

CITATION: *Robyn Nykamp v Demountable Sales & Hire* [2010] NTMC 057

PARTIES: ROBYN NYKAMP

v

DEMOUNTABALE SALES & HIRE PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20924506

DELIVERED ON: 10 September 2010

DELIVERED AT: Darwin

HEARING DATE(s): 31 August 2010

JUDGMENT OF: Tanya Fong Lim SM

CATCHWORDS:

Costs – small claims jurisdiction – Calderbank offer – Section 14(7) and 31 *Local Court Act* – Section 5 and 29 *Small Claims Act* – Rules 20 and 38 Local Court Rules.

REPRESENTATION:

Counsel:

Plaintiff: Mr Liveris
Defendant: Mr Roper

Solicitors:

Plaintiff: De Silva Hebron
Defendant: TS Lee

Judgment category classification: C
Judgment ID number: [2010] NTMC 057
Number of paragraphs: 39

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

No. 20924906

BETWEEN:

ROBYN NYKAMP
Plaintiff

AND:

DEMOUNTABLE SALES & HIRE PTY LTD
Defendant

REASONS FOR JUDGMENT

(Delivered 10 September 2010)

Ms FONG LIM SM:

1. On 27 August 2010 I handed down my decision in the substantive matter between the Plaintiff and the Defendant. The Plaintiff was successful in part of her claim and the Defendant successful in part of their counterclaim. The judgment amount for both parties was below \$5,000.00 and below the jurisdictional limit of \$10,000.00 of the small claims jurisdiction of this Court (see section 5 of the *Small Claims Act*).
2. The Plaintiff submits that the orders for the costs should be orders which reflect the normal convention that a successful party should be granted his costs. The Plaintiff submits I ought to make costs orders in favour of the Plaintiff for her action and costs in favour of the Defendant for its counterclaim. Those costs are to be on a standard basis and taxed in default of agreement.
3. The Defendant claims costs of the whole proceeding and costs on an indemnity basis from the day before the hearing on the basis of an offer made the day before the hearing commenced.

4. The Court has discretion to order costs (see section 31 *Local Court Act*). In the small Claims jurisdiction the discretion to order costs for matters for which an order has been made between \$5,000.00 - \$10,000.00 considering the complexity of the matter (see section 29 *Small Claims Act*). There is no discretion to order costs if the Court has found for a party for less than \$5000.00. There is also a practice direction in force which clarifies the application of section 14(7) and the guidelines set out in Rule 38 of the local court rules.
5. Section 14(7) of the *Local Court Act* makes it very clear that claims for less than \$5,000.00 must be commenced in the small claims jurisdiction and once commenced in the small claims jurisdiction it is equally clear that no costs will be awarded for a claim of that value.
6. Rule 38.4 of the Local Court rules provides guidance to the Court in its deliberations regarding 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 sub-rule (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, pre-hearing 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%.”

7. The Practice Direction of 1 July 1998 directs that the combination of section 14(7) of the *Local Court Act* and the guidelines in Rule 38.04 should be read that costs will not be normally awarded in matters where the claim is for less than \$5,000.00. This does not address the situation where a matter has been commenced in the Local Court for an amount above the small claim jurisdiction of the Court and the Plaintiff recovers less than the small claim jurisdiction, which is the case in the present matter.
8. This matter was commenced in the Local Court with the Plaintiff claiming \$44,961.60 in damages for the replacement of the old demountable and installation of a new demountable. There was also an alternative basis for damages for the repair or replacement of the floor. In relation to the claim for damages for the replacement of the floor, the Plaintiff’s best case was \$12,000.00 and she was only successful in a claim for \$4,500.00. The Plaintiff also made a claim for loss of income which failed.
9. The Defendant’s counterclaim was for \$1,650.00 and they were successful in that claim for \$1,320.00.
10. Most of the day of hearing was spent on the Plaintiff’s claim for replacement of the floor. Very little time was spent on the claim for lost income and the Defendant’s counterclaim.
11. Early in the negotiations between the parties the Defendant made an offer to the Plaintiff to fix the floor by way of repair through the services of Mr

Dodds and that offer was rejected on the basis that the Defendant was not prepared to warrant the repairs and in fact required a release from future actions from the Plaintiff

