

COURT: MAGISTRATES COURT OF TASMANIA (Civil Division)

CITATION: *TasWater v Kitto* [2017] TASMC

PARTIES: TASMANIAN WATER and SEWERAGE
CORPORATION Pty Ltd Trading as TASWATER
v
KITTO, Jamie Collingwood (Also known as James Kitto)

FILE NO: M/2015/3161

DELIVERED ON: 19 August 2017

DELIVERED AT: Hobart

HEARING DATE: 12 December 2016

DECISION OF: Magistrate O McTaggart

CATCHWORDS:

Procedure - Civil proceedings in State and Territory courts - Costs - Discontinuance of or withdrawal from proceeding.

Procedure - Civil proceedings in State and Territory courts - Costs - General matters - Power to award generally - Statutory basis generally- minor civil claims.

Professions and trades - Lawyers - Duties and liabilities - Duties to court - Presentation of argument- duty not to raise and argue manifestly hopeless points – Relevance to award of indemnity costs – Where lawyer a party to proceeding.

Magistrates Court (Civil Division) Act 1992

EMI Records v Ian Cameron Wallace Ltd & Anor [1982] 2 ALLER 980; *Flaherty v Staines* (No. 2) [2012] TASMC 17; *Reissig v Tubb* (No. 2) [2013] TASMC 27; *Hamod v State of New South Wales* (2002) 188 ALR 659; *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; ex parte Lai Qin* 186 CLR 622; *Ebner v Official Trustee in Bankruptcy* [2000] HCA63; *Australian Securities Commission v Aust-Home Investments Limited and Others* [1993] FCA 401; *Connelly v P and O Resorts Pty Ltd T/A Cradle Mount Lodge; One.Tel Ltd v Commissioner of Taxation* [2000] FCA 270; *Khoury v JCS Technologies Pty Ltd* [2016] NSWSC 1575; *Russell v Armstrong; NSW Electoral Commission v Gallion* [2017] NSWSC 277; *Australiawide Airlines Ltd v Aspirion Pty Ltd* [2006] NSWCA; *Ugly Tribe Co Pty Ltd v Sikola & Ors* [2001] VSC 189; *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [111]-[112]; *Oshlack v Richmond River Council* (1998) 152 ALR 83;

REPRESENTATION:

Counsel:

Claimant: E Hughes
Defendant: In Person

Solicitors:

Claimant: Rae & Partners
Defendant: In Person

Decision Number: [2017] TASMC
Number of paragraphs: 74

**TASMANIAN WATER and SEWERAGE CORPORATION Pty Ltd Trading as
TASWATER v JAMIE COLLINGWOOD KITTO (Also known as James Kitto)**

REASONS FOR DECISION

MAGISTRATE O McTAGGART

19 August 2017

Introduction

1. The claimant, Tasmanian Water and Sewerage Corporation Pty Ltd, applies for costs against the defendant, Jamie Collingwood Kitto. The claimant is a supplier of water. It claimant alleged in the claim that the defendant owed outstanding water and sewerage services charged for two properties in the sum of \$3911.66 for the period 1 July 2013 to 30 June 2015.
2. The defendant, a legal practitioner, filed a defence to the claim denying that he was indebted to the claimant. The claimant applied for summary judgement against the defendant. After the filing of the summary judgement application, but before it was heard and determined, the defendant paid the claimant the full amount of the claim. His payment of the claim was made after the expiry of an offer by the claimant to accept this sum without costs. The claimant did not accept the defendant's payment as full and final settlement of the claim. Due to the defendant's payment of the debt amount the claimant subsequently did not pursue summary judgement. Instead the claimant applied for an order for costs of the claim on an indemnity basis, and no other order.
3. The claimant submits that an award of indemnity costs against the defendant is appropriate because he unreasonably defended the action and conducted himself unreasonably through the course of the action. The claimant submits that the absence of a judgement does not prevent the court exercising discretion to make an award of costs.
4. The defendant opposed an order against him for indemnity costs, or costs on any basis. The defendant submitted that a judgement is required before there is an entitlement to an award of costs; and that, in any event, the *Magistrates Court (Civil Division) Act 1992* ("the Act"), section 31AF, prohibits an entitlement to costs unless all parties are represented by counsel. Even though he is a legal practitioner, the defendant submitted that he was not represented by counsel. He also submitted, in the alternative, that there were no "special circumstances" as required by that section justifying the award of costs.
5. I therefore heard the claimant's application for costs. Before and during the hearing of the application the defendant made a number of applications that required rulings. Although I gave the rulings orally during the hearings with reasons I now also publish those reasons. They have relevance in determining the substantive application by the claimant against the defendant for indemnity costs.

Indemnity costs in the Magistrates Court (Civil Division)

6. Indemnity costs are often equated to solicitor and own client costs. In Tasmania the two terms have been used interchangeably. However, it is arguable that an award of indemnity costs is the more favourable award. The meaning of indemnity costs in accordance with the authorities is an award of all costs except those that a taxing officer is satisfied were unreasonably incurred. See *EMI Records v Ian Cameron Wallace Ltd & Anor* [1982] 2 ALLER 980. In this court the same meaning was applied in *Flaherty v Staines (No. 2)* [2012] TASMC 17 and *Reissig v Tubb (No. 2)* [2013] TASMC 27; see also Dal Pont: Law of Costs at [16.23].

