

AUSTRALIA / JUDGMENT

Clough v Breen (No. 6) [2024] NSWSC 1634

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Supreme Court

New South Wales

Medium Neutral Citation: Clough v Breen (No. 6) [2024] NSWSC 1634

Hearing dates: 3 June, 18 July, 20 August, 26 September, and 11 November 2024.

Date of orders: 18 December 2024

Decision date: 18 December 2024

Jurisdiction: Equity - Real Property List

Before: Slattery J

Decision: Interim orders varied and continued to form final relief between the parties. Specified gross sum costs order made.

Catchwords: JUDGMENTS AND ORDERS – Amending, varying, and setting aside – interlocutory regime of orders imposed on parties engaged in a long-running dispute in relation to easements – final judgment given – whether the interlocutory regime of orders should be continued on a permanent basis and if so, whether those orders should be varied.

COSTS – specified gross sum costs order – Civil Procedure Act 2005 s 98(4)(c) – long-running dispute between two neighbours involving multiple proceedings – final judgment given – discretionary factors relevant to making a specified gross sum costs order – need to accelerate the disengagement of the parties from their present disputes and to avoid further aggravating contests between them including in relation to costs assessment – whether a specified gross sum order should be made instead of a costs assessment.

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 56(1), 57(1)(d), 60, and 98(4)(c)

Cases Cited: Aquaqueen International Pty Ltd [2015] NSWSC 500

Australasian Performing Rights Assoc Ltd v Marlin [1999] FCA 1006

Beach Petroleum NL v Johnson (No. 2) (1995) 57 FCR 119

Breen v Clough [2017] NSWSC 1681

Capello v HomeBuilding Pty Ltd [2023] NSWCA 268

Clough v Breen [2020] NSWSC 653

Clough v Breen & Anor [2022] NSWSC 1026

Clough v Breen (No. 4) [2023] NSWSC 1155

Clough v Breen (No.5) [2024] NSWSC 337

Hadid v Lenfest Communications Inc [2000] FCA 628

Halliday v SACS Group Pty Ltd [1993] HCA 13; 67 ALJR 678

Harrison v Schipp (2002) 54 NSWLR 738; [2002] NSWCA 213

Penson v Titan National Pty Ltd (No.3) [2015] NSWCA 121

Prospect County Council v Cross (1990) 21 NSWLR 601

Simone Starr-Diamond v Talus Diamond (No. 4) (2013) 272 FLR 414; (2013) 224 A Crim R 523; [2013] NSWSC 81

Category: Costs

Parties: Plaintiff/Cross-Defendant: Christine May Clough

First Defendant/Cross-Claimant: Douglas Martin Breen

Second Defendant/Cross-Claimant: Tracey Jane Dillon

Representation: Counsel:

Plaintiff/Cross-Defendant: D O'Connor

Defendants/Cross-Claimants: M McGirr

Solicitors: Plaintiff/Cross-Defendant: Michael Sommerville, Redmond Hale Simpson
Defendants/Cross-Claimants: Charlotte Morson, Morson Law Litigation Lawyers
File Number(s): 2020/130704
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JUDGMENT

1. This is the sixth judgment in these long-running easement proceedings between neighbours in the Sydney suburb of Lugarno. This judgment deals with two remaining issues: (1) what part of the interlocutory regime first ordered to de-escalate tensions between the parties on 1 August 2022 should now be continued; and (2) what specified gross sum costs order should be made to give effect to the costs orders made in favour of the plaintiff.
2. The determination of these questions requires reference back to several of the Court's prior judgments. As to the first issue for determination, the interlocutory regime of orders ("the interlocutory orders") was first imposed on the parties for the reasons of the Court gave in *Clough v Breen & Anor* [2022] NSWSC 1026. Minor variations were subsequently made to the interlocutory orders.
3. As to the second issue, on 9 April 2024 the Court delivered its fifth judgment: *Clough v Breen* (No.5) [2024] NSWSC 337 ("Clough No.5"). That judgment ordered the first defendant, Mr Breen, to pay a total of \$28,000 in aggravated and exemplary damages in respect of three incidents the subject of the Court's earlier findings of tortious conduct against Mr Breen. Clough No.5 also ordered the defendants to pay 60% of Ms Clough's, the plaintiff/cross-defendant's, costs of the proceedings to date: Clough No.5 at [59]. The present judgment addresses whether a specified gross sum costs order should be made in respect of the costs order in Clough No.5, and if so, what should be the quantum of that order.

