Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan No 61233 v Arcidiacono
Medium Neutral Citation:	[2018] NSWSC 1260
Hearing Date(s):	25 July 2018
Date of Orders:	14 August 2018
Decision Date:	14 August 2018
Jurisdiction:	Equity
Before:	Darke J
Decision:	Leave to file cross claim refused.
Catchwords:	PRACTICE AND PROCEDURE – pleadings – application for leave to file cross claim – leave to file cross claim refused because proposed claims untenable and bound to fail – clear that legal easements were validly created in 1839 – entitlement to set aside orders made ex parte resides in the person not given the opportunity to be heard – right is personal not proprietary in nature – cross-claimants lack standing to seek to set aside orders made in earlier proceedings
Legislation Cited:	Civil Procedure Act 2005 (NSW), ss 56, 58 Conveyancing Act 1919 (NSW), s 88K Real Property Act 1900 (NSW), ss 28I, 28K Uniform Civil Procedure Rules 2005 (NSW), rr 14.18, 14.28
Cases Cited:	BP Australia Ltd v Brown (2003) 58 NSWLR 322; [2003] NSWCA 216 Cameron v Cole (1944) 68 CLR 571 Doe ex diem Antil v Hodges (1835) NSW Sel Cas (Dowling) 701; [1835] NSWSupC 36 John Alexander's Clubs Pty Ltd v White City Tennis

	Club Ltd (2010) 241 CLR 1; [2010] HCA 19
Category:	Procedural and other rulings
Parties:	The Owners – Strata Plan No 61233 (Plaintiff/First Respondent) John Anthony Arcidiacono (First Defendant/First Applicant) Anna Marie Arcidiacono (Second Defendant/Second Applicant) The Owners – Strata Plan No 17719 (Second Respondent) The Owners – Strata Plan No 73850 (Third Respondent) Registrar-General for NSW (Fourth Respondent)
Representation:	Counsel: Mr A Rogers (Plaintiff/First Respondent) Mr C A Sweeney QC with Mr R Higgins (Defendants/Applicants) Ms K Rees SC (Second Respondent) Mr D F Elliott (Third Respondent) Ms L Walsh (Fourth Respondent) Solicitors: Peter Prior & Co Solicitors (Plaintiff/First Respondent) Russells Law (Defendants/Applicants) Jane Crittenden Lawyer (Second Respondent) JS Mueller & Co Lawyers (Third Respondent) Office of the Registrar-General (Fourth Respondent)
File Number(s):	2016/187360
Publication Restriction:	None

JUDGMENT

Introduction

1 These proceedings concern a passageway that runs between the buildings at 65 and 71 York Street, Sydney. The buildings are located in the block bounded by Barrack Street (to the north), York Street (to the east), Clarence Street (to the west), and King Street (to the south). The passageway runs for some distance into the block from York Street.

2 The passageway is the land contained in Lot 1 in Deposited Plan 619464. It is owned by the defendants, Mr and Mrs Arcidiacono. They also own the building at 100 Clarence Street (Lot 1 in Deposited Plan 17418). The passageway extends into the block as far as part of the rear boundary of 100 Clarence Street.

3 The registered proprietor of 71 York Street, namely The Owners – Strata Plan No 61233, is the plaintiff in these proceedings. The plaintiff seeks, amongst other things, declarations that it has the benefit of various easements over the passageway and that such easements were omitted from the Register when the passageway was brought under the provisions of the *Real Property Act 1900* (NSW). The plaintiff also seeks injunctive relief to restrain the defendants from interfering with the exercise of its rights over the passageway. In the alternative, the plaintiff seeks the imposition of various easements over the passageway pursuant to s 88K of the *Conveyancing Act 1919* (NSW).

4 The proceedings were commenced by a Summons filed on 20 June 2016. A Statement of Claim was filed on 27 July 2016. The defendants filed a Defence on 12 August 2016. The time for the filing of the Defence had been extended to 19 August 2016.

5 Other proceedings were brought against the defendants at about the same time by the registered proprietor of 104 Clarence Street, namely The Owners – Strata Plan No 17719. 104 Clarence Street adjoins the defendants' property at 100 Clarence Street. At least in part, these other proceedings also involve questions concerning the existence of easements over the passageway, and whether easements should be imposed over it pursuant to s 88K of the *Conveyancing Act*.

6 The two proceedings have been case managed together and it is envisaged that they will ultimately be heard together, but no orders to that effect have yet been made. After the service of evidence, the proceedings were referred to mediation. The mediation occurred in May 2017. The Court was informed that an agreement was reached in principle, but did not proceed to a conclusion.

