CITATION: *D & L Diesel Pty Ltd v Bob Kerr Transport Pty Ltd* [2009] NTMC 033

PARTIES:	D & L DIESEL PTY LTD
	v
	BOB KERR TRANSPORT PTY LTD
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20733752
DELIVERED ON:	17 August 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	10 August 2009
JUDGMENT OF:	Ms Fong Lim RSM

CATCHWORDS:

Procedure – Costs – Percentage of Supreme Court Costs Scale – Plaintiff partially successful – Defendant partially successful – apportionment of costs between claim and counterclaim- Part 38 Local Court Rules

Mengel v Northern Territory of Australia (1994) ATR 81-266

REPRESENTATION:

Counsel:

Plaintiff:	Ms Porter
Defendant:	Mr O'Loughlin

Solicitors:

Plaintiff:	Tony Crane
Defendant:	Maleys

Judgment category classification:	C
Judgment ID number:	[2009] NTMC 033
Number of paragraphs:	17

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

No. 20733752

[2009] NTMC 033

BETWEEN:

D & L DIESEL PTY LTD
Plaintiff

AND:

BOB KERR TRANSPORT PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 17 August 2009)

Ms FONG LIM RSM:

1. The parties come before me for a ruling on costs arising out of my decision on 24 April 2009. The Plaintiff submits there should be an order in the Plaintiff's favour at 100% of the Supreme Court costs scale for the proceedings including the Defendant's counterclaim. The Defendant argues there ought to be an order that each party bear their own costs of the proceedings as neither party was fully successful in their claim. It is conceded by both parties that the matter should be certified fit for counsel and on that point I concur.

2. It is trite the Court has an unfettered discretion to award costs and at what level those costs should be awarded and this is confirmed by Rule 38.03 of the Local Court Rules. It is also trite that the starting point in relation to costs is that the successful party be granted its costs unless there is some reason connected with the case which justify an order to the contrary *Mengel v Northern Territory of Australia (1994)* ATR 81-266. The Court is given

some guidance as to the exercise of that discretion in the Local Court by Part 38 of the Local Court Rules:

> "38.03 Power and discretion of Court
>
> (1) Subject to the Act, these Rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court's discretion and the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid.
>
> (2) The Court may exercise its power and discretion in relation to costs at any stage of a proceeding or after the conclusion of a proceeding.
>
> 38.04 Court to fix percentage of Supreme Court costs
>
> (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 proceeding;
>
> (iv) the preparedness of the parties at a conciliation conference, prehearing conference or hearing of an interlocutory application; and
>
> (v) 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 $10,001 to $50,000 – 80%;

(iii) claim of $50,001 to $100,000 – 100%.

38.05Costs of conciliation conference

Subject to rule 38.04 and unless the Court orders otherwise, costs for the preparation for and attendance at a conciliation conference are allowable in the same amount as set out in the Appendix for a contested interlocutory application."

3. My decision in the substantive claim was to find for the Plaintiff on a claim for restitution for work done, to partly find for the Defendant on its defence that the hours claimed and the rate claimed was excessive and to partly find for the Defendant on its counterclaim but only award nominal damages. There was a finding that the Defendant had proved unreasonable delay in the completion of the work done by the Plaintiff, but did not discharge its burden of proof regarding the damages arising from that delay. Further there was finding that the Plaintiff's work was defective on one out of the ten grounds but again the Defendant failed in producing evidence to support damages arising out of that defective work.

4. The Plaintiff submits even though the amount claimed and the amount granted in favour of the Plaintiff was within the range of 38.04(b) (ii), the complexity of the matter requiring expert evidence and the fact that the Defendant's counterclaim put the Plaintiff at risk of a finding of 100% of the Supreme Court Costs Scale.

5. The Plaintiff further submits that although the Plaintiff was not successful in its claim for breach of contract, it was successful in the alternative claim for restitution and the evidence called in relation to that claim was so intertwined with that of the contract claim the Plaintiff ought to have its costs of whole proceedings in any event.

6. The Defendant submits that both parties were partially successful in their claims and therefore the appropriate order should be that each party bear their own costs. I was referred to recent decisions in the Federal Court

which show a move in the Federal Court towards costs being awarded on an issue by issue basis adopting the recommendations in the Woolf Report (interim Report, June 1995) that the exercise of the Court's discretion regarding costs should be based in what is fair between the parties.

7. It has been recognised that there are circumstances in which the traditional rule of costs following the event is not strictly applied. In the present case, if the traditional rule applied, the Plaintiff would be granted its costs of its claim and the Defendant its costs of the counterclaim, it would then be up to the taxing officer to decide which of the costs related to which part of the claim or counterclaim. Examples of where Courts have not applied the traditional rule are where a litigant has only succeeded on a portion of his claim *Forster v Farquhar* [1893] 1 QB 564 or where the successful party has failed on certain issues even where that "issue" is not specifically pleaded *Cretazzo v Lombardi* (1975) 13 SASR 4.