4. This judgment should be read with the Court's previous judgments in these proceedings. Those judgments are all listed in *Clough v Breen* (No. 4) [2023] NSWSC 1155 at [6] – [8] ("*Clough No.4*"). Events, matters and persons are referred to in this judgment in the same way as they are in the previous judgments.
5. The Court had the benefit of evidence and written submissions from the parties and heard short oral submissions on the two issues for determination. The parties continued to engage the same lawyers as they did at the main hearing. Mr D. O'Connor and Ms C. Langford of counsel, instructed by Michael Sommerville of Redmond Hale Simpson Solicitors & Barristers, appeared for the plaintiff/cross-defendant, Ms Clough. Mr F. Maghami and Mr M. McGirr of counsel, instructed by Charlotte Morson, of Morson Law Litigation Lawyers appeared for the defendants/cross-claimants, Mr Breen, and Ms Dillon.
6. The interlocutory orders have been slightly modified since 1 August 2022. On 19 April and 4 May 2023, the interlocutory orders were varied in relation to the operation of the Sinking Fund. On 18 July 2024, Order 7 was varied so the references to Landing 3 and Landing 4 to replace them with references to Landing 4 and Landing 5, to correct a mistake in the original orders.
7. The issues have also been reduced since *Clough No.5* in several ways. By agreement between the parties, work has now been done to relocate the inclinator call button at Landing 1 onto a post at that landing but fixed on Lot 118. And Mr Breen and Ms Dillon have indicated that they no longer wish to pursue their Cross Claim for upgrading or replacing the inclinator.
8. Supplementary relief has been sought and made by agreement, since the interlocutory orders were first made. For example, orders have been made on what is in substance a without admissions basis that Mr Breen and Ms Dillon not park a vehicle to obstruct the doorway leading from the street to Easement D by parking or placing any object within 1 metre of the said doorway.

Issue One - Making the Interlocutory Orders Permanent

1. The CCTV Camera at Landing 6. Ms Clough complains that the defendants have mounted a CCTV camera on her driveway at Landing 6. The plaintiff points out that Ms Dillon's evidence under cross-examination is that all of the defendants' CCTV cameras record sound as well as images. Ms Clough is concerned that the CCTV camera mounted on the driveway is recording her conversations, while she is waiting at Landing 6.
2. The area in question outside Landing 6 serves several purposes. First, it is a point through which Ms Dillon and Mr Breen can join the inclinator to exercise their rights as dominant tenement owners using Easement A over the inclinator corridor of Lot 116. Secondly, it is also a point at which Ms Clough can either access her own land or pause and decide whether she will take a different pedestrian route and exercise her rights under Easement B as dominant tenement owner and pass over Lot 118.

3. The Court sees no basis for this CCTV camera to be recording conversations at this point where Ms Clough and her guests would be making that decision. A legitimate purpose for having a camera on or in the vicinity of an easement is so that the dominant tenement owner using the easement can do so safely and to avoiding encountering other persons using the easement, where those encounters might lead to conflict. But it is not necessary to listen to the conversations of persons using the easement to serve these purposes.
4. The CCTV camera in question is on Ms Dillon's and Mr Breen's own land outside the easement over the inclinator. Ms Dillon and Mr Breen are generally free to use their own land as they please. It is not necessary for the Court to decide whether sound recording by the owners of Lot 118 at Landing 6 causes Ms Clough a nuisance in trying to enter her own land, although that is strongly arguable under the general law of nuisance. But sound recording by the Landing 6 CCTV camera should be limited for another reason.
5. The area in question at Landing 6 is a place where Ms Clough should be able to pause and decide not just how to access her own Lot 116, but also to exercise her rights of way through easement B over Lot 118. Mr Breen and Ms Dillon are not free to impose a cost upon or intimidate another person from using an easement over their land: *Prospect County Council v Cross* (1990) 21 NSWLR 601 at 610 per Bryson J. Sound recording in this area imposes a cost on Ms Clough and her guests as it would deter them from pausing and gathering in this area to exercise their options to use easement B.
6. The Court will require by Friday, 14 February 2025 any sound recording for this CCTV camera to be disabled and for technical evidence that the camera has been disabled to be provided on affidavit to the Court by that time. The camera may otherwise be left operational. The orders made below provide for this outcome.
7. Landing 6 Access. Once the issue with Landing 1 resolved, Ms Clough submitted in the alternative that Mr Breen and Ms Dillon be restricted from using Landing 6 and if that occurred, Ms Clough would voluntarily submit to not making use of Landing 5. The Court could confirm such an agreement of the parties to this effect, but the parties do not agree on this trade-off of their rights. Ms Clough submits that Mr Breen and Ms Dillon do not need to use Landing 6. But Mr Breen and Ms Dillon submit that Landing 6 access is still useful to them. Landing 6 probably does have uses for them in some circumstances. There is no overriding reason in the evidence why Mr Breen and Ms Dillon should be restrained from exercising their rights to use Landing 6, so the Court will therefore not make the order requested.
8. Routine work on the inclinator – Order 4. The interlocutory orders set out (in Order 4) a detailed regime for the conduct of routine work on the inclinator. Order 4 appoints Ms Clough to engage third-party experts, engineers, tradespeople, or other workers to undertake routine maintenance or repair work on the inclinator, or on the easements on Lot 116 or Lot 118. This regime was designed as a temporary measure to produce stability in an area where there had been unnecessary conflict in the engagement of third-party assistance

