SUPREME COURT OF QUEENSLAND

CITATION:	*CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd (No 2)* [2020] QSC 197
PARTIES:	**CPR SOLUTIONS MACKAY PTY LTD** ACN 166 773 271 (applicant) **v** **ZAMMIT EARTHMOVING PTY LTD** ACN 124 851 501 (respondent)
FILE NO/S:	SC No 17 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	26 June 2020
DELIVERED AT:	Rockhampton
HEARING DATE:	Heard on the papers
JUDGE:	Crow J
ORDER:	**1. No order as to costs.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – COSTS – where insufficient copy of application to set aside statutory demand served within period for service – where application to have statutory demand set aside unsuccessful – where the successful respondent seeks an indemnity or, alternatively, standard costs order – where the applicant seeks no order as to costs – where the factor favouring the respondent is their success and offer to the applicant - where, in applicant's favour, there may be a genuine dispute as to existence of the debt claimed, the claim is of dubious nature, COVID-19 impacted court staff's ability to undertake work, and the respondent was not prejudiced by the improper service – whether, on the balance, a costs order ought be made *Civil Proceedings Act* 2011 (Qld), s 15 *Uniform Civil Procedure Rules* 1999 (Qld), r 681 *Bostock v Ramsey Urban District Council* [1900] 2 QB 616, cited *Cachia v Hanes* (1993-94) 179 CLR 403;[1994] HCA 14, cited *Calderbank v Calderbank* [1975] 3 All ER 333, cited

Cooloola Dairys Pty Ltd v National Foods Milk Ltd (2004) 211 ALR 293; [2004] QSC 308, cited
CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd [2020] QSC 165, cited
Donald Campbell & Co Ltd v Pollak [1927] AC 732, cited
Kendell v Kendell & Ors [2005] QCA 390, cited
King & Co v Gillard & Co [1905] 2 Ch 7, cited
Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59, cited
LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd [2004] QSC 134, cited
NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd [1999] QSC 328, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited

COUNSEL: M T de Waard for the applicant
S Kelly for the respondent

SOLICITORS: Taylors Solicitors for the applicant
Wilson Ryan Grose for the respondent

[1] On 11 June 2020, the application to set aside a statutory demand issued by the respondent was dismissed as a sufficient copy of the application had not been served upon the respondent within the 21-day period required by s 459G of the *Corporations Act* 2001 (Cth).[1] Given the unusual factual circumstances of the matter, I ordered that the parties were to provide written submissions as to costs.

[2] The respondent submits it ought to receive its costs on an indemnity basis because of three inter-related reasons:

(a) the respondent was wholly successful;

(b) the application was "doomed to fail"; and

(c) prior to the hearing of the application, the respondent made an open offer to the applicant to discontinue the proceedings with no order as to costs.

[3] Conversely, the applicant relies upon the unusual factual circumstances of the case to seek an order that each party bear its own costs.

[4] In *Oshlack v Richmond River Council*, Mc Hugh J (in dissent) said:[2]

> "[67] The expression the 'usual order as to costs' embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party…fairness dictates that the

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1 *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd* [2020] QSC 165.
2 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97.

> unsuccessful party typically bears the liability for the costs of unsuccessful litigation."
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> (Footnotes omitted.)

[5] As noted by McHugh J in *Oshlack*, the general rule that "costs follow the event" is grounded in reasons of fairness and policy and should not be departed from without "good reason".[3] However, the discretion to award costs is absolute and unfettered[4] and as noted by Kirby J in *Oshlack* "the principle [that costs follow the event] cannot be treated as an absolute rule…[o]therwise, the discretion conferred in unqualified terms would indeed be shackled and confined."[5] Indeed, Kirby J identified that in cases where "special" or "exceptional" circumstances existed a departure from the usual rule may be warranted.[6]

[6] As the respondents seek costs awarded on an indemnity basis, it is necessary to consider the grounds on which this is sought. With regard to awarding costs on an indemnity basis the Court of Appeal said in *Kendell v Kendell & Ors*:[7]

> "[21] This Court has the power to make an order it considers appropriate concerning the costs of an appeal. Despite the existence this wide power, the Court will usually only award costs on the standard basis unless it is of the view that the conduct of the appeal by a party has been 'plainly unreasonable' or there are other 'special or unusual features justifying a departure from the usual course."

