SUPREME COURT OF QUEENSLAND

CITATION:	*Clo Developments Pty Ltd v Sarv Pty Ltd & Anor* [2014] QSC 159
PARTIES:	**GOLD COAST CITY COUNCIL** (applicant) v **DELFIN GC PTY LTD** **ACN 085 207 174** (first respondent) **DELFIN REALTY (QLD) PTY LTD** **ACN 003 581 191** (second respondent) **LEND LEASE COMMUNITIES (AUSTRALIA) LIMITED (FORMERLY DELFIN LEND LEASE LTD)** **ACN 000 966 085** (third respondent)
FILE NO:	BS 8205 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED EX TEMPORE ON:	3 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2014
JUDGE:	Peter Lyons J
ORDERS:	**1. Pursuant to the r 188 of the *Uniform Civil Procedure Rules 1999*, the fourth party has leave to withdraw any deemed admissions in paragraphs 5 and 8 of the defence of the fourth party to the second amended fourth party statement of claim filed in this Honourable Court on 16 January 2014.** **2. The fourth party pay the costs of the first, second and third third parties of the application, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – ADMISSIONS – where the plaintiff sued the first defendant for misleading conduct regarding infrastructure charges to property the subject of a contract between them – where the first defendant then brought proceedings against the first, second and third third parties alleging misrepresentations by them in respect of infrastructure

charges – where the third parties then brought proceedings against the Gold Coast City Council in turn alleging misrepresentations about infrastructure charges – where it had been held that the Council's defence to the proceedings brought by the third parties included deemed admissions about some representations relating to infrastructure charges – where there was evidence that it was intended that the Council's defence would deny the representations – where there was evidence that the deemed admissions arose from inadvertence – where the particulars of the representations deemed to be admitted gave rise to a range of possibilities, and it was uncertain which would be relied upon at trial – where some representations were plainly contested and others not accepted – whether the Council should be granted leave to withdraw its deemed admissions

Uniform Civil Procedure Rules 1999, r 188

Green v Pearson [2014] QCA 110, followed
Hanson Construction Materials Pty Ltd v Norlis Pty Ltd (2010) 79 ASCR 668, cited
Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455; [2000] QCA 292; followed

COUNSEL: D Savage QC for the applicant
S Couper QC for the respondents

SOLICITORS: Gadens for the applicant
Carter Newell for the respondents

[1] **PETER LYONS J:** The plaintiff in these proceedings alleged that it entered into a contract, in June 2008, to purchase from the first defendant property described as Lot 130 on SP206406, County of Ward, Parish of Gilston, said to be located at Varsity Lakes in the City of Gold Coast.

[2] It sued the first defendant for misleading conduct, essentially alleging misrepresentations about the potential liability for infrastructure charges associated with the development of Lot 130. The first defendant then brought proceedings against the first, second and third third parties, again alleging misrepresentations by some or all of them in respect of liability for infrastructure charges. The first, second and third third parties have become defendants in the plaintiff's proceedings, so it is convenient to continue to refer to them as the third parties. There is a fourth third party, but it has no role to play in the present application, and I shall not make further reference to it. The third parties then brought proceedings against the Gold Coast City Council (*the Council*), in turn alleging misrepresentations by it about the potential liability for infrastructure charges. It is necessary to consider these allegations a little more carefully.

[3] The Council filed and served a defence, and it has been held that, in that defence, the making of some representations is deemed to have been admitted. The statement of claim of the third parties against the Council pleads, in paragraph 10, the making of a number of representations. Those representations, as pleaded in paragraph 10, were described as conclusionary; that is to say, they appear to be pleaded as the

effect of what was stated by the Council, rather than a reproduction of words used. Paragraph 10 alleges representations about the application of charges to land. As I read paragraph 10, most of the representations relate to land described as "land within Varsity Lakes", though one of them, in terms, relates to Lot 130.

[4] The basis for the pleading in paragraph 10 is expanded subsequently in the third parties' statement of claim. Paragraph 13 pleads the representations were made partly orally and partly in writing. Paragraph 14 then pleads the making of the oral representations, either at meetings or in telephone conversations. It identifies five representatives of the third parties and five representatives of the Council and alleges that one or more of the five representatives of the Council said words to the effect of matters which appear in the subparagraphs of paragraph 14.

[5] It might be observed that the subparagraphs of paragraph 14 do not directly match the subparagraphs of paragraph 10, although there is some correspondence between them, and that there is not complete consistency between references to land in the subparagraphs of each of those paragraphs.

[6] It is unnecessary, for present purposes, to refer to paragraph 15, which identifies written communications relied on in part for the allegations in paragraph 10 of the statement of claim.

[7] The Council filed and served a defence dated 16 January 2014. Paragraph 5 responded to paragraph 10 of the statement of claim. It commenced with a denial of the making of the representations in respect of Lot 130, whether as pleaded in paragraph 10 of the statement of claim or at all, on the ground that the allegations in paragraph 10 were, in fact, false for a number of stated reasons. Subparagraph (a) contains an allegation that no advice of the type alleged in paragraph 10 of the statement of claim was ever given in response to an inquiry made about Lot 130 "identified as such (either directly, or by implication or by inference)". In describing the effect of paragraph 5(a) of this defence, I have identified the land referred to in a way which differs from the language of the pleading, but which nevertheless seems to me to be accurate. Paragraph 5(b) of the defence similarly identifies the land in respect of which there is a denial that advice was given about infrastructure charges.

