

SUPREME COURT OF QUEENSLAND

CITATION: *Melco Engineering Pty Ltd v Eriez Magnetics Pty Ltd*
[2007] QSC 198

PARTIES: **MELCO ENGINEERING PTY LTD (ACN 064 118 154)**

(Applicant)

v

ERIEZ MAGNETICS PTY LTD (ACN 008 451 885)
(Respondent)

FILE NO: S6 of 2006 (Mackay)

DIVISION: Civil

PROCEEDING: Application

DELIVERED ON: 2nd August 2007

DELIVERED AT: Mackay

HEARING DATES: 30th July 2007

JUDGE: Dutney J

ORDERS: **1) Declare that none of the paragraphs of the Third Amended Defence and Counterclaim enumerated in paragraph 2(a) and 2(b) of the Rejoinder are deemed to be admitted by reason of the operation of rule 166(1) of the *Uniform Civil Procedure Rules 1999 (Qld)*.**

2) Order that the respondent/defendant pay the applicant/plaintiff's costs of the application to be assessed on the standard basis.

CATCHWORDS: PRACTICE AND PROCEDURE – CONTRACT – PLEADINGS – UCPR r.166 – where contractual dispute as to terms and performance of contract – where respondent alleges applicant has not complied with r.166 (4) UCPR – whether applicant is deemed to have admitted facts pursuant to r.166 (5) UCPR – whether applicant must re-plead facts to comply with r.166 (4) UCPR

LEGISLATION: *Building and Construction Industry Payments Act 2004* (Qld), cited

Uniform Civil Procedure Rules 1999 (Qld), rr. 149, 150 (4) & 166 (4) & (5), discussed

COUNSEL: Mr J R Baulch S.C. for the applicant
Mr A C Barlow for the respondent

SOLICITORS: Macrossan & Amiet Solicitors for the applicant
Bill Cooper & Associates for the respondent

- [1] This is an application to strike out a paragraph of the defendant's rejoinder. The relevant paragraph adopts deemed admissions which the defendant alleges arise from the failure of the plaintiff to properly traverse allegations of fact in the defence and counterclaim.¹
- [2] Although the application is framed as an application to strike out part of the defendant's pleading, it seems to me that it is more conducive to the resolution of this matter if I treat it as an application to rule on each of the claimed deemed admissions.
- [3] In the action, the plaintiff seeks to recover what it alleges is the contractual price for fabricating and constructing six microcel flotation units together with the price of some agreed extras.
- [4] The defendant alleges that the contract was not merely to construct the units, but also to assemble them on site. It is further alleged that the plaintiff refused to assemble the units and thereby repudiated the contract. There are some minor issues concerning defects.
- [5] The defendant also claims the cost of assembling the units by way of damages for breach of contract.
- [6] In its reply and answer, the plaintiff pleads that it was not required to assemble the units because of an agreement between the parties whereby the contract was varied to exclude that obligation and the price reduced accordingly.
- [7] From this point the argument descends into an abyss of pleading technicality.
- [8] Relevantly, rule 166 of the *Uniform Civil Procedure Rules 1999 (Qld)* ("the UCPR") provides:
- “(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 cannot 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.”
- [9] Rule 150(4) identifies matters which must be pleaded. It provides as follows:

¹ *Uniform Civil Procedure Rules 1999 (Qld)* r 166.

“In a defence or a pleading after a defence, a party must specifically plead a matter that –

- (a) the party alleges makes a claim or defence of the opposite party not maintainable; or
- (b) shows a transaction is void or voidable; or
- (c) if not specifically pleaded might take the opposite parties by surprise; or
- (d) raises a question of fact not arising out of a previous pleading.”

