CITATION: *Shelton v Eureka Garages and Sheds* [2011] NTMC 030

PARTIES:	RICK SHELTON T/AS RICK SHELTON MOBILE MECHANIC v OAKTECH PTY LTD (CAN 060 638 888) T/AS EUREKA GARAGES AND SHEDS
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court – Alice Springs
FILE NO:	20819899
DELIVERED ON:	10 August 2011
DELIVERED AT:	Alice Springs
HEARING DATE:	3 June 2011
JUDGMENT OF:	J M R Neill

CATCHWORDS:

Entitlement to pre-judgement interest; entitlement to a costs order where the judgement sum is less than $5,000.00; costs orders where there have been mixed outcomes; Calderbank letters.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Floreani
Defendant:	Mr McConnel

Solicitors:

Plaintiff:	Povey Stirk
Defendant:	Cridlands MB

Judgment category classification:	C
Judgment ID number:	[2011] NTMC 030
Number of paragraphs:	24

IN THE LOCAL COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20819899

BETWEEN:

RICK SHELTON T/AS RICK SHELTON MOBILE MECHANIC
Plaintiff

AND:

OAKTECH PTY LTD T/AS EUREKA GARAGES AND SHEDS
Defendant

REASONS FOR JUDGMENT

(Delivered 10 August 2011)

Mr Neill SM:

1. I delivered the Decision in this matter on 11 May 2011. There then remained the outstanding questions of pre-judgement interest and costs.

2. I received written submissions from the parties on these outstanding questions and I heard their oral submissions on 3 June 2011. I subsequently received supplementary written submissions on costs from counsel for the Defendant.

INTEREST

3. I was informed that pre-judgement interest on the sum of $2,090.00 was agreed between the parties in the sum of $254.00 as at 11 May 2011, however the Defendant argued that interest should not be payable at all.

4. Mr McConnel for the Defendant submitted that while an award of pre-judgement interest is discretionary, it is awarded not to punish the

unsuccessful party but to compensate the successful party for the loss of the use of the judgement moneys prior to judgement. He argued firstly that the Plaintiff was itself responsible for its loss of use of the judgement moneys because it didn't accept the Defendant's early offer of repair, and secondly the amount of the judgement sum is so small that "…the Plaintiff cannot be said to have been deprived of the use of the money in any real sense".

5. I have previously considered the Defendant's offer contained in Exhibit P14.24 and transmitted on about 28 November 2008, to repair the Plaintiff's damage. That offer was limited to a contribution of up to $500.00 for materials only, with nothing additional for labour or labour costs. I rejected the Defendant's claim made in that exhibit that its expenditure of $3,679.00 to visit the site and provide an engineer's report should be seen as part of its remediation offer – paragraph [28] of the Decision of 11 May 2011. I subsequently found that the value of appropriate remediation was $10,477.50, inclusive of GST, although I then went on to reduce the amount payable by way of judgement in light of the Plaintiff's contributory negligence. That offer of repair was therefore inadequate and the Defendant was justified in not accepting it.

6. I have also considered the Defendant's offer contained in Exhibit P14.26 and for the reasons I set out in more detail in paragraphs 19 and 20 later in these Reasons I find that this offer too was not adequate and the Defendant was again justified in not accepting it.

7. In any event, the Defendant had the use of the judgement sum and the Plaintiff did not have that use, from the damage sustained by the Plaintiff in the high wind event on 22 September 2008 until judgement on 11 May 2011.

8. I do not accept that the small amount of the judgement sum in all the complex circumstances of this case should lead me to exercise my discretion against allowing pre-judgement interest to the Plaintiff.

9. I award interest to the Plaintiff payable by the Defendant on the judgement sum of $2,090.00 from 22 September 2008 to 11 May 2011 inclusive in the agreed sum of $254.00. Interest on that sum after the date of judgement is controlled by Rule 39.01 (1) of the Local Court Rules.

COSTS

10. The Plaintiff commenced these proceedings against the Defendant on 24 July 2008. However, it was not until well after that that the Plaintiff's Statement of Claim was amended to raise the issues which went to hearing in March 2010. In its final Statement of Claim the Plaintiff pleaded various defects in paragraphs 9.1 to 9.6 inclusive arising out of its allegation that the Defendant had breached implied conditions as to fitness for purpose and/or merchantable quality in the supply the goods in dispute. The Plaintiff was ultimately successful only in the claim in paragraph 9.6, one out of six claims.

11. During the hearing in March 2010 further issues arose and were argued. These included the appropriate law of the contract and the credibility of Mr Dominic Sabatino, the Director of the Defendant company. The Plaintiff was unsuccessful in its arguments on both these issues.

12. The issue which took up the majority of the time at the hearing, and in submissions, was responsibility for problems arising through the erection of the shed, and the cause of the defects pleaded in paragraphs 9.1, 9.2 and 9.3 in the final Statement of Claim. The Plaintiff was wholly unsuccessful on this issue.

13. The Plaintiff was successful on the issue pleaded in paragraph 9.6 of the final Statement of Claim, but the Defendant was successful in its pleading of contributory negligence, which reduced the judgement for the Plaintiff by 80%.

