DISTRICT COURT OF QUEENSLAND

CITATION: *Logan v GBR Helicopters & Ors; Grant v GBR Helicopters & Ors; Murray v GBR Helicopters & Ors (No. 2)* [2021] QDC 239

PARTIES:

PETER JAMES LOGAN
(Plaintiff)
v
GBR HELICOPTERS PTY LIMITED (ACN 143 159 531)
(Defendant)
AND
ERGON ENERGY CORPORATION LIMITED (ACN 087 646 062)
(First Third Party)
AND
CAIRNS REGIONAL COUNCIL
(Second Third Party)
88/13

JOHN GEOFFREY MURRAY
(Plaintiff)
v
GBR HELICOPTERS PTY LIMITED (ACN 143 159 531)
(Defendant)
AND
ERGON ENERGY CORPORATION LIMITED (ACN 087 646 062)
(First Third Party)
AND
STATE OF QUEENSLAND
(Second Third Party)
92/13

EARL DOUGLAS GRANT
(Plaintiff)
v
GBR HELICOPTERS PTY LIMITED (ACN 143 159 531)
(Defendant)
AND
ERGON ENERGY CORPORATION LIMITED (ACN 087 646 062)
(First Third Party)
AND
STATE OF QUEENSLAND
(Second Third Party)
93/13

FILE NO:	88/13, 92/13 and 93/13
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Cairns District Court
DELIVERED ON:	23 September 2021 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2021
JUDGE:	Porter QC DCJ
ORDERS:	**1. The application filed 9 September 2021 be dismissed; and** **2. The Applicant/First Third Party pay the costs of the application on the standard basis.**
CATCHWORDS:	CIVIL PROCEDURE – PLEADINGS AND AMENDMENT – AMENDMENT – ORIGINATING PROCESS AND PLEADINGS – QUEENSLAND – where Ergon seeks leave under rule 188 of the *Uniform Civil Procedure Rules* 1999 (Qld) to withdraw an admission – where Ergon has admitted that the injury to each plaintiff is within the scope of the Civil Aviation (Carriers' Liability) scheme – where Ergon seeks to withdraw that admission – where Ergon alleges that the admission of law was incorrect – whether leave is required to withdraw an admission of law – whether leave to withdraw the admission should be granted
LEGISLATION:	*Civil Aviation Act* 1988 (Cth), ss. 27, 28BA, 28BI *Civil Aviation (Carriers' Liability) Act* 1964 (Qld), s. 4 *Civil Aviation (Carriers' Liability) Act* 1959 (Cth), ss. 21A, 26, 27, 41E, Parts IV and IVA *Law Reform Act* 1995 (Qld), s. 6 *Uniform Civil Procedure Rules* 1999 (Qld), rr 5, 166, 188
CASES:	*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 *Brannock v Jetstar Airways Pty Ltd* (2010) 273 ALR 391 *Endeavour Energy v Precision Helicopters Pty Ltd* [2015] NSWCA 169

Ridolfi v Rigato Farms [2001] 2 Qd R 455

South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312.

COUNSEL: S. McLeod QC and S. Lumb for the Applicant/First Third party in each proceeding

R. Ashton QC and R. Ivessa for the Respondent/Defendant in each proceeding

SOLICITORS: Allens for the Applicant/First Third party in each proceeding

GSG Legal for the Respondent/Defendant in each proceeding

[1] This an application for leave to withdraw an admission brought by Ergon Energy Corporation Limited (**Ergon**) in three proceedings (proceedings 88/13, 92/13, and 93/13) filed in the Cairns registry of this Court in 2013. Leave is sought to withdraw the admission under Rule 188 *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**). The considerations that inform the exercise of that discretion are articulated in *Ridolfi v Rigato Farms*[1] and are well-known. The considerations ordinarily identified as relevant to the exercise of the discretion are how and why the admission came to be made, the evidence surrounding the issue the subject of the admission and whether there is a real dispute about the admission, any delay in making the application for leave and any explanation for that delay, and prejudice to any party.

[2] While those factors are ordinarily relevant, that does not confine the scope of the matters which might be relevant to the discretion to give leave. Further, one consideration might be more important than another in a particular case or there might, in a particular case, be matters other than those which inform the exercise of the discretion.

[3] Also to be considered are the principles in Rule 5 UCPR, noting that the purpose of the Rules (including leave to withdraw admissions) is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. Those Rules also identify that a party impliedly undertakes to the Court and to the other parties to proceed in an expeditious way.

[4] I mention those broader considerations because of the context in which this application is brought. The three proceedings in which the current application is brought are referred to, by the parties involved in these and two related proceedings, as the Passengers Proceedings. The Passengers Proceedings comprise claims by three individual passengers arising out of the tragic crash of a helicopter which flew into power lines near Cairns in 2011 while conducting aerial surveying of miconia weeds. In that accident, three passengers, Messrs Logan, Murray, and Grant, were injured, the pilot Mr Rose was injured, and the helicopter was substantially damaged or destroyed. Mr Rose, the owner of the helicopter, and the

[1] [2001] 2 Qd R 455.

three passengers are the plaintiffs in five separate proceedings in this Court, all of which arise out of that tragic event. Orders have been made for the proceedings to be heard together.

