SUPREME COURT OF QUEENSLAND

CITATION:	*Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd* [2012] QSC 314
PARTIES:	**PINEHURST NOMINEES PTY LTD ACN 007 826 717 (applicant/plaintiff)** **v** **COEUR DE LION INVESTMENTS PTY LTD ACN 006 334 872 (respondent/defendant)**
FILE NO/S:	BS 2588 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 June 2012
JUDGE:	Martin J
ORDER:	**1. I dismiss the application by Pinehurst;** **2. I grant leave to CDLI to withdraw the admissions the subject of this application; and** **3. I grant leave to CDLI to file an amended defence and counterclaim in the form exhibited to the affidavit of Mr Innes.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where defendant did not respond to certain allegations in plaintiff's statement of claim – where plaintiff adopted those allegations as deemed admissions – whether summary judgment should be granted under r 190 on the basis of those deemed admissions PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – where defendant did not respond to certain allegations in plaintiff's statement of claim – where plaintiff adopted those allegations as deemed admissions – where defendant seeks leave to

withdrawn deemed admissions – where defendant seeks leave to file amended defence and counterclaim – whether defendant should have leave to withdraw deemed admissions and file amended defence and counterclaim

Uniform Civil Procedure Rules 1999, r 165, r 166, r 188, r 190

Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd [2009] 1 Qd R 116; [2008] QSC 302, applied
Groves v Australian Liquor, Hospitality and Miscellaneous Workers' Union & Anor [2004] QSC 142, considered
Hanson Construction Materials P/L v Davey & Anor (2010) 79 ACSR 668; [2010] QCA 246, considered
Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455; [2000] QCA 292, applied

COUNSEL: D E F Chesterman for the applicant/plaintiff
P H Morrison QC with S Cooper for the respondent/defendant

SOLICITORS: Sykes Pearson Miller for the applicant/plaintiff
Ashurst Australia for the respondent/defendant

[1] The plaintiff ("Pinehurst") seeks summary judgment on its claim against the defendant ("CDLI") on the basis of what it argues are deemed admissions contained in CDLI's defence filed 4 May 2012.

[2] CDLI resists Pinehurst's application on the basis that its defence does not give rise to those deemed admissions; in the alternative, if it does not succeed on that point, it has applied for leave to withdraw any relevant deemed admissions.

Background

[3] In early March 2000, Pinehurst and CDLI entered into a lease concerning the 18 hole golf course which forms part of the resort now known as Palmer Coolum Resort.

[4] The lease entitled Pinehurst to, among other things, access to and use of the golf course and leased locker for the term of the lease, including the right for up to six people to use the golf course and hire golf buggies at no charge. It was subject to an option to renew for a further term of 20 years.

[5] Pinehurst availed itself of its rights in two ways:
1. it used any or all of the spots for the benefit of its directors and guests; or
2. it sold its six spots to members of the public at a cost of $70 for a round.

[6] Pinehurst submits that CDLI has known at all material times that Pinehurst used the golf course to conduct its business in this fashion. CDLI denies this knowledge and submits that this was done without its consent.

[7] By an email dated 5 January 2012, CDLI informed Pinehurst that it would no longer accept bookings from players purportedly exercising Pinehurst's right to use the golf course.

[8] By letters dated 10 and 12 January 2012, Pinehurst demanded that CDLI comply with the terms of the lease and foreshadowed proceedings for specific performance and damages if CDLI failed to do so.

[9] On 20 March 2012, Pinehurst filed its claim and statement of claim. CDLI filed a defence on 3 May 2012 which it amended the following day to correct a minor error ("the first defence").

[10] Pinehurst filed its reply on 18 May 2012, in which it adopted the deemed admissions it says were contained in the first defence.

[11] CDLI filed a further amended defence ("the amended defence") on 4 June 2012 pursuant to r 378 of the *Uniform Civil Procedure Rules* 1999 ("UCPR").