to repair the inclinator and related easements. It has reduced that conflict. But this regime does not fully reflect the rights of the parties under the easement. In substance, it gives Ms Clough the right to engage these third-party subject to the consent of the solicitor for Mr Breen and Ms Dillon, but on the basis that consent would not be unreasonably withheld.

9. Mr Breen and Ms Dillon submit in substance that Order 4 gives too much control to Ms Clough to determine how much maintenance and repair is done on the inclinator before creating "External Easement Liabilities" with third-party contractors, as that term is defined in the interlocutory orders. They submit that as presently structured Order 4 is not consistent with Mr Breen and Ms Dillon's ongoing right to affect maintenance and repair of the easement as the dominant tenement owner, the right recognised by Darke J in *Breen v Clough* [2017] NSWSC 1681 at [157]. They say that in substance Order 4 confers a superior right on Ms Clough which is not consistent with the further statement of Darke J in *Breen v Clough* [2017] NSWSC 1681, who said at [256], "[t]he terms of the easement do not confer rights upon the defendant [Ms Clough] that are superior to those of the plaintiffs [Mr Breen and Ms Dillon] in respect of the use and maintenance of the inclinator", observations with which I respectfully agree.
10. Mr Breen and Ms Dillon submit that if Order 4 is to be made permanent that it should more accurately reflect their legal rights. They suggest two options to do this: (1) the appointment of an independent third-party to manage and contract External Easement Liabilities as defined in the interlocutory orders, or (2) the parties could alternate the role of arranging routine maintenance of the inclinator, swapping roles every three or six months. Mr Breen and Ms Dillon submit that one disadvantage of the imbalance in the current Order 4 regime is that because they only hold an advice and consent role, they cannot initiate works but are merely constrained to agree or disagree with the program of works for the inclinator set by Ms Clough.
11. Ms Clough submits that the current regime should continue because it works and represents a practical solution to the conflict that has occurred over time.
12. The Court has reached the view that on a permanent basis and rebalancing of the powers conferred by Order 4 needs to take place to better reflect the legal rights of the parties so that Mr Breen and Ms Clough have more agency in relation to repair and maintenance decisions about the inclinator. But relations between these parties are so poor the Court has no confidence that they can deal with one another directly about such decisions. Alternating roles is a recipe for further conflict and decision-making paralysis.
13. Appointing an independent person is therefore the only viable alternative. The Court will vary Order 4 to appoint a suitably qualified and independent professional third-party to arrange routine maintenance and repair of the inclinator. Such a person should have the broad skill set like that of strata manager but someone with prior experience with inclinators would be an advantage. If the parties cannot agree upon a suitable candidate for appointment, the Court will select from panels of experts with CVs put together by the

parties on a blind basis – with the Court not being aware which parties put forward which expert.

