DISTRICT COURT OF QUEENSLAND

CITATION:	*Workcover Queensland v Wallaby Group Limited & Anor* [2020] QDC 154
PARTIES:	**WORKCOVER QUEENSLAND** (Plaintiff) v **WALLABY GRIP LIMITED** (First Defendant) and **WALLABY GRIP (BAE) PTY LIMITED (IN LIQUIDATION)** (Second Defendant)
FILE NO/S:	437 of 2019
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court Brisbane
DELIVERED ON:	10 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	21 April 2020
JUDGE:	Richards DCJ
ORDER:	**1. Application to withdraw the deemed admissions to Questions 1 to 4 of the Notice to Admit Facts allowed.** **2. Questions 6 to 9 of the Notice to Admit Facts be struck out.** **3. Application to strike out paragraphs 15 and 16 of the respective defences is dismissed.** **4. Application for discovery adjourned to a date to be fixed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ADMISSIONS – WITHDRAWAL – where the lawyers for the first and second defendants received a notice to admit facts - where the lawyers for the first and second defendants inadvertently neglected to respond to the notices to admit facts within the required timeframe – where the

first and second defendant's lawyers sought confirmation from the plaintiff that Workcover Queensland would not rely on the notices to admit facts as they were objectionable – where the plaintiff confirmed they were deemed admissions – whether counsel for the first and second defendants are able to set aside the deemed admissions on the bases that the admissions are either too wide or matters of law

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where the applicant seeks to strike out paragraphs 15 and 16 of the respective defences – where the applicants argument turns on an interpretation of s 207B of the *Worker's Compensation and Rehabilitation Act* 2003 – where the applicants argue that any injury that materially contributes to the injury is covered by the section – where the determination of the interpretation of the Act will depend on the final findings of fact – whether relevant findings of fact can be determined prior to trial

Legislation

s 207B *Worker's Compensation and Rehabilitation Act* 2003

s 189 *Uniform Civil Procedure Rules* 1999

Cases

Ridolfi v Rigato Farms Pty Ltd (2001) 2 Qd R 455 at 459

COUNSEL: K F Holyoak for the Plaintiff

G W Diehm QC and T Moisidis for the first and second Defendants

SOLICITORS: BT Lawyers for the plaintiff

Zambra Legal for the first and Second Defendants

[1] The first and second defendants have filed an application asking that notices to admit facts served by the plaintiff and dated 19 August 2019 be set aside on the grounds that:

(a) paras 6 to 9 seek admissions of law and not fact;

(b) paras 1 to 5 are so ambiguous including with respect to the facts in issue on the pleadings as to make their use in the trial prejudicial to the efficient conduct of the litigation; and

(c) it is otherwise in the interests of justice to do so.

[2] Alternatively, they seek leave to withdraw their deemed admissions in respect of paras 1 to 4 and 6 to 9.

[3] The plaintiff seeks orders that paragraph 16 of the further amended defence of the first defendant be struck out and para 15 of the further amended defence of the second defendant be struck out and that a further application for discovery be adjourned to a date to be fixed.

THE ACTION

[4] Workcover Queensland has brought an action pursuant to s 207B(8) of the *Worker's Compensation and Rehabilitation Act* 2003 seeking to be indemnified by the defendants in respect of compensation paid by it to Stefanos Coveos for a condition of mesothelioma suffered by Mr Coveos as a result of work he performed at Bradford Kendall between 1987 and 1989 as a boilermaker in Queensland. There is no dispute that Mr Coveos suffers from mesothelioma and was paid $657,023.50 compensation by Workcover Queensland.

[5] Mr Coveos also worked for Ajax Fasteners in New South Wales from the mid 1960s until 1969 as a fitter and turner. It is alleged in the statement of claim that the first and second defendants supplied to both businesses asbestos rope and tape, that it was in the course of performing repair and maintenance on steampipes and furnaces that he dealt with materials containing asbestos manufactured and supplied by the first and/or second defendant and that in the course of that work he inhaled the asbestos that has caused the injury that resulted in the compensation paid by the plaintiff.

[6] The first defendant admitted that it manufactured, supplied and distributed engineering products in New South Wales some of which contained asbestos and it supplied and distributed engineering products in Queensland some of which contained asbestos. Further, the first defendant claims that it ceased operations on 30 September 1966. It denied that it knew or ought to have known asbestos was injurious to health, that inhaling even trivial quantities of asbestos could cause mesothelioma or that it knew mesothelioma was an incurable and terminal disease.

