

DISTRICT COURT OF QUEENSLAND

CITATION: *Szendrey & Anor v Isles* [2020] QDC 53

PARTIES: **STEVEN JAMES SZENDREY**
(first plaintiff/applicant)

and

GAVIN STANLEY NEAL
(second plaintiff/applicant)

and

STEVEN JAMES ISLES
(defendant/respondent)

FILE NO: D138 of 2019

DIVISION: Civil

PROCEEDING: Application

ORIGINATING
COURT: Cairns

DELIVERED ON: 9 April 2020

DELIVERED AT: Cairns

HEARING DATE: 14 February 2020

JUDGE: Morzone QC DCJ

- ORDER:
- 1. The applications are adjourned to 9:00 am on 21 August 2020;**
 - 2. The defendant must file and serve by 4:00 pm 21 July 2020 an amended or a separate application (Form 9) applying for leave to withdraw admissions to paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14 and/or 15 of the statement of claim (as applicable);**
 - 3. The defendant must file and serve by 4:00 pm 21 July 2020 an affidavit (Form 46) sworn by oath or affirmation in support of his application(s), which must:**
 - (a) Explain on oath by reference to a proposed draft defence (to be prepared and exhibited), and any other documents:**
 - (i) For each denial (if any) in the defendant's draft defence - the reasons for contesting each separate allegation and his belief as to why the allegation cannot be admitted.**

- (ii) For each non-admission (if any) in the defendant's draft defence -
 - A. The reasonable inquiries he has made to find out whether the allegation is true or untrue; and
 - B. Why he remains uncertain as to the truth or falsity of the allegation.
- (b) Exhibit the proposed draft defence (Form 17) upon which he intends to rely to defend the proceeding, which must:
 - (i) Plead separately and directly to each allegation in the plaintiff's statement of claim filed 8 August 2019;
 - (ii) For each pleaded denial or non-admission of an allegation of fact, provide a direct explanation for the defendant's belief that the allegation is untrue or cannot be admitted;
 - (iii) Must comply with the rules for pleadings, especially: rr 149, 150(2) & (4), 151, 152, 153, 154, 157, 160, 165(1), 166 and 382(7) of the *Uniform Civil Procedure Rules 1999* (Qld);
 - (iv) Mark up all amendments by lining through those parts of the original defence filed 8 October 2019 that are deleted and underlining those parts of that defence that are added to the amended document.
- (c) Exhibit any other relevant documents relied upon to support the explanations in the affidavit.

4. Costs reserved.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – APPLICATION – ADMISSIONS – WITHDRAWAL – where plaintiff applies for judgement – where the defendant cross-applies for leave to file an amended defence – where an amended defence seeks to withdraw express and deemed admissions – whether adequate explanation for how admissions came to be made – where defendant is of ill health – whether adequate explanation for delay – where possible merit in defence and prospect of

evidence enlivening a serious question to be tried – where in the interests of justice more time and prescription of supporting a deficient application – costs reserved.

Legislation

Uniform Civil Procedure Rules 1999 (Qld) r 190, r 188, r 166

Cases

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175

du Boulay v Worrell [2009] QCA 63

Hanson Construction Materials v Davey [2010] QCA 246

Mohareb v Lambert & Rehbein (SEQ) Pty Ltd [2010] QSC 126

Ridolfi v Rigato Farms [2001] 2 Qd R 455

COUNSEL: M Jonsson QC for the plaintiff/applicant
 SOLICITORS: Connolly Suthers Lawyers for the plaintiff/applicant
 The defendant/respondent appeared self-represented