14. If the parties cannot agree upon a set of instructions for appointing and instructing the appointed expert, the Court can include them in supplementary orders. The expert will need to be formally appointed as the contracting agent of the parties. The parties will have to set aside sufficient funds in the Sinking Fund to meet all the expected liabilities of the expert. The parties will need to be bound by the decisions of the expert who may have the contractual powers of binding determination of contested issues. Therefore, the expert in question will need to be experienced and sufficiently senior to manage the making of such binding decisions. The Court will not be supervising the expert on a permanent basis, so the expert's jurisdiction will need to be contractual with self-contained mechanisms to resolve disputes. The regime will come to an end when either both parties agree, or one party sells either Lot 116 or Lot 118. The orders below require the parties to take these steps.
15. Urgent maintenance and repair – Order 5. The interlocutory orders create a separate regime in Order 5 to address inclinor malfunctions that require urgent repairs to restore its ordinary operation. There is debate as to whether this should continue. Order 5(c) presently requires that if Mr Breen and Ms Dillon become aware of any malfunction requiring urgent repairs, that they should first contact Ms Clough or her solicitor, so she can contact the regular service personnel to do the repairs. This will not need to continue. One advantage of amending Order 4 is that both parties will already be able to contact the appointed independent professional expert, who should also be able to handle urgent repairs. That independent expert should be contactable outside ordinary working hours to respond to urgent maintenance and repair requests quickly. No additional amendments will be required to Order 5 for the interlocutory orders to continue on a permanent basis.
16. The Gate between Landing 4 and Landing 5 – Order 7. The interlocutory orders, in Order 7(a), impose a restraint on Mr Breen and Ms Dillon from using the gate between Landing 4 and Landing 5 to gain access to any part of Lot 116. The order incorrectly refers to the gate as being between Landing 3 and Landing 4. This was later corrected to refer to Landing 4 and Landing 5.
17. In Clough No 4, the Court made the following declarations in paragraph [247] (2) and (3):
"(2) Easement A - Right of Access. Declare that upon the true construction of the s 88B instrument and in the circumstances required by the physical topography of the site of Easement A the rights of access conferred upon the Lot 118 owner by Easement A entitle the owners of Lot 118 to enter the lot burdened, Lot 116, outside the site of Easement A but only to the extent reasonably necessary for the purpose of the owner of Lot 118 passing across Lot 116 to get to or from Lot 118 within the site of easement A,

(3) Declare that upon the true construction of the s 88B instrument and in the circumstances required by the physical topography of the site of Easement A the owners of Lot 118 may access the site of Easement A on Lot 116 by means of

(a) the call button at Landing 1, and

(b) the garden gate,

but only for the purposes of and within the limits described in declaration (2)."

1. But notwithstanding these declarations, the Court decided to continue the interlocutory orders restricting Mr Breen's and Ms Dillon's use of the gate between Landing 4 and Landing 5, as follows

"(5) Continuation of the Interim Orders. Notwithstanding the making of declarations (2) and (3) in these orders as to the rights of access available to Mr Breen and Ms Dillon under Easement A, by reason of the Court's findings about the conduct of the parties the interim orders are continued without any variation by these orders until an opportunity has been afforded to each of the parties to put submissions in relation to the matters set out in direction (6) below, and for the avoidance of doubt, until that time Mr Breen and Ms Dillon are restrained until further order from:

(a) using the gate between Landing 3 and Landing 4 to gain access to any part of Lot 116, and

(b) accessing the inclinator call switch situated wholly on Lot 116 at Landing 1."

1. Mr Breen and Ms Dillon submit that Order 7 should now be vacated because, as was contemplated by Order 5, an opportunity has been afforded to the parties to put submissions in relation to the continuation of the interlocutory orders, the costs of the proceedings and all the various other matters that direction (6) of the orders made in Clough No 4 contemplated should be the subject of further orders.

2. These various steps have been taken and there is no obstacle to the Court now moulding final relief in relation to the gate between Landing 4 and Landing 5. The Court has decided that notwithstanding the declarations made in Clough No 4, that final relief should place a limit upon Mr Breen's and Ms Dillon's use of this gate for a further period. This is because the Landing 4/Landing 5 gate has been one of two principal sources of dispute between these parties, the other being the Landing 1 call button. The issue of the Landing 1 call button has now been resolved by moving the button. But access onto Ms Clough's property through the Landing 4/Landing 5 gate and via what is described as the "Lot 116 stepdown" which allows Mr Breen to roam generally widely outside the inclinator corridor, have been sources of immense conflict between these parties.

3. In moulding final relief, the Court can modify a party's strict legal rights to prevent conflict with another party, which might lead to breaches of the peace, a trespass, or nuisance. But the Court should not ordinarily permanently modify parties rights. Here, the Court has reached the view that some medium-term modification to Mr Breen's and Ms Dillon's rights

is required for the sake of avoiding breaches of the peace or the commission of intentional torts. In the Court's view, a further "cooling off" period of four years is required to provide for a notice procedure before Mr Breen and Ms Dillon can exercise their rights to go onto the inclinator corridor by either of these usual means of access, through the Landing 4/ Landing 5 gate or via the Lot 116 stepdown. The Court will require Mr Breen and Ms Dillon to give 14 days' advance notice to the independent expert of their intention to go onto the inclinator corridor by these means. They will be able to do so, but Ms Clough will be able to avoid them because of the prior notice to the independent expert who can inform Ms Clough. The independent expert should have the authority to fix a reasonable time for this access to occur. The Court has prepared its draft orders to reflect these reasons.

