SUPREME COURT OF QUEENSLAND

CITATION:	*Piatek v Piatek and Another; Piatek v Piatek* [2010] QSC 122
PARTIES:	**RENATA ANNA PIATEK** (plaintiff) **v** **STAN WALDEMAR PIATEK** (first defendant) and **MAGDALENA JOANNA PIATEK** (second defendant)
	RENATA ANNA PIATEK (plaintiff) **v** **STAN WALDEMAR PIATEK** (first defendant)
FILE NO/S:	BS 645 of 2007 BS 3439 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	15 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2010
JUDGE:	Daubney J
ORDER:	**1. The applications will be dismissed.** **2. That the defendant to the 2005 proceedings, and the defendants to the 2007 proceedings, will pay the plaintiff's standard costs of and incidental to each of the applications to strike out the notices to admit facts and the applications for leave to withdraw deemed admissions.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF

COURT – OTHER MATTERS – where notices to admit facts were delivered by the plaintiff in July 2009 – where the notices to admit facts were not responded to by the defendant – where the matter was on the Supervised Case List and was the subject of judicial case management at regular reviews – where the matters were set down for trial in January 2010 with the consent of all parties - where the defendants have made an application to strike out the notices to admit facts – where the notices to admit facts in effect called on the defendant to admit each allegation in the pleadings which were denied or not admitted by the defendant – where the form of each notice did so by reference to the specific allegation in the plaintiff's pleading – whether the notices to admit facts should be struck out as an abuse of process

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – OTHER MATTERS – where the defendant has applied to withdraw the deemed admissions – where the defendants solicitors were owed a considerable amount in respect of outstanding accounts for legal fees – where work on the matter was suspended in light of the outstanding fees prior to the defendant being served with the notices to admit facts – where the defendant was unable to pay outstanding fees and the firm's retainer remained suspended – where the defendant's son has a heart condition – where the defendant is defending litigation brought by the plaintiff three different jurisdictions – where an agreement was reached in relation to payment and work was resumed by the defendant's solicitors in December 2009 – where no evidence was led regarding the responses the defendants would seek to make if the deemed admissions were withdrawn – whether this justified a favourable exercise of the court's discretion to withdraw the deemed admissions

Uniform Civil Procedure Rules (1999) Qld, r 5, r 189

Aon Risk Services Australia Limited v Australian National University [2009] 239 CLR 175, applied
Coopers Brewery Ltd v Panfida Foods Ltd (1992) 26 NSWLR 738, cited
Cormie v Orchard and Another (unreported, 20 January 2001, Margaret Wilson J), distinguished
Equuscorp Pty Ltd v Orazio [1999] QSC 354, cited
Rigato Farms Pty Ltd v Ridolfi [2000] QCA 292, applied

COUNSEL: PG Bickford for the plaintiff
A Moriarty for the defendant

SOLICITORS: DLA Phillips Fox for the plaintiff
Tucker & Cowen Solicitors for the defendants

HIS HONOUR: These applications are brought on behalf of Mr Stan Piatek who is the defendant in BS3439 of 2005 and the first defendant in BS654 of 2007. The applications concern notices to admit facts which were delivered by the plaintiff in each proceeding in July 2009.

I will describe the proceedings in a little more detail shortly but would firstly record the following matters:

(a) these proceedings have for some time been on the supervised case list and have been the subject of judicial case management at reviews of the cases;

(b) on 18 January 2010 at the request of and with the consent of all parties (including Mr Piatek) I ordered that the proceedings be set down for trial for nine days commencing 4 May 2010;

(c) the fact that notices to admit facts had been delivered in July 2009 and not responded to by the defendant was mentioned on several occasions in the course of supervised case list reviews in the context of seeking to determine the length of trial. It was not until a review was convened by me on 8 March 2010 (obviously many weeks after the defendant had consented to the matter being listed for trial and trial dates allocated) that the solicitor for the defendant intimated that the defendant wished to make an application to withdraw

the deemed admissions arising due to his non-response to the notices to admit facts. I should also note that the review on 8 March 2010 was not convened at the request of the parties but was convened by me because certain correspondence directed to me by the defendant had been received in my Chambers;

