SUPREME COURT OF QUEENSLAND

CITATION:	*Collie v Edmunds* [2006] QSC 343
PARTIES:	**IAN DAVID STAFFORD COLLIE** **(plaintiff)** **v** **RODNEY EDMUNDS** **(first defendant)** **IAIN ROBERTSON CALDER YOUNG** **(second defendant)** **MALCOLM MCGREGOR MCKAY** **(third defendant)** **COLIN DENIS HUNT** **(fourth defendant)**
FILE NO:	BS4225 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	20 November 2006
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2006
JUDGE:	Mackenzie J
ORDER:	**1. The application is dismissed.** **2. The applicant pay the respondents' costs of and incidental to the application to be assessed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – AMENDMENT – where plaintiff seeks declaration pursuant to r 371(2) of the *Uniform Civil Procedure Rules 1999* (Qld) that the defendants' amended defence is ineffectual – whether the amended defence substantially repleads the defence resulting in withdrawal of admissions – whether the court's leave was required pursuant to r 188 of the Rules — whether non-compliance with the Rules renders a document or step ineffective *Uniform Civil Procedure Rules 1999* (Qld) r 188, r 371(1)(2), r 372, r 378 *Bates v Queensland Newspapers Pty Ltd* [2001] QSC 83, applied *New Asian Shipping Co Ltd v Omar Farooq Sultan* [2005] QSC 228, applied

COUNSEL:	L J Nevison for the applicant T J Bradley for the respondent
SOLICITORS:	Damien Bourke & Associates Solicitors for the plaintiff Minter Ellison Lawyers for the defendants

[1] **MACKENZIE J:** This is an application in which the plaintiff seeks, primarily, a declaration pursuant to r 371(2) *UCPR* that the amended defence filed on 5 September 2006 is ineffectual due to the failure of the defendants to seek the court's leave to withdraw admissions made in the defence filed on 14 July 2005. The defendants' position is that the application cannot succeed because:

(a) A declaration cannot be made because the amended defence is not "ineffectual" within the meaning of r 371(1);

(b) The applicant has not complied with r 372 which is a prerequisite to relief under r 371(2); and

(c) There has been compliance with r 378 relating to amending pleadings before the filing of a request for trial date.

[2] Rule 188 provides that a party may withdraw admissions made in a pleading only with the court's leave. If there is an amendment of the defence, and leave of the court has not been obtained, r 378 does not assist the defendants, because it applies only where leave of the court is not required. The tenor of the respondents' argument in relation to proposition (c) is really directed to establishing that what was done did not involve withdrawal of admissions. The essential argument was that no admissions had been withdrawn in the process of substantially repleading the defence, even though the result was that the defence had been significantly recast.

[3] The applicant does not articulate with any precision or descent to detail why it is said admissions were withdrawn, except to the extent that particular paragraphs of the pleadings are identified as ones where admissions were allegedly withdrawn. As it is put in his written submissions, "The pleadings speak for themselves. … It is patently clear that the Amended Defence does vacate admissions previously made by the defendants and does tell a different story in a different way". The underlying expectation, therefore, seems to be that the court will, without more focus than that, undertake the task of comparing and analysing the defence and amended defence in the context of the statement of claim, the reply and the correspondence between the solicitors to divine whether there has been withdrawal of admissions made in the defence.

[4] This is not a satisfactory way of conducting the matter. Rule 372 requires more focus than a mere assertion that a series of pleadings and other documents, if read carefully, will reveal an ultimate conclusion that an admission has been withdrawn. At least there should be an attempt to identify what is said to be the substance of the admission made and how what is pleaded by amendment differs from it to an extent that constitutes a withdrawal of the admission.

[5] More fundamentally, r 371 provides that failure to comply with the rules is an irregularity and does not render a proceeding, document or step taken in a

proceeding a nullity. Where it is alleged that there has been a failure to comply with the UCPR, setting aside a step pursuant to r 371(2)(c) is an available and more appropriate remedy. Where there has been non-compliance with the UCPR, the non-complying document or step is not ineffectual, in the absence of any additional complication, merely because the UCPR have not been complied with (*Bates v Queensland Newspapers Pty Ltd* [2001] QSC 83; *New Asian Shipping Co Ltd v Omar Farooq Sultan* [2005] QSC 228). There is no reason why, if there is a withdrawal of an admission without leave, it should not be treated as an irregularity, not an ineffectual step.

[6] Accordingly, even if it were to be established that an admission had been withdrawn without leave of the court, an order of the kind sought in this application, which seeks a declaration that the step is "ineffectual" cannot succeed. Accordingly, I make the following orders:

1. The application is dismissed.
2. The applicant pay the respondents' costs of and incidental to the application to be assessed.