DISTRICT COURT OF QUEENSLAND

CITATION:	*Brodsky & Anor v Willi* [2018] QDC 1
PARTIES:	**DMITRY BRODSKY** **(first plaintiff)** **AND** **FIONA KATE HEALY** **(second plaintiff)** **v** **ALAN NEVILLE WILLI** **(first defendant)** **AND** **ROBYN ANNE WILLI** **(second defendant)**
FILE NO/S:	165/16
DIVISION:	CIVIL
PROCEEDING:	Trial
ORIGINATING COURT:	District Court of Queensland, Maroochydore
DELIVERED ON:	29 January 2018
DELIVERED AT:	Maroochydore
HEARING DATE:	16 – 18 October 2017, final trial submission 17 December 2017, Costs submissions up to 7 February 2018.
JUDGE:	Robertson DCJ
ORDER: (made 29 January 2018)	Order that the defendants pay to the plaintiffs: (a) by way of restitutionary damages for trespass the sum of $2,450; (b) aggravated damages for trespass in the sum of $20,000; (c) exemplary damages $25,000. I will allow interest in accordance with s 58 of the *Civil Proceedings Act* 2011. I dismiss the counterclaim.
ORDER: (made 16 February 2018)	In addition to the orders made on the 29th of January 2018 I make the following additional orders: 1. I allow interest on the damages components of restitutionary and aggravated damages in the total sum of $6,206.88.

2. I order the defendants to pay the plaintiffs costs of and incidental to the proceedings including any reserved costs to be assessed on the indemnity basis.

3. By consent, I make the following order by way of declaration:

> The defendants not carry out any works including the removal of works the plaintiffs may carry out upon Easement G unless and until:
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> 1. full particulars of the intended works is supplied to the plaintiffs in writing; and
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> 2. a period of thirty (30) days has elapsed from the supply of such particulars of works and the plaintiffs have consented to such works in writing. In the event that the plaintiffs fail to consent to such works the matter shall be referred to arbitration.
>
> Should any dispute arise between the plaintiffs and the defendants in respect of any matter or thing arising pursuant to the easement or proposed works to it, such dispute shall be referred to arbitration pursuant to the *Commercial Arbitration Act* 2013 (as amended). The parties agree that the arbitrator shall be appointed by the President of the Queensland Law Society incorporated from time to time at the request of either party. Within fourteen (14) days of the above order the plaintiffs shall remove all signage referring to a dispute between the parties or their respective rights.

CATCHWORDS: EASEMENTS, REAL PROPERTY: where defendants have right of way easement over plaintiffs land, where disputes arose between the parties over their respective rights under the Grant;

TRESPASS/NUISANCE: where plaintiffs constructed a cross-over on the easement area to enable them to more safely access the lower part of their property which is bisected by the easement; where defendants caused contractors to remove the cross-over without the consent of the plaintiffs, whether in so doing the defendants committed the tort of trespass; whether the cross-over substantially interfered with the rights of the defendants pursuant to the grant;

DAMAGES, EXEMPLARY & AGGRAVATED DAMAGES: where from the time they first met the defendants adopted an aggressive and intimidating attitude

towards the plaintiffs asserting that they "owned" the easement and that the plaintiffs could exercise no rights in relation to the easement without the consent of the defendants; whether the actions of the defendants involved contumelious disregard for the plaintiffs legal rights;

COSTS: whether there was some special or unusual feature of the case which required the Court to depart from the ordinary course of standard costs to follow the event.

Legislation

Civil Proceedings Act 2011 s 58

Uniform Civil Procedure Rules 1999 r 5, 156, 226, 360 and 658(1) and (2)

Commercial Arbitration Act 2013

Peace and Good Behaviour Act 1982

Cases

Browne v Dunn (1893) 6 R. 67

Gallagher v Rainbow (1994) 179 CLR 624

Hannay v Lewis [1999] NSW ConvR 53-879

Saggers v Brown (1981) 2 BBR 9329

Stewart v Cooper (1986) Tes. R. (NC) N1

Stereff v Rycena & Anor [2010] QDC 117

Bilic and Bilic v Nicholls [2013] QDC 112

TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 33

Colgate-Palmolive Company v Cussons Pty Ltd (1993) 43 FCR 42

The Commonwealth of Australia v Murray [1988] Aust Tort Reports 68,038

Grieve v Gomez [2017] QDC 298

Di Carlo v Dubois & Ors [2002] QCA 225

Paroz v Paroz (2010) QSC 157

Fail v Hutton [2003] QSC 291

COUNSEL: Mr Gerber for the plaintiffs

Mr Hall for the defendants

SOLICITORS: Neilson Stanton and Parkinson for the plaintiffs

AJ & Co Solicitors for the defendants

Introduction

[1] The proceedings before the court have a long history commencing in a claim by the plaintiffs filed in the Gympie Magistrates Court (GMC) in 2014. There have been many amended pleadings and changes in parties. The trial in this court proceeded on the basis of the latest pleadings.[1] Although the pleading filed on 13 October 2016 is described in the Magistrates Court file as an Amended Defence, it also includes a Counterclaim, and it is in that pleading for the first time that the defendants sought declarations beyond the jurisdiction of the Magistrates Court which led to the transfer of the proceeding to this court. The plaintiffs' claim has always been for damages for trespass including a claim for aggravated and exemplary damages. It is true, as Mr Gerber asserts, that the essential facts pleaded by his clients are admitted, however it is necessary for me to undertake a detailed analysis of the evidence led at trial, and to make credibility and reliability findings as this is an issue that is also relevant to exemplary and aggravated damages.

[2] In 2007 the plaintiffs purchased vacant land at 161 Jubilee Road, Carters Ridge. Their property is formally described as Lot 5 on RP 839360 (Lot 5). The property is acreage set in a very pleasant rural setting, approximately 22kms southwest of Gympie. It was their plan and hope to build a home for their growing family (they now have three children aged 10, 8 and 6), and to expose their children to the joys of rural life. Mr Brodsky works in a bank in Gympie, and the couple lived in Gympie for five years, before moving a Queenslander-type house onto Lot 5 in 2011. The family moved into the house just before Christmas 2011, and Ms Healy spoke of their happiness with their new home which is set on the highest part of Lot 5 and enjoys magnificent rural and mountain views to the north. Their eldest son, Jayden, was then four years old.

[3] Unfortunately for them, and for their dreams, Lot 5 is burdened by a Right of Way Easement[2], in favour of the defendant's land which is at 12 Oak Court Carters Ridge, and formally described as Lot 4 on RP 839361 (Lot 4). The easement is the only access to Lot 4 from the public road system. It essentially bisects Lot 5, with the lower portion of approximately 2 acres sloping down into a wooded gully. In order to access the lower part of their property the plaintiffs have no option but to cross over or drive on the easement. The defendants acquired Lot 4 at some time prior to 2008. In 2008, at their expense (and without in anyway consulting with or notifying the plaintiffs), they commissioned the Cooloola Shire Council to construct a sealed road over the easement from its commencement on Oak Court to the defendant's entrance gate, then on up the hill to the defendant's residence.[3] In that year, the Council became part of the Gympie Shire Council (the Council) whose officers later became heavily involved in the disputes between the parties.

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1 Further Amended Statement of Claim filed 10 March 2016 (GMC33); Amended Defence filed 13 October 2016 (GMC43); Amended Reply and Answer filed 24 October 2016 (GMC44).

2 Exhibit 1.

3 Exhibits 53, 55.

[4] Lots 4 and 5 share a common boundary, which runs the entire length of the plaintiff's property and which is fenced. The plaintiffs were not to know when the moved into their new home in December 2011 with such high hopes, that their neighbours, the defendants would behave towards them over a number of year in such a manner so as to greatly affect their enjoyment of their property. Mr Gerber of counsel, in his opening on behalf of the plaintiffs, described the correspondence from the defendants to the plaintiffs much of which is now in evidence, which commenced in early 2012 as being despicable. I agree.

The nature of the claim

[5] It will be necessary to refer in more detail to the pleadings later, but these proceedings commenced in the Gympie Magistrates Court in March 2014, when the plaintiffs filed a claim for damages (including exemplary and aggravated damages) for trespass. It is common ground that Mr Brodsky and his father-in-law, in May 2013, constructed a crossover or covered driveway on the easement (but not on the sealed driveway) at a point close to the entrance to the defendant's land, which was the safest and most appropriate point of access from Lot 5 onto the access easement for the purposes of accessing the bottom part of Lot 5. The cross-over was designed to improve access to the lower part of Lot 5 via an existing access track from the house on Lot 5 down to where it intersects with the easement.

[6] It is common ground that the defendants employed contractors who removed the covered driveway, which comprised a 100mm PVC pipe covered by concrete and gravel on or about 18 July 2013, without the consent of the plaintiff. The contractors were originally parties to the Magistrates Court proceedings, but the claims against them were compromised and have been discontinued.

[7] The claim for restitutionary damages is, and always has been, for $2,450.00 – being the estimated cost of restoring the cross over as built by Mr Brodsky. Initially the defendant's Counter-Claim was for damages for "a breach of easement rights", but this has morphed (over at least four iterations of the Defence and Counter-Claim) to an Amended Defence and Counter-Claim, filed 13 October 2016. That pleading claims that the "conduct" of the plaintiffs has led to damages "in the amount of $53,790", but no identifiable cause of action is pleaded. For the first time, in that pleading, the defendant sought declarations,[4] which lead to an application to transfer the proceedings to this court. It follows that the only reason that the jurisdiction of this court was invoked was because in that pleading for the first time, the defendant sought equitable relief beyond the jurisdiction of the Magistrates Court. Otherwise, the identifiable causes of action in the pleadings were well within the jurisdiction of the Magistrates Court.

The history between the parties

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4 Prayer for Relief, paras 1 and 2, Document No. 43 in the GNC file.

