SUPREME COURT OF QUEENSLAND

CITATION:	*Pollock v Thiess Pty Ltd & Ors* [2014] QSC 22
PARTIES:	**SCOTT WILLIAM POLLOCK** Plaintiff And **THIESS PTY LTD** First Defendant and **AUSTRALIAN BEARINGS CORPORATION PTY LTD** Second Defendant and **WORKCOVER QUEENSLAND** Third Defendant
FILE NO/S:	S234 /2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Rockhampton
DELIVERED ON:	3 March 2014
DELIVERED AT:	Supreme Court Bundaberg
HEARING DATE:	20 February 2014
JUDGE:	McMeekin J
ORDERS:	**1. Time for service of each application is abridged.** **2. The second defendant is given leave to:** **(i) withdraw the deemed admissions made in paragraphs 3 and 8 of its defence; and** **(ii) amend its defence, as it might be advised, in accordance with these reasons.** **3. The third defendant is given leave to withdraw the deemed admissions to paragraphs 4(a), 4(b), 4(c), 4(e), 6 and 7 of the plaintiff's Notice to Admit Facts dated 21 November 2013.** **4. No order as to costs in either application.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE –

QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES – OTHER MATTERS – where the second defendant's pleading resulted in deemed admissions – where the second defendant's pleading does not comply with the *Uniform Civil Procedure Rules 1999* (Qld) – whether leave should be granted to withdraw the deemed admissions

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNFORM CIVIL PROCEDURE RULES – OTHER MATTERS – where the third defendant failed to respond to a Notice to Admit Facts served by the plaintiff resulting in admissions – where the Notice to Admit Facts contained questions of law – whether a question of law can be deemed an admission under r189 of the *Uniform Civil Procedure Rules 1999* (Qld)

Uniform Civil Procedure Rules 1999 (Qld) r149, r150, r166, r171, r188, r189

Ballesteros v Chidlow (No 2) [2005] QSC 285 cited

Commix Communications Pty Ltd v Cammeray Investments Pty Ltd [2005] QSC 394 cited

Cormie v Orchard [2001] QSC 21 cited

Hanson Construction Materials Pty Ltd v Davey & Anor [2010] QCA 246 cited

Hartmann v Pilkington & Ors [2012] QSC 254 cited

In Roma Pty Ltd v Adams & Anor [2012] QCA 347 cited

Piatek v Piatek & Anor [2010] QSC 122 cited

Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455 followed

COUNSEL: R Morton for the Plaintiff

SK Yau (solicitor) for the First Defendant

S Deaves for the Second Defendant

B Charrington for the Third Defendant

SOLICITORS: Suthers Lawyers for the Plaintiff

Sparke Helmore for the First Defendant

DibbsBarker for the Second Defendant

Hopgood Ganim Lawyers for the Third Defendant

[1] **McMeekin J:** There are two applications before the Court. They each concern a defendant's desire to withdraw admissions, alleged deemed admissions resulting from a very poorly drawn pleading in the case of the second defendant, and admissions following on from a failure to make a timely response to a Notice to Admit Facts in the case of the third defendant.

[2] The proceedings involve a claim for damages for negligence, the plaintiff having been injured at his place of employment when a very large weight (a tub plate) fell crushing his foot. The plaintiff's employer was a labour hire company, now in liquidation. WorkCover Queensland, the third defendant, stands in its shoes. The plaintiff's labour was hired to the second defendant, Australian Bearings Pty Ltd. That company had apparently agreed to perform work for the first defendant, Thiess Pty Ltd, the owner of the mine where the relevant work was being performed. There is a debate between the defendants as to who, if any of them, should shoulder responsibility for the accident. All deny that they are liable to the plaintiff.

[3] The plaintiff resists the applications.