12. On 2 December 2009 the Defendant made an offer to pay \$2,000.00 with each party bearing their own costs. The letter was without prejudice save as to costs.
13. On the day before the hearing the Defendant made a further offer by email agreeing to pay \$5,000.00, each party bear their own costs with a release from all other future claims. That email was stated to be a “Calderbank offer”. The offer was only open until 9:00am the next morning.
14. The Defendant is relying on the offer made on the day before hearing to make a claim for indemnity costs from that date. The Defendant did not refer to the Local Court Cost Rules in their submissions to the Court to support that claim.

Issues

15. The present case creates an interesting situation regarding costs in the Local Court. I have to decide the following:
 - (a) Does section 14(7) of *Local Court Act* in combination with Rule 38 of Local Court Rules and the Practice Direction prohibit the granting of costs in the present case?
 - (b) If the answer to (a) is no what effect do the offers made by the Defendant have on the grant of costs?
 - (c) Which party should be granted their costs?
 - (d) What percentage of the Supreme Court Scale should be applied in the present circumstances?

Effect of section 14 (7) *Local Court Act*, Rule 38 of Local Court Rules and the Practice Direction issued 1 Jul 1998

16. It is clear from section 14(7) of the *Local Court Act* that claims for less than \$5,000.00 must be commenced in the small claims jurisdiction. It is the clear intention of the legislature that claims of a limited nature should be dealt with in the informal small claims jurisdiction. It is also clear that it is the intention of the legislature that claims for less than \$5,000.00 ought not be subject to orders of costs to encourage parties not to incur unnecessary legal costs.
17. What is not clear is what costs rules apply if the Plaintiff has a genuine complaint and has evidence to support a claim for greater than the small claims jurisdiction, but is unsuccessful in attaining judgment for that amount.
18. I made comment in my judgment that the Plaintiff's claim for the replacement cost of the demountable was clearly unrealistic because it was not necessary or reasonable. The Plaintiff did however have an alternative basis for a claim in damages and that is the replacement of the flooring for which she had received a quote for \$12,000.00, which is a claim clearly outside of the small claims jurisdiction, that claim was more realistic and although it ultimately failed, was a legitimate claim. The Plaintiff cannot be criticised for commencing her proceedings in the Local Court jurisdiction.
19. Apart from the restrictions in section 14(7) of the *Local Court Act*, the Court's discretion to award costs is at large (see section 31 *Local Court Act*) subject to the Act and Rules of the Local Court.
20. I find it is not the effect of section 14(7) of the *Local Court Act* and Rule 38.4 of the Local Court Rules and the Practice Direction of 1 July 1998 to prohibit a costs order in favour of a Plaintiff who had good cause to commence a proceeding in the Local Court jurisdiction.

What effect do the offers made by the Defendant have on the grant of costs?

21. The Plaintiff submits that the order for costs should be:
 - (1) Costs in favour of the Plaintiff on her claim on a standard basis.
 - (2) Costs in favour of the Defendant on its counterclaim on a standard basis.
22. The Defendant submits that the three offers made to the Plaintiff throughout the proceeding should be the basis for a costs order on an indemnity basis for the whole proceedings. Alternatively the Defendant should at least be granted its costs on an indemnity basis from the day of the hearing.
23. It is important to note that the Local Court Rules set out a process for offers of compromise in Rule 20.02-20.07. The process created requires an offer to be in writing and served on the respondent party in a certain manner. Rule 20.03 (5) & (6) sets out the effect of the acceptance of an offer on costs between the parties and 20.07 the consequences of failure to accept those offers.
24. The Defendant did not use the process set out in the Rules which would have made the task of allocating costs simpler, however their failure to use this process does not stop them from making a claim for costs on the basis of those offers.
25. It is submitted by the Defendant that the first offer made to repair the floor in May of 2009 ought to have been accepted by the Plaintiff because it reflected my findings on the Plaintiff's substantive claim. The Defendant argues had this offer been accepted, then there would have been no action or legal costs and therefore, the Plaintiff acted unreasonably.
26. The Plaintiff submits it was not unreasonable to reject the initial offer to repair the floor because the Defendant wanted a release from any further action. I agree with the Plaintiff. The Defendant's call for a release from further action regarding the floor was unreasonable.