[12] Pinehurst filed its application for summary judgment on 8 June 2012 on the basis of the first defence.

Rule 165

[13] Rule 165 of the UCPR provides:

> (1) A party may, in response to a pleading, plead a denial, a nonadmission, an admission or another matter.
> (2) A party who pleads a nonadmission may not give or call evidence in relation to a fact not admitted, unless the evidence relates to another part of the party's pleading.

Rule 166

[14] Rule 166 of the UCPR provides:

> (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) However, there is no admission under subrule (1) because of a failure to plead by a party who is, or was at the time of the failure to plead, a person under a legal incapacity.
> (3) A party may plead a nonadmission 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 nonadmission 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 nonadmission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted.

(5) If a party's denial or nonadmission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation.

(6) A party making a nonadmission 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.

The requirements of rules 165 and 166

[15] Rule 165 sets out the alternative pleas which may be made in response to an allegation in the earlier pleading. It specifically provides that a consequence of pleading a nonadmission is that the party may not give or call evidence in relation to a fact not admitted, unless the evidence relates to another part of the party's pleading. It follows that it will conduce to the efficient conduct of a trial, and the making of any necessary rulings on evidence, if it is clear that a party does not admit a particular allegation.

[16] The other provisions which deal with nonadmissions and denials in r 166 were the subject of "convincing analysis"[1] by Daubney J in *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd*.[2] I gratefully adopt what his Honour said in that decision and, in particular, the following:

> "[27] It is important, however, that the requirement for a defendant to give its "direct explanation" for its belief that an allegation is untrue not be elided with the obligations on a defendant imposed by r 149(1)(b) and (c) to state all the material facts on which it relies (but not the evidence by which the facts are to be proved) and to state specifically any matter that, if not stated specifically, may take the plaintiff by surprise.
>
> [28] A "direct explanation for a party's belief that an allegation is untrue" is precisely what it says – a direct explanation for the belief. At first blush, it might be thought curious that the rule requires such an exposition of an essentially subjective matter – a party's belief as to matters is generally neither here nor there so far as the Court is concerned. There is a significant body of principle and statute devoted to the primary evidentiary rule that witnesses should state facts not opinions and the exceptions to that rule. But **the requirement that a party provide a direct explanation for its belief that an allegation is untrue fulfils two important functions:**

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1 *Australian Securities and Investments Commission (ASIC) v Managed Investments Ltd (No 3)* (2012) 88 ACSR 139, 144; [2012] QSC 074, [18].

2 [2009] 1 Qd R 116; [2008] QSC 302.

> **1. it compels the responding party to expose, at an early stage of the proceeding, its rationale for a joinder of issue on a particular allegation;**
>
> **2. it necessarily compels the responding party to formulate that rationale. In other words, the party must ask itself, and be able to answer the question, "Why am I denying this fact?"**

[29] A party's direct explanation may, depending on the nature of the allegation in question, be straightforward (e.g. "this event alleged by the plaintiff did not occur at all"). It may be that the party's belief that the allegation is untrue is founded in a different factual matrix (e.g. "this event did not occur in the manner alleged by the plaintiff"). Or it may be that the party believes the allegation to be untrue because the allegation is inconsistent with other matters which the party would propound (e.g. "the alleged fact is so inconsistent with other matters that the defendant believes it to be untrue"). I should hasten to add that, in giving these examples, I do not purport to cover the field of possible direct explanations, nor should these examples be regarded as templates. I refer to them, however, to reinforce the proposition that what r 166(4) requires is exactly what it says – a direct explanation for the belief.

[30] The direct explanation itself, clearly enough, is not a statement of a material fact for the purposes of r 149. It may be, however, that the nature of the direct explanation of the party's belief that an allegation is untrue necessarily compels the party to plead, in compliance with r 149, the material facts (not evidence) on which it will rely to controvert the allegation or other matters to prevent the opponent being taken by surprise. Thus, if the direct explanation given by a defendant is that the alleged fact is so inconsistent with other matters that the defendant believes it to be untrue, the defendant should plead those other matters by way of response, either as material facts under r 149(1)(b) or as matters required to be stated to prevent surprise under r 149(1)(c). On the other hand, if a party's direct explanation is, for example, that it believes that a particular event simply did not occur, it may, depending on the case which it would seek to advance at trial, not be necessary to plead any other matters.

