SUPREME COURT OF QUEENSLAND

CITATION:	*Aimtek Pty Ltd v Flightship Ground Effect Pte Ltd* [2014] QCA 294
PARTIES:	**AIMTEK PTY LTD** ACN 009 679 207 (appellant) **v** **FLIGHTSHIP GROUND EFFECT PTE LTD** (respondent)
FILE NO/S:	Appeal No 4299 of 2014 SC No 1607 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	21 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2014
JUDGES:	Holmes, Fraser and Morrison JJA 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 – PROCEDURES UNDER UNIFORM CIVIL PROCEDURE RULES – PLEADING – GENERALLY – where the appellant applied for interlocutory orders striking out paragraphs of the respondent's amended answer to its amended counterclaim – where the appellant appeals against the primary judge's refusal to strike out six paragraphs of the amended answer – where the appellant argues that five paragraphs, which pleaded nonadmissions, did not comply with r 166 of the UCPR because they did not explain why the respondent believed the allegations could not be admitted – where the appellant argues the other paragraph, a denial, was defective for uncertainty – whether the primary judge erred in refusing to strike out those paragraphs *Uniform Civil Procedure Rules* 1999 (Qld), r 166(3), r 166(4) *Australian Securities and Investments Commission v Managed Investments Ltd (No 3)* (2012) 88 ACSR 139; [2012] QSC 74, considered

Barker v Linklater [2008] 1 Qd R 405; [2007] QCA 363, considered
Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited [2009] 1 Qd R 116; [2008] QSC 302, cited

COUNSEL: D R Cooper QC for the appellant
R J Douglas QC, with G D Beacham, for the respondent

SOLICITORS: Morrow Petersen for the appellant
Thomson Geer for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the order he proposes.

[2] **FRASER JA:** The appellant (the defendant and plaintiff by counterclaim in the Trial Division) applied for various interlocutory orders, including orders striking out paragraphs of the respondent's amended answer to the appellant's seventh amended counterclaim. The primary judge acceded to the application in part. The appellant has appealed against so much of the judgment by which the primary judge refused to strike out six paragraphs (33F, 33H(d), 33I, 33M(g), 33N and 33V) of the amended answer. The appellant also challenges the primary judge's directions for the delivery of amended pleadings and the order reserving the costs of the application. It would be necessary to consider those challenges only if the appellant were to succeed on its challenge to the six impugned paragraphs of the pleading.

Approach to the appeal

[3] This appeal involves only procedural questions. The settled rule is that the Court should exercise restraint and be reluctant to interfere with interlocutory decisions which do not determine substantive questions but are concerned only with practice and procedure.[1] That rule plainly should be applied in this case, where the primary judge was managing the proceeding in the Trial Division with a view to expediting a trial. The primary judge was therefore well placed to determine the appropriate procedural response to any defect in the respondent's pleading. It is also relevant to mention that the appeal record includes a further amended answer in which two of the impugned paragraphs have been amended, including by substituting denials for nonadmissions; in those respects the appeal appears now to involve only hypothetical questions.

Paragraphs 33F, 33H(d), 33I, 33M(g), and 33N

[4] Although the notice of appeal contends that the primary judge erred in not deciding to strike out paragraphs 33F, 33H(d), 33I, 33M(g), and 33N (the first five of the six impugned paragraphs) of the amended answer, the notice of appeal seeks a striking out order only as an alternative to an order that the respondent admit the facts not admitted in those paragraphs. The appellant's senior counsel informed the Court that the latter order was not sought before the primary judge and that the appellant asked the primary judge only for an order striking out these paragraphs. In the circumstances discussed in paragraph [3] of these reasons it would not be appropriate to allow the appellant to seek a different order for the first time on appeal.

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1 See *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170.

[5] These impugned paragraphs plead nonadmissions. Paragraph 33F pleads that the respondent "does not admit the allegations in paragraph 45F, because, having undertaken reasonable investigations, it remains unsure of their truth or falsity". The remaining four of the paragraphs are in a materially indistinguishable form. The appellant argued that nonadmissions in that form did not comply with paragraphs (3) and (4) of r 166 of the *Uniform Civil Procedure Rules* 1999.