- [1] The plaintiff applies for judgment for his claim of defamation, with damages to be assessed, in reliance upon admissions including deemed admissions. The defendant who is self-represented and unwell cross-applies for leave to file an amended defence with the effect of withdrawing express and deemed admissions.
- [2] The proceedings involve publications complained of by the plaintiff arising from the defendant's posts on Facebook. The statement of claim pleads the allegations of the essential facts in the conventional way. However, the defendant's current, and proposed defence, is substantially contained in his response to paragraph 5 of the statement of claim (although well beyond the bounds of that allegation), followed by bare denials for later allegations.
- [3] For present purposes I have treated the defendant's application for leave to file an amended defence as, including by necessary implication, an application withdrawing express and deemed admissions.
- [4] In short, the defendant's defence and proposed defence remains patently unsatisfactory despite the opportunity to revisit the pleading and apply for leave to withdraw admissions. The plaintiff maintains their entitlement to summary judgment in reliance upon the admissions and deemed admissions pursuant to rule 190 of the *Uniform Civil Procedure Rules 1999 (Qld)*.
- [5] In all of the circumstances and gleaning some semblance of the prospect of merit in his defence, I have decided to allow the defendant a further opportunity to make good his defence and applications.

Deemed admissions for non-compliance with rules for pleading

- [6] First it's necessary to identify the relevant admissions.
- [7] The plaintiff's statement of claim pleads the material facts relied upon to support the cause of action as prescribed by the rules of pleading:
1. In paragraph 5 they plead the publication they complain of;
 2. In paragraph 7 they plead the imputations they maintain are carried by the publication;
 3. In paragraph 8 they plead the identification of the plaintiffs within the publications complained of;
 4. In paragraphs 9 and 11 they plead that the imputations said to have been carried are defamatory of each of the plaintiffs;
 5. In paragraphs 10 and 12 they plead that the publication of the defamatory material has caused damage for each plaintiff;
 6. In paragraphs 13 to 15 they plead matters bearing upon the assessment of damage.
- [8] In both the original filed defence and in his proposed amended defence, the defendant unduly focuses on his asserted "facts in defence of the claim 'Matter complained of' (5)" citing a reference to the plaintiffs' allegations of the act of publication complained of in paragraph 5 statement of claim.
- [9] Paragraph 5 of the statement of claim sets out those material parts of what the plaintiffs maintain was actually published on the defendant's Facebook page. The defendant does not seem to challenge or question the substance of the particular allegation in paragraph 5, but instead he goes well beyond the scope of paragraph 5. He goes to matters extraneous to that paragraph to the effect that the publications are not defamatory, or not defamatory of the plaintiffs, or by reliance upon a broader contextual tirade. That is, he seems to conflate his response about the "matter complained of" with his response to allegations about the imputations carried, and their defamatory quality, subsequently addressed in later paragraphs 7, 9 and 11 of the plaintiffs' statement of claim. The defendant fails to separately and expressly plead to these paragraphs in his first defence.
- [10] In these circumstances, by operation of rr 166(4) and (5), the defendant is taken to have admitted an allegation where his denial or non-admission of the allegation is not accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted.
- [11] Rule 166 regulates express pleading of non-admissions and denials, and also deemed admissions imposed by operation of law in these terms (relevant here):
- (1) 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—
 - (a) the allegation is denied or stated to be not admitted by the opposite party in a pleading; or
 - (b) rule 168 applies.
 - (2) ...
 - (3) A party may plead a non-admission 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 non-admission 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 non-admission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted.
- (5) If a party's denial or non-admission of an allegation does not comply with sub-rule (4), the party is taken to have admitted the allegation.
- (6) A party making a non-admission 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) A denial contained in the same paragraph as other denials is sufficient if it is a specific denial of the allegation in response to which it is pleaded.”
- [12] The defendant's defective responses in breach of r 166(4)¹ constitute deemed admissions by virtue of r 166(5) to the effect that:
1. The imputations maintained by the plaintiffs are carried by the publication as pleaded in paragraph 7 of the statement of claim; and
 2. The imputations said to have been carried are defamatory of each of the plaintiffs as pleaded in paragraphs 9 and 11 of the statement of claim.

- [13] In the absence of the court's leave to withdraw these admissions, the plaintiffs seek judgment in reliance upon the admissions and deemed admissions pursuant to rule 190 of the *Uniform Civil Procedure Rules 1999* (Qld).

