SUPREME COURT OF QUEENSLAND

CITATION:	*Mackay Computer Services Pty Ltd v Wi-Man Pty Ltd* [2008] QSC 221
PARTIES:	**MACKAY COMPUTER SERVICES PTY LTD** **ACN 065 626 824** (Applicant) **v** **WI-MAN PTY LTD** **ACN 110 684 869** (Respondent)
FILE NO:	S 93 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court in Mackay
DELIVERED ON:	19 September 2008
DELIVERED AT:	Rockhampton
HEARING DATE:	8 and 10 September 2008
JUDGE:	McMeekin J
ORDER:	**1. That the respondent pay the applicant's costs of the application on the standard basis, limited to the first day of the hearing.**
CATCHWORDS:	PROCEDURE – COSTS – JURISDICTION – GENERAL – COMPROMISE OF PROCEEDINGS – where the respondent withdrew a statutory demand the day after the applicant applied to have it set aside – where the applicant claims costs for preparing the application and hearing – where the applicant claims the respondent had no basis for the statutory demand – where the respondent claims incorrect forms and affidavits were used *Corporations Act 2001* (Cth), s459G, s459N, s467A, *Acts Interpretation Act 1954* (Qld), s49 *UCPR*, r 681, r 995, Sch 1A *Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin* (1997) 186 CLR 622, followed.

	QUYD Pty Ltd v Marvass Pty Ltd [2008] QCA 257, followed
	Walton v Gardiner (1993) 177 CLR 378, followed.
COUNSEL:	S Naylor (*sol*) for the Applicant
	P Land (*sol)* for the Respondent
SOLICITORS:	Macrossan & Amiet Solicitors for the Applicant
	SR Wallace & Wallace for the Respondent

[1] **McMEEKIN J**: The dispute concerns whether and what order for costs should be made in these proceedings.

[2] The application before the Court is to set aside a creditors statutory demand served on the applicant by the respondent pursuant to the *Corporations Act 2001* (Cwlth) ("the Act"). The demand alleged a debt owing of $47,014.79. A director of the respondent swore an affidavit that he believed that there was "no genuine dispute about the existence of the debt".[1]

[3] On the day following the filing of the application the respondent withdrew the demand.[2] The applicant contends that an order should be made that its costs incurred in preparing the application and supporting material, and the subsequent two hour hearing over two days concerning the costs issue, be paid by the respondent and that the order be on the indemnity basis.

[4] The applicant relies on s 459N of the Act which provides:

> *"Where, on an Application under Section 459G, the Court sets aside the demand, it may order the person who served the demand to pay the company's costs in relation to the Application."*

[5] Alternatively the applicant relies on r 681(1) *UCPR* which provides:

> *"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."*

[6] The basis for the applicant's claim for a costs order is that the there never was any proper basis for the claimed debt, the respondent by its officers well knew it, and well knew there would be a substantial dispute about such a claim. The applicant contends that the service of the demand amounted to an abuse of the process of the court.

[7] The respondent contends not only that it should not be ordered to pay costs but that it is entitled to costs.

[8] The respondent resists the costs order on several grounds as follows:

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1 Affidavit Delahunty ex JAD 1 p5

2 In fact it was withdrawn at 8 pm on the night of filing and serving and so is deemed to be the next day – see Affidavit of Naylor filed by leave 8 September 2008 paras 2, 3 and 5

(a) The Court has no jurisdiction or power to make the costs order as the application is in the wrong form. The application to set aside the statutory demand is one governed by the Corporations Proceedings Rules ("*CPR*"): see r 995 *Uniform Civil Procedure Rules.* It is an originating application and must be in accordance with Form 2 (r 2.1 of the *CPR*). The form used was that applicable for originating applications under the *UCPR* and not in accordance with Form 2*;*

(b) The affidavit in support of the application failed to exhibit a record of an ASIC search of the debtor company as required by r 2.4(2) *CPR* and is therefore not properly completed and the application a nullity;

(c) That even if the first two submissions are wrong the respondent acted reasonably in issuing the statutory demand. The applicant admits that a debt in excess of the statutory minimum necessary for the issuing of a demand is owing.[3] I note that it is also said by the applicant that it has a substantial set-off in excess of the small amount said to be otherwise owing.

