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Deemed Admissions in Queensland Pleadings: An Analysis of UCPR r.166(4)

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The rule provides in relation to pleadings that:

> "A party's denial or non-admission 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."

The consequences of non-compliance are severe, as r.166(5) provides that:

> "If a party's denial or non-admission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation."

These rules involve a significant departure from the previous rules of pleading1. Formerly, a party was entitled to plead in response to allegations with a bare

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denial or non-admission. This approach was found to be unsatisfactory. It permitted parties to conceal in their pleadings the true matters in controversy, with the consequence that unfair surprise could occur at trial2. The purpose of the new rules is to avoid this mischief3. As White J. explained in *Ballesteros v Chidlow* (No.2) at [35]:

> "[35] The function of pleadings is to state with sufficient clarity the case that must be met, *Gould v Mt Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 at 517. The Rules of Court exist to bring that about and r 166(4) in particular has been beneficial in achieving that object. Pleadings define the issues and make clear that which is in issue for proof at trial....."

The new rules, however, have given rise to a number of recurring questions. Which allegations in a pleading require a response in conformity with r.166(4)? What form should the response take? What is sufficient to constitute a "direct" explanation for the purposes of this rule? Must the response satisfy the pleading rules (eg. being confined to material facts and not evidence)? Can further particulars of the explanation be sought? Is the provision of an explanation sufficient to avoid the need for a matter to be explicitly pleaded? What impact does such an explanation have on the further conduct of the matter? How can one resolve, in advance of a trial, disputes about whether or not the rule has been satisfied? Can one seek to withdraw a deemed admission?

The purpose of this paper is to consider these central questions.

II. Which allegations are the subject of rule 166(4)?

Rule 166(4) is applicable only to an "allegation of fact".

In the authorities, the phrase "allegation of fact"

appears to have been understood as incorporating the conventional distinction between material facts, particulars and evidence.

Accordingly, it has been held that:

(1) Mere allegations of law do not require a response in conformity with r.166(4). As Jones J observed in *James v. Hill* [2007] QSC 258 at [13]:

> "The application of r.166 relates to factual issues and not to contentions as to duties arising from known or agreed facts".

(2) Mere particulars do not require a response in conformity with r.166(4)4.

(3) Nor do mere allegations of evidence. In *Melco Engineering Pty Ltd v Eriez Magnetics Pty Ltd* [2007] QSC 198, Dutney J held at [36]:

> "There is no obligation on the plaintiff to plead to evidence. UCPR r 149 (1)(b) distinguishes between evidence and material facts. Rule 166 is concerned only with facts and not with the evidence by which it is hoped facts can be established."

(4) Statements in a pleading which are not allegations of fact, but mere explanations in conformity with r.166(4), do not require a further response in conformity with r.166(4)5.

Of course, where a pleading may be thought to contain even a partial "allegation of fact", the prudent course is to plead a response in conformity with r.166(4)6.

Allegations of fact in a defence (or subsequent pleading) do not necessarily require a further pleading in response. In an appropriate case, a party may choose to simply rely upon the deemed non-admission which arises automatically upon the close of pleadings under r.1687. However, this course is often not appropriate for a party who wishes to adduce evidence to contest these allegations, because that party may be prevented from doing so by r.165(2). Where a pleading in response is in fact filed, it should ensure that it responds to each allegation of fact in conformity with r.166(4)8.

It should be added that r.166(4) is applicable only to the extent that no contrary direction is made. Such a direction may be sought in cases where the operation of r.166(4) would be inconsistent with a privilege against self incrimination. However, an objection to the application of r.166(4) must be made promptly. This issue was considered by the Court of Appeal in *Commissioner of Taxation v. Price* [2006] 2 Qd.R. 316 (CA) at [31]:

> "[31] The appellant's first ground of appeal is that the procedure below was fundamentally unfair, so that the order made by the learned trial judge should be set aside. There are two reasons why, in my view, this ground of appeal should be rejected. First, the agitation of this ground of appeal is an attempt to resile from the appellant's conduct of the case both prior to and at trial. The appellant at no stage sought to be relieved from the obligations imposed by r. 166 of the UCPR. Such an application could have been made under r. 367(1) of the UCPR which empowers the court to make "any order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with another provision of these rules". Section 136 of the Act itself also contemplates the making of judicial directions, and there can be no doubt that the fair trial of an excise prosecution may be ensured by such judicial directions as are necessary either under r. 166 and r. 367 of the UCPR or s. 136 of the Act. The appellant made no such application. Whether or not the appellant is able to establish a miscarriage of justice by reason of the failure by the prosecution to seek directions to preserve his right to silence and his privilege against exposing himself to penalties, is a matter to which I shall return. It is sufficient for present purposes to say that it is simply wrong to contend that either s. 136 of the Act or the UCPR operate inevitably to deny a defendant the benefit of these common law rights and privileges."