7. This Court has jurisdiction to make an award of indemnity costs in the exercise of its discretion in appropriate cases. The reasoning for this proposition is set out in *Flaherty v Staines (No. 2)*, *supra*, and *Reissig v Tubb (No. 2)*, *supra*. The power arises from the general discretion of the court to award costs as set out in section 33 of the Act including a discretion to determine by whom and to what extent the costs are paid. As I will shortly discuss, the discretion in respect of awarding costs generally in the case of minor civil claims is also informed by the requirements of section 31AF of the Act.

8. In *Reissig v Tubb (No. 2)*, Magistrate Pearce (as he then was) discussed the authorities dealing with the exercise of the discretion to award indemnity costs. Relevantly, some factors in the authorities referred to by his Honour included: the wilful making of allegations which ought never to have been made, undue prolongation of a case by groundless allegations and unreasonable refusal of an offer to compromise.

9. In *Hamod v State of New South Wales* (2002) 188 ALR 659 the Full Court of the Supreme Court of New South Wales said at 20:

“Indemnity costs are not designed to punish a party for persisting with a case that turns out to fail. They are not awarded as a means of deterring litigants from putting forward arguments that might be attended by uncertainty. Rather, they serve the purpose of compensating a party fully for costs incurred, as a normal costs order could not be expected to do, when the Court takes the view that it was unreasonable for the party against whom the order is made to have subjected the innocent party to the expenditure of costs.”

The course of the proceeding

10. I set out below the events during the course of the proceeding relevant to my determination of the substantive application and the various rulings:

- On 7 September 2015 the claimant filed the claim. Included on the claim were the further sums of \$306 for solicitor’s costs, \$51 for service and other fee, \$111 court fee on filing. These further amounts purported to be inserted as mandated by virtue of rule 25 of the *Magistrates Court (Civil Division) Rules 1998* (“the Rules”) that prescribes the scale for such costs and fees.
- On 9 October 2015 the defendant filed a defence pleading only the following three matters:
 - A denial of the claimant’s claim;
 - A denial that he was indebted to the claimant as alleged or at all;
 - That he had no contract with the claimant for the services alleged and did not occupy the subject properties referred to in the claim.
- On 24 March 2016 the parties participated in a conciliation conference that did not resolve the action. The Deputy District Registrar made orders on the same day, following the conciliation conference. These orders were made properly pursuant to the powers under rule 85A of the Rules. The orders were that (a) the claimant was to file and serve further and better particulars of claim within 21 days and (b) that the defendant was to file an amended defence within 21 days thereafter.

- On 5 April 2016 the claimant's solicitors wrote to the defendant marking the correspondence "*without prejudice save as to interest and costs*". The correspondence stated that the defendant's defence was entirely without legal or factual merit. The claimant offered to accept from the defendant the sum of \$3911.66 being the amount of the debt within seven days of the date of the letter, being 12 April 2016. The offer included the proposal that each party paid its own costs. The claimant's solicitors advised the defendant that if he failed to accept the offer they would prepare the further and better particulars, seek leave to be represented at the hearing, and if successful, apply for indemnity costs. The letter further advised the defendant as follows:

"...Finally, notwithstanding that you are a litigant in person; you are a legal practitioner practising as a lawyer in litigation and general practice.

The duty to advance the matter without delay and or expense and upon proper grounds, as opposed to frivolous or unmeritorious grounds, is a professional duty owed to the court.

This letter will be relied upon in support of the application for indemnity costs."

- No response was received from the defendant within the period of the offer. The claimant's solicitors then commenced preparation of the further and better particulars of claim as required by the order.
- On 15 April 2016 the defendant emailed the claimant's solicitors purporting to accept the claimant's offer, this being three days after the expiry of the period for acceptance. By email on the same date, the claimant's solicitors advised the defendant that the claimant did not accept this payment as settlement of the claim, stating that the claimant had been put to the expense of having them prepare the further and better particulars. However, they offered to settle the claim if the defendant paid \$4379.66 being the amount of the alleged debt plus the amount of the costs endorsed on the face of the claim by 18 April 2016. The defendant emailed by return that he was only content to pay the amount of the claim. By return email the claimant's solicitors advised, *inter alia*:

"...With respect, if the matter is unresolved we rely upon that letter, your correspondence after expiry of the offer and your past conduct with respect to past claims.

In our view, a Court will be invited to find that you have specifically and contumaciously delayed in effecting payment in order to avoid a costs obligation. Far from relieving you from costs, your conduct will in our submission establish that an indemnity costs order is appropriate."

- The defendant responded by email on the same date noting that the claimant had no basis to insist upon payment of costs. He also stated in his email:

"...Secondly, it is contended that your client's claim raises a question of principle of general importance and in the interests of justice or in the particular circumstances of this case, it may well be that special leave to the High Court is granted to test the validity of the basis upon which your client claims it is owed monies by the writer. In that respect, are you able to indicate your client's position as to an Application for special leave and in that respect I await your reply."

