SUPREME COURT OF QUEENSLAND

CITATION:	*Groves v Australian Liquor, Hospitality and Miscellaneous Workers' Union & Anor* [2004] QSC 142
PARTIES:	**EDMUND STUART GROVES** (plaintiff) **AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS' UNION** (first defendant) **RON MONAGHAN** (second defendant)
FILE NO/S:	SC No 2789 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2004
JUDGE:	Mackenzie J
ORDER:	**1. The plaintiff's application that paragraphs 9(a)(i) A to H, 12(a)(i) A to H and 16(a)(i) A to H of the defence be struck out is refused.** **2. I order that the plaintiff pay the defendants' costs of and incidental to that application to be assessed.** **3. The defendants' application for a declaration that the denials pleaded in the defence comply with r 166(4) is refused.** **4. The defendants have leave to amend paragraphs 4, 5(c), 6(c) and 7(e) of their defence.** **5. I order that the defendants pay the plaintiff's costs of and incidental to that application to be assessed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – DEFENCE AND COUNTERCLAIM – defamation – whether parts of defence should be struck out – where application on grounds disclose no reasonable means of defence/unnecessary – whether wealth necessary/relevant consideration – whether particulars could support allegation that plaintiff mean or greedy PROCEDURE – SUPREME COURT PROCEDURE –

QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – DEFENCE AND COUNTERCLAIM – whether declaration of sufficiency of denials should be given – where direct explanation of belief that allegation untrue required – where denial non-compliant allegations deemed admitted – where evidence contrary to facts deemed admitted could not be led – whether mere statement to the opposite sufficient - whether pleading sufficient to comply with *UCPR* 166(4).

Uniform Civil Procedure Rules, rr 162, 166, 171

Thomas v The King (1937) 59 CLR 279, applied

COUNSEL: T C Somers for the plaintiff
M Amerena for the defendants

SOLICITORS: Le Mass Solicitors for the plaintiff
Hall Payne Lawyers for the defendants

[1] **MACKENZIE J:** In this claim for defamation there are two separate applications, one by the plaintiff to strike out certain parts of the defence and one by the defendant for a declaration that a pleading of certain denials complies with *UCPR* 166(4).

Application to strike out

[2] There is an application pursuant to *UCPR* 171 that certain parts of the defence be struck out on the grounds that they disclose no reasonable means of defence or are unnecessary. The respondent submitted that the complaint was really a complaint about particulars and should be determined under *UCPR* 162. It is unnecessary to resolve that for the purpose of the proceedings because, as the respondent submits even if the application were so treated it is devoid of substance.

[3] The paragraphs complained of are paragraphs 9(a)(i) A to H, 12(a)(i) A to H and 16(a)(i) A to H. The defence is a voluminous document of 66 pages without annexures of which the paragraphs complained of comprise about 27 pages. The statement of claim states that the plaintiff is joint managing director and controller of companies which operate a large number of child care centres throughout Australia and is their "public face". The defendants are a union and its branch secretary. There were three separate publications in written form with which the application is concerned. The pleadings are concerned with imputations that the plaintiff was mean and greedy. The first publication was on 3 December 2002 in a special edition of Educare which describes itself as a journal for Queensland teachers aides and child care workers published by the first defendant. The reference is not to the plaintiff directly but to his child care centres in that publication. The second, on 4 December 2002 was in a media release by the union in which references to the plaintiff by name and the child care centres were made. The third, also on 4 December 2002 is in another special edition of Educare. It does

not mention the plaintiff by name but there were references to "bosses" and "owners" of the child care centres referred to by their generic business name, attributed to the second defendant.

[4] In the case of the first publication it was alleged that the words would have been understood to refer to the plaintiff as meaning he was mean and greedy. It was alleged that in relation to the second publication the words meant and would be understood to mean that the plaintiff was mean and greedy and was trying to drive down low wages of child care workers at his centres and line his own pockets at their expense. He was attempting to have child care workers sign Australian Workplace Agreements (AWAs) knowing that it was extremely doubtful that they were legal, and was trying to trick them. In the case of the third publication it was submitted that the words would have been understood to refer to the plaintiff, and as meaning that he was trying to trick child care workers employed at the centres and had caused false representations to be made to them. He had promoted illegal AWAs to them, was greedy, and was trying to obtain personal financial gain at their expense.