III. Form of a rule 166(4) response

In order to satisfy the requirements of r.166(4), a pleading in response to an allegation of fact ordinarily begins with an express statement that the allegations is either "denied" or "not admitted". Whilst a court may interpret more indirect language as conveying an express denial9, matters of this kind should not be left in doubt.

A denial or non-admission of an allegation must be "accompanied" by a direct explanation for the party's belief that the allegation is untrue or can not be admitted. The term "accompanied" suggests that the explanation is to comprise a statement which is distinct from the denial or non-admission, but provided in immediate proximity to it.

The proper form of such an explanation is to be found in the Form 17 Defence which has been approved for use under the UCPR. Pursuant to the rules, approved forms of this kind must be used for the purposes for which they are applicable, subject to any necessary changes which circumstances may require10.

The Form 17 Defence outlines the following form of denial:

> "3. [The [first] defendant denies the allegation in paragraphŠ.of the statement of claim because.... (*give explanation*).]"

The Form 17 Defence also outlines two alternative forms of non-admission:

> "2. [The [first] defendant does not admit the allegation in paragraph.....of the statement of claim. The [first] defendant has made reasonable inquiries and remains uncertain of the truth or otherwise of the allegation and is unable to admit it because.....(*give explanation*). [The [first] defendant believes the allegation cannot be admitted because.....(*give explanation*).]"

Each of these forms uses the word "because" to signal

that the statement which follows is the "direct explanation for the party's belief that the allegation is untrue or can not be admitted".

This approach is not ideal. The difficulty is that the word "because" does not unequivocally identify the statements which follow it as providing a mere "explanation" for a denial or non-admission. It is a word which is equally apt to introduce further positive allegations of fact. The distinction is important, as statements within the latter category call for a pleading in response.

This point may be readily illustrated. Consider the following pleading in response to an allegation that a statement concerning future matters was made without a reasonable basis:

> "3. The first defendant denies the allegation in paragraph 2 because the said statement merely repeated information provided to the Defendant's employees from the Australian Bureau of Statistics." [emphasis added]

Is the statement which follows the word "because" merely an explanation for the denial or a positively pleaded allegation of fact?

To avoid this difficulty, some pleaders incorporate into the approved form of denial an express reference to the party's belief, to clearly distinguish a "direct explanation" from a positively pleaded allegation of material fact. So the example given above is modified to read:

> "3. The first defendant denies the allegation in paragraph 2 because of its belief that the said statement merely repeated information provided to the Defendant's employees from the Australian Bureau of Statistics." [emphasis added]

To overcome the same difficulty, other pleaders depart from the approved form of denial by providing an explanation under a distinct heading:

> "3. The first defendant denies the allegation in paragraph 2.
>
> ***Direct Explanation for Denial***

> The First Defendant believes that the said statement merely repeated information provided to the Defendant's employees from the Australian Bureau of Statistics."

Both of these approaches avoid the ambiguity inherent in the approved form, and neither appears to have attracted any judicial criticism.

IV. What is a “direct” explanation?

Rule 166(4) requires a "direct" explanation of the party's belief that the allegation of fact is to be denied or not admitted.

The rules do not further define the content of this requirement. In principle, however, the adequacy of the explanation should be tested by reference to the purpose of the rule. As explained above, the purpose of the rule is to give opposite parties due notice of the true issues to be contested at trial. An explanation which does not adequately identify the areas of contest would not seem to satisfy the requirements of the rule.

This point is neatly illustrated by *Groves v. Australian Liquor, Hospitality and Miscellaneous Workers' Union* [2004] QSC 142 (Mackenzie J), which considered the adequacy of a bare denial accompanied by an explanation that the relevant allegations were believed to be "untrue". In the circumstances of that case, it was held that this response was not in conformity with the rules11:

> "[15].....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."

