Wallace v. Brian Gale Associates [1997] ABC.L.R. 03/07

J U D G M E N T : **HHJ HUMPHREY LLOYD Q.C.** High Court, Official Referees Business. 7th March 1997.

1. In this action the plaintiffs, Mr and Mrs Wallace, claimed damages from the defendants, Brian Gale & Associates, for negligence in surveying 19 Ash Close, Merstham, Surrey. Mr and Mrs Wallace had bought the property in 1992 on the strength of a survey carried out by the defendant firm which had been retained by the couples' mortgagees. Literally on the moment of moving in Mr and Mrs Wallace saw that the floors sloped and that the house was structurally unsound. This shocking discovery would have been distressing for anyone but it was particularly tragic for Mr and Mrs Wallace who had committed all their savings towards buying the house and were therefore unable to carry out remedial works and had to live in a severely defective house. They commenced proceedings in 1994 which eventually came to trial in July 1995 when a settlement was sensibly arrived at. The terms of the compromise were embodied in a Tomlin Order dated 7 July 1995. The wording of the order and of the Schedule to it are important and I shall therefore set out most of both in full. They read as follows:

"AND TERMS OF SETTLEMENT HAVING BEEN AGREED BETWEEN THE PARTIES.

BY CONSENT,

IT IS ORDERED that:

1. *All further proceedings in this action be stayed upon the terms of settlement agreed between the parties set out in the Schedule herein except for the purpose of carrying the said terms into effect and that there be liberty to apply for the said purpose.*
2. *The sum presently standing to the credit of the Defendant paid into court on 4th November 1994 be paid out to the Defendant forthwith together with interest accrued thereon.*
3. *There be Legal Aid taxation of the Plaintiffs' costs from 31st October 1994 and of the Defendant's costs under certificate no. 02/01/94/29547/R from 8th December 1994 and under certificate no. 02/0195/13305/H from 12th June 1995 and it is further ordered that paragraph 6 of the Schedule shall apply as an order of the court.*

SCHEDULE

1. *WORKS*

   The Defendant agrees forthwith to procure the carrying out of the works specified in the Performance Specification and Schedule of Works annexed hereto marked "A", and in addition the screeding of the kitchen floor save beneath fixed units, to a good and proper standard to the property known as and situate at 19 Ash Close, Merstham in the county of Surrey ("the property") at the Defendant's costs ("the works"). The works are to be carried out as soon as reasonably practicable subject to the arrangements to be made under paragraph 2 and 3 below.

2. *VACATION AND REMOVALS*

   The Plaintiffs agree to vacate the property for the purpose of the carrying out of the works for such reasonable period as is required for the same to be completed, such vacation to take place from a date not more than 1 calendar month from the date on which the Plaintiffs receive written notice from the Defendant that the works will be commenced. The Defendant agrees to procure for the Plaintiffs at its own cost reasonable accommodation of a similar nature to the property within : mile of the property for the said period. The Defendant further agrees to procure for the Plaintiffs at its own cost (a) the removal and storage of such goods as the Plaintiffs may reasonably require to be removed and stored during the course of the works and (b) the removal and transport of such other goods as the plaintiffs may reasonably require to be removed and transported to the said substitute property during the courser of the works, and on completion of the works also (c) the removal from storage and transport to the property of the goods so stored, and (d) the removal and transport to the property of the goods then at the substitute property.

3. *SUPERVISION*

   The works shall be under the controlling supervision of such engineer as shall be agreed and appointed by the parties within 2 months of today's date and the costs of appointment and supervision shall be borne by the Defendant. In default of agreement and appointment as aforesaid the parties shall apply to the President for the time being of the Institution of Civil Engineers or his deputy (and if 1 party shall not join with the other in so applying within 7 days of receipt of a written request therefor then that other shall apply alone) for the appointment of an engineer for the said purpose. The said engineer shall, inter alia, ensure that the works comply with the relevant codes of practice, the performance specification, and the contractors' proposals as approved by James Brian Pyle, and shall certify the date of completion of the works ("the completion date") and notify the parties thereof in writing.