4. Moreover, this notice should not be burdensome for Mr Breen and Ms Dillon. Planned work on services to Lot 116 and Lot 118 can still occur within the periods set aside by Order 3 of the interlocutory orders. And the parties have now been operating under this interlocutory regime for over two years and the reports back to the Court are that it has been generally satisfactory. The operation of the interlocutory orders since August 2022 shows there is not a pressing demand for Mr Breen and Ms Dillon to walk on the inclinator corridor, using either of these means of access. A slight restriction for a further four years by giving advance notice to the independent expert represents a reasonable balance of the rights of the parties in the circumstances.
5. Empty Inclinator Cars. The final matter in dispute is what should happen to empty inclinator cars. This issue has arisen since the interlocutory orders have commenced operation. In orders which are otherwise satisfactory Ms Clough has complained that Mr Breen and Ms Dillon have a habit of using the inclinator then sending it down to one of the landings adjacent to their residence on Lot 118. Ms Clough says this is not within the spirit of the interlocutory orders and that a direction should be made, requiring a user to leave the inclinator at whatever landing it was that the current user last used it.
6. The Court will not make such a direction for several reasons. First, it is likely to create many problems in enforcement and supervision and generate further complaints of breach. Secondly, Ms Clough has an available remedy of doing the same thing and sending the inclination to a landing near her residence. Eventually the party should develop a pattern of cooperation about this. Thirdly, as the two residences on Lot 118 on Lot 116 are erected adjacent to one another on those two lots, the problem complained of is probably less severe than is made out.

Issue Two – Making a Specified Gross Sum Cost Order

1. In Clough No.5 (at [59]), the Court ordered the defendants/cross-claimants to pay 60% of the plaintiff's costs of these proceedings up to the date of that judgment.

2. On 3 June 2024, the Court made orders for the parties to file and serve written submissions and evidence in support of what final costs orders should be made. The Court noted its general intention to make a lump sum cost order pursuant to Civil Procedure Act 2005 (NSW), s 98(4)(c). Neither party opposed making such an order. Established authority justifies the making of such an order in circumstances such as a present.
3. The principles for the making of specified gross sum costs orders instead of assessed costs are now well settled. Civil Procedure Act, s 98(4)(c) is expressed in general terms and is not limited to cases of a particular type: *Australasian Performing Rights Assoc Ltd v Marlin* [1999] FCA 1006 (Burchett J). The power to award a Civil Procedure Act, s 98(4)(c) specified gross sum instead of assessed costs is exercised whenever circumstances warrant its exercise; the purpose of the rule is to avoid the expense, delay and aggravation arising out of a taxation or assessment: *Beach Petroleum NL v Johnson* (No. 2) (1995) 57 FCR 119.
4. Probable inability to pay a costs order will usually provide a proper basis for the making of a s 98(4)(c) order. If the unsuccessful party ordered to pay costs is unlikely to be able to pay the amount of costs ordered, then the successful party is further aggravated by having to fund the additional costs of taxation, those costs also being unrecoverable: *Harrison v Schipp* (2002) 54 NSWLR 738; [2002] NSWCA 213 ("Schipp") at [21] (Giles JA) and *Hadid v Lenfest Communications Inc* [2000] FCA 628 ("Hadid") (Lehane J).
5. That is not an issue here. In this case, the circumstances that warrant the exercise of the power are the avoidance of a potentially drawn-out costs assessment dispute between neighbours whose dispute has otherwise been substantially resolved by the Court. It is important these neighbours are separated as soon as possible to begin to de-escalate tensions between parties who must see each other daily when sharing the same inclinator. These circumstances suggest the need to accelerate the disengagement of the parties from their present disputes and to avoid further aggravating contests between them including in relation to costs assessment.
6. The specified gross sum can be fixed under s 98(4)(c) by the application of what has been described as a "broad brush" approach, having regard to all the information available to the Court: *Schipp* at [22] and *Hadid* at [27] and *Penson v Titan National Pty Ltd* (No.3) [2015] NSWCA 121 at [7] and [25]. The approach taken to the estimation of costs must be "logical, fair and reasonable" and the powers should only be exercised when the Court considers it can do so "fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available": *Schipp* at [22] per Giles JA.
7. A definitive statement of the applicable law in this state appears in *Hamod v State of New South Wales* [2011] NSWCA 375 at [813] to [820] ("Hamod") which the Court applies in this case. Some of the relevant principles stated there are: that before exercising the power the Court should be confident that the approach taken to estimating costs is fair logical and reasonable; that the terms of s 98(4), together with the more general considerations reflected in Civil Procedure Act, ss 56(1), 57(1)(d) and 60, suggest the factors that merit