Similarly, in response to a very specific pleading of the quantum of loss, it has been held to be insufficient to explain a denial merely on the basis that the quantum is believed to be "excessive"12. However, the generality of the pleading which is being responded to may necessitate a more general explanation for the denial13.

Similarly, an explanation which does not provide a tenable basis for denying the relevant allegation is also defective and is liable to be struck out14. Where there are numerous allegations which are the subject of a denial, the explanation must provide a tenable basis for the denial of each of the relevant allegations15.

A mere complaint about the adequacy of an opposite party's pleading does not provide a valid explanation for a denial16.

In providing the necessary explanation, it is not necessary to repeat matters which have already been pleaded. A party may properly provide an explanation by reference to other paragraphs in the pleading (or an earlier pleading) which provide a tenable basis for the denial17.

The position in relation to non-admissions was considered by the Court of Appeal in *Barker v. Linklater* [2007] QCA 363. In that case, the defendants pleaded that:

> "The defendants do not admit the allegations in paragraphs 18 to 28, inclusive, on the grounds that the defendants are unable to attest to the truth or otherwise save for their knowledge that....."

The Court of Appeal held that this non-admission was properly pleaded18. There was no need for the pleading to expressly recite facts which demonstrated that inquiries had been made in compliance with r.166(3) and (6). As Muir JA explained at [50]:

> "The pleading should be construed in light of the requirements of sub-rules (3) and (6) and with regard to the presumption of regularity. There is no implicit requirement in subrule (4) that a pleaded non-admission recites or adverts expressly to the requirements of sub-rule (3). Compliance with subrule (3) is a precondition of the right to plead the non-admission."

But that is not to say that a non-admission can be validly pleaded by the mere recitation of a particular formula. The pleading is apt to be struck out if the Court is satisfied, particularly by the time of trial, that the party is in fact in a position to plead a denial with an appropriate explanation. As McMurdo J explained in *Anderson v AON Risk Services Australia Ltd* [2004] QSC 04919:

> "[87].....Secondly, according to r 166 a non admission may now be pleaded only if the party has made reasonable enquiries to find out whether the allegation is true or untrue, and the party remains uncertain as to the truth or falsity of the allegation. A party's non admission must be accompanied by a direct explanation for the party's belief that the allegation cannot be admitted: r 166(4). In a case such as this, at least by the time of the trial, the requirements of r 166 would not have been satisfied by a bare non admission accompanied only by a statement that the defendant remains uncertain on the matter. In my view, where the only logical alternative is fraud, the rules require the defendant to state the facts suggestive of fraud as the basis of its non admission, although there is no positive allegation of fraud."

V. Are the pleading rules applicable?

As the "direct explanations" necessarily appear in the documents which we describe as "pleadings", at least some of the rules which govern pleadings are applicable to them (eg. *UCPR r.171* which gives power to strike out parts of a pleading)20.

But does that mean that "direct explanations" must be prepared in conformity with *all* the rules which govern the contents of pleadings? Pleadings, for

example, are required by r.149(1)(b) to state the material facts relied upon, rather than evidence by which they are to be proved. Does this mean that explanation given under r.166(4) must observe this distinction?

In principle, there is a clear distinction between:

- statements which merely convey an *allegation* of some matter of fact or law, and the admission, non-admission or denial thereof - being statements which do not involve any representation of the party's belief in their truth21.
- statements which actually contain *representations* of matters of fact - being the facts which have led that party to form a particular belief.

Statements in the first category conform to the conventional definition of a "pleading", and are governed by quite specific rules relating to their content which generally trace their origin to at least the *Judicature Act* reforms.

Statements in the second category are the "direct explanations" which are now required to "accompany" particular kinds of pleadings (viz. denials and non-admissions of material facts), and are of a fundamentally different nature.

A recognition of this distinction appears to underlie the authorities in this area, in which the courts have not required explanations to comply with all the rules which govern conventional pleadings.

In *Metyor Inc v. Queensland Electronic Switching Pty Ltd* [2002] QSC 252, Mullins J held that:

> "Because of the consequence of a failure to comply with r166(4) a defence may set out in detail evidentiary matters which are relied on as to the explanation for the belief of the defendant to support a non admission or denial and to ensure the defendant is not precluded from calling evidence relevant to the non admission and therefore not limited to merely putting the plaintiff to proof of the allegation the subject of the non admission."

In *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 209, White J held at [113] that:

> "I think the conclusion must be that if evidence necessarily intrudes into the "direct explanation", so be it, and it should not, unless employed profligately, be struck out on that ground alone."

