SUPREME COURT OF QUEENSLAND

CITATION:	*Rigato Farms P/L v Ridolfi* [2000] QCA 292
PARTIES:	**RIGATO FARMS PTY LTD** ACN 010 025 448 (defendant/appellant) v **KENNETH FRANK RIDOLFI** (plaintiff/respondent)
FILE NO/S:	Appeal No 11448 of 1999 SC No 153 of 1998 DC No 225 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	General civil appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	28 July 2000
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2000
JUDGES:	de Jersey CJ, McPherson JA and Williams J Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Appeal dismissed with costs to be assessed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – OTHER MATTERS – application to withdraw admissions refused by trial judge – application made by appellant in course of respondent's action for damages for injuries sustained in course of employment – admissions made by operation of *UCPR* 189 by appellant's solicitors' failure to respond to notice to admit facts – application brought by new solicitors following change of appellant's solicitors – no sworn evidence to explain failure to respond to notice – whether ground for interfering with judge's discretion established PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – OTHER MATTERS – purpose of procedural rules, particularly *UCPR* – whether failure to respond excusable in light of initial reasonable latitude in compliance allowed under Practice Direction No 10 of 1999

EMPLOYMENT LAW – THE CONTRACT OF SERVICE AND RIGHTS, DUTIES AND LIABILITIES AS BETWEEN EMPLOYER AND EMPLOYEE – LIABILITY OF EMPLOYER FOR INJURY TO EMPLOYEE AT COMMON LAW – EVIDENCE AND ONUS OF PROOF – whether not permitting withdrawal unfairly deprived appellant of opportunity to raise significant issues as to causation at trial

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 5(1), r 189(1), r 189(2), r 189(3), r 189(4)
Practice Direction No 10 of 1999

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170, referred to
Astley v Austrust Ltd (1999) 161 ALR 155, referred to
Coopers Brewery Ltd v Panfida Foods Ltd (1992) 26 NSWLR 738, referred to
Cropper v Smith (1884) 26 ChD 700, considered
Equuscorp Pty Ltd v Orazio [1999] QSC 354, No 9208 of 1996, 30 November 1999, referred to
H Clark (Doncaster) Ltd v Wilkinson [1965] Ch 694, distinguished
House v the King (1936) 55 CLR 499, followed
Queensland Trustees Limited v Fawckner [1964] QdR 153, considered
Re Brighton Club & Norfolk Hotel Co Ltd (1865) 35 Beav 204; (1865) 55 ER 873, referred to

COUNSEL: RAI Myers for the appellant
JA Griffin QC, with AP Simpson for the respondent

SOLICITORS: Bradley & Co for the appellant
Corsetti Lawyers for the respondent

[1] **de JERSEY CJ:** The respondent brought a claim in the District Court against the appellant for damages for negligence and breach of statutory duty, in relation to injuries he allegedly suffered in the course of his employment. He allegedly suffered injury to his lumbar spine, as the result of three incidents, on 30 October 1992, in May 1993 and in October 1994.

[2] The respondent filed his plaint on 24 October 1995. The appellant filed an entry of appearance and defence on 8 February 1996. The appellant by and large did not admit the factual allegations basing the claims of negligence, denied that it had been negligent, and alleged contributory negligence on the part of the respondent.

[3] On 3 August 1999, proceeding under rule 189 of the *Uniform Civil Procedure Rules*, the solicitors for the respondent served on the solicitors for the appellant a notice to admit facts. (A notice to admit documents was also served but it has no

relevance to the determination of this appeal.) By the notice to admit facts, the respondent sought, within fourteen days, admissions by the appellant of 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.

[4] Rule 189 provides:

> "(1) A party to a proceeding (the **"first party"**) may, by notice served on another party ask the other party to admit, for the proceeding only, the facts or documents specified in the notice.
>
> (2) If the other party does not, within 14 days, serve a notice on the first party disputing the fact or the authenticity of the document, the other party is taken to admit, for the proceeding only, the fact or the authenticity of the document specified in the notice.
>
> (3) The other party may, with the court's leave, withdraw an admission taken to have been made by the party under subrule (2).
>
> (4) If the other party serves a notice under subrule (2) disputing a fact or the authenticity of a document and afterwards the fact or the authenticity of the document is proved in the proceeding, the party must pay the costs of proof, unless the court otherwise orders."

