SUPREME COURT OF QUEENSLAND

CITATION:	*Davies v Davies & Anor (No 1)* [2019] QSC 293
PARTIES:	**BEVAN ROY DAVIES as Executor of the Estate of ALAN DOUGLAS DAVIES** (applicant) **v** **JEANNE LORRAINE DAVIES as Executor of the Estate of NEVILLE BRIAN DAVIES** (first respondent) **MICHAEL DOUGLAS DAVIES in his personal capacity and as Executor of the Estate of ALAN DOUGLAS DAVIES** **ELAINE JAN LOUISE FISHER** (second respondents)
FILE NO:	BS No 13463 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2019
JUDGE:	Bradley J
ORDER:	**1. The application filed 31 October 2019 is dismissed.** **2. Leave to withdraw the admission made in paragraph 1 of the document "Matters not in Issue" filed on 14 October 2019 is refused.** **3. The second respondents are to pay the applicant's costs of and incidental to the application on the indemnity basis.** **4. The first-named second respondent Michael Douglas Davies is not entitled to an indemnity from the deceased's estate for the costs ordered to be paid to the applicant or for his own costs of the application.**
	EVIDENCE – ADDUCING EVIDENCE – COURSE OF EVIDENCE – RE-OPENING CASE – BY PARTY – where, after the trial in the proceeding had concluded and judgment had been reserved, the second respondents applied to adduce further evidence – where the application is opposed –

whether exceptional circumstances justifying re-opening are demonstrated

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ADMISSIONS – WITHDRAWAL – where the second respondents seek leave to withdraw an admission made prior to trial – where the admission was made in a list of "Matters not in Issue", signed by the solicitors for each party and filed in the court – where the second respondents allege the admission was made by mistake – where no evidence was adduced as to how the alleged mistake was made – whether leave ought to be granted to withdraw the admission

AON Risk Services Aust Ltd v Australian National University (2009) 239 CLR 175, cited
Bailey v Marinoff (1971) 125 CLR 529, cited
Bendigo and Adelaide Bank Ltd v Clout (No 2) [2016] FCA 561, cited
FYD Investments Pty Ltd v Promptair Pty Ltd [2017] FCA 1097, cited
Green & Ors v Pearson [2014] QCA 110, cited
Hamilton v Oades (1989) 166 CLR 486, cited
Hansen Construction Materials Pty Ltd v Davey (2010) 79 ACSR 668; [2010] QCA 246, applied
Inspector-General in Bankruptcy v Bradshaw [2006] FCA 22, cited
Mackellar Mining Equipment Pty Ltd & Ors v Thornton & Ors [2019] QCA 77, applied
Spotlight Pty Ltd v NCON Australia Ltd (2012) 46 VR 1, cited
Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd (No 5) [2019] WASC 310, cited

COUNSEL: R T Whiteford for the applicant
A C Barlow for the second respondents

SOLICITORS: Morton & Morton Solicitors for the applicant
Carswell & Company for the second respondents

[1] This is a decision on an application made after the trial of the principal proceeding concerning the estate of the late Alan Douglas Davies (the **deceased**). Bevan Davies is the applicant in the principal proceeding. He is one of the executors of the deceased's estate. Michael Davies is the other executor. Michael and his sister Elaine Fisher are the second respondents in the principal proceeding.

[2] The primary issue in the principal proceeding is whether a commercial fishing boat licence passes to the estate of another son, Neville Davies, under the deceased's will. If the licence does not pass to Neville's estate, it forms part of the residue of the deceased's estate and so passes to Bevan, Michael, Elaine and Neville's estate as tenants in common in equal shares. Neville's executor Jeanne Davies is the first respondent.

[3] The second respondents (Michael and Elaine) seek leave to adduce further evidence not led at the trial and to withdraw an admission they made in a notice filed prior to the trial.

[4] Leave is opposed by Bevan Davies. Jeanne Davies made no submissions.