[8] As I have noted, the defendants caused the easement to be sealed at their expense in 2008, without consulting with or informing the plaintiff. Both the plaintiffs said in their evidence that they did not know their neighbours then and when they found out after the event, it did not cause them any concerns. The first trouble between the parties arose soon after the plaintiffs moved into their new home, when they were walking around their property on 26 December 2011 and discovered that the entrance gate to the easement at Oak Drive was padlocked shut. It seems to be common ground that the plaintiffs, either one or the other, approached the defendants almost immediately, asking that the gates not be locked or that they, the plaintiffs, be given a key. It seems to be common ground that one of the defendants (probably Mr Willi) told the plaintiffs that the gate was locked only at Christmas and Easter because of break-ins that they had experienced in the past. I accept the evidence of the plaintiffs that they suggested to the defendants that if security was an issue, they could lock their own gate, which would not interfere with the plaintiffs' right to access the easement area from Oak Court.

[9] I do not intend to deal with every contest between the parties verbally in this earlier stage. It is suffice for me to say that I am certain (on the basis of all the evidence) that the defendants were the aggressors from the start, and it was their conduct that reasonably provoked the plaintiffs to protect their personal and property rights over the following years.

[10] An interesting example of this came early in the evidence in chief of Mr Willi. Although he described both plaintiffs as being abusive to him in this early stage, he was unable to recall any examples of abuse apart from Ms Healy saying to him "I want to talk to you"; and "remove the lock on the gate"; and "I'll get my husband to grind the lock off the gate." He told his own counsel that after that conversation, which I infer was in late December 2011, he rang Mr Brodsky and told him (when Ms Healy answered the phone and handed it to her husband): "I don't want to talk to the bitch." It was perhaps an unconscious window into the real heart and mind of Mr Willi and that is, like his wife, he was aggressive, nasty and unreasonable in dealings with the plaintiffs from when they first met. Because the evidence of the defendants was disjointed, often unresponsive and replete (especially Mrs Willi) with serious allegations never put to either plaintiff in cross-examination, it is difficult to discern why they would behave like this towards a young couple who they had never met, and who were now their neighbours. I comfortably conclude that from the start, they regarded the easement as their easement and, in their minds, the plaintiffs had no rights in relation to that part of Lot 5 burdened by the easement. As will be demonstrated later, this perception was wrong in law, as I suspect the Willis well understood in late 2011 when they first met the plaintiffs.

[11] Mr Brodsky frankly acknowledged in his evidence that he was upset about the combative and uncompromising attitude demonstrated by the defendants about the

easement and the locked gate at its entrance.[5] After receipt of what I infer was the first in a long line of written demands from the defendants in early February 2012,[6] the plaintiffs caused a sign to be placed on the easement off the roadway. Ultimately, in the same month, because the defendants continued to lock the gate, Mr Brodsky cut the lock, however the defendants relocked the gate and he ultimately removed the lock again in April 2012 and secured the gate to a star picket.[7] I find that after this the defendants regularly placed two wheelie bins at the entrance to the easement in the middle of the sealed driveway, which impeded access to the easement via vehicle from the Oak Court entrance. In keeping with my general conclusions on credibility, I comfortably prefer the evidence on the bin issue given by the plaintiffs, to the effect that each of them removed the bins from the driveway, and on a number of occasions, they were left on their side in the ditch beside the roadway.[8] This occurred after the defendants ignored warnings not to place their bins in the middle of the easement, including signs that Mr Brodsky placed on the bins himself.[9] As the correspondence between the parties (and between the defendants and Council obtained on Right to Information application by the plaintiffs) indicates, the relationship between them leading up to the construction of the cross over in May 2013 was tense and unpleasant. After the defendants caused the cross over to be removed on 18 July 2013, the relationship further deteriorated to a point where, on 27 August 2013, the female defendant assaulted Ms Healy on the easement near the entrance to Lot 4. There was a trial in the Gympie Magistrates Court in relation to this incident, and Mrs Willi was convicted of common assault on 13 February 2014 by her Honour Magistrate Baldwin and was placed on a good behaviour bond with no conviction recorded. She was also ordered to pay Healy $1,000 in compensation, which she has paid. Despite all this, and her decision not to appeal the magistrate's decision, Mrs Willi still maintains that she did not assault the female plaintiff. Mrs Willi's response to the magistrate's decision was to refer her to the Attorney-General and to the CCC which obviously was futile, but demonstrates her complete inability to accept other than her view of reality. Mr Gerber points out that in the List of Documents filed in these proceedings, only 19 documents are disclosed, whereas in this futile attempt to smear a judicial officer, the defendants provided to the authorities seven folders of documents and 144 exhibits.[10]

[12] I infer that since her Honour's decision the parties have had little or no contact. The plaintiffs have frankly given up their intention of using the whole of their property, including the easement. Mr Brodsky still traverses the easement up to 15 times a year on his tractor to slash the lower two acres of Lot 5, but not surprisingly both have counselled their children not to venture down to the part of Lot 5 on the lowest

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5 Exhibit 41.
6 Exhibit 3.
7 Exhibit 4.
8 Exhibit 44.
9 Exhibit 5.
10 T2-127 ll 10-25.

side of the block, I infer, to avoid any possibility of contact with the defendant. They were also concerned about their children being photographed or filmed without their consent. Their fears are justified because of:

(a) the defendants' conduct in the past;
(b) the fact that the defendants have a number of motion sensitive cameras at the entrance to Lot 4, and up to eight CCTV cameras on their house, a number of which point in the direction of Lot 5, including in the direction of the plaintiff's home.

[13] The plaintiffs no longer enter their property via the easement on Lot 5 at the Oak Street entrance and avoid any opportunity for contact with the defendants.

Issues of credibility

[14] As I have indicated, I have formed a poor view of the credibility and reliability of both defendants. Mr Gerber, in his cross-examination raised with both defendants (but in particular Mrs Willi), what he refers to what are undoubtedly many breaches of the disclosure rules by the defendants who, in any event, have not complied with r 226 UCPR. I immediately observe this is not the fault of the defendants' present solicitor, who only came onto the record on 20 July 2017, or Mr Hall of counsel who was briefed thereafter. There are many documents e.g. photographs of various incidents referred to in the evidence, correspondence between the defendants and Council etc. that are almost certainly relevant to issues in the pleadings that have never been disclosed by the defendants. Both defendants were defensive and unresponsive to questions from Mr Gerber about their understanding of the duty to disclose. Ultimately, my conclusions about credibility and reliability are primarily informed by the frank contradictions between the oral evidence of the defendants and the correspondence in evidence, particularly correspondence from them or on their behalf to the plaintiffs. In my view, it is probable that they both readily understand the duty of disclosure but that their attitude is to produce only documents that they see as suiting their own case.

[15] Mr Gerber also referred to many instances in the evidence where the defendants made allegations about the plaintiffs which were never put to them in cross-examination, however probably for tactical and/or forensic reasons, he never took the steps required to enable the trier of fact to draw an adverse inference of the kind referred to in *Browne v Dunn.*[11]

[16] My conclusions about credibility and reliability are also informed by the very favourable impression I formed of the evidence of both plaintiffs, who presented as reliable and thoughtful witnesses who gave responsive answers and were prepared to make concessions in cross-examination. Both appeared to be genuinely and significantly adversely affected by the behaviour of their neighbours, which has fractured their dreams of enjoying their property with their children to the fullest potential.

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11 (1893) 6 R. 67.

[17] The first letter in evidence was on 1 February 2012.[12] It is described by the defendants as a "**Notice of Intent**."

[18] It is clear that the defendants had a copy of the Easement, including its covenants, when they wrote that letter. There are relevantly two covenants in the easement:[13]

1. Full and free right and liberty for the Grantee and his successors in title and the owners and occupiers for the time being of the dominant tenement and his or their respective servants and licensees (in common with the Grantor and all others having a like right) at all times hereafter by day or not at their will and pleasure with or without carriages, motor cars, motor trucks, or other vehicles or other description whatsoever for all lawful purposes connected with the use and enjoyment of the dominant tenement for whatever purposes the dominant tenement may from time to time be used and enjoyed to enter, leave, re-enter, go, pass, re-pass, along, through, over and across the servient tenement.
2. Full and free right and liberty at all times hereafter and from time to time to have, lay, construct and thereafter forever use and maintain, repair, disconnect and reconnect water, drainage, sewerage and gas pipes and electricity and telephone wires for the more beneficial use and enjoyment of the dominant tenement under (or in the case of electricity and telephone wires under or over) the surface of the servient tenement in order that any necessary wires, pipes, drains and sewers may be connected from the dominant tenement with the sewer drain or other pipeline or wires beyond the servient tenement and for the purpose to have full and free access to the servient tenement for the Grantee and his servants, agents, workmen and others at all reasonable times."

[19] In the first paragraph of Exhibit 3, the defendants accurately quote from the first covenant. They then purport to make a series of demands and/or accusations including a number that are difficult to understand. Clause (c) is an example, among a number, of the defendants' attitude then (and I infer now) that the easement was their property and the plaintiffs needed their permission to access it. On page 2 of Exhibit 3 the defendants write:

> "This is where good neighbours come together and look after each other properties (sic) in times of holidays, excessive rains which will cause land slips and erosion of the easement and fires."

On page 3 of Exhibit 3 they write:

> "In brief (sic) and we do hope common sense prevails and we can be classed as good neighbours and work amicably together otherwise you leave us with no option but to resort to litigation to enforce our rights."

[20] To describe these statements as hypocritical would be an understatement as the letter, in its terms, is combative and demanding and includes (at (e)) this extraordinary threat:

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12 Exhibit 3.
13 Exhibit 1.

> "Please let it be noted that Fiona or yourself do not have protector head equipment on any of your siblings (sic) that ride bikes. We again will not be responsible for what may or will happen if any of your siblings (sic) fall off their bikes and sustain any head injuries. I can only notify Child Welfare that you have been put on notice of no head protection when or if riding on our easement. This also applies for any of your family or friends (sic) children."