- On the basis that the defendant apparently intended to make application for special leave to the High Court, the claimant requested to be provided with notice pursuant to section 78B of the *Judiciary Act* 1903 within 7 days. The defendant did not provide the notice and did not further pursue any application to the High Court. He did not pay the total amount claimed by the claimant.
- On 18 April 2016 the claimant filed further and better particulars of claim. This was a 16 page pleading setting out the basis of the claim for the outstanding charges and interest for the periods in question, including the basis for the defendant's liability over the period of the statutory transition of the services from the *Local Government Act* 1993 to the *Water and Sewerage Corporation Act* 2008. It also pleaded details of the various Interim Price Orders under the latter Act setting out applicable charges, as well as pleading the details of the nature and quantum of services used, the quantum of tariffs, fees and charges levied upon the defendant for various billing periods.
- On 21 April 2016 the claimant's solicitors wrote to the defendant noting that a defence to the particulars was required within 21 days from the date of service or that the total amount (that is, debt plus endorsed costs) was paid within that timeframe.
- The defendant was required by the order of the Deputy District Registrar to plead to the claimant's further and better particulars by 9 May 2016. However, he did not do so. The defendant did not in fact file an amended defence at any time during the currency of the action.
- On 20 June 2016 the claimant made application for summary judgement seeking the following orders:
 - a) Judgement for the claimant on the claim in the amount of \$3966 plus costs on an indemnity basis;
 - b) In the alternative, summary judgement for the claimant on the claim plus costs on an indemnity basis;
 - c) Further, in the alternative, the defence of the defendant filed 9 October 2015 be struck out and judgement be entered for the claimant on the claim, plus costs on an indemnity basis.
- Two affidavits accompanied the application and were filed on the same date. The hearing of the application was listed for 18 July 2016.
- On 14 July 2016 the defendant paid the claimed sum of \$3911.66 directly to the claimant advising the court administration and claimant's solicitors by email in open correspondence that the claim amount had been paid in full, and that the claimant was not entitled to its costs by virtue of section 31AF of the Act.
- The listing of the matter was administratively adjourned from 18 July 2016 to 3 August 2016.
- On 3 August 2016 I held a directions hearing in respect of the application. At the directions hearing counsel for the claimant advised that the claimant no longer pursued the application for summary judgement, having received a sum of money from the defendant, but still pursued the application for costs on an indemnity basis. The defendant submitted that the claimant could not, as a matter of principle, recover costs if

no judgement was obtained and that the Act also specifically prohibited recovery of costs. The matter was adjourned for a further directions hearing to enable the claimant to finally determine the orders it sought.

- Before the directions hearing on 30 August 2016 the claimant's solicitors forwarded to the defendant and the Court registry the decision of *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; ex parte Lai Qin* 186 CLR 622 as authority for the proposition that costs could be awarded to a party without judgment.
- A further directions hearing was held on 30 August 2016 at which counsel for the claimant confirmed that the only order sought by the claimant was that of indemnity costs. A comprehensive timetable of orders to progress the matter was negotiated and agreed between the parties. The agreed timetable also involved both parties preparing and filing affidavit material and providing notice of their intention to cross-examine the deponents of any such affidavits. The defendant submitted at the directions hearing that I should disqualify myself from hearing the matter on the basis that I had been advised of the defendant's payment to the claimant. Therefore the timetable also incorporated provision for filing an application for disqualification.
- On 4 October 2016 the claimant's solicitors advised the defendant in writing that they intended to adduce evidence of the defendant's conduct in relation to previous claims against him by the claimant (between August 2012 and May 2014) to show that the defendant had a tendency to frustrate and delay similar claims against him and avoid associated costs liability.
- On 13 October 2016 the claimant, pursuant to the order, filed and served the affidavits upon which it intended to rely. The defendant thereafter had 21 days in which to file any affidavits upon which he intended to rely. He did not file affidavits within this time period.
- The parties thereafter had 7 days in which to give notice to the other in respect of their intention to cross-examine the deponents of any affidavits filed. The defendant did not give any notice within that time period. The claimant had not had any contact from the defendant since the direction hearing on 30 August 2016.
- On 7 December 2016 the defendant filed an affidavit and also an application seeking that I disqualify myself.
- On 12 December 2016 the claimant's application for indemnity costs proceeded. Four affidavits were received into evidence, three on behalf of the claimant and the affidavit of the defendant. The deponents were not subject to cross-examination. The application proceeded by way of submissions upon the evidence.

Ruling on defendant's preliminary applications

Application to disqualify myself from hearing the matter

11. The defendant made application that I disqualify myself from hearing the costs application because I had been informed of the fact of his payment to the claimant of the debt amount.

12. Rules 70, 71 and 72 of the Rules deal with interlocutory applications. An application that I disqualify myself was required to be served with supporting affidavit not less than three days before

the date fixed for the hearing of the application. Mr Kitto served the application on 7 December 2016, being only 2 clear days before the date fixed for the hearing of the application. On this basis, the claimant opposed the hearing of the application. The defendant applied to abridge time, an application that I granted given the lack of prejudice to the claimant.

13. The defendant submitted that the fact that I was aware of the payment by him of the claimed amount “may cause prejudice in my mind”.

