Kevin Lucas & KDL Building P/L v Robert Montgomery [2008] Adj.L.R. 07/15

JUDGMENT : Cogswell SC DCJ. District Court of New South Wales. 15th July 2008

1. Kevin Donald Lucas and his company KDL Building Pty Limited are builders. They were to build a new house at Fairlight for Robert and Michelle Montgomery. Disputes arose between the builders and the owners (that is, the Montgomerys). The owners terminated the building contract. The builders sued the owners for breach of contract and other causes of action. The owners cross claimed against the builders. The owners claimed that it was the builders who breached the contract and they sought damages from the builders.

2. The case was heard by Phegan DCJ of this court. His Honour found in favour of the owners who were awarded a verdict and judgment against the builders for $482,356.84. None of this has yet been paid by the builders.

3. Two issues have arisen since his Honour's orders and they were argued before me yesterday. They were argued before me because Phegan DCJ retired on 18 April 2008. The first issue is this. His Honour's main formal order was in the following terms: "*Verdict and judgment for the cost claimants against the cross defendants in the sum of $482,356.84*". (The cross claimants were the owners and the cross defendants were the builders.) His Honour also awarded costs to the owners against "*the plaintiffs/cross defendants*".The owners have since encountered a potential problem with how these orders are expressed. The orders do not differentiate between the builder Kevin Donald Lucas and the builder KDL Building Pty Limited. There is just one judgment against both of them and similarly one costs order against both of them. The owners say that because there is just one judgment and one costs order against both builders jointly, that that could hinder their efforts to recover their judgment debt from Kevin Donald Lucas. So what the owners have asked me to do is to change Phegan DCJ's orders so that they are expressed as separate judgments and costs orders against each of Kevin Donald Lucas and KDL Building Pty Limited.

4. The second issued argued before me is this. The builders have appealed to the Court of Appeal from Phegan DCJ's orders. They have asked me to stay the execution of the orders made by Phegan DCJ until the outcome of the appeal.

5. I will deal first with the issue of the request to change the form of Phegan DCJ's orders. Because neither of the builders has yet paid the judgment debt the owners are contemplating compulsory enforcement of the orders in their favour. They have served a statutory demand on the builder KDL Building Pty Limited under the *Corporations Act 2001*. Failure to comply with such a demand can form a ground to wind up a company. The company has responded to this demand by applying to the Supreme Court to set the demand aside. That application has not yet been heard.

6. The owners are also contemplating recovery from the builder Kevin Donald Lucas. That may involve bankruptcy proceedings. This is where the potential enforcement problem emerged. Counsel for the owners, Mr H J A Neal, came across in his researches a case in the Federal Court of Australia named ***Re Neate and Anor Ex Parte Pegasus Leasing Limited*** (1995) 57 FCR 40. It was a decision of O'Loughlin, J. The case concerned two judgment debtors. One was liable under a lease to the judgment creditor. The other was liable as guarantor of the first. However judgment had been entered in the District Court of South Australia against them jointly, just as in this case. (At this stage it is important to point out that Phegan DCJ found that the company KDL Building Pty Limited had breached the building contract. The damages awarded to the owners in this case were recoverable from the company as builder and from Mr Lucas as guarantor.) Returning to ***Neate's*** case, O'Loughlin J relevantly said at 42:

   "*As a general rule, the liability incurred by the principal debtor and the guarantor is several… . The promises that were made by the debtors to the judgment creditor in the present case was separate: one was contained in the lease agreement and the other in a contract or guarantee… thereby making their respective liabilities several.*

   Where liability is several, separate judgments are in my opinion required."

   His Honour then referred to English authority and then continued at 43 to conclude:

   "*In my opinion, the District Court judgment is flawed. There should have been a judgment entered against each debtor separately. Because of this error the bankruptcy notice is a nullity and must be set aside.*"

7. Needless to say **Neate**'s case was a cause of some concern to the owners' legal representatives. As Rachelle Harrington said in her affidavit dated 1 July 2008 filed and admitted without objection in these proceedings:

   "*34. Arguably that decision may be authority for the proposition that in some circumstances, where there is a joint action against one party as principal and a second party as guarantor (as in this case), two judgments should be given; a bankruptcy notice based on one judgment may be set aside.*

   35. Prior to Mr Neal informing me about this, I was not aware of this decision. I am informed by Mr Neal that he only became aware of it on 27 June 2008. It was never discussed before Phegan DCJ, who in his judgment of 2 April 2008 made the order of verdict and judgment for the cross claimants against the cross defendants in the cross claim (as opposed to separate judgments against each cross defendant)."