[4] There are common features to each application. The plaintiff does not assert that he will suffer any prejudice if the admissions are withdrawn. The admissions have come about through inadvertence – if not worse - on the part of the lawyers rather than any deliberate decision of the party. There is ample time to gather evidence - I have set the matter for trial in the May sittings of the Court in Rockhampton. I did so at the request of the plaintiff on February 3rd and over the objections of the defendants as no request for trial form had been executed by them. It would appear that it was in preparation for that hearing that attention was paid by the defendants to the state of their pleadings and of the effect of the non response to the Notice to Admit Facts.

The Second Defendant

[5] The relevant offending paragraphs are paragraphs 3 (c), 5 and 8 of the second defendant's defence.

[6] Rule 188 of the *Uniform Civil Procedure Rules 1999* "(UCPR") is relevant – the Court has a discretion to permit the withdrawal of admissions made in a pleading.

Paragraph 3c

[7] By paragraph 5 of his pleadings the plaintiff asserts:

> "By a series of e-mails passing between the first defendant and the second defendant in the period from 29 March 2010 until and including 31 March 2010 the first defendant agreed with the second defendant that the second defendant would carry out certain work at the mine, namely repairs to the tub plates on draglines at the mine (hereinafter called "the tub plate work").

[8] The second defendant responded by paragraph 3 of its defence in these terms:

> "a. admits that e-mails were sent to and from the first defendant (Thiess) and ABC [a reference to the second defendant] between 29 March 2010 and 31 March 2010;
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> b. denies the remainder of the allegations because the above e-mails dealt with, inter alia, the supply of labour by ABC to Thiess to assist with boiler making work as directed by Thiess, which in this instance, was repairs to tub plates on draglines;
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> and
>
> c. alternatively to b., does not admit the remainder of the allegations because the terms of any agreement evidenced by the above e-mails is a matter to be determined by the court having regard to the entirety of the evidence and application of relevant legal principles."

[9] I observe that it is obvious from the pleadings that the scope of the dispute is somewhat limited. It is agreed that an unidentified number of e-mails in unidentified terms, were sent between the relevant parties between the relevant dates. It is agreed that the e-mails concerned repairs to the tub plates on draglines. It is admitted by the second defendant that e-mails concerned the supply of labour by it to Thiess to carry out that work. All that remains in issue is whether the emails resulted in an agreement with the first defendant "that the second defendant would carry out certain work at the mine", as the plaintiff alleged, or whether the emails did not amount to an agreement but merely "dealt with", whatever that might mean, "the supply of labour by ABC to Thiess to assist with boiler making work as directed by Thiess", as the second defendant alleged, without, presumably, any agreement coming about.

[10] In case the profession is in any doubt – and the explanation for the pleading was said to be the adoption of the firm's usual practise - I should immediately observe that pleading that a matter that is the subject of dispute "is a matter to be determined by the court having regard to the entirety of the evidence and application of relevant legal principles" should never appear, at least in supposed compliance with the requirements of r166(4). No doubt the observation is accurate – all issues in dispute are "to be determined by the court having regard to the entirety of the evidence and application of relevant legal principles" – but the pleading does not meet the test that the relevant rule lays down.

[11] Whether a pleading results in a deemed admission turns on the effect of r 166 UCPR which provides:

> **166 Denials and nonadmissions**
> (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 by the opposite party in a pleading; or
> (b) rule 168 applies.

(2) However, there is no admission under subrule (1) because of a failure to plead by a party who is, or was at the time of the failure to plead, a person under a legal incapacity.
(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 for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in which the denial or nonadmission of the allegation is contained; 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 nonadmission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation.
(6) A party making a nonadmission remains obliged to make any further inquiries that may become reasonable and, if the results of the inquiries make possible the admission or denial of an allegation, to amend the pleading appropriately.
(7) A denial contained in the same paragraph as other denials is sufficient if it is a specific denial of the allegation in response to which it is pleaded.

[12] Rule 166 introduced a change to pleading practise. Previously it was commonplace for a defendant to simply deny or not admit the various matters alleged in the plaintiff's pleading regardless of whether the facts were truly in issue. Rule 166 was introduced in the, possibly vain, hope of putting a stop to specious denials and non admissions. The second defendant's pleading in paragraph 3(c) reintroduces the specious denial or non admission approach. It does not pretend to set out "a direct explanation for the party's belief that the allegation is untrue or can not be admitted". Absent that explanation r166(5) deems the fact in issue to be admitted.