[21] This was the first of a number of threats of this nature which unsurprisingly unnerved the female plaintiff who at one point actually rang Child Safety to be informed that their office is often used in this way in neighbourhood disputes. The female defendant said she did call Child Safety at some point. Whether she did or not is not to the point. This is an early example of the attitude of both defendants. It was designed, on completely fallacious grounds, to intimidate the plaintiffs and it succeeded.

[22] The plaintiffs replied on 9 February 2012 after getting legal advice. In Exhibit 3, the defendants had informed the plaintiffs that it was their intention "to install a water pipe in the easement to allow the flow of water to stop under minding (sic) of the easement." The plaintiffs reply to Exhibit 3[14] is in these terms:

> "We acknowledge that the Easement Agreement allows you access to your property across our land. The agreement does not confer any right to yourselves to construct or maintain a bitumen road across the easement. If you want to do any earthworks on our property relating to the maintenance of this road or drainage works on our property relating to this road, then you will require our written consent and the works will have to be carried out to our satisfaction.
>
> The Easement Agreement does not confer any obligation to ourselves to maintain your access across out land.
>
> We have received legal advice to the effect that you have no right to put a lock on the gate to our property. If you want to have the gate to the easement locked, at certain times, then you can provide us with a lock and keys and we will consider any request by yourselves to lock the gate on a case-by-case basis for a specified period in each case.
>
> If you have any concerns about the security of your property, then we suggest you lock the gate where the easement adjoins your property.
>
> We would be happy to meet with yourselves with a view to establishing a more neighbourly relationship."

[23] The defendants replied on 28 February 2012.[15] This lengthy and discursive letter contains reference to involvement by the defendants of the Imbil Police and the Council. Unfortunately for both the police and the Council, this proved to be

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14 Exhibit 7.
15 Exhibit 8.

correct. The letter continues attempts by the defendants to intimidate the plaintiffs by implying that Council was on the side of the defendant. As will be demonstrated, Council was on no one's side and remained neutral. An example is on page 1 of Exhibit 8:

> "The Council have ready (sic) taken extensive photos of the easement, the easement gully and the side wall of your land where it comes down into the gully of the easement. If the Council sees there is a case of neglect from your side or you trying to stop us from maintaining the easement and easement gully then our Lawyers will have to be involved along with the Council recommendation. Then we will pursue (sic) that you pay the costs for negligence (sic)."

[24] By then, the plaintiffs had planted a variety of bamboo along their boundary fence at the top of Lot 5 to shield their home from the defendants' house. In this letter, there is much reference to the bamboo described by the defendants as "bad weeds" e.g.:

> "4. The Council has been notified of the bad weeds and the distance. The Council have stated along with a tree nursery and Land Care have all agreed you have planted the weeds incorrectly and without thought and it will cause a lot of problems to yourselves.
>
> In short, if we dig and find any of your bad weeds or any other tree roots under our boundary fence, then we will have the Council to nominate someone to eradicate the problem swiftly and you will be billed for it.
>
> The bad weeds will also endanger your septic tank and any underground pipes and wiring where the roots will wrap themselves around and you will have a huge expensive unblocking drains and to the fact (sic) where it will crush your septic tank. The root system of the bad weeds will seek out any new plants or trees you have planted close and will strangle them. Health and Safety will be called in once an odour comes from your septic tanks or pipes. Again, no thought has been put into planting of the bad weeds."

[25] I accept the evidence of the plaintiffs that they carefully selected a variety of bamboo which they described as "clumping"; which does not migrate and/or affect septic tanks. The bamboo hedge was observed at the inspection and is now quite an effective shield. There is not a shred of evidence to suggest that any of the bodies referred to in the letter had expressed any concerns about the bamboo, nor is there a shred of evidence of any of the adverse effects alleged in the letter.

[26] The letter states:

> "On Sunday 25 February 2012, your eldest son for no reason started barking at our dog. He was asked to stop and go inside a number of times by Allan, which was into Abby's home. This he did not.

> It is very clear Fiona has no control over your eldest son, and Fiona obviously thought socialising was more important than taking control of your out of control son. There was no need for this and it should have been stopped from the first outbreak. This was not done. The Council has been notified and have stated this is a serious offence and are looking into the legal side and are coming back to us. No wonder dogs bite children."

[27] At this time, Jayden was four. When one of the defendants' dogs barked at the fence while his mother was visiting another neighbour, Abby Andrews, at 157 Jubilee Road, the child "barked" back. There is no suggestion that he entered the defendants' property, and I accept the evidence of Ms Healy that she immediately called him to her and stopped his behaviour. The tone and terms of the letter is yet another example (aptly described by Mr Gerber as "despicable") of the defendant's attempts to intimidate the plaintiffs by making these allegations against their 4 year old son.

[28] By this time, both plaintiffs were attempting to assert their legitimate property rights over that part of their land affected by the easement. By then Mr Brodsky had put up a notice,[16] and had removed the lock on the gate, and planted the bamboo screen, and both had removed the bins from the middle of the driveway. Clearly the defendants were not prepared to countenance any view other than their own. The tone and content of their letters can be contrasted with the tone of the plaintiffs' letter,[17] which contained no threats, no hyperbole, and no untruths. At that time they were still interested in a "neighbourly relationship", whereas the defendants clearly were not. By 28 February 2012, the defendants had abandoned the hypocrisy of their earlier letter in which they professed to want to be good neighbours. Exhibit 8 concludes thus:

> "Your continuing statement of 'we have no money' and your continuing lies, your lack of respect to neighbours, negligence, attitude and ignorance. [sic] As soon as we mention your names to anyone, they know of the problems and comments again are not favourable.
>
> However, if you wish to have your solicitor phone us personally we will talk to him and arrange a time for him to meet with our Barrister in his Chambers in Brisbane along with yourselves. We did full research of your easement and our easement instructed by our Barrister. Our Barrister specialises in easements and land rights.
> We sent a copy of the Titles Office search to Colleen with a covering letter sited [sic] by our Barrister of her rights of the easement and yourselves and the Andrew having access rights that the easement on Jubilee Road. [sic]
>
> Do not reply to this letter as we are cutting off a communication by mail you have no intention of being good neighbours; however we

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16 Exhibit 33.
17 Exhibit 7.

> strongly suggest you read our 'Notice of Intent' as we will enforce our rights of protection in every way possible."

[29] This letter was said to be copied to Imbil Police as well as the letter of 1 February 2012 which was also said to be copied to the Council.

[30] The defendants in their evidence and in their letters demonstrated a complete lack of insight into their own contradictory behaviour. Their reference to "lack of respect for neighbours", should, in fact, be a reference to their lack of respect for neighbours. Exhibits 9 and 10 are copies of letters written in early March 2012 by the defendants to neighbours Abby Andrew and "Fraser" who featured in one of the later unseemly encounters between the parties. These letters are framed in similar terms to the earlier letters to the plaintiffs. Both letters contain references to the easement over Lot 5 in favour of Lot 4 which the defendants describe as "our easement". In the letter to Fraser, the defendants refer to what is easement H which is the easement that provides access to Jubilee Road from Lot 5. It is not in evidence, but interestingly, the defendants refer to Mrs Andrews (whose property again was favoured by easement H) as having "no rights at all only access". That letter (which on its face is from Mrs Willi only, but Mr Willi said he was aware of it) ends ominously ".. you need to know the real truth and where this will eventually end up – in court."

[31] On 1 April 2012 (notwithstanding their professed intention to cut off communication by mail) the defendants wrote another letter, this time to the male plaintiff headed up "**YOU ARE ON NOTICE**".[18] Consistent with my earlier observations, this letter clearly indicates that the defendants were quite ignorant of their legal rights under the easement and, in particular the rights retained by the plaintiffs as owners of the servient tenement. The plaintiffs did not need the defendants "permission" to drive "along" the easement; nor were the defendants entitled, on a proper construction of the covenants attaching to the grant, to limit Mr Brodsky's access to the easement for the purposes of accessing the lower part of Lot 5. As Mr Brodsky said in his evidence, it was the intention of himself and his wife to have a form of extended driveway from their house in a circular fashion from the top of Lot 5 using Exhibit 1 as part of this driveway. Certainly by the time he built the crossover in May 2013, he and his wife had abandoned that idea because (I find) of the defendants' conduct, and he was (in effect) only crossing the easement at the crossover point with his tractor to slash the lower half of Lot 5. The plaintiffs responded to Exhibit 11 on 5 April 2012[19] and attempted to contradict the flawed interpretation of the easement in the defendants' letter by directly quoting from covenant 1 in Exhibit 1. In particular the letter refers to the words in brackets in Exhibit 1 "in common with the Grantor and all others having a like right". The plaintiff advised the defendants that they would not further respond to letters from them unless they came from a lawyer.

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18 Exhibit 11.

19 Exhibit 12.

[32] On 16 May 2012 an application was made by either one or both of the defendants for an order under the *Peace and Good Behaviour Act* 1982. The order was sought against Mr Brodsky. It is referred to in a letter from the plaintiffs' solicitors dated 27 July 2012,[20] and in the evidence of Mr Brodsky,[21] and in the evidence of Mrs Willi.[22]

[33] The complaint and summons issued under that Act is also referred to by the defendants in their response to the solicitor.[23] On the evidence, it is more probable than not that the defendants applied for an order under that Act in this period against the male defendant alleging many of the issues now alleged by them. The application was dismissed with costs. Consistently with her tendency to blame everyone but herself for outcomes she does not accept, the female defendant blamed her lawyer.[24]

[34] It is common ground that in May 2012 the defendants commissioned Max Waterson, a surveyor, to survey the easement and to place survey pegs along its boundary.[25] The defendants did not inform the plaintiffs of their intention to do this. No one was called from the surveying firm. I accept Ms Healy's evidence that the first she knew of the surveyors was when she came home and saw a number of people on Lot 5 in the area of the easement. When she spoke to them she was told that they had been told not to speak with her. I accept her evidence that there was no abuse from them or from her and that Mr Waterson came out personally that evening and apologised to her. I accept her evidence that the surveying crew returned in July 2012 and sought her permission before going onto the easement. I accept that mention was made by them of instructions to place pegs at close intervals, probably at 5m intervals as referred to in Exhibit 13, but she directed them not to do that and they complied.

