CITATION: *Kone v The Proprietors of Unit Plan 2002/40 (no 2)* [2007] NTMC 079

PARTIES:	KONE ELEVATORS PTY LTD Plaintiff v THE PROPRIETORS OF UNITS PLAN 2002/40 Defendant
TITLE OF COURT:	Local Court
JURISDICTION:	Darwin
FILE NO(s):	20522706
DELIVERED ON:	28 November 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	22 November 2007
JUDGMENT OF:	Ms M Little SM

CATCHWORDS:

Costs - Whether order for Indemnity Costs to be made

REPRESENTATION:

Counsel:

Plaintiff:	Ms Kelly
Defendant:	Ms McLaren

Solicitors:

Plaintiff:	Cridlands
Defendant:	Asha McLaren

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 079
Number of paragraphs:	17

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

No. 20522706

[2007] NTMC 079

BETWEEN:

KONE ELEVATORS PTY LTD
Plaintiff

AND:

THE PROPRIETORS OF UNITS PLAN 2002/40
Defendant

(no 2)

REASONS FOR DECISION

(Delivered 28 November 2007)

Ms M LITTLE SM:

1. On 16 August 2007 I found in favour of the defendant in this matter. The claim by the plaintiff was dismissed and I reserved the question of costs and granted liberty for parties to call the matter back on with respect to costs and any other consequential applications. The defendant had sought in its defence that the claim be dismissed with costs. The defendant has now made an interlocutory application for costs to be ordered on the indemnity basis from 7 November 2005. This application does not relate to the costs prior to that date. The plaintiff does not oppose an order for costs but opposes costs being awarded on an indemnity basis from 7 November 2005. On 22 November 2007, there was a hearing on the interlocutory application. I reserved decision on that question and I now deal with the defendant's application.

2. The application for indemnity costs principally relates to a letter sent on 7 November 2005. On that date the defendant's solicitor sent a letter

marked “Without Prejudice” to the plaintiff’s solicitors which stated as follows:-

> I refer to your statement of claim in the above matter which I am instructed to say is without merit.
>
> I am, therefore, instructed to request you withdraw proceedings with a view to avoid further costs, failing which my client reserves its right to tender this document and seek costs on an indemnity basis against your client, the plaintiff.

3. This is the full text of the letter. The plaintiff did not respond to the letter and the plaintiff can be taken to have rejected the request (or offer) of the defendant.

4. The first matter to be considered is whether this was a genuine offer of compromise. There is no explanation as to why the defendant claims that the plaintiff case was without merit. The assertion is made without any material to substantiate the claim. Such material would have provided the plaintiff with ample opportunity to shore up their case (if that was deemed to be the appropriate course of action), or at the very least would have given a clear idea to the plaintiff as to the defendant’s arguments in defence of the claim. Such information would have been in addition to the matters set out in the defence filed on 19 October 2005. This would have given the plaintiff’s advisers an opportunity to consider their case from the point of view of the defendant. From a tactical point of view the defendant would not have been ‘keeping its powder dry’ were it making a genuine offer of compromise. If the offer was not accepted, the claim dismissed at hearing and the matters raised by the defendant were replicated in the decision of the Court, the communication setting out the basis of the defence could have been used to help justify an order for costs on an indemnity basis.

5. There was no monetary compromise made by the defendant contained in the letter. For example, there was no indication that if a notice of discontinuance was filed by the plaintiff, the defendant would not be

seeking its costs from the plaintiff up to the date of filing a notice of discontinuance. At this early stage of the proceedings, while it may have only been a relatively low sum, it would still have represented a compromise. This is now being inferred by the application in that indemnity costs are only being sought as from the date of the letter, but such a compromise is not evident on the face of the letter. There is no obligation on the plaintiff to follow up the letter to ascertain whether costs will be sought. I decline to find that the letter dated 7 November 2005 was a genuine offer of compromise.

6. If I am found to be wrong on that point, I will consider the matter further. As stated, it is inferred that the plaintiff rejected the offer. The next issue is whether the rejection of the offer was unreasonable.