Indemnity costs

[7] It is plain that, just as "cost follow the event", that there exists a general rule that indemnity costs ought not be awarded except in cases where the behaviour of a party has been "plainly unreasonable", there are "special or unusual features", or where offers to settle have been made pursuant to rr 360 and 361 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") (or a *Calderbank*[8] offer).

[8] As noted above at paragraph [2] the respondent submits they are entitled to indemnity costs on the basis of three inter-twined reasons. I place little weight in the first reason advanced by the respondent, that is, they were "wholly successful", success in itself is not grounds for an indemnity costs order nor does success significantly strengthen an argument for indemnity costs. As noted in *Kendell v Kendell* there needs to be "unreasonable" behaviour or a "departure from the usual course". In an adversarial system it is hardly a "departure from the usual course" when one party succeeds over the other.

[9] The respondent further submits that as the strict operation of s 459G of the *Corporations Act* 2001 (Cth) is "well known", as is *LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd* [2004] QSC 134, and that by persisting with the

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3 *NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328 at [22].
4 *Donald Campbell & Co. v. Pollack* [1927] A.C. 732; Cited with approval by McHugh J in *Latoudis v Casey* (1990) 170 CLR 534 at 569.
5 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 121.
6 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120, 126.
7 *Kendell v Kendell & Ors* [2005] QCA 390 at [21].
8 *Calderbank v Calderbank* [1975] 3 All ER 333.

application the applicant unnecessarily caused the respondent to incur expenses. The respondent, relying on *LJAW*, submits that the applicant ought to have known that the lack of a return date would be fatal to the application (the respondent did, by way of letter inform the applicant of that) and that persisting with the application was "unreasonable" behaviour such that an award of indemnity costs is appropriate. In the present case, it was common ground that the application had been filed, the dispute related to the validity of the service of the application upon the respondent.[9]

[10] The conclusion that the present case was clearly analogous to *LJAW* and that the application was doomed to fail is made in reliance of a misreading of my judgment.[10] In *LJAW,* the copy served omitted a return date whilst the original application (held by the Registry) did notate a return date. Her Honour held that it was clear the absence of the return date meant that the copy served "failed to reflect the original application in a matter of substance".[11] In the present case both the copy that was served and the original application lacked a return date, the seal of the court, the matter number and the registrar's signature.[12] There was extensive analysis of the pertinent case law[13] as well as the rules of procedure relating to whether what was served was a copy under the *Corporations Act* 2001 (Cth).[14]

[11] What is clear, is that whether a copy served constitutes a copy relies very much on what has been filed in court. As Chesterman J said: "the authorities establish that the copy of the application served on the respondent must be such as to show that it is a replication of the application which has been filed in the court".[15] It is plain, that whether or not a copy served constitutes a copy for the purposes of the *Corporations Act* 2001 (Qld) depends on the unique circumstances of the case.

[12] As can be seen from the lengthy analysis of the relevant cases in my decision the applicant's position wasn't "doomed", the unusual factual circumstances required extensive application of both common law and legislation. The factor which proved fatal to the application was the absence, on the copy served, of the filing stamp and receipt stamp.[16] The absence of those stamps had the effect of rendering the application served on the respondent not a sufficient copy of the application on the court file, and thus not a copy under s 459G of the *Corporations Act* 2001 (Qld). It should be appreciated that this is markedly different to *LJAW*.

[13] I do not accept the respondent's submissions that the applicant need only to peruse *LJAW* and come to the conclusion that their application was "doomed". While the end result may be the same, that is, the application to set aside the demand was dismissed, I do not find that the applicant acted unreasonably in proceeding with the application, certainly not to the level referred to in *Kendell v Kendell*.

[14] As the final point in support of their submission for indemnity costs, the respondent refers to an offer made on 22 April 2020, where it was offered that, should the

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9 *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd* [2020] QSC 165 at [33].
10 *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd* [2020] QSC 165.
11 *LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd* [2004] QSC 134 at [9].
12 *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd* [2020] QSC 165 at [32].
13 *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd* [2020] QSC 165 at [15]-[24].
14 *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd* [2020] QSC 165 at [24]-[33].
15 *Cooloola Dairys Pty Ltd v National Foods Milk Ltd* (2004) 211 ALR 293 at 301.
16 *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd* [2020] QSC 165 at [64].

applicant withdraw the application, then the respondents would consent to no order as to costs being made.