[13] No doubt appreciating that the pleading offended this basic principle Mr Deaves of counsel who appeared for the second defendant sought to amend paragraph 3 (c) to read:

"c. to the extent that it is alleged that the e-mails constitute an agreement, does not admit the allegations because the terms of any agreement evidenced by the above e-mails is a matter of law".

[14] Mr Morton of counsel, who appeared for the plaintiff, countered that the amended pleading still did not meet the requirements of r166(4) and so did not avoid the effect of r166(5). The mere statement that the pleading concerns a matter of law is not, on his submission, "a direct explanation for the party's belief that the allegation is untrue or cannot be admitted". The fact that an allegation involves a matter of law does not *ipso facto* mean that it cannot be admitted and to that extent I agree with the submission. As Mr Morton argued, matters of law are frequently pleaded and frequently admitted or otherwise meaningfully responded to.

[15] The rules permit a conclusion of law to be pleaded (r149(2)) and the rules require a proper response to that pleading as much as to any other. The avoidance of a direct response at least offends the spirit of the rules and in my view is to be discouraged. The difficulty, however, lies in applying the strictures of r166(5). By its terms

r166(4) only applies to a "party's denial or nonadmission of an allegation of fact", not to a conclusion of law.[1]

[16] The conclusion of law pleaded here is that the exchange of emails did not result in an agreement. If that was all that the second defendant wished to say on the subject then, unfortunately, the explanation proffered serves merely to confuse the issue. The explanation that I suspect the pleader wishes to advance is simply that the allegation is denied because the emails do not have the effect in law contended for by the plaintiff. If that had been said no complaint could be made.

[17] But the explanation now advanced is far from satisfactory. It effectively says that if the emails do constitute an agreement (as you assert) then we will not tell you what we say are the terms agreed because that is a question of law. That is the most obvious meaning of the claim that "the terms of any agreement evidenced by the above e-mails is a matter of law".

[18] There are two complaints about that. First, it is no explanation for a nonadmission to say, well, maybe you are right, which is the effect of the explanation proffered. Second, the claim is simply wrong. The terms of an agreement are not matters of law but matters of fact. If material to the issues the terms are required to be pleaded in order to ensure that the other party is not taken by surprise (see r149(1)(c) and r150(4)(c)).

[19] That an agreement of some sort was reached is plain enough from other parts of the pleading. In paragraph 4 of its pleading the second defendant admits that the plaintiff was hired to the second defendant by his employer to perform work for the second defendant and further pleads that the second defendant "required the plaintiff to perform boilermaking work as directed by Thiess, which in this instance, was repairs to tub plates on draglines" (see paragraph 4b of the second defendant's defence). How this could come about without an agreement between the two companies is difficult to conceive.

[20] The end result is that the pleadings seem to me to obscure what is in issue between the parties. The proposed amendment thus offends r171(1)(b) – it has the tendency to prejudice or delay the fair trial of the proceedings.

[21] The plaintiff does not claim to have suffered any prejudice by any reliance on the pleading in its original form. The pleading now proffered in paragraph 3c, ignoring the supposed explanation, is restricted to a conclusion of law. There is no objection by the plaintiff to the proposed amendment, save that it did not achieve the second defendant's object of avoiding the deemed admission.

[22] In my view, restricted to a conclusion of law, the proposed amended pleading does avoid any deemed admission as the rules do not extend so far. Given the lack of any prejudice and the evident fact that the state of the pleading is the fault of the lawyers, not the party, it is appropriate that the second defendant be relieved of the effect of the lawyers' errors.