[35] I reject the evidence of Mrs Willi that Ms Healy ever abused or harassed the surveyors, and if this allegation was added to the application under the *Peace and Good Behaviour Act* as the defendants assert in Exhibit 14, it was false. I reject her evidence that Mr Brodsky deliberately drove over and/or wrecked survey pegs placed on the easement. In what was one of many bizarre pieces of evidence, she told her counsel, Mr Hall, that she collected one of the broken pegs and "sent it off to the Attorney General".[26]

[36] Mr Brodsky was finding it increasingly difficult to safely cross the easement at what is agreed to be the safest point from which vehicles can access the bottom of Lot 5 from the top of the property. As a warning to contractors (such as surveyors) who may intend to enter the easement area without consulting the plaintiffs, he erected

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20 Exhibit 13.
21 Transcript 1-33, l 35 to Transcript 1-34, l 25.
22 Transcript 3-23, l 26 to Transcript 3-24, l 18 and Transcript 3-46, l 10.
23 Exhibit 14 dated 30 July 2012.
24 Transcript 3-23, l 45.
25 Exhibit 13, Exhibit 14.
26 Transcript 3-48, l 5.

and placed a sign on his property near the access point in the terms pleaded in para 5 of the Amended Statement of Claim filed 10 March 2016:

> "This property, including the easement, Lot 5 belong to Brodsky/Healy. The owners of Lot 4 have no right to authorise any work on this property (including the easement) or to authorise the removal of anything at all from this property. Anything done will be the responsibility of the perpetrator & Will result in prosecution.
> Lot 5 owners contact ph: 54479807."

[37] The sign can been seen in a number of photographs.[27] I accept Mr Brodsky's evidence that the state of the crossover when they purchased Lot 5 was very similar to how it is depicted in Exhibit 6, although he noted that that photograph was taken after these proceedings were commenced and experts involved probably from around 2015.

[38] It is similar to how the crossing appeared on inspection. I accept his evidence that in that state, the crossover is not safe for 2 wheel drive vehicles and is also difficult to traverse even with a tractor.

[39] The spark for these proceedings was the erection of the crossover at that point on their land by Mr Brodsky and his father in law. It is common ground that the plaintiffs constructed a form of covered drain at the point where a form of driveway coming down from the top part of Lot 5 intersected with the easement on the top of Lot 5. Mr Brodsky and his father in law installed a concrete covered 100mm PVC pipe under the driveway which they concreted in and covered with gravel. As completed, the crossover is depicted in Exhibit 16.

[40] The defendants regarded this as a breach of their easement rights and as dangerous and unlawful. Prior to the installation of the crossover, Mr Brodsky was using planks to negotiate over the ditch at this point,[28] which I accept the defendants removed on a number of occasions and deposited on the bottom of Lot 5.

[41] On 27 May 2013 the defendants wrote again (signed only by Mrs Willi), and complained about the works to Mr Hartley at the Council.[29] Once again, the letter is drafted in combative and aggressive terms including allegations about Council Officers. Indeed Mr Hartley was informed that "he has let us down before on Brodsky and Healy", and (in bold font) "I hope you make a right decision you can sleep at night [sic] knowing full well we could be killed within days by Brodsky or Healy". Even in their evidence to this court over four years later, the defendants were still prepared to state that this was a serious concern. Consistently with previous correspondence the letter stated (in bold font) "Tomorrow I will notify Child Welfare of Fiona Healy putting her siblings [sic] in life threatening danger". In cross-examination Mrs Willi acknowledged that whenever she referred to siblings in her correspondence she was in fact referring to the plaintiffs' children.

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27 Exhibit 6, Exhibit 34.
28 Exhibit 17.
29 Exhibit 18.

[42] As an example of multiple occasions not put to Mr Brodsky, the letter accuses both plaintiffs of reckless behaviour, which accusations are clearly without foundation. The letter ends with what can only be described as a threat that if Mr Hartley did not respond within seven days "all information" would be sent to named State Government Ministers.

[43] Although no Officer from Council gave evidence, I comfortably infer that Mr Prout (a Council Officer) and/or other Officers, inspected the easement and crossover with the defendants on site on 31 May 2013. On 2 June 2013, the defendants wrote directly to the plaintiffs alleging (among other things) that Council had authorised them to pull up the drain as they had "broken the law by not coming to us and talking to us of your intensions [sic]".[30]

[44] The defendants still maintain that Mr Prout told them this on 31 May 2013. I reject their evidence in this regard as being either deliberately false or a distortion of the truth which (consistently with the general attitude of regarding their view of reality as being the only reality), they have convinced themselves, contrary to fact, is true.

[45] On 5 June 2013[31] Council wrote to both parties. The letter is in clear and unambiguous terms. Council made it clear that the issues raised at the site meeting "do not trigger any Council requirements and are a civil matter between (the parties)". By then the gate to the easement had been removed, and Council made it clear that in relation to easement rights the parties should get legal advice. Prior to Exhibit 19 being written by Council, the defendants wrote again to the plaintiffs,[32] again completely misrepresenting Council's position, and containing veiled threats. Neither defendant could explain why Mr Prout would write this letter when on their evidence, at the site meeting, he said to them that the plaintiffs had acted unlawfully. Mr Willi said in his evidence that he had a "funny feeling" that Mr Prout had been in touch "with the other people and that they had swayed him to back out of it".[33]

[46] By then Mr Brodsky had also removed the posts that held the gate to the Oak Ridge easement entrance to prevent any further interference with their access to the easement from that point. By then however, he was only using that part of the easement in line with the crossover.

[47] Exhibit 21 concludes as follows:

> "Your constant ongoing intimidation, harassment and your latest assault of letting go of the hand break [sic] and letting your car roll down directly at me (Alan) is unacceptable and has been reported along with your everyday throwing our bins away down into Council gully.

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30 Exhibit 20.
31 Exhibit 19.
32 Exhibit 21.
33 Transcript 2-141, ll 29-30.

> However we would like to thank you for cutting down your boundary fence. We wanted to do that when the girls from Melbourne owned the land, but were informed that this was not our fence but the girl's boundary fence. This will add so much more value to our property by opening it up. It's great and thanks."

[48] The last paragraph can be regarded as a poor attempt at irony and is not relevant as Mr Brodsky's actions in relation to the gate and posts is not the subject of any pleaded claim.

[49] Yet another letter was sent by the defendants to the plaintiffs on 10 July 2013.[34] The letter demonstrates that the defendants were prepared to deliberately misrepresent the terms of the covenants in Exhibit 1 for their own purposes. It should have been obvious to them that this attempt was futile in relation to the plaintiffs who clearly had a copy of the easement. Also in the letter the defendants accuse Mr Brodsky of breaching the terms of an easement that was not the easement over Lot 5. Relevantly Exhibit 22 states:

> "You, Dmitry have breach [sic] this act [sic] as **'The Grantor will not construct, erect or install buildings, improvements, pipes, wires, cables or other services of a fixed or permanent nature (hereinafter called 'fixed improvements') on or over or under the servient tenement without the consent of the Grantee**'. [sic]
>
> **The Grantor will not nor will the Grantee jointly allow or permit any alteration in the level or gradient of the easement or any change to the surface of the easement or to the natural or artificial features of the easement which divert, contain or assist in containing the flow of stormwater drainage on, under or through the easement.**
>
> **The Grantor will not obstruct interruption, impeding, hampering or interference with diversion, scouring, change or alteration in or to defile stormwater drainage through or under the easement at any time.**
>
> **Only the Council under terms and conditions may impose or stipulate in the event of such permission being granted.**
> **In the event of a breach by the Grantor of this covenant the Grantee may in its absolute discretion without notice to the Grantor demolish and/or remove any such fixed improvements and in such event the Grantee will not be liable to the Grantor for reinstatement, restitution, damages, compensation or otherwise for or by virtue of the exercise of its rights under our access easement.**
>
> **In the event of this breach by the Grantor (you), the Grantor will indemnify the Grantee against all costs and expenses of any nature or kind incurred or expended by the Grantee in carrying**

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34 Exhibit 22.

> **out any work necessitated by or arising out of any breach on the part of the Grantor of this easement.**
>
> **The Grantee is not required to contribute to the cost of maintaining the surface level of the servient tenement.**"

[50] The letter goes on:

> "The above states very clearly you have breached and up for full cost [sic] unless you dismantle the drain yourself. It also states very clearly you or anyone at any time cannot do any work to our access easement or easement gully. You have to talk to us and we have to agree. It is even illegal for you putting boards across the gully of the easement as previously; photos have been taken where you have damaged the gully.
>
> If you do not remove of the illegal drain [sic], then the removal will take place anytime soon and any interference from either of you the police will be called [sic] and will enforce charges of obstruction."

[51] The clearly futile attempt to intimidate the plaintiffs by reference to covenants that were clearly not part of the relevant covenants in Exhibit 1 shows how distorted the thinking of the defendants was at this stage as earlier,[35] they had accurately quoted from covenant 1 of Exhibit 1 and had received correspondence from the plaintiffs[36] which should have clearly indicated that the plaintiffs too had a copy of Exhibit 1.

[52] The letter also contained this very unpleasant paragraph:

> "Fiona if you pursue to do [sic] anymore [sic] amateur acting on the day the drain goes, we will remove you with delicate care and precision, call the police have you arrested for obstruction. [sic] The day you sat on the bonnet of the vehicle everybody witnessed your daughter very red face [sic] sitting in the car. They all wanted to know if Fraser was your husband as he looked all too familiar with your children. It left everybody talking. We have photos of you climbing up with your arse on display and your legs spread eagle [sic] and playing woe is me when Bill Greer is telling you that we can remove the vehicle and drain. Photos were taken and will be produced when we **all** go back to court.
> Let it be noted the Peace and Good Behaviour will be against Dmitry name forever [sic] however, you will **all** be going to court this time under a new Peace and Good Behaviour."