Application to adduce further evidence

[5] When the trial concluded on 17 October 2019, I reserved my decision to consider the evidence and the submissions and prepare written reasons.

[6] On 31 October 2019, an application was filed seeking an order that "Further evidence be adduced", together with an affidavit of Michael Davies. Although the application and the affidavit purported to have been filed on behalf of "the executors", in fact they were filed on behalf of the second respondents, one of whom, Michael Davies, is an executor and the other, Elaine Fisher, is a beneficiary.

Legal principles

[7] As Sofronoff P explained in *Mackellar Mining Equipment Pty Ltd & Ors v Thornton & Ors*:

> "The circumstances must be exceptional before a court may allow a case, having been closed and judgment reserved, to be reopened. The overriding principle is that the court must consider whether, taken as a whole, the justice of the case favours the grant of leave to reopen."[1]

[8] The requirement of exceptional circumstances arises from the long-recognised need for finality in litigation.[2] It serves to maintain the efficient administration of justice, the discipline of hearings and the high standard of competence required of legal practitioners.[3] It is consistent with the purpose and objective of the court's rules.[4] It maintains public confidence in the judicial system, as an efficiently-used and publicly-funded institution.[5]

[9] In *Inspector-General in Bankruptcy v Bradshaw*,[6] Kenny J identified four situations in which leave to re-open may be granted:

(i) where fresh evidence, unavailable or not reasonably discoverable before, becomes known and available;

(ii) where there has been inadvertent error;

(iii) where there has been a mistaken apprehension of the facts; and

(iv) where there has been a mistaken apprehension of the law.

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1 [2019] QCA 77 at [58].
2 *Bailey v Marinoff* (1971) 125 CLR 529 at 539 (Gibbs J).
3 *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1 at [17] (Harper and Tate JJA and Beach AJA).
4 *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**), r 5(1), (2).
5 *AON Risk Services Aust Ltd v Australian National University* (2009) 239 CLR 175 at 182 [5] (French CJ).
6 [2006] FCA 22 at [24].

[10] The situations in which a party may have leave to re-open and adduce further evidence are not limited to those in which leave has been granted in the past. So, the application may be judged against the relevant considerations that affect whether the justice of the case favours a grant of leave to re-open. The following relevant considerations have been identified in other recent authorities:[7]

- The public interest in the finality of litigation;
- The public interest (and the interests of the parties) in litigation being conducted efficiently and expeditiously;
- The associated expectation that parties will advance all of their arguments at the time of the hearing and the need for a limit on the number of times a party can re-visit issues that have arisen in the course of the trial and have been addressed;
- The need for fairness so that a party is entitled to know all of the evidence it has to meet before making forensic decisions about the cross-examination of witnesses and the extent of the evidence it will adduce on matters in issue;
- The concern that the parties may take advantage of the re-opening to develop parts of their respective cases that may not fall clearly within the prescribed limits of the re-opened case;
- Whether there has been a change in the subject matter of the litigation or the publication of a binding or persuasive judgment;
- The significance of the proposed new evidence and submissions to the disposition of the proceeding;
- The reasons for the evidence not being led at the trial;
- Any delay in seeking leave to re-open;
- The character of the matter on which judgment is reserved;
- The likely prejudice to the opposing party if the application is allowed and the likely prejudice to the applicant if the application is refused;
- The inadequacy of a costs order to cure the element of unfair prejudice occasioned by unnecessary delays in the resolution of litigation.

The proposed further evidence

[11] The proposed further evidence was presented in the form of the affidavit of Michael Davies filed with the application. The second respondents conceded a number of the applicant's objections to parts of the affidavit and others were ruled upon by the court.

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7 *FYD Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097 at [32] (White J), *Bendigo and Adelaide Bank Ltd v Clout (No 2)* [2016] FCA 561 at [25] (White J) and *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd (No 5)* [2019] WASC 310 at [93] (Tottle J).