4. *CERTIFICATE*

   Upon completion of the works the Defendant shall at his own expense procure from James Brian Pyle of 69 London Road, Redhill in the county of Surrey and Engineer's Opinion to the effect that the property is structurally stable and that the foundations of the property and the soil beneath are stable, adequate and effective to support and to continue to support the property. Such Opinion shall be addressed to the Plaintiffs or to such other person or persons as may be nominated by them and shall be effective as regards the heirs assigns and transferees of the Plaintiffs and each of them. In the event that the said James Brian Pyle be dead or otherwise incapacitated upon completion of the works the Defendant shall procure in the same manner a similar Opinion from an engineer similarly qualified and of similar seniority and experience to the said James Brian Pyle.

5. *.....*

6. COSTS

6.1 The Defendant agrees to pay the Plaintiffs' costs of the action to be taxed if not agreed subject to the provisions set out hereunder.

6.2 The provision at 6.1 above is not to be enforced without the leave of the court save in the event that a finding of liability is made by the court in the proposed proceedings mentioned at paragraph 6.3 hereunder, ...

6.3 The said proposed proceedings are an action or actions by the Defendant against the Defendant's professional indemnity insurers and/or the Defendant's brokers in respect of such insurance, whereby the Defendant will claim to be indemnified against such loss and damage as it may have suffered in connection with the proceedings herein.

6.4 The Defendant's obligation to pay the costs of the action herein pursuant to a finding of liability as mentioned above shall be limited to those sums actually recovered by the Defendant on account of the Plaintiffs' costs herein but so that the Defendant shall use all reasonable endeavours to commence and to carry on the said proposed action and if successful to recover the sum or sums awarded thereunder.

6.5 .....

7. INFORMATION

The Defendant shall keep the Plaintiffs' solicitors informed in writing of the commencement and progress of the proposed proceedings mentioned at paragraph 6.3 above once every 3 months commencing on 1st September 1995."

2. It will be seen that the amount that had been paid into court by the defendant was paid out so as to enable the defendant firm to finance the execution of the remedial works. The scheme was however not implemented without difficulty. Problems arose over the appointment of the supervising engineer. Ultimately John Marsh & Associates was appointed. There were further delays in the selection of suitable contractors so that the remedial works would not in any event have been completed by Christmas 1995. They had therefore to be postponed until 1996. Indeed Mr and Mrs Wallace did not move out until March 1996 and were not able to return until early May 1996. On their return defects were found in the work which had to be made good. The defendant was not able to pay the fees of the supervising engineer or Mr J.B. Pyle, as a result of which a certificate of completion and an opinion were not issued as required by the terms of settlement.

3. According to the affidavit evidence (from the plaintiffs' solicitor and Mr McQuillan) Mr and Mrs Wallace remained remarkably patient throughout the lengthy period from the settlement of the action and apparently maintained a friendly and cordial relationship with the defendant firm and in particular Mr Brian Gale. However it was not surprising that Mr and Mrs Wallace's solicitors had to correspond with the defendant's solicitors in order to keep the defendant to the terms of the agreement, including trying to obtain information from the defendant about the proposed proceedings against its professional indemnity insurers (which have apparently still not been commenced even though new solicitors were instructed on behalf of the defendant in April 1996). The partnership comprising the defendant firm was dissolved in 1996. (Mr John McQuillan was represented by Mr Alain Choo-Choy and Mr Brian Gale appeared in person.)

