SUPREME COURT OF QUEENSLAND

CITATION:	*Hanson Construction Materials P/L v Davey & Anor* [2010] QCA 246
PARTIES:	**HANSON CONSTRUCTION MATERIALS PTY LTD** ACN 009 679 734 (plaintiff/respondent) **v** **NORLIS PTY LTD** ACN 097 876 303 **trading as SEQUENCE BUILDING SOLUTIONS** BN 196 907 82 (first defendant/not a party to the appeal) **NORMAN LISTER DAVEY also known as NORMAN LISTER DAVEY SNR** (second defendant/first appellant) **NORMAN LISTER DAVEY also known as NORMAN LISTER DAVEY JNR** (third defendant/second appellant)
FILE NO/S:	Appeal No 2299 of 2010 SC No 8511 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2010
JUDGES:	Muir and Chesterman JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where respondent commenced proceedings against appellants claiming moneys owing under a contract – where appellants filed a defence that did not comply with *UCPR* r 166 and were deemed to have admitted the facts alleged in the statement of claim – where respondent sought summary judgment and appellants applied for leave to withdraw the deemed admissions – where primary judge refused leave and gave summary judgment against the appellants – whether there was a real dispute about the

subject matter of the admissions – whether primary judge erred in dismissing appellants' application

CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – CREDITORS ON WHOM BINDING – where appellants were the directors of the first defendant company and gave written guarantees to indemnify respondent for all money owing or payable by the company – where appellants charged in favour of the respondent certain freehold and leasehold land – where the company subsequently executed a Deed of Company Arrangement – where appellants relied upon a clause in the Deed that purported to deem all liabilities to have been paid in full so that personal guarantees were not triggered – where primary judge held the contract of guarantee granted equitable charges in favour of the respondent over the land – whether the Deed operated to extinguish the appellants' personal guarantees

MORTGAGES – PARTICULAR SECURITIES – OTHER CASES – where the claim sought declarations that the appellants had granted equitable mortgages by virtue of the contract of guarantee – where primary judge granted equitable charges in favour of the respondent – whether primary judge gave judgment for relief which had not been claimed

Corporations Act 2001 (Cth), s 9, s 444A(4)(d), s 444D, s 444H, s 444J, s 1305
Evidence Act 1977 (Qld), s 83, s 84
Land Title Act 1994 (Qld), s 74
Property Law Act 1974 (Qld), s 99(2)
Uniform Civil Procedure Rules 1999 (Qld), r 166, r 295(2)

BBC Hardware Limited v GT Holmes Pty Ltd [1997] 2 Qd R 123; [1996] QSC 273, cited
Bunnings Building Supplies Pty Ltd v Blue Diamond Homes Pty Ltd & Anor [2004] QSC 54, cited
City of Swan v Lehman Brothers Australia Ltd (2009) 74 ACSR 191; (2009) 179 FCR 243; [2009] FCAFC 130, applied
Deputy Commissioner of Taxation v Ahern (No 2) [1988] 2 Qd R 158, cited
M & S Butler Investments Pty Ltd v Granny May's Franchising Pty Ltd (1997) 24 ACSR 695, followed
In re Bank of Credit and Commerce International SA (No 8) [1998] AC 214; [1997] 3 WLR 909, cited
In re Cosslett (Contractors) Ltd [1998] Ch 495; [1998] 2 WLR 131, cited
Perry v National Provincial Bank of England [1910] 1 Ch 464, cited
Phillips v Hogg [2001] QSC 390, cited
Potts v Miller (1940) 64 CLR 282; [1940] HCA 43, cited

R v Hally [1962] Qd R 214, cited
Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455; [2000] QCA 292, applied
Worrell v Issitch [2001] 1 Qd R 570; [2000] QSC 146, cited

COUNSEL: D Rangiah, with P Travis, for the appellants
M J Luchich for the respondent

SOLICITORS: Piper Alderman for the appellants
Patane Lawyers for the respondent

[1] **MUIR JA**: I agree that the appeal should be dismissed with costs for the reasons given by Chesterman JA. I would record however that, in my view, the observations of Williams J in *Ridolfi* at 461 concerning the withdrawal of deemed admissions are unexceptionable. I take the passage in question as doing no more than acknowledging that a deemed admission may come about in a variety of ways and that, where an explanation for the admission is called for on the hearing of an application to withdraw it, failure to give a satisfactory explanation will be a relevant consideration.