27. The Plaintiff submits the offer made by the Defendant on 2 December 2009 should have no effect on the order for costs because the Plaintiff achieved a judgment for more than that offer. I agree with the Plaintiff, there should be no costs sanctions for the refusal of an offer when the final resolution netted the Plaintiff an amount more than the offer. That finding is supported by Rule 20.07 of the Local Court Rules. If the offer had been made under the Local Court Rules cost sanctions only apply if the Plaintiff refuses an offer and received less than that offer on judgment.
28. The final offer on the day before the hearing was brief in its terms and the Plaintiff submits the short period for which the offer was open did not allow the Plaintiff sufficient opportunity to fully consider that offer and its effect and therefore, should be of little effect. The offer was sent by email at 4:08pm and expired at 9:00am the next day. The terms of that offer were the Defendant pay the Plaintiff \$5,000.00, each party bear their own costs and the Plaintiff releases the Defendant from any future claims.
29. There is no evidence of when that email was opened by the Plaintiff's solicitor or when it was passed onto the Counsel for the Plaintiff. Even if the email was opened almost immediately and discussed with Counsel immediately, it is in my view there was not sufficient time for the legal representatives to discuss the ramifications of accepting the offer with the Plaintiff. Some attention would have to be given to the issue of costs and some attention would have to have been given to the release.
30. It is not my view that it would be just to use that offer to disentitle the Plaintiff from an order for costs.
31. For the reasons set out above, I find that all of the offers made by the Defendant do not support their claim for costs on an indemnity basis of the proceedings.

Which party should be granted their costs?

32. Without legislative restrictions or intervention, the rule of law is that a successful party ought to be granted their costs. There are some circumstances in which the Court will order otherwise and the basis for making an order otherwise must be what is fair between the parties. (see Woolf Report June 1995).
33. The Plaintiff was successful in the substantive subject to her claim on liability, the Defendant was responsible to her to rectify the fault in the demountable. She was not successful in her claim for damages for replacement of the demountable, or alternatively the replacement of the floor nor in her claim for negligence or the loss of income. The Defendant was partially successful in their defence of the Plaintiff's action and partially successful in their counterclaim, on failing on the quantum of their counterclaim by a small amount.
34. The Defendant has provided the Court with a draft bill of costs from his solicitor for \$48,699.00 including barrister's fees of \$19,250.00. I have no information about the Plaintiff's costs, however I am relatively certain they would also be far in excess of the judgment granted to their client.
35. In considering what is fair between the parties, both successful to an extent in their claims, I have to take note that it is the clear intention of the legislature that matters worth less than \$5,000.00 ought not attract an order for costs. I also take note that both parties did not act reasonably in their dealings with each other, the Defendant in failing to agree to repair the flooring without a release for further liability and the Plaintiff initially pursuing the cost of the replacement of the whole demountable.
36. Given all of the above, it is my view that this is matter where a just order is that each party bear their own costs of an incidental to the proceedings. Any interlocutory costs which have been reserved are determined with each party bearing their own costs.

What percentage of the Supreme Court Scale should be applied in the present circumstances?

37. If I am wrong in refusing to grant either party their costs, the only alternative order which would reflect my judgment on liability is that the Defendant pay the Plaintiff's cost of the Plaintiff's claim in relation to the breach of contract and the Plaintiff pay the Defendant's cost of the Defendant's counterclaim. All costs to be agreed or taxed on a standard basis.
38. In all of the circumstance of this matter, I would fix the percentage of the Supreme Court Costs Scale at 30% primarily because the judgment amount for both parties was under \$5,000.00 and had the matter been dealt with in the Small Claims jurisdiction, no costs would have been awarded at all. There were no complex legal or factual issues and while the Court was assisted by the expert opinion of Mr Klishans and Mr Da Zylva, their evidence was simple and straight forward and could have been produced to the Court in the form of non contested reports.

Order:

39. Each party bear their own costs of the proceedings.

Dated this 10th day of September 2010

Tanya Fong Lim
STIPENDIARY MAGISTRATE