14. In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 Gleeson CJ, McHugh, Gummow and Hayne JJ established a two stage test to resolving an allegation of apprehension of bias. Their Honours stated at paragraph 8:

“The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.”

15. Mr Kitto did not refer to *Ebner* or to how I should apply this test. Conceivably, his submission, albeit unmeritorious, may have been that my knowledge of the fact of his payment of the claim to the claimant might lead me to decide the matter other than on its legal and factual merits. However, there could never be a satisfaction of the second step of the test by articulating a logical connection between the fact of my knowledge of that matter and the feared deviation from the course of deciding the case on its merits.

16. It should have been obvious to the defendant as a practitioner of some years, that the conduct of the parties in the action, including the making of offers and payments, is central to the question of awarding costs. This is particularly so in the application for indemnity costs. Such argument cannot sensibly be heard without disclosing any offers that might affect the discretion to award costs. The factual setting of the litigation is crucial to such question. Justice could not be done in the argument without the court being informed of all relevant circumstances.

17. Whilst the defendant did not categorise the nature of the bias alleged, I did not take him to assert actual bias on my part, for example that I had prejudged the matter or would consider the matter from a preconceived Opinion (See *Sun Zhan Qui v Minister For Immigration and Ethnic Affairs* (1997) 151 ALR 505). I have had no relevant dealings with the parties that could induce this state of mind. I do not consider that I would have approached the matter with prejudgment on any issue. My task was to determine the matter on the evidence before me.

18. In connection with his disqualification application, the defendant asserted that there was a breach of section 131 of the *Evidence Act* 2001. He submitted that this section prohibited the court being informed of any settlement negotiations until after judgement.

19. The defendant, in oral submissions, modified his submission regarding the *Evidence Act* provision agreeing that I probably was not required to comply with it because of the nature of minor civil proceedings and that the Court is not bound by the rules of evidence. I do not consider myself bound by this provision. Even if it applied, section 131(2)(h) specifically makes an exception for

communications relevant to determining costs. The fact of this exception emphasises the importance of communications pertaining to attempts to settle disputes in the determination of liability for costs. In pressing his submission on me, the defendant, concerning, did not draw my attention to this exception, one that wholly negates his argument.

20. In making this submission the defendant also confused the concept of disqualification as the result of me having certain knowledge, with an exclusionary rule of evidence which would not necessarily result in recusing myself from hearing the matter. The two concepts are different.

21. There were no grounds made out by the defendant to cause me to recuse myself from hearing this matter and I dismissed the defendant's application.

Application that the claimant not be represented by a legal practitioner at the hearing

22. The defendant submitted that I ought not allow the claimant to be represented at the hearing by a legal practitioner. Section 31AD of the Act relevantly states:

"31AD. Representation of parties –

(1) A legal practitioner is not to represent a party to a proceeding in respect of a minor civil claim unless –

(a) another party to the proceeding is a legal practitioner; or

(b) all parties to the proceeding agree; or

(c) the Court is of the opinion that the party would be unfairly disadvantaged if not represented by a legal practitioner.

(2) The Court may permit the representation of a party by a legal practitioner at the hearing of interlocutory proceedings if the Court considers it appropriate to do so.

(3) A party to a proceeding in respect of a minor civil claim who is a body corporate may be represented by an officer or an employee of the body corporate who is not a legal practitioner....."

23. Therefore, there are three circumstances, each standing alone, in which a party to a proceeding in respect of a minor civil claim may be represented – where another party to the proceeding is a legal practitioner; where all parties to the proceeding agree; or the court was of the opinion that the party would be unfairly disadvantaged if not represented by a legal practitioner. Subsection (2) dispenses with these requirements for interlocutory proceedings and replaces them with a discretion to allow representation if appropriate. As this matter finally determines the issue of costs between the parties, I will proceed on the basis that it is not interlocutory in nature but a final order that is sought.

24. The defendant is a party to the proceeding and a legal practitioner. The claimant is therefore permitted to be represented by a legal practitioner.

25. The defendant submitted that, as he does not agree to the claimant being represented under section 31AD(1)(b) the claimant is not permitted to be represented. This submission defies basic principles of statutory interpretation, the first criterion already having been satisfied.

26. The defendant also submitted that as the claimant is a body corporate it must be represented by an officer or an employee of the body corporate who is not a legal practitioner, in accordance with the provision of section 31AD(3). Again, this argument is clearly not open on an interpretation of the

section. Sections 31AD(3),(4), (5), and (6) permit representation, appearance and assistance in particular circumstances. These provisions do not negate or override the primary provisions governing the circumstances in which a legal practitioner may represent a party.

27. I would also have allowed legal representation to the claimant pursuant to section 31AD(1)(c) of the Act on the basis that if the claimant was not legally represented it would clearly be unfairly disadvantaged in attempting to convey concisely to the court its case and submissions in the face of the myriad of submissions and arguments advanced by the defendant.

Application to cross examine Matthew Neil

28. The defendant submitted that the notice to cross-examine Matthew Neil, the claimant's debt recovery manager, was given to the claimant on 14 July 2016. At that stage only the first affidavit of Mr Neil sworn 17 June 2016 and filed 20 June 2016 was in existence. There was no timetable for directions regarding notices to cross-examine at that time, the timetable not having been set until 30 August 2016. Pursuant to that timetable the claimant filed a further affidavit of Mr Neil on 13 September 2016. In fact, on that same date the claimant filed and served all of the affidavits upon which it intended to rely. The time for the defendant to file and serve affidavits was 4 October 2016. No affidavits were filed.