(d) in any event, on 8 March 2010 I ordered that any application to withdraw admissions be filed and served by 22 March 2010 and listed for hearing in the applications list in the week commencing 29 March 2010. That week was identified as one in which I would be sitting in applications. Whilst the applications to withdraw were filed by 22 March 2010, the supporting affidavit was not filed and served until 29 March 2010. On 31 March 2010 the defendant filed applications in each proceeding seeking that the notices to admit be struck out. This late service of material by the defendant meant that the matters had to be adjourned. They came before me on 8 April 2010. After hearing argument I gave the parties liberty to put on further written submissions on one specific aspect which had arisen during argument, with those submissions to be delivered to me by 9 April 2010. The defendant took full advantage of that liberty to put on submissions which addressed the specific issue raised in oral argument and also to reargue large parts of his

case. Nothing, however, in the result is affected by the defendant's conduct in this regard.

Thus there is, in each of the proceedings, an application to strike out the notices to admit facts delivered in July 2009 and what is, in effect, an alternative application to withdraw the deemed admissions.

It is necessary to say something about the principal proceedings. There are, as I have already noted, two proceedings. The first was commenced on 28 April 2005, the second was commenced on 24 January 2007. In both proceedings the plaintiff, Mrs Piatek, seeks similar relief against Mr Stan Piatek and in the 2007 proceedings also seeks relief against Mr Piatek's new wife, Ms Siudy.

The relief sought in the 2005 proceedings can be summarised as follows:

(a) that Mr Piatek forthwith account to Mrs Piatek for her half interest in the moneys received from the sale of land situated at 29-30 The Peninsular, Paradise Point in the State of Queensland ("the subject land");

(b) that Mr Piatek be ordered to pay Mrs Piatek the amount due and owing to her for that half interest;

(c) further or alternatively a declaration that

Mr Piatek held his interest in a mortgage granted by the purchaser of that land on trust for the plaintiff, a declaration that the plaintiff was entitled at all material times to a one half share of the proceeds of sale of the subject land and a motor vehicle that was sold by Mr Piatek for an amount of $308,000.00 on or about 8 July 2004; and a declaration that Mrs Piatek was entitled at all material times to a one-half share in the funds located in the Australian joint account referred to in subparagraph 7(b)(iii) of the Second Further Amended Statement of Claim;

(d) an injunction to restrain Mr Piatek from disposing of, parting with possession of, or otherwise dealing with moneys already received;

(e) further, an order that the amount of $1.4 million paid into Court on or about 8 August 2006 be paid out to the plaintiff together with all accretions;

(f) costs.

The 2007 proceedings were originally commenced by way of an originating application and relate to two properties and a Mercedes Benz motor vehicle. Mrs Piatek alleges that the two properties were purchased with joint funds, specifically the $1.7 million amount retained by the defendant, Mr Piatek, for the sale of the subject land. The Mercedes Benz was wholly

owned by Mrs Piatek but was taken by Mr Piatek. That vehicle is currently being held in storage pursuant to orders made by the Court.

The 2007 proceedings also relate to certain items of clothing and jewellery claimed to be the property of Mrs Piatek which were allegedly taken by Mr Piatek and Ms Siudy from the Caboolture property without her knowledge and approval.

