority: *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333; [2002] NSWCA 82 at [23]-[24] (Spigelman CJ, Mason P and Grove J agreeing).

39 In *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15, Mason CJ, Brennan, Gaudron and McHugh JJ held, at 435-6:

“Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right [*Entick v. Carrington* (1765) 2 Wils KB 275 at 291 (95 ER 807 at 817); *Halliday v. Nevill* (1984) 155 CLR 1 at 10 per Brennan J; *Plenty v. Dillon* (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ See also *Colet v. The Queen* (1981) 119 DLR (3d) 521 at 526.]. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law [*Halliday v. Nevill* (1984) 155 CLR at 10 per Brennan J; *Plenty v. Dillon* (1991) 171 CLR at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ].”

40

Thus, any person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises: *Plenty v. Dillon* (1991) 171 CLR 635 at 647 (Gaudron and McHugh JJ); [1991] HCA 5.

- 41 Police officers have no special rights to enter land, except in cases provided for by the common law and by statute: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ). There was no suggestion in the present case that the police officers had any lawful right to enter the Warrazambil Creek property absent the consent or licence of the occupier.
- 42 The question whether an occupier of land has consented or granted a licence to another to enter upon it is essentially a question of fact: *Halliday v Nevill* (1984) 155 CLR 1 at 6 (Gibbs C.J., Mason, Wilson and Deane JJ); [1984] HCA 80. If a driveway or path leading to the entrance of a dwelling is left unobstructed, with the entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the driveway to the entrance of the dwelling for the purpose of lawful communication with any person in the house but such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it: *Halliday v Nevill* at 7; *Kuru v State of New South Wales* at [45] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Plenty v. Dillon* at 647.
- 43 In the present case, the gate opening from the road on to the driveway was locked with a chain and padlock, there was a sign on the gate itself which indicated that trespass would apply in the absence of prior consent or invitation and there was a further sign in the vicinity of the gate which indicated that there was to be no trespassing, that admittance was by invitation only and that that the police were specifically excluded in the absence of an invitation or consent. In these circumstances, even if the two police officers attended at the Warrazambil Creek property with the lawful purpose of making enquiries of Sanchia concerning the possible organisation of a public gathering or protest, the implied licence for the police officers to enter the property for the purpose of such lawful communication was impliedly refused or withdrawn by the locked gate and expressly revoked or precluded by the signs. There being no other authority for their entry, the police officers therefore committed the tort of trespass.

### **Whether Maia was entitled to sue in trespass**

- 44 There was no dispute that Sanchia was relevantly in possession and entitled to sue in trespass, since she was the registered proprietor and had an immediate right to exclusive possession at all relevant times. Maia's position was, however, entirely

different and it is necessary to determine whether Maia was relevantly in exclusive possession of the Warrazambil Creek land and thus also entitled to sue in trespass.

45 Maia is Sanchia's daughter and Sanchia let her live at the Warrazambil Creek property as at 24 August 2021 as part of ordinary family arrangements. It was not suggested that Maia had any right of occupation or possession other than that her mother let her live in the family home. At most, Maia was a mere licensee; she had no immediate right to exclusive possession of the Warrazambil Creek property.

46 The tort of trespass protects the interest of a plaintiff against invasion of the plaintiff's exclusive possession of the land in question. That protection extends to the freedom from disturbance of those persons present there with the leave of the plaintiff, as family members or as an incident of some other bona fide domestic relationship: *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 (*NSW v Ibbett*) at [31] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). As the High Court said in that case at [31], the affront to such a family member may aggravate the infringement of the right of the plaintiff to enjoy exclusive and quiet possession. Nonetheless, such affront to a family member in occupation by leave of the registered proprietor has not been held to give rise to the family member having an independent entitlement to sue in trespass.

47 The types of possession or occupation required to establish an entitlement to sue in trespass or nuisance were considered by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655. In that case, Lord Hoffman held at 703:

“In speaking of ‘possession or occupation’ Lord Wright was in my view intending to refer to both a right to possession based upon (or derived through) title and to de facto occupation. In each case the person in possession is entitled to sue in trespass and in nuisance. ...