4. On 14 January 1997 a summons was issued pursuant to the provision for liberty to apply contained in paragraph 1 of the Order of 7 July 1995 whereby Mr and Mrs Wallace sought a number of orders. By the time the application was heard by me on 28 February 1997 the defendants had procured the certificate required by paragraph 3 of the schedule to the order and the opinion required by paragraph 4 of that schedule, both in forms acceptable to the plaintiffs. Accordingly no such orders had to be made. Similarly undertakings were given by the two defendants to inform the plaintiffs' solicitors about the progress of the proceedings so again no order was made as sought in the summons. However the plaintiffs ask in paragraph 4 of the summons for: *"A declaration that the plaintiffs' costs of and concerned with the implementation of the order of His Honour Judge Humphrey LLoyd QC of 7 July 1995 including the matters set for in the schedule thereto are to be borne as set forth at paragraph 6 thereof."*

5. In April 1996 the defendant's solicitors had indicated, that, on the taxation of the plaintiffs' costs in the action, they intended to take the point that the defendants were not liable for any costs incurred after the date of the Tomlin Order. Rather than pursuing this point on taxation, the plaintiffs were sensibly advised that the point should be determined prior to taxation, as a matter of principle. Mr Charles Joseph for the plaintiffs made it clear that such determination would not disentitle the defendants from maintaining that some of the costs incurred after the date of the Tomlin Order might not be recoverable on a taxation on other grounds. The issue raised by paragraph 4 of the application therefore concerns the meaning of the phrase "costs of this action". It has not apparently been considered recently and I am indebted to both counsel for their clear and careful submissions on a question which is not as straightforward as it might first appear.

6. Mr Joseph for Mr and Mrs Wallace submitted that when, under the terms of a Tomlin Order (such as that set out in paragraph 1 of the order of July 1995 and paragraph 6 in the schedule to it), it is provided that the defendant is to pay the plaintiff's costs of the action, the defendant continues to be liable after the date of the order for the costs of implementing the order since the action does not end when the order is made, as it is only stayed and may be revived under the express provision whereby either party can apply for the purposes of securing the carrying into the effect of the terms agreed and embodied in the order. Accordingly Mr Joseph submitted that if it were necessary (as it has been) to make such an application then the court has jurisdiction to deal with the costs of implementing the order as they necessarily form part of the costs of the action, as they would not otherwise have been incurred. In support of his submission he relied first, on ***Krehl v. Park*** (1875) LR 10 Ch. 334. In that case

an order had been made 25. *"directing specific performance of the agreements for sale, ... directing an inquiry whether any and what damage had been sustained by the plaintiffs by reason of the act of the defendant complained of in the plaintiffs' bill, and ordering the defendant to pay the cost of the suit; liberty to apply being given, but further consideration not being adjourned."*

7. The plaintiffs maintained that they had suffered loss of about ,13,000. On the inquiry the Chief Clerk disallowed the bulk of the items but assessed the plaintiffs' damages at ,1,425 10s 8d. Although Vice-Chancellor Bacon dismissed an application to vary that decision the defendant was successful on an appeal as a result of which the plaintiffs obtained no damages at all. The defendant then asked the Vice-Chancellor for an order for the plaintiffs to pay the costs of the inquiry as to damages. That application was refused and an appeal was made to the Lords Justices. Although the appeal succeeded, in part, James LJ said:- *"I am of opinion that the counsel for the respondents, the plaintiffs in the suit, are well-founded in saying that, according to the well established practice of this court, the cost of suit when given to a party are not confined to the costs of suit up to the hearing, but include the cost of all accounts and enquiries requisite for carrying out the decree: nor are these latter costs costs for subsequent consideration. That is the general rule, and it is very important that that general rule should not be interfered with. ...."*

8. However he considered that in the circumstances of the case it was abusive and oppressive to the defendants to have to pay the costs of the inquiry. He concluded his judgment by saying: *"The true meaning of the order is not that the defendant was to pay the costs if damage should result, but the inquiry was to be at the cost of the defendant, and if that had been properly and fairly and reasonably carried out, the plaintiffs would have had the costs of the whole inquiry, according to the general practice of the court, although it resulted in finding nothing to be due in respect of damages."*