(d) Alternatively that the respondent acted entirely reasonably once alerted to the applicant's case. The respondent sought a short deferment before the application was filed, to the day following the filing of the application, in which to consider withdrawing the demand. In the context that the relevant director was on his honeymoon in Greece, and that the demand was withdrawn within hours of the filing of the application the respondent could not have acted more reasonably.

Power to Award Costs

[9] Before turning to the submissions it is necessary to say something about the power to award costs. The basis for the jurisdiction to award costs is said by s 459N of the Act to be dependent on a decision of the court to set aside the demand. That section cannot apply because I have not set aside the statutory demand – it was withdrawn by the respondent.

[10] The alternative ground of power is said to be the *Uniform Civil Procedure Rules 1999.* They apply "so far as they are relevant and not inconsistent with these rules": r 1.3(2) *CPR*. There are two relevant issues. The first is whether the *UCPR* can apply when the Act expressly provides that a precondition must first be satisfied for the exercise of the power to award costs - a condition not found in the *UCPR.* The second is whether I can determine where the merits lie given the compromise of the dispute here – mere withdrawal of the demand does not necessarily establish that the demand should not have issued.

[11] No submissions were addressed to either issue.

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[3] Affidavit John Delahunty para 10 - $3,146.06

[12] Plainly it would be unfortunate if the court's power to award costs was thwarted by a party withdrawing an unmeritorious demand prior to a hearing. The court's proceedings would be open to abuse.

[13] As to the first issue there is no inconsistency with the *CPR* as there is no provision in the *CPR* dealing with costs. The inconsistency, if there is one, is with the Act. In my view there is no relevant inconsistency. Section 459N does not say that the court can "only" award costs when it sets aside the demand. I would be slow to adopt an interpretation that would have the effect of depriving the court of the very useful power of indemnifying partially or wholly a party wrongly subjected to the court's processes.

[14] As to the second issue I am conscious of the principle enunciated by McHugh J in *Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin*[4] that, in general terms, a court will not try a settled case in order to determine the incidence of costs. Where neither party to litigation wishes to pursue it, and each party has acted reasonably in commencing and defending the proceeding, and continued so to act until settlement, the proper exercise of the Court's discretion as to costs will usually lead to an order that no order as to costs be made.[5] The reason for this is the practical difficulty of the Court being required to undertake a hypothetical trial to determine whether one or other party would eventually succeed on the settled issues and thereafter have an entitlement to costs following that hypothetical event. This would be extremely wasteful of the time of courts. A further reason is that the Court acknowledges that it is in the public interest that parties compromise their disputes and the law should not create difficulties in the way of this.

[15] Here there is no need for a hypothetical trial as none was required by the Act to determine the fate of this application. All that I needed to be satisfied about is that there is a genuine dispute about the existence or amount of the debt or that the company had an offsetting claim[6]: s 459H(1) of the Act.

[16] I am satisfied that I have the power to award costs.

[17] McHugh J recognised two categories of case in which costs might be awarded despite compromise of the action and no curial determination of the issues - unreasonableness of commencing or defending proceedings or certainty of success for one side: *Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin* (supra) at pp 624-625.

[18] The question of reasonableness in issuing the demand turns on what the respondent knew about these two matters – the existence of the dispute and the claimed set off.

[19] Even if I was satisfied that the respondent acted reasonably in issuing the demand I can still exercise the discretion to award costs if I am satisfied that success for the respondent was certain. There is a degree of overlap between the two considerations.

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4 (1997) 186 CLR 622

5 *Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin* (1997) 186 CLR 622 at pp 624-625

6 Particularised in Ex JAD 9 affidavit John Delahunty as totalling $21,864.37

[20] There is a further issue allied to these. Mr Naylor contends that the issuing of the statutory demand constituted an abuse of process. Where a party institutes proceedings that they know are foredoomed to failure then the proceedings will constitute an abuse of process. In discussing the principles applicable to the exercise by the court of its power to stay or dismiss proceedings on the basis of abuse of process Mason CJ, Deane and Dawson JJ in *Walton v Gardiner*[7] said:

> "… The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that regardless of the propriety of the purpose of the person responsible for the institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail .... Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them. Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances did not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings. The jurisdiction ... in such a case was correctly described by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* ... as 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party ... or would otherwise bring the administration of justice into disrepute among right thinking people.' " (underlining added)

[21] I turn then to the submissions advanced by Mr Land for the respondent.

