PARTIES:	B.P. Australia Limited and Bryan Campbell Carige and Ors
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	INTERLOCUTORY APPLICATION exercising Territory jurisdiction
FILE NO:	674/89
DELIVERED:	Delivered at Darwin 19 November 1992
HEARING DATE:	Heard at Darwin 3 and 17 September, 15, 22 and 29 October and 12 November 1992.
REASONS OF:	Master Lefevre

CATCHWORDS:

Practice and Procedure - Notice of dispute out of time - Facts deemed admitted - application for leave to withdraw - principles considered - R35.03.

Cases considered:

Celestino v Celestino, (unreported, Federal Court of Australia, 16 August 1990)
Cropper v Smith (1884) 26 Ch D 700

REPRESENTATION:

Counsel:

Plaintiff:	Mr Ryan
Defendant:	Mr Wyvill

Solicitors:

Plaintiff:	Cridlands
Defendant:	Philip & Mitaros

Judgment category classification: CAT A

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

674 of 1989

BETWEEN:

B.P. AUSTRALIA LIMITED

Plaintiff

and

BRYAN CAMPBELL CARIGE, MARY HAMILTON CARIGE and GREGORY LAURENCE CARIGE trading as ABLE FREIGHT SERVICE

Defendants

MASTER LEFEVRE: REASONS FOR DECISION

(Delivered 19 November 1992)

The application with which I am asked to deal is that the defendants be given leave to withdraw certain admissions deemed to have been made in pursuance of r35.03.

R35.03 reads:

> **"(1) A party may serve on another party a notice stating that unless that party, within a time to be expressed in the notice (which shall not be earlier than 14 days after service), disputes a fact specified in the notice, he shall, for the purpose of the proceeding only, be taken to admit the fact.**
>
> **"(2) If the party served with the notice does not dispute a fact specified by serving notice that he disputes the fact within the time allowed for that purpose, he shall, for the purpose of the proceeding only, be taken to admit the fact.**
>
> **"(3) A party may, by leave of the Court, withdraw an admission which is taken to have been made under subrule (2).**

"(4) A notice under subrule (1) shall be in Form 35A, and a notice under subrule (2) shall be in Form 35B."

It is, of course, in pursuance of r35.03(3) that the application is brought.

On 17 June 1992, the plaintiff's solicitors served on the defendants' solicitors' town agent a notice to admit which, omitting formal parts, reads as follows:

"In this Notice:-

(i) "the Tanks" means the items described in particulars (f) and (g) of paragraph 10 of the Amended Statement of Claim.

(ii) "the Goods" means the items described in particulars (a) to (e) of paragraph 10 of the Amended Statement of Claim.

"1. On or about 19 April 1988, Centralian Fuel Supplies on behalf of the Plaintiff engaged the Defendants to cart the Goods:-

(a) From Alice Springs to White Range Mine;
(b) For reward.

"2. On or about 19 April 1988, one Desmond Carty on behalf of the Defendants collected the Goods from the Centralian Fuel Supplies depot in Alice Springs.

"3. At all material times, Desmond Carty was:-

(a) An employee;
(b) A servant;
(c) An agent; or
(d) An independent contractor;

of the Defendants.

"4. The Defendants took delivery of the Tanks from Centralian Fuel Supplies or the Plaintiff at a time prior to 19 April 1988.

"5. On 19 and 20 April 1988 the:-

(a) Tanks; and
(b) Goods

were the property of the Plaintiff.

"6. On or about 20 April 1988 the Defendants' vehicle carrying the Goods and the Tanks was involved in an accident ("the Accident").

"7. The driver of the Defendants' vehicle as at the time of the Accident was:-

(a) An employee;
(b) A servant;
(c) An agent; or
(d) An independent contractor,

of the Defendants.

"8. In the Accident the:-

(a) Tanks were damaged; and
(b) Goods were lost beyond recovery, save for 2,980 litres of diesoleum.

"9. (a) The pre-Accident value of Tanks was $15,500.00;
(b) The salvage value of the Tanks after the accident was $Nil;
(c) The pre-Accident value of the Goods was $15,715.49.
(d) The value of the diesoleum recovered after the Accident was $1,750.75.

"10. The Defendants have failed to deliver to the Plaintiffs, its agents or White Range Mine the:-

(a) Tanks; or
(b) Goods (less the 2,980 litres of diesoleum recovered);

or their value (less the value of the 2,980 litres of diesoleum recovered), in their pre-Accident condition.