7 The defendants retained new solicitors and counsel in July 2017. Shortly thereafter the defendants foreshadowed that they wished to seek leave to file a

cross-claim in these proceedings. A draft cross-claim was served on 1 September 2017. On 4 October 2017 the defendants filed a Notice of Motion seeking leave to file the cross-claim.

The proposed cross-claim

8 The proposed cross-claim seeks relief against the plaintiff (71 York Street), the plaintiff in the other proceedings (104 Clarence Street), The Owners – Strata Plan No 73850 (65 York Street), and the Registrar-General. The latter two are not currently parties to either proceeding. Each of the proposed cross-defendants opposes the grant of leave to file the cross-claim. In essence, it is contended that various aspects of the cross-claim are untenable and bound to fail. It is further contended that to permit the cross-claim to proceed would cause unacceptable delay in the proceedings which are otherwise ready to be set down for hearing.

9 The defendants have indicated that they would alter certain parts of the draft cross-claim, including to delete one of the prayers for relief, and to add claims for declaratory relief against the Registrar-General. The proposed cross-claim, so adjusted, may be described as follows.

10 The first part of the pleading makes claims that two rights of way, purportedly created by instruments in 1839, are invalid or in any event not enforceable against the defendants as owners of the land affected (see paragraphs 2 to 13 of the pleading). The relevant land is the passageway (Lot 1 in Deposited Plan 619464) and a further passageway (Lot 1 in Deposited Plan 1052948) that runs some distance north from the end of the passageway towards (but not as far as) Barrack Street. The passageways are sometimes referred to as the 12 foot passageway and the 8 foot passageway respectively, based on their widths. The passageways were acquired by the defendants in February 2008.

11 The easements purportedly created in 1839 benefit 71 York Street in the first case (the Book 8 easement), and 65 York Street in the second (the Book 13 easement).

12 It is alleged that the persons who purported to create the rights of way in 1839 held no legal interest over either of the passageways and that the easements are thus not valid (see paragraphs 7 to 9). It is further alleged that even if the

easements are valid (presumably as equitable easements), they are not enforceable against the defendants because the defendants acquired title to the passageways without notice of the interest (see paragraphs 10 to 13).

13 The next part of the pleading makes claims against the Registrar-General in relation to the recording of the easements on various folios in the Register (see paragraphs 14 to 23). In particular, it is alleged that because of "the matters set out above" (presumably because the easements were not valid or enforceable), they were not subsisting interests within the meaning of Part 4A of the *Real Property Act*, the Registrar-General thus lacked power under ss 28I and 28K of that Act to record the easements, and the recordings constitute errors on the Register (see paragraphs 17, 20 and 22).

14 Paragraph 24 of the pleading raises, albeit in an unsatisfactory manner, a claim that the cross-defendants have abandoned any rights they may have over the relevant land.

15 The final part of the pleading makes claims that orders made in two earlier sets of proceedings commenced in this Court imposing easements over the passageways should be set aside because the owners of the passageways were not parties to those proceedings (see paragraphs 25 to 38).

The challenge to the 1839 rights of way

16 There is no dispute that the land in the two passageways was part of the subject matter of a Crown grant on about 20 May 1819 in favour of Mr Hugh Macdonald. The grant was of Allotment 2 of Section 52 of the Town of Sydney.

17 The evidence establishes that Mr Macdonald died on 9 September 1819, leaving a wife (Mary Ann) and four children. By his last will (dated 8 September 1819) Mr Macdonald left his estate both real and personal to two trustees (Henry Antill and John Campbell) to convert into money and divide equally between Mary Ann Macdonald and each child. However, Messrs Antill and Campbell renounced their executorship of the will on 23 August 1820. It appears that later in 1820 Mary Ann Macdonald obtained a grant of administration in respect of her husband's estate, but this grant was limited to his personal property.

18 There is evidence, in the form of a report of an early judgment of this Court in *Doe ex diem Antil v Hodges* (1835) NSW Sel Cas (Dowling) 701; [1835] NSW SupC 36, that in 1830 a decree was issued by the Court transferring trusteeship of Hugh Macdonald's estate to James Scott and Stephen McDonald (sic), the eldest son of Hugh Macdonald. It appears from the judgment that Mr Scott had died in the meantime, leaving Stephen Macdonald as the sole surviving trustee of the estate.

