DISTRICT COURT OF QUEENSLAND

REGISTRY: SOUTHPORT

NUMBER: D315/15

Applicant:	P HOUGHTON SUPER PTY LTD (ACN 162 742 636) AS TRUSTEE FOR THE HOUGHTON SUPERANNUATION FUND
	and
Respondent:	CRAIG ROBERT JOHN MAINDONALD

Evans Lawyers on behalf of the Applicant filed an application on 13 April 2016 seeking an order for the Respondent to disclose to the applicant all of the documents falling within his control or possession relevant to facts in issue in the proceedings.

On 4 May 2016, the Respondent consented to the relief sought but not as to costs. The Applicant proceeded with the application to addresses the issue of costs.

RELEVANT LAW

1. The ordinary position as to costs is set out in UCPR 681(1) which provides that 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.

2. In *Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 662, McHugh J held:-

> *"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".*

THE EVIDENCE AND SUBMISSIONS

3. A request for disclosure was made to the Respondent on 6 April 2016. The request called for disclosure within 3 business days being 12 April 2016 and foreshadowed an Application to the court if no disclosure was made.

4. The fact that the request was sent under UCPR 444 (which strictly speaking does not apply) does not invalidate the correspondence for what it is. In *BTU Group v Noble Promotions Pty Ltd* [2002] QCA 505, the Court of Appeal held at [5] that:-

> *"…experience (both of Judges and legal practitioners) has shown that the Rule 444 procedure is useful on a much wider basis than is expressly contemplated by its provisions. In consequence the procedure has been extensively used in situations outside the strict scope of operation of the rule. The practice should be encouraged because in many instances it obviates the necessity of an application to the court".*

5. No response was received on or before 12 April 2016.

6. On 13 April 2016, this Application was filed and served.

7. The Application was not opposed by the Respondent (except as to costs) and it was submitted that the court ought to infer from that there was no reasonable basis for the Respondent to have not have made disclosure prior to the Application being made.

8. By reason of the Respondent's delay in communicating with the Applicant, it was submitted that the Respondent acted so unreasonably that the Applicant should obtain the costs of and incidental to the Application.

ORDER

The Court accepted the submissions made by Counsel instructed by Evans Lawyers, and made Orders that the Respondent pay the Applicant's costs of and incidental to the Application.