SUPREME COURT OF QUEENSLAND

CITATION:	*SDW Projects Pty Ltd v Modi & Ors (No 2)* [2012] QSC 426
PARTIES:	**SDW PROJECTS PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 110 335 923** (applicant) **v** **SANJU MODI** (first respondent) and **LISA JANE CLEMENTS** (second respondent) and **HOLDING REDLICH (A FIRM)** (third respondent) and **THOMAS BRADLEY** (fourth respondent)
FILE NO:	10460 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application for costs
DELIVERED EX TEMPORE ON:	12 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12 December 2012
JUDGE:	Peter Lyons J
ORDER:	**1. The first and second respondents pay the costs of the applicant of and incidental to the proceedings and of the third and fourth respondents, to be assessed on a standard basis.** **2. The order for costs made today extend to the costs of the hearing of 20 April 2012.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – CO–DEFENDANTS – where the applicant sued two firms of solicitors who had acted for it in relation to some conveyancing transactions – where it was alleged that those firms had been negligent in relation to compliance with a requirement of s 365(2A)(c)(ii) of the *Property Agents and Motor Dealers Act 2000* (Qld) – where there were applications to add the third and fourth

respondents as defendants to those actions for failing to conclude that the actions taken by the first and second respondents were sufficient to comply with those requirements and in accordingly not advising the applicant to enforce a number of contracts – where it was found the first and second respondents had failed to comply with the requirement previously mentioned – where the applicant and third and fourth respondents sought their costs against the first and second respondents – where the first and second respondents contended that the court should not allow two sets of costs to defendants where there is no possible conflict of interest between them in the presentation of their cases – whether the first and second respondents should pay the costs of the applicant and the first and second respondents

Almeida v Universal Dye Works Pty Ltd (No 2) [2001] NSWCA 156

Re Octaviar Ltd (No 8) [2010] QCA 57

Smyth v The State of Queensland [2005] QSC 193

Statham v Shepherd (No 2) [1974] 23 FLR 244

Sved v Council of the Municipality of Woollahra [1998] NSW Conv R 55–842

The Beach Retreat Pty Ltd v Mooloolaba Marina Limited [2009] 2 Qd R 356

COUNSEL: MK Madsen for the applicant.

RPS Jackson for the first respondent.

PK O'Higgins for the second respondent.

D de Jersey for the third respondent.

D O'Brien QC for the fourth respondent.

SOLICITORS: Mullins Lawyers for the applicant.

Bartley Cohen for the first respondent.

Barry Nilsson lawyers for the second respondent.

Thynne & Macartney for the third respondent.

Ashurst Australia for the fourth respondent.

HIS HONOUR: I'll ask my associate to provide the legal representatives with a copy of my reasons. There is no order which appears on the cover sheet. I thought I should wait and see whether anybody had any submission to make about the form of order which should be made, or if it should be simply in terms of the declaration.

...

HIS HONOUR: The present proceedings arose out of other actions in which the applicant sued two firms of solicitors who had acted for it in relation to some conveyancing transactions. It alleged that each of those firms had been negligent in relation to compliance with a requirement of section 365(2A)(c)(ii) of the *Property Agents and Motor Dealers Act 2000* (Qld).

Those defendants in turn alleged that a third set of solicitors, the third respondent, had been negligent in failing to conclude that the actions taken by the other solicitors, the first and second respondents, were sufficient to comply with those requirements and in accordingly not advising the applicant to enforce a number of contracts for the sale of units in a proposed development. The fourth respondent had given the third respondent advice about those requirements.

Both of the actions previously mentioned had been subject to supervision on the supervised case list and a point had been

reached where there were applications to add the third and fourth respondents as defendants for those actions.

It was considered by the parties that it would be efficient and convenient to have the question determined whether the first and second defendants had failed to comply with the requirement previously mentioned, or whether they were correct to say that they had complied. It was also considered appropriate to have that question determined not only between those who were already parties to the actions, but as against those who might become parties. For that purpose it was proposed to commence a separate action for a declaration on that question, which resulted in hearing, reasons determining which were given this morning.

Directions were also agreed for the conduct of that hearing. They included that each party would file and serve any material in relation to that hearing, and that the parties would each file and exchange written submissions or outlines of argument prior to the hearing. All of that occurred. The matter was then heard on the 3rd of December 2012 and reasons were given today.

At the conclusion of the hearing, because the reasons favoured them, the applicant and third and fourth respondents sought their costs against the first and second respondents. The first and second respondents did not oppose the applicant's application for costs, but submitted that no order should be made in favour of the third and fourth respondents. They

relied principally on the proposition formulated in *Statham v. Shepherd (No 2)* [1974] 23 FLR 244 that a Court will not normally allow two sets of costs to defendants where there is no possible conflict of interest between them in the presentation of their cases.

Three provisos were identified in *Statham*, the second of which is of particular relevance to the submissions of the third and fourth respondents. It is that there could be circumstances in which, although the defendants were united in their opposition to the plaintiff, their relationship to each other might be such that they would be acting reasonably in remaining at arm's length during the general course of litigation.

The third respondent said there was a difference in the position between it and the fourth respondent by reason of an amendment of the pleading. The fourth respondent did not adopt that position, and it seems to me that the fourth respondent is correct, because as a matter of substance it seems that the difference was not particularly significant and could have easily been dealt with without separate representation.

