

PARTIES: CITY DEVELOPMENTS PTY LTD
AND:
PROPRIETORS OF UNITS PLAN No 97/026

v

THE REGISTRAR GENERAL OF THE
NORTHERN TERRITORY
AND:
EDWARD ARTHUR FIELD
AND:
TREVOR LINDSAY SULLIVAN
AND:
ANDRE & RINALDO SCARTON
AND:
ROBERT JOHN NASH

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: 131/1999 (9919269)

DELIVERED: 23 November 2001, Darwin

HEARING DATES: 19 April 2001

JUDGMENT OF: THOMAS J

CATCHWORDS:

APPLICATION FOR COSTS

Whether reasonable for each defendant to instruct separate solicitors – no distinction drawn between the easements – no conflicting material or submissions – certain defendants acted reasonably and responsibly in reducing costs by instructing one counsel – no obligation upon them to instruct same solicitor

Supreme Court Rules 1987 (NT), r 47.04

REPRESENTATION:

Counsel:

1 st & 2 nd Plaintiffs:	J Waters QC
1 st Defendant:	No Appearance
2 nd Defendant:	TS Lee
3 rd , 4 th & 5 th Defendants:	P Barr

Solicitors:

1 st & 2 nd Plaintiffs:	De Silva Hebron
1 st Defendant:	Solicitor for the Northern Territory
2 nd Defendant:	TS Lee and Associates
3 rd Defendant:	Priestleys
4 th Defendant:	Hunt and Hunt
5 th Defendant:	Vincent Close

Judgment category classification:	C
Judgment ID Number:	tho200127
Number of pages:	6

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

City Developments Pty Ltd & Anor v Registrar General (NT) & Ors [2001] NTSC 103
No. 131/1999 (9919269)

BETWEEN:

CITY DEVELOPMENTS PTY LTD

First Plaintiff

AND:

**PROPRIETORS OF UNITS PLAN N°
97/026**

Second Plaintiff

AND:

**THE REGISTRAR GENERAL OF THE
NORTHERN TERRITORY**

First Defendant

AND:

EDWARD ARTHUR FIELD

Second Defendant

AND:

TREVOR LINDSAY SULLIVAN

Third Defendant

AND:

ANDRE and RINALDO SCARTON

Fourth Defendant

AND:

ROBERT JOHN NASH

Fifth Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 23 November 2001)

- [1] I refer to my written reasons for judgment delivered on 2 June 2000. On 19 April 2001 this Court heard an application by the second, third, fourth and fifth defendants for an order as to the costs relating to the proceeding.

[2] The third fourth and fifth defendants sought orders as follows:

- “1. That the plaintiffs pay the third defendant’s costs of the proceeding to be taxed on the standard basis.
2. That the plaintiffs pay the fourth defendant’s costs of the proceeding to be taxed on the standard basis.
3. That the plaintiffs pay the fifth defendant’s costs of the proceeding to be taxed on the standard basis.”

[3] The second defendant was represented separately from the third, fourth and fifth defendants, but sought an order in the same terms.

[4] The orders made on 2 June 2000 were as follows:

1. The right conferred in the respective Grants of Easement are in law Easements; and
2. Leave is granted to the parties to make application on the question of costs.

The orders made are set out in the transcript of proceedings on 2 June 2000 t/p 103.

[5] The document titled Form 60F, which is headed “Judgment or order at trial of preliminary question”, reflects those orders but incorrectly states that one of the orders made was “the Plaintiffs’ application is dismissed”. This document is dated 14 July 2000. It was taken out by solicitors for the plaintiffs. In accordance with normal practice it was not referred back to the judge before being sealed. Solicitors for the plaintiffs should arrange for this document to be amended to accord with the actual order made by the Court on 2 June 2000. If there is to be an order that the plaintiffs’

application is dismissed then that should be the subject of a separate application unless the parties can come to agreement on the issue.

- [6] On 2 June 2000, the validity in law of the easements was upheld. The second, third, fourth and fifth defendants submit that costs should follow the event, and accordingly seek an order that the plaintiffs pay the defendants' costs of the proceeding to be taxed on a standard basis.
- [7] The second, third, fourth and fifth defendants instructed different solicitors. Each of them was sued separately, each claim relating to a separate easement.
- [8] The third, fourth and fifth defendants engaged one counsel, Mr Barr, to appear on behalf of those defendants at the hearing.
- [9] Mr Barr submitted that costs are an indemnity to a party which is successful in litigation and that it was entirely reasonable for the defendants to have their own individual solicitors who were all involved in instructing counsel present in court at the hearing.
- [10] Mr Barr asked that separate orders be made for costs.
- [11] The second defendant was represented by Mr Lee, who endorsed Mr Barr's submissions and sought an order for the plaintiffs to pay the second defendant's costs of the proceeding, in the same terms as the proposed orders set out in par 2.

[12] It was submitted on behalf of the plaintiffs that there was no distinction drawn between any of the easements because different though they may be, on the issue of the preliminary point they are identical.

[13] Mr Waters QC, counsel for the plaintiffs, submitted that the defendants consented to the disposition of the preliminary point in the form comprised in the order made by Bailey J on 12 November 1999. He further submitted there is no conflict of interest and that no conflict has been articulated.

[14] The relevant order made by Bailey J on 12 November 1999 was by consent and reads as follows:

“That the issue of the alleged nullity of the easements granted in favour of the defendants is to be heard as a preliminary issue and that’s pursuant to rule 47.04.”

[15] Mr Waters QC submitted that the Court should exercise its discretion judicially as to costs “having regard to the ordinary tenets of fairness and fair play as the justice of the situation allows”.

[16] It was further submitted on behalf of the plaintiffs that there was no division of labour between the respective solicitors for the defendants and the plaintiffs should not have to pay to enable the defendants to have the luxury of their own solicitor.

[17] Mr Waters QC agreed that in damages issues and standard prejudice and evidentiary issues there are very often major conflicts between the defendants which provide that they be separately represented but that in the

preliminary point in this matter the interests were absolutely identical. The submission on behalf of the plaintiffs is that there was no conflicting material and there were no conflicting submissions. Mr Waters QC noted that some of the defendants acted reasonably and appropriately in joining their activities and they did so, in their own interests and in the interests of justice and the interests of this court.

[18] I do not accept the submissions on behalf of the plaintiffs. The plaintiffs chose to proceed against five defendants separately, four of whom disputed the application on the preliminary point. I accept Mr Barr's submission that it was reasonable for each defendant to instruct separate solicitors. I accept that at the time of instructing solicitors each defendant would not necessarily know what the other defendant would do or how they would proceed. There must always be a potential for conflict although in this instance it did not arise. Hindsight, however, is very different to foresight. The defendants had separate interests arising from their separate properties which interests they were entitled to pursue. Ultimately, solicitors for the third, fourth and fifth defendants instructed one counsel. This means there will be only one counsel fee for the third, fourth and fifth defendants to be apportioned as determined by the taxing master. The third, fourth and fifth defendants acted reasonably and responsibly in reducing costs by instructing one counsel. I do not consider there was any obligation upon them to instruct the same solicitor.

[19] I do not consider it an appropriate exercise of discretion to deny the defendants costs for their respective solicitors.

[20] The order I make is as follows:

1. That the plaintiffs pay the second defendant's costs of the proceeding to be taxed on the standard basis.
2. That the plaintiffs pay the third defendant's costs of the proceeding to be taxed on the standard basis.
3. That the plaintiffs pay the fourth defendant's costs of the proceeding to be taxed on the standard basis
4. That the plaintiffs pay the fifth defendant's costs of the proceeding to be taxed on the standard basis.