Use of the Wrong Form

[22] The respondent's principal submission was that the *CPR* used the word "must" in rr 2.1 and 2.2(3)(a) and that allowed of no deviation. Rule 2.1 provides: "The title of a document filed in a proceeding must be in Form 1". Rule 2.2(3)(a)provides: "An originating application must be in form 2". It was submitted that there was no discretion in the Court to permit some other form to be used. Thus it was submitted that the failure to use Form 2 was not a defect in form but no application at all. Mr Land relied on a number of cases for the proposition that a failure to use at all a form prescribed cannot amount to substantial compliance.

[23] The form used differed from the form required in only two respects – the heading should have commenced with the words "In the Matter of [inserting the name of the applicant company]" and there should have been a note at the foot of the form

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[7] (1993) 177 CLR 378 at 392, 393

advising the respondent – who already had lawyers acting for it as was evident from the statutory demand – that without the leave of the court it must be represented by a legal practitioner at the hearing. In all other respects the information required by the prescribed form, Form 2, was contained in the form used.

[24] Section 49(1) of the *Acts Interpretation Act 1954 (Qld)* is relevant. It provides:

> *"49(1) If a form is prescribed or approved under an Act, strict compliance with the form is not necessary and substantial compliance is sufficient."*

[25] To like effect is s 25C of the *Acts Interpretation Act 1901 (Cwlth).*

[26] The effect of s 49(1) may be displaced by a contrary intention appearing in the relevant Act: s 4 *Acts Interpretation Act 1954 (Qld).* Similarly in the Commonwealth legislation: s 2(1).

[27] The authorities that Mr Land relied on were determinations under the *Bankruptcy Act 1966 (Cwlth)* and the *Migration Act 1958 (Cwlth).* In my view they do not assist in determining the relevant question here – did the form used fail to meet a requirement made essential by the Act? To determine that question requires an examination of the relevant provisions of the *Corporations Act 2001.*

[28] In my opinion the word "must" in the *CPR* does not have the connotation that the respondent seeks to put on it. As Fraser JA pointed out in *QUYD Pty Ltd v Marvass Pty Ltd*[8]: "The prescription of a form will normally be expressed in language of obligation rather than of permission: that raises the question whether a provision in the form of s 49(1) [of the *Acts Interpretation Act 1954 (Qld)]* is excluded but it does not answer it."

[29] Firstly I observe that a failure to file and serve an application to set aside a statutory demand within 21 days (s 459G(2)) has dire consequences for the debtor company – it is the foundation for an application to wind up the company: s 459Q of the Act. In responding to that application the debtor cannot rely on any matter that it could have relied on in an application to set aside the statutory demand: s 459S of the Act. The court has no discretion to extend the 21 day period. Given the consequences it would be surprising if the failure to include inconsequential matters rendered such an application a nullity.

[30] Secondly it is evident that strict adherence to the forms laid down are not required in relation to the statutory demand itself. If there is a defect in the form it is necessary also to show that "substantial injustice will be caused unless the demand is set aside": s 459J of the Act. It would be an odd result if pedantic adherence to the form was required in respect of the application to set aside the demand but not in relation to the demand itself.[9]

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8 [2008] QCA 257 at [24]

9 Whilst no authority was cited directly on point in *Ceramco Java Pty Ltd v Wendy Wilson Concepts Pty Ltd (in Liq) [2001] QSC 204* Mullins J held that substantial compliance was sufficient with respect to an affidavit in support of a statutory demand – a conclusion consistent with my conclusion here.

[31] Thirdly there are two provisions which suggest that strict adherence to the form is not intended. Rule 1.7(1) *CPR* provides: "It is sufficient compliance with these rules in relation to a document that is required to be in accordance with a form if the document is substantially in accordance with the form required…".

[32] The application is one brought under Part 5.4 of the Act. Section 467A of the Act provides:

> ***"467A Effect of defect or irregularity on application under Part 5.4 or 5.4A***
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> *An application under Part 5.4 or 5.4A must not be dismissed merely because of one or more of the following:*
>
> > *(a) in any case—a defect or irregularity in connection with the application;*
> > *(b) in the case of an application for a company to be wound up in insolvency—a defect in a statutory demand;*
>
> *unless the Court is satisfied that substantial injustice has been caused that cannot otherwise be remedied (for example, by an adjournment or an order for costs)."*

[33] In my view these provisions make plain that the prescriptive words used in the rules do not have the effect that a departure from the form prescribed renders the proceedings a nullity as contended. No injustice whatever has been caused by the adoption of the wrong form. All relevant information was provided and was well understood.