- [10] The issue raised is illustrated by the first of the matters the defendant alleges has been deemed to be admitted.
- [11] In paragraph 2 of the Further Amended Statement of Claim (“SOC”) the plaintiff pleads that it entered into “a contract, partly in writing and partly oral, for the fabrication and construction of six microcel flotation units and associated works.”
- [12] By paragraph 2 of its Third Amended Defence and Counterclaim (“DAC”), the defendant responds by denying the allegation in paragraph 2 of the SOC “on the grounds that it was an express term of the contract that the plaintiff would supply, fabricate, surface treat, deliver and assemble six microcel flotation units.”
- [13] Subsequent paragraphs of the DAC make it clear that the requirement to assemble the units on site was the critical issue in dispute between the parties in relation to the subject matter of the contract.
- [14] The plaintiff’s Further Amended Reply and Answer (“RAA”) does not specifically refer to paragraph 2 of the DAC. In paragraph 5, however, the plaintiff pleads that at a meeting on 11 May 2005 the defendant’s representative requested that the plaintiff delete from the contract the obligation to assemble on site. By an e-mail of 16 May 2005, the plaintiff pleads that it accepted this variation and reduced its price accordingly. Subsequently, the defendant requested assembly of the units on site but the plaintiff would agree to vary the contract back to its original form only upon certain conditions which were not met.
- [15] Paragraph 5 of the RAA specifically addresses an allegation in paragraph 11 of the DAC that the plaintiff repudiated the contract by failing to assemble the units on site. Paragraph 11 of the DAC itself responds to the plaintiff’s allegation in paragraph 10 of the SOC that the defendant refused to pay the progress claims submitted by the plaintiff.
- [16] In summary, the plaintiff alleges a contract to perform certain work. The defendant alleged that the contract was to perform different and additional work. I consider that at that point the issue is fairly joined. The RAA goes further and explains why the contract alleged by the plaintiff is different from the contract alleged by the defendant.
- [17] I am not persuaded that rule 150 (4) of the UCPR requires a party to re-plead facts it has asserted in an earlier pleading. The purpose of the Defence as a document is to set out the basis on which the plaintiff’s claim is not maintainable. Having set that

out there is no obligation on the plaintiff to reassert the original facts in its statement of claim. A reply is necessary only where the defence raises new matters by reason of which the claim of the other party is said to be not maintainable or where facts are alleged which otherwise fall within sub rule 151 (4). In any case, the plaintiff has incorporated the SOC into the RAA as part of its general reply to the defence and answer to the counterclaim. Where something has already been pleaded, I can see no reason why it cannot be adopted into a subsequent pleading by reference.

- [18] By way of example, where, by way of defence to a claim in contract, the defendant pleaded illegality, duress or fraud, it would often be necessary for the plaintiff to respond to the facts in a reply because the defence raised would be a new issue. Where one party merely pleads that the contract is “X” and the other says that it is “Y” there is no need to go further.
- [19] Many of the issues in this application are of a similar nature.
- [20] In paragraph 3 of the SOC, the plaintiff pleads that the written part of the contract is comprised of documents in a list which is provided. The defendant by paragraph 3 of the DAC pleads that the contract included additional documents. By its RAA the plaintiff simply joins issue with the defendant on the basis of the facts pleaded in the SOC. This seems to me to be a convenient way of the plaintiff asserting that it continues to rely on the facts previously alleged in the statement of claim despite the defendant’s allegation.
- [21] In those circumstances, whether there is any deemed admission under sub-rule 166 (5) depends on whether the facts pleaded in the statement of claim constitute a sufficient traverse of the contrary facts in the defence. In most cases they would be. Again, it would be necessary to plead further only if the defence raised some issue other than a contradiction of the fact alleged by the plaintiff.
- [22] Paragraphs 4 and 5 of the DAC respond to paragraph 4 of the SOC. Paragraph 4 of the SOC pleads what the plaintiff alleges were the material terms of the contract. By way of defence, the defendant pleads that the contract included assembly of the units and that it would not have entered into any contract without that condition. The defendant also denied the pleaded contractual price and asserted a lower figure as the price. The paragraphs also deny any obligation to make progress payments and explain that such progress payments as were made were made voluntarily by the defendant without any contractual obligation to do so.
- [23] In the RAA the plaintiff denies the defendant’s construction of the contract and reasserts that the terms were as pleaded in the SOC.
- [24] I am not persuaded that there has in the circumstances been any failure to properly plead or that there is any deemed admission for the same reasons I reject the defendant’s submissions in relation to the earlier paragraphs.
- [25] Paragraph 5 of the SOC pleads as an alternative to the contractual claim that the defendant had an implied obligation to make progress payments. The DAC responds by repeating the denial of any term requiring progress payments. The defendant also pleads that the term is unnecessary to give business efficacy to the contract nor obvious and is otherwise imprecise and inconsistent with the written contract.

