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Cutting Corners? The risks of filing a '*holding*' defence in Queensland

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Every litigator or in-house claims manager has felt the temptation to '*just file a holding defence*'. The reasons may be varied, and often sensible – perhaps the claim is not worth a great deal, it appears to have no prospects of success, there are high hopes of settlement in the immediate short term, or a strike out or other interlocutory application is to be filed which may put an end to the whole proceeding without the need to invest further costs in the defence.

However, a series of cases in the Queensland Courts over the past year have highlighted with increasing precision the financial and strategic risks for any defendant who rashly adopts such a course. Whether attempting to conserve costs, or merely failing at the earliest opportunity to critically review the available evidence, a holding defence can lead to wasted costs or worse, unintended admissions of key facts in the proceedings.

Introduction

For decades, litigators and claims managers have felt the economic price which a simple lack of particularity in a pleading can produce. The costs of drafting, receiving or answering a lengthy request for particulars (and all associated correspondence between the parties, if not an application to Court as well) can quickly add up, and can usually have been avoided by the delivery of a pleading which pays more heed to pleading requirements.

More recently, however, judicial focus has shifted to a particular quirk in the Uniform Civil Procedure Rules (**UCPR**) which is unique to the pleading rules of the Queensland jurisdiction, with consequences stretching far beyond costs alone.

The '*deemed admission*' – what's it all about?

In short, the mechanism comprises four sub-rules, as follows:

> .. Rule 165(1) provides that a party responding to '*a pleading*' must plead an admission, a non-admission or a denial;[1]

.. Rule 166(3) allows the pleading of a non-admission only where the party, despite having made reasonable enquiries,[2] remains uncertain whether the allegation is true;

.. Rule 166(4) provides that a denial or non-admission must be accompanied by '*a direct explanation for the party's belief that the allegation is untrue or cannot be admitted*'; and

.. Rule 166(5) provides that if a party's denial or non-admission does not comply with 166(4), the party '*is taken to have admitted the allegation*'.

Two immediate drafting points can be distilled from these provisions.

Firstly, the *only* basis for a non-admission is that, despite reasonable enquiries, the party remains uncertain whether the allegation is true.

Secondly, simply stating that a fact is denied because the defendant believes it to be untrue does not constitute a satisfactory '*explanation*' for the purposes of rule 166(4), because for reasons based on a thorough examination of chapter six of the UCPR, it has been held that the only basis for a denial is that the party believes it to be untrue – something more must be said in order to provide the explanation for that belief.[3]

The broader consequence of a failure to appreciate and apply these important rules is simple. The fact in issue is deemed admitted by the responding party. It is not difficult to anticipate the horror facing a defendant upon realising that a key fact in issue (such as the occurrence of an injury-producing incident, the fact of a particular conversation having taken place between commercial parties, or even a simple causative link between an occurrence and losses) has inadvertently been '*deemed*' admitted as a result of a substandard defence.

What if a non-compliant defence has been filed?

Unfortunately, the situation is not capable of being remedied merely by simply amending the defence in the ordinary way. Rather, the Court's leave to withdraw the admission must be obtained,[4] by way of an application which must be served on the opposing party.

A series of recent cases in the superior Courts in Queensland provide not only useful examples of what must be established in order to obtain leave to withdraw an admission (and indeed, what may be insufficient to warrant a grant of leave), but also clear warning of the risks for those involved in drafting pleadings who fail to carefully heed to the rules cited above. [5]

Case example: *Pollock v Thiess Pty Ltd & Anor*[6]

In *Pollock v Thiess*, Justice McMeekin of the Supreme Court of Queensland (**SCQ**) considered an outdated but oft-used pleading, to the effect that the defendant did not admit a certain allegation in the statement of claim because it involved '*a matter to be determined by the court having regard to the entirety of the evidence and application of relevant legal principles*'.[7]

In finding that explanation to be non-compliant with rule 166(4) (in that it failed to provide a direct explanation for the defendant's inability to admit the allegation), his Honour commented that whilst that statement in the defence was no doubt accurate (as '*all issues in dispute are to be determined by the court…*') – and had been adopted by the defendant's solicitors as being the firm's '*usual practice*' – such a statement '*should never appear, at least in supposed compliance with the requirements of r 166(4)*'.[8]

In *Pollock*, McMeekin J also found fault with another purported explanation which has been commonly used in times past. The defendant purported to explain its non-admission of another allegation in the statement of claim on the basis that the allegation involved '*a matter of law*'.[9] His Honour accepted the plaintiff's argument that '*the fact that an allegation involves a matter of law does not ipso facto mean that it cannot be admitted, and to that extent [is not a direct explanation for the party's belief as required by rule 166(4)]*'. His Honour found that such a pleading '*at least offends the spirit of the rules and in my view is to be discouraged*'.[10]

His Honour also rejected as non-compliant the trite '*explanation*' that another allegation '*contains mixed questions of law and fact*'[11] – another commonly used defence which ought now be relegated to history.

Luckily for the defendant, his Honour held that although existing case law makes clear that leave to withdraw an admission is not to be had just '*for the asking*',[12] the Court may nonetheless be swayed where the withdrawal of an admission '*will result in the true matters in issue being identified and determined*'.[13] His Honour was convinced that this was such a case, and leave to withdraw the admissions and replead those paragraphs of the defence was granted.

Case example: *Green & Ors v Pearson*[14]

In *Green v Pearson*, it was common ground that the defendant had sought to file a '*holding defence*' which addressed the allegations in the statement of claim in rather broad strokes. The defendant had approached the matter in that way because he sought to reduce his costs pending the determination of a summary judgment application based on a limitation defence.