29. Therefore the defendant was required to provide notices to cross-examine regarding any of the claimant's affidavits by 11 October 2016. He did not do so. However, at 12.18pm on 9 December 2016 the defendant wrote to Mr Hughes stating that he required Mr Neil to be present at the hearing for the purpose of cross examination on his affidavit. The defendant stated in the letter *"it is believed that the writer has already provided notice of this and this facsimile is sent on the basis that it was indicated by you no notice had been given"*. At 3.42pm the defendant sent an email to the claimant's solicitors with an extract of section 31AB of the Act relating to procedures for minor civil claims highlighting that a court may dispense with the application of rules. He then stated *"accordingly, you have been given notice that Mr Neil is required at the hearing of this matter and in the event that he is not present then I should advise that I would object to any of his affidavit material being relied upon in support of the claim, your client's application, and as to the issue of costs"*.

30. It is plain that the defendant's notice to cross-examine of 14 July 2016 was not the notice required by the Court order of 30 August 2016. A basic understanding of civil procedure and the nature of the timetable should have alerted him to this fact. Whilst not resiling from his position, ultimately he relied on dispensation of the rules and what he described as his own "misconception" that his original notice was compliant with the rules to submit that he should be entitled to cross-examine Mr Neil.

31. Mr Neil's affidavit comprised five paragraphs in a single page. The sole purpose of his affidavit was to provide evidence that on 14 July 2016 the claimant received direct payment from the defendant in satisfaction of the outstanding debt for water and sewerage charges in respect of the two properties the subject of claim. This fact was non-contentious and, as previously discussed, an essential piece of evidence for the costs argument. The defendant did not, in his submissions, apply to abridge time in respect of the order requiring the notice, provide any reason why he wished to cross-examine Mr Neil, or identify any prejudice in not being able to cross-examine Mr Neil. I was satisfied that any cross examination of Mr Neil would simply unnecessarily prolong the proceedings with no benefit to the defendant or in respect of the contentious issues regarding costs.

32. I have considered whether the defendant was genuinely of the view that his original notice to cross examine was responsive to a subsequent court order, the standard of such submission falling far

below what would be expected from counsel. His submissions in respect of the representation provision in section 31AD were similarly without any merit. However, it is not necessary to express a concluded view on the defendant's state of mind in inappropriately advancing such matters.

33. The defendant's application was refused.

Application to abridge time for the filing of the defendant's affidavit

34. The defendant was required to file affidavits by 4 October 2016. His affidavit was filed and served on 7 December 2016. In his affidavit he simply stated "*I seek an extension of time in which to file this my affidavit in this matter. I say that the late filing is merely oversight and does not prejudice the claimant in any way*".

35. Mr Hughes objected to the admission of the defendant's affidavit into evidence on the basis of non-compliance with the timetable. He did not submit that there was prejudice to the claimant.

36. The defendant's affidavit was brief and repeated the existence of correspondence already attached to the claimant's affidavits. Given the extent of the duplication, the limited time remaining for the hearing, and the fact that there may have been some documents explaining the pre-trial negotiations that were not already in evidence in the claimant's material, I granted the application to abridge time and received the affidavit into evidence.

Objections to the claimant's affidavits

37. The defendant objected to the tendering of Mr Neil's affidavit regarding payment by the defendant to the claimant, on the basis that he was not reliably able to know that the amount paid had been received and banked by the claimant. Mr Neil is the debt recovery manager of the claimant. I gather the defendant's objection was based upon the affidavit not satisfying the court of the provisions for admission of business records under the *Evidence Act* 1995 as an exception to the hearsay rule. Having emphasised in his previous submissions that the court was not bound by formal procedures nor rules of evidence, the defendant appeared to have no qualms in making this submission based upon technicality. As discussed, the affidavit was non-contentious with the defendant himself filing an affidavit in which he stated the claim was paid. Further, if any officer of a corporation would be in a sound position to know of payments made towards or in satisfaction of debts, it would be the debt recovery manager.

38. The defendant also objected to the tender of the affidavit of Mr Rohan Foon, legal practitioner, on behalf of the claimant. The affidavit deposed to the fact that the claimant's solicitors had provided the defendant with a tendency notice pursuant to section 97 of the *Evidence Act* relating to similar conduct by the defendant in defending two previous claims by TasWater. The conduct alleged was a tendency by the defendant to frustrate and delay the proper advancement and resolution of similar claims against him by the claimant for outstanding water and sewerage services, and to make payments towards similar claims filed against him by TasWater without paying the costs component of the claim, in an attempt to avoid costs. The defendant's objections to the evidence were that it was irrelevant to the current matter, involved another defendant as well as himself and that the proceedings were discontinued.