8. Hence the owners make their application to change the form of the judgment and costs orders made by Phegan DCJ from joint to separate judgments and orders. As Ms Harrington says:

   "*37. The reason for this is to avoid any risk of Mr Lucas being able to argue that any bankruptcy notice based on the unsatisfied judgment should be set aside, on the authority of Re Neate.*"

9. The owners point to two alternative sources of power for me to make such a change to Phegan DCJ's orders. One source is r 36.17 of the *Uniform Civil Procedure Rules 2005*. The other is a power to do so which is said to be

implied from express powers conferred on me by statute. Such implied power arises because arguably it is reasonably required in order to exercise the express powers.

10. Rule 36.17 of the *Uniform Civil Procedure Rules* is a relatively short rule which says:

"If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on application of any party of its own motion, may, at any time, correct the mistake or error."

Mr Neal says that there has been, in this case, "*an error arising from an accidental slip or omission*" in the orders framed by Phegan DCJ. Hence I am asked to use the rule to "*correct the error*". Mr Neal relies upon a decision of the New South Wales Court of Appeal as to how I should interpret this rule. The case is ***Newmont Yandal Operations Pty Limited v J Aron Corporation & The Goldman Sachs Group, Inc*** [2007] NSWCA 195. That decision was delivered on 10 August 2007. Spigelman CJ delivered the principal judgment. Santow JA and Handley AJA relevantly agreed. From that judgment I draw and rely upon the following propositions as to my approach in interpreting and applying r36.17.

11. The Chief Justice said at [24] how it was particularly important to focus on the precise words of the rule rather than applying terminology in the reasoning of previous case law. His Honour observed that the position in New South Wales is different to what it used to be and to what it is in other jurisdictions. His Honour made particular reference to s 56 of the *Civil Procedure Act 2005*. His Honour set out the relevant provisions of that section which I, too, set out in my judgment:

"56(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule."

12. Having referred to that provision the Chief Justice observed that courts in New South Wales are required to approach the task of interpreting the words in r 36.17 including "*error*" and "*accidental slip or omission*" and "*correct*" in such a manner as to give effect to the overriding purpose, namely the facilitation of the just, quick and cheap resolution of the real issues in the proceedings.

13. Similarly, his Honour observed a court must seek to give effect to that overriding purpose when exercising the discretion to correct an error or mistake in a judgment pursuant to r 36.17. His Honour said at [114] that, as a matter of interpretation, r 36.17 "*must extend to the correction of a mistake or error in an order which, arguably, resolves an issue that has intentionally not been adjudicated. Such a consequence, in my opinion, falls squarely within the concept of an 'error arising from an accidental slip or omission'*". In the following paragraph his Honour extended "*the scope of my reasons to an order which arguably resolves an issue upon which there has not been an adjudication. Of course, there has to be a real risk.*" Once again referring to s 56 of the *Civil Procedure Act*, his Honour observed that words such as "*error*" and "*correct*" should not be given a narrow interpretation. His Honour then expressed the opinion that "*carrying into effect the actual intention of the judge making the order, and making sure that the order did not have a consequence which the judge clearly intended to avoid, falls within the natural and ordinary meaning of the word 'correction', particularly as understood in the light of the overriding purpose.*"

14. As to an error or omission which may be attributable to an oversight on the part of a legal practitioner his Honour set out passages from the judgment of White J from which the appeal was brought in ***Newmont Yandal Operations*** and said at [153]:

"I agree with the reasons of White J in this regard. I would add that the issue is whether the Court's order can be characterised as arising from an accidental slip or omission. Advertence or inefficiency on the part of legal representatives may explain why the court's order can be so characterised."

15. Finally the Chief Justice again set out a passage from the judgment of White J and observed that the reasons contained in that passage were compelling. The relevant passage for my purposes is contained in [163] of the Court of Appeal's judgment (the Chief Justice's observation being contained in the following paragraph). White J said:

"The inherent jurisdiction, and the jurisdiction under the slip rule, is available to correct errors where the order does nor reflect the intention of the judge making it. (This may include errors to reflect what the judge's intention would have been had the particular matter been addressed when the original orders were made, but were not addressed because of an accidental slip or omission). Subject to the other matters which were argued, the jurisdiction arises once it is demonstrated that the orders made did not reflect Austin J's intentions."