19 The change in trusteeship is further evidenced by the particulars obtained in an Indenture of Release entered into between Henry Antill, James Scott and Stephen McDonald (sic) in April 1830. The particulars refer to the decree of the Court in terms that indicate that it provided for the real and personal property of Hugh McDonald (sic) to be transferred by Henry Antill to James Scott and Stephen McDonald (sic) so as to be lawfully vested in their joint names and the survivor of them upon the trusts in the will of Hugh McDonald (sic).

20 It seems, therefore, that upon the death of James Scott (by 1835), the real property of Hugh Macdonald became vested in Stephen Macdonald as the surviving trustee.

21 There is evidence that after that time Stephen Macdonald, together with others, entered into a transaction involving the conveyance of the fee simple of the land that includes the two passageways. In September 1835 he, together with Mary Ann Rochford (the widow of Hugh Macdonald, who had married Bernard Rochford in 1828), Bernard Rochford, Thomas Coulson and his wife Elizabeth Coulson, granted a mortgage over the land to William Kerr (to be redeemed within three years). The evidence, including the terms of the Book 8 easement, shows that Elizabeth Coulson was the daughter of Hugh Macdonald.

22 The Book 8 easement formed part of an Indenture made on 30 September 1839. It is clear that by that time, Bernard Rochford had died. The Indenture was made between Mary Ann Rochfort (sic), Stephen Macdonald and his wife (also Mary Ann), Thomas and Elizabeth Coulson, Macquarie Macdonald (a son of Hugh Macdonald) and Campbell Leverston Macdonald (another son of Hugh Macdonald) of the one part, and Henry Macdermott of the other part. It is recited that those of the first part were "seised in fee simple in possession" of

the lands thereafter described and which were to be sold to Henry Macdermott. The lands to be sold included land on the west side of York Street bounded on the north "by a private road or passage twelve feet or thereabouts in width…". That is a reference to the 12 foot passage. Accordingly, the sale was of land immediately to the south of the 12 foot passage. This is or at least includes the land at 71 York Street.

23 The Indenture went on to provide that those of the first part assigned to Henry Macdermott a right of way and passage upon and over "the reserved Road or passage hereinbefore mentioned", namely the 12 foot passage. The Book 8 easement, if valid, created a right of way over the 12 foot passage in favour of the land that is now 71 York Street.

24 The Book 13 easement formed part of an Indenture made on 28 November 1839. The Indenture was made between Mary Ann Rochfort (sic), Stephen Macdonald, Thomas and Elizabeth Coulson, Macquarie Macdonald and Campbell Leverston Macdonald of the one part, and Hugh Nolan of the other part. It concerns the sale to Hugh Nolan of the land that is or at least includes the land at 65 York Street. (It is land bounded on the west by "a reserved road of eight feet in width" – the 8 foot passage; and bounded on the south by "a reserved carriage road of twelve feet" – the 12 foot passage). It is recited that those of the first part were "seised in fee simple in possession" of the lands so described. The Indenture provided that those of the first part assigned to Hugh Nolan a right of way and passage over "the two reserved roads or passages hereinbefore mentioned", namely the 8 foot passage and the 12 foot passage. The Book 13 easement, if valid, created a right of way over the 8 foot passage and the 12 foot passage in favour of the land that is now 65 York Street.

25 The defendants seek to challenge the effectiveness of the deeds to create valid easements over the passageways. Various points are raised. It is submitted that there is no evidence that those named in the deeds are the beneficiaries of Hugh Macdonald's estate, and no evidence that Mary Ann Macdonald is the same person as the Mary Ann Rochfort named in the deeds. It is submitted that if Mary Ann Macdonald remarried, under the law at the time she would be unable to deal with any property without her husband. It is submitted that there

is no evidence that the estate was ever distributed, it being clear that by 1839 the land had not been sold in accordance with the terms of the will. It is then said that the evidence leads to the conclusion that the land remained in the estate with Mary Ann Macdonald as administrator, but she did not enter into the deeds as administrator. Rather, it is apparent that she and her children entered into the deeds in their capacities as beneficiaries of the estate. The defendants submitted that the beneficiaries had no rights to possession of the land, and no other rights that would enable them either individually or together to confer any legal (or even beneficial) interests in the land. It is then submitted that absent a legal right the Macdonalds could not create the easements. The defendants submitted, in the alternative, that if any valid easements were created the interests were equitable not legal, and could not be enforced against a bona fide purchaser for value without notice. The proposed cross-defendants submitted that the defendants' challenges to the validity and enforceability of the easements were groundless and bound to fail.