In this regard, it is important to recognise that the term "pleading" is used in at least two senses. In a narrow sense, it refers to a particular category of statements which consist primarily of allegations of material fact. The rules which govern "pleadings" in the narrow sense do not appear to govern "direct explanations". In a wider sense, however, the term is used to refer to the documents in which the pleadings are required to be embodied. The rules which govern "pleadings" in the wider sense may well be found applicable to statements of "direct explanations" embodied therein.

This distinction assists in resolving the issues which are discussed below.

VI. Can particulars of an explanation be sought?

The first subsidiary issue is whether a party may seek further particulars of an explanation given for a denial or non-admission.

This question was considered in *Gilbert v. Goodwin (No.3)* [2006] 1 Qd.R. 499 (Helman J):

> On behalf of the respondents a number of arguments were advanced in resisting this application, but the main argument was that the respondents should not be required to produce the documents or to give the particulars sought because, by referring to them by way of explanation for the respondents' pleading, the respondents did not put the contents of those documents or the facts referred to in issue in the proceeding. In the case of a denial, the fact in

> issue is the fact denied. In the case of a non-admission, the fact in issue is the fact not admitted. The explanations given in the amended defence were included to comply with the rules but did not thereby create issues of fact for determination at the trial of the proceeding.
>
> I am persuaded by the argument on behalf of the respondents. It appears to me that the acceptance of the proposition advanced for the applicants that the direct explanations create further issues for determination at the trial of the proceeding would result in a proliferation of ancillary issues not directly relevant to the questions in issue between the parties.

This analysis is again founded upon the distinction between pleadings and mere explanations.

VII. Does the explanation need to be specifically pleaded?

A second subsidiary issue is whether a party can avoid the burden of expressly pleading an allegation of fact (with the accompanying obligations of particularization), by merely incorporating its case in a series of "direct explanations" for denials.

In principle, there is only a limited scope for the use of such a technique. If the rules require a matter to be specifically pleaded (eg. r.150(1)), this obligation cannot ordinarily be avoided by a statement which is simply not a "pleading" in the relevant sense. The one arguable exception to this proposition is the requirement that matters be pleaded to avoid surprise (r.149(1)(c)). If this is the only reason why a matter may be required to be pleaded, then a sufficiently clear "explanation" would seem to remove the risk of surprise and thus the requirement to specifically plead the matter.

VIII. Relevance of ambit of explanation?

A third subsidiary issue concerns the legal consequences of the direct explanation given. Does it have the same effect as a pleading in narrow the range of disclosure and the range of issues to be litigated at

trial?

Whilst it is difficult to find any authority which precisely addresses this question, as noted above, the courts have recognized that the purpose of r.166(4) is to assist in defining the issues in the action. Accordingly, in principle, the duties of disclosure and the ambit of admissible evidence should both be governed by the issues as defined and narrowed by the terms of the explanations given for any denial or non-admission.

IX. Resolving disputes about adequacy of explanations

One practical consequence of the introduction of r.166(4) has been the frequency with which parties have fallen into dispute, at an interlocutory stage, as to whether or not a deemed admission has arisen from the pleadings.

The question which has arisen is how, procedurally, disputes of this nature can be resolved prior to trial.

One procedural approach which has been taken by parties seeking to uphold the denial or non-admission is described by White J in *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 20922:

> "[109] FFE, by its application, seeks orders by way of declaration that certain denials and non-admissions in the defence comply with the requirements of rr 165 and 166 of the UCPR. Alternatively, FFE seeks leave to amend or withdraw any admissions deemed to be so as a consequence of failing to comply with the rules."

An alternative approach, taken in *Melco Engineering Pty Ltd v Eriez Magnetics Pty Ltd* [2007] QSC 198 (Dutney J), was for that party to apply to strike out a subsequent pleading which purported to adopt its deemed admissions.

Applications to strike out an inadequate explanation, so as to leave a bare denial or non-admission (and thus a clear deemed admission), may also be brought23.

In a clear case, summary judgment may also be

available24.

X. Can deficiencies be cured?

The consequence of non-compliance with r.166(4) is that the pleading is deemed to contain an admission.

It would seem, therefore, that the pleading cannot be amended to withdraw the admission without leave pursuant to r.18825.

Attempts to use r.371 to cure this non-compliance with the rules would appear to be misconceived26.