[6] Rule 166 of the *Uniform Civil Procedure Rules* relevantly provides:

> "(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] The appellant cited paragraphs [32] and [47] of Fryberg J's reasons in *ASIC v Managed Investments*[2] for the proposition that the respondent's non-admissions did not comply with r 166(4) because they gave an explanation for the non-admission rather than a "direct explanation for the party's belief that the allegation…can not be admitted". In the first cited paragraph, Fryberg J held that a denial with a refusal to "provide a direct explanation for the denial" on the ground of privilege against self-incrimination or exposure to penalties involved a misreading of the rule. In the second cited paragraph Fryberg J held that a party's pleading that the party "…denies paragraph 9 because the allegations are untrue" did not comply with r 166(4) because the denial was accompanied by an explanation why the party denied the relevant allegations rather than an explanation for the party's belief that the allegations were untrue.

[8] The rules concerning nonadmissions differ from the rules concerning denials. Fryberg J's conclusions cannot be applied to the pleading in this case. Rule 166(4) requires a direct explanation for the party's belief that the allegation can not be admitted,[3] but it would be mere pedantry to insist that a pleaded expression of that belief is defective merely because it does not precisely adopt the words used in the rule. *Barker v Linklater*[4] is inconsistent with any such requirement. In that case,

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2 (2012) 88 ACSR 139. An appeal from that decision concerned different issues: *Anderson v Australian Securities and Investments Commission* [2013] 2 Qd R 401.

3 *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited* [2009] 1 Qd R 116 at 121 – 122 [22].

4 [2008] 1 Qd R 405.

Muir JA (with whose reasons Jerrard JA, who gave additional reasons, and Douglas J agreed) held that a non-admission "on the grounds that the defendants are unable to attest to the truth or otherwise" of specified allegations, amounted to a non-admission which was accompanied by the necessary "direct explanation for the party's belief that the allegation…can not be admitted" – albeit that the explanation "paid scant heed to grammatical rules and was not felicitously expressed".[5] The respondent's pleading should not be held to be defective merely because it might have been expressed more elegantly.

[9] The essence of the appellant's argument was that the respondent's non-admissions were defective because they omitted any statement which related the pleaded explanation for the nonadmissions to a belief by the respondent that the allegations could not be admitted. Accepting that it would have been preferable for the pleader to use or more closely adapt the words of the rule, in the context of this pleading the explanation for the non-admission that the respondent remained unsure of the truth or falsity of the allegations after having made reasonable investigations conveyed that the respondent believed that the allegations "can not be admitted". The primary judge did not err in refusing to strike out these paragraphs on the ground advocated for the appellant.

[10] The appellant applied for leave to adduce additional evidence in the appeal, including a further amended pleading delivered by the respondent. It was submitted that the additional evidence together with evidence before the primary judge demonstrated that the respondent was in possession of sufficient information to deny or admit the relevant allegations. If the additional evidence does materially change the basis upon which the primary judge decided the application then the appellant is entitled to apply to the primary judge to strike out those of the contentious paragraphs which are repeated in the respondent's current pleading. In effect, admitting the additional evidence in the appeal would transfer to the Court of Appeal a discretion which should be exercised by the judge who is managing the proceeding towards a trial. In the circumstances of this case it is not appropriate to grant leave to the appellant to adduce additional evidence in the appeal.

[11] The appellant also contended, though less strenuously, that even upon the evidence before the primary judge the respondent must have possessed sufficient information to deny or admit the relevant allegations. The appellant particularly relied upon evidence that before the respondent pleaded the nonadmissions the respondent was allowed ample time to conduct extensive investigations into the allegations against it, the respondent possessed a large volume of relevant records (including business records of the respondent, and of its subsidiary which dealt directly with the appellant, which reflected transactions alleged by the appellant), and the respondent could have interviewed persons who had been personally involved in the transactions with the appellant and between the respondent and its subsidiary. The appellant argued that the evidence proved that the respondent could not have made the reasonable enquiries required by rule 166(3) and, in particular, that the respondent could not have made the required enquiries of Mr Leslie, the former sole director of the respondent's subsidiary (who was then also the sole director of the respondent) and of other investors in the respondent who must have known of the transactions.