The relief sought in the 2007 proceedings can be summarised as follows:

(a) a declaration that Ms Siudy holds her interest in certain land at Sandstone Point on trust for the plaintiff;

(b) alternatively, a declaration that Ms Siudy holds her interest in the Sandstone Point land on trust for the plaintiff and defendant in equal shares;

(c) an injunction restraining Mr Piatek and Ms Siudy by themselves, their servants or agents from disposing of, selling, encumbering or otherwise dealing with the Sandstone Point land other than in accordance with an order of the Court;

(d) an order that Ms Siudy forthwith transfer to the plaintiff her interest in the Sandstone Point land;

(e) alternatively orders under the Trust Act vesting the Sandstone Point land in Mrs Piatek;

(f) orders against the Registrar of Titles to effect registration and transfer of title;

(g) similar declarations and relief in relation to the Caboolture land;

(h) a declaration that the balance of certain bank accounts referred to in the statement of claim are the property of the plaintiff;

(i) a declaration that the Mercedes Benz registered in the plaintiff's name is owned by her;

(j) other alternative and injunctive relief;

(k) declarations and injunctions in relation to certain items of jewellery and clothing;

(l) damages for the alleged unlawful detention and/or conversion of the motor vehicle, jewellery, clothing and personal items;

(m) damages in respect of the storage costs incurred with respect to the motor vehicle;

(n) interest and costs.

On the 28th of July 2009 the plaintiff served notices to admit facts in respect of each proceeding. In essence, the notices were directed to the plaintiff's pleadings (i.e. the statement of claim and the reply and answer in each proceeding) and effectively called on the defendant to admit each allegation in those pleadings which were denied or not admitted by the defendant.

The form of each notice did so by reference to the specific allegation made in the plaintiff's pleading. So, for example, paragraph 1 of the notice to admit facts in relation to the statement of claim in BS 3439 of 2005 identified the fact the admission of which was sought as follows:

> "1 The facts pleading in paragraph 1 of the Second Further Amended Statement of Claim, which have not been admitted by the Defendant, namely that:
>
> 1.1 the Plaintiff is the estranged wife of the Defendant."

It was submitted on behalf of the defendant that each of the notices should be struck out as an abuse of process. The defendant called in aid the judgment of Margaret Wilson J in *Cormie -v- Orchard and Another* (unreported, 30 January 2001), to which I will refer in more detail shortly, to found the following submissions:

(a) the fact that the plaintiff had called on the

defendant to admit each and every allegation which was the subject of a denial or non-admission was itself oppressive and an abuse of process;

(b) the notices are vague for failing to specify the facts on which admissions are sought;

(c) a large number of the paragraphs in the notices contain alternative statements which make it difficult to identify which facts are those sought to be admitted;

(d) some paragraphs seek admission of mixed matters of fact and law.

The defendant sought to persuade me of the oppressive and incomprehensible nature of these notices by undertaking a selective and highly focused examination of individual subparagraphs of each notice with a view to demonstrating that, both in form and substance, the notices were not amenable to proper or sensible response.

On reading the notices as a whole, however, and reading the impugned subparagraphs in their proper context, I am quite unpersuaded that the notices are as incomprehensible as was submitted. Three examples will suffice.

The defendant complained that the following paragraph in the notice to admit facts concerning the amended reply and answer

in the 2007 proceedings did not specify any facts or admission:

"2.3 the allegations contained in paragraph 9(t) of the Amended Defence and Counterclaim are untrue insofar as they contain matters of fact."

The whole of paragraph 2, however, within which that subparagraph contained, read as follows:

"2. The facts pleaded in paragraph 4E of the Amended Reply and Answer which have not been admitted by the Defendants, specifically by the First Defendant, namely that:

2.1 the Plaintiff did not cease to be part of the Piatek Family Unit in any material sense or at all;

2.2 the Second Defendant did not become a member of the Piatek Family Unit in any relevant sense;

2.3 the allegations contained in paragraph 9(t)of the Amended Defence and Counterclaim are untrue insofar as they contain matters of fact."

Paragraph 9(t) in the Amended Defence and Counterclaim to which reference is made in that request for admission, is a plea by the defendant in the following terms:

"9(t) in the premises, as a matter of Australian law, it is unconscionable for the Plaintiff to assert that the Defendants and the First Defendant's parents are not entitled to any interest in the subject land, and holiday house, and the proceeds of sale thereof, and the Plaintiff is estopped from denying that the Defendants and the First Defendant's parents have an interest in the proceeds of sale."

