HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B56/2020
File Title:	Craven v. Commercial & Process Services Australia Pty Ltd &
Registry:	Brisbane
Document filed:	Form 23 - Application for leave or special leave to appeal
Filing party:	Applicant
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

Appellant :	**Gordon James Craven**
	v
First Respondent :	**Commercial & Process Services Australia Pty Ltd ACN 151 394 679**
	AND
Second Respondent :	**Warren Nigel Russ**

10 APPLICATION FOR SPECIAL LEAVE TO APPEAL

The applicant applies for Special Leave to Appeal from the whole of the judgment of the Queensland Court of Appeal regarding Security for Costs, by Justice Morrison JA given on 25 August 2020 and the Order dated 25 August 2020.

The applicant seeks an order that compliance with the time limited by rule 41.02.1 be dispensed with.

PART I - the proposed Grounds of Appeal :

Ground 1 - judgement par [23] PURPORTED DENIAL / PROCEDURAL IRREGULARITY

Given that the the pleadings were central to his Honour's findings, his Honour has erred by arbitrarily failing to apply UCPR166 sub-rules (4) and (5) to a denial in
20 paragraph 4 in the defence pleading in answer to paragraph 2 of the statement of claim, when that denial is manifestly not compliant with UCPR 166 sub-rule (4) by there being no proper *direct explanation*(1) *accompanying*(2) the denial and thereby admitted by reason of sub-rule (5). Consequently the Defendants have admitted the contentious core issue that the Plaintiff had lawful occupation and possession of the property as pled at paragraph 2 of the statement of claim.

(1) *Groves v Australian Liquor, Hospitality…. & Anors* [2004] QSC 142 at 15.

(2) *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd* [2012] QSC 314 at [21].

Ground 2 - judgement par [25] PURPORTED DENIALS / PROCEDURAL IRREGULARITY

30 Again, when the pleadings were central to findings, his Honour has erred by arbitrarily failing to apply UCPR166 sub-rule (1), to paragraph/sub-paragraphs 6.1, 6.1(a), 6.1(b), 6.1(c), 6.1(d), 6.2(a), 6.2(b) and 6.2(c) of the statement of claim **that were not pleaded to at all and thus not defended.** By reason of there being zero pleading or at best an unintelligible non-observance of UCPR 166(1)(a) and UCPR 149(1)(b) & (c), all the core issue allegations within the said paragraph/sub-paragraphs can only be taken to admitted.

Ground 2.1 PURPORTED DENIALS / PROCEDURAL IRREGULARITY

To the extent that his Honour has erroneously adopted denials at paragraphs 18 and 19 of the defence. The denials are simply restating previous pleadings that lack specificity and direct explanation as required to ***accompany***(2) a denial. Being blanket or general denials not compliant with sub-rule 166(4), whatever is being denied is taken to be admitted by reason of sub-rule 166(5), as was adopted in the Amended Reply filed 27 June 2018.

Ground 3 - judgement paragraph [26] AVOIDANCE / PROCEDURAL IRREGULARITY

10 His Honour has erred in adopting that paragraphs 7.6 and 7.7 of the Statement of Claim (SoC) were answered properly. Paragraphs 16 and 16A of the defence did not address the specific issues at paragraphs 7.6 and 7.7 of the SoC. Consequently "specifically" answering 7.6 and 7.7 as required by UCPR149(1)(c) was avoided, and pursuant to UCPR 166(1), 7.6 and 7.7 are taken to be admitted, while SoC paragraphs 7.8 and 7.9 **were not pleaded to at all** and thus admitted.

Ground 4 paragraphs [33] and [34] of the judgement.

His Honour is in error by failing to consider :

(a) the admissions at above Grounds 1, 2, 2.1 and 3; and

20 (b) that the Defendants declined an invitation to further amend their defence.

As such his Honour failed to find :

(c) that the said admissions were reasonable grounds for the Plaintiff's partial summary judgement application for declarations; and

(d) that it was unreasonable for the primary judge to award costs against the Plaintiff in circumstances of the admissions; and

(e) in relation to judgement paragraph [18], failed to realise that the Plaintiff had **satisfied** *"various orders for security for costs"* as mentioned by his Honour.

Consequently, along with the errors set out at Grounds 5 to 11 below, it is reasonable to believe that his Honour has exhibited a bias towards the Plaintiff.