"11. By letters dated 21 and 29 November 1988, the Plaintiff demanded of the Defendants the Tanks and the Goods or their equivalent value."

To assist in understanding the definitions in the notice to admit, I set out verbatim par 10 of the amended statement of claim -

"10. By reason of the matters pleaded aforesaid, the Plaintiff has suffered loss and damage.

(a) Diesoleum

20,520 litres at 58.75c per litre $12,055.50	$12,055.50

(b) HLP 68

205 litre drums x 2 at $355.41 per drum	$ 710.82

(c) RD Compound

205 litre drums x 2 at $436.18 per drum	$ 872.36

(d) Degreaser

205 litre drums x 1 at $236.78 per drum	$ 236.78

(e) LMS 210

2.5 kilogram packs x 6 at $14.48 per pack	$ 89.28

(f)	**Lift on tank Serial No. TC 4536 Market value**	**& 8,000.00**
(g)	**Lift on tank Serial No. S3111 Market value**	**$ 7,500.00**

On 2 July 1992 the defendants' solicitors' served on the plaintiff's solicitors' what purports to be a notice in pursuance of r35.03(2) and (4) disputing all the facts. That notice, omitting formal parts, reads:

> **"The Defendants disputes** (sic) **the following facts specified in the Plaintiff's notice dated 16 June 1992.**
>
> **"Facts alleged in Items 1 to 11 of the Notice to Admit are disputed."**

The notice to admit was served on 17 June 1992 and allowing for the fourteen days referred to in it, the last date to file a notice of dispute was 1 July 1992. The document served on 2 July 1992 was therefore one day out of time.

The plaintiff has agreed to an order allowing withdrawal of the admissions deemed to have been made in respect of the matters in pars 1, 3 and 7 of the notice to admit. The defendants do not now seek to withdraw the admissions made in respect of pars 2, 4, 5(a), 6, 8, 9(b), (c) and (d), 10 and 11 of the notice to admit. A dispute remains over the admissions deemed to have been made in respect of pars 5(b) and 9(a) of the notice to admit.

The plaintiff's amended statement of claim (which I shall call "the statement of claim") alleges that the defendants, as common carriers, received from

the plaintiff and agreed to carry certain goods (being the "Tanks" and the "Goods" - which I shall collectively call "the Property" - referred to and described in the notice to admit) safely from Alice Springs to White Range Mine. In the alternative, the defendants received them as bailee for reward. The defendants, in breach of their duty as common carriers or of their duties as bailees for reward or in breach of the contract or of a duty of care, lost or damaged the Property in transit while it was in their care.

In their amended defence (which I shall call "the defence") the defendants admit the delivery of the Property to them but do not admit the other allegations made in the statement of claim. They also raise the question of a warranty by the plaintiff that the Property was insured and allege that the defendants are not vicariously liable for the actions of their servant who failed to deliver the Property. The defence also pleads estoppel by representation.

As a result of what has occurred, the defendants seek effectively to have the question of whether -

(a) on certain relevant dates, the Goods were the property of the plaintiff; and

(b) the pre-accident value of the Tanks was $15,500-00,

remain in issue.

The reason for the defendants' solicitors' failure to serve the notice in time is not clear. They allege that they had no record of receipt of the notice to admit and the two systems which operate in their office regarding receipt of documents served on them have each failed to disclose that the

document in question was received. However, somehow, a notice of dispute was served which was only one day out of time.

In **Cropper v Smith (1884) 26 Ch D 700**, Bowen LJ, at pp710-711, said:

> **"... the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party...as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."**

This principle was approved in **Clough & Rogers v Frog (1974) 48 ALJR 481** and also in a more recent decision of the Federal Court, **Celestino v Celestino** (unreported, 16 August 1990). In the latter case, their Honours said of the principle that it:

> **"... assumes that an error or mistake by or on behalf of the party seeking the amendment has been demonstrated. Where the proposed change involves the withdrawal of an admission, a further matter arises for consideration. In Langdale & Anor v Danby [1982] 1 WLR 1123 Lord Bridge of Harwich, speaking for the House of Lords, said at 1134 that in the absence of clear evidence to the contrary, a court is entitled to assume that counsel who make an admission in the course of the conduct of a trial, has satisfied himself that the admission was, on his client's version of the facts, a proper admission to make. In our**

opinion a court, and other parties to litigation, are similarly entitled to make that assumption about admissions made by solicitors on their client's behalf in the course of litigation whether in the pleadings or in correspondence. For this reason, where leave to withdraw an admission is sought, a court will require an explanation for the making of the admission. The explanation must be a sensible one based on evidence of a solid and substantial character: Langdale v. Danby at 1134; Hollis v. Burton [1892] 3 Ch. 226; and Cumper v. Pothecary (1941) 2 K.B. 58 at 70."