It might be debatable whether paragraph 9(t) truly contains any allegations of fact, but it is clear enough that the plaintiff by her reply has asserted that any matters of fact in paragraph 9(t) are untrue. It is also clear enough that the notice to admit called on the defendant to acknowledge and accept, by admission, this assertion of untruth by the plaintiff. Obviously it was open to the defendant to decline the opportunity to do so by responding to the notice.

Two other examples are found in paragraph 14.1 of the notice to admit facts concerning the Second Further Amended Statement of Claim in the 2005 proceedings. The Defendant asserted before me that paragraph 14.1.1(b) impermissibly contained mixed and multiple questions of fact and law and that paragraph 14.1.1(e) called for admission of a matter of law.

If one has regard to the terms of those subparagraphs alone one can understand these submissions but it is necessary to read them in the context of paragraph 14.1 as a whole:

"14.1 on or about the 15th of September 2005, the solicitors for the Plaintiff lodged a caveat claiming an interest as beneficial owner of the interest of the Defendant, as mortgagee, in Registered Mortgage No. 708538024 of the subject land ("the second caveat"), on the following grounds:

14.1.1 The Plaintiff claimed an interest in the mortgage, which was registered over the subject land, pursuant to a constructive, and/or resulting, and/or implied trust, in that:

(a) The mortgagee Defendant, was the former registered proprietor of the subject land;

(b) The Plaintiff was the beneficial owner of a one half interest in the subject land by virtue of an agreement between the Plaintiff and Defendant or, in the alternative, by virtue of the fact that the subject land was purchased using joint funds which the Plaintiff and Defendant owned, in equal shares or, in the further alternative, by virtue of the contributions, including financial contributions, made by the Plaintiff to the improvement of the subject land, including contributions towards the outgoings in respect of the subject land;

(c) The Defendant sold and transferred his interest, as registered proprietor, of an estate in fee simple in the subject land, to Carmel Byham;

(d) Contemporaneously with the transfer of his interest in the fee simple to the subject real property, and because Carmel Byham, registered proprietor, could not pay the Plaintiff the full agreed purchase price, the Defendant was granted the benefit of a mortgage over the subject land, by Carmel Byham, in respect of the balance of the unpaid purchase price, being a sum less than half the sale price of the lot; and

(e) Accordingly, the Plaintiff is beneficially entitled to the Defendant's interest in the mortgage with respect to the subject land, in place of the Defendant."

When one reads the paragraph as a whole it is clear that the fact of which admission is sought is the lodging of the caveat and not admissions of the legal grounds on which the caveat was founded.

I do not propose descending into a further detailed exegesis of the notices to admit facts. The matters to which I have just referred exemplify the defendant's complaints.

Having perused the notices and the pleadings to which they relate, I am quite satisfied that they are neither incomprehensible (in the sense contended for by the defendant) nor do they fail to sufficiently specify the facts of which admissions were sought.

This case is quite different from the one considered by Margaret Wilson J in *Cormie v Orchard and Another*. The plaintiff in that case had sued solicitors for professional negligence arising out of an allegedly missed limitation date in personal injuries proceedings. The proceeding was defended.

The plaintiff's solicitors sent the defendant solicitors a notice to admit which simply called on the defendant to admit, "Paragraphs 1 to 21.4 inclusive of the plaintiff's third further amended statement of claim".

The defendant in that case submitted that a notice in that form was an abuse of process. Her Honour said:

"By rule 189 subrule (1), a party may serve on another party a notice to admit 'facts or documents specified in the notice'. Counsel for the first defendant submitted that 'specified' means set out in detail on the face of the notice. While I accept that some precision is required in order to 'specify' a fact, I consider that in an appropriate case the facts can be 'specified' by reference to paragraphs in a pleading. However, this will not be appropriate where, for example, more than one

fact is alleged in a single paragraph of a pleading or where there are mixed allegations of fact and law.

