

# MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Chavez-Suaniu v Parun* [2023] QMC 6

PARTIES: **Natalie Lineethe Chavez-Suaniu**  
**V**  
**Larissa Parun**

FILE NO/S: 53941/22

DIVISION: Magistrates Courts

PROCEEDING: Application

ORIGINATING COURT: Brisbane Magistrates Court

DELIVERED ON: 08/08/2023

DELIVERED AT: Brisbane Magistrates Court

HEARING DATE: 14/07/2023

MAGISTRATE: Pinder

ORDER: (1) The defendant be given leave to withdraw admissions contained in paragraphs 4, 5(a)i, and 5(a)iii of the defence.  
(2) I will hear the parties as to cost.

CATCHWORDS: Procedure – Rules of Court  
Application for leave to withdraw admissions in defence.  
UCPR – r 188  
*Green v Pearson* [2014] QCA 110  
*Hanson Construction Material Pty Ltd v Davey* [2010] QCA 246  
*Ridolfi v Rigato Farms Pty Ltd* [2000] QCA 292

COUNSEL: P.C.M Van Grinsven for applicant defendant  
M.L Lilley for respondent plaintiff

SOLICITORS: RTN Lawyers for plaintiff  
SLF Lawyers for defendant

### **Introduction**

- [1] The plaintiff brings suit against the defendant claiming damages for negligence for property damage and cost of a replacement vehicle arising out of a motor vehicle accident which occurred on 2 March 2022.
- [2] The plaintiff's claim is in fact being prosecuted, in her name, by Right 2 Drive an "accident management company" purportedly pursuant to an agreement between Right 2 Drive and the plaintiff.

### **The defendant's application**

- [3] The defendant applies for orders that she be given leave to withdraw admissions made in paragraphs 4, 5(a)i, and 5(a)iii of the defence.
- [4] The defendant's application is opposed and both counsel for the applicant defendant and the respondent plaintiff have conveniently provided written outlines of argument.

### **The applicant's material**

- [5] The applicant defendant relies on the following material
  - 1) Application filed 9 June 2023
  - 2) Affidavit of Alex Canavan (solicitor) filed 30 June 2023
  - 3) Statement of Claim filed 5 October 2022
  - 4) Defence filed 19 October 2022
- [6] The respondent plaintiff, whilst initially considering seeking leave to read and file affidavit material, ultimately did not do so and simply relies on the pleadings in the action to date.

### **The relevant rule**

- [7] The *Uniform Civil Procedure Rules* (UCPR) empowers the court to grant a party leave to withdraw an admission made in a pleading.
- [8] Rule 188 UCPR provides as follows

"188 withdrawal of admission:

A party may withdraw an admission made in a pleading or under r 187 only with the court's leave."

### **The relevant legal principles**

- [9] In respect of an application for leave to withdraw admissions, the Court of Appeal in *Green v Pearson* [2014] QCA 110, considering the decision of the Judge at first instance the court said:

*“[34] His Honour instructed himself by reference to the decision of this court in Hanson Construction Material Pty Ltd v Davey<sup>[10]</sup> and referred to the five factors identified in the reasons for judgment in that case as relevant to an application to withdraw admissions as follows:*

*“The first was how and why the admission came to be made. I’ve dealt with that already. The second was the evidence surrounding the issues, the subject of the admission. That evidence is found in the verification of the proposed defence. That demonstrates to my satisfaction that there is likely to be a real dispute about the evidence, and, in some respects, the defence of the other defendants also supports the view that there is likely to be a real dispute about those matters. That is the third of the factors specified in Hanson. Fourth is the question of whether any delay has been made in the application for leave to withdraw the admissions. In the present case there has been no delay. The matter has indeed proceeded quite promptly. Finally, there is the question of prejudice to the other party. Mr Williams, on behalf of the plaintiff, frankly considered that no prejudice would be suffered by the plaintiff if leave were granted. That is to say, no prejudice in the relevant respects.”*

*[35] For those reasons, and with specific directions as to particular matters by way of further pleading which need to be attended to in the final amended defence, his Honour made the order giving leave to amend the defence.”*

- [10] In that decision the court endorsed the decision in *Hanson Construction Material Pty Ltd v Davey*<sup>1</sup> and the five factors identified in that decision relevant to an application to withdraw admissions.
- [11] The Court of Appeal in *Hanson Construction Material Pty Ltd v Davey* confirmed the correctness of the Judge at first instance’s approach and in particular at paragraph 10 the identification of the five factors relevant to an application for leave to withdraw admissions.