8. The present matter certainly is one where consideration must be given to whether the successful party should be entitled to all of its costs. It is clear both litigants have only succeeded on a portion of their claim and failed on certain issues. In my reasons for decision I have made findings of credit and fact which go against both parties. I found both the principals of the Plaintiff and Defendant to be exaggerating their claim and unreliable in someway. I have not been satisfied on the balance of probabilities of the Plaintiff's claim for hours spent on the job and the charge out rate claimed for two reasons. I did not find Mr Brown to be a reliable witness on that issue and the expert evidence did not support him. I have not been satisfied on the balance of probabilities of the Defendant's claim for rectification of defective work or lost opportunity for two reasons. I did not find Mr Kerr to be a reliable witness on those issues, the expert evidence did not support the claim for defective work except on one issue and there was insufficient evidence to establish damages arising out of that defective work.

9. The Plaintiff submits that the circumstances of the present case do not make it possible to extract the costs of that portion of its claim for which it failed because the costs in proving that breach of contract claim were so intertwined with the costs of proving the claim for restitution for work done.

10. The majority of the time spent at hearing was in analysing the expert evidence about the cause of the failure of the engine in question and the time spent on the job. The evidence of both experts and some of Mr Brown's evidence, Mr Kerr's evidence as well as the mechanics who worked on the vehicle concentrated on what work was done on the engine, how it was done, if it was done correctly, the cause of failure and the time spent on the job. That evidence went towards proving the Plaintiff's claim as well as the Defendant's counterclaim. The balance of the evidence can be attributed to the Plaintiff's unsuccessful contract claim and the Defendant's unsuccessful counterclaim for lost opportunity.

11. It is important to note at this point that I found both Mr Brown and Mr Kerr to be most likely exaggerating their claims and while I could not totally disregard their evidence, I did not find them to be reliable. Both the claim and counterclaim were built around the factual dispute between Mr Brown and Mr Kerr as to what was the scope of the work, the delay, the quality of the work provided and the amount charged. The unreasonableness of the Plaintiff's claim for further payments of approximately $47,000.00 led to the litigation and the Defendant's counterclaim for loss opportunity for which no tangible evidence was produced.

12. I agree with the Plaintiff that the time spent in evidence proving the Plaintiff's claim for restitution and the time spent defending the Defendant's counterclaim are so intermingled that it would be impossible to apportion those costs. However, it can be equally said that the time in evidence spent in proving that Defendant's defence regarding the unreasonableness of the

time claimed and the proving the defective work and delay is also so intertwined it would be impossible to apportion those costs.

13. Therefore, the circumstances of this case are such that it is clear that neither party were fully successful in their prosecution or defence of the claim and counterclaim and that the evidence put forward by both parties was criticised by the Court as unreliable and scant. Both parties contributed to the length of the proceedings by making unrealistic claims and both parties must take some responsibility for the costs of those proceedings. I do not accept the Plaintiff's submission that the Defendant essentially failed on its counterclaim, the Defendant was successful in establishing the Plaintiff a significant defect in the Plaintiff's work, but did not discharge the evidential burden regarding damages arising out of that defect.

14. It would be an arbitrary and artificial exercise to try and attribute a portion of costs to the Plaintiff and a portion to the Defendant and in my view, that circumstances of this case lay the liability for those costs at the door of both parties. Accordingly, the most appropriate order in relation to costs is that each party bear their own costs of this litigation.

15. Given the order that each party bear their own costs of the claim and counterclaim, there is no need to attribute a percentage of the Supreme Court Costs Scale pursuant to Rule 38.04(2). However if I am wrong about the liability for costs, I make the following observations, taking into account the factors set out in Rule 38.03(3)(a):

    a. The matter was factually complex requiring days of expert evidence

    b. The amount awarded to the Plaintiff was within the range for 80% of the Supreme Court Costs scale as set out in Rule 38.03(3)(b)

    c. The amount awarded to the Defendant on its counterclaim was less than the small claims jurisdiction of the Local Court and at a level that would not usually allow for costs to be awarded in its favour

d. Both parties ran their cases with as much efficiency as the issues allowed

e. I can make no comment as to the preparedness of the parties at conciliation conference

f. Both Mr Kerr and Mr Brown were criticized as unreliable witnesses

g. The experts produced to the Court both had appropriate qualifications yet given the circumstances it was not clear the cause of the failure of the engine despite the best efforts of the experts

16. Given the above, had I been required to make a ruling pursuant to Rule 38.04(2), I would set both the costs of the claim and counterclaim at 80% of the Supreme Court Scale. There is nothing in the circumstances of the Plaintiff's claim which on balance convinces me to make an order to the contrary and even though the award made on the Defendant's counterclaim was within the compulsory small claims jurisdiction of the Local Court and if it were standing alone, would not have attracted an award of costs, the Defendant's counterclaim was not totally unreasonable and was brought only in answer to the Plaintiff's unreasonable claim.

17. My orders are:

1. Each party bear their own costs of the proceedings regarding both the claim and counterclaim.

2. Each party bear their own costs of the application for costs.

Dated this 17th day of August 2009

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Tanya Fong Lim
RELEIVING STIPENDIARY MAGISTRATE