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Ground 5

His Honour erred by failing to provide procedural fairness and a fair hearing in compliance with section 31 of the Human Rights Act 2019 (QLD) because of :

(a) a total failure to give consideration to the Plaintiff's UCPR 190 Application filed on 13 March 2019 relating to the core issues of UCPR 166 sub-rules (1), (4) & (5) not being complied with, being before the primary judge on:

(i) 29 March 2019, **but not heard**; and

(ii) then again on 6 December 2019, **but again not heard**; and

(b) a failure to consider evidence before his Honour that the :

(i) solicitor for the Defendants had made submissions to the primary judge that were misleading and thereby false because they were not specific to the defence pleading and resultant issues; and

(ii) which caused the primary judge to erroneously adopt those false submissions as is evidenced by his judgement; and

(c) a failure to give proper consideration to the Plaintiff's sworn evidence that was before his Honour, which served as rebuttal evidence of the primary judge's erroneous finding that :

10 *"He applied for summary judgment in circumstances where a rational assessment would have indicated such an application had little chance of success".*

<u>**Ground 6 -** paragraphs [28] and [29] of the judgement</u>.

His Honour erred in finding :

"On that basis there is reason to doubt that when he referred to "items left in the back yard" he was referring to the shipping containers";

(a) when this finding is unreasonable, not logical and defies common sense, when his Honour found the Second Defendant was aware of the shipping
20 containers in the back yard and had been instructed to secure them, and the Second Defendant knew he was providing evidence to a court of law for the purpose of (falsely) proving the property had been abandoned; and

(b) in stating *"On that basis there is reason to doubt",* his Honour has not provided any reasonable *"basis"* or *"reason"* for *"doubt"*;

when prima facie by reason of (a), there is omission of true facts in the affidavit.

<u>**Ground 7 -** paragraphs [28] and [29] of the judgement</u>.

Following on from Ground 6, his Honour erred by not questioning the Second Defendant who attended the hearing for the purpose of cross examination on his
30 affidavit[(3)] pursuant to a UCPR 439(2) notice served on him, regarding the shipping containers and other personal items of the Plaintiff & his wife being omitted from :

(a) the deposition part of his affidavit; and

(b) the 50 or so photographic exhibits to his affidavit.

His Honour having not taken the questioning opportunity (or allowed the Plaintiff to do so), to establish the *"basis"* for a finding, **incredibly** has stated in his judgement that it… *"is not able to be determined on the present material"*.

(3) *Cloverdell Lumber Co Ltd v Abbott* (1924) HCA 4 (*"You must satisfy the Judge that there is reasonable ground for saying so"* e.g, REASONS FOR OMISSIONS).

Ground 8 - judgement paragraph [25]

His Honour accepted the submissions by the Defendants that their activities complained of were lawful because of instructions given to them by the Trustee and the Trustee's lawyers. **This is clearly in error**, because the said instructions have no bearing on the lawfulness of the activities complained about. Just because the Defendants were instructed to do something does not mean it is lawful. In fact there has been zero particulars of lawfulness regarding trespass and taking possession of the property, provided within the defence pleading or any disclosure. In any event, it is a long held principle, that persons such as agents are always responsible for their own torts and as such cannot claim indemnity(4).

10 (4) *Miller v Miller* [2011] HCA 9 at 24.

Ground 9 - judgement paragraph [20]

His Honour erred in finding that it was relevant as to whether the Defendants;

"acted outside the scope of their agency with the trustee"

when acting within the scope or outside the scope, was irrelevant because of the matters at Ground 8. *i.e, agents are always responsible for their own torts.*

Ground 10 - judgement paragraph [19]

His honour erroneously followed the finding of the primary judge, where the

20 primary judge found that the Plaintiff's claim did not enjoy great prospects of success because he was :

"pursuing essentially the same claims he settled against the Trustee"

This is manifestly in error because in the circumstances of the claims against the Trustee, being :

(a) finalised by a negotiated settlement; and

(b) no judicial determination of liability; and

(c) no consequential award of damages to the Plaintiff; and

(d) the Plaintiff receiving no pecuniary compensation from the Trustee;

authority(5) dictates that there is no restriction on the Plaintiff suing the Defendants

30 for the same claims levelled against the Trustee.

(5)
- Nau v Kemp & Associates [2010] NSWCA 164
- Newcrest Mining Limited v Thornton [2012] HCA 60

Ground 11

His Honour's judgement shows that he has erred in failing to consider :

(a) the Public Interest component of the proceedings, as per the Plaintiff's oral submissions to the Court; and

(b) the Court's responsibility pursuant to the Human Rights Act 2019 (QLD).