[53] The reference to the female plaintiff climbing on the car I take to be a reference to an occasion when the defendants had arranged (probably around 11 June 2013) to have a backhoe operator, Mr Milne, inspect the works with a view to removing the crossover. I accept Ms Healy's evidence that she came home and saw the defendants and their adult son and other people near or on the easement in the vicinity of the crossover. By then Mr Brodsky had taken the precaution of parking

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35 Exhibit 3.
36 Exhibit 12.

an old 4 wheel drive vehicle along the crossover to discourage the defendants from ripping it up as they had threatened to do. Also present was a local real estate agent, an associate of the defendants, Mr Bellingham who had been recruited as "a witness" by the defendants. Ms Healy, who was very distressed, drove down the fence line and parked her vehicle with the three children in the vehicle including her youngest who was a baby, under a tree which can be seen in some of the photos.[37] She says she felt intimidated and "surrounded" and that the adult son of the defendants called her a drunk and a prostitute. She sat on the bonnet of the car. The long suffering Sergeant Greer was called to the scene and told everyone that nothing could be done while Ms Healy was on the vehicle. This incident is not referred to in the pleadings, apart from a reference in the defendants' counterclaim[38] to some money allegedly paid to Milne that was never proved. It is also relevant to the claim for aggravated and exemplary damages. Mr Milne was not called to give evidence, nor was the adult son. The only person (apart from Ms Healy and the Willi's) who gave evidence about this incident was Mr Bellingham.

[54] Mr Bellingham did not have a good memory of events which is hardly surprising given that the incident occurred over four years ago and he'd only recently been asked to give evidence. He could recall being asked by the defendants to be a witness as they were going to repair a driveway. He was the only witness who described the "excavator fellow" as taking out a piece of concrete. He recalled that Ms Healy (who he could not identify in court) had a baby with her. He could recall a "degree of tension" and the police being called. He describes the occasion as "unremarkable". He could not recall any abuse. He could recall Mrs Willi taking photographs but none have ever been produced. The male defendant generally appeared to have a poor memory of this event. In relation to this incident, he could not remember much being said. He recalled his wife taking photos and Ms Healy climbing onto the car. Mrs Willi had a different memory of the incident. She says Ms Healy drove down and said "please sir don't do this". She could recall the baby in the car screaming and Ms Healy climbing onto the bonnet of the 4 wheel drive across the driveway. She denied any abuse.

[55] She asserts that Sergeant Greer said that the drain could come out. I comfortably prefer the evidence of Ms Healy in relation to this incident over the evidence of the defendants and Mr Bellingham. I accept that when she drove down in her vehicle with the three children and parked her car under the tree, she was told that the defendants intended to dig up the driveway. I am satisfied that she was abused by the defendants' adult son as she alleges, and that after Sergeant Greer left, it is more probable than not that the female defendant yelled at the children in the car "you know your mother does not love you". Such a despicable action is consistent with the defendants' attitude to Ms Healy as a mother and the children expressed frequently in the antecedent correspondence referred to above. Ms Healy recalled the neighbour, Fraser, coming down at some stage to help her. Although she does

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37 e.g. Exhibit 36.

38 Para 3(e)(iii).

not mention the female defendant taking photographs, I am satisfied that she did but they have not been produced. In a letter to the contractor who removed the crossover in July 2013 at the direction of the defendants, the defendants specifically refer to having photos of "Fiona Healy AGAIN sitting on the bonnet of their unregistered vehicle which was parked over the illegal drain and stopped the previous contractor from removing the drain. That day we had the police and witnesses".[39] That letter also attaches what is a copy of the covenants quoted in Exhibit 22, again, I find there to be a deliberate attempt by the defendants to mislead their own contractor as to the nature of the easement agreement burdening Lot 5.

[56] The despicable passage extracted from Exhibit 22 and quoted above was not supported by any photographs taken by the female defendant that day. I accept that this incident was deeply distressing to Ms Healy and to her husband when he was informed about it, and contributed to the long standing despair that they both felt about being unable to properly and appropriately enjoy their property with their family.

[57] The plaintiffs were determined that the defendants would not remove the cross-over. They replied to Exhibit 22 on 14 July 2014.[40] The defendants say they never received this letter. I accept the evidence of Mr Brodsky (as noted at the bottom of Exhibit 24) that he attempted to hand deliver the letter to the defendants who tore it up in front of him. The defendants accept that the letter was addressed to their actual postal address and yet it was returned to sender.[41]

[58] On or about 18 July 2013, without notifying the plaintiffs, as noted above the defendants caused contractors to remove the cross-over. This was done at a time when the defendants knew that neither of the plaintiffs would be home. Miss Healy did arrive as the contractors were leaving but could do nothing to prevent what had already occurred. Mr Brodsky attempted to recover the material removed which had been dumped off the easement onto Lot 5. He used a shovel to return some of the gravel to try to render the cross-over safe for his use with the tractor. I accept his evidence that he placed the recovered concrete under the tree, and later placed some of the concrete above the drain;[42] and although he accepted in cross-examination that he placed concrete in the drainage area[43] on its face that photograph taken by the defendants or by one of their fixed cameras bears the date 9 October 2012 that is the previous year. This was never explored and may be an issue to do with the settings of the camera so nothing turns on this.

[59] I accept Mr Brodsky's evidence that at some point after 18 July and before the defendants wrote to the Council on 30 July 2013[44] there was an unpleasant

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39 Exhibit 23.
40 Exhibit 24.
41 Part of Exhibit 24.
42 Exhibit 46.
43 Exhibit 46.
44 Exhibit 25.

confrontation between Mr Brodsky and the defendants in the area of the cross-over. They both alleged that he was pouring wet concrete into the ditch created as a result of their actions on 18 July 2013. He says he was using a shovel to return removed gravel to the ditch to try and level it when the defendants arrived and Mrs Willi had a shovel. As he attempted to place gravel in the ditch she was attempting to remove it with her shovel. I accept his evidence that he told her to stop and tried to take the shovel from her. This incident is depicted in one of the defendants' many cameras' photographs and was tendered by their counsel in cross-examination of Mr Brodsky.[45] Although he removed one camera and found it contained nothing, I conclude comfortably that least one or more of the other cameras was working – hence the production of Exhibit 50 – but no other photographs have ever been produced. Mr Brodsky alleges that while he was trying to take the shovel from Mrs Willi, she struck him in the head with her hand. He said that Mr Willi was there and he said to him words to the effect, "How can you let your wife get away with this?" and Mr Willi said, "I didn't see a thing".[46]

[60] Both defendants vehemently denied that anything like this occurred. I do not accept their evidence. One of the letters obtained by the plaintiff from the Council through Right to Information is Exhibit 25 which, despite Mr Willi's reluctance to accept, is clearly an email from either one or both of them to Mr Prout on 30 July 2013.

[61] This email was not disclosed in these proceedings by the defendant. In [6] of that email it is stated by the defendants (with redactions not included):

> "Brodsky in his wisdom filled in the gully of the easement with concrete and has now stopped the water altogether flowing freely. We went down and dug the wet concrete out as he was putting it in. One can guess what happened, he tried to manhandled [sic] me and was rewarded with a backhand across his head then he spat at me and threw wet concrete at me. All is on camera. He tried to get an assault charge against me and Terry Kennedy knows what this man is like."

[62] This is clearly a reference to this incident and constitutes an acknowledgement that he "was rewarded with backhand across his head". It was never put to Mr Brodsky that he spat on Mrs Willi or threw wet concrete at her. Significantly the email states, "all is on camera" but, as the evidence reveals, the only photo produced by the defendants (but not disclosed earlier) relevant to this incident is Exhibit 25.

[63] I accept Mr Brodsky's evidence that he was indeed assaulted by the female defendant. In a letter dated 31 July 2013[47] there was a response to the email (Exhibit 25) from Council in these terms:

> "1. As stated at our site meeting on 31 May 2013 and in Council's letter of 5 June 2013, the works that have been

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45 Exhibit 50.
46 T-1-48, l 37-44.
47 Part of Exhibit 25.

> carried [sic] within the easement by the owners of 161 Jubilee Road do not trigger any Council requirements and are a civil matter between yourselves and the owners of 161 Jubilee Road; …
>
> We empathise with all the parties, in this case however the issues raised in your email are not a Council matter, they are a civil matter between yourselves and the owners of 161 Jubilee Court and can only be resolved between yourselves."

[64] The defendants did not accept Council's advice. Mr Brodsky made a few more attempts to return gravel to the cross-over area and in the end he reverted to using wood planks to cross with his tractor. He was accused in cross-examination of deliberately blocking the drainage ditch with logs.[48] I accept his evidence that this occurred on one occasion only when he was rolling a log from the top half of his property to dispose of it at the bottom of Lot 5. As the evidence reveals, the defendants (despite their denials) were watching and photographing the every move of the plaintiffs in the hope of gaining evidence to use against them. I comfortably conclude that they have selected only those photos that they think assist their case to produce in cross-examination, albeit (in most cases) not disclosed.

[65] As persistent as the plaintiffs were in trying to maintain a safe cross-over point, the defendants were equally persistent in thwarting their efforts in the belief that the easement was theirs and the plaintiffs had no right to do works on the easement without their consent. The next confrontation referred to in the evidence was on 27 August 2013 when Ms Healey came home and saw the defendants on the cross-over area with a jack-hammer, a generator and a tractor. I accept her evidence that when she went down the defendants were removing gravel and Mr Willi was using the jack-hammer to break up concrete. She intervened and was struck by Mrs Willi on her nose. She persisted. She stood in front of Mr Willi and disconnected the power cord from the jack-hammer to the generator.

[66] I accept her evidence that she was hit a second time to the left side of her face. Mrs Andrew, the elderly neighbour who has since left the district, came down and had an angry confrontation with Mrs Willi. There is only one photograph of this incident[49] which was disclosed.