Leave to withdraw such an admission is not granted as a matter of course27. However, in cases where there has been technical non-compliance with the rules, and no apparent prejudice to opposite parties, then a proper exercise of the discretion would ordinarily result in a grant of leave28.

XI. Conclusion

The difficulty with any substantial innovation to procedural law is the uncertainty which it is apt to create. Rule 166(4) has been a source of particular difficulty because of the serious consequences which flow from its misapplication. Whilst it is unfortunate that the ambit of its operation is yet to be fully explored at appellate level, a body of authority has now developed in the Trial Division to assist pleaders in applying the rule in a practical and beneficial manner.

J.D.McKenna SC

Endnotes

1 *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 209 (White J) at [112]; *Ballesteros v Chidlow (No.2)* [2005] QSC 285 (White J) at [18].

2 *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 209 (White J) at [112]. *Ballesteros v Chidlow (No.2)* [2005] QSC 285 (White J) at [18].

3 *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 209 (White J) at [112]; *Ballesteros v*

Chidlow (No.2) [2005] QSC 285 (White J) at [20].

4 *Ballesteros v Chidlow (No.2)* [2005] QSC 285 (White J) at [21].

5 *Melco Engineering Pty Ltd v Eriez Magnetics Pty Ltd* [2007] QSC 198 (Dutney J) at [45].

6 For example, in *Commex Communications Corporation Pty Ltd v. Cammeray Investments Pty Ltd* [2005] QSC 394 (Holmes J), an allegation of an implied term was held to be properly the subject of a non-admission on the basis that it was a matter of law.

7 *W & I Wright Nominees Pty Ltd v Haxview Pty Ltd & Ors* [2003] QDC 010 (O'Sullivan DCJ) at [22].

8 As appears below, this response may often involve little more than a reference to earlier pleadings.

9 *Melco Engineering Pty Ltd v Eriez Magnetics Pty Ltd* [2007] QSC 198 (Dutney J) at [43], [49].

10 UCPR r.975.

11 See also *Texas-Australia Power Inc v Clements* [2006] QSC 082 (McMurdo J) at [14].

12 *Ballesteros v Chidlow (No.2)* [2005] QSC 285 (White J) at [24].

13 *Ballesteros v Chidlow (No.2)* [2005] QSC 285 (White J) at [22] ff.

14 *Robinson v Laws* [2003] 1 Qd R 81 at [37] (CA); *Allen v. Cleary & Hoare* [2006] QSC 408 (Atkinson J).

15 *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 209 (White J) eg [126]-[129], [138]-141].

16 *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 209 (White J)at [117], [122-[124]. And see *Texas-Australia Power Inc v Clements* [2006] QSC 082 (McMurdo J) at [13]; *Woodco Services Pty Ltd v. John Holland Pty Ltd* [2002] QSC 264 (Dutney J) at [5].

17 *Melco Engineering Pty Ltd v Eriez Magnetics Pty Ltd* [2007] QSC 198 (Dutney J) at [17] ff

18 At [48]-50] per Muir JA (with whom the other members of the Court agreed).

19 See also *Melco Engineering Pty Ltd v Eriez Magnetics Pty Ltd* [2007] QSC 198 (Dutney J) at [21].

20 *Allen v. Cleary & Hoare* [2006] QSC 408 (Atkinson J)

21 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 86, 98; *Jamieson v. R* (1993) 177 CLR 574, 579; *Pearce v. Hall* (1989) 52 SASR 568 at 573 (FC).

22 See also *Groves v. Australian Liquor, Hospitality and Miscellaneous Workers' Union* [2004] QSC 142 (Mackenzie J).

23 Allen v. Cleary & Hoare [2006] QSC 408 (Atkinson J); *Texas-Australia Power Inc v Clements* [2006] QSC 082 (McMurdo J) at [6] ff.

24 *Woodco Services Pty Ltd v. John Holland Pty Ltd* [2002] QSC 264 (Dutney J) at [13].

25 *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 209 (White J) at [118] ff.

26 *Wright v. Liongain Pty Ltd* [2003] QSC 381 (Moynihan SJA)

27 *Ridolfi v Rigato Farms Pty Ltd* [2001] 2 Qd R 455 (CA).

28 *Barker v. Linklater* [2007] QCA 363 (CA) at [55]. And see *Thiess Pty Ltd v. FFE Minerals Australia Pty Ltd* [2007] QSC 209 (White J).