26 It may be accepted that by 1839 the relevant land had not been sold in accordance with the terms of Hugh Macdonald's will. However, it is not the case that the land remained in the estate with Mary Ann Macdonald as administrator. The grant of administration to Mary Ann Macdonald did not extend to the real property in the estate. Moreover, the evidence is clear in my view that in 1830 the land was vested in James Scott and Stephen Macdonald as trustees, and following the death of James Scott (which had occurred by 1835) the land was vested in Stephen Macdonald as the surviving trustee. He thus became the legal owner of the land, entitled to possession of it.

27 Despite the variances in the spelling of some names, I do not think it can be seriously doubted that those of the one part in the deeds consist of Mary Ann Macdonald (the surviving widow of Hugh Macdonald), the four surviving children of Hugh Macdonald, and in each case a spouse of one of those children.

28 Neither is it accurate to say that Mary Ann Rochford and her children entered into the deeds as beneficiaries of the estate. That is contradicted by the statements in the deeds that those of the first part were "seised in fee simple in

possession" of the subject land. That would not be an accurate statement in relation to the interests of the beneficiaries under the will.

29 The terms of the deeds reveal an intention that there would be a conveyance of the totality of the interests in the land held by the conveying parties, both legal and equitable. For example, the deeds refer to "all the estate right title interest use trust property possibility claim and demand whatsoever both at law and in equity".

30 I do not think there is any reason to doubt that when the deeds were made the entirety of the legal interest in the subject lands resided amongst those of the first part. The deeds recite that they were seised in fee simple in possession. There is no evidence that Stephen McDonald had disposed of his legal title by the time the deeds were made. It is conceivable that there had been by that time a conveyance of the trust property in specie to the beneficiaries, but on either view the legal title was dealt with under the terms of the deeds, including by the creation of the rights of way over the passageways. I do not accept the submission that the conveying parties, whether individually or together, were unable to confer legal interests in the land.

31 The parties have had a more than ample opportunity to obtain evidence that bears upon the ownership of the land up to the time when the deeds were made in 1839. It was not suggested that further enquiries remain to be undertaken. The prospect that additional documents may emerge to complete the picture is small.

32 In these circumstances, and based on the evidence that has been marshalled, the defendants' challenges to the validity of the Book 8 and Book 13 easements are in my view untenable and bound to fail.

33 I should add that I also do not accept as arguable that when the defendants acquired the passageways in 2008 they were bona fide purchasers of the legal estates without notice of the Book 8 and Book 13 easements.

34 On 24 June 2003 the Department of Lands sent a letter to solicitors acting for the defendants concerning the 12 foot passage and the 8 foot passage. The letter sets out the results of an Official Search (No 35811) that had been

requested by the defendants. The letter notes (on page 2) the existence of the rights of way created in Book 13 and Book 8. Reference is made to the Book 13 easement being noted on the folio (at that time Folio Identifier 1/57659) for 65 York Street and the Book 8 easement being noted on the title for 71 York Street. The letter further refers (on page 3) to the fact that the right of the parties to the deeds of 1839 to grant a right of way on the 12 foot passage and the 8 foot passage had been accepted in earlier primary applications (55977 and 59407).

35 On 6 April 2004 a surveyor, William Kimber, made an affidavit to be filed for the defendants in one of the earlier proceedings commenced in this Court. Annexed to the affidavit was a letter authored by Mr Kimber dated 21 September 2002 which refers (in paragraph 3) to the existence of easements over the passageways in favour of 65 York Street and 71 York Street. Mr Kimber's letter of 21 September 2002 was annexed to an affidavit sworn by the first defendant himself on 13 September 2004 for the purposes of the same proceedings. The defendants were clearly on notice of the easements prior to 2008. This aspect of the defendants' claim is also untenable and bound to fail.

The claims against the Registrar-General

36 The passageways were under old system title when they were acquired by the defendant in 2008. Later in 2008 the defendants applied to bring the land under the provisions of the *Real Property Act*. However, the statement of title particulars lodged with the application omitted any mention of the easements, and the qualified title folio subsequently created did not include them. That occurred notwithstanding the fact that the Book 8 and Book 13 easements had for many years been recorded on the titles to the 71 and 65 York Street properties respectively.

37 The omission of the Book 8 easement from the title to the 12 foot passage was overcome in December 2011 by action of the Registrar-General pursuant to s 28I of the *Real Property Act* (see Departmental Dealing AG646633). The omission of the Book 13 easement from the titles to the 8 foot passage and the 12 foot passage was overcome in January 2012 by action of the Registrar-

General pursuant to s 28I of the *Real Property Act* (see Departmental Dealing AG720659).