[5] It is not necessary to consider the particular pleadings separately since they are essentially identical. The first two relate to the imputation that he was mean and the third to the imputation that he was greedy. The defence pleaded was that the published imputations that the plaintiff was mean and greedy were, so far as there was a statement of fact, true, and, alternatively, in so far as there was an opinion expressed, it was correct. The particulars relied on with respect to the allegation that he was mean and/or greedy were numerous. They may be summarised as follows:

A. He was a very rich man. He was legally and beneficially possessed of valuable and extensive capital and income interests in a variety of companies and trusts (of which greater particularisation was given). He was entitled to considerable remuneration on account of positions held by him as a result of his interests. He was in possession of other assets including an interest in a late model Ferrari. He was possessed of the advantage of living in a household with a spouse and business partner possessed of wealth in her own right equivalent to that of the plaintiff.

B. By contrast child care workers at centres were possessed of modest assets and income entitlements, the latter being determined by an Award.

C. One of his companies was a franchisor of numerous child care centres under which the franchisee was responsible for day to day conduct of the centre, was required to pay a license fee determined by a formula in the agreement, and was responsible for employing staff and meeting the obligations to the staff.

D. By reason of this arrangement the franchisor attempted (successfully) to avoid or minimise payment of payroll tax and shifted responsibility of meeting employees' rights of child care workers at centres to third party companies with less resources.

E. The business of the franchisor and the fees payable to it were dependent on receipt of child care benefits from the Federal Government which formed a "considerably greater part of child care fees" received by franchisees.

F. At all material times the plaintiff anticipated an increase in the provision of child care benefits and other forms of funding for child care in relation to such activities from the Commonwealth Government.

G. At the time of the publications the plaintiff and his wife held a substantial shareholding in a holding company and received dividends of $2.1m and other remuneration and benefits (particularised). According to a report to the Australian Stock Exchange the company was very profitable, having doubled its after tax profit from the previous year and was anticipating to increase it again. Earnings had increased by 65% in the year and the share price by 175%.

H. There had been approval in November 2002 of a directors' options plan giving rights to the plaintiff and his wife.

[6] A number of parts of paragraphs 9, 12 and 16 were not sought to be struck out. They set out facts alleging that the plaintiff had become aware that the first defendant was preparing a wage case for increased award conditions for child care workers. About 8 months later, efforts began at the plaintiff's instigation or with his knowledge and consent to persuade all child care workers at the centres to enter into an AWA which gave inferior terms and conditions to the award, did not comply with federal law and would significantly reduce labour and related costs at child care centres with which the plaintiff was connected. It would also increase license fees to the franchisor under the formula in the agreement with franchisees and increase profits to the plaintiff directly or indirectly.

[7] The applicant's argument was expressly limited to paragraphs A to H of the pleading, principally pertaining to the plaintiff's wealth. Paragraphs principally addressing matters other than his wealth, paragraphs I to M, were not objected to. The argument was that particulars of wealth could not support, alone or in conjunction with other particulars, an allegation that the plaintiff was mean or greedy. It was submitted that a person possessed of great wealth is not automatically to be assumed to be mean or greedy; he may be a philanthropist. It was submitted that inclusion of particulars concerning the plaintiff's wealth would be "unnecessary and an unwarranted distraction" since it was unrelated to the issue whether or not the plaintiff was mean or greedy, especially because of the defendants' desire to have trial by jury.

[8] I am not persuaded that on the limited basis on which the matter was argued by the applicant plaintiff that the parts of the pleading complained of should be struck out. The analysis of the matter as pleaded is that the defendants' pleaded case is that a person who has large business interests and access to wealth from them is attempting to increase his personal wealth by the means particularised in the paragraphs not objected to, while attempting to reduce the working conditions of persons whose capacity to earn income in the industry is limited, and through reducing the profitability of franchisees. Where a defence seeks to make out a case that the imputation that the plaintiff was mean or greedy was true or was fair comment, the question whether the plaintiff was wealthy is, in my view, not irrelevant or unnecessary. It may be one of the elements in the defence pleaded by the defendant, particularly if it was ultimately established that activities that did not

conform to legislated standards were knowingly engaged in for the purposes alleged.

[9] Whether the facts pleaded can be made out and whether individual paragraphs of the pleading are objectionable on other grounds are not in issue in this application having regard to the narrow focus of the plaintiff's argument. Nor is the issue whether the case, which may involve complex issues involving accounting evidence, taxation law and industrial law, is suitable for trial by jury. I therefore dismiss the application of the plaintiff with costs to be assessed on the standard basis.

Application for declaration of sufficiency of denials

[10] The defendant seeks a declaration that denials in the defence comply with *UCPR* 166(4). The application is a consequence of correspondence in which the issue whether the defendants had failed to comply with r 166(4) in respect of the pleading of denials in paragraphs 4, 5 (c), 6(c) and 7(e) of the defence was discussed. The defendant seeks the declaration because of a concern that, should its view that the pleading of denials sufficiently complies with *UCPR* 166 prove to be wrong, it will be deemed to have admitted the allegations in the statement of claim under *UCPR* 166(5), with the consequence that evidence contrary to the facts deemed to be admitted could not be led.