[23] As I have said, I have previously ordered that the matter be set for trial next May despite no request for trial date being signed by the defendants. As no request for

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1 And see *In Roma Pty Ltd v Adams & Anor* [2012] QCA 347 at [25] per de Jersey CJ

trial date has been signed strictly no leave is required to amend the pleading (r378) but the second defendant nonetheless has sought leave to amend, Mr Deaves considering that was the appropriate course. While I am prepared to give leave to amend the pleading I will not do so in terms of leave to plead in accordance with the amended draft as sought. The explanation proffered in paragraph 3c of the pleading is not needed and, as I have said, simply confuses the issue.

Paragraph 5

[24] By paragraph 7 of his pleading the plaintiff alleges that at the relevant time he was a "coal mine worker" within the meaning of the *Coalmining Safety and Health Act* 1989. The second defendant responded with a non-admission in paragraph 5 of its pleading and proffered the following explanations:

> "a. whether or not the plaintiff was, whilst at the mine, a "coal mine worker" within the meaning of that term is contained in the *Coalmining Safety and Health Act* 1989 is a conclusion of law and/or mixed fact and law to be determined by the court having regard to the entirety of the evidence and application of relevant legal principles; or
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> b. alternatively to a., despite due enquiry, ABC remains uncertain as to the truth or otherwise of the allegations."

[25] The proposed amendment appropriately deletes the words "to be determined by the court having regard to the entirety of the evidence and application of relevant legal principles" and "alternatively to a.,". It is also proposed to change the disjunctive between the subparagraphs from "or" to "and".

[26] The issues relevant to the exercise of the discretion whether to allow the withdrawal of any deemed admission are the same as for the previous paragraph.

[27] While the original pleading obscured the point, in my view, there is no deemed admission. To the extent that the question of the status of the plaintiff under the *Coalmining Safety and Health Act* 1989 is an allegation of fact an explanation for the nonadmission is supplied: "despite due enquiry, ABC remains uncertain as to the truth or otherwise of the allegations". As to the balance, as Holmes J (as her Honour then was) remarked in *Commix Communications Pty Ltd v Cammeray Investments Pty Ltd*[2] an explanation that the matter in issue is one of law not fact does constitute a direct explanation "that is not so specious as to amount to no explanation at all".[3]

[28] It is appropriate that leave be granted to amend.

Paragraph 8

[29] Paragraph 8 of the second defendant's pleading responds to paragraph 11 of the plaintiff's statement of claim. In that paragraph the plaintiff commences "On 7 April 2010" and then makes various allegations in 12 subparagraphs. The pleading is lengthy and I will not detail the allegations. The response elicited from the second defendant was a nonadmission and an "explanation" in the terms discussed in

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2 [2005] QSC 394

3 At [15]

paragraph [10] above with some addition, which is no explanation for the nonadmissions at all.

[30] The second defendant argued that there was no deemed admission because:

(a) the pleading contains mixed questions of law and fact;
(b) to the extent that there are any allegations of fact they are in the nature of particulars to which no response is required citing *Ballesteros v Chidlow (No 2)*[4];
(c) there is a direct explanation for the nonadmission.

[31] My responses are:

(a) the allegations of fact are easily identified and quite separate from any questions of law;
(b) the subparagraphs are not in the nature of particulars at all and so do not attract the principle that no response is required; and
(c) there is no explanation proffered at all.

[32] The second defendant's pleading plainly results in several deemed admissions.

[33] Again the discretionary considerations are the same as previously discussed. Effectively if the withdrawal is allowed that will result in the true matters in issue being identified and determined, the admissions result from the lawyer's inadvertence or incompetence and not at the direction of the party, and there is no prejudice to the plaintiff. An amended pleading is advanced.

[34] The plaintiff submits that the second defendant has failed to comply with the pre-conditions necessary to justify the withdrawal of admissions. The judgment of the Chief Justice in *Ridolfi v Rigato Farms Pty Ltd*[5] was cited:

> "Asked to exercise the discretion under rule 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."

[35] It is true that the explanation offered for the failure to properly plead earlier is not greatly enlightening – further instructions have now been obtained – from whom and to what effect are not explained. And there is no hint that any evidence might be available to support the new stance.