38 Section 28I of the *Real Property Act* provides:

> (1) When creating a qualified folio of the Register for any land, the Registrar-General shall record in that folio any subsisting interest then apparent to the Registrar-General, but shall not be concerned to make searches or inquiries as to the existence of any such interest.
>
> (2) The Registrar-General may, at any time after the creation of a qualified folio of the Register, record in that folio any additional subsisting interest in the land comprised therein.

39 Relevantly, "subsisting interest" in relation to land for which a qualified folio of the Register has been created means (s 28A of the *Real Property Act*):

> …any contingent or vested estate or interest in that land that was in existence at the date on which the qualified folio of the Register was created and would have been enforceable against the person for the time being registered in that qualified folio as the proprietor had that qualified folio not been created and had any dealing registered therein been effected by a corresponding instrument duly registered under Division 1 of Part 23 of the Conveyancing Act 1919 at the same time as the dealing became registered in the Register…

40 The defendants contended that as the Book 8 and Book 13 easements were not valid or enforceable they were not "subsisting interests" and the Registrar-General thus had no power to record them under s 28I(2). For the reasons given earlier, the premise of the argument is in my opinion untenable. So, too, is the premise of the argument that there was no power to record the easements pursuant to s 28K of the *Real Property Act*.

41 It is therefore not necessary to consider the submissions made by the Registrar-General concerning the construction and operation of Part 4A of the *Real Property Act*, including s 28I. I do not propose to do so, save to observe that in circumstances where the title to land under qualified title is subject to subsisting interests whether recorded in the Register or not, there is much to be said for the view that the powers of the Registrar-General to record subsisting interests should not be construed in a restrictive manner.

The challenge to orders made in earlier proceedings

42 The orders sought to be set aside by the defendants are various orders made in earlier proceedings in this Court under s 88K of the *Conveyancing Act* imposing easements over the passageways. The defendants wish to invoke

the inherent power of the Court to set aside orders made in the absence of an affected party. It was submitted that the then owner of the passageways was not a party and there was no contradictor or someone present to "speak for that land". The defendants submitted as they now owned the passageways they could seek to set the ex parte orders aside.

43 The proposed cross-defendants submitted that the claims to set aside the orders made in the earlier proceedings were groundless. It was submitted that the defendants had no standing to impugn the orders on the basis that the then owner of the passageways, whose interests were affected by the orders, were not parties to the proceedings. It was submitted that only the owner at the time the orders were made could mount such a challenge to the orders.

44 I agree that it is not open to the defendants to seek to set aside the orders made in the earlier proceedings. The defendants have since become the owners of the passageways. However, they do not thereby succeed to the right of the former owner to have the ex parte orders set aside. In my opinion, the right is a personal right that is based upon the principles of natural justice.

45 In *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 the High Court referred (at [137]) to the general proposition that a person who should have been joined as a necessary party is entitled to have orders that affect them set aside. In support of the general proposition the High Court cited the judgment of Rich J in *Cameron v Cole* (1944) 68 CLR 571 at 589 where his Honour said:

> It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside; and a court which finds that it has been led to purport to determine a matter in which there has been a failure to observe the principle has inherent jurisdiction to set its determination aside (*Craig v Kanssen* (1943) 1 KB, at p. 262). In such a case there has been no valid trial at all. The setting aside of the invalid determination lays the ghost of the simulacrum of a trial, and leaves the field open for a real trial…

46 The High Court also cited *BP Australia Ltd v Brown* (2003) 58 NSWLR 322; [2003] NSWCA 216 at [132]-[134], where Spigelman CJ referred to the

principle that a person affected by an order made in breach of the rules of procedural fairness is entitled to have such an order set aside.

47 The entitlement resides only in the person affected by the denial of natural justice; that is to say, the person who should have been given the opportunity to be heard. The entitlement thus bears a personal, not proprietary, character. That is so even if the relevant orders affect the proprietary interests of the person. In such a case the entitlement to set the orders aside does not attach in some fashion to the property involved.

48 In the present case, the defendants' acquisition of ownership of the passageways (by conveyance from the Council of the City of Sydney exercising powers under the *Local Government Act 1993* (NSW)) did not involve any transfer to them of the personal right of the former owner to set aside the orders made in the earlier proceedings.