The ASIC Search

[34] It is not in issue that no affidavit exhibiting an ASIC search of the applicant was filed with the application.

[35] Mr Naylor filed an affidavit after the commencement of the hearing exhibiting a record of a search of the ASIC records in relation to the applicant. Mr Land submitted that was too late.

[36] Because of the withdrawal of the demand several days before the hearing there was no point to the applicant ensuring that the requirements of r 2.4(2) *CPR* be met by the time of the hearing save to meet this argument.

[37] The issue is whether the failure to file an affidavit exhibiting an ASIC search renders the application a nullity and one unable to be cured by the filing subsequently of such an affidavit.

[38] In my view there is nothing in the statutory scheme which would suggest such a result. There is no requirement in the rules that the affidavit in support be filed at any particular time. There is nothing in s 459G to suggest that more than one affidavit is prohibited. I cannot see that the apparent purpose of the requirement to file such a search – that the court be satisfied that it is dealing with a registered company and one not insolvent – is thwarted by permitting a later affidavit.

[39] No authority directly on point was cited. Mr Land referred to *Najarian v Mima*[10] decided in relation to the *Migration Act 1958* (Cwlth). There it was accepted that the subsequent filing of certain information required by that Act operated to complete an inchoate application. Until then there was no valid application. I do not find the discussion there particularly helpful here – it concerns a different Act with different purposes and requirements.

[40] I should record that there was a dispute with respect to the requirement that an ASIC search be filed as to whether that was required in relation to the applicant (the debtor company) or the respondent. Mr Naylor contended for the respondent. I thought that the requirement in the rule clearly intended the debtor company. There are a number of reasons for so thinking. Rule 2.4(2) in requiring such a search refers to "the company that is the subject of the application". This application is about the applicant not the respondent – the applicant was seeking to set aside a statutory demand directed to it. The purpose of the search presumably is so that the court can be satisfied that the company in question is in fact registered – that the court is not making orders in respect of a non existent entity or one already found to be insolvent.

[41] As well the filing of the results of such a search is required in all cases. The rule plainly envisages that a company will be the object of the application. In an application of this type there is of course no necessity that the creditor be a company, it merely happens to be so in this case. A company will always be the debtor in an application under the Act.

[42] I note that a new rule was introduced last week – r 2.4A – expressly applicable to applications to set aside statutory demands.[11] That makes plain that the search is required in respect of the applicant debtor company: r 2.4A(3)(a).

[43] In my view the failure to file the required affidavit does not render the application a nullity.

[44] I am not persuaded by the first two submissions that I lack the necessary jurisdiction.

The Evidence as to the Dispute

[45] Before turning to the relevant considerations I should say something as to the facts. The respondent exhibited five invoices to the affidavit filed supporting the statutory demand. Each related to the supply of goods to the applicant and allegedly not paid. Three of those result in an alleged and disputed debt due of $1,151.70. The remaining two concern more significant and contentious debts - one for $13,134 (Inv No 2939 dated 24/11/06) and one for $32,813 (Inv No 3225 dated 2 August 2007). The applicant by its director swears that the first invoice has been paid and that the second invoice related to goods that were supplied free of charge as compensation for difficulties experienced with other stock supplied.

[46] Mr Naylor submitted that the applicant made out a strong case that the proceedings should never have been brought because the respondent knew that there was a substantial dispute about the claimed debt.

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10 [2000] FCA 933; 175 ALR 695 per Merkel J

11 Uniform Civil Procedure Amendment Rule (No 4) 2008 s 2

[47] As to Inv No 2939 the applicant contended effectively that the applicant had a running account with the respondent. The applicant's director swore to various payments made in reduction of the debt to nil. The director also swore to a reconciliation of the running account which demonstrated an amount owing of $3,146.06 but in relation to debts different from those the subject of the invoices relied on in the affidavit supporting the demand.[12]

[48] As to Inv No 3225 the applicant pointed to two compelling pieces of evidence emanating from the respondent:

(a) Invoice 3225 is dated 2 August 2007. In a statement of account subsequently issued by the respondent on 9 August 2007 and sent to the applicant the balance owing on invoice no 3225 was shown as nil – as the applicant contends it ought to be; and

(b) invoice 3225 was not in fact rendered to the applicant for the goods delivered until 25 June 2008, 10 months after the delivery – consistent with the applicant's claim that there was in truth no valid debt.