[2] **CHESTERMAN JA**: By written contract dated 23 September 2004 the respondent agreed with Norlis Pty Ltd ("Norlis") that it would supply its products (apparently concrete) on credit. The appellants were the directors of Norlis and by a written contract of guarantee and indemnity also dated 23 September 2004 they "unconditionally and irrevocably guarantee(d) … the due and punctual payment" of moneys owed by Norlis to the respondent, and further agreed:

> "1.
>
> …
>
> (a) on demand from time to time to pay an amount equal to the Guaranteed Moneys then due and payable;
>
> (b) any statement signed by a Hanson director, secretary, credit manager or authorised representative certifying the amount of Guaranteed Moneys … owing … under his Guarantee is, in the absence of manifest error, binding and conclusive on and against the Guarantor;
>
> (c) this Guarantee is a continuing guarantee and remains in full force and effect until all the Guaranteed Moneys are paid or satisfied in full and is in addition to, and not prejudiced or affected by any other security or guarantee held by Hanson for the payment of Guaranteed Moneys;
>
> (d) the liabilities of the Guarantor and the rights of Hanson under this Guarantee are not affected by anything which might otherwise affect them at law or in equity; and
>
> (e) if any payment by the Guarantor under this Guarantee or the Customer is avoided, set aside, ordered to be refunded or reduced rendered unenforceable by any laws relating to bankruptcy, insolvency or liquidation, that payment will be taken not to have been made and Hanson is entitled to

recover from the Guarantor the value of that payment as if that payment had never been made. This clause continues after this Guarantee is discharged.

2. **Indemnity**
If the obligation of the Customer to pay the Guaranteed Moneys to Hanson is unenforceable for any reason, the Guarantor as a separate undertaking unconditionally and irrevocably indemnifies Hanson against any loss Hanson suffers as a result. Hanson need not incur any expense or make any payment before enforcing this right of indemnity.

…

5. **Continuing Guarantee**
Any guarantee shall remain in force so long as the customer shall maintain an account with Hanson. All guarantees shall be continuing guarantees and will terminate only in writing from Hanson.

…

7. **Charge**
As security for payment to Hanson of the Guaranteed Moneys and for its obligations generally under this Guarantee, the Guarantor charges in favour of Hanson the whole of the Guarantor's undertaking, property and assets (including, without limitation, all of the Guarantor's interests, both legal and beneficial, in freehold and leasehold land) both current and later acquired."

"Guaranteed Moneys" were defined to mean all money owing or payable to the respondent by Norlis, including principal, interest, fees, costs, indemnities, charges, duties or expenses. "Hanson" is the respondent. Norlis was the "Customer". The appellants were the "Guarantor".

[3] On 6 August 2009 the respondent commenced proceedings in the Supreme Court against Norlis and the appellants claiming:

(a) $53,897.47 being "the balance of the total outstanding purchase price of goods sold and delivered", by the respondent to Norlis;

(b) declarations that the appellants had each granted an equitable mortgage in favour of the respondent over land (which was fully described); in respect of which each was a registered proprietor;

(c) orders that the equitable mortgages be enforced by sale pursuant to s 99(2) or s 100 of the *Property Law Act* 1974;

(d) order for the sale of the land under the general law.

[4] On 17 September 2009 Norlis executed a Deed of Company Arrangement ("the deed") pursuant to the provisions of Pt 5.3A of the *Corporations Act* 2001.

[5] The statement of claim having set out the agreement went on:

"3. The material terms of the Credit Agreement were, inter alia, as follows:-

(a) The (respondent) would supply materials and products on credit and on a running account to (Norlis);
(b) All moneys payable by (Norlis) to (the respondent) pursuant to the running account would be paid … within 30 days from the date of invoice;
(c) If (Norlis) did not pay … by the due date … it would be liable to pay continuing interest until payment … plus all costs, charges, expenses incurred by (the respondent); and
(d) (Norlis) was to pay all costs and expenses incurred by (the respondent), its legal advisers (sic) and others in respect of anything instituted against (Norlis).

…

5. In accordance with its obligations under the Credit Agreement, (the respondent) from time to time supplied materials and products on credit and on a running account to (Norlis).

6. In breach of its obligations … under the Credit Agreement, as at 6 July 2009, (Norlis) had wrongfully neglected and/or refused to pay all outstanding sums due … in accordance with the Credit Agreement.

7. As at 6 July 2009, the total of the indebtedness to the (respondent) for the supply of materials and products stood at $52,693.19 for goods sold and delivered to (Norlis) by (the respondent) in accordance with the Credit Agreement.

8. (Norlis):-

(a) Remains justly and truly indebted to (the respondent) for the balance of the debt in the sum of $52,693.19;
(b) Pursuant to the Credit Agreement and by reason of its aforesaid breach of the Credit Agreement, is now liable to pay (the respondent) continuing interest, until the payment of debt plus all costs, charges and expenses … ."

[6] The statement of claim then pleaded the guarantee and claimed against the appellants as guarantor the amount owed by Norlis.

[7] On 19 August 2009 the appellants filed their defence but did not serve it. It was very brief. The appellants pleaded:

"1. (The appellants) … are unable to plead further to the Statement of Claim as it is defective and embarrassing … and fails to plead a cause of action against (the appellants). (The appellants) are in the process of requesting clarification of the Statement of Claim, including further and better

particulars. Until that clarification and particulars have been provided, and (the appellants) afforded an opportunity to complete an investigation of the facts alleged, (the appellants) are unable to properly plead to these proceedings. For these reasons (the appellants) deny the allegations contained in the Statement of Claim.