Leaving aside fact-free, purely argumentative statements, the only remaining parts of the affidavit were the following:

> "5. The following is relevant to that question:
>
> (a) When my father retired in 2005 he disbanded his fishing business and became a recreational fisherman, only;
>
> (d) [At the time my father made his 2010 will, the *Ajax*] could not and did not operate commercially.
>
> (e) In fact, to my knowledge, my father's fishing licence had been leased to another commercial fisherman from 2005 to 2014;
>
> 9. In the rest and residue of the Estate, there is also a block of land located in Boonooroo which was valued at approximately $230,000.00 two and a half years ago."

Submissions on leave to adduce additional evidence

[12] The application for leave was heard on 19 November 2019. The second respondents were represented by Mr Barlow of counsel, who relied on written submissions.[8]

[13] The only explanation for the failure to adduce the further evidence at the trial may be found in the following passages from the written submissions:

> "whether or not the beneficiary (Neville) of "the *Ajax'* (37 ft fishing trawler) would or could have considered using *the Ajax* in conjunction with the deceased fishing licence was not a matter previously raised as a means of determining the meaning of the words "*fishing gear*".
>
> … the second Respondent's … understanding of the law indicates the licence could not have been associated with *the Ajax*, (thus not a consideration when construing the words "*fishing gear*") because *the Ajax* was not commercially viable in or about 2014/2015 (around the time of Mr Davies' death)."

[14] These submissions were reinforced by Michael Davies' affidavit, in which he swore:

> "the question of whether or not brother Neville could utilise my father's fishing licence was not raised on previous material, and consequently was not the subject of evidence given by me or others."

Consideration of the submissions

[15] There are four difficulties with the second respondents' submissions.

[16] Firstly, the submissions are factually incorrect.

[17] The use of the *Ajax* in conjunction with the licence was raised in three paragraphs of the affidavit of Mr Williamson, which was filed on 6 December 2018, more than ten

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8 Oddly, the written submissions are dated 15 October 2019.

months before the trial. At the trial, the second respondents' counsel cross-examined Mr Williamson about that topic.

[18] It was also raised in the affidavit of Mr Bevan Davies, filed on 11 March 2019, about seven months before the trial.

[19] On 11 October 2019, six days before the trial, the applicant served his written submissions. In these, the applicant contended that the second respondents' interpretation of the will made "little sense" because it would require the court to find:

> "the deceased's intention was:
>
> (a) to give Neville sole ownership of equipment to work as a commercial fisherman, but not sole ownership of the licence which would allow him to use that equipment to do so;
>
> (b) to give all four of his children ownership of the licence to work as commercial fishers but only one of them ownership of equipment to do so."

[20] Secondly, the respondents' understanding of the law, for what it may be worth, is also incorrect.

[21] The *Ajax* is the primary boat identified, by name, boat mark and length, in the licence. The licence allows the holder to use the *Ajax* to take fish for trade or commerce in any of the commercial fisheries noted on the licence.[9] It allows the licence holder to use a tender boat – at the same time as the *Ajax* or independently of the *Ajax* – to take fish for trade or commerce in commercial fisheries L1 and L3.[10] It allows the licence holder to sell fish taken using the licence and to process such fish.[11] It allows the licence holder to buy, sell or possess commercial fishing apparatus.[12] It also allows the licence holder to authorise someone else to do any of these things.[13]

[22] It allows only a commercial fisher to use the *Ajax*.[14] It allows the *Ajax* to be used in any of the commercial fisheries noted on the licence.[15] It allows the tender boats for the *Ajax* – the jet boat and the dinghies – to be used in a commercial fishery the subject of the licence.[16]

[23] Thirdly, the commercial viability of the *Ajax* in 2014 or 2015 is not relevant to any matter in issue in the proceeding. The only evidence admissible in aid of the interpretation of the will is evidence of the deceased's intentions at about the time he made the will, in January 2010.