[67] I infer that the defendants then changed tack and focussed their campaign on accusing the plaintiffs of causing actionable damage to the easement. The plaintiffs received a letter from solicitors[50] just before Christmas 2013 which referred to damage caused to the easement, and mis-stating the law. In what I deem to be a hollow threat, the solicitors threatened to commence proceedings if quotes from a firm called Roll Formed Driveways attached to the letter for $23,650 was not paid by 8 January 2014. Even a cursory glance at the quote would inform a junior

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48 Exhibit 48.
49 Exhibit 51.
50 Exhibit 28.

solicitor that the quote related to "in part" repairs to the whole 150 metre length of the drain along the easement and could not, as a proper construction of the actual easement, be the responsibility of the plaintiff. The reply from the plaintiffs,[51] indicates that they knew more about the law and the true facts than the solicitors did. The solicitors did not reply to that letter and did not institute the threatened proceedings.

[68] They did however write again to the plaintiffs on 11 April 2014[52] where the demand had dropped sharply to $3,784 and enclosed a quote which appears to focus on the area of the cross-over. It was alleged that the drain installed by the plaintiff was "illegal" and "has caused and/or contributed to the collapse of the surface". It is clear that the solicitors had no instructions about the defendant's actions on 18 July 2013. The letter alleges "the repair…is required to allow our clients to perform their daily duties and work commitments." There is not a shred of evidence that the plaintiffs' actions installing the drain in May interfered in any way with the defendants' right of way over the property, and thus their ability to "perform" their "duties" and "work". By then the plaintiffs had commenced proceedings for trespass in the Gympie Magistrates Court[53] but only against the contractors. The plaintiffs replied on 17 April 2014[54] advising the solicitors of the real facts and heard nothing else from them.

[69] The contractors joined the defendants to the plaintiffs' proceedings as Third Parties by Notice filed 3 June 2014 and the defendants filed a defence through a firm of solicitors who were not the firm which had engaged in the correspondence with the plaintiffs referred to above. In the first pleading filed by a firm named Crana Law but signed by the defendants (then third parties) themselves, they plead a claim styled "Specific damage for breach of Easement rights", and claim $5,387.96.

[70] Both their defence and counter claim have changed a number of times since 2014 as have their solicitors. The matter proceeded to trial before this Court on the basis of a further Amended Statement of Claim filed 10 March 2016 and settled by Mr Gerber, and the amended defence and counter claim filed on 13 October 2016 and settled by Mr Tam of counsel at a time when the firm of Tucker and Cowen were the solicitors for the defendants on the record.

The law relating to the easement

[71] The terms of Exhibit 1, the Easement are set out above. The rights and obligations of the parties to an easement are determined by the terms of the grant.[55] The dominant tenement holder is entitled to alter the surface of the servient tenement to accommodate the rights granted under the easement if there is no undue interference

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51 Exhibit 29.
52 Exhibit 30.
53 Claim filed 14 March 2014.
54 Exhibit 31.
55 *Gallagher v Rainbow* (1994) 179 CLR 624 at 632, 639.

with the rights of the servient tenement holder.[56] As the evidence establishes, the defendants did just that when they engaged Council to seal their driveway in 2007, and the plaintiffs (when they found out about it) did not object. Clause 2 should be construed as to permit the defendants to do works to the driveway to facilitate their rights as limited by the clear words of Clause 2. Clause 2 should not be construed to permit the defendants and/or their contractors to enter that part of the servient tenement not used to facilitate the defendants' right of way under Clause 1 except for the purposes of exercising the right of way rights under Clause 1.

[72] Importantly a person entitled to a right of way cannot use the easement area as if it was his or her own property, as a distinction should be maintained between ownership of land and rights granted under a right of way easement.[57] This is the nub of the issue in dispute here. The defendants have from late 2011 acted towards the plaintiffs as if they the defendants owned the easement and the plaintiffs had extremely limited rights to access it i.e. to pass directly across it at the cross-over point to access the lower part of Lot 5. The plaintiffs were correct when they attempted to convince the defendants that they owned the land on which the easement was situated, and that they the defendants were only entitled under the terms of the easement to have reasonable access, and their rights did not give them unlimited access from that right of way to any part of the land that has the benefit of the right of way unless the circumstances suggest otherwise.[58]

[73] If there was any doubt the very clear words in Clause 1 "(in common with the grantor or all others having a like right)" should have been understood by the defendants as permitting the plaintiffs at all times to access not only the easement but the driveway area of the easement provided that in so doing they did not interfere with the right of way provided for in Clause 1 of the easement. This is a complete answer to the issues in dispute here. The plaintiffs were perfectly entitled to erect the cross-over which from the Council's perspective was lawful. I will deal with the conflicting expert evidence later in these reasons. The cross-over did not in any way conflict with the defendants' right of way under the terms of the easement. It did not in any way interfere with the rights of the defendants actually conferred under Ex 1 and any alleged claim based on a "substantial interference" with a right of way fails, both on the facts and the law.[59] In effect (although not pleaded as such) the defendants have purported to exercise the remedy of abatement. Here the plaintiffs were doing no more than facilitating safer and more convenient access across the easement from the upper part of Lot 5 to the lower part as they were lawfully entitled so to do.

The expert evidence and repair quotes

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56 *Hannay v Lewis* [1999] NSW ConvR 53-879.
57 *Saggers v Brown* (1981) 2 BBR 9329 at 9331.
58 Ibid *Saggers v Brown* at 9331.
59 *Stewart v Cooper* (1986) Tes. R. (NC) N1 at [17] per Neasey J.

[74] Both parties engaged engineers to assess various aspects of the "roadworks and drainage" on the easement. Mr Lesmes was engaged by the plaintiffs in 2017 and Mr Thompson by the defendants in 2015. No issue is raised about the expertise of either man to give evidence in the proceedings. Mr Thompson has provided two individual reports,[60] Mr Lesmes one,[61] and they participated in a joint experts conclave on 25 July 2017 and produced a joint expert report.[62] I comfortably prefer the opinion of Mr Lesmes to that of Mr Thompson.

[75] It is clear from his report that in July 2015 he was commissioned by the defendants to conduct an expert assessment of the complete driveway and outline issues of user safety. Mr Lesmes however was commissioned in 2017 to focus on the real issue in the dispute, and that is the cross-over and its effect on the drainage along and over the easement.

[76] Mr Thompson approached his task as if he were applying current Council standards in circumstances in which the Council itself had advised both parties,[63] after actually examining the constructed cross-over on 31 May 2013 that "the issues raised do not trigger any Council requirements". Of course neither engineer ever saw the "as constructed" cross-over, but they both had access to photographs of it in the course of their work.

[77] Mr Lesmes reasonably agreed that a 300 millimetre concrete pipe (as opposed to the 100 millimetre PVC concrete encased pipe constructed) would be more effective for drainage and prevention of blockage, but he did not think this was necessary for this site as it was "very close to the top of the hill and the catchment is small, the pipe will cope with the worst storm that will happen every 10 years."

[78] Both engineers agreed,[64] that the cross-over (obviously after the works had been removed) exhibited no additional signs of erosion over and above that observed by Mr Thompson in 2015, when both experts visited the site in 2017. Mr Thompson's proposal for the cross-over site[65] is, in my opinion, completely unnecessary for this site either from the safety or a drainage perspective. I much prefer Mr Lesmes' evidence on this point particularly as it relates to the quote obtained by the plaintiffs in November 2013 to reinstate the cross-over actually using bigger pipes and headwalls.[66] Mr Lesmes' evidence about the topographical features of the site of the cross-over are supported by the contour map tendered by Mr Gerber when cross-examining Mr Willi.[67] Given the agreement of the experts that the works undertaken by the plaintiffs in May 2013 at the cross-over site did <u>not</u> trigger any

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60 Exhibits 42 and 43.
61 Exhibit 37.
62 Exhibit 36.
63 Exhibit 19.
64 Exhibit 38, [19].
65 See for example [1]B.
66 Exhibit 39.
67 Exhibit 59.

Council requirements, the opinion of Mr Thompson expressed in the last sentence under Points of Disagreement[68] 1B:

> "The design of the Cross-over may trigger Development Approval (Operational Works) if earthworks volumes exceed triggers for the Local Authority's Planning Scheme";

may seem incongruous. It became apparent that what he was talking about was a design concept which would include a driveway up to the plaintiffs' house which may involve cut and earthworks of up to 140 cubic metres close to Council's trigger of 150 cubic metres. He accepted that the earthworks involved in construction of the cross-over would be "potentially 5 cubic metres". Consistently with my strong preference for Mr Lesmes' evidence, I do not accept Mr Thompson's evidence relating to one of the photographs[69] taken by him in 2015 that if constructed as now proposed, that the cross-over could "potentially" cause erosion in the areas marked by him on the exhibit. Clearly, the surface of the roadway constructed by the defendants in 2008 has deteriorated in parts since then, but none of that is due to any actions by the plaintiff. On a proper construction of Ex 1, it is the defendants' responsibility to repair and maintain it and not the plaintiffs. I accept Mr Lesmes' evidence that the sealed driveway as seen today has deteriorated due to effects of weathering and wear/tear from vehicles. This includes heavy vehicles brought onto Lot 4 after 2008 via the driveway by the Willis to renovate their home. I find that the use of vehicles either on the driveway itself, (minimal on the evidence), or across at the cross-over point (very small indeed) by the plaintiffs has contributed nothing to what can be seen along the whole length of the driveway. I accept the evidence of Mr Lesmes that the main cause for deterioration is the lack of adequate base and sub-base for the road when constructed. That is a matter between the defendants and the Council. The road was formed by cutting the existing soil that has a significant amount of clay content which does not have adequate load-bearing capacity. How this could be the responsibility of the plaintiffs is not explained.