Thus even a possession which is wrongful against the true owner can found an action for trespass or nuisance against someone else: *Asher v Whitlock* (1865) L.R. 1 Q.B. 1. In each case, however, the plaintiff (or joint plaintiffs) must be enjoying or asserting exclusive possession of the land: see *per* Blackburn J. in *Allan v Liverpool Overseers* (1874) L.R. 9 Q.B. 180. Exclusive possession distinguishes an occupier who may in due course acquire title under the Limitation Act 1980 from a mere trespasser. It distinguishes a tenant holding a leasehold estate from a mere licensee.”

48 In the same case, Lord Hope of Craighead said at 724:

“So where it is the tort of nuisance which is being relied upon to provide the remedy ... the plaintiff must show that he has an interest in the land that has been affected by the nuisance of which he complains. Mere presence on the land will not do. He must have a right to the land, for example as owner or reversioner, or be an exclusive possession or occupation of it as tenant or under a licence to occupy.”

49 Relying on various passages from *Hunter v Canary Wharf Ltd*, Gordon J in the High Court held in *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43 at [385] in relation to the entitlement to sue in nuisance:

“The plaintiff must have a right over or an interest in the land that has been affected by the nuisance of which complaint is made. The plaintiff must be more than a mere licensee or a person merely present on the land. For example, the plaintiff may have

a right over the land as ‘owner or reversioner, or be in exclusive possession or occupation of [the land] as tenant or under a licence to occupy’.” (footnotes omitted)

- 50 The same principles should be taken to apply in relation to trespass as apply in relation to nuisance: *Hunter v Canary Wharf Ltd* at 703 (parts of which have been quoted above).
- 51 Since Maia resided at the Warrazambil Creek property as a mere licensee of her mother and had no immediate right to exclusive possession and was not in exclusive occupation, she is not entitled to sue in trespass in the present case and her claim fails. That is not to say, however, that the affront to Maia as a result of the police officers’ trespass may not be taken into account when assessing the damages to which Sanchia may be entitled in accordance with the principles referred to in *NSW v Ibbett* at [31].

### Duration of trespass

- 52 There was a factual issue as to whether the trespass lasted for no more than three minutes as the State contended, or longer as the plaintiffs contended. The police officers, in their evidentiary statements, both estimated that they were on the property for about two minutes, having spoken to Maia for about 30 seconds or for about 30 to 40 seconds. Maia’s evidence was that she believed that the officers would have been on the property for about five minutes.
- 53 While on the Warrazambil Creek property, the officers climbed over the gate, walked about half way to the house, which was approximately 100 to 200 m from the gate, met Maia and had a conversation with her, which included at least what is recorded above, and then walked back to the gate and climbed over it once again. There was nothing to suggest that the officers ran or walked at faster than a normal walking pace nor was there anything to suggest that the conversation was fast or not punctuated with the usual pauses and repetitions common in everyday speech. In the circumstances, I am satisfied that the officers probably spent in order of three to five minutes on the Warrazambil Creek property.

### Damages

- 54 Sanchia is entitled to recover damages as a result of the police officers’ trespass. In their summons, the damages sought totalled \$2.35 million but they were not otherwise particularised except, perhaps, for the words “Personal Injury – Other” appearing in the summons.
- 55 It will be appropriate to consider, first, the types of damages that may be available, namely general damages for violation of the right of exclusive possession, aggravated damages and exemplary damages, and then to consider the quantification of those

damages.

*General damages for violation of the right of exclusive possession*

56 Damages for trespass to land reflect that the policy of the law in this regard is to protect exclusive possession of property and the privacy and security of the exclusive occupier: *NSW v Ibbett* at [29]. Even though the trespass lasted only about three to five minutes in the present case and no damage was done to the land, Sanchia is entitled to some damages in vindication of her right to exclude the officers from her property: *NSW v Ibbett* at [30]; *Plenty v Dillon* at 645. In the present case, these damages serve to vindicate Sanchia's interest in maintaining her right to exclusive possession of her place of residence, free from uninvited physical intrusion by strangers and to recognise the violation of, or injury to, that interest by the actions of the police officers.