2. Save as specifically admitted, (the appellants) deny each and every allegation of (the respondent) as if each allegation was transversed in this pleading."

[8] The defence did not comply with the appellants' obligation to plead any specific defence they had. *UCPR* 166 provides:

"(1) An allegation of fact made by a party in a pleading is taken to be admitted by an opposite party required to plead to the pleading unless –

(a) the allegation is denied or stated to be not admitted … ;

…

(3) A party may plead a nonadmission only if –

(a) the party has made inquiries to find out whether the allegation is true or untrue; and

(b) the inquiries … are reasonable having regard to the time limited for filing and serving the defence … ; and

(c) the party remains uncertain as to the truth or falsity of the allegation.

(4) A party's denial or nonadmission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted.

(5) If a party's denial or non-admission … does not comply with subrule (4), the party is taken to have admitted the allegation."

Consequently the appellants were deemed to have admitted the facts alleged in the statement of claim. Accordingly on 9 December 2009 the respondent filed an application for summary judgment. Belatedly, realising their predicament, the appellants sought an adjournment of the hearing and filed a cross application for leave to withdraw the admissions deemed to have been made by the deficient defence.

[9] The applications came before Margaret Wilson J who, on 11 February 2010, dismissed the appellants' application to withdraw their deemed admissions, and gave judgment on the respondent's application against the appellants in the sum of $53,897.47 with interest of $2,791.53. As well her Honour declared (a) that the contract of guarantee between respondent and appellants granted equitable charges in favour of the respondent affecting the land described in the claim and (b) that the charges charged the appellants' respective interests in the land with the payment of all monies due and owing by the appellants to the respondent on any account whatsoever associated with the Credit Agreement made between the respondent and Norlis.

[10] The appellants challenge on appeal both orders made by her Honour. It is convenient first to deal with the appeal against the dismissal of the appellants' application. Her Honour gave these reasons for dismissing it:

"**Whether to give leave to withdraw admissions**

[15] The second and third defendants are deemed to have admitted the following allegations in the statement of claim –

"5. In accordance with its obligations under the Credit Agreement, the Plaintiff from time to time supplied materials and products on credit and on a running account to the First Defendant.

6. In breach of its obligations to the Plaintiff under the Credit Agreement, as at 6 July 2009, the First Defendant had wrongfully neglected and/or refused to pay all outstanding sums due by it to the Plaintiff in accordance with the Credit Agreement.

7. As at 6 July 2009, the total of the indebtedness to the Plaintiff for the supply of materials and products stood at $52,693.19 for goods sold and delivered to the First Defendant by the Plaintiff in accordance with the Credit Agreement.

8. The First Defendant:-

(a) Remains justly and truly indebted to the Plaintiff for the balance of the debt in the sum of $52,693.19;

(b) Pursuant to the Credit Agreement and by reason of its aforesaid breach of the Credit Agreement, is now liable to pay the Plaintiff continuing interest, until the payment of debt plus all costs, charges and expenses are recovered;

(c) Pursuant to the Credit Agreement and by reason of its breach as aforesaid, is now liable to pay to the Plaintiff all costs and expenses incurred by the Plaintiff, in respect of anything instituted or being considered against the First Defendant"

[16] A party may withdraw an admission made in a pleading only with the Court's leave. The following matters are generally relevant to the exercise of the discretion whether to grant leave:

- how and why the admission came to be made;

- the evidence surrounding the issues the subject of the admission;
- whether there is likely to be a real dispute about the evidence;
- any delay in making the application for leave to withdraw the admission;
- prejudice to the other party.

Leave to withdraw admissions is not obtained for the asking. It will rarely be granted in the absence of evidence that there is a genuine dispute about the matters deemed to have been admitted.

[17] The holding defence which contained the deemed admissions was prepared and filed by a very inexperienced solicitor who intended serving with it a letter setting out the second and third defendants' concerns about the statement of claim. However, he failed to do so. When it became obvious that the plaintiff was relying on the deemed admissions, the second and third defendants consented to the order made on 23 December 2009 which included an order for costs on the indemnity basis. However, the solicitors compounded their error by filing an amended defence which purported to withdraw the admissions without leave having been obtained.