Mellish L.J. said:- *"I am of the same opinion. The rule which appears to be established is, that where costs of suit are given generally by the decree at the hearing, the subsequent costs of working out the directions of the decree will be included. I am of opinion that no distinction can be made between a decree and a decretal order of this kind by which the costs of the suit generally are given and, according to the case of* ***Quarrell v. Beckford*** *1 Madd. 269, it appears to make no difference if one of the inquiries turns out frivolous that no damages are given to the plaintiffs in respect of it. I am therefore of the opinion that the plaintiffs are entitled to so much of the costs that were properly incurred in carrying out, or endeavouring to carry out the enquiry directed by the decretal order."*

9. Mr Joseph also referred to ***In re Lavey*** [1920] 3 KB 625. In that case an order had been made in favour of a trustee in bankruptcy that the bankrupt's wife should account on oath before a Registrar for the furniture on the bankrupt's premises and to pay the taxed costs of and incident to the motion. It was further provided that, with a view to the furniture being bought by or on behalf of the wife from the trustee at a valuation, an independent valuer was to be appointed by the parties and upon the wife undertaking not to part with or dispose with of the furniture execution should not issue except with leave. The furniture was valued by Knight Frank & Rutley and ultimately bought by the wife. On the taxation of the trustee's solicitors' bill of costs the taxing master disallowed the fee of ,40 10s 4d paid by the trustee to the valuers. Horridge J. on review of the taxation held that the fee formed part of the costs incurred in working out the order. He said:- *"It is therefore quite clear that carrying out that portion of the order was working out the order within the language of Mellish J. in* ***Krehl v. Park*** *where he said: "The rule which appears to be established is that where costs of suit are given generally by the decree at the hearing, the subsequent costs of working out the directions of the decree will be included.""*

10. Neither of these cases were of course concerned with the interpretation of a Tomlin Order. Mr Joseph referred to ***Copeland v. Houlton*** [1955] 1 WLR 1072 in which a Tomlin Order had been made whereby the defendant agreed to convey certain property to the plaintiff. Paragraph 3 of the schedule provided that: "*The documents necessary to carry out the foregoing terms shall be in such form as counsel for the plaintiff and counsel for the defendant shall agree and in default of agreement as the judge shall direct."* On a legal aid taxation of the plaintiff's costs the taxing master disallowed the costs of the conveyancing work undertaken to give effect to paragraph 3 of the schedule. On appeal Wynn-Parry J. held that the costs of the conveyancing work were recoverable since under section 1(5) of the Legal Aid and Advice Act 1949 legal aid included "all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect where compromise to avoid or bring to an end any proceedings." (The present legislation is in indistinguishable terms.) Mr Joseph therefore submitted that it would be odd if the costs of implementing the order might be recoverable upon a legal aid taxation but not be recoverable by the plaintiffs from the defendants. I shall return to ***Copeland v. Houlton*** later.

11. Mr Choo-Choy's submission for Mr McQuillan was that the terms of the Tomlin Order had evidently been carefully drafted to apportion liability for costs that might be incurred after the order had been made, e.g. it specifically referred to certain work and other commitments which were to be done or borne by the defendant at its own cost or expense. The agreement embodied in the order was therefore to be read as it stood: the costs of implementation were not mentioned in the order and therefore were to be the liability of the plaintiffs. However he accepted that if it were necessary for an application to be made under the provision for liberty to apply in order to secure the enforcement of any part of the order because of default on the part of the defendant then the costs of enforcement would be dealt with as part of that application.

12. However his principal submission was that paragraph 6 of the schedule in referring to the defendant's liability for the costs of the action had to be construed as part of the terms of the settlement agreement between the parties and that the normal rules for the construction of contracts were therefore applicable. Unless the schedule expressly or by necessary implication provided for "the plaintiffs' costs of and concerned with the implementation of the order" (which it did not) the declaration should be refused. In support of his proposition he relied upon certain passages in The Law and Practice of Compromise, 4th edition, 1996 by Mr David Foskett Q.C. e.g.:-

"5-02: Subsequent to the conclusion of a compromise, questions may arise as to its meaning and effect. This can occur even when those with the highest calibre of legal expertise have been responsible for the drafting of the agreement. The task is to determine the common intention of the parties by construing the agreement.