Application for leave to withdraw admissions

- [14] Faced with the plaintiffs' application for summary judgement, the defendant who is self-represented and unwell, cross-applies for leave to file an amended defence with the effect of withdrawing express and deemed admissions.
- [15] Pursuant to r 188, a party may withdraw any admission made in a pleading only with the court's leave. Leave is required regardless of whether an admission is expressly made, or whether an allegation is taken to be admitted by operation of the rules. It is incumbent on him to demonstrate that the proposed amended pleading is viable in compliance with rr 166(3) and (4).
- [16] Leave to withdraw admissions is not given merely for the asking.² The defendant bears the onus of persuading the court that there is a genuine dispute that, in all the circumstances, he should be permitted to re-enliven. This is an indulgence granted to a party who is in default in the exercise of the court's discretion having regard to the following considerations:³
1. Is there an adequate explanation for how the admissions came to be made?

¹ Affidavit of Mr Fraenkel, paras 11, 20, 23, 29, 35, 41, 47, 53, 59, 70, 76, 82 and 86.

² *Ridolfi v Rigato Farms* [2000] 2 Qd R 455, 461 [32] (per Williams J).

³ *Hanson Construction Materials v Davey* [2010] QCA 246 at [10] per Chesterman JA (Muir JA and Applegarth J agreeing).

2. Is there an adequate explanation for any delay in bringing the application to withdraw the admissions?
3. Is there a sufficient evidentiary basis for contesting the allegations which currently stand admitted?

Is there an adequate explanation for how the admissions came to be made?

- [17] The cause of the admissions is plainly a manifestation of the defendant's lay understanding and conduct of the proceeding.
- [18] It is often difficult for an unrepresented litigant to negotiate the procedural rules of court. This is all the more challenging when ignorance of procedural matters is overlaid with emotional reaction. However, an unrepresented litigant is as much bound by the rules of court as any other litigant.⁴
- [19] Even so, I think he has adequately explained how the admissions came to be made, which can be gleaned by his material, efforts to amend the pleading and his submissions.

Is there an adequate explanation for any delay in bringing the application to withdraw the admissions?

- [20] All parties are subject of the implied undertaking to the court and to each other to proceed in an expeditious way.⁵
- [21] I accept that the defendant is struggling with ill health. I accept that he continues to be limited by ongoing medical concerns which include chronic pain, surgeries, medical procedures and requirement for further surgeries arising from a serious car accident which occurred on 28 September 2018. He points to these matters and his shoulder surgery on 10 October 2019 as rendering him medically incapacitated for work until after 25 October 2019. His efforts have continued to be marred by his legal and procedural illiteracy, emotional reaction and his ill health and incapacity to attend to the task or court.
- [22] I am satisfied that the defendant has unconventionally, but genuinely done his best to make a timely application to withdraw admissions.

Is there a sufficient evidentiary basis for contesting the allegations which currently stand admitted?

- [23] The question then is whether the defendant has shown by affidavit a sufficient evidentiary foundation for contesting the allegations.⁶
- [24] The answer is, he hasn't. The state of the pleading, his proposed amended pleading, and state of supporting evidence, falls well short of what he needs to show the requisite evidentiary foundation for contesting the allegations.

⁴ Compare *du Boulay v Worrell* [2009] QCA 63, at [69]; *Mohareb v Lambert & Rehbein (SEQ) Pty Ltd* [2010] QSC 126, at [35].

⁵ *Uniform Civil Procedure Rules 1999* (Qld), s 5(3).

⁶ *Hanson Construction Materials v Davey* [2010] QCA 246 at [10] per Chesterman JA (Muir JA and Applegarth J agreed). *Ridolfi v Rigato Farms* [2000] 2 Qd R 455, 461 [32] (per Williams J).