[5] The form of the notice to admit facts drew attention to the consequence of failure to respond. So did the respondent's solicitor's accompanying letter, which said:

> "We respectfully refer you to Rule 189 of the Uniform Civil Procedure Rules (particularly Sub-rule 2) as to the consequences of your clients [sic] failure to serve a notice disputing the facts specified in the Notice to Admit Facts or the authenticity of the documents specified in the Notice to Admit Documents.
>
> Should we not hear from you within fourteen days from the service of both notices, we shall assume that your client has admitted those facts or documents specified in both Notices."

[6] The appellant did not respond to the notice as required. The respondent's solicitors promptly, on 20 August 1999, drew the consequence to the attention of the appellant's solicitors in these terms:

> "We refer to our letter dated 3rd August which enclosed by way of service Notice to Admit Facts and Notice to Admit Documents. As fourteen days has now elapsed since the service of both notices, we respectfully refer you to Sub-Rule 189(2) of the Uniform Civil Procedure Rules, which provides that your client has now taken to admit, for this proceeding only, the facts specified in the Notice to Admit Facts and the authenticity of the documents specified in the Notice to Admit Documents.
>
> With reference to the quantum of our clients [sic] damages, we anticipate serving a Supplementary Statement of Loss and Damage within the next seven (7) days."

The appellant's solicitors did not respond taking issue with those matters.

[7] On 2 August 1999 the respondent's solicitors sent the appellant's solicitors, for signing, a certificate requesting the allotment of a trial date. On 9 September 1999 the respondent's solicitors again sought the execution and return of that certificate, which did not occur, so that on 21 September 1999 the respondent's solicitors filed an application for an order setting the action down for trial. That provoked the appellant's solicitors to sign the certificate. The matter was eventually listed for trial on the "running list" for the sittings commencing 29 November 1999.

[8] On 22 November 1999 the appellant's new, and still current, solicitors advised the respondent's solicitors that WorkCover had retained them in lieu of the former solicitors. On 24 November 1999 the respondent's solicitors informed the appellant's new solicitors of the deemed admissions arising from the absence of a response to the notice to admit facts. The appellant's new solicitors on 29 November foreshadowed an application under rule 189(3) for the leave of the court to withdraw the admissions, asserting: "our predecessors did not take instructions to respond to your notices". The respondent's solicitors responded saying they had placed "significant reliance upon the admissions made by the (appellant) in preparing (their) client's matter for trial".

[9] Counsel for the appellant made application for leave to withdraw the admissions, orally, at the commencement of the trial on 6 December 1999. The learned judge refused the application, but was prepared then to adjourn the trial to allow time to the appellant to reassemble the necessary evidence. As to liability, the issue of alleged contributory negligence remained live (although this may have been academic in light of *Astley v Austrust Ltd* (1999) 161 ALR 155). The extent to which the admittedly negligent acts and omissions of the appellant caused particular injury to the respondent certainly remained fully in issue.

[10] The learned judge referred to the history of the matter, the philosophy behind the *Uniform Civil Procedure Rules* (cf. rule 5), acknowledged the disadvantage to one party whichever way the matter were resolved, and said that "weighing the competing disadvantage, particularly in context of the philosophy" of the rules, he should refuse leave to withdraw the admissions.

[11] 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. Notwithstanding some criticisms levelled by counsel for the appellant, I am satisfied the learned judge has apparently not acted on any wrong principle, taken account of irrelevant or extraneous matters, failed to take account of some material consideration, or proceeded upon a misapprehension of the facts.

[12] The catalyst for the attempt to withdraw from the deemed admissions was the change in the identity of the appellant's solicitors. The previous solicitors must be taken to have been aware of the consequence of not responding to the notice (which had been expressly, directly flagged in the clearest of terms), and that the respondent's solicitors were preparing for trial on the basis that the admissions were deemed to have been made.

[13] Although the appellant's new solicitors contended by letter on 29 November 1999 that their predecessors "did not take instructions to respond to (the) notices", and

although the appellant's counsel says in his outline of argument that the admissions deemed to have been made arose "inadvertently or without due consideration of material matters", there is no sworn evidence of those claims. There is indeed no sworn evidence of any explanation for the former solicitor's failure to respond to the notice.