[7] The second defendant admits that it operated between 1 October 1966 and 31 December 1979 and at the time manufactured, supplied and distributed engineering

products in New South Wales and supplied and distributed engineering products in Queensland some of which contained asbestos. It admitted that it knew prolonged periods of heavy exposure to asbestos could cause respiratory problems, but denied that it knew that inhaling even trivial quantities of asbestos could cause mesothelioma and that mesothelioma was an incurable and terminal disease.

[8] Both defendants have denied that the plaintiff is entitled to indemnity under s 207B of the Act on the basis that there is no entitlement to compensation for Mr Coveos under the Act with respect to his New South Wales employment and no liability owed by them to Mr Coveos with respect to either the New South Wales or Queensland employment.

[9] The facts in issue between the plaintiff and the first defendant have been summarised by the first and second defendant's counsel as follows:

(a) whether the plaintiff in the course of his employment in New South Wales was exposed to asbestos dust from products manufactured, distributed etc., by the first defendant;

(b) whether the plaintiff in the course of his employment in Queensland was exposed to asbestos dust from products manufactured, distributed etc., by the first defendant;

(c) whether the first defendant owed Mr Coveos a duty of care;

(d) whether the first defendant breached the duty of care;

(e) whether the breach of the duty of care by the first defendant was the cause of the plaintiff's mesothelioma;

(f) whether Mr Coveos had an entitlement to compensation under the Queensland Act for injuries suffered in the New South Wales employment and whether s 207B(1) is otherwise engaged.

[10] With respect to the second defendant, counsel submits the key issue at the time of the notices to admit facts were:

(a) whether the plaintiff in the course of his employment in New South Wales was exposed to asbestos dust from products manufactured, distributed etc., by the second defendant;

(b) whether the plaintiff in the course of his employment in Queensland was exposed to asbestos dust from products manufactured, distributed etc., by the second defendant;

(c) whether the second defendant owed Mr Coveos a duty of care;

(d) whether the second defendant breached the duty of care;

(e) whether the breach of the duty of care by the second defendant was the cause of the plaintiff's mesothelioma;

(f) whether Mr Coveos had an entitlement to compensation under the Queensland Act for injuries suffered in the New South Wales employment and whether s 207B(1) is otherwise engaged.

NOTICE TO ADMIT FACTS

[11] On 19 August 2019, the lawyers for the first and second defendants received a notice to admit facts and were advised that instructions were being sought to strike out specific paragraphs in the amended defences. On 30 August 2019, an email was received asking for disclosure in relation to specified documents. On 14 November 2019 the defendants' solicitors realised that they had inadvertently neglected to respond to the notices to admit. They sent a letter to the plaintiff's lawyers arguing that the notices were objectionable and sought confirmation that Workcover Queensland would not rely on the notices to admit. Workcover Queensland replied that they regarded them as deemed admissions.

[12] The admissions, other than date changes, are identical between the first and second defendants. They are as follows:

1. That the defendants knew or ought to have known at all times after 1 January 1962 for the first defendant, and 1 September 1966 for the second defendant, that the products it manufactured, supplied, distributed and installed contained asbestos.
2. That the defendants knew or ought to have known at all times after 1 January 1962 for the first defendant, and 1 September 1966 for the second defendant, that inhaling asbestos was injurious to health.
3. The first defendant knew or ought to have known at all times after 1 January 1962 for the first defendant, and 1 September 1966 for the second defendant, that the inhalation of even trivial quantities of asbestos could cause mesothelioma.
4. The defendants knew or ought to have known at all times after 1 January 1962 for the first defendant, and 1 September 1966 for the second defendant, that mesothelioma was an incurable and terminal disease.

5. Mesothelioma is an indivisible injury.
6. Each inhalation of asbestos dust and fibre suffered by a person who contracts mesothelioma is a cause at law of the consequent mesothelioma.
7. Each inhalation by the worker of asbestos dust and fibre in New South Wales was a legal cause of the worker's mesothelioma.
8. The compensation paid by the plaintiff to the worker for his mesothelioma compensated the worker for the injury caused by inhalation of asbestos dust and fibre in New South Wales and in Queensland.
9. The plaintiff is entitled pursuant to s 207B(8) of the *Worker's Compensation and Rehabilitation Act* 2003 (WCRA) to recover compensation from a tort feasor whose negligence caused the worker to inhale asbestos dust and fibre in New South Wales notwithstanding the worker's injury was also caused by inhaling asbestos dust and fibre in Queensland.