[18] In an affidavit filed on 8 January 2010 the third defendant deposed –

> "2. I was the director of the First Defendant during the period that the Plaintiff supplied goods and services to the First Defendant.
>
> 3. I have reviewed the limited records of the First Defendant that I presently have access to and I verily believe that, if there is any debt owed by the First Defendant to the Plaintiff, that it is much less than the amount claimed by the Plaintiff.
>
> 4. The balance of the First Defendant's records, being those that I do not presently have access to, are presently under the control of Mr David Hambleton and Mr Robert Murphy of R.E. Murphy and Co who are the joint deed administrators for the First Defendant ("the Deed Administrators").
>
> 5. The First Defendant, who is presently controlled by the Deed Administrators, is not joined as a party to the application set down to be heard on 23 December 2009.
>
> 6. Based on my recollection of the goods supplied to the First Defendant by the

> Plaintiff, I deny that most of it, if not all, the goods set out in the invoices that appear as exhibit "CS-4" of the affidavit of Carolann Skerratt filed 9 December 2009 [Document No. 3 on the Court File Index] were ever supplied or invoiced to the First Defendant."

[19] Ms Skerratt, the plaintiff's credit manager, had deposed to having had access to the plaintiff's books and records regarding the account maintained on behalf of the first defendant, and that –

> "12. In accordance with its obligations under the Credit Agreement, the Plaintiff from time to time supplied materials and products on credit and on a running account to the First Defendant."

She had then deposed that the total purchase price of the products and materials supplied was $53,897.47, as shown in a table listing invoices by date, number and amount. She had exhibited copies of those invoices to her affidavit, before continuing –

> "14. In breach of its obligations to the Plaintiff under the Credit Agreement, the First Defendant has failed and/or refused to pay the outstanding sum of $53,897.47, referred to in paragraph 13 above, to the Plaintiff."

[20] The third defendant did not provide any details about which of the goods the subject of the invoices were not delivered or which were not invoiced in support of the application for leave to withdraw the admissions.

[21] In my view the second and third defendants have not shown that there is a genuine dispute about the delivery and invoicing of the goods.

[22] In all the circumstances, I refuse leave to withdraw the admissions." (footnotes omitted)

[11] As de Jersey CJ pointed out in *Ridolfi v Rigato Farms Pty Ltd* [2001] 2 Qd R 455 (at 457):

> "The judgment is of a discretionary character. *House v The King* (1936) 55 CLR 499, 505 sets out the well-established limitations on an appellate court's capacity to review such a judgment."

His Honour went on (459):

> "Further, appeal courts should be especially circumspect about interfering with decisions on matters of practice and procedure. As put by the High Court (*Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 177) 'particular caution' must be exercised. The constraints confirmed in *House v The King* are real constraints, to be respected not perfunctorily discarded, and

> they are especially powerful, in limiting an appellate court, in a case of this character."

[12] McPherson JA who agreed with the Chief Justice said (459-460):

> "In *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738, 742, Rogers CJ Comm D said that admissions are required for the purpose of ensuring that the court is called upon to determine 'only questions bona fide in dispute'. This statement was adopted and applied in *Equuscorp Pty Ltd v Orazio* [1999] QSC 354, where, in referring to that passage, Mackenzie J substituted 'genuinely' for bona fide.
>
> Before permitting the admission to be withdrawn, the first step to be determined here was whether there was a genuine dispute about the defendant's liability in this action. Drawing on the analogy provided by another branch of the law, it is not enough for that purpose simply to assert that a dispute exists: see *Re Brighton Club & Norfolk Hotel Co Ltd* … (1865) 55 ER 873, 874. Some proper basis must be laid for that assertion, which would ordinarily include an explanation of how the earlier admission came to be made and why it should now be permitted to be withdrawn."

[13] Williams J said (461):

> "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. … 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."

[14] *Ridolfi* was decided shortly after the *UCP Rules* came into force and it may be the decision was intended to underscore the importance of adherence to the new procedures and to emphasise that the consequences the rules provided for non-compliance were to be taken seriously. That may account for the severity of some of the expressions, particularly those of Williams J. I would have thought myself, with respect to that learned judge, that a detailed and clear explanation as to how an admission came to be made may not be necessary where an admission is deemed by the rules. How the admission came to be made will be obvious enough. An explanation of the failure to comply with the rule should be given so as to establish that it was not deliberate. His Honour's remarks apply with full force where an admission is intentionally made.

[15] It is no doubt true that the *UCP Rules* are meant to expedite litigation and to limit disputes to issues that are genuinely in contest, but it must, in my respectful opinion, remain the case that the rules do not operate so as to prevent the trial of issues that are genuinely in dispute.

[16] 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.

[17] As her Honour's reasons reveal the primary judge approached the application on this basis and dismissed it because the appellants had not demonstrated a sufficient evidentiary basis for their assertion that Norlis did not owe the sum claimed by the respondent. All that was said by the appellant who was the director of Norlis when the respondents supplied it with goods was that he had "reviewed the limited records" to which he had access and, without identifying them, said he believed that any debt was "much less than the amount claimed". Based on his "recollection of the goods supplied" Mr Davey denied that "most of … if not all … the goods (invoiced) … were ever supplied or invoiced".