57 It appears that the words "Personal Injury – Other" in the summons were relevantly intended to refer to this type of injury to Sanchia's personal right to exclusive possession of the Warrazambil Creek land free from uninvited intrusion from the two police officers in this case. It does not appear that those words referred to personal physical or psychiatric injury to Sanchia since she was not present at the time of the trespass and she described her reaction to the trespass, when she was told about it, as being that she felt that:

- (1) her and her family's privacy had been "grossly invaded";
- (2) "their liberties to abide peacefully within [their] own property and home was grossly infringed"
- (3) the conduct of the police officers was "intrusive"; and
- (4) the officers acted in "a disturbing manner" and that "they used their powers to intimidate".

58 In addition, Sanchia said she was perplexed as to why police officers would jump her padlocked gate when "no trespass" signs were clearly displayed and why they would see this as acceptable or lawful.

59 None of this bespeaks any personal injury in the sense of physical or psychiatric injury or impairment of Sanchia's physical or mental condition. In addition, there was no evidence from any medical practitioner or psychologist to establish that there was any physical, psychiatric or psychological injury to Sanchia resulting from the actions of the two police officers on 24 August 2021.

60

If, however, this understanding was found to be incorrect and Sanchia intended to seek damages for consequential loss resulting from some form of psychiatric or mental injury or impairment of her physical or mental condition suffered because of the trespass, such a claim would not be successful. The relevant test for recovery of consequential loss as a result of an intentional tort such as trespass to land is that it is limited to the “natural and probable consequence” of the trespass: *TCN Channel Nine Pty Ltd v Anning (TCN v Anning)* (2002) 54 NSWLR 333; [2002] NSWCA 82 at [103] (Spigelman CJ, Mason P and Grove J agreeing) citing *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388; [2001] HCA 69. What is a natural and probable consequence arising from a trespass to land is essentially a question of fact and must depend on all the circumstances of the case: *TCN v Anning* at [104]-[106]. Nonetheless, in *TCN v Anning*, Spigelman CJ held at [107] and [114]:

“107. ... Humiliation, injured feelings and affront to indignity may be a natural and probable consequence of intrusion by the media on private property. Such damage is compensable as aggravated damages. Such damage is different in kind to mental trauma. In my opinion, mental trauma – or indeed any form of personal injury – does not flow ‘naturally’ and ‘probably’ from a trespass to land committed in the way the Appellant acted [by entering land, and filming and attempting to interview the plaintiff], in all of the circumstances of this case.

...

114. Filming on premises and attempting to conduct an interview, even with a view to broadcasting, does not, in the normal course, result in personal injury of any kind, including mental trauma, in a person of normal fortitude. Such damage is of a qualitatively different kind to what would normally result, e.g. distress, worry, anger, shame, anxiety. If, as her Honour concluded, mental trauma did eventuate, it must be understood to have occurred as a consequence of factors other than the trespass to land. Such damage was not encompassed within the presumed intention of the Appellant. I would allow the appeal insofar as damages were awarded for mental trauma.”

61 Similarly in the present case, entering the land and having a conversation with Sanchia’s daughter, even if somewhat intimidating, should not be found to have had the probable and natural consequence of some form of psychiatric personal injury or impairment of Sanchia’s mental condition so as to entitle Sanchia to recover damages in that regard in the present case.

62 It can also be noted at this point that this reasoning has the additional consequence that Pt 2 of the *Civil Liability Act 2002* (NSW) does not apply to restrict the awarding of damages in the present case, since the relevant injuries do not fall within the definition of “injury” and the damages to be awarded do not fall within the definition of “personal injury damages”, in s 11 of that Act. If, however, this were not the case and Sanchia was seeking to claim damages for non-economic loss which were “personal injury damages” relating to “injury” arising out of impairment to her physical or mental condition, any award of non-economic loss damages would be governed by s 16 of the *Civil Liability Act*. Subsection (1) of that section precludes the awarding of any such

damages “unless the severity of the non-economic loss is at least 15% of a most extreme case”. There was no significant basis in the evidence to find that this threshold had been crossed and, thus, Sanchia would not be entitled to recover amount in respect of such damages, if Pt 2 of the *Civil Liability Act* applied in the present case.