- [25] It is clear that these circumstances are plainly borne out by the defendant's relative inexperience and ignorance of the complexities and nuances of pleading in a defamation case. This is why he has received significant indulgences to address the deficiencies in his pleading and cross apply.
- [26] I accept that the defendant continues to struggling with ill health arising from his serious car accident which occurred on 28 September 2018, continuing pain, and rehabilitation following his shoulder surgery on 10 October 2019.
- [27] The defendant initially failed to file a timely defence, and faced a request for default judgment. He received the court's reprieve to belatedly file a defence on 8 October 2019. That defective pleading was met with the plaintiffs' application filed 10 October 2019 for summary judgment in reliance upon deemed admissions. The defendant seemed to realise his jeopardy and he cross-applied to amend his pleading on 25 November 2019. He applies for leave to file an amended pleading, which I accept also involves the need for the court's leave to withdraw admissions to facilitate the amendments. When the applications came before the court on 6 December 2019, the defendant had the benefit of the plaintiffs' counsel's outline of argument and oral submissions. He received a two month reprieve until 14 February 2020 to address his defective pleading, take advice, prepare a competent pleading and file material in support of his application to withdraw admissions and amend the pleading. He has been put on notice with the benefit of the plaintiffs' counsel's detailed and informative outline of argument. When the matter returned to court on 14 February 2020, the defendant did not seek to advance any substantially new or different pleading, but has made some attempt to identify and expose what he perceives as the real issues for determination in the litigious controversy. Despite having more than one attempt to address the shortcomings in his defence, they fall well short of the mark.
- [28] At the first return date of these applications, whilst the defendant was not granted leave to re-plead, he was encouraged to reconsider his position, seek advice, consider the way to properly plead and consolidate his application.
- [29] Despite the significant indulgences, and time to deal with the applications, the defendant has not provided any sworn affidavit evidence verifying any material counterfactual. However, has made a second and third attempt to re-plead his defence in support of his application by delivering copies of defendant amended defences to the registry on 5 February 2020 and 7 February 2020. These draft amended defences do not advance the matter much since the defendant has retained the conflated response to the "matters complained of" and then merely pleads bare non-admissions and denials for the later paragraphs of the statement of claim. It seems the defendant inferentially relies upon the diatribe in his first paragraph and subparagraphs as sufficient explanation for his belief that the allegation cannot be admitted.
- [30] It is not enough to support a non-admission with a bald denial or merely assert that a dispute exists.⁷ And the defendant's attempts are not sufficient to qualify as a direct explanation. He may only plead an effective denial if he can directly explain his belief that the particular allegation in the subsequent paragraphs of the statement of

⁷ *Ridolfi v Rigato Farms* [2001] 2 Qd R 455 at 460 per McPherson JA.

claim are untrue. Therefore, in the strict sense, his filed pleading (and his later draft) remain fatally flawed.

- [31] The court ought apply the rules with the objective of avoiding undue delay, expense and technicality and is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.⁸ In that way, the rules are the mere handmaidens of justice and the level of persuasive onus ought properly be commensurate with the nature and circumstances of each case.⁹
- [32] It is with this in mind that I have tried to glean any real prospect of a meritorious defence, and the prospect granting of leave to withdraw an admission, if properly supported.¹⁰
- [33] I have also considered the defendant's misplaced discursive narrative and commentary about other facts or circumstances in his purported response to paragraph 5 of the statement of claim to glean some merit in his application. It seems to me that the content does indicate some semblance of the prospect of evidence tending to enliven a serious question to be tried in defence of the proceeding. Doing the best I can, it seems to me that the defendant's original defence discloses a genuine dispute about:
1. Narrowing the scope of the defamatory material of and concerning the first and second plaintiff, and alleged imputations.
 2. Reliance the common law defence of truth or justification, and the defence of justification pursuant to s 25 of the *Defamation Act 2005* (Qld).
 3. Asserting lawful excuse perhaps in reliance upon defence of qualified privilege at common law and/or under s 30 of the *Defamation Act 2005* (Qld) conveying information about police misconduct and/or corruption, in the public interest, interest to the confined readership and the defendant believed so, his conduct was reasonable in the circumstances, and he was in a position to disseminate and perceived a social duty to enable public discussion in the public interest.
 4. Reliance upon the defence of fair comment at common law and/or honest opinion under s 31(1) of the *Defamation Act 2005* (Qld) the words of the publication expression of opinions of the defendant rather than statements of fact; related to matters of public interest; based on proper material and/or material that was substantially true; and honestly held.
 5. Entitlement, nature and scope of damages.
- [34] Therefore, despite his uncongenial approach I do see merit in the defendant's application to support the prospect of this court exercise of the indulgence inevitably associated with a grant of leave to withdraw an admission.¹¹ In these unusual circumstances, I think the court should permit the defendant a further opportunity to consolidate his application to enable a fair assessment of its merits whilst facilitating just and expeditious resolution of the real issues. This may result in a more eloquent, informed and refined draft pleading narrowing the genuine dispute for a jury trial, and for him to properly show by affidavit a sufficient evidentiary foundation for contesting the allegations. Again, the sufficiency of any