Similarly to the application before me to correct orders made by Phegan DCJ, the application before White J was to correct orders made by Austin J.

16. Mr TO Bland, who appears for the builders in this case, opposes the application to correct the orders made by Phegan DCJ. As I understand his submissions, his three arguments are as follows. First, he argues that there is no utility in amending the orders because the owners would still have to go through the process of winding up the builder company before they can proceed against Mr Lucas. He argues that because Mr Lucas' liability arises from his role as a guarantor, the liability of the principal debtor, namely the company, has to be determined first. He adds that it will be a short period of time, namely months, before the company's liability will be resolved by the Supreme Court proceedings. Mr Neal replied that the liability of the company and Mr Lucas is no longer based upon contractual considerations such as a building contract or a guarantee but upon the judgment debt which is the result of the order made by Phegan DCJ.

17. Mr Neal's argument, in my opinion, is correct. It is reflected in the form of the statutory notice issued by the owners against KDL Building Pty Limited which cites in the schedule the judgment debt entered in the District Court. In any event, I am not persuaded that those considerations carry significant weight with me. They are factors which could be argued in the Supreme Court proceedings or in proceedings against Mr Lucas in the Federal Court of Australia. They do not represent compelling reasons why, if otherwise justified, an order ought not to be made under r 36.17.

18. The second argument advanced by Mr Bland is that ***Neate's*** case concerned a bankruptcy notice which was directed to the judgment debtors jointly. He points out that any bankruptcy notice which may be in the future issued will, of course, be issued against Mr Lucas only. However, I do not find that to be a relevant consideration to distinguish ***Neate's*** case from this case. The significance of ***Neate's*** case, in my opinion, is the finding by O'Loughlin J that the District Court judgment was flawed. O'Loughlin J concluded that the liability of the debtors in that case was several. One was sourced in the principal contract, the other was sourced in the guarantee. O'Loughlin J concluded that that consideration warranted separate judgments against each judgment debtor. Indeed, O'Loughlin J said as much at 43 in the passage I have already quoted. O'Loughlin J, "*because of this error*", determined that the bankruptcy case notice in that case was a nullity and must be set aside. The fact that the bankruptcy notice was directed to the judgment debtors jointly is not, in my opinion, a factor which reduces the potential for ***Neate's*** case to present an obstacle to the owners in this case in pursuing bankruptcy proceedings against Mr Lucas. There is clearly in my opinion, as a result of O'Loughlin J's judgment in ***Neate's*** case and upon the orders of Phegan DCJ as they are presently framed, an arguable defence by Mr Lucas to have any bankruptcy notice issued against him set aside as a nullity. I therefore do not accept that second argument of Mr Bland.

19. Mr Bland's third argument relies upon a judgment of Hammerschlag J in the Supreme Court of NSW in ***Amorin Constructions Pty Limited v Kamtech Electrical Services Pty Limited*** [2008] NSWSC 285. Mr Bland argues that the case is authority for the proposition that the slip rule is not available to assist where the court was properly constituted and where the error was a result of inadvertence by counsel. He argued that in this case Phegan DCJ gave consideration to the amendment of the orders.

20. What had happened in this case, I should set out briefly, it is referred to in the affidavit of Ms Harrington. When his Honour delivered judgment on 2 April 2008 his Honour did not specify the amount of damages and his Honour invited further submissions as to costs. His Honour heard further argument on 8 April 2008 and then made the orders which are the subject to the application in these proceedings. The variation was that his Honour specified the amount of the judgment debt and made a specific further order in respect of costs. I should add that in finalising his Honour's orders his Honour omitted to include an order which had been made by his Honour originally on 2 April 2008. That was order 1 which provided, "*Verdict and judgment for KDL Constructions Pty Limited in the plaintiffs' claim against the defendants on the quantum meruit claim. No damages awarded.*" The omission by his Honour of order 1 is also the subject of the application made by the owners under r36.17. That was clearly an oversight made by his Honour, perhaps even a clerical error. Mr Bland does not oppose Phegan DCJ's orders being corrected to include that order being reinstated and in due course I will make that order.

