

CITATION: *Bailey & Bailey v King* [2002] NTMC 003

PARTIES: EDMUND JOHN BAILEY
AND
NOLA MARGARET BAILEY

v

PATRICK NOEL KING

TITLE OF COURT: LOCAL COURT (NT)

JURISDICTION: Local

FILE NO(s): 20001812

DELIVERED ON: 4 February 2002

DELIVERED AT: Darwin

HEARING DATE(s): 5 November 2001

JUDGMENT OF: Mr Lowndes

CATCHWORDS:

Costs – Discretion to award costs – Fixing of costs at a percentage of the Supreme Court scale
Local Court Rules – Rule 38.04

REPRESENTATION:

Counsel:

Plaintiff: Mr Sweet
Defendant: Mr Davis

Solicitors:

Plaintiff: Cridlands
Defendant: Davis Norman & Associates

Judgment category classification: C
Judgment ID number: [2002] NTMC 003
Number of paragraphs: 12

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

No. 20001812

[2002] NTMC 003

BETWEEN:

**EDMUND JOHN BAILEY AND NOLA
MARGARET BAILEY**
Plaintiff

AND:

**PATRICK NOEL KING
TRADING AS TOP END TILING
CONTRACTORS**
First Defendant

TOP END TILING PTY LTD
Second Defendant

RULING ON COSTS
(Delivered 4 February 2002)

Mr Lowndes SM:

1. On 17th August 2001 I ordered that there be judgment in favour of the Plaintiffs in the sum of \$ 27,115.00. The question of costs was reserved. Subsequently I received submissions in relation to that issue. I now give my ruling on costs.
2. Part 38 of the Local Court Rules governs the question of costs in Local Court proceedings. Rule 38.03 confers upon the Local Court a discretionary power to order costs. Rule 38.04, which deals with the power of the Court to fix costs at a percentage of the Supreme Court scale of costs, provides as follows:

- “ (1) Subject to these Rules, costs for work done are allowable at an appropriate percentage of the relevant costs set out in the Appendix up to and including 100%.
- (2) Subject to rules 38.07 and 38.08, when making a costs order the Court must fix the appropriate percentage referred to in subrule (1).
- (3) In fixing the appropriate percentage, the Court is to –
- (a) have regard to –
- (i) the complexity of the proceeding in fact and law;
 - (ii) the amount awarded to the plaintiff or defendant;
 - (iii) the efficiency with which the parties conducted the proceedings;
 - (iv) the preparedness of the parties at a conciliation conference, prehearing conference or hearing of an interlocutory application; and
 - (v) and any other matter the Court considers appropriate; and
- (b) be guided by the following percentages in relation to the amount of the claim in the proceeding:
- (i) claim of \$5,001 to \$10,000 – 50%
 - (ii) claim of \$10,000 to \$50,000 – 80%
 - (iii) claim of \$50,000 to \$100,000 – 100%.”

3. It is well settled that where a court has a general discretion to award costs, the normal rule is that costs follow the event ie the successful party is to be indemnified as to its costs by the unsuccessful party. The first defendant,

being the unsuccessful party, does not submit that the general rule ought to be departed from in the instant case; rather it is submitted that the plaintiffs should only be awarded costs at the rate of 80% of the Supreme Court scale. The plaintiffs, on the other hand, submitted that this was an appropriate case for an award of costs at the rate of 100 % of the scale.

4. I propose to deal with each of the conditions set out in sub rule (3) of Rule 38.04.

The complexity of the proceedings in fact and law

5. The evidence adduced in the proceedings was of a highly complex and technical nature and involved the calling of expert evidence. There was a conflicting body of evidence which gave rise to issues of causation. The factual findings in this case were preceded by a close and careful examination and weighing of the evidence.
6. The proceedings also involved a threshold question of law concerning the identity of the contracting parties. It was argued by the defendants that Top End Tiling Pty Ltd, the second defendant, contracted with the plaintiffs. The plaintiffs, on the other hand, contended that they contracted with the first defendant. The dispute generated extensive legal argument relating to the relevant principles governing the liability of an agent and /or principal where the agent does not disclose the existence of the agency and the liability of an agent and/or principal where the agency is disclosed but the identity of the principal is misstated.
7. Having regard to the various issues generated by the litigation, I would characterise the proceedings as having been of reasonable complexity.

The amount awarded to the plaintiff.

8. The plaintiffs were awarded the sum of \$27,115.00. The guidelines set out in sub rule 3 (b) of Rule 38.04 would indicate an award of costs at the rate of

80% of the Supreme Court scale. However, sub rule 3(b) is not determinative of the matter and has to be considered along with the other statutory considerations set out in sub rule 3. The priority and weight to be attached to the various considerations varies from case to case.

The efficiency with which the parties conducted the proceedings

9. Overall the parties conducted the proceedings in an efficient manner. However, it became necessary for the plaintiffs to recall its expert witness, Mr Russell, because of difficulties with the factual premises upon which his expert opinions were founded. That course of events increased the length of the hearing. It was necessary for the Court to hear an application for leave to recall the witness. The witness was subsequently recalled, examined and cross-examined. At the close of all the evidence, the Court heard submissions as to the weight to be given to the revised evidence given by Mr Russell.
10. After weighing and balancing the relevant considerations, I consider that the complexity of the proceedings justifies an award of costs at the rate of 100% of the Supreme Court scale. However, I believe that it would just, in the circumstances, to disallow the plaintiffs costs occasioned by the recalling of Mr Russell.
11. In coming to these conclusions, I considered but ultimately rejected the submission made by Mr Davis, counsel for the first and second defendant, that an award of costs at the rate of 100% of the Supreme Court scale in the present case would inflate the cost of legal services in the Northern Territory. The fact is that the Court's discretion in relation to the matter of costs is structured and confined by the Local Court Rules, and the Rules clearly contemplate that, in some cases, an award at the rate of 100% of the scale will be appropriate. Presumably, the Local Rules were formulated after taking into account the true cost of legal services in the Northern Territory

and the need to indemnify, to a reasonable degree, a successful party as to its costs.

12. Accordingly, I make the following orders as to costs:

- (1) Subject to order (2) the first defendant to pay the plaintiffs' costs assessed at the rate of 100% of the Supreme Court scale
- (2) The plaintiffs are disallowed such costs as were incurred in relation to the recalling of the expert witness, Mr Russell.
- (3) For the purposes of order (2), the specified costs mean costs incurred in relation to-
 - (i) the application for leave to recall the expert witness;
 - (ii) examination in chief and cross-examination of the witness and
 - (iii) submissions as to the weight to be attached to the witness' revised evidence.

I give liberty to the parties to apply to the Court in the event of any need to clarify the above orders.

Dated this 4th day of February 2002.

JOHN LOWNDES
STIPENDIARY MAGISTRATE