63 The approach adopted above is consistent with the observation by Hodgson JA (Sheller JA and Nicholas J agreeing) in *State of New South Wales v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208 at [128] that:

“in cases where the wrongful conduct is trespass to land, for which damages for psychological injuries are not generally awarded, one can say that aggravated damages are compensatory damages for injury to the plaintiff’s feelings by the manner of the trespass, which would not otherwise have been awarded.”

64 Sanchia’s feelings of hurt or distress resulting from the trespass, which have been referred to above, are not in my view fully compensated for by the awarding of general damages for violation of the right of exclusive possession. Compensation for such feelings of hurt or distress caused by the circumstances and manner of the wrongdoing may, however, be achieved by way of aggravated damages, provided there is no double counting.

#### *Availability of aggravated and exemplary damages in the present case*

65 In a case of trespass to land, such as the present, damages may additionally include aggravated and exemplary damages.

66 Aggravated and exemplary damages were not expressly claimed in the summons nor were particulars of the facts and circumstances relied upon to establish those claims provided, as required by UCPR rr 6.12(5), 15.7 and 15.8. Given the fact that the proceedings involved a claim for damages for the tort of trespass and in light of the evidence, during the hearing the Court raised the question whether aggravated and exemplary damages were claimed. Sanchia indicated that they were and Mr Newton of counsel, who appeared for the State, quite properly stated that, given the informality in certain aspects of the proceedings, the State would not take any point based on a failure to comply with the rules in relation to claiming and particularising aggravated and exemplary damages. Accordingly, the hearing proceeded on the basis that Sanchia sought exemplary and aggravated damages as well as general damages for infringement of her right of exclusion possession of the land.

#### *Aggravated damages*

67 Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing: *NSW v Ibbett* at [31]. Relevant injury to the plaintiff for these



purposes includes injury to the plaintiff's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* (1987) 164 CLR 1 at 8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); [1987] HCA 47. Since Sanchia was not present at the time of the trespass and was not, herself directly, insulted, humiliated or mistreated, aggravated damages would not be appropriate on that basis.

68 Nonetheless, aggravated damages may be awarded to vindicate a plaintiff's interest against invasion of the exclusive possession of the plaintiff and this interest extends to the freedom from disturbance of those persons present there with the leave of the plaintiff, at least as family members or as an incident of some other bona fide domestic relationship: *NSW v Ibbett* at [31]. Thus, in the present case, the affront to Maia and Sanchia's son, who were present and participated in or observed the incident, because of the police officers' conduct and manner of questioning which caused them to feel intimidated as well as anxious, distressed, worried and traumatised, amounted to intangible injury to Sanchia which aggravated the infringement of her right to enjoy exclusive and quiet possession of the land by herself and her family free from uninvited intrusion and disturbance.

69 Consequently, in the present case, I am satisfied that Sanchia is also entitled to an award of aggravated damages having regard to the effect on her and her family members of the circumstances and manner of the police officers' wrongdoing, especially their entering the property despite the locked gate and the signs, their failure to leave the property when requested, their questioning of Maia in a manner that was perceived as intimidating, their comments to Maia about returning that were also perceived as intimidating and their general attitude that was perceived as disrespectful.

70 The extent of the aggravation of the injury to Sanchia's right of exclusive possession, in this case, is to be assessed against the background of her family's previous experience of a home invasion and the fact that she took deliberate steps to ensure that there would be no entry by anyone, including expressly police officers, on the Warrazambil Creek property except by prior invitation or consent. This was sought to be achieved by locking the gate and erecting signs so that there could be no misunderstanding that there was an implied licence to enter the property in the absence of prior invitation or consent.