[18] These statements are no more than what McPherson JA described as a simple assertion that a dispute exists. The goods which the respondent alleged it supplied appear to have been volumes of concrete delivered to various building sites. They are identified with some particularity in the invoices annexed to the affidavit of Ms Skerratt, the respondent's credit manager. The invoices identify the "Job Address" to which the goods were delivered, a "Document Date" which is not defined, but may be the date of the order or delivery, and a description of the various types and volume of product supplied, together with the price.

[19] Presumably an employee of Norlis ordered goods from the respondent from time to time. There is no evidence that the appellants approached any employee to inquire whether he or she remembered placing orders with the respondent for the delivery of concrete in the amounts invoiced and to the addresses identified. It may be that Norlis placed its orders in writing. If that were the case the absence of any orders corresponding with what was invoiced might be significant. Mr Davey did not condescend to explain how orders were placed, or who placed them, or even whether such records as might assist the case existed. Nor did the appellants say anything about the job sites to which the invoices record deliveries being made. They did not deny that they built at each of the addresses identified in the invoices. If one assumes that Norlis did building work at each of the addresses identified in the invoices then an employee must have been present and known whether concrete product of the described type and volume was delivered. The appellants produced no evidence that they had made any inquiries of any site foreman or employee.

[20] Nor is it sufficient to say that Norlis' records are now in the possession of the deed administrator. There is not even a hint that the appellants have asked the administrator's permission to look at the records. There is no reason why the records could not have been subpoenaed had the administrators denied the appellants access to them.

[21] One would expect also that had the respondent invoiced Norlis for goods that had not in fact been supplied, that company would have responded, pointing out the error and explaining why it would not pay the invoice. The appellants do not say anything like that happened. The appellants did not even identify what records Norlis had, and which the administrators now have, which might support the existence of a contest.

[22] The appellants' evidence did not establish a basis for disputing the delivery of the goods, payment for which was claimed. The primary judge was right so to conclude and her Honour's refusal of leave to withdraw the admissions cannot be criticised.

[23] Having refused the appellants' leave to withdraw their admissions the primary judge did not have to consider whether the evidence established the respondent's entitlement to summary judgment. Nevertheless her Honour considered the point and ruled that it did, and that summary judgment would have been ordered had the admissions been withdrawn. The appellants challenge this conclusion which it is not necessary to decide but the points raised by the appellants deserve some comment.

[24] The argument is that the evidence on which the respondent relied to prove the supply of goods which were not paid for was objectionable. The objection to it was overruled but the appellants say that was wrong.

[25] Her Honour said:

> "[10] The second and third defendants filed an application for leave to withdraw admissions, returnable on 22 January 2010. In support of that application they filed an affidavit of their solicitor to which was exhibited a draft defence."

[26] Ms Skerratt deposed:

> "2. I have custody and control of this matter on behalf of the (respondent), and have access to the (respondent's) books and records of the information deposed to in this Affidavit, which I believe to be accurate.
>
> 3. In particular, I have access to the (respondent's) records regarding the credit account maintained on behalf of … Norlis … .
>
> …
>
> 12. In accordance with its obligations under the Credit Agreement, the (respondent) from to time to time supplied materials and products on credit and on a running account to (Norlis).
>
> 13. The total purchase price of the products and materials referred to in paragraph 12 above was $53,897.47 as shown in the following table: …
>
> 14. In breach of its obligations … under the Credit Agreement, (Norlis) has failed and/or refused to pay the outstanding sum … referred to in paragraph 13 … .
>
> 15. Now produced and shown to me marked "CS-4" are true and correct copies of the tax invoices rendered by the (respondent) to (Norlis) that are outstanding and due and owing to the (respondent).
>
> 16. As at 6 August 2009 the indebtedness of (Norlis) under the Credit Agreement to the (respondent) stood at $53,897.47. In breach of the terms of the Credit Agreement that sum has been outstanding for at least 30 days.

> 17. The said sum of $53,897.47 remains outstanding and unpaid.
>
> 18. By reason of (Norlis') failure to pay the amount outstanding … the (appellants) are liable under the Guarantee … .
>
> …
>
> 28. As at the date of swearing this Affidavit, the amount which is payable by (Norlis and the appellants) to the (respondent) under the Credit Agreement and Guarantee is $53,897.47 together with costs and interest."

[27] The appellants objected to paragraphs 12 to 19 and 28 of the affidavit on the basis that Ms Skerratt failed to disclose the factual basis for her assertions, which were accepted to be hearsay, and that she "merely repeated the content of documents, which themselves were not shown to satisfy a relevant hearsay exception", so that her evidence "remained inadmissible hearsay".

[28] I do not understand the objection to paragraphs 12, 13 and 15 of the affidavit. The invoices, copies of which were exhibited to the affidavit, were business records of the respondent. They are "books of account" as defined by s 83 of the *Evidence Act* 1977 and were, by s 84, admissible evidence of the matters, transactions and accounts therein recorded.