[24] Finally, the submissions misstate the issue for determination by the court. The actual issue is the proper construction of clause 4.03 of the will, in light of the evidence of the

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9 *Fisheries Regulation* 2008 (Qld), s 246(1)(a).
10 s 246(1)(b), (c).
11 s 246(1)(e), (f).
12 s 246(1)(g).
13 s 246(1)(h).
14 s 247(2).
15 s 247(3).
16 s 247(6).

deceased's intentions at the time he made the will. It is not confined to determining the meaning of "fishing gear".

[25] These observations may be made about the proposed further evidence of Michael Davies.

[26] All of it must have been known to Michael Davies at the time of the trial. The explanation for the failure to adduce the further evidence at the trial was incomplete and unsatisfactory. It was not said that any mistake as to the facts or the law led to its omission.

[27] The evidence in paragraphs 5(a) and (e) of Michael Davies' affidavit is consistent with and adds nothing to evidence already before the court through other witnesses as to those matters.

[28] While expressed as a matter of fact, paragraph 5(d) is actually the expression of an opinion. The original basis for the opinion was a notice issued in June 2016. The notice was ruled irrelevant because it related to a matter more than six years after the will was made. Michael Davies' opinion about whether the *Ajax* could operate commercially is of no weight.

[29] Although paragraph 9 was not the subject of any objection by the applicant, it does not appear to be relevant to any matter in issue in the proceeding. No submissions were made as to how paragraph 9 might be relevant.

Conclusion on the application for leave to adduce further evidence

[30] The circumstances in which the second respondents seek leave are not exceptional. The further evidence was available at the time of the trial. The explanation for its omission is not satisfactory. It was not the result of any mistake of fact or law. It best be understood as a failure to consider the evidence and submissions served by the applicant in advance of the trial.

[31] The refusal of leave will not cause an injustice to the second respondents. The proposed further evidence is not significant to the determination of the issues in the proceeding. Much of it is irrelevant. Some of it is before the court through other witnesses. The balance has no weight.

[32] Undue delay and expense will be avoided and the just and expeditious resolution of the issues in the proceeding will be facilitated by the refusal of leave. The public interest in the finality of litigation and in the efficient and expeditious conduct of litigation will also be served by such an order.

[33] Leave to adduce further evidence should be refused.

Leave to withdraw an admission

[34] No application for leave to withdraw an admission was filed by the second respondents. The matters came before the court in a rather circuitous way.

Background

[35] The proceeding was commenced by an originating application. No pleadings were directed or exchanged. However, the relief sought by the applicants indicated the scope of the dispute extended to whether five dinghies, a jet boat and a 37 foot fishing trawler, named *Ajax*, should pass to Neville's estate as a gift under clause 4.03 of the will or form part of the residue of the deceased's estate and pass to the four surviving children of the deceased under clause 4.05.

[36] Prior to the trial, the parties agreed that the dinghies, the jet boat and the *Ajax* should pass to Neville under clause 4.03. These were the only matters the parties agreed were not in issue. The agreement was evidenced by the solicitors for the second respondent signing a document to that effect and sending it to the solicitors for the applicant on 9 September 2019.

[37] The second respondents' solicitors signed another such document to be filed in court and sent it to the applicant's solicitors on 25 September 2019. This second document was signed by the solicitors for each of the other parties and filed on 14 October 2019. Under the heading "Matters not in Issue", the parties listed only one paragraph. By reference to the paragraphs in the originating application, they notified the court that it was not in issue that the dinghies, the jet boat and the *Ajax* pass to Neville under clause 4.03 of the will. Under the heading "Matters in Issue", the document recorded that only the disposition of the commercial fishing boat licence was in issue.

[38] I infer that the document was filed in compliance with an order made by the resolution registrar on 19 September 2019, which required the parties to file "an agreed list of the matters in issue and the matters not in issue" in the proceeding.