If an agreement has been reduced to writing, whether purely as a written contract or as an agreement embodied in a consent order or judgment, the intention of the parties must be construed by reference to the document or order itself: extrinsic evidence of what may or may not have been in the minds of the parties is not admissible for this purpose."

"5-09 As already indicated, the general approach to the construction of a contract of compromise. Since a consent order or judgment is itself evidence of the agreement it embodies or reflects, there would be no objection in principle to evidence of the terms of that agreement being received to assist in resolving any ambiguity in the terms of the order or judgment. Where, however, there is a patent conflict between the terms of the order and the antecedent agreement, and the conflict is not susceptible of resolution by rectification of one or other, the question arises as to which would prevail. It is difficult to give an answer which would necessarily apply in every situation of such an unusual nature, but overall, it is submitted, the order or judgment should prevail. As the final stage of the process by which the parties have sought to put to rest their previous disputation, they must be taken to have submitted themselves consensually to the jurisdiction of the court. The consent order or judgment then falls to be interpreted in the way in which an order or judgment of a like nature, but not expressed to be by consent, would be interpreted. If there is any doubt about whether the order or judgment is within the powers of the court, it should be construed as being limited to the jurisdiction of the court and be enforced only that extent." ....

"5-21 Whilst a court will always deal with the question of costs in contested proceedings, it is, of course, something for the parties to resolve by agreement if they settle those proceedings. If they do not mention it at all in their negotiations or their agreement, the only conclusion would seem to be that each side must bear its own costs. It is not necessary, in order to give efficacy to the agreement, for the court to imply a term relating to costs."

13. This latter paragraph continued with a summary of ***Somerset v. Ley*** [1964] 1 WLR 640, upon which Mr Choo-Choy also relied in support of his submission that ***Krehl v. Park*** established no more than a rule of practice applicable to the interpretation of orders made by a court and that it had no application to consent orders which were to be construed as consensual agreements. In ***Somerset v. Ley*** there had been a settlement of a Chancery application which had been adjourned by Cross J. to be heard in chambers. Although the compromise made provision for the payment of the plaintiff's costs it made no express provision for the fees of leading counsel who had appeared for the plaintiffs on the application. A certificate for two counsel had not been requested from Cross J. when he approved the order. Cross J. held that no term could be implied into the settlement that the fees of leading counsel should be included on taxation on the ordinary *"officious bystander"* test. Mr Choo-Choy therefore submitted that you could not read into the order of July 1995 any provision whereby the costs of the action were to be read as including such costs as might be incurred by the plaintiffs in securing the implementation of the order or policing it.

14. Mr Choo-Choy also referred to ***Lancaster v. Lancaster*** [1896] P.75 and 118. It concerned a suit for judicial separation which had been settled on terms which included provisions for: *"A deed of separation to be entered into with all usual clauses, to be settled by Mr Bayford. .... Mr Lancaster is to pay Mrs Lancaster's costs of suit, to be taxed ...." .... These terms may be made a rule of court."*

15. The deed was settled but Mr Lancaster refused to pay to Mrs Lancaster the costs of settling the deed. The President (Sir F. H. Jeune) ruled in favour of Mr Lancaster. He said:- *"The agreement is a substantive agreement which (apart from its being made a rule of court) can be enforced by specific performance. As there is a term that it should be made a rule of court, it could be made a rule of court in and enforced by any division of the High Court. It appears to me, therefore, that the agreement is not strictly in this suit, nor are the carrying out of it, and the enforcement of it, steps in this suit. It follows that the costs of settling the deed are costs which the parties might have provided for by agreement but have not, and that I have no jurisdiction over them."*

16. It seems that the appeal was dismissed fairly summarily, for the Court of Appeal, having heard Sir Edward Clarke Q.C., did not call upon the respondents. The judgments are so short that they may be set out in their entirety:-

"Lindley L.J. In my opinion we cannot grant this application. The expression "costs of suit" is a technical one. It is well understood by the taxing masters and by everyone who is familiar with the practice of the Court, and I think we ought not to stretch its meaning. The true ground of the decision is, I think, to be found in the last sentence of the judgment of the learned President, where he said: "the costs of settling the deed are costs which the parties might have provided for by agreement, but have not." It would be a bad precedent if we were to allow these costs. The appeal be dismissed.