particular consideration and include the degree of any disproportion between the issue litigated and the costs claimed and the complexity of proceedings in relation to their cost; that the power may also 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 proceeding; that the assessment of any lump sum to be awarded must represent a review of the successful party's costs by reference to the pleadings and complexity of the issues raised on the pleadings; the interlocutory processes; the preparation for final hearing and the final hearing; that in the exercise of its discretion, the Court is not required to undertake a detailed examination of the kind that would be appropriate to taxation or formal costs assessment; that 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); and that the approach taken to estimate the costs to be ordered must be logical, fair and reasonable and this may involve an impressionistic discount of the costs actually incurred or estimated, in order to take into account the contingencies that would be relevant in any formal costs assessment.

8. I have previously summarized the law regarding the powers available in Civil Procedure Act, s 98(4)(c) in *Simone Starr-Diamond v Talus Diamond* (No. 4) (2013) 272 FLR 414; (2013) 224 A Crim R 523; [2013] NSWSC 81.
9. In accordance with the 3 June Orders, on 17 June, the plaintiff/cross-defendant filed and served an affidavit setting out the professional costs and disbursements she had incurred and which she now claims to recover. She states that she has incurred the following costs:

Plaintiff's Costs Amount Incurred Total

Barristers' Costs: \$160,765.00

Mr D O'Connor \$33,783.20 \$194,548.20

Ms C Langford

Solicitor's costs and disbursements \$97,108.24 \$97,108.24

Disbursements paid into Solicitor's trust account \$1,981.00 \$1,981.00

Disbursements paid directly: \$7,489.98

Expert Witness \$4,377.93

Professional and witness costs \$2,333.00 \$27,821.20

Court fees \$5,895.00

Transcript fees \$7,725.29

Printing and stationary

Total \$321,458.64

1. On 15 July, the defendants filed and served an affidavit of Charlotte Morson, the solicitor for the defendants, setting out their objections to the costs being claimed by the plaintiff. The defendants challenge the costs claimed by the plaintiff on the basis either that they were not properly incurred or were excessive in amount. The objections cover a range of subjects, but the principal categories are the following: costs said to be duplicated, costs pertaining to the Cross-Claim, which were not subject to the award of costs, costs which are not party/party costs, and general objections to the quantum of various charges.

Indemnity Principle

1. Mr Breen and Ms Dillon contend that Ms Clough has not established a liability to pay legal costs to her solicitors and counsel because her principal affidavit in relation to costs of 17 June 2024 does not include a copy of the costs agreements with her solicitors or counsel. Without proof of formal contractual liability through a costs agreement, she contends the indemnity principle is not satisfied and that Ms Clough's claim for costs should fail.
2. This argument is not persuasive. The Court had the benefit of extensive documentary evidence attached to Ms Clough's principal costs affidavit of 17 June 2024, which attaches the memoranda of fees from the barristers and detailed accounts of solicitors' professional costs and disbursements, trust account records and evidence of amounts actually paid by Ms Clough to her solicitors and counsel. Mr Breen and Ms Dillon offer no challenge to the authenticity of these documents, which are a firm basis for inferring not only Ms Clough's liability to pay costs but the fact that costs have been paid.
3. Courts have commonly emphasised the need to avoid taking overly technical points in relation to the indemnity principle and like issues on arguments about costs at the conclusion proceedings: *Capello v HomeBuilding Pty Ltd* [2023] NSWCA 268 at [39] – [44]. And there is a strong presumption that a contract of retainer exists where solicitors and counsel appear on the record and on behalf of the party as Redmond Hale Simpson and Mr O'Connor and Ms Langford of counsel do here: *Halliday v SACS Group Pty Ltd* [1993] HCA 13; 67 ALJR 678 at [7]. The Court infers from all the available material that Ms Clough does have a liability to pay costs to her lawyers.