21. Returning to Mr Bland's third argument based upon ***Amorin's*** *case*, he argued that Phegan DCJ gave consideration to the form of the orders and amended them accordingly. Mr Bland argues further that this court ought not to amend orders to suit the parties and added that the issue had already been determined and adjudicated upon by Phegan DCJ. Part of his argument was that the order now sought, or the correction now sought by the owners, had it been sought before Phegan DCJ, would have required the exercise of an independent discretion requiring judicial determination. Even if the outcome was obvious, once a judicial discretion was required to be exercised I ought not to rely upon r 36.17 to correct the orders made by the first judge.

22. In response to Mr Bland's argument Mr Neal argues that there was indeed a discretion which the primary judge would have exercised in ***Amorin's*** *case* and which therefore made it inappropriate for Hammerschlag J to make orders under r 36. 17, or indeed in that case the inherent jurisdiction of the Supreme Court. That was a case where proceedings for winding up a corporation had been commenced. A statutory provision required such proceedings to be determined within six months after they are commenced. The same statutory provision made allowance for the court to extend the period, but only if the court is satisfied that special circumstances justify the extension. What had happened in that case was that the hearing of the application had been listed before Hammerschlag J after the expiry of six months from their commencement. Confronted with the statutory time limit the applicants in that case made an application to amend the orders made by the judge who had listed the case for hearing by including an additional order extending the time. As Hammerschlag J said:

"The central issue is whether r 36.17 is available to the plaintiff to bring about the result that there will be an extension of the date for the determination of its winding up application."

His Honour then made observations about the statutory provision concerning the time limit including that a court may only extend the period if it is satisfied that special circumstances justify it. His Honour also observed that if the application is not determined then the winding up application is dismissed. As his Honour observed, the provision of special circumstances before the making of an extension order "*undoubtedly involves the exercise by the court of an independent discretion*". As Hammerschlag J observed, even though the primary judge, or first judge, would have intended to exercise the discretion had it been drawn to his attention "*a finding that he would have had that intention does not permit the court now to exercise a special discretion his Honour did not and which his Honour was not called upon to exercise*". Hammerschlag J further observed, at [56], as follows:

"It seems to me that it is equally important to distinguish between the exercise of a discretion to correct an error so as to reflect the intention of the court - or the intention that the court would have had but for the failure that caused the accidental slip or omission - on the one hand, with the exercise by the court of an initial special statutory discretion which the earlier court omitted to exercise. on the other."

23. Mr Neal points out that this case does not involve the exercise of any such discretion. He points to [84] in the judgment of Phegan DCJ in which his Honour reasons that the contract in this case was validly terminated by the defendants and the *"damages which flow from KDL's breach are recoverable in the cost claim from KDL, as builder, and Mr Lucas, as guarantor."* From that passage, Mr Neal argues, clearly separate liabilities arise in KDL Building Pty Limited and Mr Lucas. Accordingly, he says separate judgments ought to have been given.

24. I am in agreement with Mr Neal. It is clear in my opinion that Phegan DCJ's intention was to find against both builders, that is against the company builder, KDL Building Pty Limited, and the personal builder, Mr Lucas. In my opinion the step of entering separate judgments as distinct from a single joint judgment against both debtors would not have involved the exercise of such a discretion by Phegan DCJ, that I should refrain from using my powers under r 36.17 in this case.

25. The findings I make on this application are as follows. The issue of whether the judgments against KDL Building Pty Limited and Kevin Lucas ought to have been joint or several was never raised before Phegan DCJ. There was therefore no adjudication upon that issue. In my opinion Phegan DCJ's intention would have been, had his attention been drawn to the potential impact of ***Neate**'s case*, to make separate orders against each of the judgment debtor so that there was no prospect of his Honour's judgment against Mr Lucas being frustrated by an argument to the effect of the one raised in ***Neate**'s case*. That issue was not addressed, as I said, before his Honour. Therefore, to adapt the words of White J quoted by the Chief Justice in ***Newmont Yandal Operations** case*, I have jurisdiction, in my opinion, under r 36.17 to correct the error in this case because it did not reflect the intention of Phegan DCJ, this including what Phegan DCJ's intention would have been, had the particular matter been addressed when his Honour was considering the orders. The fact that they were not addressed, arguably because of an oversight by the legal representatives, does not preclude me, in my opinion, from exercising the power conferred by the rule. As the Chief Justice said at [153] of ***Newmont Yandal Operations***, *"inadvertence or inefficiency on the part of legal representatives may explain why the court's order can be so characterised."* I hasten to add that I do not intend by these remarks to criticise in any way the owners' legal representatives. Clearly they were diligent when it came to the consideration of bankruptcy proceedings against Mr Lucas and their researches turned up the case which could have been a potential problem in those proceedings and they are seeking to avert that potential problem by bringing this application in a timely manner. I cannot see that the determination whether to give a joint judgment against both judgment debtors or separate judgments against each judgment debtor would involve any discretion on the part of Phegan DCJ.