[29] As well the invoices are books, as defined by s 9 of the *Corporations Act* 2001, and by s 1305 are admissible in evidence in any proceedings as prima facie evidence of any matter stated or recorded in them.

[30] Paragraphs 12 and 13 state a conclusion which comes from the contents of the invoices which were exhibited. That course is admissible where the deponent is competent to give an opinion as to the effect of the documents. See *R v Hally* [1962] Qd R 214 at 228, 230.

[31] The objection to the remaining paragraphs was, I think, well taken. They amount to assertions that Norlis had not paid any of the amounts invoiced in the exhibited invoices. Unless Ms Skerratt were the only person in the respondent's employment who received payments so that she had personal knowledge of what was paid and what was not, the assertion must have been a conclusion based upon hearsay. *UCPR* 295(2) permits an affidavit to contain statements of information and belief, but only if, "the person making the affidavit states the sources of the information and the reasons for the belief".

[32] Ms Skerratt did not explain her sources of information nor the reasons for her belief that the invoices had not been paid. No doubt the latter requirement could have been easily supplied by evidence that there was a course of careful record keeping in the respondent's business and that the records could be relied on. But the former required an identification of the records in which or from which one can discern what payments had been made by which customers for what goods supplied. It is not enough to say that there are "records". They must be described. See *Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2 Qd R 158. Moreover, in accordance with the principle described by Gibbs J in *Hally* and by Dixon J in *Potts v Miller* (1940) 64 CLR 282 at 304-5 the documents themselves should have been put into evidence. Had that been done Ms Skerratt could have spoken to their

effect. The records would have been admissible under the sections referred to earlier, and indeed, at common law, as *Potts* established.

[33] The consequence is that the objection to paragraphs 14, 16, 17, 18 and 28 should have been upheld. The point has no consequence for the appeal. I mention it only to draw attention to the need for a proper evidentiary basis when summary judgment is sought on a debt. Plaintiffs who do not comply with the rules of evidence and of practice, whether from ignorance or indolence, cannot expect to succeed.

[34] The appellants also resisted summary judgment in reliance on the deed. They submitted that the effect of its terms was to discharge Norlis from any indebtedness to the respondent so that there was no liability which the appellants, as guarantors, could be called upon to discharge. By Clause 1.1 of the deed "Claim" was defined to mean "any existing or contingent liability of (Norlis) that arose out of events that occurred prior to the appointment of a Voluntary Administrator … ". Clause 8 provided:

> "8.1 This Deed releases (Norlis) from all Claims.
>
> 8.2 This Deed also releases all indemnities, guarantees and other claims against the Directors to the same extent that the Claims against (Norlis) are released or satisfied by this Deed."

[35] Clause 9 was in these terms:

> "9.1 The releases provided by this Deed from all Claims shall occur upon execution of this Deed.
>
> 9.2 To remove any doubt, all liability shall have been deemed to have been paid and fully satisfied in full regardless of when any amount is actually received by each Creditor from the Deed Administrator.
>
> 9.3 Nothing in this clause affects the right of each creditor to share in any payment from the General Fund pursuant to this Deed, their right to vote as an Admitted Creditor pursuant to this Deed or their other rights under this Deed."

[36] The amount of the general fund from which creditors were to be paid appears to have been negligible.

[37] Section 444D of the *Corporations Act* provides:

> "(1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)."

In this case the date was 4 August 2009.

[38] Section 444H provides:

> "A deed of company arrangement releases the company from a debt only in so far as:
> (a) the deed provides for the release; and
> (b) the creditor concerned is bound by the deed."

[39] Section 444J is important. It provides:

> "Section 444H does not affect a creditor's rights under a guarantee or indemnity."

[40] Clause 8.2 of the deed offends s 444J. The clause is probably illegal and is certainly void. The appellants do not rely upon it. They rely instead upon clause 8.1 which operated to release Norlis for all claims as defined and clause 9.2 which provided that all liabilities were deemed to have been paid and fully satisfied upon execution of the deed on 17 September 2009.

[41] The appellants' argument was:

- The deed binds all creditors of Norlis whether or not they vote in favour of administration;
- When the deed was executed the respondent was a creditor of Norlis which had a claim or claims which arose prior to 4 August 2009 for money owing for goods sold and delivered prior to that date;
- Clauses 9.1 and 9.2 of the deed released Norlis from all claims and provided that all liabilities were deemed to have been paid and fully satisfied in full with effect from 17 September 2009;
- Accordingly the deed has operated to pay the respondent the amount of its claim. It cannot recover the amount a second time from the guarantors. The principal debt has been paid and its payment has discharged the guarantors' liabilities;
- Section 444J of the *Corporations Act* does not apply because it has effect only with respect to the release of a company from debts by a deed of company arrangement;
- Norlis' debt to the respondent was not released, but paid in full.