[39] At the commencement of the trial, counsel for the second respondents, Mr Barlow, informed the court that his instructions were that the fate of the jet boat and the dinghies was not as earlier agreed. When his attention was drawn to the signed document on the court file, Mr Barlow told the court he would take the matter up with the applicant's counsel Mr Whiteford "in the break." There was a short adjournment between 10:45 am and 11:09 am, to facilitate the taking of evidence by video. When court resumed the last of the applicant's witnesses gave evidence. The second respondents accepted certain objections made to their evidence, redacted copies of their witness affidavits were tendered and none of their witnesses was required for cross-examination. The parties closed their cases and then counsel addressed the court.

[40] In his closing address, Mr Whiteford said the jet boat and the dinghies were "no longer in dispute", but asked the court to make a declaration that they pass under clause 4.03 of the will to Jeanne Davis on the basis that "it has been a troubled administration as is evident from us coming before you today".

[41] Mr Barlow did not address on the topic. He did not contradict the points made about the topic in Mr Whiteford's address. Indeed, he did not raise the topic of the jet boat or the dinghies again.

[42] In the circumstances, at the conclusion of the trial it appeared that the only remaining issue was whether the licence held by the deceased passes under clause 4.03, as the applicant contends, or whether it forms part of the residue of the deceased's estate and passes under clause 4.05 of the will to the three surviving children and to Neville's estate, as the second respondents contend.

Material at the 19 November 2019 hearing

[43] In an affidavit filed on 31 October 2019, two weeks after the conclusion of the trial, Michael Davies swore as follows:

> "I say that I am informed by my solicitor, Mr Ponti, that the document saying that the disposition of these items (set out in paragraphs 1(b) and (c) of the Originating Application) is not in issue was signed in error. I also ask that this honourable Court determine how the executors should deal with these items. I say there is no additional evidence necessary, and I respectfully say, it is my understanding, it is simply a matter of construing my father's Will."

[44] On 19 November 2019, at the hearing of the application to adduce further evidence, dealt with above, Mr Barlow provided written submissions that asserted Michael Davies had:

> "indicated he had not consented to the other boats and dinghies and points to an internal error which resulted in those items being included in "*Matters not in Issue*". As there is no further evidence necessary it should be of little inconvenience to determine the beneficiaries of those items – submitting that that pass under the rest and residue clause of the Will (Clause 4.05)."

Legal principles

[45] The court has a broad power to make "any order or direction about the conduct of a proceeding it considers appropriate"[17] that may be engaged to grant leave to withdraw an admission. The interests of justice are paramount in determining whether an order or direction should be made.[18] The broad power is to be applied with the objective of "avoiding undue delay, expense and technicality" and facilitating "the just and expeditious resolution of the real issues … at a minimum of expense."[19] The court's inherent power to control and supervise proceedings extends to granting such leave where that is an "appropriate action to prevent injustice".[20]

[46] A party seeking leave to withdraw an admission should identify the reason for the withdrawal, explain how the admission came to be made, and identify any prejudice that may be caused if the application is refused. The stage of the proceeding, the prospects of the party succeeding on the issue if the admission is withdrawn, any prejudice to other parties if the admission is withdrawn, and any other matter affecting the administration of justice should be considered to determine how the interests of justice may be served, consistently with the express objective of the rules. All of these matters may inform the exercise of the discretion under r 367 or the court's inherent power.

[47] In *Hansen Construction Materials Pty Ltd v Davey*, Chesterman J explained:[21]

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17 UCPR, r 367(1).
18 UCPR, r 367(2).
19 UCPR, r 5(1), (2).
20 *Hamilton v Oades* (1989) 166 CLR 486 at 502 (Deane and Gaudron JJ).
21 (2010) 79 ACSR 668; [2010] QCA 246.