26. I will return to the orders which I will make on this application at the conclusion of these reasons.

27. I turn now to the second issue argued before me, which is an application to stay the orders made by Phegan DCJ. The application is made by the builders. Mr Bland argues that the builders have good prospects on their appeal and that a failure to stay Phegan DCJ's orders may result in the prevention of KDL Building Pty Limited being able to prosecute its appeal. That submission is based upon the assertion that there is a possibility that KDL Building Pty Limited may not succeed in setting aside the statutory demand and may be wound up. In those circumstances the liquidator may determine that the appeal is not justifiable.

28. The argument concerning the prospects of success in the appeal was based upon the appeal grounds set out in the builders' notice of appeal, filed in the Court of Appeal on 4 June 2008. I was not invited by either party to canvas the merits of the appeal in detail but to some extent the issues had to be addressed. Mr Bland directed arguments to what is in the appeal grounds called a 'Contract Appeal' and argued before me that the contract had, in this case, expired at a particular time and his Honour's finding that there was a contract was not available. As I understand it, he did not address argument to the appeal grounds under the heading 'Conduct During Construction'. Mr Neal responded by pointing out that the onus to satisfy me that a stay ought to be granted clearly rests with the builders.

29. Apart from the fact, which appears to be common ground, that the judgment debt in this case has not been paid by either judgment debtor there is not before me any evidence concerning the assets or liabilities of KDL Building Pty Limited, nor is there any evidence of its solvency apart from the fact that it has apparently not complied with the statutory demand made upon it by the owners. Indeed, it has applied to set aside that statutory demand. I am therefore, I accept on Mr Neal's argument, not in a position to determine the capacity of KDL Building Pty Limited to pay the judgment debt. For all I know, KDL Building Pty Limited may well be in a position to pay this judgment debt and to resist any winding up proceedings. I am not satisfied that the builder KDL Building Pty Limited and also Mr Lucas who, as Mr Bland says is a passenger in the appeal, will have their appeal frustrated because there is a prospect of KDL Building Pty Limited being wound up or, indeed, of Mr Lucas being bankrupted. Even if that were so, as Mr Neal points out, either builder can come back either before me or before the Court of Appeal in the event that winding up proceedings are commenced and are to be heard. In other words, if KDL Building Pty Limited's application to set aside the statutory demand is unsuccessful and winding up proceedings are commenced there may well be a stronger case for a stay in the appeal proceedings. Of course, I do not express a concluded view upon that because naturally I do not have evidence before me which might be present before a

judge determining that issue at that time. Nevertheless if that were to happen, the capacity of KDL Building Pty Limited to pay the judgment debt would clearly be the subject of evidence which is not the case before me.

30. I am also persuaded by Mr Neal's argument that the appeal lacks, or appears to lack, real prospects of success insofar as the builders appear to be arguing that a contract was frustrated or did not exist upon which they appeared to sue in the District Court. The effect of s 92 and s 94 of the *Home Building Act 1989*, referred to in the appeal grounds, does not appear to me to be to set aside the existence of the contract. Indeed, as Mr Neal points out, s 4(2) provides that a builder may remain liable under a contract even though it has not complied with s 92 or s 94. That non-compliance is a fact which is relied upon by the builders in their appeal grounds.

31. I do not find that I am persuaded by anything that Mr Bland says, that any of the grounds of appeal enumerated under the heading 'Conduct During Construction' leads me to conclude that the builders' prospects of success in the appeal are anywhere near good.

32. Accordingly, I propose to, in general terms, allow the application of the owners under R 36.17 and to disallow the application of the builders for a stay of the orders of Phegan DCJ.

33. I now turn to the formal orders which I should make.

34. I dismiss the notice of motion filed 9 July 2008 by the plaintiffs KDL Building Pty Limited and Kevin Donald Lucas.

NEAL: I seek costs, your Honour in the usual way.

HIS HONOUR: Mr Bland, why shouldn't--

BLAND: Your Honour, there's two separate notices of motion-

HIS HONOUR: Looking at the stay application first.