[42] The argument cannot be accepted. It is contrary to authority and would deprive s 444J of any effect. According to the submission the section may be circumvented by drafting a deed in terms which do not release an insolvent company from its debts but binds the creditors to an agreement that they have been paid. The section is concerned with realities not forms of words. If the debts of the company are released by deed of company arrangement, whatever terms the deed uses to express the facts of release, s 444J operates to exempt a creditor's rights under a guarantee or indemnity from the release.

[43] Clause 9 of the deed released Norlis from the respondent's claim. The fact that it also deemed the claimant to have been paid does not alter the fact that the deed released Norlis from its debt to the respondent.

[44] The conclusions are reinforced if one has regard to s 444A(4)(d) of the *Corporations Act*. That provides that a deed of company arrangement must specify "to what extent the company is to be released from its debts". That subject matter must be addressed in the deed. The Act does not specify what form of words must be used, or even that the word "release" must be used. The deed must specify to what extent the company does not have to pay its debts and to that extent it is released from them. It is in that sense that s 444H is to be understood and s 444J operates.

[45] The pointlessness of the distinction which the appellants' submission seeks to make was pointed out by Cozens-Hardy MR in *Perry v National Provincial Bank of England* [1910] 1 Ch 464 at 474.

> "Under a composition, a part is taken in satisfaction of the whole. … Where there is a release, the creditor in effect says to the debtor 'I release you from your debt'; whereas, if there is a composition only, the creditor in effect says, 'I agree to accept a portion of your debt in satisfaction and discharge of the whole.' The difference, however, is merely technical, and in substance they are the same thing."

[46] In *M & S Butler Investments Pty Ltd v Granny May's Franchising Pty Ltd* (1997) 24 ACSR 695, a case decided before the insertion of s 444J into the *Corporations Act*, Spender J said (703):

> "It is accepted on behalf of the applicants … that there is no power under the (Corporations) Law to enable a majority of creditors to extinguish the personal obligations under guarantees of directors of a company, assumed in respect of some of the debts of that company.
>
> A deed of company arrangement can only deal with *company* property; it is not competent for an administration under Pt 5.3A of the Law to exempt directors from their personal guarantees.
>
> This much is made clear from s 440J which restricts the enforcing of any guarantee against the directors of a company during the administration of a company. However, a director's obligations under a guarantee continue to exist: this is implied by the fact that the court may give leave to proceed against a director to enforce those obligations. There is accordingly no power in a majority of creditors to restrain the enforcement of personal obligations under guarantees."

[47] The topic was also considered in passing in *City of Swan v Lehman Brothers Australia Ltd* (2009) 74 ACSR 191. The case did not concern the effect of a deed of company arrangement on the enforceability of directors' guarantees. It was concerned with whether a deed of company arrangement executed by one company bound other related companies. It was held not to do so. An appeal to the High Court ((2010) 77 ACSR 489) was dismissed.

[48] In the Full Federal Court Stone J said this, relevant to the present appeal:

> "[5] ... Section 444D(1) states that such a deed 'binds *all* creditors of the company *so far as concerns* claims arising on or before the day specified in the deed under paragraph 444A(4)(i)' … . It is not in dispute that a deed binds not only those creditors who voted in favour of the company entering into the deed but also those who voted against it. …
>
> …
>
> [27] There is no express provision in Pt 5.3A that either permits or forbids a deed of company arrangement to interfere with creditors' rights against an entity other than the company. What follows from this silence?
>
> …

> [30] ... In my view, when the objects, purpose and contents of Pt 5.3A are taken into account, the language of s 444D(1) must be construed as referring only to claims that creditors of the company have against the company under administration.
>
> [31] In a decision that predates the insertion of s 444J into Pt 5.3A, Spender J considered a deed of company arrangement that, inter alia, purported to prevent a creditor from enforcing guarantees given by the directors of the company in *M & S Butler Investments Pty Ltd v Granny May's Franchising Pty Ltd* (1997) 24 ACSR 695. His Honour held that the deed could not so provide and held, at 703:
>
> > A deed of company arrangement can only deal with *company* property: it is not competent for an administration under Pt 5.3A ... to exempt directors from their personal guarantees.
>
> [32] The enactment of s 444J put the matter of guarantees beyond doubt by specifically providing that the release of debts referred to in s 444H does not affect a creditor's rights under a guarantee or indemnity. Nevertheless, his Honour's general proposition that a deed of company arrangement can only deal with company property is unaffected by that change; indeed it is supported by it. …
>
> …
>
> [39] ... The Part provides for a deed of company arrangement to alter the rights of the creditors and consequently adjusts the claims that they may make against the company. Conspicuous by its absence is any express provision having the effect of diminishing a creditor's rights against entities other than the company. In fact the combination of ss 444H and 444J ensure by express words that a release of the company's debt is limited to the provisions of the deed and does not affect the relevant creditor's rights under a guarantee or indemnity."

[49] The appellants' challenge to the judgment on the basis that they have the benefit of the deed must fail.