[5] In about May this year, I directed that all five proceedings be transferred to Brisbane for case management. The proceedings are listed for trial in early May next year in Cairns. There have been a number of directions hearings directed to finalisation of the pleadings in each proceeding, notwithstanding they have been on foot for between five and eight years, with a view then to setting trial directions so the trial can proceed.

[6] I make those observations because there is a very substantial public interest in this trial proceeding on the dates that have been allocated in Cairns next year, there is a very substantial interest of every party involved in these proceedings that that occur, and considerations of public interest identified in *Aon Risk Services Pty Ltd v Australian National University*,[2] and other cases, loom very large in this particular case, especially bearing in mind (meaning no disrespect to anybody) that apart from the settling of the plaintiffs' claims in the Passengers Proceedings and the making of an order that the matters be heard together, no realistic progress had been made in getting the matters to trial for some five years.

[7] Messrs Logan, Murray, and Grant have settled their claims against GBR, the holder of the Air Operator's Certificate (the **AOC**), who was operating the helicopter on the fateful day. Those proceedings continue by GBR against Ergon.

[8] Messrs Logan, Murray, and Grant asserted entitlement to damages for their injuries on a strict liability basis, based on the statutory schemes comprised in the Commonwealth and Queensland *Civil Aviation (Carriers' Liability) Acts*[3] (the **CACL scheme**). GBR, as the operator under the AOC, admitted its liability based on the application of that statutory scheme. Subsequently, about a month later, GBR issued third party notices directed to Ergon. They sought contribution under s. 6 of the *Law Reform Act* 1995 (Qld) (**LRA**) in each proceeding. They asserted an entitlement to contribution against Ergon because of negligence allegedly by Ergon in its management, marking, and so on, of the powerlines into which the helicopter flew. The three proceedings are relevantly identical for the purposes of this application, so I will, for convenience, refer to the Logan proceeding in the balance of this judgment, though the comments apply to the other two proceedings.

[9] Strangely, that third party notice in the Logan proceeding sought contribution or indemnity under the LRA, not only in respect of the injuries to Mr Logan, but also in respect of a claim for the damage to the helicopter itself. Mr Ashton QC, who appeared for GBR today, was not able to work out why it was done that way and nothing turns on it.

[10] Importantly, Ergon defended the third party notice and statement of claim. It did not admit any specific allegation that Mr Logan was entitled to claim damages under the CACL scheme (largely, it seems, because that was not specifically

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[2] (2009) 239 CLR 175.
[3] See *Civil Aviation (Carriers' Liability) Act* 1959 (Cth); *Civil Aviation (Carriers' Liability) Act* 1964 (Qld).

alleged), but what Ergon did do was positively plead, in response to the claim for relief contribution, that the carriage was carriage under that scheme but that, for that reason, contribution was not available.

[11] There have subsequently been third party proceedings by Ergon against Cairns Regional Council and the State of Queensland, but those pleadings need not trouble us.

[12] The situation then was, as at 2013, that while Ergon had not admitted in a formal sense that the CACL scheme applied, it did positively assert that was so in its pleading.

[13] As I have said, the only real progress in the proceedings was the settlement of the passenger plaintiffs' claims against GBR in the Passengers Proceedings. Mr Gray-Spencer, solicitor for GBR, has been continuously involved from the start of these proceedings and tendered advice to the insurers who stand behind GBR. He swears that when he gave advice to settle those claims, he acted on the basis that all parties accepted that the CACL scheme applied, that the passengers were all plaintiffs within that regime and that there was no common law liability of GBR.

[14] I observe, at this point, that the second two propositions are clearly correct and not cavilled with by anybody if the CACL scheme does indeed apply. Each of the three gentlemen were passengers on the aircraft. And if that scheme applies, one of its two fundamental characteristics is that common law liability is excluded for the carrier, the *quid pro quo* being that the carrier is strictly liable for physical injury or death that is caused.

[15] Mr Gray-Spencer says because it seemed to be the consensus of all parties that the CACL scheme applied, he negotiated a settlement paid under the CACL scheme to each of the passenger plaintiffs. That happened by the middle of 2016. So matters stood until February 2017, when GBR amended its third party statement of claim against Ergon.

[16] Prior to dealing with that amendment, that the position was that although Mr Gray-Spencer had formed the view that the parties were of a common view that the scheme applied and that common law was excluded, there is no evidence of any undertaking, promise, representation or acceptance by Ergon that it would adhere to that position in the future. There was no evidence of any attempt to seek such an undertaking or anything else that might fix Ergon with any responsibility for the assumptions made by GBR's solicitor, other than the fact that it had filed a pleading that made an allegation which, under the UCPR, could have been amended without leave at any time.

