

## DISTRICT COURT OF QUEENSLAND

CITATION: *Kellahan v Hughes* [2014] QDC 97

PARTIES: **PRUDENCE JANE KELLAHAN**  
(Appellant/Defendant)  
v  
**ROBERT WINDSOR HUGHES**  
(Respondent/Plaintiff)

FILE NO: 233 of 2013

DIVISION: Civil

PROCEEDING: Appeal

ORIGINATING COURT: Magistrates Court at Cairns

DELIVERED ON: 24 April 2014

DELIVERED AT: Cairns

HEARING DATE: 24 April 2014

JUDGE: Everson DCJ

ORDER: **1. Appeal allowed.**  
**2. Decision of the magistrate set aside.**  
**3. Respondent to pay the appellant's costs of and incidental to the appeal on the standard basis and the costs of and incidental to the application the subject of the appeal, which are to be assessed.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW - where the magistrate dismissed the appellant's application for a direction that she was not subject to a deemed admission in respect of her pleadings and alternatively, sought leave to withdraw any deemed admission that may be found against her - whether the application should have been dismissed

PROCEDURE – DISTRICT COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES – where the appellant filed a defence which omitted to plead to a paragraph of the Statement of Claim – where the appellant subsequently engaged legal representation and filed an Amended Defence which denied the relevant paragraph of the Amended Statement of Claim– where the respondent asserted that a deemed admission arose in respect of the appellant's initial

omission –the effect of r 385 of the UCPR – whether the initial omission still gave rise to a deemed admission

*Uniform Civil Procedure Rules* 1999 (Qld), r166, r385

COUNSEL: M Jonsson for the Appellant  
J Jacobs for the Respondent

SOLICITORS: Preston Law for the Appellant  
Williams Graham Carman Lawyers for the Respondent

- [1] This is an appeal from a decision of a magistrate sitting at Cairns delivered on 26 November 2013 dismissing the appellant’s application for a direction that she was not subject to a deemed admission in respect of her pleadings in the proceeding before the court below and alternatively, seeking leave to withdraw any deemed admission which may be found against her in this regard.
- [2] The dispute between the parties concerned the failure of the appellant to complete a contract for the sale of a unit at Freshwater in circumstances where the respondent was the vendor and the appellant was the purchaser. The negotiations between the parties that occurred as the appellant’s difficulties in completing the contract became apparent, resulted in alternative scenarios being pleaded by the respondent in the Statement of Claim filed on 28 February 2012. Relevantly, however, the respondent pleaded at paragraph 13 that he was “at all material times...ready, able and willing to effect completion of the Contract”. Initially the appellant filed a defence on her own behalf omitting to plead to paragraph 13 of the Statement of Claim. It is this omission, which is said to potentially give rise to a deemed admission pursuant to r 166(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) (“UCPR”). R 166(1)(a) relevantly states that “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 the allegation is denied or stated to be not admitted by the opposite party in a pleading”.
- [3] The appellant subsequently engaged legal representation and an Amended Defence was filed on 7 September 2012. The Amended Defence denied the allegations in paragraph 13 of the Statement of Claim. The respondent filed an Amended Statement of Claim on 16 November 2012. Paragraph 13 now reads: “at all material times, the Plaintiff was ready, able and willing to effect completion of the Contract on 30 September 2011”. A further paragraph 17A was added alleging that “at all material times, the Plaintiff was willing and able to effect completion of the Contract on 10 October 2011”. Both of these allegations were expressly denied by the appellant in her Further Amended Defence filed on 25 March 2013 and subsequently in her Further Amended Defence and Counterclaim filed on 10 May 2013. The allegation that the respondent was not capable of completing the contract on any relevant date now lies at the heart of her defence.

- [4] It appears that the respondent asserted that a deemed admission arose as a consequence of the failure of the appellant to initially deny the allegation in paragraph 13 of the Statement of Claim and out of an abundance of caution, the appellant brought the application before the magistrate pursuant to r 166 of the UCPR, so that the issue would not arise at trial. No issue is taken by the parties as to the jurisdiction of the magistrate to entertain the application, which was effectively a ruling concerning the pleadings before him, with alternative relief sought in the event the primary relief sought was unsuccessful.
- [5] The provisions of r 166 must be seen in the context of the UCPR as a whole. Relevantly, r 385(1) provides that “if a party amends a pleading, another party may plead to the amended pleading or amend the opposite party’s own pleading”. It is a broadly worded provision, which is reflective of the realities of how civil litigation is conducted pursuant to the UCPR. Curiously, despite being expressly taken to r 385, in both written and oral submissions, the magistrate failed to refer to it at all in his decision dismissing the application.
- [6] The respondent submits that the relevant amendments to the Statement of Claim were merely by way of particulars and that the appellant remained subject to the deemed admission in respect of paragraph 13 of the original Statement of Claim. The submission is contrary to the plain meaning of r 385, however. The respondent can point to no authority that suggests that there are any implied limits to the application of r 385. As the pleadings currently stand, no implied admission concerning whether at any stage the respondent was ready, willing and able to effect completion of the contract between the parties arises.
- [7] The appellant also argues that there was no implied admission in any event, as r 166 only applies to an allegation of fact and the allegation in question involves allegations of fact and law. However, it is unnecessary to determine whether this argument is correct, any implied admission having been effectively withdrawn when the appellant pleaded to the Amended Statement of Claim on 25 March 2013. Similarly, it is unnecessary to address the alternative relief sought in the application before the magistrate.
- [8] Accordingly, the appeal is allowed and the decision of the magistrate is set aside. I order the respondent to pay the appellant’s costs of and incidental to the appeal on the standard basis and the costs of and incidental to the application the subject of the appeal, which are to be assessed.
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