7. The plaintiff did not have a paper thin case. There were aspects to the plaintiff's case which demonstrated it may have had an arguable case. There were actions by the defendant which were found to lay the foundations for the plaintiff's case. Nevertheless the plaintiff did not prove its case on the balance of probabilities and the claim was dismissed. I do not believe it can be found there was an alternative motive for continuing on with the case or that there is some wilful disregard of the known facts or clearly established law which can be pointed to.

8. An aspect of the claim which Ms McLaren focused upon in the interlocutory application related to the action for specific performance. That aspect of the claim was withdrawn approximately six months prior to the hearing date and, whilst may have taken up some attention, does not appear to have been the primary focus of the case at any stage. It was not a matter agitated at hearing and was withdrawn well prior to the hearing date. The fact that one part of a claim was withdrawn long before a hearing does not justify an order for costs on an indemnity basis up to and including the hearing date.

Further, on these facts I find it does not justify an order for costs on an indemnity basis up to the time that part of the claim was withdrawn.

9. I do not regard the question of the difference in the financial circumstances as between the plaintiff and the defendant as relevant to the question of costs being awarded on an indemnity basis. Costs orders are ordinarily made in favour of the successful party. Orders for costs on an indemnity basis should not be used as a device to discourage litigants who are acting in good faith to pursue or defend an action. Such an order would disproportionately affect parties who are in the opposite financial circumstances to this defendant and plaintiff. Ms McLaren made the point that had the plaintiff been successful, she was sure that they would have made an application for indemnity costs. That may well be, but as stated in Court, that is not to say that the order would have been made. There may well be public policy reasons why in some cases indemnity costs will be ordered. This is not such a case.

10. The defendant was acting as its own manager of body corporate matters and must be taken to have understood that there may well have been legal costs associated with its actions while acting in this role. I have not been pointed to any legal authority for the proposition that the ability to easily meet legal costs without hardship or conversely that the lack of ability to meet legal costs without incurring hardship is relevant to the question of indemnity costs being ordered. Each case is decided on its own facts but I do not see that the authorities are decided on the ability (or inability) of a litigant to pay costs if awarded on an indemnity basis.

11. Further, I do not regard the fact that the summary judgement application by the plaintiff was unsuccessful as being indicative of whether an order for indemnity costs should be made. An application for summary judgement is not always a guide as to whether a claim will ultimately be successful or unsuccessful.

12. This case was decided based upon a consideration of the evidence, both oral and documentary and an assessment of the witnesses' credibility. Findings of fact were made. The claim was adjudicated. There was nothing out of the ordinary in this case. The case was not prolonged by the actions of the plaintiff. There were no allegations made against the defendant or any of the defendant's witnesses which cause for consideration of an award of costs on an indemnity basis. I can find no evidence of misconduct on behalf of the plaintiff in the conduct of its case. In the final analysis, the case turned on a consideration of the witnesses' evidence and the documentary evidence before the Court. I do not find that this is a case where the plaintiff properly advised *should have known* it had no chance of success. In my view, that is a relatively high test and one which is not made out in these circumstances. The rejection of the offer (or request) was not unreasonable in this case.

13. The application for an award of costs on an indemnity basis from 7 November 2005 is declined. I make no order for costs on the interlocutory application. While the matter was not specifically agitated, the plaintiff sought its costs of the interlocutory application. This order is declined. While not obliged to respond to the letter of 7 November 2005, the plaintiff did not respond. In particular, it did not advise that it would seek an order for costs should such an application be made by the defendant. There is nothing about this interlocutory application which takes it outside the usual case where an award of costs would be made against the unsuccessful party, in this case the defendant.

14. With respect to the application for costs, this is not opposed. The defendant sought an award of costs at 100% of the Supreme Court scale. This is opposed by the plaintiff. They consent to an order for costs at 80% of the Supreme Court scale. There is uncontroverted evidence before me that the plaintiff's claim, had it been successful, would have been in the sum of

$30,746.35. There is nothing about this case that calls for an award at 100% of the Supreme Court scale.

15. Orders for costs are made as follows :

16. The plaintiff is to pay the defendant's costs on a party-party basis. Such costs are to be awarded at 80% of the Supreme Court scale, to be agreed or, in lieu of an agreement, to be taxed.

17. I will make these orders and direct that these reasons and a copy of the order be forwarded to the parties solicitors.

Dated this 28th day of November 2007.

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Ms M Little
STIPENDIARY MAGISTRATE