> "The first consideration, therefore, in an application to withdraw admissions must be whether the subject matter of the admission is truly contested. Often, if not always, that determination will be informed by the circumstances in which the admission was made. It is usually a good indication that a fact is not in dispute that the party against whom it is made admits it to be true. This, I apprehend, is why the cases emphasise the need for an explanation as to the making of the admission. If an applicant cannot demonstrate that there is a real dispute about the subject matter of the admission no other consideration need be examined."[22]

Consideration of the material

[48] The document containing the admission was executed by the second respondents' solicitor, with ample notice of its terms, and knowing that it was to be filed and the parties and the court were to act upon it. There was only one admission paragraph in the document, so that it could not have been overlooked amongst other matters. The document was not proffered and was not signed until after all the evidence for the trial had been filed and served. The second respondents had a full opportunity to consider whether the admission should be made and to take advice on it.

[49] On its face it was a formal and deliberate admission. It was quite different from a "deemed admission" arising through inadvertence or misunderstanding of the pleading rules, which may or may not call for an explanation,[23] or a deemed admission made to facilitate a summary determination of a more important issue.[24] The significance of the second respondents' admission is that it was made in a document the court specifically ordered the parties to file to frame the matters in issue for the trial.

[50] If Michael Davies did not consent to his solicitor signing the document to give notice to the court that the fate of the jet boat and dinghies was not in issue, he failed to say so in his affidavit. If his solicitor, Mr Ponti, signed the document in error, the solicitor gave no evidence to that effect. If Mr Ponti told his client how it was that an error was made, his client did not share that information with the court.

[51] The trial concluded on 17 October 2019. Judgment was reserved. The application to withdraw the admission was made at an extremely late stage of the proceeding.

[52] Mr Barlow offered no submissions as to how the court should determine whether the jet boat and dinghies pass under clause 4.03 or clause 4.05, save for the statement of position in the extract at [44] above. The second respondents' material indicates only that they have a view different to the applicant's, with which they had formally notified their agreement.

[53] It follows that the second respondents had nothing specific to say to the court about why the position should be other than as they had formerly admitted it to be. Given their silence, it is not possible to form a view of the second respondents' prospects of success, if leave were to be granted. So there is no measurable prejudice to the second respondents from a refusal of leave.

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22 at 675 [16] (Chesterman JA; Muir JA and Applegarth J agreeing).

23 ibid at [1] (Muir JA), [14] (Chesterman JA) and [60] (Applegarth J).

24 *Green & Ors v Pearson* [2014] QCA 110 at [51]-[52] (Jackson J; Fraser and Morrison JJA agreeing).

[54] The prejudice to the applicant is obvious. The trial was conducted and closing addresses delivered expressly on the basis of the admission. If leave were granted to withdraw the admission, the court would be left with no submissions from any of the parties about the topic. There would have to be a further hearing or opportunity for the parties to address the court about the fate of the jet boat and dinghies. This would involve further delay and costs.

Conclusion on withdrawal of the admission

[55] The second respondents have not shown that a grant of leave would be in the interests of justice or that they would suffer an injustice if leave were refused. The objective of avoiding undue delay and expense and facilitating the just and expeditious resolution of the real issues at a minimum of expense is better served by the refusal of the application.

[56] The court should refuse leave to withdraw the admission.

Costs

[57] The application to adduce additional evidence was wholly misconceived and never had any prospect of succeeding. It ought never to have been made. The cost of responding to it diminished the residue of the deceased's estate to the detriment of all four beneficiaries. The second respondents should pay the applicant's costs of the application on the indemnity basis to minimise the adverse effect on the beneficiaries as a whole.

[58] Insofar as Michael Davies is concerned, he should not be entitled to an indemnity from the deceased's estate for those costs or for his own costs of the application. The application cannot be said to have been brought in the interests of the administration of the estate.

[59] The second respondents' conduct in respect of the withdrawal of the admission fell far below the standard to be reasonably expected from legally represented parties in this court. To the extent that any costs of or incidental to the second respondents' application were incurred in relation to the proposed withdrawal of the admission, those costs should be awarded in the same manner as those in relation to the application to adduce additional evidence.