[13] It is submitted by counsel for the first and second defendants that those deemed admissions should be set aside on the bases raised in the application.

THE APPLICATION TO SET ASIDE THE ADMISSIONS

[14] At the hearing of this matter I was asked to deal firstly with the application in relation to the admitted facts. The facts were deemed to be admitted pursuant to Rule 189 of the *Uniform Civil Procedure Rules* 1999 14 days after they were served. The application firstly deals with objections to the questions and secondly, in the alternative, asking for the court to exercise its discretion to withdraw the admissions.

[15] I will deal firstly with the discretion to withdraw the admissions.

[16] In *Ridolfi v Rigato Farms Pty Ltd*[1] where De Jersey J (as he then was) noted at [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 Brewing Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 and *Equuscorp Pty Ltd v Orazio* (1999) QSC 354.

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1 (2001) 2 Qd R 455 at 459.

> The charter of procedure contained in the *Uniform Civil Procedure Rules* 1999 cannot be approached on the basis that if important provisions are ignored, even if advertently (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 work of a very important procedural mechanism directed, through expediting cases and reducing costs, to promoting the interests of justice."

[17] In this case the explanation for the lack of response to the notice to admit facts is found in the affidavit of Christine Wearne, assistant general counsel for the first and second defendants. She notes that on 19 August 2019 the notice to admit facts was received and the letter enclosing that notice also advised instructions were being sought to strike out specific paragraphs in the amended defences. There was a further letter on 30 August seeking disclosure from the defendants and advising that instructions were being obtained to file an application to strike out parts of the defences. A letter was sent on 5 September advising that the defendants were seeking instructions. There were letters flowing back and forth through September to 10 November in relation to pleadings, particulars and disclosure. On 14 November it was discovered that the defendants had neglected to respond to the notices to admit. On 14 November the solicitor in charge of the case sent a letter to BT Lawyers seeking their advice as to whether they were relying on the notice to admit and they indicated that they were.

[18] Essentially the affidavit is to the effect that the solicitor with the conduct of the file did not appreciate that a failure to respond to the notice to admit facts within 14 days meant that there was deemed admissions. The senior supervising solicitor did realise that but she didn't appreciate the junior solicitor did not understand it, and as a result the notice was neglected.

[19] At the hearing of the application, the first and second defendants as applicants, have acknowledged that admissions in relation to questions 1 to 5 would be appropriate, but maintained their objection to the form of these particular admissions because

they are effectively too wide. They further submit that questions 6 to 9 inclusive contain matters of law and therefore cannot be admitted.

[20] The applicant first and second defendants submit that questions 6 to 9 of the notice to admit facts contain questions of law. I accept that. The respondent plaintiff argues that the matters of law could effectively be excised from the questions but in my view that would change the nature of the admissions and therefore the objection is properly made.

[21] In relation to questions 1 to 5, the plaintiff submits that in relation to those questions the questions of facts are said to be too vague and/or too wide. (I note however that the defendants have admitted question 5) In relation to question 3 in particular it is submitted that the term "trivial quantities" is undefined and undefinable. I accept that the term "trivial quantities" is difficult to define with certainty.

[22] In relation to the remaining questions I do not accept the proposition that they are too wide - any reply could have limited the admissions as to facts. I do however accept that the time when the defendants acquired the knowledge alleged in Questions 1 to 4 is likely to be crucial to the determination of liability.

In any event I accept that the discretion to withdraw the admissions is wide. The affidavit evidence establishes that the failure to reply to the notice was not because the defendants chose to ignore the notice but rather because of the poor file management of the solicitors. The case is not yet ready for trial and while strict proof of some of these matters will no doubt be the subject of further discussion, it is likely that the timing of these matters will remain in dispute. In all the circumstances, it is appropriate to exercise my discretion to allow the defendants to withdraw the deemed admissions to questions 1 to 4 of the notice to admit facts. Questions 6 to 9 are struck out.**APPLICATION TO STRIKE OUT**

[23] The applicant's argument to strike out paragraphs 15 and 16 in the respective defences, turns on an interpretation of s 207B of the *Worker's Compensation and Rehabilitation Act* 2003. Section 207B of the Act reads as follows:

> "**207B Insurer's charge on damages for compensation paid**
>
> (1) This section applies to—
>
> (a) an injury sustained by a worker in circumstances creating—

(i) an entitlement to compensation; and

(ii) a legal liability in the worker's employer, or other person, to pay damages for the injury, independently of this Act; and

(b) damages that an employer is not indemnified against under this Act.