[8] Paragraph 5(c) states that:

> To the extent any advice was given about a specific parcel of land which is found to have been capable of a wider scope or construction as being advice about charges for developing land in accordance with a document described as Varsity Lakes Concept Plan (Plan 4A), the advice did not apply to Lot 130 –

for reasons which are set out in that defence.

[9] Paragraph 8 responds to paragraphs 13(a) and 14 of the statement of claim. It denies that any of the five named representatives of the Council, referred to in paragraph 14, said words to the effect that infrastructure charges would not apply to Lot 130 "(whether identified expressly, or by implication or inference)", as the allegation is false in fact. A denial of the use of words alleged in paragraphs 14(a)

and 14(b) is found in paragraph 8(b). There is then a specific denial of an allegation in paragraph 14(b) of the statement of claim.

[10] Paragraph 14(e) of the statement of claim alleged that one or more of the five named Council representatives said words to the effect that the Council's approval of Plan 4A meant that, provided development of land within Varsity Lakes was in accordance with that plan, infrastructure charges would not be payable.

[11] Paragraph 5(c) of the defence commences with a denial that any such statement was made in respect of Lot 130, again with the expression "(whether identified expressly, or by implication or inference)", followed by an allegation that if any of the five representatives said words to the effect that infrastructure charges would not be payable, provided development of the land was in accordance with Plan 4A, then the statements were not relevant to Lot 130, for reasons there set out.

[12] The reply to this defence did not identify deemed admissions. However, in a dispute about disclosure and application, it was held that the defence was deemed to have admitted the making of the representations pleaded in paragraph 10 and 14, the only denial being about their relationship to Lot 130. The determination that there were deemed admissions has led to the delivery of an amended defence. That is challenged in the proceedings before me, but only in relation to the withdrawal of the deemed admissions.

[13] I was referred to a number of authorities dealing with the circumstances in which deemed admissions might be withdrawn. While one related to an admission deemed to have been made by a failure to respond to a notice to admit facts, the principles stated in that case are accepted as relevant to the present proceedings. That case was *Ridolfi v Rigato Farms Pty Ltd*.[1] It is sufficient to note that it was there said that, when an application is made for leave to withdraw an admission, "a court would ordinarily expect sworn verification of the circumstances justifying a grant of leave".[2] It was also said that the provisions of the *Uniform Civil Procedure Rules 1999* "cannot be approached on the basis that if important provisions are ignored, even inadvertently… the court may be expected to act indulgently and rectify the omission".[3] Williams J, as he then was, said that an admission flowing from the provisions of the rules relating to the failure to respond to a notice to admit facts are not to be withdrawn merely for the asking. Rather, "a clear explanation on oath should be given as to how and why the admission came to be made and detailed particulars should be given of the issue or issues which the parties would raise at trial if the admission was withdrawn".[4]

[14] The second authority was *Hanson Construction Materials Pty Ltd v Norlis Pty Ltd*.[5] In dealing with the question whether leave should have been given to withdraw a deemed admission, Chesterman JA said that the first consideration must be whether the subject matter of the admission is truly contested.[6] That case was factually different to the present case, and it seems to me that his Honour's discussions of the facts and evidence in that case demonstrates the need to consider the circumstances

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1 [2001] 2 Qd R 455.
2 Ibid [19].
3 Ibid [21].
4 Ibid [32].
5 (2010) 79 ACSR 668 (*Hanson*).
6 Ibid [16].

of each case but does not provide a great deal of guidance beyond the statement of general principle to which I have referred.

[15] The third case was *Green v Pearson*.[7] Jackson J, with whom the other members of the court agreed, referred to *Hanson* with approval. On the question of the evidence required to demonstrate whether the subject matter of the admission is truly contested, his Honour said that there is no *a priori* rule as to what evidence is required in every case. Beyond that, he went on to say that there was no such rule that an affidavit generally verifying a proposed defence will not be enough.[8] In that case, the defence was verified by the principal witness, and his Honour considered that was a sufficient basis for the grant of leave to withdraw the defence.

[16] Two issues were contested on the present application. The first was the explanation for the defence in the form in which it was delivered in January. The second was whether the evidence demonstrated a genuine basis for contesting the facts which had been deemed to be admitted.

[17] On the first question, there was evidence from the Council's solicitor on the basis of information on the belief from Counsel who drew the defence. That evidence was that, in drafting the defence, it was intended, in accordance with instructions from the Council, to deny representations pleaded in paragraphs 10 and 14 of the statement of claim, and that language chosen to achieve that effect was intended to be comprehensive. The earlier decision to which I have made reference demonstrates that Counsel was mistaken in his view about the effect of what he pleaded. The affidavit based on information and belief from the same source goes on to say that any deemed admission arose from inadvertence, the document not fully and unambiguously reflecting the instructions. No attempt was made to cross-examine either the deponent or the person who provided the instructions leading to the deponent's belief. It is difficult for me not to accept that evidence in those circumstances.

