PARTIES:	Tropicus Orchids Flowers and Foliage Pty Ltd v Territory Insurance Office
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Interlocutory Application
FILE NO.:	222 of 1994
DELIVERED:	14 December 1995
REASONS OF:	Master Coulehan

CATCHWORDS:

PRACTICE - Northern Territory - O.36 Supreme Court Rules - amendment - defence - admission, withdrawal of - prejudice - election

Cases followed:

BP Australia v Carige (1992) 112 FLR 118
Celestino v Celestino (FC (FCA) - 16 June 1990)
Clough and Rogers v Frog (1974) 48 ALJR 481
Commonwealth v Verwayen (1990) 170 CLR 394
Cropper v Smith (1884) 26 Ch.D. 700
Moslemi v Moslemi (FC (Vic) - 13 May 1991)

Representation:

Counsel:

Plaintiff	Mr McCarthy
Defendant	Mr Reeves

Solicitors:

Plaintiff	Brian Johns
Defendant	Ward Keller

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

222 of 1994

BETWEEN:
TROPICUS ORCHIDS FLOWERS AND FOLIAGE PTY LTD
Plaintiff

and

TERRITORY INSURANCE OFFICE
Defendant

MASTER COULEHAN: REASONS FOR DECISION
(Delivered 14 December 1995)

The plaintiff alleges that on 3 June 1993 it suffered loss and damage to its orchard growing business as a result of malicious damage. It claims indemnity for its consequential loss pursuant to a policy of insurance issued by the defendant and damages for breach on contract. The sum claimed is substantial.

This proceeding was commenced on 11 October 1994. On 9 November 1994 the defendant filed its defence, by which it admitted that the plaintiff suffered damage in the manner alleged but denied the extent of the damage.

By summons filed on 9 June 1995 it seeks to amend its defence by withdrawing this admission and putting liability in issue, having notified the plaintiff's solicitors of its intention by letter dated 9 February 1995.

The insurance claim the subject of this proceeding was made shortly after the damage was sustained. Until the letter dated 9 February 1995 there appeared to be no indication by the defendant that liability was in dispute. A claim for property damage arising out of

the same incident was settled in full in the sum of $120,074-47 and the defendant made interim payments on the claim the subject of this proceeding, in the sum of $20,000-00 on 27 April 1994 and $20,000-00 on 4 July 1994.

Amendments to pleadings are usually allowed if they may be made without injustice to the other party (see O.36 Supreme Court Rules, **Cropper v Smith (1884) 26 Ch.D 700, 710-711, Clough and Rogers v Frog (1974) 48 ALJR 481, Commonwealth v Verwayen (1990) 170 CLR 394).**

Where it is sought to withdraw an admission made in the pleadings, or otherwise in the course of litigation, an explanation may be required which is sensible and based on substantial evidence. (See **Celestino v Celestino,** an unreported decision of the Federal Court of Australia comprising Spender, Miles and Von Doussa JJ, dated 16 June 1990 and **B.P. Australia v Carige (1992) 112 FLR 118, 123**).

Here the explanation is that the admission was made before the defendant had sought counsel's advice. The advice, subsequently obtained, is that liability was in doubt and that the admission be withdrawn. The basis for the advice has not been revealed.

In order to succeed in this proceeding, in the absence of admissions, it is necessary that the plaintiff prove that its loss resulted from malicious damage. The investigator's reports and police statements suggest that the damage was caused by the addition of a herbicide to insecticide which was sprayed on the plaintiff's plants. This could only have occurred accidentally or maliciously, unless insurance fraud was involved, and this has not been suggested.

There is evidence contained in the reports and statements which suggests the possibility that the

herbicide was accidentally added to the insecticide sprayed on the plants. There appears to be an arguable defence.

I am satisfied that the defendant has provided a sensible explanation for the making of the admission and its proposed withdrawal and that the proposed amendment is not futile.

The plaintiff alleges that the defendant has, by its conduct, elected not to dispute liability, and is now precluded from changing its position.

Whether or not this is so, it is not appropriate that it be decided in this application. In **Moslemi v Moslemi**, an unreported decision of the Full Court of the Supreme Court of Victoria comprising Crockett, McGarvie and Southwell JJ, delivered 13 May 1991, where it was argued that the conduct of the defendant constituted promissory estoppels, the Court held that this issue did not arise for determination until the defence was amended and the relevant facts proved or agreed. (See also **Commonwealth v Verwayen** supra per Dawson J at p. 456).

The question is whether the amendment, if allowed, would cause prejudice to the plaintiff which could not be compensated for by an order for costs or otherwise.

The plaintiff alleges prejudice in its disclosure to the defendant of its financial circumstances in the course of negotiations. While there is evidence that it has disclosed its financial circumstances, there is no evidence that this would not have been done if liability had been in issue or as to what prejudice may have resulted. Further, this was done before the defence was served.

The delay between the service of the defence and the bringing of this application, a period of seven months, is also alleged to be prejudicial and reference was made to case flow management implications, although there was no evidence or argument directed to any efforts made by the plaintiff to pursue the proceeding during this period.

The plaintiff also refers to the increase in the length of the trial and its costs if the admission is withdrawn. While there is no evidence as to the extent of such increase, I accept that this is likely.

Prejudice may not always be measured in monetary terms and it is argued that the plaintiff is a small family company and the effect on its principal caused by the defendant's conduct should be considered. There was no direct evidence of any such effect.

While these matters are significant, I do not consider that the withdrawal of the admission will cause such prejudice as to justify refusal of the application.

I order that the defendant be at liberty to amend paragraph 3 of its defence in the terms set out in paragraph 1 of the summons filed on 9 June 1995.