71 The fact that the officers wrongly thought that they were entitled, under the common law or otherwise, to enter despite the locked gate and signs does not serve to reduce any intangible injury to Sanchia or to mitigate in any way the relevant impact of her feelings as a result of the reactions of her family members, in relation to the assessment of aggravated damages.

### Exemplary damages

- 72 In addition to aggravated damages, exemplary damages may also be awarded in the cases of trespass to land.
- 73 While aggravated damages are compensatory in nature and focus on the injury suffered by the plaintiff, exemplary damages are not compensatory and are awarded to mark the court's disapprobation of the conduct and to punish the wrong-doer and to deter; they are punitive in nature and focus on the conduct of the person causing the harm: *State of New South Wales v Cuthbertson* (2018) 99 NSWLR 120; [2018] NSWCA 320; at [87]-[88] (Beazley P); *NSW v Ibbett* at [35].
- 74 Generally, exemplary damages may be awarded where a defendant has acted in conscious and contumelious disregard of the plaintiff's rights: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 154 (Windeyer J); [1966] HCA 40; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 (Brennan J); [1985] HCA 12. Nonetheless, while "conscious wrong-doing in contumelious disregard of another's rights" describes the greater part of the field in which exemplary damages may properly be awarded, it does not fully cover that field and, similarly, malice is not always essential: *State of New South Wales v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208 at [138] (Hodgson JA, Sheller JA and Nicholas J agreeing). Hodgson JA went on to observe that conduct may be high-handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing.
- 75 A similar approach was adopted by Spigelman CJ in *State of New South Wales v Ibbett* (2005) 65 NSWLR 168; [2005] NSWCA 445 at [35]-[50] and see also the comments of Basten JA at [221]ff. In particular, Spigelman CJ observed at [50]:
- "In a case in which two private investigators wrongfully asserted a right to enter certain premises by licence, that very insistence, contrary to the fact, was held to justify an award of exemplary damages. (*Schumann v Abbot & Davis* [1961] SASR 149 at 158-160.)"
- 76 In *State of New South Wales v Zreika* [2012] NSWCA 37, Sackville AJA held at [62] in relation to exemplary damages in cases involving police officers:
- "Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: *NSW v Ibbett*; *NSW v Landini*, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:
- 'should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen.'
- Ibbett*, at 653 [51], citing *Adams v Kennedy* (2000) 49 NSWLR 78, at 87, per Priestley JA."

The nature and extent, if any, of training or instruction received by police officers after an incident giving rise to a claim for damages for trespass may be taken into account when the Court is considering an award of exemplary damages: *NSW v Ibbett* at [60].

78 In the present case, the police officers believed at the time of the trespass, and appeared to maintain in their evidence in this Court, that they were lawfully entitled to enter the Warrazambil Creek property notwithstanding the locked gate and the no trespassing signs, because they wished to make enquiries in relation to a potential future breach of a COVID-19 health order with a person whom they understood resided there. In my view, although their conduct was not malicious and did not involve wrongdoing which the officers knew or believed to be unlawful at the time, their conduct in ignoring the locked gate and the no trespassing signs, not leaving immediately when requested to do so and questioning Maia in a manner that could be, and was, perceived to be intimidating was high-handed and showed contempt for the rights of Sanchia and those she permitted to reside with her at the Warrazambil Creek property. Their wrongful assertion and belief that they were entitled to enter as they did also supports an award of exemplary damages. The police officers were apparently unaware of the advice to landholders given by the police themselves in the NSW Police Force Crime Prevention publication "Protect your property from Trespass, Rural Crime" or thought it did not apply to them. In addition, from the evidence of the officers at trial and the absence of evidence that the police officers received any subsequent training or instruction in relation to trespass or the limits on the rights of police officers to enter, even for an otherwise lawful purpose, a property the entrance gate to which is locked and where no trespassing signs are displayed, I find that the officers have received no such training or instruction.