[15] The acceptance of this submission would promote informal offers to a position of being more effective than offers made pursuant to the *Calderbank* principle and offers made by defendants pursuant to r 361of the UCPR. Whilst the defendant's offer to settle is relevant with respect to discretion in respect of standard costs, it is not sufficient by itself or in combination with the other matters the respondent relies upon to justify an order for costs on an indemnity basis.

Standard costs

[16] The more difficult issue to be determined is whether the applicant is correct in its submission that there ought to be no order as to costs.

[17] In *Oshlack*, McHugh J (in dissent) said:[17]

> "69. The traditional exceptions to the usual order as to costs focus on the conduct of the successful party which disentitles it to the beneficial exercise of the discretion. In *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd*,[18] Devlin J formulated the relevant principle as follows:
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> > 'No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct.'
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> 'Misconduct' in this context means misconduct relating to the litigation[19], or the circumstances leading up to the litigation[20]. Thus, the court may properly depart from the usual order as to costs when the successful party by its lax conduct effectively invites the litigation[21]; unnecessarily protracts the proceedings[22]; succeeds on a point not argued before a lower court[23]; prosecutes the matter solely for the purpose of increasing the costs recoverable[24]; or obtains relief which the unsuccessful party had already offered in settlement of the dispute."[25]
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> (Footnotes included.)

[18] It is apparent from the cases referred to by McHugh J that misconduct has a broad meaning when it is referred to in respect of costs. After Mr Bostock failed in his suing the Ramsay Urban District Council for malicious prosecution, the trial judge,

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17 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97-98.
18 [1951] 1 All ER 873 at 874.
19 *King & Co v Gillard & Co* [1905] 2 Ch 7; *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 812.
20 *Bostock v Ramsey Urban District Council* [1900] 2 QB 616.
21 *Jones v McKie* [1964] 1 WLR 960; *Bostock v Ramsey Urban District Council* [1900] 2 QB 616 at 622, 625, 627.
22 *Forbes v Samuel* [1913] 3 KB 706.
23 *Armstrong v Boulton* [1990] VR 215 at 223.
24 *Hobbs v Marlowe* [1978] AC 16.
25 *Jenkins v Hope* [1896] 1 Ch 278.

Lord Russell of Killowen CJ deprived the defendant council of its costs. The Court of Appeal unanimously affirmed the judgment of the Lord Chief Justice. Vaughan Williams LJ said:[26]

> "The second point is whether, assuming the Lord Chief Justice had a discretion for good cause to deprive the defendants of costs, there were in this case any facts on which he was entitled to hold that the defendants had so conduced to the litigation that they ought not to have their costs. It is not disputed by the plaintiff's counsel that there must be some facts forming a basis of the exercise of the discretion; that there must have been some conduct on the part of the defendants, either in the course of litigation, or conducing to it, which might amount to a cause for depriving the defendants of costs. Both sides accept the law as laid down in *Harnett v Vise*; and, therefore, really the only question in this case comes to be whether there was conduct on the part of the defendants which can be considered as having led to the action being brought, and but for which it probably never would have been brought."
>
> (Footnotes omitted.)

[19] In *King & Co v Gillard & Co*,[27] the defendants succeeded in the case that had been brought against them for passing off their goods. Having ruled for the defendant, the trial judge, Kekewich J, deprived the defendants of costs on the grounds that they had acted dishonestly in making statements about medals and awards it claimed had been bestowed upon the defendant's desiccated soup products. Kekewich J concluded as the defendant's advertising was misleading, it had amounted to a fraud upon the public and in view of that dishonest general conduct, he declined to award the defendant's costs.

[20] The Court of Appeal unanimously disagreed with Kekewich J. Vaughan Williams LJ said:[28]

> "The Court has no right to deprive a successful defendant of his costs because he has done some act which is a wrong to the public. In order that he should be deprived of his costs, he must have done some wrongful act in the course of that transaction of which the plaintiff complains."

[21] Romer LJ agreed, stating:[29]

> "But, even if that view were correct in fact, and the defendants had been guilty of misrepresentation, still it was with reference to a collateral matter and had nothing to do with the plaintiffs' case."