[17] The next step was an amendment to GBR's third party statement of claim which occurred on 14 February 2017. That amended pleading effectively redrafted the allegations, deleted the mysterious helicopter certificate holder claim from the Logan proceeding, and finally, expressly alleged both statutes of the scheme and expressly alleged that GBR became liable to the passengers pursuant to the CACL scheme, and settled the plaintiffs' claim (in the case of the Logan proceeding) for $400,000 inclusive of costs under the scheme.

[18] GBR further expressly alleged it suffered loss of $400,000 for its liability to Mr Logan pursuant to the legislation it had identified. It is convenient to set out the specific allegations:[4]

> 13. At all material times Ergon knew or ought to have known that there was a risk that the Plaintiff as operator of the aircraft would in the circumstances referred to in paragraphs 1-12 become liable to the passengers pursuant to the strict liability provisions of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) and/or *Civil Aviation (Carriers' Liability Act 1964* (Qld) and would thereby suffer loss.
>
> …
>
> 16. As a consequence of Ergon's breach of duty:
>
> 16.1. the helicopter collided with the power line, crashed and was destroyed;
>
> 16.2. the passengers suffered personal injuries; and
>
> 16.3. GBR became liable to the passengers pursuant to the legislation referred to in paragraph 13 and settled the Plaintiff's claim for a sum of $400,000 inclusive of costs.
>
> 17. GBR suffered a loss of $400,000 for its liability to the Plaintiff pursuant to the legislation referred to in paragraph 13.

[19] Ergon defended the amended third party statement of claim (**A3PSOC**) on 21 November 2017:[5]

> 6. The Third Party denies the allegations in paragraph 13 of the A3PSOC:
>
> (a) for the reasons pleaded in response to the balance of the allegations in the A3PSOC; and
>
> (b) because it had no notice of the flight; and
>
> (c) because it had no notice that the Defendant intended flying operations at tree-top level using downwash from the helicopter rotor blade to turn over the ground cover to help identify the purpose underside of a specific weed.
>
> …
>
> 10. In answer to paragraph 16 of the A3PSOC the Third Party:
>
> (a) denies, for the reasons already given, the allegations of negligence and breach of duty;
>
> (b) admits the allegations contained in paragraphs 16.1 & 16.2;
>
> (c) admits the Defendant became liable to the persons referred to by it as *"passengers"* as a result of operation of the state Act pleaded in paragraph 13 of the A3PSOC but otherwise does not admit the allegations contained in 16.3 as they are not within the knowledge or means of knowledge of the Third Party.
>
> 11. In answer to the allegations in paragraph 17 of the A3PSOC the Third Party:
>
> (a) does not admit the amount of the liability of the Defendant to the Plaintiff because the matter is not within the knowledge or means of knowledge of the Third Party;

[4] Amended Statement of Claim by the Defendant Against the Third Party filed 14 February 2017.
[5] Defence of the Third Party to the Defendant's Amended Statement of Claim filed 21 November 2017.

(b) says further that the amount of any such liability does not constitute loss recoverable by the Defendant from the Third Party as it amounts to no more than pure economic loss.

[underlining added]

[20] Most directly relevant is paragraph 10(c) of that defence. By paragraph 10(c), it can be seen, Ergon admitted that GBR became liable to Mr Logan as a passenger under (effectively) the CACL scheme.[6] So matters stood from November 2017.

[21] As I have said, efforts to get these proceedings ready for a trial started in about May this year. GBR took the opportunity to further amend its statement of claim against Ergon and filed that amended pleading on 20 July 2021. The amendments gave more detailed particulars but did not amend in any relevant way the paragraphs set out in paragraph [19] above.

[22] On 6 August 2021, Ergon filed its amended defence to the amended GBR statement of claim.[7] It made two relevant amendments. One was to paragraph 10, which was amended to read as follows:

10. As to paragraph 16 of the GBRSOC, Ergon:

(a) denies, by reason of the matters pleaded in paragraphs 1A to 9 and 14 hereof, the alleged duty or, alternatively, that Ergon breached any such duty;

(b) admits the allegations contained in paragraphs 16.1 and 16.2;

(c) denies that GBR became liable to the persons referred to by it as *"passengers"* pursuant to the legislation pleaded in paragraph 13 of the GBRSOC and believes the allegations are untrue because, in point of law, in the premises pleaded paragraphs 1A to 1D hereof, GBR was not so liable;

(d) does not admit that GBR settled the Plaintiff's claim for a sum of $380,000 inclusive of costs and believes the allegation cannot be admitted because, despite disclosure by GBR, Ergon remains uncertain that the alleged amount was the amount paid to the Plaintiff in settlement of the Plaintiff's claim and costs.