The Queensland Court of Appeal was not sympathetic to that strategy as justification for a non-compliant defence, and found that rule 166(5) deemed the defendant to have admitted a number of key allegations of fact.

Justice Jackson (with whom Fraser and Morrison JJA agreed) conceded that the defendant's cost-minimisation strategy explained how it was that the admissions came to be made (and thus to the Court's discretion to grant leave to withdraw them) but observed in the clearest of cautionary terms that '*I would not generally endorse any suggestion that it is an appropriate procedure for a defendant to file and serve a "holding"defence that does not comply with the UCPR*'.

Case example: *Gold Coast City Council v Delfin GC Pty Ltd & Ors*[15]

In *GCCC v Delfin*, Justice Peter Lyons of the SCQ emphasised to the defendant seeking leave to withdraw deemed admissions that the relevant case law requires the Court to consider five matters, including particularly (in this case) how it was that the admissions came to be made.[16]

Unlike *Green v Pearson* where the defendant had had an understandable – if erroneous – explanation for how the defence came to be prepared in a non-compliant fashion, the defendant in *GCCC v Delfin* was forced to lead affidavit evidence from its counsel who had settled the defence. Counsel deposed that his intention (in accordance with the client's instructions) had been to deny the allegation, and counsel had considered his language to have been comprehensive, such that any deemed admission arose as a matter of inadvertence, with the defence not reflecting the client's instructions.[17]

Fortunately for the defendant, the Court accepted that evidence and found also (after a lengthy debate) that the defendant '*genuinely contests the facts deemed to have been admitted*'. The Court consequently granted leave to withdraw the admissions.

Case example: *Elford v Nolan & Anor*[18]

The defendant in *Elford v Nolan* was less fortunate. Although not strictly a '*deemed admission*' case, the decision of the District Court highlights both that leave to withdraw an admission is not a foregone conclusion, and secondly the strategic risks of a hasty or ill-considered pleading.

By contrast with the earlier cases, the defendant in *Elford v Nolan* had (at the time of filing the defence) made considered admissions of fact, including particularly as to causation of the plaintiff's injuries. That is, the defendant formally admitted that the plaintiff's injuries were caused by the incident the subject of the proceedings.

However, two years later, the defendant appointed new solicitors who took a different view of the available evidence, and consequently

sought leave to withdraw the admission and place causation back in issue.

In exercising its discretion, the Court considered that it was against the defendant that the two year delay was unexplained (particularly, whether the admissions had been made incorrectly or inadvertently), there was no medical evidence to positively support the contrary view on causation for which the defendant now sought to contend, and the real basis seemed to be just the different view of a new solicitor.

Moreover, the Court noted that the question of prejudice to the plaintiff must be considered, and in this case, the plaintiff had prepared his case for two years in reliance on causation having been admitted, such that attempts now to seek to identify witnesses or other evidence could well be '*significantly affected by the passage of time*'.[19]

Leave to withdraw the admissions was denied, and the defendant had to proceed without any opportunity to test the plaintiff's case on causation.

Implications and lessons to learn

Ultimately, all defendants (and also their insurers) should be firmly on notice of the implications of the mechanism in rules 165 and 166, whose purpose has been held to '*promote the interests of justice, by expediting cases and reducing cases*'.[20] More particularly, heed should be taken of the Court's guidance that the mechanism is said to force a defendant at an early stage to disclose its rationale for joining issue on an allegation, and to ask itself and be able to answer '*Why am I denying this fact?*'.[21]

So whilst economic considerations can and should be borne in mind in conducting any litigation, it can be a false economy for a party to fail at an early stage to give proper consideration to the issues, the available evidence, and that party's obligations under the UCPR.

As experienced litigation solicitors skilled in negotiating this tricky area, our approach is to ensure our clients are best placed to defend claims strategically and economically.

[1] The rule also permits the party to plead '*another matter*', but in the writer's experience this is limited to a situation where another mechanism of the UCPR is to be invoked, such as that the pleading is embarrassing, scandalous, oppressive or vexatious.

[2] Enquiries must be reasonable '*having regard to the time limited for filing and serving the defence…*' (r. 166(3)(b)).
[3] *Cape York Airlines Pty Ltd* [2008] QSC 302 [21].
[4] Rule 188.
[5] Whilst this newsletter focuses on the immediate effects of a non-compliance with rule 166(4), it can also be said that a savvy knowledge of these provisions and the relevant case law can allow the party to reap numerous strategic and procedural benefits of a careful '*direct explanation*', with consequences for particulars, disclosure and evidence at trial. This provides scope for another newsletter.
[6] [2014] QSC 22.
[7] Ibid [8].
[8] Ibid [10].
[9] Ibid [13].
[10] Ibid [14] to [15].
[11] Ibid [30] to [32].
[12] Ibid [38], citing *Rigato Farms Pty Ltd v Ridolfi* [2000] QCA 292, per the Chief Justice [20].
[13] Ibid [33].
[14] [2014] QCA 110.
[15] [2014] QSC 159.
[16] At [16] to [17].
[17] This explanation appears, without citation in the *GCCC v Delfin* judgment, to have taken up a comment by McMeekin J in *Pollock v Theiss* that '*the admissions [in the Pollock case] have come about through inadvertence – if not worse – on the part of the lawyers rather than any deliberat decision of the party*' ([4]).
[18] [2014] QDC 257.
[19] Ibid [38] to [40].
[20] *Ridolfi v Rigato Farms Pty Ltd* [2000] QCA 292 [21].
[21] *Cape York Airlines Pty Ltd (supra)* [27].

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