[22] Stirling LJ said:[30]

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26 *Bostock v Ramsey Urban District Council* [1900] 2 QB 616 at 625.
27 [1905] 2 Ch 7.
28 *King & Co v Gillard & Co* [1905] 2 Ch 7 at 11.
29 *King & Co v Gillard & Co* [1905] 2 Ch 7 at 12.
30 *King & Co v Gillard & Co* [1905] 2 Ch 7 at 14.

> "No doubt this case is very near the line. If the learned judge had exercised his discretion on the ground taken by him combined with other facts of the case, it would have been difficult to interfere. But he has singled out this one fact, which, in my opinion, was not open to him, as a ground of depriving the defendants of their costs."

[23] In *Donald Campbell & Co Ltd v Pollak,*[31] the plaintiff company sued its former manager, Mr Pollack, in respect of transactions alleged to have been engineered by Mr Pollack and Mr Boris Said. At first instance, Branson J gave judgment for Mr Pollack but without costs, mainly on the ground of the misconduct of Pollack in concealing his partnership with Said. Branson J considered that Mr Pollack's misconduct in concealing his partnership was the real reason why the second action was brought. The Court of Appeal allowed the appeal against the costs verdict of Branson J on the basis that Branson J was not entitled to take into account proceedings in an earlier action, and therefore had no basis upon which to exercise his discretion. The House of Lords unanimously set aside the order of the Court of Appeal and restored the order of Branson J.

[24] In *Donald Campbell & Co Ltd v Pollak*, Viscount Cave LC said:[32]

> "A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case….But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by statute from entertaining an appeal from it. Judged by these tests, I doubt whether the decision in *King & Co v Gillard & Co, Edmund v Martel and Ritter v Godfrey* can be supported; and judged by the same tests I am satisfied that the order made by the Court of Appeal in the present case cannot stand."
>
> (Footnotes omitted.)

[25] In supporting Viscount Cave LC, Lord Carson said:[33]

> "My Lords, I agree with the motion proposed by the noble Viscount on the Woolsack. I am not at all sure that the course of legal decisions has not gradually so circumscribed the discretion as to costs given to a judge in cases tried by him alone without a jury as to render such discretion almost nugatory. Indeed, Atkin L.J. in the

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31 [1927] AC 732.

32 *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 811-812.

33 *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 825-826.

> quotation made by the noble Viscount from his judgment in *Ritter v Godfrey*, seems to lay down that such discretion must be exercised under formulated rules, which appear to me to leave very little 'discretion' to the judge. It is not surprising, therefore, in the state of authorities that protracted litigation as to costs only should ensue, involving in some cases a rehearing of the action and a reproduction of evidence and documents used at the trial in order to enable a full inquiry as to whether the judge has acted within the rules laid down by the cases already decided. This, I think, is a result quite contrary to what was intended by the provisions of the Judicature Acts and the Rules of the Supreme Court already quoted, which drew a clear line as to costs where issues were tried before a judge and jury respectively. It seems strange that in the course of so many authorities, so little attention has been given to s.49 of the Judicature Act, 1873. The words of the section are clear and explicit, and deal not with the exercise of the discretion but with the question whether the discretion is conferred upon the judge, and, in my opinion, no matter what practice may have been hitherto, we are bound to give full effect to it."
>
> (Footnotes omitted.)

[26] As the plurality of the High Court pointed out in *Cachia v Hanes* (1993-94) 179 CLR 403, costs have been a creature of statute since 1278[34] and are intended to be a partial indemnity for professional legal costs.[35]

[27] Obviously, in modern times, statute regarding costs still persists. Relevantly, section 15 of the *Civil Proceedings Act* 2011 (Qld) provides:

> **"15 Power to award costs**
>
> A court may award costs in all proceedings unless otherwise provided."

Rule 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") provides:

> "(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court, but follow the event unless the court orders otherwise."

[28] In *Oshlack*,[36] McHugh J (in dissent) said, of the discretion as to costs, that"[b]y far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of litigation. A successful litigant is generally entitled to an award of costs."[37]

[29] In this proceeding, the respondent has succeeded and that is an important factor in its favour. However, the application is the first step in potential litigation between the parties. Another important factor in the respondent's favour is its offer not to

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34 *Statute of Gloucester* 1278 (U.K.) 6 Edw. I c. 1.
35 C*achia v Hanes* (1993-94) 179 CLR 403 at 410.
36 *Oshlack v Richmond River Council* (1998) 193 CLR 72.
37 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 96.

pursue the applicant for costs if it withdrew its application. There are, however, a series of factors against the successful respondent.