[79] The plaintiffs called Mr Ritelle who was the author of Exhibit 39, and Exhibit 40 which was his quote to reinstate the cross-over as constructed by the plaintiff. He was an impressive witness. He regarded the cross-over as constructed as safe as a temporary measure. His solution in Exhibit 39 was a better one for that site. He noted that as the site was on a crest, there should be no issue of water flow contributing to erosion. He was asked questions about quotes from Mr John Hill of Roll Formed driveways[70]. It is these quotes which form the basis of the damages claimed in the defendants' final pleading. Even setting aside the failure of the defendants to properly plead a discernible cause of action, this evidence is critical to the measure of damages as claimed. Mr Ritelle pointed out what is self-evident, and that is that both quotes (especially the one dated 15 September 2016) relate to the

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68 Exhibit 38.
69 Exhibit 41.
70 Exhibit 45.

whole length of the drain and/or driveway along the 150 metres approximately of the driveway area in the easement. As I have noted, the plaintiffs performed the works off the bitumen surface, but in the area of the drain near the entrance to Lot 4 to facilitate safe access from the top to the lower part of their property. There is no credible evidence that their actions contributed in any actionable way to the deterioration of the road surface or problems with the drain. Mr Ritelle was critical of some of the items claimed particularly in the quote of 15 September 2016,[71] but it is not necessary for me to take this any further as the defendants have failed to prove any causal link between the actions of the plaintiffs in constructing the cross-over in May 2013 and the present state of the roadway surface and the drain.

Conclusions

[80] The plaintiffs have proved that in constructing the cross-over in May 2013 they acted consistently with the law and their rights as the owners of Lot 5 and the servient tenement in relation to Exhibit 1. When the defendants caused contractors to enter onto the plaintiffs land on or around 18 July 2013 to remove the cross-over without the consent of the plaintiffs and in wilful disregard both to the lawful rights of the plaintiffs as owners of Lot 5 and to the various signs and written warnings not to so enter, they committed trespass. The plaintiffs are entitled to restitutionary compensatory damages in the sum of $2,450 as claimed. The plaintiffs have proved all of the facts pleaded in [5] – [12] of their Amended Statement of Claim filed 10 March 2016.

[81] In relation to their counter-claim, the defendants have failed to establish any viable cause of action or any causal link between any actions by the plaintiffs and the present state of the sealed area of the driveway and the drain along its length. Insofar as they are alleging any infringement of their rights under the easement, in light of what I have written above that "claim" must fail.

[82] That leaves only the declaratory relief sought at [1] and [2] of the Prayer for Relief:

> "1. A declaration that:
>
> *The owners or occupiers of the dominant tenement, Lot 4 on RP 839361 had the right, at their own expense, to improve their access to Lot 4 along the 4 metre wide easement, being easement No. 602043321, L211723F, easement G, by carrying out such works as may be reasonably necessary to maintain and improve the easement, and to enter (and to authorise their servants, agents or contractors to enter) onto the servient land for the purpose of conducting those works, as is reasonably necessary, from time to time, so long as such works do not interfere with the use and enjoyment of the owners of the servient tenement, Lot 5 on LRP839360 to a greater extent than is reasonably necessary.*

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[71] Part of Exhibit 45.

2. A declaration that:
The terms of the Sign pleaded in Paragraph 5 of the Statement of Claim (and any other similar notices) are contrary to law and the Plaintiffs are not entitled to erect a notice in those terms, on the servient land or otherwise in the vicinity of the dominant tenement or the Easement or in a position where it is visible by persons approaching these areas."

[83] The declaration sought in [1] lacks utility. The rights of the defendants are clear from the unambiguous terms of the grant itself. In light of my factual findings declaration 2 must fail. In his final written outline,[72] Mr Gerber proposes a form of declaration (at paragraph [92]) that he suggests might protect his clients' rights under the easement. I would only make such declaration if it was by consent as it was not the subject of any pleading or any discussion at the hearing.

[84] The late claim for declaratory relief in a pleading settled by counsel is the only reason these proceedings were transferred and heard in this Court. This is very relevant to the issue of costs.

Exemplary and aggravated damages

[85] In *Stereff v Rycena & Anor* [2010] QDC 117, a case in which there was a claim for restitutionary compensatory damages for trespass as well as exemplary and aggravated damages, His Honour Judge Irwin with his well-known industry and thoroughness, analysed much of the relevant jurisprudence to distil the relevant principles. I quote with approval from [159] – [165] of His Honour's judgment:

"[159] The plaintiff claims damages by way of compensatory damages, aggravated damages and exemplary damages. These are conveniently explained by Cullinane J in *Coleman v Watson & Shaw & Anor*:

'[55] The first of these two categories are compensatory damages. Lord Diplock in *Cassell and Co Ltd v Bruin* (1972) A.C. 1027 at pages 124-126 explained the nature of such damages and the principles applicable to them; 'The three heads under which damages are recoverable for those torts which damages are 'at large' are classified under three heads:
(1) **Compensation for harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought.** In addition to any pecuniary loss specifically proved the assessment of compensation may itself involve putting a money value upon physical hurt, as in assault, upon curtailment of liberty, as in false imprisonment or malicious prosecution, upon injury to reputation, as in defamation, false imprisonment and malicious

[72] Filed 13 December 2017.

> prosecution, upon inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation.
> (2) **Additional compensation for the injured feelings of the plaintiff** where his sense of injury resulting from the wrongful physical act **is justifiably heightened by the manner in which or the motive for which the defendant did it**. This Lord Devlin calls '**aggravated damages**'.
> (3) **Punishment of the defendant** for his antisocial behaviour to the plaintiff. This is what Devlin calls '**exemplary damages**' - - - '

[56] Exemplary damages are to be assessed separately from compensatory damages. See *Henry v Thompson* [1989] 2 Qd R 412.

[57] The nature of exemplary damages and the principles governing the award of such damages were discussed by the High Court in *Lamb v Cotogno* (1987) 164 CLR 1.

[58] There are various factors which might give rise to an award of **exemplary damages** and no particular type of conduct is essential. **Generally speaking** however, **the purpose of such damages is to mark the disapprobation of the court for the conduct and to deter others from like conduct** although an award of exemplary damages is not wholly in the nature of punishment.' (my emphasis)

[160] In *TCN Channel Nine Pty Ltd v Anning* it was held:

> 'In light of the reasoning in *Palmer*, *Bruyn* & *Parker*, the relevant test for the recovery of consequential loss after an intentional tort in terms of 'natural and probable consequence' is the preferred formulation in Australia. However, it must not be applied as if it were a statutory formulation. Numerous other cognate formulations have been used in the authorities.
> …
>
> What is a natural and probable consequence arising from trespass to land must depend on all the circumstances of the case. It is essentially a question of fact.'

[161] The recovery of aggravated damages is based on different principles to recovery for personal injury as a distinct head of damage for trespass to land. With respect to both aggravated and exemplary damages, there is a focus on the

conduct of the defendant. However, in the case of aggravated damages, that focus is directed at compensating the plaintiff 'for the circumstances and manner of the defendant's wrongdoing' or 'the manner in which the act was done'. In contrast, in relation to exemplary damages, in *Gray v Motor Accident Commission*, the four joint judgment said:

> 'In considering whether to award exemplary damages, the first, if not the principal, **focus of the inquiry is upon the wrongdoer**, not upon the party who was wronged. (The reaction of the party who is wronged [for] high-handed or deliberate conduct may well be a reason for awarding aggravated damages in further compensation for the wrong done. But it is not ordinarily relevant to whether exemplary damages should be allowed.) **The party wronged is entitled to whatever compensatory damages the law allows (including, if appropriate, aggravated damages).** By hypothesis then, the party wronged will receive just compensation for the wrong that is suffered. **If exemplary damages are awarded, they will be paid in addition to compensatory damages** …' (my emphasis).

[162] In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* Brennan J said:

> '**As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again**, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In *Merest v Harvey* substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, Gibbs CJ saying:
>
> > 'I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages.'
>
> The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in *Broome v Cassell & Co*, 'to teach a wrong-doer that tort does not pay'. (my emphasis)

This was quoted with approval by the High Court in *Lamb v Cotongo* which affirmed that, under Australian law, exemplary damages may be awarded in tort. In that case, it was held that:

> '[Exemplary damages] apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence, or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights.'

In *Trend Management Ltd v Borg* it was said:

> 'One may, I think, act 'in contumelious disregard of the plaintiff's rights' by doing recklessly and negligently what is likely to cause damage to the plaintiff even though it is not one's intention to cause it'.

However, as was said in *TCN Channel Nine Pty Ltd v Anning*, such damages are rarely awarded and require something more than a finding of fault. In *Gray v Motor Accident Commission* the remedy was described as exceptional 'in the sense that it arises (chiefly but not exclusively) in cases of malicious wrongdoing in contumelious disregard of the plaintiff's rights'. Accordingly, in *Trend Management Ltd v Borg* it was observed that the High Court has emphasised that findings of contumeliousness are not lightly made, and said:

> 'The terms in which the contumely is described in the cases indicate, I think, that the conduct of the defendant must be of considerable seriousness and deliberation to warrant this remedy.'

Therefore, it should be used with restraint.

[163] In *Pollack v Volpato*, it was said:

> 'Whereas compensatory damages have to be approached by looking at the situation of the plaintiff in consequence of the wrongful act to which he has been subjected, punitive damages have to be looked at from the side of the defendant. If he is to be punished **it is his proper punishment which provides the basis for the assessment of damages**.
> …

> Just as in inflicting a fine, amongst the factors which have to be considered is the capacity to pay of the person ordered to pay it, **in my view the means and resources of the defendant are an important consideration for the jury in inflicting punitive damages**, e.g., if evidence has been given that the defendant was a poor man who, if ordered to pay substantial punitive damages would lose his home, and the jury had awarded damages of this order, a basis for review might have been laid in that the punishment was quite unreasonable'. (my emphasis)

[164] In *TCN Channel Nine Pty Ltd v Anning* it was held that an amount awarded as exemplary damages should be separately quantified from an amount awarded for aggravated damages; and exemplary damages should not bear interest until the date of judgment.