Kay L.J. I agree, and for the same reasons. If the parties intended that these costs should be included under "the costs of suit", they should have added some such word as these: "including all her costs of and incident to the compromise." If they had done this, the costs of and incident to the preparation and settlement of the separation deed would have been included; but, in the absence of such words, it would be a very strong thing to say that those costs are "costs of suit."

A.L. Smith L.J. concurred."

17. Based upon this authority Mr Choo-Choy therefore argued that the costs of implementation of the order were also *"costs which the parties might have provided for by the agreement but have not".*

18. ***Lancaster v. Lancaster*** had been relied on by the taxing master in ***Copeland v. Houlton*** and was cited to Wynn-Parry J. together with ***Krehl v. Park.*** Wynn-Parry J observed that the action in ***Krehl v. Park*** was one in which it was frequently necessary that accounts should be taken and made, and went on: *"I can see no difference in principle between such matters and the costs of the conveyance necessary to carry out the order even though it be a consent order in the Lord Tomlin form."*

He then said:- *"As I read the judgments in **Lancaster v. Lancaster**, that of the President and those of the Court of Appeal, the matter was decided on the basis that the costs in question could not be regarded as costs properly incurred in working out the order. Upon that basis there can be no conflict between **Lancaster v. Lancaster** and the earlier case of **Krehl v. Park.** It is quite impossible to imagine that such learned judges as considered the problem in **Lancaster v. Lancaster** did not have clearly in their minds the rule as stated by the Court of Appeal in **Krehl v. Park.** They were dealing with a very narrow and particular problem. All that they did, as I think, was to say that in that case, applying the general rule, the costs could not be allowed because they could not be regarded as costs of suit or costs of working out the order."*

19. Mr Choo-Choy also referred to ***Horizon Technologies International Ltd v. Lucky Wealth Consultants Ltd*** [1992] 1 WLR 24. He therefore contended that it must have been apparent to the plaintiffs and their legal advisers that work would have to be done after the making of the order in order to secure its implementation and that such costs could therefore have been expressly included in the order; that the parties did however deal with other costs of carrying into effect the terms of the settlement and expressly agreed that they should be borne by the defendant; it was therefore not necessary to imply any further term that the plaintiffs' costs or concerned with the implementation the order were to be borne by the defendant firm, since such an implication would disturb the balance of the compromise; as a matter of language the word "action" plainly did not include the implementation of steps which were to be taken after the action had been stayed; and to grant the declaration would be to rewrite the agreement reached between the parties. He also argued that ***Re Lavey*** not being a consent order was of no assistance and that Wynn-Parry J. had misunderstood the decision of the Court of Appeal in ***Lancaster v. Lancaster*** and his comments were both obiter and wrong.

20. Mr Gale adopted Mr Choo-Choy's submissions on the law and added that, so far as he was concerned, the agreement was one which had been carefully arrived at and that, for example, it could not have been undertaken without the withdrawal of the money in court which indicated how important it was that there should have been no indeterminate exposure to further costs.

21. I accept Mr Choo-Choy's basic proposition that the terms of a Tomlin Order have to be construed as an agreement between the parties. However where the terms of settlement of an action are embodied in an order of the court and provision is made in that order for liberty to apply to the court for the purposes of carrying the order into effect, the terms must also be construed as if it were an order (as indeed it is). This approach is also consistent with that suggested by Foskett on Compromise as appropriate where there is a conflict between the terms of the order and a prior agreement, for there the author states at paragraph 5-09:

"The consent order or judgment then falls to be interpreted in the way in which an order or judgment of like nature, but not expressed to be by consent, would be interpreted."