[30] The first factor is the history of the relationship between the parties, which is strongly supportive of the conclusion that there is genuine dispute between the parties as to what is owed by either party. According to Mr Haack's affidavit,[38] the parties, notwithstanding their long-standing friendship and business relations, have been unable to agree an amount, if any, owed by one party to the other. Mr Haack, with reference to the applicant company's tax invoices, shows that it was the applicant on 30 June 2016 who sought payment from the respondent for $84,312.80. Thereafter, Mr Haack deposes, from the end of August 2016, he provided equipment to the respondent at the respondent's request, which Mr Haack deposes the applicant is entitled to a further $213,120.

[31] Almost 3 years later, the respondent's solicitors, Wilson Ryan Grose, sent a letter addressed to "Darren and Nichole Haack, CPR Solutions Mackay Pty Limited" which demanded payment of $273,285.81.[39] It is instructive that the total payment was said to be the balance of monies owed to the respondent by Darren and Nichole Haack in the sum of $49,181, monies owed to the respondent by 'Big Boys Toys Blast and Paint Pty Ltd' in the sum of $5,440, and monies said to be owing by the applicant company in the sum of $244,701.81. This totals $329,804.81 less a "set-off in the amount of $56,519.00 against invoice #00000129 which was issued by you (CPR Solutions Mackay Pty Ltd)." By their letter of 14 June 2019 Wilson Ryan Grose promised legal action within 14 days if the amount was not paid, however, it seems nothing occurred for several months.

[32] On 5 November 2019, Taylors Solicitors, acting for CPR Solutions Mackay Pty Ltd, sent a letter asking the respondent to "provide us with a copy of all Invoices referred to in your letter of 14 June 2019."[40] The tax invoices were sent on 8 November 2019.[41]

[33] Mr Haack deposes that receipt of the email of 8 November 2019 was the first occasion he had observed all of the tax invoices that the respondent claimed it has previously sent to the applicant.[42]

[34] Attention must then be focussed upon the creditor's statutory demand for payment and the accompanying affidavit of Simon Paul Zammit. As noted in *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd*,[43] the applicant company did not come into existence until 14 November 2013. Of the 25 tax invoices said to constitute the full disputed amount owing of $244,824.04, 11 of them[44] are issued for "goods and services supplied by the Creditor for the Company" prior to the applicant company coming into existence.

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38 Affidavit of Darren Anthony Haack filed 22 April 2020.
39 Exhibit DH-5 to the affidavit of Darren Anthony Haack filed 17 March 2020.
40 Exhibit DH-6 to the affidavit of Darren Anthony Haack filed 17 March 2020.
41 Exhibit DH-7 to the affidavit of Darren Anthony Haack filed 17 March 2020.
42 Paragraph 8-10 of the affidavit of Darren Anthony Haack filed 22 April 2020.
43 [2020] QSC 165 at [1].
44 Invoices 5939, 5943, 5944, 5945, 5946, 5947, 5948, 5949, 5950, 5951 and 5952.

[35] Each of the last 11 invoices was issued 2018,[45] that is 6 to 7 years after the work had been completed, and whilst the late creation of the invoices explains why they did not appear in the 2014 and 2015 account statements of the creditor, Zammit Earthmoving Pty Ltd as shown in DH-3, there has been no explanation proffered as to why those amounts did not exist on the 31 January 2019 statement, which is also exhibit DH-3.

[36] On its face, the statement of 31 January 2019, concluding, as it does, that there is $146,439.28 owing, all of which was in respect of invoices dated between 30 May 2014 and 30 August 2016 supports a conclusion that as at 31 January 2019, the applicant was not indebted to the respondent for the last 11 invoices.

[37] On the face of the creditor's statutory demand, the respondent did not seek to hide the fact that it had back dated its invoices for work performed 6 to 7 years earlier, however, it is, at its lowest, misleading to describe the work as work being supplied "to the company" at a point in time when the company did not exist. Whilst the first 14 tax invoices, said to be issued from the respondent to the applicant, do relate to a time when the applicant company was in existence, there are some anomalies and difficulties with the tax invoices and their lack of supporting documentation attached to the tax invoices.