[31] **This approach to r 166, in my view, reflects the scheme of pleadings introduced by the UCPR to achieve early comprehensive disclosure of the cases to be mounted by each party. The requirement for parties who are responding to allegations to turn their minds to making appropriate admissions and articulating their direct explanation in connection with denials and non-admissions is directed to the early and efficient identification of the "real issues" which require "just and expeditious resolution … at a minimum of expense", and thereby observing the aspirational statement of purpose expressed in r 5.**" (emphasis added)

[17] Pinehurst is seeking judgment on the basis that CDLI's pleading gives rise to deemed admissions. Before I consider the submissions with respect to the proper construction of CDLI's pleadings, I will examine the operation of r 166 and what needs to be done to avoid its operation.

[18] The "default position" established by r 166(1) is that allegations of fact are taken to be admitted. It is only when the responsive pleading satisfies the criteria in r 166 that the deeming will not occur.

[19] An allegation will not be deemed to have been admitted where:

(a) the allegation is denied or is *stated* to be not admitted (r 166(1)(a)); **and**

(b) the denial or non-admission is *accompanied* by

(c) a *direct* explanation for the party's belief that the allegation is untrue or cannot be admitted (r 166(4)).

[20] Thus, a non-admission will not satisfy the requirements of r 166 unless it is "stated" to be a non-admission. This requirement is consistent with the intention of the rules relating to pleadings generally, that is, that the real issues be identified early and efficiently.

[21] Further, the denial or non-admission must be "accompanied by" a "direct explanation". In order to accompany a denial or non-admission, the explanation must be clearly connected with the denial or non-admission. It will not be sufficient for a non-admission to be in one paragraph and the explanation in another paragraph unless there is a clear statement of connection. A series of non-admissions may be pleaded with the explanation to be given by direct reference to the first non-admission and the explanation given for it, for example, "The defendant does not admit the allegation in paragraph 10 of the Statement of Claim for the reasons set out in paragraph 4 of this Defence." But an allegation in one paragraph of a defence will not, without more, *accompany* a non-admission even if it concerns the allegation the subject of the non-admission.

[22] The explanation must also be "direct". That is, it must unambiguously relate to the allegation and the non-admission. The mischief of "evasive denials" was a blight which this rule seeks to eliminate.[3] The nature of such an explanation was considered by Daubney J in *Cape York Airlines* [4] and by Mackenzie J in *Groves v Australian Liquor, Hospitality and Miscellaneous Workers' Union & Anor*: [5]

> "… A mere statement to the opposite of what is alleged by an opposing party is not a denial "accompanied by a direct explanation for the party's belief that the allegation is untrue". A direct explanation is more than this. There does not need to be a pleading of evidence as that term is understood by the rules of pleading. A statement of fact as to why it is believed that the allegation is untrue does not involve contravention of the rule. If the point of the other aspect of the defendants' argument is that in some cases the belief might depend on a mixed question of fact and law, a statement of a conclusion expressed as fact is ordinarily

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3 *Ballesteros v Chidlow & Anor No 2* [2005] QSC 285, [20].

4 At [21].

5 [2004] QSC 142, [15].

treated as a statement of fact (*Thomas v The King* (1937) 59 CLR 279 at 306-307)."

The pleadings

[23] In order to understand the arguments relating to deemed admissions, it is necessary to set out in full those parts of the pleadings which give rise to the issue.

[24] The explicitly admitted allegations are:

(a) that the parties are corporations,
(b) that CDLI owns the land upon which the golf course and the locker are situated, and
(c) the parties entered into a lease of the locker from CDLI to Pinehurst.