(2) An amount paid as compensation to a person for an injury, to which there is an entitlement to payment of damages at a time or for a period before the person becomes entitled to payment of damages by an employer or another person, is a first charge on any amount of damages recovered by the person to the extent of the amount paid as compensation to the person.

(3) Subsection (2) applies to compensation paid under chapter 4A only if the damages include treatment, care and support damages.

(4) An employer or other person from whom the damages are recoverable must pay the insurer the amount of the first charge or, if the damages are not more than the amount of the first charge, the whole of the damages.

(5) Payment to the insurer under subsection (4), to the extent of the payment, satisfies the liability of the employer or other person for payment of the damages.

(6) A person cannot settle, for a sum less than the amount that is a first charge on damages under subsection (2), a claim for damages had by the person independently of this Act for an injury to which there is an entitlement to payment of damages without the insurer's written consent.

(7) If, without the insurer's consent, a settlement mentioned in subsection (6) is made, then to the extent that the damages recovered are insufficient to meet all payments due to the insurer under this section—

(a) the insurer is entitled to be indemnified by the employer or other person who is required by the settlement to pay the damages; and

(b) to that end, the insurer is subrogated to the rights of the person who has sought the damages, as if the settlement had not been made.

(8) If a person who has received compensation has not recovered, or taken proceedings to recover, damages for the injury from another person, other than the worker's employer—

(a) the insurer is entitled to be indemnified for the amount of the compensation by the other person to the extent of that person's liability for the damages, so far as the amount of damages payable for the injury by that person extends; and

(b) to that end, the insurer is subrogated to the rights of the person for the injury.

(9) Payment made as indemnity under subsection (8), to the extent of the payment, satisfies the person's liability on a judgment for damages for the injury.

(10) In addition to all rights of action had by the insurer to give effect to its right to indemnity under this section, all questions about the right and the amount of the indemnity may, in default of agreement, be decided by an industrial magistrate if all persons affected by the indemnity consent.

(11) In this section—

damages includes damages under a legal liability existing independently of this Act, whether or not within the meaning of section 10."

[24] The argument turns in part on an interpretation of ss (1) of s 207B, namely whether the circumstances creating the entitlement to compensation and the legal liability in the worker's employer or other person to pay damages for the injury independently of the Act can arise from different circumstances. On behalf of the applicant plaintiff, it is argued that they can, that any injury that materially contributes to the injury is covered by the section. For the first and second defendants, it is argued that, firstly, the entitlement to compensation was compensation paid solely for the injury in Queensland, and secondly, the circumstances creating that entitlement to

compensation must be the same as the legal liability of the worker's employer or other person liable to pay damages for the injury independently of the Act.

[25] For the purpose of this argument, I will accept that the plaintiff can prove that:

(i) the first and second defendants supplied asbestos related material to the workplace in New South Wales where the worker, Mr Coveos, worked from 1962 to 1969 as a fitter and turner.

(ii) Mr Coveos further worked in Queensland as a boilermaker at Runcorn between 1987 to 1989 for Bradford Kendall.

(iii) He was a worker for the purposes of the *Worker's Compensation and Rehabilitation Act* 2003 and he suffered an injury as a consequence of exposure to asbestos during his employment, namely malignant mesothelioma.

(iv) he had not taken proceedings against the first and second defendants to recover damages in respect of his injuries

(v) that worker's compensation was paid on 14 April 2014 to Mr Coveos in the sum of $657,023.50.

(vi) that Workcover is entitled to be indemnified for the sum of the compensation paid pursuant to s 207B if another party other than the employer owes a legal liability to Mr Coveos due to this injury

[26] The plaintiff/applicant sums up the defence of the first defendant, para 16 and the second defendant, para 15, as follows:

"1. The New South Wales employment was not employment for which compensation was payable (under the Qld Act) in respect of any injury arising from employment in New South Wales .