[38] The first 6 tax invoices for sums varying between $704 and $6,160 have a degree of detail placed upon them, yet the seventh invoice, tax invoice 3625 of 15 June 2016 has the complete description of works as "site: MMT154 – Telegraph Creek Civil Works and Earthworks completed $75,403.25".[46] The accompanying documents to that, the largest invoice, are a series of daily timesheets, most of which record the client as being "ZE", presumably Zammit Earthmoving, or Wilmar.

[39] The applicant (presumably), is recorded twice on those time sheets supporting invoice number 3625. Once, on time sheet number 16405,[47] as the "Client's Mailing Address"; the respondent was still noted as the client. Then time sheet, number 16126, refers the client as "Willmar – CPR".

[40] As is shown in Exhibit DH-2 and paragraph 4 of Mr Haack's affidavit, in the month of June 2016 it appears that the applicant company sent to the respondent tax invoices totalling $84,312.80 and the respondent company had sent to the applicant company the aforementioned undetailed tax invoice 3625 claiming that the applicant company owed the respondent company $82,943.58.

[41] As is shown in Exhibit DH-3, Mr Haack has deposed that the applicant company not receiving a statement from the respondent between 1 May 2015 and 31 January 2019. I conclude, as may be demonstrated by review of the respondent company's documentation that there are serious anomalies and that the last 11 tax invoices (tax invoices totalling $98,263.21 cannot, on the material provided, be a genuine debt owed by the applicant to the respondent. In the affidavit accompanying the statutory demand, Mr Zammit has sworn that the total sum of $244,824.04, as shown in the statutory demand, is due and payable by the debtor company and that "I believe there was no genuine dispute about the existence of all amount of the debt."

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45 Exhibit DH-2 to the affidavit of Darren Anthony Haack filed 17 March 2020.
46 Exhibit DH-2 to the affidavit of Darren Anthony Haack filed 17 March 2020.
47 Exhibit DH-2 to the affidavit of Darren Anthony Haack filed 17 March 2020.

[42] The documents disclosed by both the applicant and the respondent, being the tax invoices, supporting information and statements provided, show, on the balance of probability, that the total sum of $244,824.04 was not due and payable to the defendant company and that it is objectively unreasonable and misleading to conclude or hold the belief "that there is no genuine dispute about the existence or amount of the debt". Many of the tax invoices themselves appear to raise serious questions to be tried.

[43] The identified unreasonable and misleading declaration in the affidavit accompanying the statutory demand is the second factor in the applicants favour.

[44] The third factor in the applicant's favour is the circumstances pertaining to the inability in the registry to issue the application in a timely manner in which applications are ordinarily issued as a result of the interference of the COVID-19 restrictions.

[45] The fourth factor in the applicant's favour is the service of the official court receipt upon the respondent, on the facts of this case, provided the same information to the respondent that it could have received had a sufficient copy of the application been served upon the respondent. As set out my principal judgment, the requirement to serve a copy, under s 459G of the *Corporations Act* 2001 (Cth), of the application and supporting material is a requirement to ensure that a respondent is appropriately informed that an application has been brought and there is indeed a genuine dispute as to the underlying debt. The application failed, as recorded in my judgment, because of the lack of the receipt and date stamp which was present upon the application filed in the registry.

[46] As is recorded in my judgment, the fact that the application had been filed was acknowledged by the respondent and it was provided was sufficient proof of that fact by the provision by the applicant to the respondent of the court receipt. What was in fact recorded on the court file was not known to the parties and accordingly the outcome of the application could not be known until enquiries were made as to what was contained upon the court file at the time of the service of the copy of the application.

[47] In circumstances where the respondent in fact had the information in his possession as to the date of filing and the place of filing and the receipt number, and that was precisely the same as the information contained upon the date stamp and filing stamps placed upon the application. The failure to serve a sufficient copy of the application did not prejudice the respondent in any way. However, as recorded in my judgment, the test is not whether the respondent company had been prejudiced or deprived of information, but rather whether the document served was a sufficient copy of that which was filed.

[48] The present case is an example of the harsh operation of 5.4 of the *Corporations Act* 2001 (Cth). In my view, the combination of the above four factors leads me to conclude that, on the balance, it is a proper exercise of discretion to order that there be no order as to costs.