79 In all the circumstances, I am of the view that it is appropriate for the Court to mark its disapprobation of the officers' conduct by an award of exemplary damages, albeit quite limited having regard to the lack of any malice or knowledge or belief of wrongdoing on the part of the officers.

#### *Separate award for aggravated and exemplary damages*

80 It has been observed on various occasions by the Courts that, in some cases, it might be difficult to differentiate between aggravated damages and exemplary damages: *NSW v Ibbett* at [33]. Furthermore, facts justifying an award of aggravated damages may also support awarding exemplary damages. In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to

mark its disapprobation of that conduct, the court may choose to award one sum which represents both aggravated and exemplary damages but no element more than once: *NSW v Ibbett* at [35].

81 In my view, while there is some overlap between the circumstances which support the award of aggravated damages and the award of exemplary damages, there are also significant differences. Consequently, in my view, it is more appropriate to make separate awards in respect of aggravated and exemplary damages but being mindful of not awarding damages twice for the same factor or circumstance.

### *Quantification of damages*

82 As to the quantification of damages, each case must be considered on its own facts and the amount awarded must be proportionate and reasonable having regard to those facts. Nonetheless, some general indication of the appropriate level of an award of damages can be gained from previous cases, taking into account the particular facts and circumstances of each case.

83 *State of New South Wales v Ibbett* (2005) 65 NSWLR 168; [2005] NSWCA 445, (in which the award of damages was not disturbed on appeal to the High Court: *NSW v Ibbett* at [61]) was a case involving, among other things, trespass to land by police officers for which general damages for invasion of the right to exclusive possession, aggravated damages and exemplary damages were awarded. What relevantly occurred in that case was set out by the High Court in *NSW v Ibbett* at [8]-[18] and may be summarised as follows.

84 Mrs Ibbett was a 70 year old widow who had worked as a paymistress and been very involved with the bowling community on the Lower North Coast District. One of her sons, who was about 42 years of age, returned to live with her after his release from prison in 1997 after serving five and a half years, which was the third of three lengthy periods of imprisonment served by him.

85 The relevant events occurred in the early hours of 23 January 2001 at Mrs Ibbett's house which had an attached double garage, with access from the house. Shortly before 2.00 am, whilst Mrs Ibbett was asleep in a bedroom near the garage, her son arrived home in his van pursued by a police vehicle occupied by the two police officers who were acting under operational orders "to keep a lookout for" Mr Ibbett. However, the only offence, commission of which the police reasonably suspected Mr Ibbett, was a driving offence.

86 Mr Ibbett drove into the garage of the house and, using a remote control device, closed the roller door. As the roller door was closing, one officer dived under and sought to arrest Mr Ibbett. He had no proper basis for making such an arrest or entering the

property. He was not uniformed and was wearing casual clothing.

- 87 There was a commotion which awakened Mrs Ibbett. Whilst the officer had his service pistol directed at Mr Ibbett, Mrs Ibbett opened a door leading into the garage. She heard her son say to the officer, "Who are you? Get outta here." She repeated words to that effect, at which stage the officer swung towards her, pointed his gun at her and said, "Open the bloody door and let my mate in." Mrs Ibbett had never seen a gun before and was petrified. The second police officer, who was also in casual clothing, came into the garage when the roller door was re-opened. Mrs Ibbett's son was removed onto the driveway, handcuffed and pushed to the ground. After his vehicle was removed onto the driveway and searched, Mr Ibbett was strip searched in the garage.
- 88 The trial judge found that the entry into the property by both police officers had been without lawful justification and had amounted to trespass to land. His Honour also held that the confrontation between the first officer and Mrs Ibbett amounted to an assault.
- 89 Mrs Ibbett brought proceedings against the State of New South Wales seeking damages for both the trespass and the assault and was successful. "The award of \$50,000 for trespass comprised general damages of \$10,000 to recognise 'the offence and indignity to [Mrs Ibbett's] rights caused by the unlawful entry', aggravated damages of \$20,000 and exemplary damages of \$20,000: *NSW v Ibbett* at [20].
- 90 The trespass in that case involved conduct on the part of the police officers directly involving Mrs Ibbett, including her being offensively ordered to open her garage, having a gun pointed at her and at her son in a threatening manner, and witnessing the indignity of her son being arrested and strip searched in her own garage. The award of aggravated and exemplary damages was upheld by reference to the affront to Mrs Ibbett as a result of the police officers' treatment of her as well as the affront to her son. When compared to the present case, it appears to me that the invasion of Mrs Ibbett's right to exclusive possession of her property was of significantly longer duration and significantly more serious in nature than occurred in the present case, which lasted only about three to five minutes, did not involve any abusive language, drawing or pointing of a firearm, strip searching of anyone on the property or similar humiliating conduct. That is not to say that the conduct in the present case was trivial or should not attract an award of more than nominal damages.
- 91 In *Sahade v Bischoff* [2015] NSWCA 418, the parties were involved, in May 2012, in what was described by Basten JA, at [1] as:

"an unedifying brawl between two neighbours in Wolseley Road, Point Piper, which resulted in unsuccessful prosecutions by the police, followed by civil proceedings for assault, trespass and malicious prosecution."

- 92 In relation to the trespass to land aspect of the case, it was found that Mr Sahade entered the home of the Bischoffs, proceeding a metre or two inside for approximately 13 seconds, but no damage was occasioned to the Bischoffs. The Bischoffs were awarded \$500 damages in respect of this trespass. They appealed against that award to the Court of Appeal which refused leave to appeal in this regard. It was noted that there were no circumstances of aggravation in that case and, while Mr Sahade's entry into the Bischoffs' residence was a deliberate entry without consent, it was only for a very short period of time and the physical extent of the entry was quite small and only "some modest damages in vindication of the Bishcoff's right to exclude" was justified: at [182]. It was held that the circumstances did not justify any additional award of aggravated or exemplary damages.
- 93 It should be accepted that the present case is a more serious trespass to land than what occurred in *Sahade v Bischoff* and a substantially higher award of damages in vindication of Sanchia's right of exclusive possession is justified. In addition, for the reasons given above, an award for aggravated and for exemplary damages are also appropriate in the present case, unlike in *Sahade v Bischoff*.
- 94 Taking into account all the circumstances of the present case, it appears to me that the vindication of Sanchia's right to exclude the police officers from the Warrazambil Creek property is appropriately recognised by an award of general damages of \$7,500.00.
- 95 Furthermore, the intangible injury to Sanchia as a result of the officers' conduct in violating her and her family's right to privacy on, and possession of, their home and the affront to her children because of the police officers' conduct and manner of interacting with them justify an award of aggravated damages of \$5,000.00.
- 96 Finally, to mark the Court's disapprobation of the officers' conduct and the other relevant circumstances including the high handed way in which the officers entered the property, disregarding the locked gate and the signs, and questioned Maia and the absence of subsequent training or instruction in relation to the limits on the rights of police officers to enter and remain on land, especially when the gate to the property is locked and there are no trespassing signs, warrant an award of exemplary damages of \$5,000.00.
- 97 Accordingly, the total award of damages in this case is to be \$17,500.00.

## Interest

- 98 Under s 100(1) of the *Civil Procedure Act 2005* (NSW), in proceedings such as the present in which Pt 2 (including s 18) of the *Civil Liability Act* does not apply, the Court may include interest in the amount for which judgment is given at such rate as the court thinks fit. Under UCPR r 6.12(6), however, an order for interest up to judgment must be

specifically claimed. The plaintiffs in this case did not do so. Since Sanchia and Maia are litigants in person and may well not have been aware of the need to claim interest expressly and there does not appear to be any significant risk of unfair prejudice to the State if interest is included in the judgment, and in order to give such judgment as the nature of the case requires, I propose to dispense with the requirement in r 6.12(6) and award interest up to judgment. This will not, however, include interest on the exemplary damages, which are not compensatory in nature, for the reasons given by Wood J in *Murray v Commonwealth of Australia* (1986) 5 NSWLR 83 at 87.