39. The claimant was not obliged to provide notice to the defendant under the *Evidence Act*. Whilst the court is not bound by the rules of evidence, any evidence must tend to prove the existence of a fact in issue (see *Connelly v P and O Resorts Pty Ltd T/A Cradle Mount Lodge* [1996] TASSC 132 per Wright J at para 22). The contents of the affidavit deposed to the defendant conducting himself in a very similar manner in defending two previous claims by the claimant. That conduct

included the defendant entering a defence to the claims, failing to disclose any arguable defence, being placed on notice by the claimant that it intended to apply for summary judgement and ultimately making payment of the debt amounts without costs. This evidence was plainly relevant to the question of the defendant's reasonableness and bona fides in defending the current proceeding. This in turn was of relevance to the question of any award of indemnity costs.

40. I therefore allowed the affidavit of Mr Foon to be tendered into evidence.

Entitlement to costs without judgement or determination

41. The first issue for determination is whether, in absence of a judgement or determination of a upon merits, a party is entitled to an award of costs.

42. In *Australian Securities Commission v Aust-Home Investments Limited and Others* [1993] FCA 401 Hill J, in reviewing the authorities, stated at para 31:

“(1) Where neither party desires to proceed with litigation the court should be ready to facilitate the conclusion of the proceedings by making a cost order ...

(2) It will rarely, if ever, be appropriate, where there has been no trial on the merits, for a court determining how the costs of the proceeding should be borne to endeavor to determine for itself the case on the merits or, as it might be put, to determine the outcome of a hypothetical trial ... This will particularly be the case where a trial on the merits would involve complex factual matters where credit could be an issue.

(3) In determining the question of costs it would be appropriate, however, for the court to determine whether the applicant acted reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them.

(4) In a particular case it might be appropriate for the court in its discretion to consider the conduct of a respondent prior to the commencement of the proceedings where such conduct may have precipitated the litigation ...

(5) Where the proceedings terminate after interlocutory relief has been granted, the court may take into account the fact that that interlocutory relief has been granted ...”

43. In *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex Parte Lai Qin* (1997) 186 CLR 622 McHugh J said at 624–5:

“In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is *prima facie* entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.

.....

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried.

.....

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.”

44. In *One.Tel Ltd v Commissioner of Taxation* [2000] FCA 270 Burchett J stated at [6]:

“In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the Court's discretion otherwise than by an award of costs to the successful party. It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs.”

45. Recent authorities have considered exercising the costs discretion where there is a “capitulation” by a party leading to proceeding being discontinued or not determined upon its merits. The authorities also refer to the concept of “delinquency” by one party invoking the costs discretion, *Khoury v JCS Technologies Pty Ltd* [2016] NSWSC 1575; *NSW Electoral Commission v Gallion* [2017] NSWSC 277.

46. The authorities also establish that the discretion to award costs in such circumstances remain, notwithstanding that rules specific to a jurisdiction may also provide for a usual order in awarding costs.

47. In *Australiawide Airlines Ltd v Aspirion Pty Ltd* [2006] NSWCA 365 at para 53:

“Rule 42.20(1) would be overstated if described as creating a presumption about the disposition of costs. It goes no further than to state the first point of consideration; there is no presumption which must be outweighed; what the rule says is what the order for costs is to be unless there is a discretionary decision to order otherwise. At the discretionary stage the matters to be considered are little altered: cf *Fordyce v Fordham* [2006] NSWCA 274 at [87] (McColl JA)”

48. In light of the authorities, I therefore reject the defendant's submission that a costs order is unable to be made without judgment for one party. I also reject his submission that the Act and Rules do not allow such a discretion. Section 33 of the Act provides the widest of discretion in respect of costs orders. It states:

“(1) *The costs of and incidental to all proceedings are in the discretion of the Court and the Court may determine by whom and to what extent the costs are to be paid.*

(2) In the due exercise of the discretion conferred by subsection (1), in any proceedings before the Court, the Court may order a practitioner to pay the costs of the proceedings or a portion of the costs.”

49. Rule 138(1), the primary rule relating to costs states; *(1) Unless the Court orders otherwise, a successful party in a proceeding is entitled on judgment to costs against an unsuccessful party in accordance with this rule and rule 139.* Therefore the Rules provide a general position as to costs but preserve the wide discretion.

50. In my view the meaning of 'successful' in the Rule 138 should be interpreted as meaning 'a favourable determination on merits or by judgment'. Such an interpretation is supported by the following sub-rules in Rule 138. Therefore, whilst the matter may not fall within what the usual costs award for a 'successful' party, the Court's discretion remains, but requires consideration in light of section 31AF of the Act.

51. Section 31AF of the Act provides:

"(1) In a minor civil claim, costs for getting the action up to trial or by way of counsel fees are not to be awarded unless –

(a) all parties to the action were represented by counsel; or

(b) the Court is of the opinion that there are special circumstances justifying the award of costs.

(2) The Court may award compensation to a party in a proceeding before it if the Court considers that the minor civil claim to which the proceeding relates is a frivolous or vexatious claim."

52. I will deal with two further legal arguments raised by the defendant as to why the claimant was precluded from claiming costs.