[underlining added]

[23] It also substantially amended paragraph 15 to allege the loss was caused, or contributed to, by the negligence of GBR or Mr Rose, and then states as follows:

15. The loss or damage alleged by GBR was caused or contributed to by the following negligence of GBR by its Chief Pilot and/or by Mr Rose:

(aa) undertaking the Flight when the Flight was not authorised by the AOC;

(ab) undertaking the Flight when the Flight was not authorised by the Operations Manual);

(ac) undertaking the Flight when the Flight was not authorised by the LF Permit;

…

[6] The effect of the admission is that the Queensland Act applied but that Act picks up the operative provisions of the Commonwealth Act.
[7] Amended Defence of the Third Party to the Defendant's Further Amended Statement of Claim filed 6 August 2021.

[24] This application arises out of the amendments to paragraph 10(c), wherein Ergon denies, instead of admits as it previously did, that GBR became liable to Mr Logan pursuant to the CACL scheme and says that it is untrue because in point of law, in the premises pleaded in certain paragraphs, GBR was not so liable. The certain paragraphs are paragraphs 1A to 1D. Those paragraphs recite the scope of the authority under the AOC and allege that the work that was being done (which, it seems uncontentiously, was aerial spotting of flora) was neither specifically authorised by the AOC nor authorised as a specialised low flying operation.

[25] Ergon contends that leave should be given to withdraw the admission in the previous version of paragraph 10(c) of its defence, that GBR became liable to Mr Logan under the CACL scheme.

[26] Ergon's application arises in the context where the admission is an admission of law, rather than fact. The line between what is a matter of law and what is a matter of fact can be a difficult one to draw. But here, it seems to me that the admission is an admission of law, that is, on the facts as identified and that seem to be largely uncontentious, the scheme does not apply because it is said the work that was being done was not within the scope of that which was authorised by the AOC.

[27] It seems to me that an admission of law on a pleading remains an admission for which leave is required to withdraw, even though ordinarily admissions will be of fact, or at least, mixed law and fact. Part 4 of the Rules, for example, is concerned with compelling parties, when answering pleadings, directly to admit, not admit, or deny each allegation of fact contained in a pleading, and applies, according to its terms, only to an allegation of fact made in another pleading.[8] I cannot see that those provisions apply to an allegation of law.

[28] However, despite that, I can see no reason, in principle, why an admission of an allegation of law is not an admission to which Rule 188 applies.

[29] The effect of admitting a proposition of law in a pleading is, consistent with the ordinary meaning of the word "admit", to admit that proposition (or to make an admission of it). If that is so, what warrant is there for reading down the scope of the word admission in Rule 188? I can see none. An admission of law can operate like an admission of fact in the effect it has on how parties apprehend the case they have to meet and how they have to prepare to meet it. And since that is one of the two principal purposes of a pleading (the other being, of course, to identify facts which give rise to a cause of action or defence known to the law), it seems to me that there is no good reason why a clear statement that one accepts a proposition of law put in a pleading does not amount to an admission. I should say, with respect to counsel, neither contended for a different view.

[30] It does seem to me, however, that where one is dealing with an admission of law, there might be slightly different considerations when considering whether to give leave to withdraw it.

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[8] See Rules 166(1) and (4) UCPR.

[31] When dealing with an admission of law, particular regard probably should be had to not only the ordinary considerations that apply in withdrawing admissions, but also to the place the legal proposition admitted has in the preparation of the proceedings, and the extent to which that admission might be seen to be wrong as a matter of law.

[32] One cannot think of all the permeations and combinations, but one would have thought that if a proposition of law had been admitted, and the admitted proposition was clearly wrong, the Court would be much more inclined to grant leave to withdraw the admission, other things being equal, than if it was arguably wrong. And similarly, if the Court took the view that the proposition of law that was admitted was very likely to be right or clearly right, then the other things being equal, the Court would be less likely to give leave to withdraw the admission.

[33] Ergon contends that the admission of law was wrong. Ergon starts with the AOC under the *Civil Aviation Act* 1988 (Cth) (**CAA**). It is not in dispute that GBR was the holder of an AOC. Section 27(1) and (2) CAA provides:

> **27 AOCs**
>
> (1) CASA may issue AOCs for the purposes of its functions.
>
> (2) Except as authorised by an AOC, by a New Zealand AOC with ANZA privileges that is in force for Australia (but only so far as it authorises ANZA activities in Australian territory), or by a permission under section 27A:
>
> (a) an aircraft shall not fly into or out of Australian territory; and
>
> (b) an aircraft shall not operate in Australian territory; and
>
> (c) an Australian aircraft shall not operate outside Australian territory.
>
> Note: For when a New Zealand AOC with ANZA privileges is in force for Australia, see section 3AA.