PART II - Questions that arise :

1. As to Grounds 1, 2 and 2.1, can Queensland's UCPR166 sub-rules (1), (4) and (5) be dispensed with or abrogated and not even be cited, at the discretion of a judge when the pleadings were central to the findings ?

2. As to Ground 3, does avoidance in a defence, by not directly addressing issues in a statement of claim, attract a UCPR166 sub-rule (1) sanction ?

3. Are the circumstances of three security for costs applications oppressive, given the poor state of a defence pleading **and the admissions made** ?

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4. As to Ground 4, was it fair and reasonable for his Honour to not consider the fact that the Rule 190 Application by the Plaintiff (being at the core of Rule 166 compliance), was not heard by the primary judge on the two occasions it was listed to be heard ?

5. Again to Ground 4, in the circumstances of the defence pleading and the Defendants declining the Plaintiff's invitation to further amend it[(6)], was it reasonable for the Plaintiff to :

(a) apply for partial summary judgement for declarations ?

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(b) suffer a costs order to be paid immediately on losing that application ?

(6) Exhibit "GJC-19" Plaintiff's Affidavit - Doc no. 6 Appeal Court file 2850/20.

6. As to Ground 5, is the Appeal Court and his Honour, required to provide :

(a) a hearing; and

(b) a record of a judgement;

that complies with section 31 of the Human Rights Act 2019 (QLD) ?

7. Ground 11 (**public interest**), has the Court of Appeal provided procedural fairness in accordance with sec. 31 of the Human Rights Act 2019 (QLD) ?

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PART III - A brief statement of argument :

KEY MATTERS

A. PUBLIC INTEREST when a lawyer makes misleading submissions in Court.

B. PUBLIC INTEREST will be served by clarifying the law if necessary, or otherwise by addressing procedural regularity in regard to UCPR 166 QLD.

C. PUBLIC INTEREST is also served by ensuring there is no miscarriage of justice because of procedural irregularities devoid of any reasoning and zero reference to the truth within UCPR 166 & UCPR 149.

D. Central to the considerations of the application for Security for Costs, are the prospects of success of the appeal CA 2850/20 [(7)].

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(7) *Woolworths Ltd v Berhane* [2016] QCA 238 + *Neale v Ancher Mortlock…* [2013] NSWCA 209

Ground 1. Lawful occupation and possession of the property was a fundamental issue when both the primary judge and his Honour found that there was an issue for trial as to whether the Plaintiff had lawful occupation and possession of the property.

1.1 This finding was erroneous, because the denial in the defence (thus purportedly creating an issue for trial), was a not in accordance with UCPR166(4). That was because the direct explanation required by UCPR166(5) was in fact not compliant as per found in;

10 *Groves v Australian Liquor,….* [2004] QSC 142 at 15;

Consequently the issue was taken to be admitted, which has been adopted in the Plaintiff's Amended Reply filed 27 June 2018, **thus it was not an issue for trial**.

1.2 This goes to the heart of the matter in the principal appeal CA 2850/20, as to whether the primary judge should have :

(a) dismissed the Plaintiff's summary judgement application; and

(b) in any event, made a costs order against the Plaintiff.

Ground 2. The primary judge and his Honour have erroneously failed to find that :

20 (a) fundamental core issues in the statement of claim were not pleaded to at all, and thus not defended; and

(b) the non application of UCPR 166(1) to those non defended issues.

2.1 A fundamental rule of pleading is, <u>if you don't plead to it then you admit it.</u> Along with Ground 1, this ALSO goes to the heart of the matter in the principal appeal CA 2850/20 as to whether the primary judge should have :

(a) dismissed the Plaintiff's summary judgement application; and

(b) in any event, made a costs order against the Plaintiff.

when the Plaintiff's reasons for making his summary judgement application

30 were because of defective defence pleadings as per Grounds 1 to 3 herein and as per the reason at 2.4 below.

2.2 The admissions pursuant to UCPR166(1) have not been considered by the primary judge or his Honour, when sub-rules 149(1)(b) and (c) require specificity and statement of all the material facts relied upon. That is :

> *"In the defence, the defendant must explicitly plead a denial, an admission or a non-admission to each allegation of fact in the statement of claim"* (8).