[50] The appellants' last point was that the primary judge gave judgment for relief which had not been claimed. The point is that the claim sought declarations that the appellants had, by their contract of guarantee, granted equitable mortgages over their real property when in fact the effect of clause 7 was to create an equitable charge. It was not open, the appellants contended, for her Honour to have made a declaration that by their written guarantee the appellants had each granted an equitable charge over their real property.

[51] Margaret Wilson J dealt with the point in these terms:

> "[35] I agree with the submission of counsel for the second and third defendants that under the guarantee the plaintiff obtained equitable charges rather than equitable mortgages in the strict sense. I respectfully concur in the views expressed by PD McMurdo J in *Equititrust Ltd v Gamp Developments Pty Ltd* and by Applegarth J in *Equititrust Ltd v Gamp Developments Pty Ltd (No 2)* that a plaintiff cannot seek summary judgment for relief which is not within its claim as filed or duly amended. While the claim seeks declarations as to equitable mortgages, it also seeks orders for sale pursuant to s 99 of the *Property Law Act*. Given the definition of mortgage in the *Property Law Act* I am satisfied that declarations of equitable charges would be within the relief claimed."

[52] The point is without substance. The difference in expression between claim and declaration cannot mean that the respondent obtained relief not sought in its claim.

[53] There is, of course, a distinction between an equitable charge and an equitable mortgage.

> "The difference between them is that a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an equitable charge does not."

Per Millett LJ in *In re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508.

[54] This distinction loses much of its force with respect to land registered under a *Torrens* Scheme. Mortgages, both legal and equitable, take effect by way of hypothecation and not conveyance, and therefore resemble a charge. Indeed s 74 of the *Land Title Act* 1994 expressly provides that a registered mortgage "operates only as a charge". It used to be said that the remedies available to an equitable mortgagees were more extensive than those available to the equitable chargee. The latter's remedies were said to be the appointment of a receiver and court ordered sale. See e.g. *Fisher and Lightwood's Law of Mortgage 11th Edition* para 2.10. The equitable chargee could not foreclose, but when describing the features of an equitable charge, Lord Hoffmann in *In re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 at 226-7 included foreclosure as one of the remedies available to a chargee. It may be it was that assertion which prompted the authors of the *Law of Mortgage* to remark (para 2.3):

> "… the tendency of mortgage and charge to converge in practice is still evidenced by a judicial disinclination to separate the two."

[55] The relief claimed by the respondent included:

(1) declarations that the written guarantee of 23 September 2004 granted equitable mortgages over the appellants' land;

(2) an order that the equitable mortgages be enforced by sale;

(3) relief pursuant to s 99(2) or s 100 of the *Property Law Act* 1974;

(4) an order that the land be delivered to the respondent.

[56] The respondent was not entitled to the last order which was a claim for possession not foreclosure or sale, or the appointment of a receiver. It was, however, entitled to

orders 2 and 3. It had proved the existence of an equitable charge in its favour to secure the payment of the debt guaranteed by the appellants and it had a right to have the court order the sale of the land to satisfy the debt. The power of the court to make such an order is found in equity and in s 99(2) of the *Property Law Act*. The latter power has been accepted in a number of decisions in this Court: *Worrell v Issitch* [2001] 1 Qd R 570; *Phillips v Hogg* [2001] QSC 390; *BBC Hardware Limited v GT Holmes Pty Ltd* [1997] 2 Qd R 123. Despite the misgiving entertained by Fryberg J in *Bunnings Building Supplies Pty Ltd v Blue Diamond Homes Pty Ltd & Anor* [2004] QSC 54, it is, I think, clear that the power conferred on the court by subsections 1 and 2 of s 99 are separate.

[57] The "action … for sale …" in subsection 2 is not limited to an action for sale brought by "(a)ny person entitled to redeem mortgaged property" which is the subject matter of subsection 1. To construe the second subsection in that restricted manner would deprive the phrase "(i)n any action" with which it commences of most of its meaning. More generally the *Property Law Act* was a remedial statute and should not be construed to limit the reforms it brought to the law of property.

[58] The making of a declaration that the respondent was entitled to an equitable charge over the appellants' property cannot have occasioned them any injustice, prejudice, or even inconvenience. Having established a right to have the appellants' property sold I can see no reason why the respondent could not obtain a declaration as to the existence of the actual security interest which gave rise to that right, given the slight distinction between the security interests in question.

[59] The appellants have failed to make out any of their grounds of appeal. The appeal should be dismissed with costs.

[60] **APPLEGARTH J**: I agree with the reasons of Chesterman JA and with the proposed order that the appeal be dismissed with costs. I also agree with the observations of Muir JA that occasions will arise where an explanation for the making of a deemed admission will be called for on the hearing of an application to withdraw it. It may not always be obvious how the deemed admission came to be made. If an explanation is called for, it should be clear. The absence of a satisfactory explanation will be, as Muir JA observes, a relevant consideration.