[34] Ergon contends that the effect of s. 27(1) and (2) is that operating an aircraft in Australian territory, outside the scope of the authority of the AOC, is contrary to that provision. That is, such operation will be unauthorised. Although there was not full argument about the operation of the Act as a whole, one can accept that proposition is correct. The next step in the Ergon argument is to identify the scope of what is authorised by the AOC in this case. The AOC for GBR relevantly states:[9]

<table>
<tr><td colspan="3">AIR OPERATOR'S CERTIFICATE</td></tr>
<tr><td rowspan="2"></td><td>Australia</td><td rowspan="2">…</td></tr>
<tr><td>Civil Aviation Safety Authority</td></tr>
<tr><td>AOC #: 1-K0Z3T-01</td><td rowspan="2">This Air Operator's Certificate (AOC) is issued to:
GBRH GROUP PTY LTD
(ARN: 796996 ACN: 143 159 531)</td><td></td></tr>
<tr><td>Date of expiry: 31 October 2012</td><td></td></tr>
<tr><td colspan="3">This certificate is issued pursuant to section 27 of the Civil Aviation Act 1988 and authorises its holder to operate the aircraft in the type of operation(s) described in the attached operations</td></tr>
</table>

[9] Third Affidavit of Alana Maree Petty filed 9 September 2021 at pages 256-8.

specifications, in accordance with its operations manual.	
…	

AIR OPERATOR'S CERTIFICATE OPERATIONS SPECIFICATIONS

Schedule 1 Type of Operation: Regular Public Transport Operations

RESERVED

Schedule 2 Type of Operation: Charter Operations

Part 2.1.1.
The certificate holder is authorised to operate the following Australian registered aircraft types and models in Charter operations in the territories indicated.

Manufacturer	Class/Type	Model	Serial Number	Reg Mark	Passenger	Cargo	In Australia	Outside Australia	Into and Out of Australia
BELL	BELL 206	-	-	-	√	√	√	x	x
EUROCOPTER	AS350	-	-	-	√	√	√	x	x
ROBINSON	R44	-	-	-	√	√	√	x	x

Schedule 3 Type of Operation: Aerial Work Operations

Part 3.1.1
The certificate holder is authorised to operate the following Australian registered aircraft types and models in the Aerial Work operations specified in part 3.1.2 in the territories indicated.

Manufacturer	Class/Type	Model	Serial Number	Reg Mark	In Australia	Outside Australia	Into and Out of Australia
BELL	BELL 206	-	-	-	√	x	x
EUROCOPTER	AS350	-	-	-	√	x	x
ROBINSON	R44	-	-	-	√	x	x

Part 3.1.2
The certificate holder is authorised to conduct the following Aerial Work operations in the territories indicated.

Aerial Work Type	Aerial Work Details	In Australia	Outside Australia	Into and Out of Australia
1. AERIAL PHOTOGRAPHY	a. Low-level filming	√	x	x
	b. Media operations	√	x	x
	c. Still and motion	√	x	x
2. AERIAL SPOTTING	a. Fire	√	x	x
3. AERIAL SURVEYING	a. Pipeline inspection	√	x	x
4. DROPPING	a. Water and fire retardant	√	x	x
	b. Incendiaries (bushfire control)	√	x	x
5. FERAL AND DISEASED ANIMAL CONTROL		√	x	x
6. POWERLINE	a. Inspection	√	x	x
7. SLING LOAD OPERATIONS		√	x	x

[underlining added]

[35] It also has attached to it the colourfully named low flying permit which identifies, under the heading 'Permission Low Flying Operations', that it permits operations carried out by day for aerial survey, aerial spotting, aerial photography, dropping and powerline inspections.

[36] Schedule 2 contains conditions on that low flying permit and relevantly states all operations are to be conducted in accordance with the conditions and requirements for these aerial work operations as specified in the company operations manual. The AOC also referred to the operations manual. The operations manual is in evidence. It contains a great deal of general information, practices and procedures for air operations.

[37] Part D contains specialised operations provisions which contain 10 specific headings, similar to, but obviously not the same as, the aerial work type items identified at Part 3.1.2 of the AOC above. There is not a direct correlation between the two. What is clear is that nowhere in the AOC does it expressly authorise aerial spotting of flora. The aerial spotting provision in Schedule 3 of the AOC identifies, under the heading 'Work Details', fire only. And there is nothing in the operations manual which deals specifically with flora spotting. Thus, the starting point for Ergon's argument is that undertaking a flight for the purpose of spotting flora was not authorised by the AOC.

[38] There is a contrary argument on the construction of the AOC. Mr Ashton QC, who appeared with Mr Ivessa for GBR, submitted that weed spotting, as it was occurring on the day of the accident, was authorised by the AOC. He contended that Ergon's construction involved construing the AOC too narrowly and excessively confining the authority it conferred. His argument focussed on the operative provision of the AOC which authorised GBR to operate aircraft in the "*type* of operations" described in "the attached operation specifications". He contends as follows:

(a) When one looks at the operation specifications (which are set out in Schedules 1, 2 and 3), they consistently refer to the type of operation being conducted: relevantly Schedule 2 refers to "charter operations" and Schedule 3 "aerial work operations".

(b) Schedule 3, in respect of the type of operation being aerial work operations, relevantly provides that GBR is authorised to operate identified aircraft in aerial work operations specified in Part 3.1.2. Part 3.1.2 picks up again the word "type" and identifies the type of work as being that which is in the first column, and then in the next column links aerial work details to each type of aerial work.