Alleged Costs Duplication

1. Mr Breen and Ms Dillon contend that the costs claimed include duplication of costs as between the Summons, the Statement of Claim, and the Amended Statement of Claim.
2. Ms Morson's affidavit of 8 July 2024 sets out the chronology relevant to this contention. Ms Clough commenced proceedings in the Equity Duty List by way of Summons filed on 1 May 2020. On 15 May 2020, Ms Clough was directed to file and serve a Notice of Motion setting out the terms of any interim relief to be sought listed before the Equity Duty Judge which was done. This Notice of Motion did not seek costs. On 28 May 2020, an Amended Notice of

Motion was filed by Ms Clough which added two orders, one order was for costs and the other was for certain ancillary relief. On 14 August 2020, the plaintiffs filed a Statement of Claim which was replaced by an Amended Statement of Claim filed on 9 June 2021.

3. Mr Breen and Ms Dillon contend that it is not clear why Ms Clough could not have commenced the proceedings by way of pleadings from the outset and that the costs they incurred in responding to the Summons and the two Notices of Motions were wasted. They contend that no explanation has been given as to why the proceedings were not commenced by way of pleadings from the outset. Despite
4. Ms Clough submits that she was reacting to the Mr Breen's conduct and that she was forced to commence proceedings by way of an urgent Summons because Mr Breen had used epoxy glue to seal off an easement to restrict Ms Clough's access: *Clough v Breen* [2020] NSWSC 653.
5. Ms Clough says the delay in adopting by way of pleadings to run the proceedings was a result of the urgency created by Mr Breen's conduct and this is evident from the procedural history of the matter, having been commenced in the Duty List and only later referred to the Real Property List after some stability had been brought to the matter. She therefore contends that to commence proceedings for urgent relief by way of pleadings is unrealistic because the preparation of full pleadings, which requires time and is usually only undertaken once proceedings have stabilised.
6. In the Court's view, Ms Clough's argument is persuasive. The approach that she took in relation to the filing of process was common as proceedings move from the more urgent interlocutory phase towards a final hearing. Once Ms Clough had obtained some urgent interlocutory relief she followed the usual pattern and pleaded her claim for final relief, which was necessary because of the mix of factual and legal issues in the proceedings.
7. In the fixing of a specified gross sum instead of assessed costs there should be no reduction of costs on account of this issue.

Costs relating to Cross-Claim

1. Mr Breen and Ms Dillon contend that the costs claimed by Ms Clough incurred significant costs in relation to the Cross-Claim. Mr Breen and Ms Dillon point out that Ms Clough was not successful on the Cross-Claim, nor or indeed were Mr Breen and Ms Dillon. So, it is contended on behalf of Mr Breen and Ms Dillon that costs associated with the Cross-Claim should be excluded from the calculations of costs. The excluded costs are said to include affidavits of experts and the like.
2. The Court has already considered in *Clough* No. 5 in making its order that "the defendants pay 60% of the plaintiff's costs of these proceedings incurred up to the date of this judgment" the conduct of the Cross-Claim. It is undesirable set for parties a task of separating out the costs of a claim and a Cross-Claim. That is why the Court made a combined order relating to the cost of "these proceedings". It is clear that the Cross-Claim

was considered as it is mentioned in Clough No. 5 for example at [53]. To make a further reduction in costs now on account of the Cross-Claim would involve double counting.