[11] Paragraph 4 of the defence responds to paragraph 4 of the amended statement of claim which alleges that ABC Learning Centres had operated and continued to operate 120 child care centres, employed approximately 2,200 child care workers and that they were members of the first defendant. The defence denies each proposition, saying that the first and second defendants deny them believing them to be untrue at all material times. Paragraph 5(c) of the defence responds to paragraph 7 of the amended statement of claim which alleges that the first publication was distributed by the first defendant to child care workers employed by ABC Learning Centres at its various centres throughout Australia and to many thousands of other union members throughout Australia including other child care workers, teachers aides, ambulance, casino and security workers. Paragraphs 6(c) and 7(e) of the defence respond to similar allegations with regard to the other two publications.

[12] The denial consists of simply stating the negative of the propositions pleaded in the amended statement of claim without any further elaboration why the defendants believe that the allegation is untrue. *UCPR* 166(4) provides that the party's denial of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegations are untrue.

[13] The plaintiff respondent submitted that the meaning of the rule is that a defendant may not merely deny an allegation of fact but must give to the plaintiff material facts which he or she intends to establish by way of explaining the denials. The defendant contends that it does not require the basis of the denial to be expressed. It is submitted that it would be an unlikely interpretation of the rule to hold that it required a statement of evidence the defendant proposed to lead at trial since *UCPR*

149(1)(b) prohibits a pleading from containing evidence. Alternatively, if a denial were to be based on a "statement of opinion from the defendants as to why the denial should be made" this was also an unlikely interpretation for the same reason. Further, it was submitted that what were material facts to be proved depended on where the onus lay. The denials in paragraphs 4, 5(c), 6(c) and 7(e) were all concerned with material facts upon which the plaintiff bore the onus of proof. It could not have been the intention of *UCPR* 166(4) to impose an onus of proof on the respondent.

[14] One of the oddities of the last proposition of the defendant's argument is that the purpose of seeking the declaration is to preserve the right to rebut, if necessary, evidence led by the defendants, by calling evidence, to tip the balance, in a civil case, in the defendant's favour on the issue. Whichever way one looks at it, the plaintiff will still have to prove, on the balance of probabilities, that facts it alleges are true if it is to succeed in establishing the proposition whether the defendant calls evidence or not. Once there is no deemed admission, the plaintiff bears an onus of proof, which may be defeated either by cross-examination on behalf of the defendant without calling evidence, or calling evidence to show, on the balance of probabilities, that the plaintiff's proposition is not true.

[15] With respect to the other aspects of the defendant's argument, there is a question which need not be pursued (and was not argued) whether giving an explanation involves simply that, and does not involve pleading a fact at all. Whatever the proper view is, I am satisfied that the pleading is not sufficient to comply with *UCPR* 166(4). A mere statement to the opposite of what is alleged by an opposing party is not a denial "accompanied by a direct explanation for the party's belief that the allegation is untrue". A direct explanation is more than this. There does not need to be a pleading of evidence as that term is understood by the rules of pleading. A statement of fact as to why it is believed that the allegation is untrue does not involve contravention of the rule. If the point of the other aspect of the defendants' argument is that in some cases the belief might depend on a mixed question of fact and law, a statement of a conclusion expressed as fact is ordinarily treated as a statement of fact (*Thomas v The King* (1937) 59 CLR 279 at 306-307).

[16] I therefore refuse a declaration that the denials in paragraphs 4, 5(c), 6(c) and 7(e) of the defence comply with *UCPR* 166(4). In the event that that was the conclusion reached, the defendants sought leave to amend the defence to ensure compliance with *UCPR* 166(4). Since that is not the subject of any direct opposition I will grant such leave. I should conclude by saying that the fact that I have embarked on consideration of whether the plaintiff was entitled to the declaration sought should not be treated as acceptance on my part that an application of this kind should be countenanced as a matter of course. A declaration is a discretionary remedy and may not necessarily be granted.

Orders

1. The plaintiff's application that paragraphs 9(a)(i) A to H, 12(a)(i) A to H and 16(a)(i) A to H of the defence be struck out is refused.
2. I order that the plaintiff pay the defendants' costs of and incidental to that application to be assessed.

3. The defendants' application for a declaration that the denials pleaded in the defence comply with r 166(4) is refused.
4. The defendants have leave to amend paragraphs 4, 5(c), 6(c) and 7e) of their defence.
5. I order that the defendants pay the plaintiff's costs of and incidental to that application to be assessed.