[36] But there is an important distinction between the situation here and that which pertained in *Ridolfi*. Rule 189(3) has no application here. A deemed admission under r 166 is potentially in a different category of case to an admission that comes about from a failure to respond to a Notice to Admit Facts. The distinction was made in *Hanson Construction Materials Pty Ltd v Davey & Anor*[6] and *Hartmann v*

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4 [2005] QSC 285 at [21] per White J
5 [2001] 2 Qd R 455 at [19]
6 [2010] QCA 246

Pilkington & Ors[7]and is relevant here. That is not to say that somewhat similar considerations may not need to be addressed – all depends on the facts.

[37] In my judgment it is plain enough what has happened here. A relatively inexperienced solicitor has drawn the pleading and avoided confronting the issues with what she thought was a satisfactory response, a belief engendered by the success of others at the firm who had used this form of pleading in other cases.

[38] As well, I also observe that what might "ordinarily" be expected, which the Chief Justice discussed in *Ridolfi*,[8] is not the same as an assertion of what must be shown in all cases. So much is clear from the use by the Chief Justice of the word "may" and from the next paragraph of the judgment:

> "[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 NSWLR 738 and *Equuscorp Pty Ltd v Orazio* [1999] QSC 354." (My emphasis)

[39] The relevant matters in *Ridolfi* included that the attempted withdrawal was on the day of trial, the admission had been in place for months, the plaintiff had relied on the admission for the purpose of preparation for trial and the defendant was claiming an intention to positively assert a case. The circumstances cried out for explanation and evidence to satisfy the court that there was in fact a true issue to be joined.

[40] The proposed amended pleading here largely admits the matters of fact alleged by the plaintiff. The nonadmission of the facts alleged in paragraphs 11(h), (i), (j) and (k) is explained. It makes no sense to demand the demonstration of evidence that supports that nonadmission: see the reasoning of Wilson J in *Hartmann*.[9]

[41] The allegation in paragraph 11(b) is denied. There the plaintiff alleges that the authors of the relevant "Job Safety and Environment Analysis" "should have identified all reasonably foreseeable hazards to health and safety". What the defendant's employees "should" have done is arguably a question of law. The second defendant's denial that they were seeking to identify reasonably foreseeable hazards but only "obvious" ones rather suits the plaintiff's case. It is certainly a sufficient explanation for the denial.

[42] The allegation in paragraph 11(e) is denied. But the reason for the denial is explained. Complaint was made that the pleading was not responsive. It is true that paragraph 8c.iii, in pleading that a telehandler was present at the site, does not explain the response but rather pleads the evidence that might tend to support the denial. The addition of a non relevant reason for a denial does not detract from the presence of relevant ones. The test seems to be whether the explanation proffered is so specious as not to be an explanation at all: *Commix Communications Pty Ltd v Cammeray Investments Pty Ltd.*[10] The explanation here is simply that the men did identify the risk in question, contrary to the plaintiff's pleading. It is satisfactory.

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7 [2012] QSC 254 per Margaret Wilson J

8 And see the slightly different emphasis given by McPherson JA at [27] and Williams J at [32]

9 [2012] QSC 254 per Margaret Wilson J at [13]-[17]

10 [2005] QSC 394

And when the explanation is read with the following paragraph, 8d, it is clear what is being alleged – the risk of the tub plate falling arose only when all welds were gouged out and not before. The implication seems to be that the need to attend to the risk arose only immediately prior to the tub plate toppling. Again that tends to suit the plaintiff's case.

[43] Leave should be given to withdraw the deemed admissions and to allow the second defendant to amend its pleading as it might be advised in light of these reasons.