[49] I adjourned the application for two days to give the respondent the opportunity to respond to the claims made by the applicant. Whilst the affidavit subsequently filed by its director Mr Wallace clearly indicates that there are contentious issues surrounding the claimed debt the respondent did not respond to either of the two pieces of evidence referred to in paragraph [48] above. No explanation was offered as to why it did not. Nor did the respondent refute the claimed reconciliation of accounts either by pointing out errors in it or by producing one of its own.

Discretionary Considerations

[50] The demand was served by letter dated 12 August 2008 on the registered office of the applicant. Mr Delahunty swears that the demand was received by the Applicant on 20 August 2008.[13] The applicant's solicitors sent a letter on 29 August setting out the applicant's case and seeking a withdrawal of the demand. The solicitors' letter indicated that if the demand was not withdrawn by 4pm on 1 September 2008 then application would be made the following day to have the demand set aside.[14] On 1 September the respondent's solicitors sought a further period of 24 hours to decide whether to withdraw the demand. The originating application and supporting affidavit were served on the respondent's solicitors at 1.53 pm on 2 September by email, a sealed copy being served at 5.02 pm that day. At 8.02 pm that night, by facsimile mail, the solicitors for the respondent withdrew the demand.

[51] Mr Land contended that the respondent had acted reasonably in its response to the application by seeking a short period of time to consider the request to withdraw the application and then withdrawing it within that short period of time and within hours of service of the application itself. He pointed out that Mr Wallace, the

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[12] Affidavit Delahunty Ex JAD 3

[13] The actual date of service may not be 20 August – it is not entirely clear whether that is the day on which service was effected on the registered office or the day on which Mr Delahunty learnt of the service.

[14] Affidavit Delahunty Ex JAD 9 at p 37

guiding mind of the respondent, had recently married and travelled to Greece on his honeymoon and so communication was not as straightforward as usual.

[52] There are a number of difficulties with those submissions.

[53] Firstly there is no obligation on a company served with such a demand to afford any latitude to the creditor. The legislation demands a response within a very short time and the effect of failing to comply is quite dire for the debtor. The debtor company is entitled to think that the demand would not have been issued without careful consideration of its position by the creditor.

[54] Secondly, latitude was given by the debtor. The respondent was given 3 days in which to consider its position and withdraw.

[55] Thirdly, the applicant's attitude to the request for further time must be judged in the light of the communications that did occur. The respondent's response to the letter of 29 August and the request to withdraw the demand is contained in a series of six emails sent by Mr Wallace to Mr Delahunty between 6 pm on 31 August and 2.46pm on 1 September. Mr Wallace referred to Mr Delahunty as "a liar and a thief", "a duplicitous criminal", accused him of insurance frauds, and said that he would "enjoy bankrupting MCS [a reference to the applicant] & you personally". He was told to "go ahead and do your worst and see what happens".[15]

[56] It is in the context of those emails that one must judge the submission advanced on behalf of the respondent that the applicant acted unreasonably in failing to extend more time to it to determine the attitude the respondent would take to the withdrawal of the demand. It is hardly surprising that Mr Delahunty took the view that the statutory demand would not be withdrawn and instructed his solicitors to proceed to prepare and file the subject application and supporting material. There is a claim that communications to and from Greece were difficult and that some latitude should have been allowed because of Mr Wallace's honeymoon. These factors proved no impediment to Mr Wallace communicating with Mr Delahunty.

[57] There is no merit in the claim that the applicant acted precipitately.

Certainty of Success

[58] To award costs to the applicant I would need to be satisfied firstly that it was virtually certain that it would succeed in the application and secondly that the respondent well knew that there was a genuine dispute as to the debt or that a set off was claimed such that the statutory demand should not have issued and that the outcome of the application was obvious.

[59] The affidavit of Mr Wallace filed on the adjourned day of the hearing indicates that there is substantial dispute between the parties as to the position of the running account that was plainly conducted between them. If that is all that could be said then I could not be satisfied that the respondent had acted unreasonably or that success in this application was certain.