14. Ultimately there was judgement for the Plaintiff for only $2,090.00, which is well below the jurisdictional limit of $5,000.00 of the Small Claims Court.

15. Counsel for the Defendant submitted that an award of less than $5,000.00 means that no costs can be awarded to the Plaintiff, and he referred me to the Local Court Act and Rules and to the Practice Direction dated 1 July 1998. I do not accept that submission. There is a distinction to be drawn between proceedings commenced seeking an amount of up to $5,000.00, and proceedings seeking more than $5,000.00 but where an amount of less than $5,000.00 is ultimately awarded. In the second scenario there is no prohibition to be found in the Local Court Act or rules or the said Practice Direction against a costs order in favour of a successful plaintiff.

16. The present case comes within the second scenario, and the question for my consideration is whether the Plaintiff had good cause to commence these proceedings in the Local Court rather than in the Small Claims Court. I refer to and respectfully adopt the reasoning of Magistrate Fong Lim of this Court set out in *Robyn Nykamp v Demountable Sales & Hire Pty Ltd* [2010] NTMC 057 paras 16 to 20 inclusive, where she considered these issues. The Plaintiff is not excluded from being awarded any costs simply because the ultimate judgement in its favour was for an amount of less than $5,000.00.

17. I am satisfied that in the complex factual and legal circumstances of this case it was reasonable for the Plaintiff to commence these proceedings in the Local Court rather than the Small Claims Court.

18. I received helpful, detailed submissions from both parties on the law relevant to the award of costs in cases where there have been mixed outcomes. I do not need to repeat here those submissions or the principles to be derived from the many cases on the subject. Ultimately, the question of costs remains a matter of discretion.

19. The Defendant submitted that it should have its costs because it made an offer to remediate the Plaintiff's relevant damage. It said that the offer was contained in its letter of 13 February 2009 (Exhibit P 14.26). This letter refers to remediation "… using our engineer's suggestion". The letter does not provide any details of or otherwise identify that suggestion. The Defendant in supplementary written submissions argued that the details of the engineer's suggestion can be found in other specified exhibits before the court by a process of inference. I don't agree. The Defendant is seeking to rely on something akin to a Calderbank letter. Such letters must be clear and unambiguous before they can be considered in relation to costs. Winneke P suggested in *Grbavac v Hart* (1997) 1 VR 154 that the court should only consider the costs effects of such an offer if "… the terms of the offer are such as to leave the offeree in no reasonable doubt as to the nature and extent of what is being offered". There is no such clarity to be found in Exhibit P14.26 when read with the other materials before the court as identified in the Defendant's supplementary submissions on costs.

20. In addition, such offers of settlement need to address the question of costs in a clear fashion. That was not addressed in the materials identified by counsel for the Defendant in relation to the offer in Exhibit P14.26 discussed in the preceding paragraph. It was also not addressed in the lump sum settlement offer made at the conciliation conference on 7 December 2009, referred to in the affidavit of Ashley Dewell sworn 2 June 2011 which was relied on by the Defendant in costs submissions on 3 June 2011. Counsel for the Plaintiff did not object to my receiving that affidavit but neither did he positively consent to that. Pursuant to rule 32.11(1) of the Local Court Rules such offers made at a conciliation conference are confidential and, absent the consent of the parties, evidence concerning them is not admissible in the proceeding. This is an important principle to be upheld, and I disregard that evidence of that offer.

21. I find that there was no Calderbank letter or settlement offer in sufficiently precise terms from the Defendant to the Plaintiff to affect the exercise of my discretion on the issue of costs in this case.

22. I note that the Defendant by its pleadings denied any liability for the Plaintiff's damage up to and throughout the hearing of the matter, notwithstanding the contents of each of Exhibits P14.24 and P 14.26, and notwithstanding the clear admission at the hearing by Dominic Sabatino for the Defendant of relevant inadequacy in the goods supplied – see para [29] of my Reasons for Judgement delivered 11 May 2011. The Plaintiff had little option under these circumstances but to proceed to hearing in an effort to recover such damages as it could prove.

23. I am satisfied on the history of this matter where the Plaintiff has been successful to some extent, albeit a very limited extent, that it would be appropriate to make some award of costs to the Plaintiff. I am also satisfied that is appropriate to award some costs to the Defendant in recognition of its success in the great majority of the issues before the court the hearing of which occupied the great majority of the time before the court.

24. I have regard to principle number 9 identified by Robson J in *GT Corporation Pty Ltd v Amare Safety Pty Ltd (No.3)* [2008] VSC 296 at para 59, to the effect that the court can make a single costs order thus obviating cross-orders. I have determined that the appropriate costs orders in the circumstances of this matter are: 1) the Plaintiff is to bear its own costs of and incidental to the proceedings, and 2) the Plaintiff is to pay 50% of the Defendant's costs of and incidental to the proceedings to be taxed in default of agreement at 100% of the Supreme Court scale, and I so order.

Dated this 10th day of August 2011.

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John Neill
STIPENDIARY MAGISTRATE