(8) Cairns, Bernard UTAS <u>http://classic.austlii.edu.au/au/journals/PrecedentAULA/2017/53.html</u>

2.3 By reason of not pleading proper denials, the Defendants have **admitted** the following which have been adopted in the Plaintiff's Amended Reply :

(a) trespassing on the property multiple times;

(b) ignoring notices not to trespass;

(c) climbed over locked gates or some other method of unlawful entry;

(d) **the property had not been abandoned;**

(e) they knew a warrant of possession was required to do what they did;

(f) they knew that they didn't have a warrant of possession;

(g) they knew that they were not lawfully authorised to enter the
10 premises and take possession;

(h) they knew about the tenants' possessions and two shipping containers on the property;

(i) illegally cut & broke locks so as to gain illegal entry to the property;

(j) did not act with proper diligence;

(k) did not contact the tenants to seek permission to enter the property;

(l) did not comply with the Rules of Entry per sections 192 to 200 of the RTRA Act, and thereby contravened section 202 of the RTRA Act.

2.4 Having created the **admissions**, the Defendants (since the beginning of proceedings in November 2017) have further, not disclosed or particularised
20 any LAWFUL excuse to enter and take possession of the property.

Ground 3. Further admissions to paragraphs 7.6, 7.7, 7.8 and 7.9 of the statement of claim, amount to the Defendants **admitting** to :

(a) causing the Plaintiff's shock and severe emotional distress;

(b) bullying, intimidating, harassing and coercing the Plaintiff;

(c) causing the Plaintiff to be substantially mentally depressed which resulted in him being taken by ambulance and admitted to the psychiatric ward of Nambour Hospital;

(d) contravening Australian Consumer Law by misleading the Plaintiff.

3.1 And while the Plaintiff suffered the matter at 3(c), the Second Defendant
30 has **admitted** changing all the locks at the Property and placing padlocks on the 2 shipping containers on the Property that belonged to the Plaintiffs wife, thus ensuring that the Plaintiff and his wife were locked out of the Property and their personal possessions. In doing so he has also **admitted** unlawfully dispossessing the Plaintiff of the property & illegally evicting him.

Ground 4. A core issue to appeal CA 2850/20 are the admissions failed to be considered, and along with the below Grounds and authority [(9)], AND given previous costs orders against the Plaintiff had been satisfied, all of this demonstrates that even if the Plaintiff's summary judgement was unsuccessful, he should not have been burdened with an order for costs effectively taking him out of the proceeding because he is unable to pay the ordered security. The Plaintiff also suffers hurt and distress by having his intelligence wrongly insulted by being described as obsessive and irrational (implying he is vexatious), which is published in Court Reports.

10 (9) *State of Qld v Nixon & Ors* [2002] QSC 296.

Ground 5

(a) The Plaintiff was prejudiced by not having his UCPR 190 application heard by the primary judge, when the application directly related to the non application of UCPR 166 in above Grounds 1, 2, 2.1 and 3.

(b) This error was a consequence of his Honour erroneously believing the submissions by Mr. Argles (solicitor/lawyer) to be relevant to the Amended Defence when they were not relevant because they were not specific to issues raised by the defence pleadings by reason of Grounds 1, 2, 2.1 & 3, **and any competent lawyer would have known this**.

20 **(c)** The Plaintiff's Affidavit evidence that was not considered, deposed :

(a) the procedures the Plaintiff had undertaken prior to making his Summary Judgement Application, which included inviting the Defendants to further amend their defence, which they declined;

(b) the Plaintiff's reliance on the then current Amended Defence containing all the deemed admissions, in making his Application for partial Summary Judgement for declarations.

So essentially the matter boils down to whether the Amended Defence pleading is competent in making the denials that his Honour has adopted. To advance a resolution of that issue, the four page Amended Defence

30 pleading is available, but disallowed to be uploaded by the Registry.

Grounds 6 & 7. It is prima facie obvious that the purpose of the omissions in the affidavit was to give a false impression to the Court, that the property had been abandoned when it had not been abandoned. To not take the opportunity to gather further evidence by questioning the Second Defendant on his affidavit is simply wrong, and the Plaintiff relies on the authorities 1, 2 & 3 of Part V, which demonstrate the gravity of the omissions.

Grounds 8, 9 & 10.

(a) Agents are always responsible for their own torts and cannot claim indemnity from the principal irrespective of whether they acted within or outside their scope of authority from the principal.

(b) The authorities[5 above] relied on as to this issue, show that previous claims against the Trustee, have no relevance whatsoever to the Plaintiff's claims for declarations and damages from the Defendants.

Ground 11. No further argument is submitted.