The Third Defendant

[44] Leave is sought pursuant to r189(3) to withdraw admissions constituted by the third defendant's failure to respond to paragraphs 4(a), (b), (c), (e), 6 and 7 of a Notice to Admit Facts tendered by the plaintiff. The plaintiff opposes leave being given only in relation to paragraph 6. Rule 189(2) is relevant:

> (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. (My emphasis)

[45] Paragraph 6 of the Notice sets out *verbatim* paragraph 15 of the plaintiff's statement of claim. It provides:

> "Further and alternatively the Plaintiff's injury was caused by [the third defendant's] breach of its obligations and duties referred to above, particulars of which are:
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> a. Failing to identify the risk of the tub plates falling when the welds were ground out;
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> b. Failing to devise, maintain and enforce a system of work which required that the tub plate work be carried out only when the tub plates were supported by dog plates and/or a telehandler;
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> c. Failing to instruct the Plaintiff and/or the Second Defendant only to carry out the task of grinding out the welds when the tub plates were supported by dog plates and/or a telehandler and/or by any other means;
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> d. Failing to warn the Plaintiff of the possibility of injury to him in carrying out the task when the tub plates were not supported by dog plates and/or a telehandler, or by any other means;
>
> e. Failing to supply dog plates and/or a telehandler to the plaintiff
>
> f. Failing to take any steps at all to ascertain whether the system of work proposed to be used by the Second Defendant was reasonably safe."

[46] That the document was prepared without much thought is plain. The author's references to "[f]urther and alternatively" and the "obligations and duties referred to above", where the Notice does not set out any such "obligations and duties" above,

show a lazy indifference to the preparation of the Notice. The capacity of software to facilitate "cut and paste" operations has its dangers. Mr Morton submitted that the meaning of the document was plain. The reference he submitted was back to paragraphs 3 and 4 of the Statement of Claim where those duties and obligations are set out. Had the Notice made express reference to those paragraphs then its meaning would have been clear. But it is not for the recipient of such a Notice to determine its meaning. This is not to insist on unnecessary pedantry. As the decision in *Ridolfi* and many other cases show, these Notices can have the effect of severely circumscribing a party's ability to contest issues. It is important that they be carefully drafted so as to ensure that there is no doubt about the issue identified and admitted.

[47] So the plaintiff is off to an unpromising start in his insistence that the failure to respond to the Notice results in an admission as r189(2) provides.

[48] It is only that the author of the Notice met his match in the indifference stakes that results in any argument. In its form as delivered a response along the lines that the Notice was unintelligible would have been perfectly proper. A lack of any response does not improve the plaintiff's position a great deal.

[49] The third defendant argues that the Notice sought admission of matters that involved questions of law and not facts, and the rules did not permit or require the result of a deemed admission on matters of law. There seems to me merit in this point. Although the particulars themselves involve issues of fact, the overarching issue is whether the plaintiff's injury was caused by breach of the third defendant's obligations and duties. Plainly enough, whether an employer has breached a duty of care owed to an employee involves a question of law. Rule 189 refers only to "facts". It is difficult to see why the distinction between facts and conclusions of law which has informed the decisions in relation to r166(4), some of which I have mentioned above, should not apply with equal rigour to r189(2).

[50] The plaintiff points out that the admissions resulting from the failure to respond to the Notice in *Ridolfi*[11] were described, without adverse comment, by the Chief Justice as involving "the factual matters founding the allegations of negligence and breach of duty and that the alleged negligence and breach of duty had in fact occurred".[12] But there is no indication there that the point was argued. And admissions of the factual matters underpinning the conclusion of breach might well have rendered otiose any complaint about the inclusion of matters of law.

[51] The third defendant argued that the delivery of a Notice which merely repeated the allegations in the pleading was an abuse of process citing *Cormie v Orchard*.[13] The plaintiff complained that the argument was raised on the morning of the hearing for the first time. A belated recognition of a good point of law is none the worse for its tardy recognition. The only relevant prejudice from the late notice is that the plaintiff could have withdrawn his opposition to the leave sought if he agreed with the point, which he did not.