49 I do not think that the absence of a contradictor itself gives rise to any rights to set aside the orders. It is true that if a necessary party is not heard, arguments that may have been made in that person's interests might not be put. However, it is not that circumstance that underpins the entitlement to set aside the orders; it is the infringement of the rules of procedural fairness which provide that a person affected should be afforded the opportunity to be heard, whatever use the person might make of the opportunity.

50 No party was able to cite any authority that was directly on point on this issue. I am nonetheless satisfied that, as a matter of principle, it is plainly not open to the defendants to seek to set the orders aside on the basis that the orders were made in the absence of the then owner of the passageways.

51 Additional reasons were advanced by the proposed cross-defendants as to why the defendants could not succeed in having the orders set aside. These reasons include:

(a) that the defendants were themselves parties to the earlier proceedings;

(b) that in one of the proceedings the defendants sought and obtained easements over the passageways for the benefit of 100 Clarence Street; and

(c) that the defendants, who have owned the passageways since 2008, have been guilty of delay.

52 As pointed out by the defendants, these matters do not go to the question of the power of the Court to set aside the orders. In any event, having concluded that it is not open to the defendants to invoke the power to set aside the orders made in the absence of the former owner, it is not necessary to consider these additional reasons. In my opinion, this part of the proposed cross-claim is also untenable and bound to fail.

Abandonment of rights

53 The proposed cross-defendants did not submit that this aspect of the proposed cross claim was untenable and bound to fail. In fact, no submissions were directed to this claim which is found in paragraph 24 of the proposed cross claim.

54 However, as mentioned earlier, the claim is not pleaded in a satisfactory manner. The paragraph refers in general terms to little or no use of "The Land" by any of the cross-defendants and "the manner of construction" which is said to manifest an intention not to use "The Land". There is no differentiation between the various parts of "The Land" and the various cross-defendants (which include the Registrar-General), and there is no identification of the material facts relied upon. The paragraph is furthermore not supported by any particulars.

55 The paragraph undoubtedly has a tendency to cause prejudice, embarrassment or delay, and would therefore be liable to be struck out (see Uniform Civil Procedure Rules ("UCPR") r 14.28).

Case-management issues

56 It was submitted by the proposed cross-defendants that the proposed cross claim was advanced at a late stage after the close of pleadings and service of evidence. It was submitted that the explanation proffered for the delay, namely the application of "fresh legal minds" identifying new issues, was not an adequate explanation. It was put that to permit the cross claim to proceed would inevitably cause further delay and additional expense, as well as involve new parties. In that regard, it was pointed out that if the orders in the earlier

proceedings were sought to be set aside still further new parties (including the Council of the City of Sydney and the owners of a property in Barrack Street) would need to be added. Some further matters were raised, including that the proposed cross claim was inconsistent with paragraph 8(b) of the defendants' Defence which contains an admission that a right of way was granted over the 12 foot passage in favour of 71 York Street on the terms set out in Book 8. The proposed cross claim would thus infringe UCPR r 14.18 unless leave was obtained to withdraw the admission.

57 The defendants submitted that whilst some delay would be occasioned, no significant prejudice was shown to be likely to be suffered if the cross claim proceeded. It was submitted that the explanation for the delay was adequate and proper.

58 I accept that the delay is explained by the fact that a new approach was taken by the lawyers retained in July 2017. However, that does not provide a full excuse because the points now sought to be raised were available to be raised at all times since the commencement of the proceedings.

59 In my view, allowing the cross claim to proceed would bring about considerable delay and thus extra cost to the existing parties (including by reason of the problem of inconsistent pleading referred to above). The delay would likely be exacerbated by the need for not only 65 York Street and the Registrar-General, but also others, to be added as parties.

60 These matters provide further reasons to decline to grant leave for the filing of the proposed cross claim, but they are not by themselves decisive.

Conclusion

61 I have concluded that with one exception the claims sought to be raised by the proposed cross claim are untenable and bound to fail. The exceptional claim is itself not properly pleaded. In my opinion it would be futile to grant leave to file the proposed cross claim because it would be liable to summary dismissal and striking out. It seems to me that when regard is had also to the case-management matters referred to above, it would not be appropriate to grant leave for the filing of the proposed cross claim.

62 In my opinion, in all the circumstances it would not serve the dictates of justice referred to in s 58 of the *Civil Procedure Act 2005* (NSW) or the overriding purpose referred to in s 56 of that Act to grant the leave sought by the defendants. Accordingly, the defendants' Notice of Motion filed on 4 October 2017 will be dismissed with costs.

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