(c) Mr Ashton submitted the aerial work details (which do not refer to flora spotting) are just examples or instances of the type of aerial work authorised and does not confine the scope of the authority to conduct that type of work to that particular detail.

[39] Although I accept that Mr Ashton and Mr Ivessa's construction is open, I think the better view is that which is authorised is limited to aerial work types of the kind described under aerial work details. I take that view because the key provision-conferring authority under the AOC refers to the "type of operation(s) described in the attached operations specifications, in accordance with [the] operations manual". The operations manual does not have any specific provision for aerial spotting of flora.

[40] I also note that what is authorised under Part 3.1.2, specifically, is aerial work operations, and that does not draw a distinction between the type of work and the detail.

[41] Nonetheless, there is a reasonable argument on the construction, and it may also be that the low flying permit is itself arguably sufficient authority to undertake this kind of activity.

[42] But as I say, I think the better view, at least on the arguments at the moment, is that Ergon's first proposition is correct, that using the helicopter for the purpose of weed spotting was outside the scope of the authorisation conferred by the AOC. (I say that being conscious that there might be consequences in other places about whether the flora spotting was unauthorised, and I emphasise this is not a final judicial determination that what happened here was not authorised by the AOC.)

[43] The next stage in the Ergon argument is that the fact, that the use of the helicopter for weed spotting was not authorised by the AOC, means that the CACL scheme does not apply. That is where the argument fails.

[44] To those familiar with the international instruments that give effect to civil aviation liability limitation in international carriage of passengers and cargo, Ergon's argument would come as a surprising proposition. Mr Ashton referred me to Article 1 from Chapter 1 of the Warsaw Convention from 1929 (which was where this regime for regulation of rights and liabilities of passengers and carriers, and cargo and carriers, has its genesis). That Article applied the treaty, effectively, to all international carriages of persons by aircraft for reward.

[45] However, even bearing in mind the importance of uniformity in the interpretation of that treaty and its many subsequent protocols, I did not find that of itself a compelling reason to reject Ergon's argument on the proper construction of the legislation. That is because the part of the CACL scheme with which I am dealing is not covered by the treaty and its protocols. Rather, it represents the enactment of an analogous statutory regime to that in the treaty and protocols within the combined legislative powers of the Commonwealth and the States, such that carriage of passengers and cargo by aircraft within Australia is effectively regulated by the provisions of the Commonwealth statute. The CACL scheme certainly reflects the basic principles of the treaty regime, which involves passengers confronting a limit on liability in exchange for strict liability of the carrier. It has been enacted, however, in the way the Federal and State Parliaments have chosen to enact it, and it is the language of the Commonwealth Act (which indirectly applies to this accident, because this accident might have happened within

Queensland, but Queensland picks up the relevant provisions of the Commonwealth Act) to which one must look, except in relation to the scope of application provisions.

[46] I start with s. 4 *Civil Aviation (Carriers' Liability) Act* 1964 (Qld) which provides:

> **4 Carriage to which Act applies**
>
> (1) This Act shall apply to the carriage of a passenger where the passenger is or is to be carried in an aircraft being operated by the holder of an airline licence or a charter licence in the course of commercial transport operations under a contract for the carriage of the passenger---
>
> (a) between a place in Queensland and another place in Queensland; or
>
> (b) in the case of the holder of a charter licence---beginning at a place in Queensland and ending at that place without any intermediate landing or landings at any other place or places.

[47] It is not contentious that the definitions in the Commonwealth Act in Part IV apply to s. 4(1) of the Queensland Act (indeed, the whole of Parts IV and IVA apply, except for the provision which itself identifies the scope of the Commonwealth Act which, when compared to s. 4, reveals that they are complementary). It can be seen (reading into the section what is relevant in this case) that s. 4(1) applies the Act to:

> [A] carriage of a passenger where the passenger…is carried in an aircraft…operated by the holder of an [air operator certificate] in the course of commercial transport operations under a contract for the carriage of the passenger.

[48] If one was construing that provision to identify its elements, one would find that the Act applies:

(a) **First**, to the carriage of a passenger;

(b) **Second**, where a passenger is carried in an aircraft;

(c) **Third**, where the aircraft is operated by the holder of an AOC;

(d) **Fourth**, where the passenger is carried in the aircraft by that entity in the course of commercial transport operations; and

(e) **Fifth**, that carriage occurs under a contract for the carriage of the passenger.

[49] It is now clear (if there was any doubt before) that Ergon accepts that all of those elements are made out but the third: that Mr Logan was being carried in a helicopter operated by the holder of an AOC. (It might also be contended, I suppose, that the fourth element is not made out for essentially the same reason.)

[50] This is how Ergon developed that argument. It starts confronting an awkward point of construction, and that is that s. 4 just requires the aircraft to be operated by someone who *holds* an AOC, not that they be operating the aircraft *within the scope* of that AOC. Another difficulty might arise, looking at the element "commercial transport operations". There, one is directed to the Commonwealth definitions. They provide, in s. 26, that "commercial transport operations" means

operations in which an aircraft is used for hire or reward for the carriage of passengers or cargo. Neither provision requires for application of the CACL scheme that the operator be operating the aircraft within the scope of the AOC, just that the operator is the holder of an AOC.