22. I also consider that such an approach is also consistent with the dicta of Beldam L.J. in ***Cornhill Insurance Plc v. Barclay & ors. (***1992) C.A.T. 948 (extracted in footnote 32 to the same paragraph) where he said:- *"[When] the court is asked to make an order enforceable by the parties to give effect to their agreement, the parties should in the absence of express reservation be taken to have intended that the order has the same effect as it would have had if made after the court had resolved the underlying issues between them."*

23. What therefore is the scope and effect of the phrase *"the costs of the action"* as used by these parties in the agreement embodied in this Tomlin Order? It is in my judgment important that the action was not brought to an end by the order but merely stayed and remained therefore in existence, albeit dormant. It could be revived under the provision for liberty to apply to carry the terms into effect. The compromise of the action would not therefore be finally achieved until all the terms had been fully and effectually performed. The proceedings had therefore to remain alive, since the alternative course would have been to have required a new action to be brought to enforce the terms. Such a course is of course undesirable, not only on practical grounds but for reasons of public policy, since it leads to further litigation rather than to a cessation of it.

24. In my judgment therefore, as a matter of plain English, the term "the costs of the action" when used in a Tomlin Order (such as that in this action) are capable of including costs incurred after the date of any order staying the action where that order also envisages that the action may be revived for the purposes of carrying the terms into

effect and, as a result, costs will have been incurred for that purpose and by the events which gave rise to the need to make that application.

25. However the agreement and order has to be read as a whole and such an interpretation might of course be displaced by other terms. The parties' intention must derived from the document in its entirety. I do not however consider that the remainder of the agreement is inconsistent with or conflicts with such an interpretation of paragraph 6 of the schedule. The agreement in a number of places does of course expressly state that the work or other activities are to be carried out or procured by the defendant "at the defendant's own cost" (see paragraph 1), "at its own cost" (see paragraph 2), or "at his own expense" (see paragraph 4) or that the costs are to be borne by the defendant (see paragraph 3). I do not consider that these express terms mean that the term "costs of the action" is necessarily to be read as referable only to costs incurred prior to the date of the settlement.

26. First, in ***Horizon Technologies International Ltd v. Lucky Wealth Consultants Ltd*** Sir Maurice Casey in delivering the advice of the Privy Council referred at page 30H to *"the manifest intention of the parties that the defendant's obligation - fundamental to the compromise - was to pay the instalments, the Tomlin Order being no more than a convenient procedure for its enforcement."* In my judgment the plaintiffs were clearly going to be inconvenienced by the necessity to carry out the remedial work. The manifest intention of the parties was that the plaintiffs were not going to have to foot any bills thereafter, whether in having to pay the work to be done or having to pay for a supervising or other engineer to ensure that the house was structurally sound, or otherwise. They were dependent entirely upon the defendant to put the house right and to get whatever was necessary done at the defendant's own expense. I cannot believe that it was envisaged that the plaintiffs would have been further out of pocket. In my view, looking at the terms of the order and of the agreement, this was fundamental to the compromise.

27. Secondly, I see nothing in the agreement which suggests that the plaintiffs should be put to the trouble of establishing what were costs of enforcement as opposed to the costs of implementation so that the former (but not the latter) would be recoverable on a further application if the defendant were in default. In practice it would be difficult to differentiate between those categories of cost. Both Mr Gale and Mr McQuillan maintain there was no default: they did their best and were let down by others. From the plaintiffs' point of view the result would be the same: they would have to press to get the work done.

