Entry of orders in the court's computerised record system

Several recent decisions of the New South Wales Court of Appeal have highlighted the need for practitioners to be aware of the impact of the new computerised record system in New South Wales courts upon the entry of orders in those courts (in the system known as JusticeLink).

In *Cyril Smith & Associates Pty Ltd v The Owners-Strata Plan No 64970 (No 2)* [2011] NSWCA 245 the Court of Appeal delivered a separate judgment setting out the orders made, having already found in favour of the appellant.[1] The court had allowed the appellant an opportunity to identify which orders it wished to overturn in view of the complexity of the proceeding being appealed from in the Supreme Court, as numerous parties and cross-claims had resulted in a number of different orders in that proceeding.

Although Basten JA delivered the leading judgment (Bathurst CJ and Young JA agreeing), the judgment of Young JA is noteworthy for the comments made by his Honour in relation to the entry of orders in the court's computerised system. His Honour noted that the court experienced difficulties in formulating the appropriate orders in this case because the orders were entered in the Supreme Court by reference to short minutes of order rather than by entering the words of the orders. By way of example, his Honour said it was inappropriate to enter judgment as 'Orders 1 – 4 in Short Minutes initialed by Judge on 1/1/2011'. His Honour also noted that another consequence of the computerised system was that handwritten short minutes were no longer appropriate.

His Honour described the appropriate process for the entry of orders, particularly in a busy list such as the Commercial List. His Honour stated that the party seeking entry of the orders should provide the associate with both a hard copy and electronic copy of the short minutes, so that the former could be left on file and scanned for any appeal book and the latter could be used by the associate to enter the order electronically to avoid confusion as to the terms of the order.

In *Tarrant v Statewide Secured Investments* [2011] NSWCA 248, the Court of Appeal heard an application for leave to appeal from a Supreme Court judgment refusing to set aside an earlier judgment of the court. In the course of his Honour's judgment, Basten JA (McColl JA agreeing) referred to some 'disturbing' aspects of JusticeLink in relation to the entry of orders.

In the case at first instance, judgment was given on 14 May 2009 and, following a correction made to the judgment sum on 17 June 2009, the parties understood the orders to have been entered and proceeded upon that basis.

However, what was entered in JusticeLink on 18 June 2009 was the record 'Orders in accordance with SMO' and a note of a stay. The orders themselves were never formally entered.

In the course of his Honour's judgment, Basten JA (McColl JA agreeing) referred to some 'disturbing' aspects of JusticeLink in relation to the entry of orders.

Under s 133(1) of the Civil Procedure Act, a judgment or order may not be enforced until it has been entered in accordance with the Rules. Rule 36.11(1) provides that a judgment or order is to be entered. Subrule (2) provides that 'unless the court orders otherwise, a judgment or order is taken to be entered when it is recorded in the court's computerised court record system'. Subrule (2A) further provides for the procedure when the court directs that a judgment or order be entered forthwith. In that case, there was no record of the court ordering 'otherwise', nor of directing the entry of judgment forthwith, but the orders had never been recorded in the court's computerised court record system.

Basten JA held that it was appropriate that the Court of Appeal rectify the informality attending the orders of 17 June 2009, since the parties had acted on the basis that the judgment had been entered and the judgment had been enforced in part. The court directed that the orders be taken to have been entered on 17 June 2009 and further directed that the direction be taken to have effect as at that date, pursuant to rule 36.4(3).

In *Mills v Futhem Pty Ltd* [2011] NSWCA 252, the Court of Appeal heard an application for leave to appeal from the dismissal of a motion of the defendant in the District Court for a stay of the enforcement of orders related to terms of settlement filed in the District Court in November 2008.

The District Court's computer record (which predated

JusticeLink) read, as at 16 December 2008 in respect of the terms of settlement '[P-D1] Judg't Terms of Settlement entered: add to Completed SB348 CML'. The paper file contained the Terms of Settlement which listed 16 December 2008 both as the 'date made or given' and the 'date entered' and bore the court's seal (but no signature of the registrar). There was also contained on the paper file a handwritten entry on 16 December 2008 in the following terms 'Judgment for plaintiff in accordance with Terms of Settlement filed'.

It is clear from these decisions that it is no longer appropriate for orders in New South Wales courts to be entered by reference to short minutes, without setting out the orders in full, or by handing up handwritten short minutes of order.

Allsop P (Beazley JA and Handley AJA agreeing) found that the orders had not been entered (at [34]). In so finding, his Honour found that it was clear that at no time had there been an entry into the court's record system of the full terms of the terms of settlement, and the entry in the computerised court record system did not amount to what is contemplated by rule 36.11(2) of the UCPR.

His Honour stated (at [27]):

> The proper construction of r 36.11 is, it seems to me, that unless a court orders otherwise for r 36.11(2) or unless a court directs, in the manner set out in r 36.11(2A), entry under the Rules is not effected otherwise than by recording in the court's computerised court record system contemplated by r 36.11(2). Recording the orders means just that: setting them out. There is no recording of the orders if all that is stated is that some orders exist. It would undermine the integrity of a computerised record system to have mere references to pieces of paper in files treated as a recording of the judgment or order in the computerised record system. In my view, that is not what the rule means. To the extent that the record in the computerised system might be seen as some form of incorporation by reference, it does not record the judgment or orders. One cannot even ascertain the amount of the judgment in order 1. One can put the two together, by looking at the file, but that is not adequate.

Lessons to be taken from these cases

It is clear from these decisions that it is no longer appropriate for orders in New South Wales courts to be entered by reference to short minutes, without setting out the orders in full, or by handing up handwritten short minutes of order. These decisions also highlight the importance of ensuring that the terms of the orders are entered in full on JusticeLink.

Justice Peter Young AO, writing extra-judicially in the *Australian Law Journal*, 'Current issues' (2011) 85 ALJ 615 at 617 to 618 addressed this issue, and in particular, the decision in Mills and suggested that if a case is settled with a number of paragraphs in the terms of settlement, at least in a motion list or other heavy list, the lawyers should present a hard copy for the judge to initial, then have the terms re-engrossed and emailed in electronic form to the associate to be placed in the court's computer system.

Practitioners are now also able to view orders made online via the JusticeLink database.

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Endnotes

1. *Cyril Smith & Associates Pty Ltd v The Owners-Strata Plan No 64970* [2011] NSWCA 181.