[14] Therefore as the matter appears, the application to the learned judge was motivated by the attitude of the appellant's new solicitors: whereas their predecessors, taken to have been aware of the consequence of failing to respond, let the respondent's solicitors prepare for trial on the basis of the deemed admissions, making no move to set aside the admissions under rule 189(3), the appellant's new solicitors took a different attitude. It is difficult to see why a change in approach on the part of a party's legal advisers should in those circumstances warrant departing from the course previously set and on which the other party was reasonably relying.

[15] Counsel for the appellant relied on practice direction No. 10 of 1999, designed to facilitate the streamlined early implementation of the Uniform Civil Procedure Rules following their commencement on 1 July 1999. Paragraph 6 of that practice direction is in these terms:

> " … for the first three months of the operation of the UCPR, that is, until 1 October 1999, litigants will be allowed reasonable latitude in their utilisation of the UCPR. Provided it is apparent they have made reasonable efforts to comply with the UCPR and related forms, the absence of strict compliance with those rules or forms will ordinarily be excused. The Registrar is hereby authorised to act consistently with this Practice Direction."

[16] In not responding to the notice, the appellant did not fail to "comply" with the form or the UCPR. It had the option whether or not to respond. In any case, the need to respond, or suffer a particular consequence, was clearly stated in the notice itself, and repeated in the accompanying letter. The appellant's solicitors should have been in no doubt as to how to proceed. This was not a case where the appellant made some reasonable although ineffectual effort to respond to the notice: it made no response at all. The appellant gains no support in relation to the issue from the practice direction.

[17] The appellant's counsel emphasised a contention that the matter will in these circumstances proceed to trial without examination of the circumstances of the incidents in which the respondent was allegedly injured, suggesting that that would be unjust. That somewhat overstates the matter. The need to establish the link between the events and the particular extent of the respondent's alleged injuries will necessitate some examination of the circumstances of those incidents, although it is true that the appellant's primary liability is taken to be established.

[18] But that aside, the submission ignores the potentially important role of procedure, as reflected in rule 5(1) especially:

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

It also overlooks injustice to the respondent were the appellant allowed to withdraw admissions on which for months the respondent – to the knowledge of the appellant

– relied in preparing his case.

[19] Asked to exercise the discretion under 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.

[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.

[21] The charter of procedure contained in the Uniform Civil Procedure Rules cannot be approached on the basis that if important provisions are ignored, even if inadvertently (and that is not established here), the court may be expected to act indulgently and rectify the omission. Fulfilling procedural requirements will often contribute significantly to securing an ultimate result which may be considered just. Allowing the appellant to withdraw these deemed admissions would substantially erode the beneficial worth of a very important procedural mechanism directed, through expediting cases and reducing costs, to promoting the interests of justice.

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

[23] It would have been unduly yielding for the court to have accommodated this appellant's complaint about the consequence of its not responding to the notice. 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.

[24] Judges who at first instance, astute to the philosophy behind the UCPR, make procedural rulings which reflect that philosophy, sometimes proceeding with an appropriate robustness, should be able to proceed confident that their rulings will not on appeal be subjected to a pedantic or overly intrusive re-examination.

[25] No ground has been established warranting interference with the learned judge's ruling. The appeal should be dismissed with costs to be assessed.

[26] **McPHERSON JA**: I agree with the reasons of de Jersey CJ. In *Cooper's 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.

[27] 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) 35 Beav 204, 205; (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. That is not shown by a saying simply that there has been a change of solicitors, or that it is possible to see that, before the admission was made, the issue of liability was an open question. Here the defendant has not condescended to swear to the circumstances in which the admission came to be made, or to show that it occurred by inadvertence, mistake or in some other way that might now justify its withdrawal.