Statement of Claim

[25] Pinehurst pleads:

"3. The plaintiff and the defendant entered into a written lease dated 16 March 2000, which lease was:
(a) registered on the title to the property on 9 March 2009;
(b) varied in writing by amendment dated 16 February 2010; and
(c) varied in writing by amendment dated 29 March 2011.

…

5. From the commencement of the lease on 16 March 2000 until 5 January 2012:
(a) the plaintiff conducted a business whereby it sold its rights to use the golf course and golf buggies to members of the public at a cost of $70.00 per person per round; and
(b) the plaintiff's directors and authorised or invited guests used and enjoyed the Premises and the locker pursuant to clause 3 of the lease.

6. On 5 January 2012, the defendant advised the plaintiff by email from Maurice Holland on behalf of the defendant to Mr Chris Shannon on behalf of the plaintiff that:

'This is to advise you that we have been instructed by our owning company not to honour any requests from Pinehurst, for golf bookings.

We will honour any existing bookings, but with immediate effect, will not be taking future bookings'.

7. By letters dated 10 and 12 January 2012 from the plaintiff's solicitors, Sykes Pearson and Miller, to the defendant, the plaintiff demanded that the defendant comply with the terms

of the lease and foreshadowed proceedings for specific performance and damages if the defendant failed to do so.

8. By letter dated 19 January 2012, the defendant wrote to the plaintiff's solicitors, Sykes Pearson and Miller, relevantly stating:

'We [meaning the defendant] do not recognize your clients [meaning the plaintiff] have any rights whatsoever and it is our view that their alleged rights relate to dealings which are not certain and which may have been done for an improper purpose. If your clients believe they have any rights which are enforceable please be advised that the writer is authorised on behalf of the Company to accept service at the address provided below.

Please also be advised that we will vigorously oppose any action by your clients and reserve our rights to counterclaim for all unpaid golf rounds that your clients may have fraudulently received over the past 25 years'.

9. The defendant, by its conduct pleaded in paragraphs 6 and 8 above, has repudiated and breached the lease as it has:
   (a) refused the plaintiff access and use of the Premises in breach of clauses 3.2 of the lease;
   (b) refused and denied the plaintiff's right for 6 people to use and enjoy the Premises at no charge for green fees and golf buggies in breach of clauses 3.3 of the lease; and
   (c) has failed to ensure that the same booking procedures for tee-off times that apply to guests of the resort apply to the plaintiff in breach of clauses 3.4 of the lease.

10. The plaintiff is, and at all material times has been, ready, willing and able to perform the lease.

11. By reason of the defendant's breach of the lease, the plaintiff has suffered and will continue to suffer loss and damage of $2,116,030.00, calculated on the basis of a loss of 703 rounds of golf per annum at $70.00 per round, or $49,210.00 per annum, for 43 years.

… "

The first Defence

[26] CDLI pleads:

"2 The Defendant admits that the lease contained certain terms and conditions as outlined in paragraph 4 of the statement of claim but says that upon its proper construction, the Plaintiff was not entitled to hire out the Defendant's golf course for

financial gain, and as a going business concern - see paragraph 5 of the statement of claim.

…

5 The Plaintiff knew, or ought to have known, that the Defendant:

(a) conducted the premises as a top class golf course facility forming part of a golf resort (now known as the Coolum Golf & Spa Resort);
(b) charged a fee for the use of its golf course (“green fee”);
(c) charged a hire fee for its motorised golf buggies (“cart hire”).

6 The Plaintiff, in breach of clause 5.2 of the lease:

(a) conducted the same business as the defendant;
(b) deliberately charged a lesser fee to that charged by the defendant;
(c) caused the Defendant to lose the opportunity offer to the public and its resort guests up to 12 green fees and cart hire per day.

PARTICULARS
The plaintiff would book out up to 6 morning green fees including golf buggies and 6 afternoon green fees on a daily basis to use the Defendant's golf course between the hours of 6 am and 6 pm over a 7 day week.

