DISTRICT COURT OF QUEENSLAND

CITATION:	*Arthurell v Ryans Mulching Queensland Pty Ltd* [2017] QDC 90
PARTIES:	**ARTHURELL** (appellant) v **RYANS MULCHING QUEENSLAND PTY LTD** (respondent)
FILE NO/S:	37/16
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court
DELIVERED ON:	24 April 2017
DELIVERED AT:	Brisbane
JUDGE:	Devereaux SC DCJ
ORDER:	1. **The appeal is allowed to the extent that I declare the notice to admit served by the plaintiff on the defendant on 6 July 2016 an effectual step;** 2. **The respondent has leave to reply afresh to the notice to admit or file and serve any application concerning the notice within 14 days of these orders.** 3. **The appellant is to pay the respondent's reserved costs of the application for leave to appeal on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FROM INTERLOCUTORY DECISIONS – GENERALLY – where reasons given in *Arthurell v Ryans Mulching Qld Pty Ltd* [2017] QDC 74 – orders *Magistrates Court Act 1921* (Qld) s. 47 *Uniform Civil Procedure Rules* (Qld) r. 166, r. 389 *Colgate-Palmolive Company v Cussons Pty Limited* (1993)

COUNSEL:	Dr C. Jensen for the appellant
	Mr J. Ivanisevic for the respondent
SOLICITORS:	Dr Craig Jensen Lawyers for the appellant
	HopgoodGanim Lawyers for the respondent

[2] I have, since publishing reasons to the parties on 3 April 2017, received further written submissions from both parties. The respondent submits that the outcome I suggest – to declare the notice to admit an effectual step and order the respondent to have leave to reply to it afresh – would do violence to the specific findings made in my reasons. The respondent submits no appealable error has been found.

[3] I respectfully disagree with both propositions. Although I am not satisfied any of the appellant's grounds of appeal succeeded, there is nonetheless appealable error in the failure of the Magistrate to consider the application to declare effectual the notice to admit facts.

[4] The jurisdiction of the court, on appeal from the Magistrates Court, includes to "make any order, on such terms as it thinks proper, to ensure the termination on the merits of the real questions in controversy between the parties": *Magistrates Courts Act* 1921 s. 47(d). I am satisfied the orders I propose to make are within power and designed to achieve the statutory purpose.

[5] Although, given the disposition of the appeal, it is unnecessary to rule on the appellant's argument that the respondent's answer to the notice to admit - "Not admitted" - is not allowed by the *UCPR* r. 389, I notice the appellant did not provide authority to the learned magistrate for the argument. *UCPR* r. 166, which governs denials and non-admissions in pleadings, does not provide persuasive guidance in the appellant's favour. Nonetheless, it would save further argument if the respondent did not use the same formulation in any fresh response to the notice.

[6] As to costs, each side seeks payment by the other. I will make no order as to the costs of the appeal. As the orders to be made amount to the appeal being allowed in part, it may be argued costs should follow the event. However, although the plaintiff/appellant has made a gain it was not because I was persuaded by the grounds of appeal. Also, the original application and the appeal would not have been necessary if the plaintiff had given notice under *UCPR* r. 389 before serving the Notice to Admit.

[7] There is still the matter of the reserved costs of the application for leave to appeal. Chowdhury DCJ dismissed the leave application on 2 December 2016 and reserved costs. I have read his Honour's reasons: [2016] QDC 306. The respondent submits the appellant should pay the costs of the application for leave on the indemnity basis because the respondent made clear, in correspondence prior to the leave hearing, that it was unnecessary. I have read the relevant correspondence. I glean the appellant's concern was that leave was required because the decision under appeal was not a final decision. I will not set out or spend any more time revealing the correspondence but

only say that, bearing in mind the explication of relevant principles by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Limited* (1993) 46 FCR 225, neither the correspondence nor the reasons, in my opinion, trigger an indemnity costs order.

[8] I will order that the appellant pay the respondent's costs of that application on the standard basis.

[9] Orders:

1. The appeal is allowed to the extent that I declare the notice to admit served by the plaintiff on the defendant on 6 July 2016 an effectual step;
2. The respondent has leave to reply afresh to the notice to admit or file and serve any application concerning the notice within 14 days of these orders.
3. The appellant is to pay the respondent's reserved costs of the application for leave to appeal on the standard basis.