28. Thirdly, phrases used such as "*at his own cost"* or "*at his own expense"* are not or are not necessarily confined to costs or expense incurred by a party such as the defendant, but might include costs primarily incurred by the plaintiffs which fall ultimately to be borne by the defendant. Accordingly the provisions which specify that certain work or activities are to be the defendant's liability does not in my judgment preclude the defendant also being liable for costs incurred by the plaintiffs to secure the execution of the work which the parties agreed had to be carried out in order to give the plaintiffs a sound house. If such costs included costs incurred in order to hold the defendants to their obligations, then in my judgment they also form part of the costs which had to be borne by the defendant under the express terms of the agreement. The defendant's interpretation of the agreement unrealistically supposes that the plaintiffs would remain passive spectators viewing the rectification of their house with saint-like patience.

29. If therefore the questions posed by the plaintiffs' application had to be answered solely as a matter of the interpretation in the agreement I would have had little hesitation in answering them in the plaintiffs' favour either on the express terms of the agreement relating to the allocation of costs or expense for the obligations required to achieve the execution of the work and their supervision by engineers or, if necessary, by the implication of a term or terms to that end. Mr Joseph however made it clear that the plaintiffs did not seek to imply any terms into the agreement and it is therefore not necessary for me to do so. They are however the reasons why I consider that this agreement read as a whole does not require the words "costs of this action" to exclude the costs of implementing the order.

30. Am I nevertheless bound by authority to give to the words *"costs of this action"* the meaning for which the defendants contend? In my view there is plainly a conflict between ***Krehl v. Park*** and ***Lancaster v. Lancaster.*** Wynn-Parry J. did not have to resolve that conflict in ***Copeland v. Houlton.*** It is tempting to follow the distinction (or explanation) there made, but I do not consider it satisfactory to do so. Since I consider that Mr Choo-Choy is right in his submission that the ratio of ***Lancaster v. Lancaster*** is that the expression "costs of suit" is a technical one and excludes "costs which the parties might have provided for by agreement but have not". It could thus exclude costs which might be incurred in implementing any orders required by the settlement. ***Krehl v. Park*** on the other hand clearly holds that where "costs of suit" include "the subsequent costs of working out the terms of the order". I do not consider that it is possible to reconcile the decisions on the basis, suggested by Mr Choo-Choy, that the words "costs of suit" or "costs of action" may have one meaning where the order is not made by consent but have another meaning where embodied in a Tomlin Order. This seems to me to be wrong in principle. It also conflicts with the understanding of others, e.g. as set out in paragraph 5-09 of The Law of Compromise and the dicta of Beldam L.J. to which I have already referred. ***Lancaster v. Lancaster*** is capable of being distinguished from ***Krehl v. Park*** but only on the grounds that the words "costs of this action" or "costs of suit" do not apply to costs the subject of a compromise where future costs would not inevitably flow from the terms of the compromise but would require a further agreement as to their allocation as they might be borne by either party but I can perceive no other ground. If there is such a ground for distinguishing Lancaster v Lancaster it is tenuous and not rational or

satisfactory. I therefore consider that as the decisions are irreconcilable ***Krehl v. Park*** is to be preferred as more consistent with principle and practical commonsense. Furthermore ***Lancaster v. Lancaster*** does not feature in the notes of the White Book at paragraph 62/B/132 where ***Krehl v. Park*** and the other two cases relied by Mr Joseph are cited in support of his propositions. ***Lancaster*** is noted only at paragraph 62/B/40 under the heading "Family Division" and is mentioned in a footnote on page 235 of The Law of Compromise. A settlement is intended to avoid the need to return to court and, in the context of a Tomlin Order, it would be inconvenient, to say the least, if the party who had secured an undertaking in relation to costs had to return to court only to recover the costs of enforcement where such costs would be incurred inevitably as the costs of securing compliance with the terms of the order. It would be as if a fresh action had to be started.

31. I do not therefore consider that I am bound to reach a conclusion contrary to that which I consider to be the correct interpretation of this order. The plaintiffs are entitled to the declaration for which they ask.

Mr Charles Joseph appeared for the plaintiffs instructed by Copley Clark & Bennett.
Mr Alain Choo-Choy appeared for Mr John McQuillan, a former partner in the defendant firm, instructed by Attersolls.
Mr Brian Gale, another former partner, appeared in person.