7 In so doing, the Plaintiff breached a fundamental term of the lease, which breach constituted a repudiation of the lease by the Plaintiff.

8 It was a fact known by the Plaintiff that the Defendant offered green fees and cart hire to members of the public and resort guests at a commercial fee which ranged in price between $110 - $115 per player plus the hire of a motorised golf buggy rented at $40. The average green fee plus cart hire was $135 per player. The Plaintiff, using the Defendant's golf course & golf carts, charged a flat fee of $70 per player, which included cart hire.

9 And/or in the alternative, the Defendant says:

9.1 Clause 3.2 of the lease states:
“the Lessee must only use the Locker for the Permitted Purpose”.

Clause 3.5 of the lease states

“Where the Lessee is a company, it may by authority under its common seal nominate a natural person to exercise all

rights and benefits of the Lessee under this lease and may alter such nomination at any time."

In the premise, the use of the Locker for the Permitted Purpose may only be exercised by the Plaintiff or its nominee (as authorised under the common seal of the Plaintiff as Lessee). The Plaintiff nominated Chris Shannon as the natural person to exercise its rights and benefits under the lease. The lease does not contemplate (expressly or impliedly) that the Plaintiff or Chris Shannon as its nominee is entitled to conduct the business described at paragraph 5(a) of the statement of claim whereby the Plaintiff sells its rights to use the golf course and golf buggies to members of the public.

9.2 The operation of such a business constitutes a breach of the lease by the Plaintiff including, without limitation, clause 5.3 of the lease which states:
"The Lessee must only use the Locker for the Permitted Purpose".

Access and use of the Premises may only be exercised by the Plaintiff or its nominee as the natural person nominated to exercise its rights and benefits. The rights under the lease are personal to the plaintiff and/or the natural person nominated by the Plaintiff to exercise its rights under the lease.

9.3 The operation of such a business constitutes a breach of the lease, including, without limitation, clause 6.1 (f) of the lease which states:
"The Lessee must comply with any rules and regulations governing the Premises and all reasonable directions and requirements of the Lessor relating to the Premises."

9.4 The rules of the Corporate Membership provide:
"Members are required to accompany his/her visitor at all times and are responsible for all charges" incurred by his/her visitor."

9.5 The conduct of a business whereby the Plaintiff sold to the general public access to the Defendant's golf course interfered with the Defendant's occupation and use of the Premises. Only the Defendant was entitled to carry out a business whereby rights of access to use the Premises are sold to members of the public.

10 The Defendant does not admit the allegations in paragraph 5(b) of the statement of claim.

11 The Defendant admits the allegation in paragraph 7 of the statement of claim but cannot admit the allegations in

> paragraphs 6 and 8 of the statement of claim. For the reasons identified in paragraphs 12-16 of this Defence, the Defendant does not admit that the correspondence outlined in paragraphs 6 and 8 of the statement of claim constitute a breach of the lease by the Defendant.
>
> 12 The Defendant denies the allegation in paragraph 9 of the statement of claim."

The Reply

[27] Pinehurst pleads:

> 8. As to paragraph 10 of the defence, the plaintiff says that pursuant to UCPR 166(5), the non-admission of subparagraph 5(b) of the statement of claim is a deemed admission of that subparagraph as the defendant's non-admission does not comply with UCPR 166(4).
>
> 9. As to paragraph 11 of the defence, the plaintiff says that pursuant to UCPR 166(5), the non-admission of paragraphs 6 and 8 of the statement of claim are deemed admission of those paragraphs as the defendant's non-admission do not comply with UCPR 166(4).
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> 10. As to paragraph 12 of the defence, the plaintiff says that pursuant to UCPR 166(5), the denial of paragraph 9 of the statement of claim is a deemed admission of that paragraph as the defendant's denial does not comply with UCPR 166(4).

Are there deemed admissions?