⁸ *Uniform Civil Procedure Rules 1999* (Qld), s 5(1) & (2).

⁹ Cf. *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, French CJ at [14], and Gummow, Hayne, Crennan, Kiefel and Bell JJ at [82].

¹⁰ *Ridolfi v Rigato Farms* [2001] 2 Qd R 455 at 459, para [20].

¹¹ *Ridolfi v Rigato Farms* [2001] 2 Qd R 455 at 459, para [20].

evident belief must be judged in light of the particular allegation, and some allegations do not readily lend itself to tangible explanation.

Interim disposition of the proceedings

- [35] To that end, it is both prudent and reasonable, that the defendant be subject to prescriptive direction about his applications, well knowing of the continuing prospect of summary judgment.
- [36] I am also cognisant of the significant challenges facing the defendant with his ongoing ill health, the challenges presented by the COVID-19 pandemic on him and generally, and the next practicable date for the applications to return before me.
- [37] The plaintiffs will be entitled to costs of and incidental to the applications and costs thrown away by the adjournments. So that all costs can be consolidated, I will reserve costs.

Conclusion

- [38] For these reasons, I make the following orders:
1. The applications are adjourned to 9:00 am on 21 August 2020;
 2. The defendant must file and serve by 4:00 pm 21 July 2020 an amended or a separate application (Form 9) applying for leave to withdraw admissions to paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14 and/or 15 of the statement of claim (as applicable);
 3. The defendant must file and serve by **4:00 pm 21 July 2020** an affidavit (Form 46) sworn by oath or affirmation in support of his application(s), which **must**:
 - (a) Explain on oath by reference to a proposed draft defence (to be prepared and exhibited), and any other documents:
 - (i) For each denial (if any) in the defendant's draft defence - the reasons for contesting each separate allegation and his belief as to why the allegation cannot be admitted.
 - (ii) For each non-admission (if any) in the defendant's draft defence -
 - A. The reasonable inquiries he has made to find out whether the allegation is true or untrue; and
 - B. Why he remains uncertain as to the truth or falsity of the allegation.
 - (b) Exhibit the **proposed draft defence** (Form 17) upon which he intends to rely to defend the proceeding, which **must**:
 - (i) Plead separately and directly to each allegation in the plaintiff's statement of claim filed 8 August 2019;

- (ii) For each pleaded denial or non-admission of an allegation of fact, provide a direct explanation for the defendant's belief that the allegation is untrue or cannot be admitted;
 - (iii) Must comply with the rules for pleadings, especially: rr 149, 150(2) & (4), 151, 152, 153, 154, 157, 160, 165(1), 166 and 382(7) of the *Uniform Civil Procedure Rules 1999* (Qld);
 - (iv) Mark up all amendments by lining through those parts of the original defence filed 8 October 2019 that are deleted and underlining those parts of that defence that are added to the amended document.
- (c) Exhibit any other relevant documents relied upon to support the explanations in the affidavit.

4. Costs reserved.

Judge Dean P Morzone QC