2. The application for compensation made by the worker and accepted by the plaintiff was solely for the injury caused in Queensland in the Queensland employment.

3. In the premises, the compensation paid was for injury in the Queensland employment and not from New South Wales employment.

4. The plaintiff is therefore not entitled to commence proceedings against either WGL or BAE under s 207B(8) in relation to the New South Wales employment as compensation was not payable and was in fact not paid by the plaintiff to the worker in relation to the period of New South Wales employment."

[27] The applicant submits that it is immaterial for the purposes of the application whether or not the plaintiff can prove that the asbestos the worker was exposed to in Queensland was asbestos contained in products made by either of the defendants. This is because there is a statutory right of indemnification under s207B which is premised on the person, who has the injury, and who has received the compensation, not having taken proceedings to recover damages for the injury from another person. It was submitted, the premise of the defences is that even if the whole of s 207B(1) is satisfied, it relates only to compensation paid from Queensland employment. The plaintiff/applicant claims that the act allows for Workcover Queensland to be compensated by any party that made a material contribution to the injury for which compensation was paid regardless of whether it was associated with the employment in Queensland. This, it is submitted, is because the worker could have sued the defendant in New South Wales in the Dust and Diseases Tribunal and recovered damages for the whole of his injury.

[28] The applicant claims that it is accepted that mesothelioma is an indivisible injury. It is an injury which is, in effect, cumulative and consequential and in those circumstances a defendant who has tortiously contributed to the injury has caused the injury, loss or disease and is liable in full for the injury. It is submitted that if each exposure made a material contribution, then causation is established, even though individually the exposure was neither sufficient nor necessary. It is sufficient that each exposure made a material contribution by way of a substantial, successive and cumulative effect.

[29] The argument hinges on two propositions. Firstly, that the compensation was paid for the injury in New South Wales and Queensland. This is based on the assumption that the New South Wales employment materially contributed to the injury based on the applicants preferred interpretation of the phrase "indivisible injury". Secondly, that s 207B(1) applies.

[30] The defendants submit that the issues that must be considered in the case are whether the mesothelioma exposure in the Queensland employment was caused by exposure to products manufactured and/ or supplied by either of the defendants, whether it was also caused by exposure to asbestos through products of the defendants in the New South Wales employment and whether the liability at common law of one or other of the defendants in the New South Wales employment arises in the circumstances that led to liability under s207B.

[31] The defendants have not admitted that Mr Coveos was entitled to compensation for his injury in Queensland. Even if he was so entitled the defendants submit that the compensation has to be for an injury sustained in circumstances dictated by s207B(1). Injury is defined in s32 of the Act as "personal injury arising out of or in the course of, employment if the employment is a significant contributing factor to the injury". It is submitted that if the plaintiff does not prove that the compensation was paid for an injury caused in the course of the Queensland employment then the plaintiff cannot seek indemnity from the first and/or the second defendant based on the supply by the defendants [if it can be proven] of asbestos products to the New South Wales employer. This proposition follows from the provisions of s113 of the Act that the compensation is only payable for employment that is connected to Queensland.

[32] The defendants further argue that the provisions of s207B(1) do not in any event cover situations such as this one where there is an injury which has by way of material contribution been caused by an event which occurred at a time removed from the event which led to the compensation.

[33] The plaintiff submits that because this injury is one which is a cumulative injury and the event is in effect a culmination of the effect of all of the exposure to asbestos over a long period of time then s207B(1) should be read to cover that situation. The plaintiff argues that this is not the usual case where the injury is caused by a single event but rather by the accumulation of circumstances caused by the employment of the worker bringing him into contact with the asbestos fibres.

[34] The defendants maintain that even if the Act can be interpreted in that way there must still be an entitlement to compensation in Queensland together with a legal liability in the employer or other person to pay damages for the injury.

[35] Whilst the Act may be open to the interpretation suggested by the plaintiff, the determination of that interpretation will in my view depend on the final findings of fact. Those questions of law should not be decided until the matter has been properly ventilated at trial. In those circumstances, it is in my view, appropriate to leave the determination of this matter until there can be some final determination of the facts at trial.

[36] Accordingly, the application to strike out paragraphs 15 and 16 of the respective pleadings is dismissed. The application is otherwise adjourned to the registry.