At first instance in the case the court found:

*“[16] A party may withdraw an admission made in a pleading only with the Court’s leave. The following matters are generally relevant to the exercise of the discretion whether to grant leave:*

- *how and why the admission came to be made;*
- *the evidence surrounding the issues the subject of the admission;*
- *whether there is likely to be a real dispute about the evidence;*
- *any delay in making the application for leave to withdraw the admission;*

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<sup>1</sup> *Hanson Construction Material Pty Ltd v Davey* [2010] QCA 246

- *prejudice to the other party.*

*Leave to withdraw admissions is not obtained for the asking. It will rarely be granted in the absence of evidence that there is a genuine dispute about the matters deemed to have been admitted.”*

[12] The applicant defendant accepts that she carries the onus of demonstrating “a clear explanation on oath .., as to how and why the admission came to be made and then detailed particulars given of the issue or issues which the party would raise at trial if the admission was withdrawn.”<sup>2</sup>

[13] This accords with the principles referred to in *Ridolfi v Rigato Farms Pty Ltd*.<sup>3</sup>

[14] There, the court said:

*“[19] Asked to exercise the discretion under rule 189(3), a court would ordinarily expect sworn verification of the circumstances justifying a grant of leave. Those circumstances may include why no response to the notice was made as required, the response the party would belatedly seek to make, and confirmation that the response would accord with evidence available to be led at a trial. Here none of those matters was so verified. Issues of prejudice may also fall for consideration upon the hearing of such an application.*

*[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 Brewery Ltd v Panfida Foods Ltd (1992) 26 NSWLR 738* and *Equuscorp Pty Ltd v Orazio [1999] QSC 354*.”*

### **The defendant’s admissions and the present application for leave to withdraw**

[15] The uncontroversial evidence relied on by the applicant defendant is contained in the affidavit of Mr Alexander Canavan (solicitor). Annexed to Mr Canavan’s affidavit, arising in peculiar circumstances, is a statement signed by the plaintiff herself Ms Natalie Chavez-Suaniu.

[16] The plaintiff’s statement is to the effect that:

- Following this motor vehicle accident, she sought to contact her own insurer, AAMI, but unknowingly was directed to Right 2 Drive in circumstances where she was led to believe that she was in fact dealing with her own insurer AAMI.
- Right 2 Drive arranged for a tow truck to collect her motor vehicle and for the provision of a hire car.
- She recalled signing something on an iPad with Right 2 Drive but was unsure as to what she had signed or the effect of the agreement.

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<sup>2</sup> See defendant’s outline at paragraph 7(b)

<sup>3</sup> *Ridolfi v Rigato Farms Pty Ltd* [2000] QCA 292

- At all times she did not know she was dealing with an accident management company.
- Until she was required to attend by teleconference a settlement conference, she was unaware that it was not AAMI her insurer who was acting on her behalf but rather Right 2 Drive as an accident management company.

[17] Mr Canavan's affidavit sets out a chronology in relation to the preparation and filing of the defence which occurred in October 2022 and the circumstances by which he and his client insurer became aware of the plaintiff's contentions following the taking of a statement from her on 6 June 2023.

[18] Mr Canavan deposes to the significant change in circumstances of the defendant, following the plaintiff's direct disclosure, and consequently the defendant's changed position in relation to the pleaded defence in respect of paragraphs 8A of the statement of claim.

**Circumstances for the admissions applying the five-factor test identified in the decisions in relation to this application for leave to withdraw admissions**

[19] The following are relevant:

***How and why the admissions came to be made***

[20] Mr Canavan's affidavit set out that at the time the defence was drafted and then filed and served, the defendant was not aware of the circumstances giving rise to the potential difficulties that Right 2 Drive had in prosecuting this claim on behalf of the plaintiff, and the entitlement to recover the damages in relation, particularly to the replacement motor vehicle.

[21] Absent the plaintiff's contentions, contained in her statement, the defendant pleading to the allegations in paragraph 8A of the statement of claim was otherwise uncontroversial at that time.

***The evidence surrounding issues the subject of the admission***

[22] The applicant defendant, as noted above, bears the onus of providing evidence on oath in respect of the issues the subject of the admissions.

[23] Mr Canavan's affidavit and the annexed signed statement by the plaintiff clearly raise that.

***Whether there is likely to be a real dispute about the evidence***

[24] Similarly, the statement by the plaintiff annexed to Mr Canavan's affidavit provides direct evidence in support of the applicant defendant's contention that there is a dispute as to the pleaded claim for the hire of the replacement vehicle and the circumstances in respect of the bringing of this claim in the name of the plaintiff by Right 2 Drive.

***Any delay in making the application for leave to withdraw the admission***

- [25] It is clear, uncontroversially, that the applicant defendant did not become aware of the change in circumstances until the settlement conference on 28 April 2023, at which conference the registrar ordered any application for leave to withdraw admissions be filed on or before 9 June 2023.
- [26] The current application was filed on 6 June 2023 and there has been no delay at all by the defendant in making the application.

***Prejudice to other party***

- [27] The respondent plaintiff in the brief outline of argument opposing this application does not raise the issue of prejudice and it would not appear that the plaintiff can contend that she suffers any prejudice.
- [28] The applicant defendant has satisfied each of the five factors relevant to the exercise of the discretion under r 188 for leave to withdraw the admissions.
- [29] That discretion ought properly be exercised in the applicant defendant's favour and the application ought be allowed.

**Disposition**

- [30] I order that the
- (1) The defendant be given leave to withdraw admissions contained in paragraphs 4, 5(a)i, and 5(a)iii of the defence.
  - (2) I will hear the parties as to cost.