[51] The argument that s. 4 does not apply to this carriage, as I have said, depends on that provision being read as being limited to where a passenger is carried in an aircraft operated by a holder of an AOC *within the scope of the authority*.

[52] How, one might ask, could one read that far-reaching limitation into s. 4(1)? A number of contentions were advanced to make good that proposition. The first identifies the definition that brings AOCs into s. 4(1). So far, I have been paraphrasing a little. In fact, it applies to an aircraft being operated by the holder of, relevantly, a charter licence. A charter licence is defined to mean "an Air Operator's Certificate in force under the *Civil Aviation Act 1988* authorising charter operations". One argument, therefore, that could be advanced is that an operator is not operating an aircraft as the holder of a charter licence if the operator is not operating it within the scope of that charter licence. I cannot see how the definition supports that, however. It just identifies an AOC in paragraph (b) as one which authorises charter operations, any kind of charter operation.

[53] Another argument was advanced, based on two authorities in which Justice of Appeal Basten made observations in passing (they were accepted as being in passing by Mr McLeod QC, who appeared for Ergon with Mr Lumb), to the effect that the particular operations in those two cases[10] were within the scope of that which was specifically authorised. However, the issue now before me was not before his Honour. There was no issue about whether the CACL scheme applied or did not apply, depending on whether the particular carriage was within or outside that which was authorised. I did not find those cases of any assistance on this issue.

[54] The next point Ergon relied on arose out of s. 26(1A) of the Commonwealth Act, which provides:

> If an Air Operator's Certificate in force under the *Civil Aviation Act 1988* does not authorise airline operations only because the holder of the certificate does not comply with section 41E of this Act in relation to the operations, this Part has effect as if the certificate did authorise the operations.

[55] It was submitted that this provision necessarily contemplates that absent the introduction of that subsection, Part IVA would not have effect if the AOC did not authorise the operations because the holder had not complied with the insurance requirements under s. 41E of the Commonwealth Act. I do not find that at all a compelling argument either, and the reason is that insurance is a central part of the balancing of interests reflected in the CACL scheme. Section 41E requires a person who is operating aircraft for reward, in broad terms, to have insurance. It is evident from the CAA that the importance of that provision is recognised:

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[10] *Endeavour Energy v Precision Helicopters Pty Ltd* [2015] NSWCA 169; *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312.

28BA General conditions

(1) An AOC has effect subject to the following conditions:
(a) the condition that sections 28BD, 28BE, 28BF, 28BG and 28BH are complied with;
(aa) the conditions subject to which the AOC has effect because of section 28BAA;
(ab) the condition that section 28BI is complied with in relation to each operation, covered by the AOC, to which that section applies;
(b) any conditions specified in the regulations or Civil Aviation Orders;
(c) any conditions imposed by CASA under section 28BB.

[56] It can be seen from s. 28BA(1)(aa) that s. 28BI is a condition on the AOC taking effect. Section 28BI is the provision which requires a holder of an AOC to, at all times, comply with the requirements in the CACL scheme to hold insurance.

[57] It seems to me quite clear what s. 26(1A) CACL is about. The operative provision in s. 4 of the Queensland Act (and the equivalent provision in the Commonwealth Act)[11] makes the CACL scheme applicable to where someone is the holder, relevantly, of an AOC. The effect of ss. 28BA and BI CAA is that it is at least strongly arguable you are not the holder of an AOC if you have not paid your insurance, and the provision inserted in s. 21A CACL is enacted to ensure that notwithstanding that, you remain a holder. Contrary to the submission by Ergon, I think this provision tends to highlight that the criterion of liability engaged by s. 4 is being the holder of a valid AOC, not that you are operating within the scope of the authority of an AOC.

[58] Mr McLeod also emphasised that the effect of reading it in the way I have identified is that people could be subject to the limitation on the amount they can recover, even where someone is operating outside that which is authorised by the AOC.

[59] I did not find that argument persuasive for three reasons.

(a) While Mr McLeod's point might be correct, that would also mean that those people obtained the benefit of the strict liability provision which the CACL scheme ensures.

(b) Another reason is that that proposition has not troubled those who drafted the Warsaw Convention.

(c) And thirdly, unlike the Warsaw Convention and protocols, the Australian scheme does not exclude the carrier being entitled to limits of liability if the damage is caused by conduct on the part of the carrier which is wilful misconduct.[12]

[60] While Ergon advances an arguable proposition that the weed spotting activities were outside the scope of the AOC, I do not accept that it has a strong argument that the CACL scheme does not apply because of that. In fact, I consider that argument to be clearly wrong for the reasons I have articulated. Because I consider that argument to be clearly wrong, it would be futile to permit the admission that

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[11] *Civil Aviation (Carriers' Liability Act)* 1959 (Cth) s. 27.
[12] *Brannock v Jetstar Airways Pty Ltd* (2010) 273 ALR 391 at paragraph [30].

the CACL scheme applied to Mr Logan as an injured passenger in the helicopter to be withdrawn.

