CITATION: *Colless Nominees Pty Ltd v Davidson (No2)* [2006] NTMC 018

PARTIES:	COLLESS NOMINEES PTY LTD
	v
	ALLISON GAYE DAVIDSON (NO 2)
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20326458
DELIVERED ON:	2 March 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	3 November 2005
JUDGMENT OF:	Mr R.J. Wallace SM

CATCHWORDS:

Costs – successful party – percentage of Supreme Court Scale – Local Court Rules Rule 34.

REPRESENTATION:

Counsel:

Plaintiff:	B.O'Loughlin
Defendant:	W.Piper

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Pipers

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 018
Number of paragraphs:	6

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

No. 20326458

BETWEEN:

COLLESS NOMINEES PTY LTD
Plaintiff

AND:

ALLISON GAYE DAVIDSON (NO 2)
Defendant

REASONS FOR DECISION
(ON THE QUESTION OF COSTS)

(Delivered 2 March 2006)

Mr R.J. WALLACE SM:

1. On 26 October 2005 I delivered judgment in this matter. The plaintiff's claim, which in the original Statement of Claim was for $14,694, amended to $17, 294 and further amended to $11,076.36, succeeded only to the extent of $1,320.00. The defendant's counter claim, which was for $9,846.80, succeeded to the extent of $4797.00. The parties had leave to apply for costs, and I have heard submissions on the question. I am clearly of the opinion, having heard those submissions, that the plaintiff is not entitled to any proportion of its costs. The plaintiff has failed in most of its claim and most of its heads of claim. Even if my judgment were wrong as to the rest of the heads of claim, it is clearly the case that only the most optimistic assessment of the value of the claim would place it above the value of $10,000 which is to say within the jurisdiction of the Small Claims Court. If I am even approximately right about the value of the works promised in paragraphs 87-90 of my Reasons For Judgment of 26/10/05, then the greatest

possible value of the claim was less than $5000, that is within the "no costs" range of the jurisdiction of the Small Claims Court.

2. The defendant's position in asking for costs is a good deal stronger. Mr Piper points out that the choice of the Local Court as the forum was the plaintiff's, and that the defendant had no choice but to join issue there. Thus the fact that the defendant's counterclaim was never more than $10,000, and the fact that the amount of the judgment on it was for less than $5,000, is hardly to the point. Secondly, Mr Piper points out that the defendant has had a great degree of success in defending the claim, and a fair degree of success on the counterclaim. The defendant can fairly be characterised as the successful party in the litigation and entitled, prima facie to her costs.

3. None of these points is conclusive in itself. One could argue that the defendant ought to have tried to have the matter transferred to the Small Claims Court, although I cannot see how such an application would have succeeded given the sums pleaded in the evolving statement of claim. As for the success of the counterclaim, it is worth remembering that, as far as I could tell on the evidence, the defendant did not bill the plaintiff for the relevant works until after the plaintiff had issued its claim. Perhaps if that bill – for whatever sum – had existed for the plaintiff to take into account, the dispute may have taken a different course. As for the defendant's success in defending the claim, it must be remembered that more than one of the explanations for that success were matters not pleaded by the defendant, notably the question of consideration. Perhaps, if the defendant had pleaded that, the plaintiff may have seen some force in the point, and matters again may have taken a different course.

4. As best I can remember it was thoughts such as those in the preceding paragraph which were in my mind when I wrote at paragraph 144 of my Reasons for Judgment. "I think there should be no order for costs, but…" It

may also have been a factor that the defendant's counterclaim had failed in respect of various heads of damage, some of which were so evidently without merit that they were abandoned during the course of the hearing; and which had led to an amount of wasted time at the hearing and a no doubt greater amount of extra wasted preparation by the plaintiff.

5. Costs are in the Court's discretion (Rule 38.03(1)), and the above matters are sufficiently unusual to make this exercise of the discretion a difficult one. Ultimately I have come to the view that Mr Piper's argument that the defendant had no choice but to defend the matter in this Court, is strong enough to outweigh the other matters, and that the defendant should have his costs. As to the scale on which costs should be awarded, Rule 38.04(3)(a) directs me to have regard to various matters, concerning which I would comment on the "complexity of the proceeding in fact and law" – middling, I would say; "the amount awarded to the plaintiff or defendant" - piddling; and "the efficiency with which the parties conducted the proceeding" – quite high, with the exception of the parts of the counterclaim abandoned as the hearing went on. I take it that Rule 38.04(3)(a)(v), in allowing me to have regard to "any other matter the Court considers appropriate" permits me to have regard to the matters I have briefly listed above, which militate against the defendant's claim for costs. Ultimately I am of the opinion that I should give those factors some weight, and "the amount awarded to the plaintiff or defendant" some weight also. This appears to me to be a case where it is proper to exercise my discretion to depart from the guide in Rule 38.04(2)(b) and instead order that the plaintiff pay the defendant's costs fixed at 50% of the Supreme Court scale.

6. There was one other issue mentioned in the argument about costs. On 01/04/05 the defendant filed an offer of Compromise on its face in accordance with Division 2 of Order 20 of the Rules. The offer, to settle the matter by the defendant's paying $1000 to the plaintiff, was silent as to costs. It appears that the plaintiff's solicitors, perhaps sensing that the offer

was too good to be true, enquired of the defendant's solicitor whether the offer really entailed the costs consequences laid out in Rule 20.02(6)(a), and were told that it was not meant to. The plaintiff, rather decently, did not snap up the offer. I understand it was never formally withdrawn, but I take the view of it that both parties did: non est factum might be the phrase. Nothing flows from that offer in terms of my consideration of the question of costs. As far as I can see, the most Mr Piper could make of it in his argument was that the making of the flawed offer of compromise at least showed that the defendant was not closed to reason on the question of settlement. That may be right, but I have not presumed that either party was.

Dated this 2nd day of March 2006.

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R.J. Wallace SM
STIPENDIARY MAGISTRATE