53. The defendant submitted that as he represented himself he was not represented by counsel even though he is a legal practitioner. Therefore the claimant is prevented by section 31AF of the Act from obtaining an award of costs against him getting the action up to trial the way of counsel fees. Alternatively, he submitted that there are no special circumstances pursuant to the second limb of that section. As an admitted legal practitioner representing himself I do not consider in the context of this section that the defendant is represented by counsel. The purpose of this sub-section is to deal with the situation where both parties retain counsel and where each may incur a costs liability by virtue of that retainer.

54. The broad discretion as to costs in section 33 must be read in light of section 31AF which specifically prescribes the circumstances for awards of costs in the minor civil division. The provision reflects the nature of the jurisdiction and the intention that costs should only be awarded where clearly justified in the circumstances. If I am to award any costs in favour of the claimant in this matter I must be of the opinion that there are special circumstances justifying the award as the defendant is not represented by counsel. I will deal with this issue below.

55. The defendant further submitted that the claimant unreasonably pursued a claim for costs on the endorsement of claim to which they were not entitled. Therefore the claimant's conduct in pursuing the litigation past the point of the defendant's payment of the claim is an abuse of process.

56. Counsel for the claimant submits that costs are an entitlement on the endorsement including for minor civil claims as prescribed by rules 25 which positively requires a claim for debt or liquidated sum to include an amount claim for costs and service of the claim in accordance with Part 3 of Schedule 1. There is no argument that the amount claimed by the claimant on the face of the claim is incorrect or not in accordance with the schedule. In *Russell v Armstrong*, October 2004,

Magistrate Mackay held that solicitors are entitled to the costs specified in the Rules for endorsement on the claim. Notice of this decision was the subject of a Circular to Practitioners from the Administrator dated 20 October 2014. I should follow that decision unless I am satisfied that it is wrong. I am not satisfied it is wrong. It is a reasonable interpretation of section 31AF that costs prescribed for endorsement on the claim fall outside those costs involved in getting the action up to trial, as section 31AF requires.

Conclusion

57. I have therefore concluded, as a matter of law, that an award of costs is available to the claimant if there are 'special circumstances' justifying an award of costs; and also that, in appropriate circumstances, indemnity costs are available to the claimant.

58. In reality, the factors bearing upon my discretion in both questions of special circumstances and indemnity costs are similar. (See, for example *Ugly Tribe Co Pty Ltd v Sikola & Ors* [2001] VSC 189 per Harper J at [5]-[12] and the authorities referred to therein.) It is also relevant to the exercise of my discretion regarding both questions that the defendant, although a party to the proceeding, remained an officer of the court with associated duties. (See *Venezia v Marshall* [2001] VSCA 160)

59. In *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [111]-[112] McHugh J noted that the first duty of the barrister is not to the client but to the court in which the barrister appears and that the barrister can do nothing that would obstruct the administration of justice by, *inter alia*, abusing the process of the court by preparing or arguing unmeritorious applications, wasting the court's time by prolix or irrelevant arguments; using unfair means or tactics to hinder an opponent in the conduct of his or her case. Putting aside the wisdom of representing himself, the defendant had these paramount professional duties.

60. Initially, I observe that there were no substantive points of defence raised by the defendant, either before or after his payment of the debt amount. In particular, he had the chance to plead to the claimant's further and better particulars of claim in a way that would clarify any arguable points of defence and allow the claimant to rationally assess such matters, including whether they pursued the defendant for costs. The defendant, in breach of the court order, did not file such further pleading. Further, the email and other correspondence by the defendant did not reveal any matter of defence that might cause the claimant to reconsider the merits of the claim or the wisdom of pursuing costs. The defendant suggested that he would seek special leave to the High Court. However he did not elucidate the reasons for the possible application and did not pursue it.

61. Whilst the authorities plainly indicate that the court should not endeavour to determine for itself the case on the merits, it is relevant that the claimant was given no reason whatsoever to believe that it was not fully entitled to the debt, as well as the appropriate quantum of costs endorsed on the face of the claim. The defendant's payment of the total debt in the former actions reinforced the claimant's confidence in the merits of its claim.

62. On or about 19 December 2013, during the earlier proceedings against the defendant, the claimant sent the defendant a copy of a decision of Magistrate Brown in *Tasmanian Water and Sewerage Corporation (Northern Region) Pty Ltd v Fulton*, 25 November 2013. In that decision his Honour had made favourable comments in respect of the entitlement of the claimant to recover an amount for services based upon what appears to be the same or similar statutory scheme applicable to the supply of the services. The defendant did not make submissions as to his Honour's reasoning in this decision. At no time before or during the proceeding, including the costs hearing, did the defendant articulate any proper reason why he might not be liable for the debt. At no stage did he

engage with either the claimant, or importantly, the court, in rationally articulating why he may have had an arguable defence.

63. The payment made by the defendant did not come after any genuine reconsideration of the merits or negotiations between the parties. I consider that there was, in the term used by the authorities, a “capitulation” on the part of the defendant in making payment of the claim on 14 July 2016. This payment signified a surrender by him.