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Part IV - The conduct of the Respondents in relation to costs :

1. The Respondents have come to both the District Court and the Court of Appeal with unclean hands by way of :

(a) fabricated evidence; and

(b) false submissions which introduced fake issues that had not been pleaded.

1.1 These activities amount to fraudulent conduct [10] and as such the Defendants are not entitled to costs.

20 (10) Refer to Authorities 1, 2 & 3 below regarding the gravity of the behaviour.

Part V - List of Authorities :

1. *AKS Investments Pty Ltd v Gazal* [2015] QSC 247 at [54] & [63].

"A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail."

2. Dal Pont, Gino --- *Judgments Fraudulently Obtained: The Forgotten Equity*

http://classic.austlii.edu.au/au/journals/UTasLawRw/1995/11.pdf

"It is a general rule, that whenever a party, by fraud, accident, or mistake, or otherwise, has obtained an advantage in proceeding in a Court of ordinary

30 *jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong, by restraining the party whose conscience is thus bound, from using the advantage he has there gained."*

3. *Jonesco v Beard* HL 1930.

"Fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the court, it spreads and infects the whole body of the judgment."

4. *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd* [2012] QSC 314 at [21].

"…In order to accompany a denial or non-admission, the explanation must be clearly connected with the denial or non-admission…"

5. *Groves v Australian Liquor, Hospitality and Miscellaneous Workers' Union & Anor* [2004] QSC 142 at [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."

6. *Cloverdell Lumber Co Ltd v Abbott* (1924) HCA 4 (at 6th paragraph); THE SECOND DEFENDANT'S AFFIDAVIT (Ground 7)
"I think that when the affidavits are brought forward to raise that defence they 10 *must, if I may use the expression, condescend upon particulars. It is not enough to swear, I say I owe the man nothing. ...You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned."*

7. *Woolworths v Berhane* [2016] QCA 238 (pages 2, 3 and 5);
"But in my conclusion, having regard to the apparently reasonable prospects of success in the appeal – by which I mean that, as I have said, the appeal is 20 *arguable – the application for security should be refused."*

8. *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) FCA 102 at 135;
"It is consistent with authority and the existence of a broadly based discretion that the bona fides and merits of the claim be taken into account where there is material from which some assessment can be made".

9. *Neale v Ancher Mortlock and Woolley Pty Ltd; Ancher Mortlock and Woolley Pty Ltd v Neale* [2013] NSWCA 209;
at 3; *"where previous costs were not paid";* and
at 25; *"However, despite his impecuniosity, in my view, the appellant has demonstrated that he has a bona fide and reasonably arguable appeal* 30 *which would be stifled by an order for security. In such circumstances a security for costs order should not be made: Preston v Harbour Pacific Underwriting Management Pty Ltd (at [17] - [18])."*

10. *Miller v Miller* [2011] HCA 9 at 24;
"It has long been established that a contract whose making or performance is illegal will not be enforced."

11. Cairns, Bernard UTAS - "*Pleadings and case management",* 2nd paragraph.
http://classic.austlii.edu.au/au/journals/PrecedentAULA/2017/53.html

12. RE: Ground 10 :
Nau v Kemp & Associates [2010] NSWCA 164;
Newcrest Mining Limited v Thornton [2012] HCA 60;

Part VI - List of applicable Uniform Civil Procedure Rules 1999 (Qld) :

UCPR 166 sub-rules (1), (4) and (5).

(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—

10 (a) the allegation is denied or stated to be not admitted by the opposite party in a pleading;

(4) 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.

(5) 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.

UCPR 149(1).

(1) Each pleading must—

20 (b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved; and

(c) state specifically any matter that if not stated specifically may take another party by surprise;

UCPR 190(1).

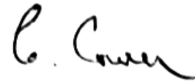
(1) If an admission is made by a party, whether in a pleading or otherwise after the start of the proceeding, the court may, on the application of another party, make an order to which the party applying is entitled on the admission.

30 UCPR 439(2)

(2) If an affidavit to be relied on at a hearing is served on a party more than 1 business day before the hearing and the party wishes the person who made the affidavit to attend the court for cross-examination, the party must serve a notice to that effect on the party on whose behalf the affidavit is filed at least 1 business day before the date the person is required for examination.

Dated : 21 September 2020

Amended to Registry requirements : 23 September 2020

Signed by the Applicant : 

To: The Respondents:

First Respondent is represented by Chris Toogood Legal

Second Respondent is represented by Chris Toogood Legal

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TAKE NOTICE: Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance and serve a copy on the applicant.

The Applicant is self-represented.