[18] The third parties submitted that a careful analysis of paragraphs 5 and 8 of the defence demonstrated that its author had applied his mind to the difference between representations about Lot 130 and representations about other land, and accordingly, the explanation in the affidavit should not be accepted. In my view, that is by no means an adequate basis to reject the evidence. Accordingly, I accept the explanation found in the affidavit of the solicitor for the Council.

[19] There is greater difficulty in respect of the adequacy of the evidence relied upon to demonstrate that the subject matter of the admissions is truly contested. It will be apparent from what I have already said that the statement of claim takes a broad approach to alleging the oral representations. The period over which they were said to have been made is between 1999 and in or about 2008. They were said to be made "in the course of meetings and telephone conversations". I have already referred to the references to five representatives of the third parties and five representatives of the Council.

[20] At trial the third parties could lead evidence that any one of its five representatives at a meeting with any one of the five representatives of the Council was the

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7 [2014] QCA 110.

8 Ibid [46].

recipient of a representation which contained words to the effect of any of the subparagraphs of paragraph 14. What case will actually have to be met at trial is unclear. It is against that background that it seems to me I should look at the evidence relied upon by the Council to demonstrate that the admitted facts are truly contested.

[21] Before I do that I should also note the submission made on behalf of the Council that there may be difficulties with the evidence of the third parties because of the passage of time, reflected by the very broad way in which the making of the representations was pleaded. Affidavits of all five of the Council's representatives were read. Mr Rowe was from 1999 to 2012 the Director of Planning, Environment and Transport for the Council. He gives evidence of having met, in a period from about 2005 to 2008, with three of the representatives of the third parties and having spoken to one of them by telephone. If, at trial, the third parties' case is that, in fact, Mr Rowe made a representation to the other two of the representatives, his evidence about who he met and spoke to will be relevant and would provide a basis for contesting that evidence. Beyond that, his evidence provides little assistance. He says that anything he said to the people to whom he spoke would have been based on advice from his officers, presumably those, or some of those, identified as the other representatives of the Council.

[22] Mr Hulse has been the Manager of Implementation and Assessment with the Council since about 2004. Prior to that, he was employed in the Council's building department. That in itself strongly indicates that prior to 2004 he was unlikely to have had any role to play in discussions about infrastructure charges. His evidence is that he does not recall having met or spoken to two of the representatives of the third parties. If their evidence at trial will be to the effect that he had made a representation to them, then his evidence can be relevant as to whether their evidence should be accepted. It may not carry great weight but again, its significance might depend upon the impression which those witnesses made, particularly in cross-examination and giving their evidence. I should add that his evidence expressly confirms that prior to 2004 he did not meet with any of the representatives of the third parties.

[23] He also gives evidence that he attended a meeting either in late 2005 or perhaps early 2006. That meeting dealt with the transition between two different methods of regulating development of land at Varsity Lakes. Originally, development occurred pursuant to a 1987 rezoning deed, but about the end of 2005 development of that land commenced to be regulated by the Council's planning scheme. He does not recall discussing infrastructure charging with representatives of the third parties at that meeting or at any other meeting. It may have come up in telephone discussions. Again, his evidence, looked at in isolation, may not be particularly compelling. On the other hand, if the evidence called at trial on behalf of the third parties alleges representations by Mr Hulse before 2004 or at meetings, then his evidence may be of some importance.

[24] Mr Lohoar has, since about 1995, been the Supervisor of Development Contributions for the Council. He says that he does not know two of the named representatives of the third parties. He has spoken to two others. The fifth he knew in another context but does not remember discussing infrastructure issues relating to Varsity Lakes with him. He recalls going to offices associated with the third parties on one occasion to discuss a proposed reconciliation of infrastructure handed over

to Council, which would offset infrastructure charges of particular kinds. He does not recall other meetings about infrastructure charging issues. Again, his evidence would provide a basis for contesting statements in the terms which appear in paragraph 14 because on his evidence it would seem that what was required was a calculation of what had been paid as against what might be charged, rather than a blanket statement that infrastructure charges would not apply to Lot 130 or, indeed, other land at Varsity Lakes.

[25] Mr Scott has been the Director of Economic Development and Major Projects for the Council since about March 2006. Prior to that he did not have any involvement with development of Varsity Lakes, nor did he have discussions with the named representatives of the third parties. He does not know four of those named representatives and says that, to the best of his knowledge, he has never spoken to them. He had one meeting with one of them, the fifth named representative. To his recollection there was no discussion about infrastructure charging at that meeting. Again, his evidence, depending on what evidence is led by the third parties, might be important in contesting the case.

[26] On the present state of the pleadings, and bearing in mind the broad way in which the statement of claim pleads the oral representations, it seems to me that the Council is in a position where it genuinely contests the facts deemed to have been admitted. I would propose to make orders accordingly.