[28] CDLI has admitted the lease (with some contentions about its construction) but Pinehurst's allegation (SoC, para 9) that CDLI has repudiated and breached that lease is met only with a bald denial (Def, para 12). It is *not accompanied* by any *direct* explanation for the denial. It was argued for CDLI that paragraphs 13 to 16 of the first defence constituted a direct explanation for the denial in that they allege breaches by Pinehurst which gave CDLI the right to terminate the lease. In order to support that, it was submitted that the breaches referred to were "self evidently" a reference to the breaches alleged in paragraphs 2, 6, 7, 9.1, 9.2, 9.3 and 9.5 of the defence. But the pleading of those breaches neither "accompany" that part of the pleading nor, and more importantly, are they *direct* explanations.

[29] The terms of r 166 are not satisfied by the type of manipulation of paragraphs and hindsight-reconstruction advanced by CDLI. The first defence is a very inadequate pleading. It is the product of a confused approach which might once have passed muster, but no longer. The exercise advanced by CDLI – of having to dig through the various parts of the pleading in an effort to prop up a denial – is inconsistent with the pleadings regime imposed by the UCPR. Neither the opposing party nor the court should have to wade through a series of unconnected assertions searching for

the issues. To paraphrase an illuminating statement made elsewhere[6] judges are not like pigs, hunting for truffles in pleadings.

[30] In the absence of a direct explanation it follows that the allegation in paragraph 9 of the statement of claim is deemed to have been admitted.

[31] In paragraphs 10 and 11 of the statement of claim, Pinehurst pleads that it is ready, willing and able to perform its obligations under the lease and that, by reason of CDLI's breaches, it has suffered a loss of $2,116,030.

[32] There is no reference to either of paragraphs 10 or 11 in the defence. CDLI again submits that it is possible to divine that it has not admitted paragraph 10 by reason of its contentions in paragraphs 2, 6, 7, 9.1, 9.2, 9.3, and 9.5. CDLI submits that, although there is no reference to paragraph 11, there could not be a deemed admission because of the bald denial of paragraph 9. For the reasons set out above, the defence does not contain pleadings sufficient to satisfy r 166(4). Thus, the allegations in paragraphs 10 and 11 are deemed to have been admitted.

Should there be judgment on the deemed admissions?

[33] The allegations which are deemed to have been admitted are sufficient to allow judgment under r 190. The defendant, though, seeks leave to withdraw the deemed admissions and to amend its defence.

Leave to withdraw admissions

[34] Rule 188 allows for the withdrawal of admissions. It provides: "A party may withdraw an admission made in a pleading or under rule 187 only with the court's leave."

[35] It is similar in effect to r 189(3) which was considered in *Ridolfi v Rigato Farms Pty Ltd*,[7] where de Jersey CJ distilled the following principles to be applied on an application for such leave. They are:

(a) a court will ordinarily expect sworn verification of the circumstances justifying a grant of leave;[8]

(b) the 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;[9]

(c) issues of prejudice may also fall for consideration upon the hearing of such an application;[10]

(d) 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;[11]

(e) the discretion to grant leave is broad and unfettered;[12]

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6 *United States of America v Dunkel* 927 F.2d 955 (7th Cir. 1991), 956.

7 [2001] 2 Qd R 455; [2000] QCA 292.

8 Ibid, [19].

9 Ibid.

10 Ibid.

11 Ibid, [20].

12 Ibid.

(f) the Uniform Civil Procedure Rules cannot be approached on the basis that if important provisions are ignored, even if inadvertently, the court may be expected to act indulgently and rectify the omission;[13]

(g) parties do not have an inalienable right to a hearing of all issues on the merits.[14]

[36] McPherson JA said:

> "[27] Before permitting the admission to be withdrawn, the first step to be determined here was **whether there was a genuine dispute about the defendant's liability** in this action. Drawing on the analogy provided by another branch of the law, it is not enough for that purpose simply to assert that a dispute exists: see *Re Brighton Club & Norfolk Hotel Co Ltd* (1865) 35 Beav 204, 205; (1865) 55 ER 873, 874. **Some proper basis must be laid for that assertion**, which would ordinarily **include an explanation of how the earlier admission came to be made** and why it should now be permitted to be withdrawn. That is not shown by a saying simply that there has been a change of solicitors, or that it is possible to see that, before the admission was made, the issue of liability was an open question. **Here the defendant has not condescended to swear to the circumstances in which the admission came to be made, or to show that it occurred by inadvertence, mistake or in some other way that might now justify its withdrawal**." (emphasis added)

[37] Williams JA added:

> "[31] Counsel for the appellant referred to the well known passage in the judgment of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710 where he said that **the court ought to correct errors or mistakes in procedure made by the parties so that the matter was determined in accordance with the rights of the parties**. That statement, though made over 100 years ago, is still relevant, and it encapsulates a principle which a judge must always take into consideration in determining whether or not it is appropriate, for example, to allow a party to withdraw an admission. **Essentially it is no more than a recognition that courts will, so far as possible, ensure that a party has a fair trial. But, for example, where the detriment or prejudice is self-induced, the party may not be entitled to relief.** So much is clear from the unreported decision of the Victorian Full Court in *Apex Pallett Hire Pty Ltd v Brambles Holdings Ltd*, referred to at length and applied by Rogers CJ Comm D in *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at 744. Rogers CJ considered that the statement of Lord Denning MR in *H Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694 at 703 that an admission made by counsel in the course of proceedings can be withdrawn unless the circumstances are such as to give rise to an estoppel were "words ... uttered in another age

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13 Ibid, [21].

14 Ibid, [22].

> and in other circumstances" (746). Such an observation can even more forcibly be made and applied in the light of the UCPR.
>
> [32] Certainly an admission flowing from the operation of r 189 should not be withdrawn merely for the asking. **In my view a clear explanation on oath should be given 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.** Such a requirement is generally in accordance with the reasons of Rogers CJ in *Coopers* and of Mackenzie J in *Equuscorp Pty Ltd v Orazio* (unreported, S9208/96, judgment 30 November 1999). That ought not be taken to be an exhaustive statement of what is required. Each case should be considered in the light of its own facts and the circumstances may well require even more extensive material in order to obtain leave to withdraw the admission." (emphasis added)

[38] In *Hanson Construction Materials P/L v Davey & Anor*[15] an application for the withdrawal of admissions deemed to have been made on the pleadings was considered. Chesterman JA (with whom Muir JA and Applegarth J agreed on this point) said:[16]

> "[15] It is no doubt true that the UCPR are meant to expedite litigation and to limit disputes to issues that are genuinely in contest, but **it must, in my respectful opinion, remain the case that the rules do not operate so as to prevent the trial of issues that are genuinely in dispute**.
>
> [16] The **first consideration, therefore, in an application to withdraw admissions must be whether the subject matter of the admission is truly contested**. Often, if not always, that determination will be informed by the circumstances in which the admission was made. It is usually a good indication that a fact is not in dispute that the party against whom it is made admits it to be true. This, I apprehend, is why the cases emphasise the need for an explanation as to the making of the admission. If an applicant cannot demonstrate that there is a real dispute about the subject matter of the admission no other consideration need be examined." (emphasis added)

[39] The questions which must be answered, then, start with these two:

(a) is there a genuine dispute? And, if so,

(b) why was that not made obvious in the pleading?

[40] As to whether there is a genuine dispute, it is appropriate to look not just at the pleadings but also the proposed pleadings and any contemporaneous communications between the parties which deal with the issues. Looking at those documents permits at least the following areas of dispute to be identified:

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15 (2010) 79 ACSR 668, [2010] QCA 246.

16 Ibid, 675.

(a) the lease did not entitle Pinehurst to conduct a business of the type which it did conduct; and
(b) in conducting that business it breached a fundamental term of the lease which amounted to a repudiation.