[61] I recognise, of course, the possibility that Ergon's argument might be correct. The relevance of that, for the task I am engaged in today, is that I must put that (in my view small) possibility into the scales on one side, and balance it up against the prospect for delay in the preparation of these proceedings on the other, if the admission is permitted to be withdrawn.

[62] I make some other observations about that weighing up process. The first is that I am unpersuaded that what happened in 2013 and 2014 provides a reason to refuse leave. I explained in my statement of the background facts that there is no suggestion that Ergon had any part to play in the decision of GBR to settle on the basis that the statutory scheme applied, other than to make an assertion accepting the application of the CACL scheme in a pleading, which it could, as of right, withdraw without leave at any time (which it eventually did).

[63] This is not to say that such assertions in pleadings might not, in some situations, give rise to an estoppel or be a relevant consideration in an application for leave on some issue. But where the consumer of the representation is an experienced solicitor, I think it carries no weight in respect of leave to withdraw the admission.

[64] The second point I should deal with is the argument as to adequacy of the explanation for making the admission. It is true there is no explanation as to why the position was adopted at the start (albeit not in an admission) that the scheme applied, nor is there a direct explanation as to why that position was continued in the admission in the defence filed in 2017. However, it is not difficult to guess, or I should say infer, that the lawyer who made that judgment made it based on their view that the CACL scheme did apply.

[65] The explanation for why it is now sought to be withdrawn is that new solicitors had formed a different view. There does not seem to be any significant forensic advantage that was attached to the original decision of the kind, for example, that can cause judgments made in criminal trials to be unable to be revisted on appeal (at least none was argued to me), and for a pure question of law, it does not seem to me that that factor tells against granting leave to withdraw an admission.

[66] It is also said that this amendment, and communication of the intention to withdraw from the position which had existed for so long, was not notified until the defence, pleading inconsistently with the admission, was delivered. That is clearly incorrect. It was notified in the position paper at the mediation in paragraph 3(c) of the redacted position paper, and the AOC type points were flagged at paragraphs 6 and 7.[13] And so, I think it a little unfair to say that this was just sprung on GBR when the current amended pleading hit the deck. I do not think that is a factor that plays any part in this.

[67] The factor that does play a part in it is this. The parties, in particular GBR (and I know some of the other parties in the further proceeding by Ergon against the State

[13] See Fifth Affidavit of Alana Maree Petty filed at paragraphs 3, 6 and 7.

and Cairns Regional Council), have been considering their position on the basis that this is a CACL scheme case, for some years now (my oral reasons said months but that was my slip). If Ergon obtained leave to withdraw that admission as to the basis upon which the liability arose, I consider there is real prospect of difficulties in justly allowing for the changed circumstances.

[68] I say that understanding, first of all, the affidavit evidence from GBR's solicitor about what the consequences would be is either irrelevant or unhelpfully vague. It was irrelevant, for example, to set out evidence about a whole lot of work that is being done to prepare the case and how much it cost, because this amendment would not change everything about the trial. A great deal of work that has been done will still be useful, indeed most of the work already done probably falls into that category. Ergon's underlying case on the fact-heavy liability issues has not changed.

[69] Similarly, when it comes to the consequences of the change in position for any specific change to the case which would be sought to be advanced by GBR, again, I found the evidence a bit vague, and Mr Ashton's efforts to develop it were respectfully not particularly convincing. I put no weight on the suggestion of a misrepresentation case. For the same reason, I did not think an estoppel type concept could inform the discretion.

[70] However, it seems to me that Mr Ashton's argument, that an equitable compensation claim might take the place of the current damages claim against Ergon, does flag the real difficulty for me to be confident that if this matter was reopened, it would not have significant consequences. That is a judgment I make as the judge who has been managing this case and trying to get it prepared for a trial for the last four or five months.

[71] The fact that GBR was not able today confidently to articulate a significant change in the factual framework for the case does not mean I am not concerned (I think on good grounds) that it might not do so in the future. One can see that if the payment, by reference to the CACL scheme, is said to have not been a payment which should have been made because there was no liability for it, GBR will either have to fold its tent or find some other way to run its case to recover this loss, and I am far from confident that the latter will not be able to be done, and if it can be done, it will have very significant implications for the trial dates.

[72] In the end, Ergon comes seeking the exercise of a discretion favourably to it, and it bears the onus of persuading me that I ought do so. I would have been more inclined to take the chance of impacting the trial date if I thought there would be a real injustice done to Ergon by not permitting it to withdraw the admission, but I do not hold that view because I think Ergon's argument on the law is wrong.

[73] I dismiss the application filed 9 September 2021. Ergon shall pay the costs of the application on the standard basis.