The purpose of the notice to admit procedure is to ensure that the Court is called upon to determine only questions bona fide in dispute. See *Rigato Farms Pty Ltd v. Ridolfi* [2000] QCA 292; *Coopers Brewery Ltd v. Panfida Foods Ltd* (1992) 26 NSWLR 738. Where, as in the present case, some facts have already been admitted on the pleadings (some subject to qualifications), and others not admitted because the opposite party is uncertain as to their truth or still making relevant enquiries, it is not a legitimate use of the procedure to call for admission of all the paragraphs in the pleading. I reject the submission of counsel for the plaintiff that it was open to the first defendant to refuse to answer mixed questions of fact and law and that matters of fact already admitted were of no effect and severable from the notice.

Rule 189 does not contemplate the use of the procedure in this manner. In my view what was done was an abuse of process, and the notice ought to be struck out."

In the present case the notices were directed - and specifically directed - only to those allegations on which issue was joined or which were the subject of non admissions on the pleadings.

The notices did not traverse facts already admitted. Properly read, as I have said, the notices sufficiently identified the facts of which admissions were sought. Her Honour's judgment does not, in my view, assist the defendant in this case.

The applications to set aside the notices to admit will, therefore, be dismissed.

Turning then to the application to withdraw the deemed admissions, UCPR rule 189 relevantly provides:

> "189 Notice to admit facts or documents
>
> (1) A party to a proceeding (the first party) may, by notice served on another party ask the other party to admit, for the proceeding only, the facts or documents specified in the notice.
>
> (2) If the other party does not, within 14 days, serve a notice on the first party disputing the fact or the authenticity of the document, the other party is taken to admit, for the proceeding only, the fact or the authenticity of the document specified in the notice.
>
> (3) The other party may, with the court's leave, withdraw an admission taken to have been made by the party under subrule (2)."

The only material filed in support of the application to withdraw was an affidavit by the defendant's solicitor, Mr Moriarty, which deposes to the following matters.

The firm in which Mr Moriarty was employed were the solicitors on the record for, and had been retained by, Mr Piatek and Ms Siudy. By July 2009, Mr Piatek and Ms Siudy had not paid accounts of the firm dating back to September 2008. There was a considerable amount owing to the firm in respect of outstanding accounts for legal fees.

In about mid July 2009, Mr Moriarty had a discussion with his supervising partner in respect of the proceedings and expressing concern as to whether Mr Piatek and Ms Siudy could be abandoning the litigation. His supervising partner then instructed him to suspend work on the 2005 and 2007 proceedings due to non-payment by Mr Piatek and Ms Siudy of their accounts. Mr Moriarty says that he accordingly then suspended all work.

On 27 July 2009 his firm was served with the relevant notices to admit facts. On that same day he sent an e-mail to Mr Piatek and Ms Siudy attaching the relevant notice to admit facts. He said in that e-mail:

"We are presently owed just over A$80,000 by you and Magdalena. As previously notified to you, we have suspended work on your matter. We cannot extend credit indefinitely or let the amount owed get larger, because it is already too much.

I estimate our fees and costs for responding to the notice and taking your instructions on it would be in the vicinity of

about $4,000 to $5,000 (which equates to approximately 10-12 hours work).

I cannot do that work knowing we are not being paid. Equally I do not want you to lose the trial or be disadvantaged due to a technicality or due to your not being able to pay now."

Mr Moriarty then set out a proposal for his clients to make part payments of the amounts owing.

Mr Piatek responded in an e-mail also dated 27 July 2009 in which he wrote words to the following effect:

(a) that he had no funds to defend himself;

(b) that he would lose this case only because his funds were frozen;

(c) that if Mr Moriarty couldn't help him then he understood, but to let the Judge know "so maybe he will find a way for this problem";

(d) he had to have funds to support his family and this was the most important thing;

(e) his son Peter was very sick and his heart was failing and his mother and her partner are to blame for that;

(f) the plaintiff had not been paying any child support for the child Nicole or giving any cooperation in raising the child.