[41] CDLI points to the following as supporting the proposition that its position is, at least, arguable.

[42] First, the lease in question is only of a locker and the rights that are the subject of dispute here are personal rights which are ancillary to the lease. Those personal rights are not, according to CDLI, able to be sold under the lease, nor can they be used to conduct a business of selling such rights.

[43] Secondly, the clause in the lease allowing for people to use and enjoy the golf course is premised on "no charge whatsoever for green fees and the hire of one buggy" being imposed. If the right which Pinehurst had was able to be sold, then it was one for which no fee could be charged. CDLI argues that, when Pinehurst charged people to "exercise" the right available under the lease, they were not exercising the right actually granted because they were charging for people to play.

[44] Thirdly, CDLI says that Pinehurst's actions interfered with CDLI's use of the golf course. By purporting to sell its rights to members of the public, it has been selling at a discounted fee which, in the absence of Pinehurst's business, would most likely have been paid to CDLI. CDLI also asserts that it has an action available to it under s 45D of the *Competition and Consumer Act* 2010. If allowed, it will plead that in a proposed further amended defence and counterclaim.

[45] I am satisfied that the brief outline of the arguments advanced on behalf of CDLI demonstrates that there is a genuine dispute with respect to the lease and the rights available to Pinehurst under it.

[46] That brings me to the next question: why was that not made obvious in the pleading? In purported satisfaction of the requirement outlined by the Court of Appeal in both *Ridolfi* and in *Hanson* an affidavit was filed in which Mr Innes, a solicitor employed by the solicitors for CDLI, deposed to certain things. He said that he had been informed by Ms Morgan, an in-house lawyer for CDLI, that until 13 June 2012, CDLI was acting on its own behalf in these proceedings and that she had the care and conduct of the matter. Mr Innes records that he was told by Ms Morgan:

(a) she did not have experience in litigation and was not familiar with the UCPR or the effect and operation of rules 166 and 188;
(b) that it was not CDLI's intention that the pleadings would give rise to deemed admissions; and
(c) that she drafted the pleadings herself.

[47] Each of the first defence and amended defence carry the following endorsement: "This pleading was settled by Mr Harry Fong of counsel". Mr Innes, in his affidavit, says that he has been informed by Mr Fong that, notwithstanding the endorsement, Mr Fong only provided minor feedback and did not in fact settle the relevant pleadings. It is concerning that Mr Fong's name appears on the pleadings when it appears that he did not settle them. Mr Innes does not record in his affidavit any explanation by Ms Morgan as to why Mr Fong's name appears on the defences. No

adequate explanation was given for the fact that neither Ms Morgan nor Mr Fong provided affidavits dealing with their involvement or lack of involvement in the pleadings.

[48] I do not regard the material supplied purportedly in explanation of the state of pleadings as being particularly satisfactory. It is implicit, though, in the affidavit and in the submissions made on this point, that the paucity of the pleading is due to a lack of competence rather than absence of a case for the defendant. I regard this as a matter in which a true dispute has been demonstrated. As Chesterman JA said in *Hanson Constructions*: "… the rules do not operate so as to prevent the trial of issues that are genuinely in dispute." Those considerations, together with the fact that Pinehurst did not seek to demonstrate any material prejudice, are grounds which are sufficient to allow for an order to be made that the defendant have leave to withdraw the deemed admissions.

[49] CDLI does not need leave to amend once the deemed admissions are allowed to be withdrawn. Should leave be necessary, I grant leave to CDLI to amend its pleadings in accordance with the draft exhibited to Mr Innes' affidavit filed by leave on 21 June 2012.

Orders

[50] I make the following orders:

(a) I dismiss the application by Pinehurst;
(b) I grant leave to CDLI to withdraw the admissions the subject of this application; and
(c) I grant leave to CDLI to file an amended defence and counterclaim in the form exhibited to the affidavit of Mr Innes.

[51] I will hear the parties on costs.