[60] However in my view matters do not rest there.

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[15] Affidavit Delahunty Ex JAD 10

[61] As I have mentioned the respondent did not attempt to explain why its own statement of account of 9 November 2007 appeared to confirm the applicant's claim that no charge was rendered for the goods supplied under invoice 3225 nor why the invoice was rendered 10 months late.

[62] Invoice 2939 related to goods supplied and a debt said to be due on 26 November 2006 – nearly two years before the demand. Whilst Mr Wallace said that the respondent had not received any objection to that claim prior to the issuing of the statutory demand[16] that rather ignores that the respondent in its statement of account did not attribute payments received to any particular invoice but rather simply credited the payments against the overall balance owing.[17] So far as the evidence shows it might more accurately be said that until the issuing of the statutory demand the applicant was not to know that the respondent claimed that this invoice remained outstanding. There remains, on the respondent's case, an unexplained absence of demand for a substantial sum over a very long period of time. All this is entirely consistent with the applicant's case.

[63] I have mentioned that the respondent does not exhibit any reconciliation of the running account to demonstrate how monies received were applied. Such a reconciliation should have demonstrated the validity of the claimed debt.

[64] It seems that all dealings between the parties stopped in November 2007.[18] At that time the respondent's statement of account showed an amount claimed to be due of $23,677.15 – some $23,337 less than the debt claimed in the statutory demand. The respondent does not explain this discrepancy nor does it exhibit any letter of demand preceding the statutory demand, as one might normally expect in this commercial setting, explaining this discrepancy. Nor is there any explanation of the delay between the last dealings between the parties and the issuing of the demand 9 months later in August 2008. The absence of any action is, at least, consistent with the applicant's claim that no monies were in fact owed, or that it had a valid set off, and that the respondent knew it.

[65] Finally there is the fact that the demand was withdrawn within 4 days of receiving the applicant's solicitors' letter of 29 August – a fact which does not conclude the issue but which suggests that the existence of a dispute as to the debt or the claimed set off is not a complete surprise.

[66] I have come to the view that if the application had proceeded to judgment then the applicant would certainly have succeeded. McHugh J instanced that as one example when a Court may be justified in ordering costs despite settlement and no determination on the merits of the dispute.[19]

[67] Further I have come to the view that the respondent well knew that a genuine dispute existed concerning the claimed debt. Its failure to explain the many discrepancies in the material despite seeking and obtaining an opportunity to do so leads to no other conclusion.

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16 Affidavit Wallace filed by leave para 10

17 Affidavit Delahunty Ex JAD 4

18 Affidavit Wallace filed by leave para 8

19 At p 625 citing *South East Queensland Electricity Board v Australian Telecommunications Commission* (Unreported – Federal Court of Australia – 10 February 1989 – Pincus J) as an example

[68] Mr Land's submitted that it was not necessary for the respondent to first go to court and establish its debt to be entitled to issue a statutory demand citing *Dooney v Henry* (2000) 174 ALR 41. Whilst that may be accepted it is no answer to the argument that the respondent issued the demand when it well knew that there was a genuine dispute about the debt.

[69] Finally Mr Land relied on the amount of the debt admitted on the applicant's material as being in excess of the statutory minimum and so justifying the issuing of the demand. There are three difficulties with that submission. First it assumes the accuracy of the reconciliation that the applicant has carried out. The respondent denies its accuracy. Such an assumption is completely contrary to the basis on which the demand issued. Secondly, it ignores the set off claimed. Thirdly, on the respondent's case, once one takes out the two major debts claimed, which is fundamental to the acceptance of the reconciliation, then the balance left owing on the account is less than the statutory minimum.

Conclusion

[70] I am not in a position to judge whether monies are owing by the applicant to the respondent. The resolution of that dispute is for another day. I am satisfied that there is a genuine dispute about the existence of the debt, that the applicant claims a set off in excess of the claimed debt, and that the respondent knew these matters when it issued the demand.

[71] It may turn out that substantial monies are in fact owed by the applicant. I am not prepared to order costs on an indemnity basis given that remains a possibility.

[72] In the circumstances I consider it appropriate that the respondent pay the applicant's costs of the application on the standard basis. Given the dispute between the solicitors as to the proper level of those costs I am not prepared to fix the costs.