[52] *Cormie* is a particularly egregious example of an abuse of the r189 procedure. There the plaintiff called on the defendant to admit "paragraphs 1 to 21.4" of the plaintiff's

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11 [2001] 2 Qd R 455

12 Supra at [3]

13 [2001] QSC 21 per Margaret Wilson J

pleading. The defendant had by its defence in fact admitted various matters contained within those paragraphs of the pleading and pleaded non admissions accompanied by relevant explanations in relation to other allegations. The defendant drew attention to r189(1) and its requirements that facts be "specified" in the Notice and submitted that no such specification had occurred. Margaret Wilson J determined that while an admission could be sought of a fact specified by reference to a paragraph in a pleading that procedure would not be appropriate where "more than one fact is alleged in a single paragraph or where there are mixed allegations of fact and law". Her Honour's analysis and reasoning were approved by Daubney J in *Piatek v Piatek & Anor*.[14]

[53] The third defendant points out that there is a precise repetition of the pleading here and so the same result as in *Cormie* should follow. But the repetition of the pleading is not the problem. It was the catch all nature of the Notice in *Cormie*, without any pretence of identifying the relevant matters genuinely in issue and in respect of which admission was sought, and the bundling up of allegations of fact and law rendering meaningful response impossible, that resulted in the abuse of process. There is greater specification here than in *Cormie*, and there is not present the vice of a multiplicity of facts (assuming the device of "and/or" is acceptable or comprehensible in any pleading) alleged in the paragraphs specified in the Notice. Putting to one side the point made earlier of the inherent unintelligibility of the Notice the third defendant's capacity to respond meaningfully is greater.

[54] But the admissions that are sought remain admissions on matters of law, or mixed fact and law.

[55] In my view r189(2) does not have the effect, assuming no response, of deeming admitted a matter of law or mixed fact and law set out in a Notice to Admit Facts.

[56] It is not necessary for me then to turn to the discretion to allow leave, but if necessary I would have exercised my discretion in favour of the third defendant. All discretionary considerations are in favour of giving leave.

[57] The third defendant's relevant defence was filed on 14 October 2013. It put in issue the allegations in paragraph 15 of the statement of claim pleading that the employer was not required to take the measures identified in that paragraph (and now set out in the Notice) and explaining why it took that stance. Essentially the issue is not whether the employer took the steps pleaded but rather the legal issue of whether it was obliged to take those steps, it being a labour hire company and the other defendants being in control of the work.

[58] The plaintiff served the Notice on 21 November 2013. The response was required by 5 December. A response, of sorts, came in the form of a letter on 27 November informing the plaintiff that the solicitor handling the matter was engaged in another trial. Because of his commitments that solicitor neglected to attend to the response to the Notice. So inadvertence is the excuse. The need to withdraw the, by then, deemed admissions was recognised on 20 January by a new solicitor, when preparing for the application by the plaintiff to have the matter set down for trial. The plaintiff was thus misled – if at all – for a period of a little over six weeks, a

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14 [2010] QSC 122

period encompassing the Christmas holiday period when I suspect little work on the file was done. No prejudice is alleged.

[59] In the circumstances it would be unjust to deny the third defendant the opportunity to argue the issue squarely raised by its pleading.

Conclusion

[60] I make the following orders:

a) Time for service of each application is abridged;

b) The second defendant is given leave to:

(i) withdraw the deemed admissions made in paragraphs 3 and 8 of its defence; and

(ii) amend its defence, as it might be advised, in accordance with these reasons;

c) The third defendant is given leave to withdraw the deemed admissions to paragraphs 4(a), 4(b), 4(c), 4(e), 6 and 7 of the plaintiff's Notice to Admit Facts dated 21 November 2013.

[61] The costs considerations are nicely balanced. The need for the applications came about because of the actions, or inactions, of the second and third defendants' lawyers. Normally a party seeking an indulgence to overcome errors on its side pays the costs. But the matter could have been dealt with far more cheaply than it was. To a large extent the defendants have been successful in their various arguments. And to a degree the plaintiff advanced arguments that were not tenable particularly given the poorly drafted Notice to Admit Facts.

[62] On balance it seems to me that the costs should lie where they fall. I order that there be no order as to costs of either application.