However for the fourth respondent it was submitted that the principle relied upon by the first and second respondents was not the correct principle. It was submitted that in truth the orders sought were in the nature of a *Sanderson* order and that the circumstances in which that would be made were identified

by a principle which appears in *Almeida v. Universal Dye Works Pty Ltd (No 2)* [2001] NSWCA 156. There, reference was made to earlier authorities to the effect that the order might be made where the costs have been reasonably and properly incurred by the plaintiff as between it and the unsuccessful defendant or, alternatively, the conduct of the unsuccessful defendant must show the joinder of the successful defendant was reasonable and proper to ensure the recovery of damages sought (see *Almeida* at paragraph 7 citing *Sved v. Council of the Municipality of Woollahra* [1998] NSW CONV R 55-842 at 56605.

In *Almeida* Priestly JA expressed the principle, after his reference to *Sved*, by saying that, "Any conduct by the defendant or state of affairs in which the defendant is an integral part which makes it fair and reasonable for other parties to be joined as defendants will be relevant to deciding on fair costs orders." (See *Almeida* at paragraph 8.) There are somewhat similar statements in the judgment of Santow AJA in *Almeida* at paragraphs 32 and 35.

The applicant has sought relief against four respondents. Its allegations against the first respondent and the second respondent in the other actions are similar. Its allegations against the third and fourth respondents, were they joined, would be different to its allegations against the first and second respondents.

The prospect of the joinder of the third and fourth respondents in the other actions arises out of allegations

made by the first and second respondents of the negligence of the third respondent. The joinder of the fourth respondent would be a likely consequence, given that the fourth respondent was retained to provide advice for the applicant, the retainer being entered into on the applicant's part by the third respondent. In other words, in substance the presence of the third and fourth respondent in this application is a consequence of the allegations made by the first and second respondents in the actions which have given rise to the present proceedings.

The order which is sought by the third and fourth respondents is a direct order against the first and second respondents. It seems to me that that makes it no different in principle to the cases where the principles formulated in *Almeida* have been developed.

I would therefore order costs in favour of the third and fourth respondents by applying those principles.

Were I wrong to do so it would be necessary to consider the effect of *Statham*. The second proviso or exception has been considered in three recent cases to which I was referred, where *Statham* was relied upon unsuccessfully to avoid orders for costs, or rather to limit orders for costs. They are *Smyth v. The State of Queensland* [2005] QSC 193, *Re Octaviar Ltd (No 8)* [2010] QCA 57 and *The Beach Retreat Pty Ltd v. Mooloolaba Marina Limited* [2009] 2 QDR 356.

Each recognised the second exception in *Statham*. In *Re Octaviar*, the Court of Appeal noted at paragraph 4 that each of the successful respondents to the appeal was made a respondent to the appeal by the unsuccessful appellant. Their Honours said, "On the face of things, there was nothing unreasonable in each of them seeking to support the decision below."

It was then submitted that it was unreasonable of them to fail to negotiate to an agreed basis for presenting a common point on the appeal. The Court rejected that, stating that while the respondents had been united in their opposition to the appeal, "It is difficult to say they were not acting reasonably in 'remaining at arm's length' from each other while maintaining that position."

In *Smyth* the second and third respondents had applied to be added to proceedings brought against the State of Queensland that arose out of a fatality. It was clear that the applicant was considering a prosecution against the third respondent and possibly the second respondent (see *Smyth* [5].) Their joinder application was opposed, but granted unconditionally because, no doubt, of their different interests. Wilson J concluded it was perfectly reasonable for them to want to remain at arm's length from the first respondent in the declaratory proceedings which her Honour was required to determine.

The conclusion reached by Martin J in *The Beach Retreat* was broadly to a similar effect, although it may have been

affected by the nature of the issues raised there: see *The Beach Retreat* at paragraph 34. His Honour considered that while there may not have been a conflict of interest between the defendants, the successful defendants in that case had different interests.

In my view there were plainly different interests as between the applicant, the third respondent and the fourth respondent. As the submissions for the fourth respondent pointed out, the success or failure of the application was not critical from the applicant's point of view, as it was sufficient that there be a determination binding all of the respondents. That was because if the application succeeded that established an important point in the applicant's action against the first and second respondents. If it did not succeed, then it established an important matter in relation to the applicant's proposed action against the third and fourth respondents. The applicant therefore had a significant but different interest from the third and fourth respondents.

For that reason it is not sufficient simply to make an order of costs in favour of the applicant. However, it seems to me also that the position of the third and fourth respondents is such that there were different interests sufficient to warrant their separate representation at these proceedings. That is because I was informed, and it was not contested or suggested to be wrong, that it was likely that the third respondent would allege negligence on the part of the fourth respondent,

and for that reason its liability should be either reduced, or it should be found not liable to the plaintiff.

It seems to me that in those circumstances it was appropriate for the third and fourth respondents to remain at arm's length during the litigation including during the present proceedings.

There is one other matter I would mention. It arises out of the history of these proceedings which I have summarised a little earlier. The directions which were made envisaged the active participation by all parties including the third and fourth respondents. The directions were, in fact, made by consent. It seems to me therefore that the first and second respondents have accepted the position in advance of the hearing and, indeed, in advance of the expenditure of, no doubt, substantial amounts of money in preparation for the hearing, that the third and fourth respondents would be actively involved in the proceedings.

It seems to me therefore that, bearing in mind that any order for costs is discretionary, that is an unusual feature of this case. If the correct application of decided principle were that otherwise orders should not be made in their favour, it seems to me that that conduct of the first and second respondents, to which I might add the fact that neither gave any notice until after reasons were delivered that they would oppose making orders in favour of the third and fourth

respondents as well as the applicant, is a reason why I should reject their submissions.

Accordingly, I order that the first and second respondents pay the costs of the applicant of and incidental to the proceedings, and of the third and fourth respondents, to be assessed on a standard basis.

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HIS HONOUR: I order that the order for costs that I have made today extend to the costs of the hearing of the 20th of April 2012.