99 Since the injury for which Sanchia is to be compensated, both by way of the general damages for the violation of her right to exclusive possession of the Warrazambil Creek property and the aggravated damages for the intangible injury, was effectively all suffered at about the time of the trespass and has not been a continuing injury, it appears to me that interest should be calculated on the whole of \$12,500 from the date of the trespass, 24 August 2021.

100 In determining the rate of interest, I have taken into account Practice Note SC Gen 16 and shall apply a rate of 4.10% from 24 August 2021 until 30 June 2022, 4.85% from 1 July 2022 to 31 December 2022 and thereafter 7.10%.

101 On these bases, the interest to be included is \$834.69. Accordingly, the judgment sum, including interest, will be \$18,334.69.

## Costs

102 In the summons, the plaintiffs sought “All associated costs + fees”. During submissions, the terms of UCPR r 42.34 and r 432.35 were brought to the plaintiffs’ attention. Rule 42.34 relevantly provides:

“(1) This rule applies if—

(a) in proceedings in the Supreme Court, other than defamation proceedings, a plaintiff has obtained a judgment against the defendant or, if more than one defendant, against all the defendants, in an amount of less than \$500,000, and

(b) the plaintiff would, apart from this rule, be entitled to an order for costs against the defendant or defendants.

(2) An order for costs may be made, but will not ordinarily be made, unless the Supreme Court is satisfied that—

(a) for proceedings that could have been commenced in the District Court—the commencement and continuation of the proceedings in the Supreme Court, rather than the District Court, was warranted,

...”.

103 UCPR r 42.35 contains a rule to a similar effect in relation to costs in proceedings in the District Court where the amount of the judgment is less than \$40,000.

104

In the present case, the plaintiff will obtain a judgment against the State for less than \$500,000 by a very considerable margin and thus the requirement in r 42.34(1)(a) is met. Since Sanchia has been successful against the State, it may be accepted that, apart from r 42.34, Sanchia would be entitled to an order for costs against the State, and thus the requirement in r 42.34(1)(b) is also satisfied.

105 Sanchia submitted, in effect, that the proceedings were commenced and continued in the Supreme Court rather than the District Court, or Local Court, because:

- (1) “the Local Court is right next to the local police station where the police officers attend and we certainly did not feel comfortable either at the Local Court nor at the District Court which is Lismore”.<sup>[3]</sup>;
- (2) the proceedings involved “a matter of private as well as public interest” and a “strong message must be sent to uphold the law and secure the people's, the people as required by their office as New South Wales Police Force officers, that people have the right to protect, be protected and be in safety and without harassment or vexatious investigations”.<sup>[4]</sup>

106 In my view, these considerations do not warrant commencement in the Supreme Court rather than the District Court, or for that matter, the Local Court. The locations of those Courts would have been more convenient for the plaintiffs and the other witnesses, and either of those Courts would also have been quite able to vindicate the plaintiffs' private rights by awarding damages and to draw attention to matters of public interest as well as sending any message that needed to be sent by the giving of judgment together with appropriate reasons for judgment.

107 In all the circumstances and in light of UCPR r 42.34, I refuse to make an order for costs in Sanchia's favour.

108 Maia has been unsuccessful in her claim and a costs order in her favour would not be appropriate. The State sought that her claim be dismissed with costs. While the State has been successful in defending Maia's claim, the affront to her because of the police officers' trespass was relevant to assessing Sanchia's damages. Most, if not all, of Maia's evidence and submissions related to Sanchia's claim, as well as her own. The two claims 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. Finally, I noted that the State has not been ordered to pay Sanchia's costs, even though she was successful. 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.

## Orders



109 For all of these reasons, the orders of the Court are:

- (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.

\*\*\*\*\*

## Endnotes

1. Tcpt, 6 December 2022, p 52(42-46)
2. Tcpt. 6 December 2022, p 73(28-29, 48-49).
3. Tcpt, 7 December 2022, p 122 (29-33).
4. Tcpt, 7 December 2022, p 122 (33-34, 39-42).

---

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 07 February 2023