Mr Moriarty says that in late July or early August 2009 after receiving that e-mail from Mr Piatek he had a discussion with Mr Piatek in which he said that if Mr Piatek wanted Mr Moriarty's firm to cease acting for him so that Mr Piatek could communicate with the Judge directly and, in effect, become self-represented then he needed to terminate the firm's retainer. He also told Mr Piatek that if that happened he would inform the Court, and me specifically, that Mr Piatek was self-represented and would file the notice of ceasing to act.

He told Mr Piatek that, alternatively, he could discuss with his supervising partner a payment arrangement for gradually paying the outstanding accounts over time.

Mr Moriarty says that Mr Piatek did not terminate his firm's retainer or pay any money off in respect of the firm's outstanding accounts or enter into any payment arrangement before the date for responding to the notice to admit had passed. He says that the firm's retainer remained "suspended" and the defendants did not respond to the notices.

Mr Moriarty then deposes to further discussions and communications that he had with Mr Piatek over the course of the latter part of 2009 saying that on about three more

occasions he invited Mr Piatek to terminate the firm's retainer, but this was never done. Mr Moriarty confirmed, however, that because the firm's accounts remained outstanding, work on the files also remain suspended.

Even though work was suspended Mr Moriarty still spoke with Mr Piatek on the phone about once per month. He did not render accounts for those telephone attendances because the firm had formally suspended its retainer. He says that on each of those occasions Mr Piatek told him that his son was very sick with a bad heart, that he, Mr Piatek, was under a lot of stress with family commitments and finding it difficult to defend the litigation which was being brought by Mrs Piatek in Poland, the United States and Australia, that he had no money because it was frozen by the Court and that there should not be a trial of the 2005 and 2007 proceedings because of an order which had been made in divorce proceedings between him and Mrs Piatek in the Polish courts.

Mr Moriarty says that on each occasion when Mr Piatek told him these things he expressed his condolences for the son's health condition. He confirmed that the firm had suspended its work on the files and that if Mr Piatek wished to be self-represented or retain new solicitors he needed to terminate the retainer or agree on a payment arrangement and that the issue about the division of his marital estate before the Polish courts appeared to be a valid legal argument which was already part of his defence in the 2005 and 2007 proceedings and that there would need to be a trial to

determine whether that defence was valid in the 2005 and 2007 proceedings.

Mr Moriarty says that he recalls that in about November 2009 Mr Piatek telephoned him and said to him, in effect, that since Mr Moriarty's firm was not representing him Mr Piatek would write directly to me, the Judge, about his concerns about the 2005 and 2007 proceedings. He also told Mr Moriarty that he was under a lot of stress, including because of the son's bad health, and that the plaintiff was wearing him down by suing him on three continents and that he was finding it difficult to cope with that stress, as well as raising a family, supporting his children and managing his business in Poland.

The letter to which Mr Piatek referred in that discussion with Mr Moriarty was the one which did not reach my chambers until the 26th of February 2010, and which was the catalyst for the convening of the review in early March 2010.

In Mr Piatek's e-mail to Mr Moriarty of 27th July 2009, Mr Piatek had referred to his son being very sick, and that his son's heart was failing. Mr Moriarty says that he did not appreciate the gravity of the son's medical condition until he received a translation of the medical report attached to an e-mail from Mr Piatek on 16 December 2009.

Mr Moriarty says that, although he had been aware prior to December 2009 that the son had heart problems, he was not

aware of the extent of it until that date. On about the same date he spoke with Mr Piatek and was told for the first time about the son's need for a heart transplant, or at least that the son had suffered a serious heart attack and was potentially in need of a heart transplant.

Mr Moriarty swears that he believes that, if in July 2009, he had properly appreciated that one of Mr Piatek's reasons for not being able to pay Tucker & Cowen's accounts and not instructing him to respond to the notices to admit facts, was because his son had suffered a serious heart attack and was seriously in risk of dying, Mr Moriarty would have responded to the notices to admit facts, notwithstanding the formal suspension of the firm's retainer.