BLAND: In respect of the notice of motion for stay, I note that yesterday afternoon Mr Neal indicated that if you had have gone against him he was prepared to have those be costs in the appeal. I'd seek to have them as costs in the appeal.

HIS HONOUR: Why should they be costs in the appeal when you have been unsuccessful in asking for a stay? What does costs in the appeal mean – that the Court of Appeal determines the costs of the stay application?

BLAND: The stay application was brought here, that it's relevant to the appeal.

HIS HONOUR: I understand.

BLAND: And it would form part of the costs of whoever won the appeal.

HIS HONOUR: What do you say about that, Mr Neal?

NEAL: Your Honour, I oppose that. My learned friend's motion seeks an indulgence by way of a stay. The usual order in my experience is that even if the party seeking a stay succeeds, because it's seeking an indulgence, the costs are costs in the appeal. But in circumstances where there's a motion for stay which is unsuccessful the usual order should apply, namely the builder should pay my client's costs of the motion.

HIS HONOUR: I agree. Anything else you want to say, Mr Bland?

BLAND: It would appear that there's nothing further to be said.

35. I order the plaintiffs/cross defendants pay the costs of the defendants/cross claimants as agreed or assessed on the notice of motion filed 9 July 2008.

NEAL: The only thing that I would respectfully request in relation to that order is that the orders be separate to avoid the potential problem that we've been arguing about.

HIS HONOUR: On the costs orders?

NEAL: Yes. So that Mr Lucas be ordered to pay the costs and a separate order that the company be ordered to pay the costs.

HIS HONOUR: Yes, I think that sounds right, why shouldn't it be the case?

BLAND: The problem with the multiplicity of these things is that, and I know we've had this discussion over the last 24 hours, is that it would appear that the costs order is being made twice and that is a costs order against Mr Lucas and a costs order against KDL.

HIS HONOUR: What you're saying is that potentially that could lead to double recovery, is that your point?

BLAND: That's correct, yes. So the structure of the order, in my submission, should be that KDL Building be required to pay the costs as agreed or assessed. If any part of those costs is not recovered from KDL Building then Mr Lucas be required to pay that portion of the costs which is unpaid. I think that probably would have been a better order for his Honour Judge Phegan as well.

HIS HONOUR: What do you say, Mr Neal?

NEAL: Your Honour, that, with respect, ignores what we've been arguing about and what your Honour has found. There is--

HIS HONOUR: Yes, I don't need to hear any more. Mr Bland, if potentially let's say they got all their costs from your corporate client and then were pursuing costs against your personal client, they couldn't resist a stay application.

BLAND: No.

36. I revoke the costs order which I have just made and I make this order. I order that the plaintiff/cross defendant Kevin Donald Lucas pay the costs of the defendants/cross claimants of the notice of motion filed 9 July 2008. I order that the plaintiff/cross defendant KDL Building Pty Limited pay the defendants/cross claimants' costs of the notice of motion dated 9 July 2008.

BLAND: Your Honour, just to complete the order, could we have it that those costs are to be as agreed or assessed and that payment of the costs be within 28 days of agreement or assessment.

HIS HONOUR: Mr Neal?

NEAL: I don't oppose that, your Honour.

37. In each case those costs are to be as agreed or assessed, such costs are to be paid within twenty-eight days of agreement or assessment.

38. I turn to the notice of motion filed 2 July 2008 by the defendants/cross claimants. I have not relied upon the implied power. I perhaps ought to have, in case this goes elsewhere, but I want to be able to check it in a judgment sooner rather than later. I didn't particularly want to delve into that area. So what I propose to do is to make orders 1 and 2 pursuant to pt 36 r 17, I am just indicating this to you informally now, and 3 and 4 as stated in the notice of motion and then costs - you are successful, Mr Neal, what do you say should be the costs order?

NEAL: Your Honour, I accept that we have come back to the court to seek an indulgence but in relation to that I say this, with no disrespect to Judge Phegan, the form of orders that gave us an issue were forms suggested by his Honour. That's the first point. The second point is that my learned friend's submissions put to your Honour firstly that ***Re Neate*** did not apply and secondly that there was no utility in making the order. Now if that was right, your Honour, why were we arguing about it? In my respectful submission, these orders were perfectly reasonable and should not have been the subject of contest having regard to both parties' obligations under s 56 mandating the just, quick and efficient resolution of the proceedings. In my submission the builders should pay my clients' costs of the motion or in the alternative that the costs of that motion be costs in the Court of Appeal. May it please, your Honour.