[165] The defendant in an action in which exemplary damages are recoverable is entitled to show that the plaintiff's own conduct was responsible for the commission of the tortious act and to use this fact to mitigate damages. It operates to prevent the award of exemplary damages which, but for the provocation, would have been awarded. However, this principle has no application to compensatory damages."

Application of these principles to this case

[86] Mr Hall argues that an award under either head of damage should not be made in this case because of the way in which the plaintiffs have pleaded their case.

[87] The plaintiffs specifically plead that the defendants have:

> "(a) by removing the cross-over, interfered with their use of their property including their use of the "driveway" (being the internal access track that led from the house to the cross-over) and that "their enjoyment and unfettered access to their property had been interfered with …";[73] and
>
> (b) shown contumelious disregard for their rights and are entitled to aggravated and exemplary damages.[74]

[88] Importantly, in their Reply, the plaintiffs plead that the defendants removed the cross-over, not for the reasons stated in their defence (because the cross-over caused erosion and the diameter of the pipe was too small etc.), but rather that it was done to "vex and inconvenience the plaintiffs".[75] In this regard, the plaintiffs plead that they rely on the correspondence particularised in paragraph 9(a) of the Reply.

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73 Paragraph 16 of GMC33.
74 Paragraph 18 of GMC33.
75 Paragraph 6(c) of GMC44.

[89] For the reasons expressed above, I have rejected the defendants' argument that they had "a genuine belief that they were within their rights to remove the cross-over".[76]

[90] To the extent that Mr Hall is submitting that on the issues of exemplary and aggravated damages, the plaintiffs be tightly limited to their pleaded case and "the broader conduct of the parties is not relevant to that case", his submission contrary to the relevant legal principles set out above, and also the Rules.[77]

[91] The plaintiffs have established that, in removing the cross-over, the defendants have acted in contumelious disregard for the plaintiffs' rights by wilfully ignoring and/or misrepresenting the easement rights as discussed above. Clearly, from an early stage, the defendants had a copy of Exhibit 1 and chose, (in the many vexatious and despicable ways referred to in these reasons), to intimidate the plaintiffs and deny their rights under the easement, and to mispresent those rights to third parties including their own subcontractors, with a view to vexing and causing inconvenience to the plaintiffs. This included a deliberate attempt to mislead by quoting from what Mr Gerber correctly describes as the "false easement".[78] This conduct alone, which involved representing to the police, the Council, their own contractor (the original defendants), and their own lawyers that the "fake easement" was in fact the easement burdening lot 5 when it was not, completely undermines any suggestion that the defendants were acting pursuant to a genuinely held belief. I accept Mr Gerber's submission that the actions of the defendants in relation to the "false easement" clearly establishes that they were well aware as at 18 July 2013 that they were not entitled to remove the cross-over. Also relevant are the defendants' false allegations that they were authorised to remove the cross-over by the Council and police as discussed earlier in these reasons. In my view, the proved assaults on both Ms Healey (27 August 2013) and Mr Brodsky (July 2013) are relevant to the motive behind the defendants' actions in wrongfully removing the cross-over on 18 July 2013, and are yet another example of the defendants' contempt for the plaintiffs' legal rights under the easement. In my reasons above, I have referred to other factual findings which bear upon the same issue – the aggressive and intimidatory attitude displayed by the defendants to the plaintiffs from their first meeting in late 2011, including false allegations about Ms Healey as a mother, false allegations to the police and Council about their character; and insulting and disparaging behaviour towards both of them leading up to the wrongful removal of the cross-over.

[92] I referred above to the effect on the plaintiffs of the appalling conduct of the defendants. As discussed above, the contemptuous conduct of the defendants was relentless and, I infer, mitigated only by:

(a) the finding of guilt against Mrs Willi in the Gympie Magistrates Court and more importantly,

(b) the reluctant decision around about that time of the plaintiffs to forego the full enjoyment of lot 5 so as to obviate the need for contact with the defendants.

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76 Defendants' written submission, 17 November 2017, para 26.

77 See UCPR 658(1) and (2) and r 156.

78 Exhibits 22 and 23.

[93] Similar conduct to the defendants resulted in a substantial award under both heads in *Stereff*.[79]

[94] For the reasons set out above I order that the defendants pay to the plaintiffs:

(a) by way of restitutionary damages for trespass the sum of $2,450;
(b) aggravated damages for trespass in the sum of $20,000;
(c) exemplary damages $25,000.

[95] I will allow interest in accordance with s 58 of the *Civil Proceedings Act 2011*. I dismiss the counterclaim. The plaintiffs are entitled to their costs. The only issue is whether those costs should be on the standard basis or on the indemnity basis as contended for by Mr Gerber.[80]

[96] When I delivered judgment on the 29th of January 2018 I asked the parties to respond within (7) days in writing on the issue of costs, the proposed declaration referred to in [83]; and interest.

[97] Both parties have provided submissions in writing.[81] The defendants consent to the declaration proposed by Mr. Gerber in his trial submission at [92]. Although this consent is not referred to in the defendants' supplementary submission, it was conveyed in a letter to Mr. Banks dated 2 February 2018 so by consent I will make the proposed declaration.[82]

[98] By reference to *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 33, the plaintiffs accept that although the discretion to award costs in s 58(3) of the *Civil Proceedings Act* 2011 is wide, authority is against the award of interest on the exemplary damages component of the award.[83] I allow interest as follows:

> "(d) interest on the sum of $2,450.00 from 18 July 2013 (the cause of action arose; the date when it was admitted that the crossover was removed) to the date of judgment; 29 January 2018 = **$677.36**; and
>
> (e) interest on the sum of $20,000.00 from 18 July 2013 to the date of judgment, 29 January 2018 = **$5,529.52**."

[99] That leaves only the issue of costs. The plaintiffs seek their costs calculated on the indemnity basis.

[100] The leading authority at common law is *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 43 FCR 42, and has been applied frequently in this State.[84] For the reasons set out above, I am satisfied that the proceedings have been prolonged by the institution and maintenance of the four counter-claims by the defendants without any proper foundation. They have certainly failed to conduct the proceedings in a

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79 Ibid at [255]. In *Bilic and Bilic v Nicholls* [2013] QDC 112, Dearden DCJ awarded $30,000 for aggravated damages for trespass and $30,000 for exemplary damages in a case which was more serious than this one and in which there was no contradictor at trial.

80 [102]-[107] trial submission filed 17 December 2017.

81 Defendants 5 February 2018, Plaintiffs 2 February 2018 and affidavit of Gordon John Banks (plaintiffs' Solicitor) filed 1 February 2018.

82 Reply submission on costs – Mr. Gerber 7 February 2018 paragraph [4].

83 *The Commonwealth of Australia v Murray* [1988] Aust Tort Reports 68,038 at 68,053; and see *Grieve v Gomez* [2017] QDC 298.

84 *Di Carlo v Dubois & Ors* [2002] QCA 225, *Paroz v Paroz* (2010) QSC 157 per Peter Lyons J at [4].

way which would facilitate the resolution of the real issues at a minimum of expense in clear breach of UCPR r.5. All of the findings referred to in Mr. Gerber's submission (at [16]) are relevant.

[101] Mr. Banks' affidavit filed 1 February 2018 discloses that during the course of the proceedings, the plaintiffs made four settlement offers to the defendants[85] none of which were accepted. Rule 360 UCPR provides:

> "**360 COSTS IF OFFER BY PLAINTIFF**
> (1) If— (a) the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order no less favourable than the offer; and (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer; the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances. 3
>
> (2) If the plaintiff makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule."

[102] As Mr. Gerber submits, on a proper construction of r.360, it is only the first offer in relation to the counterclaim, and the second offer (being the first offer made in relation to the claim) that are relevant. There is no argument that the orders made on the 29th of January 2018 were "no less favourable than the (offers)." Mr Hall argues (a) that standard costs should be ordered or, alternatively that (b) if indemnity costs are ordered, such should date from the transfer of the proceedings to the District Court, and otherwise prior to then costs should be assessed on the Magistrates Court Scale.

[103] The effect of r.360 UCPR is that if a plaintiff obtains a judgment no less favourable than the first offer it made, then it is entitled to its costs for the whole of the action.[86] There is some irony now in the defendants advancing an argument that costs should be assessed on the Magistrates Court Scale in circumstances in which it was their final Counterclaim that lead to the transfer of the proceedings to this Court.

[104] There is no issue that at all material times, the plaintiffs were willing and able to carry out what was proposed in their first offers. The defendants have not satisfied me that another order for costs is appropriate. I agree with Mr. Gerber that it is difficult to envisage a clearer case where a party in the position of the plaintiffs, would be entitled to indemnity costs.

[105] In addition to the orders made on the 29th of January 2018 I make the following additional orders:

1. I allow interest on the damages components of restitutionary and aggravated damages in the total sum of $6,206.88.

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85 See para 13 Plaintiffs costs submission 2 February 2018.

86 *Fail v Hutton* [2003] QSC 291.

2. I order the defendants to pay the plaintiffs costs of and incidental to the proceedings including any reserved costs to be assessed on the indemnity basis.

3. By consent, I make the following order by way of declaration:

> The defendants not carry out any works including the removal of works the plaintiffs may carry out upon Easement G unless and until:
>
> 1. full particulars of the intended works is supplied to the plaintiffs in writing; and
>
> 2. a period of thirty (30) days has elapsed from the supply of such particulars of works and the plaintiffs have consented to such works in writing. In the event that the plaintiffs fail to consent to such works the matter shall be referred to arbitration.
>
> Should any dispute arise between the plaintiffs and the defendants in respect of any matter or thing arising pursuant to the easement or proposed works to it, such dispute shall be referred to arbitration pursuant to the *Commercial Arbitration Act* 2013 (as amended). The parties agree that the arbitrator shall be appointed by the President of the Queensland Law Society incorporated from time to time at the request of either party. Within fourteen (14) days of the above order the plaintiffs shall remove all signage referring to a dispute between the parties or their respective rights.