In any event, Mr Moriarty says that in December 2009, Mr Piatek agreed to start paying $10,000 per month to the firm in relation to its outstanding accounts, and, accordingly, Mr Moriarty resumed work on the 2005 and 2007 proceedings.

He also says that in or about December 2009, he "received instructions from Mr Piatek that the 2005 and 2007 proceedings should be listed for trial as soon as possible".

The next contact between Mr Moriarty and Mr Piatek, which is referred to in Mr Moriarty's affidavit, did not occur until 3 March 2010, when Mr Moriarty spoke with Mr Piatek over the phone, and Mr Piatek told Mr Moriarty that the son's heart was still in a very bad condition, and the son needed an implant operation.

Mr Piatek also spoke about Mr Moriarty's firm's continued retainer and payment of outstanding invoices, and again repeated comments to the effect that he was finding it difficult to manage his family and litigation commitments in the proceedings brought by the plaintiff in Poland, the United States and Australia. Mr Piatek said to Mr Moriarty that the plaintiff was "forum shopping" by bringing the proceedings in the United States and Australia, because she thought she would get a better result from the judges there than the judges in Poland.

On 5 March 2010, Mr Moriarty received an e-mail from Mr Piatek which attached a medical report in relation to the son's heart condition and also a brochure concerning an implantable defibrillator, which is the device which is apparently to be surgically inserted to assist the son's heart condition.

In connection with the present application specifically, Mr Moriarty, in his affidavit sworn on 29 March 2010, said, "in or about early March 2010, I obtained Mr Piatek's instructions to apply to set aside the notices to admit facts in the 2005 and 2007 proceedings. Consequently the applications were filed on 22 March 2010. In the past week, since Sunday, 21 March 2009 (sic), I have attempted on several occasions to contact Mr Piatek to obtain more detailed instructions about the applications and to assist me further in preparing this affidavit. However, I have not been able to contact Mr Piatek at all to get those instructions."

He then goes on to depose to certain matters which would appear to indicate that there was a trial in the divorce proceedings in Poland between 22 and 26 March 2010, and that this probably explained the difficulty that Mr Moriarty was experiencing in contacting Mr Piatek.

It was submitted for the defendant that the chronology of the events in the life of the defendant, to which I have just referred at length, constituted "exceptional extenuating circumstances" which justified a favourable exercise of the discretion under Rule 189(3). Much emphasis was placed in the defendant's submissions on the son's illness, the defendant's lack of funds, the plaintiff's apparent lack of concern as mother for her sick son, and the contemporaneous proceedings in other jurisdictions. I observe, however, that there is no explanation at all for how it is that the defendant consented to the matter being set down for trial, knowing as he and his advisors did, that these notices had not been answered, nor is there any deposition to steps which the defendant initiated to have the deemed admissions withdrawn, as I have already observed. The matter was raised for the first time only on 8 March 2010, at a review which was convened by the Court, not by the parties.

The appropriate approach to applications to withdraw admissions was examined by the Court of Appeal in *Ridolfi v. Rigato Farms Pty Ltd* [2001] 2 Qd R 455.
De Jersey CJ said:
“[18] But that aside, the submission ignores the potentially important role of procedure, as reflected in r. 5(1)

especially:

> "The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."

It also overlooks injustice to the respondent were the appellant allowed to withdraw admissions on which for months the respondent – to the knowledge of the appellant – relied in preparing his case.

[19] Asked to exercise the discretion under r. 189(3), a court would ordinarily expect sworn verification of the circumstances justifying a grant of leave. Those circumstances may include why no response to the notice was made as required, the response the party would belatedly seek to make, and confirmation that the response would accord with evidence available to be led at a trial. Here none of those matters was so verified. Issues of prejudice may also fall for consideration upon the hearing of such an application.

[20] There is no principle that admissions made, or deemed to have been made, may always be withdrawn "for the asking", subject to payment of costs. The discretion is broad and unfettered, as exemplified by *Coopers Brewery Ltd v. Panfida Foods Ltd* (1992) 26 N.S.W.L.R. 738 and *Equuscorp Pty Ltd v. Orazio* [1999] QSC 354.