HIS HONOUR: What do you say, Mr Bland?

BLAND: Your Honour, my friend submitted in the other motion that because I was seeking an indulgence I would be required to pay his costs regardless. The indulgence has been sought by my friend in respect of a matter which wasn't raised in front of his Honour Judge Phegan and although there was no critique of the instructing attorneys and the counsel in front of his Honour Phegan DCJ in the circumstances I submit that because they have had to come back and amend and change and that there was an arguable position, in my submission, about whether those orders were proper orders to be sought, then my friend should pay our costs of that notice of motion, because it is him seeking the indulgence for the convenience of his client.

NEAL: The only thing I would just say briefly in relation to that, your Honour, is that one of the orders that we sought to include the quantum meruit order in the final orders was an order that in fact assisted my friend in the appeal and in respect of which ultimately there was consent yesterday for the first time.

38. In due course I am going to order each party to pay their own costs of this application for the following reasons. In my opinion there is merit in both arguments. The owners have sought an indulgence of the court. It was an oversight. Once again I am not being critical of it, but they have had to come back to correct Phegan DCJ's orders. On the other hand, the resistance to the application was not cogent and arguably, as Mr Neal said, did not assist in getting to the just, quick and cheap resolution of the issues in the proceedings under s 56 of the *Civil Procedure Act*.

39. The formal orders which I make on the Notice of Motion dated 2 July 2008 are pursuant to r 36.17 of the *Uniform Civil Procedure Rules 2005*, I vacate orders 2 and 3 made by Phegan DCJ on 8 April 2008 and instead of those orders I make the orders listed in paras (a), (b), (c) and (d) of para 1 of the Notice of Motion.

40. Pursuant to r 36.17 of the *Uniform Civil Procedure Rules* I make order 2 in the Notice of Motion. I make orders 3 and 4 in the Notice of Motion. Each party will bear their own costs of the motion.

NEAL: There are just to matters if I may, your Honour. The first is we would like to order a transcript of your Honour's judgment, if that is possible. We may need it elsewhere.

HIS HONOUR: Yes.

NEAL: The second point is this, your Honour, as your Honour knows if we're in the Supreme Court and we wanted to take these orders out we would go down to the registry with your Honour's associate and have the orders sealed immediately. I have a clear set of the final judgment and orders which reflects annexure A to the motion here. Could I just hand that up to your Honour. These are the final judgment orders that were annexure A to the motion.

HIS HONOUR: Just let me read it. Yes?

NEAL: Your Honour will see at the top date entered, that's been changed, and also on page 3 the date has been changed, just in my handwriting.

HIS HONOUR: Yes.

NEAL: Your Honour, given the trouble that we had with the registry last time in terms of getting a sealed copy could I respectfully ask that if your Honour's associate has some time that we go down when your Honour rises with the file and these orders to the registry and we can have them stamped today so that there's no problem with having them taken out and enforced. I'm not sure whether your Honour is sitting further today in another case, but if your Honour--

HIS HONOUR: I will be available during the day. Mr Bland, is there any reason why that shouldn't happen?

BLAND: No, your Honour.

HIS HONOUR: It is really the enforcement of order 3 in the Notice of Motion, isn't it? The registrar sealing forthwith annexure A.

NEAL: Yes. All we want, your Honour, is--

HIS HONOUR: Is this a Form 43? It is.

NEAL: Yes, it is. All we want is a stamp because once that happens in accordance with r 36.11 is these orders will be taken to have been entered and we will then have a properly accurate sealed copy of the final orders made.

HIS HONOUR: Yes, I understand. I think the only thing I will do is to amend one of the orders I made when I made order 3 of the notice of motion.

NEAL: Yes.

42. I make order 3 in the Notice of Motion, except that I note that the form which is to be sealed forthwith has been amended so that the second date entered reads 15 July instead of 14 July on page 1 and the date of the document is dated 15 July on page 3.

I will give that to my associate who can accompany you in due course.

NEAL: Does your Honour suggest then now that when your Honour rises I can go to the registry with your Honour's associate?

HIS HONOUR: No, you will have to negotiate that with her, Mr Neal, rather than me.

Mr Bland for the Plaintiffs/cross defendants
Mr Neal for the Defendants/cross claimants