[12] The question raised by this contention has become hypothetical, the relevant pleading having been superseded since the interlocutory decision and there being

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5 [2008] 1 Qd R 405 at 419 – 420 [47] – [48].

additional evidence said to bear upon the contention which was not before the primary judge. Furthermore, because the respondent had pleaded nonadmissions it should not be permitted to adduce evidence at the trial to support a positive case contrary to the appellant's allegations. Although the appellant nevertheless asserted that it would be substantially disadvantaged by being required to prove those allegations at the trial, its argument appeared to assume that it could prove those allegations without any difficulty and it did not identify the nature of disadvantage it might suffer. Accordingly I will state my reasons for rejecting the contention in a summary form. It is not controversial that if a party pleads a nonadmission without complying with one or more of the requirements of r 166(3) the nonadmission will be amenable to being struck out, with the result that the relevant allegation will be deemed to have been admitted under r 166(1). However the appellant did not adduce direct evidence of any such non-compliance. Rather, its contention was premised upon an inference that if the respondent had examined the available documents and made the necessary enquiries it could not have been left in the uncertain state of mind described in r 166(3)(c). That argument assumed that, inconsistently with the terms of the respondent's nonadmissions, the respondent should have believed that the documents and information which were or might have been supplied by the identified persons were reliable in so far as they purported to verify or contradict the appellant's allegations. The primary judge was not prepared to draw such an inference about the respondent's attitude to information derived from the identified sources, in each case making a finding to the effect that there was insufficient material to reach an informed view about the matter. There was no error in that conclusion.

[13] It should be noted that the respondent's counsel appropriately acknowledged that the respondent remains under a continuing obligation to review its nonadmissions as required by r 166(6).

Paragraph 33V

[14] Paragraph 45X of the appellant's counterclaim is as follows:

> "45X. In the premises it is unconscionable that FSS should obtain the release of the said funds without satisfying the indebtedness to NQEA:
>
> (a) which FSS knew and permitted or authorised FSA to incur from time to time throughout 2003;
>
> (b) in circumstances where it had derived and continued to derive a benefit from such indebtedness."

[15] Paragraph 33V of the respondent's answer pleaded:

> "33V. The Plaintiff denies paragraph 45X of the Counterclaim:
>
> (a) by reason of the matters set out above;
>
> (b) any continuing benefit derived from FS8 001, is derived by reason of the orders made in this honourable Court, by the consent of NQEA, for the release of FS8 001 into the possession of the Plaintiff;
>
> (c) further, because the conduct pleaded by NQEA was not unconscionable in circumstances where NQEA could have protected itself by obtaining security, or guarantees, in respect of the debts that were to be incurred by FSA."

[16] The primary judge took into account that paragraph 33V responded to an allegation of a conclusory and general character which was itself premised on matters pleaded earlier in the counterclaim and held that the paragraph did not appear to be defective or to involve uncertainty which would tend to prejudice a fair trial.

[17] The appellant argued that the denial in paragraph 33V constituted a deemed admission because it was defectively pleaded, or it should be held to constitute an admission because it was evasive, argumentative and uncertain. As was the case in relation to the other impugned paragraphs, it seems that no order to that effect was sought in the Trial Division. The appellant asked the primary judge to make an order striking out the paragraph. In the case of paragraph 33V there is the additional consideration that the question whether that paragraph constitutes a deemed admission or should be held to constitute an admission is not within the notice of appeal. The notice of appeal contends only that the primary judge "misdirected himself in failing to strike out the denial…which was not pleaded conformably with the rules of Court and is evasive and argumentative" and the only order sought is that paragraph 33V be struck out. The notice of appeal does not seek a direction or order to the effect that paragraph 33V is or should be treated as constituting a deemed admission.

[18] It is appropriate then to consider only whether the primary judge erred in refusing to strike out paragraph 33V. Even if that paragraph is defectively pleaded it does not necessarily follow that the primary judge was obliged to strike it out. As the appellant's senior counsel appropriately acknowledged, a judge asked to strike out a pleaded allegation exercises a discretionary power. The terms of the primary judge's ruling reveal that his Honour concluded that any pleading defect in paragraph 33V does not tend to prejudice a fair trial.

[19] A number of considerations support the primary judge's decision not to strike out the paragraph. Subparagraph (a) is no more ambiguous or uncertain than is the reference in paragraph 45X to "the premises". If there was any legitimate ground for concern about the generality of subparagraph (a), the appellant could have pursued an application for particulars identifying the paragraphs to which that subparagraph referred. The allegations in subparagraphs (b) and (c) of paragraph 33V are not ambiguous. The appellant argued that those allegations were irrelevant to the allegation in paragraph 45X that it was unconscionable that FSS should obtain the release of the said funds without satisfying the indebtedness to NQEA, but it would not appear to be onerous for the appellant to plead to those allegations and meet them at the trial. In those circumstances it was not unreasonable for the primary judge to consider that the relevance question argued by the appellant was better determined at the trial which was then anticipated to commence in the very near future.

Proposed order

[20] The appeal should be dismissed with costs.

[21] **MORRISON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.