[28] The appeal is, in any event, one that challenges the exercise of a discretion in a matter of practice and procedure. Even allowing for the fact that, in the present case, a matter of substantive right or liability is involved, the decision is therefore entitled to particular weight in determining whether or not it should be set aside. See *Queensland Trustees Limited v Fawckner* [1964] Qd R 153, 166, where Skerman J referred to the well-known statement of Jordan CJ in *Re Will of Gilbert* (1946) 46 SR (NSW) 318, 323:

> "The disposal of cases could be delayed interminably, and costs heaped up indefinitely if a litigant with a long purse or a litigious disposition could, at will, in effect, transfer all exercise of discretion in interlocutory applications from a judge in chambers to a court of appeal."

Here the defendant did not take any steps to apply for leave to withdraw the admission until the trial commenced on 6 December 1999, and it did so then without proffering any sworn explanation of how the earlier admissions had come to be made or why they should subsequently be set aside.

[29] Given these circumstances, it cannot be said that, in refusing to grant the leave sought, Jones J exercised his discretion on any wrong principle. The appeal should be dismissed with costs.

[30] **WILLIAMS J:** I have had the advantage of reading the reasons for judgment prepared by the Chief Justice and I agree with all that he has said therein. I only wish to add some brief observations of my own.

[31] Counsel for the appellant referred to the well known passage in the judgment of Bowen L J in *Cropper v Smith* (1884) 26 Ch D 700 at 710 where he said that the court ought to correct errors or mistakes in procedure made by the parties so that the matter was determined in accordance with the rights of the parties. That statement, though made over one hundred years ago, is still relevant, and it encapsulates a principle which a judge must always take into consideration in determining whether or not it is appropriate, for example, to allow a party to withdraw an admission. Essentially it is no more than a recognition that courts will, so far as possible, ensure that a party has a fair trial. But, for example, where the

detriment or prejudice is self induced, the party may not be entitled to relief. So much is clear from the unreported decision of the Victorian Full Court in *Apex Pallett Hire Pty Ltd v Brambles Holdings Ltd*, referred to at length and applied by Rogers CJ Comm D in *Coopers Brewery Ltd v Panfida Foods Ltd* (1972) 26 NSWLR 738 at 744. Rogers CJ considered that the statement of Lord Denning MR in *H Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694 at 703 that an admission made by counsel in the course of proceedings can be withdrawn unless the circumstances are such as to give rise to an estoppel were "words … uttered in another age and in other circumstances" (746). Such an observation can even more forcibly be made and applied in the light of the UCPR.

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

[33] It was asserted that it would be unfair to the appellant not to permit the withdrawal of at least some of the admissions because they deprived it of the opportunity of raising at trial significant issues as to causation of the plaintiff's present contribution. There is, so it was asserted, material in medical reports which would suggest that the plaintiff had a pre-existing back condition and that his present back condition was not due to any, or all, of the three incidents referred to in the pleadings. In my view that submission is misconceived. The admissions, relevant to that submission, can be summarised as follows:

(i) The admission derived from paragraph 2 of the Notice that on 30 October 1992 in the course of working for the defendant "the Plaintiff suffered immediate low back pain";

(ii) The admission derived from paragraph 6 of the Notice that in May 1993 in the course of his employment for the defendant "the Plaintiff lost his balance and fell to the ground thereby injuring his back";

(iii) The admission derived from paragraph 9 of the Notice that in October 1994 in the course of his employment with the defendant "the Plaintiff suffered a low back injury";

(iv) The admission derived from paragraph 12 of the Notice that in consequence of the three incidents referred to above "the Plaintiff suffered an injury to his lumber spine".

[34] It is immediately obvious that there is no admission that the plaintiff suffered any particular injury, nor is there any admission that the plaintiff was not suffering a pre-existing condition. At any trial it would be for the plaintiff to prove the particular injury suffered on each occasion and to establish the link between each such injury and his present back condition. There would be no obstacle to the defendant contending that the plaintiff, prior to the first injury (or indeed any of the three), was suffering from some other back condition, or susceptibility, which was

more directly responsible for his present condition than all or any of the incidents particularised in the pleadings and the Notice.

[35] The admissions made will clarify the issues for determination at trial. If the plaintiff establishes a particular injury on all or any of the three occasions in question then liability with respect thereto is admitted.

[36] Having regard to all the matters to which I have referred I am not persuaded that this is a case in which leave to withdraw the admissions should be granted.

[37] I agree with the order proposed by the Chief Justice.