Has there been an explanation for the defendants' solicitors' failure to serve in time the notice of dispute let alone **"a sensible one based on evidence of a solid and substantial character"**? Whatever the error and for whatever the cause, the fault was that of the solicitors and not that of the defendants themselves.

The discretion of the court under r35.03(3) is unfettered, but is to be exercised judicially. The following are what I see as guidelines for the exercise of that discretion, namely that there ought to be -

(1) an explanation for the failure to serve the notice of dispute within the time limited in the notice to admit;

(2) evidence that the admissions taken to have been made, if allowed to stand, will **prima facie** seriously affect the defendants' defence or cause prejudice to the defendant in the prosecution of that defence (this touches also on the question of prejudice to the defendant were leave to withdraw refused); and

(3) consideration given to any prejudice to the plaintiff which cannot be compensated for by an order for costs were an order giving leave to withdraw made.

The admissions here arise through inadvertence, and not after due consideration as was the case in **Celestino** and in **Langdale v Danby**, (referred to in the passage cited). While I do not assert that inadvertence on the part of a party's solicitors, without their client's involvement, is an excuse for failure to comply with the requirements of a rule, I accept that the consequence should, in these circumstances, not be visited upon the defendants. In accepting the explanation for failure to serve in time, I must say that I cannot avoid the comment that the defendants have satisfied me thereon only by the barest margin.

The defendants, **inter alia**, sought to rely on three affidavits of Margaret Ann Carige (MAC), sworn respectively 21 July, 21 and 28 October 1992.

On objection being taken, I struck out certain portions of those affidavits. The result is that the affidavits do not contribute anything to discharge the defendants' onus of showing that the admissions are likely to adversely affect their defence. I allowed the defendants an adjournment to permit further evidence to be adduced. As a result, on 12 November 1992, the defendants filed in court an affidavit of Gregory Laurence Carige (GLC) sworn 11 November 1992. The plaintiff also objected to that affidavit, which objection was the same as that taken to MAC's affidavits, namely that it was not established that the deponent was qualified to give evidence as to the ownership of

the Goods and of the value of the Tanks. Accordingly, the plaintiff has submitted that those parts of GLC's affidavit should be struck out. I reserved my decision on that matter as well as my decision on the merits of the application.

Going first to the matter relevant to par 9(a) of the notice to admit, I am satisfied that GLC is sufficiently qualified to give evidence of the pre-accident value of the Tanks. What he says about that in his affidavit is therefore admissible in evidence.

It seems clear from the pleadings that the pre-accident valuation of the Tanks is an important aspect of the defendants' defence.

As to the question of the ownership of the Goods, (par 5(b) of the notice to admit,) GLC, in par 4 of his affidavit, says **"I ... confirm that the goods transported belong to Rockdrill."** The reference is to Rockdrill Contractors Pty Ltd, to whom the Goods were intended to be delivered. The statement purports to affirm what was struck out of MAC's affidavit of 21 July 1992. I am not satisfied that GLC's qualification to give that evidence has been established and so, on the objection taken, I disallow GLC's evidence relating to ownership, that is that his allegation as to ownership by Rockdrill (being the last sentence in par 4(b) of his affidavit) is struck out.

Where does that take the matter? The defence, does not put in issue the question of the ownership of the Goods. Had it done so and had opposing facts been raised (e.g. facts alleging that the Goods were the property of Rockdrill), there may have been

support for a contention that the issue was important to the defence. As there is no evidence to allow me to accept such a contention, I must refuse leave to the defendant to withdraw the admission in question.

In relation to the admission the withdrawal of which I propose to allow, I am satisfied that there is no consequential prejudice to the plaintiff, at least not of a kind which cannot be compensated for by an order for costs.

I make the following orders, namely that -

1. by consent, the admissions deemed to be made in respect of pars 1, 3 and 7 be withdrawn;
2. leave to withdraw the admission deemed to be made in respect of par 5(b) be refused; and
3. the defendants have leave to withdraw the admission deemed to have been made in respect of par 9(a).

I will hear the parties as to the question of costs.