Costs That Are Not Party/Party Costs

1. Ms Clough claims a specified gross sum costs order of 60% of her actual costs of \$321,458.64, which is the sum of hundred \$192,875.18. Mr Breen and Ms Dillon's submissions and take detailed issue with the costs of the barristers and the professional costs and solicitors. Their objections if upheld would reduce the sum of \$192,875.18 by a further \$56,727.07, to produce a net amount payable of \$136,148.11.
2. It is not possible to go through all the individual objections. They relate to matters such as alleged unreasonable charges and charges involving duplicated work, work related to AVO proceedings, costs relating to the Cross-Claim, excessive disbursements and costs of unnecessary correspondence, and work on some matters not directly relevant to the matters in issue in the proceedings. The authorities in relation to specified gross sum cost orders discourage Courts from attempting to duplicate a costs assessment when applying s 98(4)(c). So, the Court will merely make the following general observations about the objections which have all been considered.
3. The Court has an experienced appreciation of what it takes to prepare a case of this kind. As the Court has said more than once it has been greatly assisted by the quality of the legal work performed on both sides of this litigation. That does involve a high degree of attention to detail the doing the bare minimum, which has shown itself up in the quality of submissions on both sides, and relevantly here on behalf of Ms Clough. But in the Court's view there are nevertheless slight amounts of duplication of effort and expenditure on some presently irrelevant matters in relation to Supreme Court costs, such as the AVO.
4. On account of these matters, the Court will reduce the claim for 60% of costs down to \$190,000. But it is then necessary apply a further discount to reflect the fact that the assessment of a lump sum should reflect the that a party invariably recovers less than actual costs and it is necessary to avoid too much risk that the sum will include costs that would not be recoverable in on an assessment: *Aquaqueen International Pty Ltd* [2015] NSWSC 500 at [18].
5. Taking these matters into account the Court will apply further discount of 15% to the figure of \$190,000. The Court has included both counsel and solicitor's costs in this discount because of the high but necessary involvement of counsel in the preparation of this case. This calculates out at \$161,500. An order for costs in the sum will be made in that amount.

Conclusions and Orders

1. The obligations created by the orders made below have been constructed to operate generally from Friday, 14 February 2025. This will give the parties an opportunity to prepare for the changes that are involved. If any issues arise there will be an opportunity to deal with them in the three weeks at the beginning of the new law term.
2. It may be that the parties see difficulties in the operation of these orders that the Court has overlooked. The parties will have liberty to put submissions in relation to the implementation of the orders. The Court is not inviting further submissions about the substance or the structure of the orders, which will not change. The Court will merely address practical implementation issues that are not presently foreseen.
3. The Court –
 1. NOTES that terms in these orders have the same meaning as they have been given in previous orders in these proceedings and otherwise the orders made on 1 August 2022 will be referred to as "the interlocutory orders".
 2. ORDERS that by Friday, 14 February 2025 the defendants shall
 1. disable all audio reception features of the CCTV camera presently located on Lot 118 near Landing 6, and
 2. provide affidavit evidence to the plaintiff and the Court of their compliance with subparagraph (a).
 1. ORDERS that commencing on Friday, 14 February 2025 the interlocutory orders will become permanent subject to the variations made to those orders by the further orders made on 19 April and 4 May 2023 and 18 July 2024 and by these orders.
 2. ORDERS that commencing on Friday, 14 February 2025 ORDER (7) of the interlocutory orders is deleted and an order to the following effect shall be substituted for it,

"(7) Mr Breen and Ms Dillon are restrained for a period of four years from 14 February 2025 from using the gate between Landing 4 and Landing 5 or the stepdown from Easement B to gain access to any part of Lot 116 without first giving 14 days' notice of their intention to do so to the independent expert appointed pursuant to Order 4."
1. ORDERS that commencing on Friday, 14 February 2025 ORDER (4) of the interlocutory orders is deleted and the following order shall be substituted for it,

"(4) All routine maintenance or repair work on the inclinators on Easement A will be conducted in accordance with the following orders:

- (a) the parties will jointly appoint a suitably qualified independent expert to arrange for any engineering, trades or other routine maintenance or repair work to be undertaken on Lot 116 or Lot 118 pursuant to the powers created by the s 88B instrument and to make final binding decisions about what engineering, trades or other routine maintenance or repair work should be undertaken on Lot 116 or Lot 118, when the parties cannot agree;
 - (b) in default of the parties being able to agree upon the appointment of a suitably qualified independent expert within 28 days, the parties shall approach the Court to request the Court to make directions for the appointment of such an independent expert;
 - (c) the parties will directly instruct the independent expert to arrange for any routine work on the inclinator to be undertaken consistently with the operation of the regime of routine maintenance provided for in Order (3) of these orders and will do all things reasonably necessary to cooperate with and facilitate the work of the independent expert;
 - (d) the independent expert is authorised by these orders to contract as the agent of the parties to assume External Easement Liabilities as defined by these orders, on their behalf"
1. ORDERS the defendants, Mr Breen and Ms Dillon to pay \$161,500 by way of a specified gross sum in satisfaction of Order 2 of the Orders made on 9 April 2024.
 2. ADJOURNS these proceedings for further mention to Friday, 7 February 2025 at 9.30am or on such other date as may be arranged with the chambers of Slattery J.
 3. GRANTS liberty to apply in relation to the implementation of these orders.

Amendments

18 December 2024 - Amendment to Legislation Cited

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Decision last updated: 18 December 2024

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