[21] The charter of procedure contained in the *Uniform Civil Procedure Rules* cannot be approached on the basis that if important provisions are ignored, even if inadvertently (and that is not established here), the court may be expected to

act indulgently and rectify the omission. Fulfilling procedural requirements will often contribute significantly to securing an ultimate result which may be considered just. Allowing the appellant to withdraw these deemed admissions would substantially erode the beneficial worth of a very important procedural mechanism directed, through expediting cases and reducing costs, to promoting the interests of justice.

[22] Parties do not have an inalienable right to a hearing of all issues on the merits. Rule 5(3), for example, confirms each party's obligation to proceed expeditiously, or risk sanctions (r. 5(4)) which may include dismissal." (underlining added)

See also the following observations of Williams J (as he then was) at paragraph 32:

"[32] Certainly an admission flowing from the operation of r. 189 should not be withdrawn merely for the asking. In my view a clear explanation on oath should be given as to how and why the admission came to be made and then detailed particulars given of the issue or issues which the party would raise at trial if the admission was withdrawn. Such a requirement is generally in accordance with the reasons of Rogers CJ in *Coopers* and of Mackenzie J. in *Equuscorp Pty Ltd v. Orazio* (unreported, S9208/96, judgment 30 November 1999). That ought not be taken to be an exhaustive statement of what is required. Each case should be considered in the light of its own facts and the circumstances may well require even more

extensive material in order to obtain leave to withdraw the admission.” (underlining added)

Notwithstanding the absence of any, let alone any sensible explanation for these applications being brought well after the defendant had consented to the matter being set down for trial, even if I were to accept that the defendant has explained why no responses were given to the notices, and has explained the delay in bringing this application, the material relied on by the defendant neither deposes to the responses which the defendant would seek to make, nor confirms that those responses would accord with the evidence to be led at trial (as per de Jersey CJ at [19]), nor are there detailed particulars of the issue or issues which the defendant would raise at trial if the admissions were withdrawn (as per Williams J at [32]).

In view of my conclusions on this aspect, it is unnecessary for me to canvass matters of prejudice, save to observe that it is clear that at this late stage the plaintiff would undoubtedly be prejudiced by the withdrawal of admissions, particularly in the absence of the defendant nominating the issues he will seek to agitate at trial.

Since the observations by the Court of Appeal in *Rigato Farms* about the need to apply Rule 189 in light of the operation of UCPR Rule 5, the High Court in *Aon Risk Services Australia Ltd. v. Australian National University* [2009] 239 CLR 175 said at paragraph 112:

"A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to the parties having a sufficient *opportunity* to identify the issues they seek to agitate."

The defendant in the present case has had choices about the way in which he would defend the claims, and still potentially had those choices available to him when he consented to have the matter set down for trial.

To make these applications, as he has done, only a month out from that trial, and to fail even to indicate what issues he would seek to ventilate at trial if the deemed admissions were withdrawn, is simply too little too late.

The applications will be dismissed.

...

HIS HONOUR: In all the circumstances, I don't think, notwithstanding the powerful arguments put by counsel and today by the solicitor for the plaintiff, that the applications were either so unarguable or so exceptional as to warrant an order for costs being made other than that which normally follows the event. I am not persuaded that there should be an approach other than the conventional approach,

the defendant having forensically chosen to make separate applications. And I won't embark into a precise examination of the circumstance which led that to come about, but it seems to me that the defendant having brought the applications, will have to pay the costs of the applications, and in the case of the 2007 proceedings, the costs orders will of course lie against both the first and the second defendants.

So, the costs orders will be that the defendant to the 2005 proceedings, and the defendants to the 2007 proceedings, will pay the plaintiff's standard costs of and incidental to each of the applications to strike out the notices to admit facts and the applications for leave to withdraw deemed admissions.

...