- [26] Apart from the general joinder of issue the RAA does not traverse these allegations in the DAC. Since no new issue is raised in this defence in relation to the material terms of the contract there is nothing further the plaintiff is required to add. The defence otherwise merely alleges that the circumstances are such that the law will not imply a term. Again, I can see no obligation on the plaintiff to plead further.
- [27] Paragraphs 6, 7 and 8 of the SOC plead the operation of the *Building and Construction Industry Payments Act 2004* (Qld) (“the Act”) and the right to payment of specified progress payments under s 13 of the Act.
- [28] In response, the DAC pleads that the plaintiff did not rely on the Act at any material time and that the work was not “construction work” within the meaning of the Act. As to the progress payments, the defendant admitted paying some of them. The defendant puts in issue the correctness of the amount the plaintiff says was paid and otherwise repeats the allegations to which I have previously referred concerning the contractual obligation to pay and the plaintiffs breach by failing to assemble the units.
- [29] As to the last of these allegations, in the RAA the plaintiff pleads that it did not assemble the units because it was specifically instructed not to.
- [30] In paragraph 9 of the SOC, the plaintiff pleads that despite paying the first four progress claims, the defendant refused to pay the balance.
- [31] By paragraph 10 of the DAC the defendant raised the same allegations it had raised earlier as a basis for non payment. These were the failure of the contract to make provision for them, the absence of the alleged implied term and the inapplicability of the Act. In addition, the defendant alleged that one of the progress claims amounting to \$352.00 was not in relation to an item covered by the contract.
- [32] With the exception of the last raised matter, I have already dealt with these issues and concluded that the plaintiffs pleading deals with them sufficiently for the purposes of the rules. In relation to the last allegation, the plaintiff has pleaded the terms of the contract, the obligation to make progress payments and the claims by reference to invoice numbers. Having pleaded the invoice, it seems to me that the resolution of the dispute on this item is merely a matter of resolving the more general dispute in relation to the terms of the contract and looking at the invoice to see whether the contract includes it. If that is so, I do not consider any further pleading is necessary to avoid the deemed admission. If there was some other reason why an item not apparently within the scope of the contract was chargeable to the account of the defendant it would have to be pleaded and the failure to do so would preclude reliance on it at trial. That is, however, a matter for evidence at the trial and is not properly the subject of this application.
- [33] Paragraph 10 of the SOC pleads a breach of contract constituted by the defendant’s refusal to pay. To this the defendant responds in paragraphs 11 and 12 of the DAC setting out various refusals by the plaintiff to assemble the units on site and concluding in paragraph 10 by alleging repudiation of the contract by the plaintiff.
- [34] In the RAA the plaintiff gives particulars of the variation to the contract to which I earlier made reference when dealing with paragraph 2 of the SOC and paragraph 2 of the DAC.