64. I conclude that the claimant acted reasonably in bringing the proceedings and that the defendant acted unreasonably in defending them. The claimant acted reasonably in alerting the defendant to the requirement to plead extensive further and better particulars and to offer to accept the amount of the debt prior to commencing to draft those particulars. It was appropriate for the claimant to warn, as it did, the defendant that the defence was unmeritorious, that the particulars would involve significant work, and that failure to pay the amount of the claim result in an application for indemnity costs. It was reasonable for the claimant to commence preparation of the further and better particulars immediately after the expiration of the offer so as to comply with the court order. The defendant was expressly put on notice that this would be the case. The extensive pleading was necessary in light of the statutory scheme, the lengthy period of the alleged debt, and not being able to anticipate matters of defence. In such circumstances, the claimant did not act unreasonably in not accepting the defendant’s subsequent offer to pay the debt amount (without costs).

65. As can be seen by the course of proceedings and also the manner in which the defendant argued his case, the defendant’s conduct throughout the matter obstructed its efficient disposition. His unreasonable conduct that caused prolongation of the proceeding and increase in costs, included the following matters, most of which I have already discussed:

- Failing to abide by the Court ordered timetable for hearing;
- Not accepting the claimant’s offer to accept only the debt amount whilst it was still open, but paid that same amount purportedly as full and final settlement of the claim only after the claimant had been forced to undertake considerable further work including a summary judgement application that was imminently listed for hearing;
- Maintaining his unmeritorious argument to the claimant, and the court, that a costs order was unable to be made without judgement for one party after he had been provided with High Court authority to the contrary;
- Maintaining unmeritoriously and inappropriately to the claimant in correspondence, and to the court, that the claimant’s claim for the endorsed costs was an abuse of process by the claimant;
- Refusing, unreasonably, to accept the claimant’s second offer to settle by payment of the claim and endorsed costs;
- Applying, unmeritoriously, for me to disqualify myself from hearing the claimant’s application for indemnity costs on 30 August 2016 and 12 December 2016;
- Submitting, unmeritoriously, that section 131 of the *Evidence Act* applied to prohibit the court being informed of the settlement negotiations;
- Submitting, unmeritoriously, that section 31AD of the Act did not permit the claimant to be represented by counsel;
- At the conciliation conference, failing to raise any arguable matter of defence, assist in narrowing the issues, and making no bona fide attempt to settle;
- Objecting, unmeritoriously, to the tendering of Mr Neil’s affidavit regarding his payment to the claimant;

- Defending the claim with knowledge from conducting a previous matter in a similar way that it would cause the claimant expense and delay in the process;
- Submitting, unmeritoriously, that the amount paid by him directly to the claimant combined with his email to the claimant and the court notifying of the payment, was a payment into court as per the Rules. There was, in fact, no compliance with the form or substance of a payment into court as specified in Rule 92 and 93;
- Submitting unequivocally to the court at the hearing as a reason for failing to file further and better particulars of defence that he did not consider that he was required to abide by the relevant court order made by the District Deputy Registrar; and offering no rational reason for this submission;
- Claiming confusion as to the nature of the claimant's application at hearing when there could have been no reasonable ground for such confusion, especially on the part of a legal practitioner.

66. The above conduct by the defendant led to a persistent frustration of the orderly court process in his conduct during the currency of the proceeding and at the ultimate hearing. The defendant was a legal practitioner with duties to the court. Nevertheless, the defendant displayed a marked pattern of obfuscation of the issues and preparedness to make and convey manifestly hopeless arguments to the claimants, and to the court, in an attempt to avoid liability. The claimant was forced to retain solicitors for an extended period of time to undertake a significant amount of work in order to deal with the defendant's misconceived arguments and resistance to advancing the matter in an efficient and expeditious manner.

67. It is difficult to understand why the defendant conducted himself in this manner. By prolonging the claim in the way that he did, he was fully aware that the claimant would seek indemnity costs against him.

68. On the other hand, the claimant and its counsel have, in my view conducted themselves impeccably with respect to the defendant and in conducting the matter. They have, with one minor exception regarding time, complied with every order of the court and have provided the defendant with full notice of the claimant's intentions and submissions, including notice of their intention to claim indemnity costs.

69. In *Oshlack v Richmond River Council* (1998) 152 ALR 83 Gaudron and Gummow JJ stated at p 96:

"It may be true in a general sense that costs orders are not made to punish an unsuccessful party. However, in the particular circumstance of a case involving some relevant delinquency on the part of the unsuccessful party, an order is made not for party and party costs but for costs on a "solicitor and client" basis or on an indemnity basis. The result is more fully or adequately to compensate the successful party to the disadvantage of what otherwise would have been the position of the unsuccessful party in the absence of such delinquency on its part."

70. I am satisfied that there has been delinquency on the part of the defendant in his conduct during the proceeding, and that his payment of the claim just prior to the application summary judgement represented a surrender and capitulation on his part. His ongoing refusal to make payment of the endorsed costs of the claim to end the matter in the sum of \$468 was unreasonable. His conduct was obstructive of the process throughout and he exhibited a disregard for court orders imposed for the purpose of expediting the proceeding. The claimant deserves to be compensated for

its costs liability in these circumstances and that such compensation should be to the fullest extent possible.

71. I am therefore satisfied for the reasons given that in accordance with section 31AF(1)(b) special circumstances exist justifying an award of costs in favour of the claimant.

72. I am also satisfied, for the reasons given, that the award of costs should be upon an indemnity basis.

73. I order that the defendant pay the claimant's costs of the claim on an indemnity basis.