- [35] Since the allegations in paragraphs 11 and 12 of the DAC are comprehensively met by the allegations in paragraph 5 of the RAA I am satisfied that there is no deemed admission of any fact alleged.
- [36] Contrary to the submissions of counsel for the defendant, I regard the material fact alleged in paragraphs 11 and 12 of the DAC to be that the plaintiff said it would not and in fact did not assemble the units on site. The balance of the paragraphs simply sets out the evidence by which the defendant intends to prove the material facts. There is no obligation on the plaintiff to plead to evidence. UCPR rule 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.
- [37] Paragraph 5 of the RAA, if made out at trial, is a complete answer to the allegations. It pleads that the contract was varied to exclude the obligation to assemble on site. Thereafter no refusal by the plaintiff to so assemble the units would amount to a breach of contract or repudiation.
- [38] Paragraphs 11 and 12 of the SOC are the particulars of the damages claimed and the prayer for relief.
- [39] In paragraphs 14 and 15 of the DAC, the defendant responds as follows:
- 14 Further, with respect to paragraphs 10, 11 and 12 of the Statement of Claim, Eriez:
- (a) Denies that it breached any term of the Contract, whether express or implied on the grounds that it did not do so;
 - (b) Denies that Melco is entitled to the sums set out in paragraph 11 of the Statement of Claim on the grounds that no such sums are owing due to Melco's repudiation of the contract;
 - (c) Denies, in any event, that Melco is entitled to any sum whatsoever on the grounds that Melco failed or refused to complete its obligations under the Contract;
 - (d) Denies in any event that the sum owing is \$246,893.17 on the grounds that \$282,188.34 plus GST is the proper sum outstanding under the contract;
 - (e) Denies that the Act is relevant to the proceedings on the grounds set out in paragraphs 5 and 6 herein;
 - (f) In any event denies that Melco served a payment claim under the Act which would entitle Melco to relief under the Act."
- [40] The defendant submits that all of these facts are admitted on the basis that they are not sufficiently traversed in the RAA.
- [41] This submission illustrates the problems with the position adopted by the defendant in relation to many of the disputes as to the adequacy of the plaintiff's traverse of the DAC.

- [42] In the first place, the entire SOC and RAA constitute a detailed response to these allegations.
- [43] Secondly, I am not persuaded that the rules require every fact in issue to be expressly denied or not admitted. It would be absurd to suggest that the following pleading amounted to a deemed admission of the allegation in paragraph 2 of the SOC as to the scope of the contract merely because it did not contain an express denial:
- “As to paragraph 2 of the Statement of Claim the defendant:
- (a) admits that it entered into a contract with the plaintiff in relation to 6 microcel flotation units;
- (b) says that such contract included the obligation to assemble the flotation units on site at the defendant’s premises.”
- [44] This alternative pleading to paragraph 2 of the SOC is as much a denial of the plaintiff’s allegation concerning the scope of the works as that pleaded by the defendant.
- [45] Thirdly, the fact asserted in each sub-paragraph and which would be the subject of any deemed admission is the fact of the denial by the defendant and the fact that the defendant denies it for a particular reason. It is not an admission that the reason itself is valid.
- [46] Next, the defendant submits that paragraphs 18 and 19 of its DAC are admitted.
- [47] Paragraph 18 notes that the defendant “repeats and relies upon paragraphs 3, 4 and 5 in its defence to [the plaintiff’s] claim.”
- [48] In the RAA the plaintiff renews its reliance on the facts pleaded in the SOC. Since paragraphs 3, 4 and 5 of the DAC are themselves a response to the facts pleaded in the SOC this seems to me to be a good answer to the defendant’s submission. I have already dealt with this above.
- [49] Paragraph 19 of the DAC pleads breach of contract by the plaintiff in failing to assemble the units on site. In this instance the plaintiff pleads that it is not in breach for the reason pleaded earlier in the RAA. If the basis of the defendant’s objection is that the word “deny” or some derivative thereof is not used, it is pedantic and unmeritorious.
- [50] There is a great deal of overlap between the submissions on the different paragraphs of the pleadings. I have dealt with every paragraph in issue and given the principal reason for my decision. Sometimes the reasons to which I have referred in relation to one paragraph may also apply to others. I have indicated where this might be so.
- [51] For the reasons given I am satisfied that none of the paragraphs of the defendant’s Third Amended Defence and Counterclaim set out in paragraphs 2 (a) or (b) of the Rejoinder are deemed to be admitted by rule 166 (1).
- [52] I have heard the parties on costs. I am satisfied that costs should follow the event.

[53] In the result, I declare that:

1. None of the paragraphs of the Third Amended Defence and Counterclaim enumerated in paragraph 2(a) and 2(b) of the Rejoinder are deemed to be admitted by reason of the operation of rule 166(1) of the UCPR.
2. I order that the respondent/defendant pay the applicant/plaintiff's costs of the application to be assessed on the standard basis.