Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan 72739 v Allianz Australia Insurance Limited
Medium Neutral Citation:	[2017] NSWSC 1118
Hearing Date(s):	16/08/2017
Date of Orders:	24 August 2017
Decision Date:	24 August 2017
Jurisdiction:	Equity - Technology and Construction List
Before:	McDougall J
Decision:	Refuse leave to withdraw admissions.
Catchwords:	CIVIL PROCEDURE — Admissions — Withdrawal – Civil Procedure Act NSW (2005) ss 56, 58, 64 — where no evidence to explain why admissions were made — where applicant will suffer prejudice if the application is refused and respondent with suffer prejudice if the application is granted
Legislation Cited:	Civil Procedure Act 2005 (NSW) Home Building Act 1989 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Drabsch v Switzerland General Insurance Co Ltd, Supreme Court of New South Wales 16 October 1996, unreported Maile v Rafiq [2005] NSWCA 410 NM Rural Enerprises Pty Ltd v Rimanui Farms Ltd [2010] NSWSC 969 Rigato Farms Pty Ltd v Ridolfi [2001] 2 Qd R 455 Sangora Holdings Pty Ltd v Dunstan, Supreme Court of Western Australia, Full Court, 13 April 1999, unreported SLE Worldwide v WGB & Others [2005] NSWSC 816

Category:	Procedural and other rulings
Parties:	The Owners – Strata Plan 72739 (Plaintiff) Allianz Australia Insurance Limited (Defendant)
Representation:	Counsel: MR Pesman SC (Plaintiff/Respondent) T Lynch / SS Ahmed (Defendant/Applicant) Solicitors: Stanton Legal (Plaintiff) Mills Oakley (Defendant)
File Number(s):	2014/283878

JUDGMENT

1 **HIS HONOUR:** These reasons deal with a defendant's application for leave to withdraw admissions.

Background

2 The plaintiff (the Owners Corporation) is the Owners Corporation of a strata title development at Chatswood. The developer was Syvic Chatswood Pty Limited (Syvic). Syvic engaged Austin Australia Pty Limited (Austin), pursuant to a design and construct contract (the D&C contract), to construct the development. The development comprises residential home units. There is no doubt that the work that Austin contracted to do was residential building work for the purposes of the *Home Building Act 1989* (NSW) (the HB Act).

3 Section 92 of the HB Act required that Austin must hold a contract of insurance complying with the HB Act. It procured the requisite policy from the defendant (Allianz).

4 Administrators were appointed to Austin on 31 December 2003. On 10 March 2004, the administrators were appointed as liquidators of Austin. On 24 June 2004, Syvic and Austin agreed to vary the D&C contract. They did so by entering into a "Construction Management Agreement" (CMA), the effect of which was apparently to "delete", with effect from 31 December 2003, all provisions of the D&C contract and to replace them with the provisions of a standard form of construction management agreement (a copy of which was annexed to the CMA), modified as set out in the CMA. I should note that two

versions of the draft CMA have been identified. Their terms vary. What I have said relates to what is said to be the later draft. No one has been able to produce a copy of whatever (if any) CMA was actually executed.

5 On 27 August 2004, Syvic, Allianz and Austin entered into a "Deed of Endorsement". That deed recited various matters, including some of those to which I have referred, and specified that Allianz would issue an endorsement to the policy certifying that it provided cover for:

(1) work undertaken by Austin pursuant to the D&C contract;

(2) work undertaken by Austin pursuant to the CMA; and

(3) work undertaken by contractors engaged by Syvic to complete the work (to the extent that they did work that Austin had been required to do pursuant to the D&C contract).

6 Allianz issued an endorsement to the policy, with an effective date of 31 August 2004, that purported to give effect to the deed of endorsement. The wording of the endorsement was defective, in that it did not refer to work to be done by contractors engaged by Syvic to complete Austin's work. However, Allianz accepts that its obligations under the policy as endorsed are those set out in the deed of endorsement. It does not take a point as to the defective wording of the endorsement itself.

The "pleadings"

7 The Owners Corporation's proceedings were commenced in the Technology & Construction List, by summons and Technology & Construction List Statement filed on 26 September 2014. Paragraph 6 of the list statement, as amended on 27 February 2015, alleged that the endorsement extended cover under the policy to the works undertaken under the D&C contract and the works undertaken under the CMA, both of which it defined as the "Contracts". The list response to that paragraph stated no more than that the endorsement extended cover under the policy to work done by Austin under the CMA and work done by "subcontractors" retained by Syvic to complete the development. It did not traverse, and thus must be taken to have admitted (as was plainly correct), the allegation that the policy as endorsed continued to cover work done by Austin under the D&C contract itself.

8 Paragraph 7 of the amended list statement alleged that the construction of the common property, which it defined as the "Work", was residential building work, as defined by the HB Act, done under the Contracts. Clearly enough, reference to the defined term "Contracts" was a reference to both the D&C contract and the CMA. Allianz admitted those allegations.

9 Paragraph 12 of the amended list statement alleged that the period of insurance for the policy had not expired by 24 April 2012. Allianz denied that. Paragraph 13 of the amended list statement alleged, alternatively, that the period of insurance expired sometime after 12 August 2011, and particularised this by reference to an alleged date of practical completion "sometime after 12 August 2004". Allianz admitted those allegations.

10 Allianz wishes to amend its list response. The opportunity to file an amended (or further amended) list response arises because, since 27 April 2015, the Owners Corporation has (twice) further amended its list statement. The contentious amendments concern its responses to paras 6, 7 and 13 of the contentions. The Owners Corporation opposes the amendments, to the extent that they seek to withdraw admissions.

The proposed amendments

11 I start by observing that none of the relevant paragraphs of the list statement – paras 6, 7, and 13 – has been amended. Nor are Allianz's proposed amendments to its responses to those paragraphs said to be motivated by, or in response to, any amendment that has been made to the list statement.

12 I consider first the proposed amendment to the response to para 6 of the list statement. Unlike the previous version of the response to para 6, Allianz proposes to admit expressly rather than by implication that the policy as endorsed continued to apply to work done by Austin under the D&C contract. However, Allianz wishes to qualify that admission by saying that it only applies to work done up to 31 December 2003 (the date when the administrators were appointed to Austin).

13 As a matter of pleading (and I acknowledge that list statements and list responses are not pleadings, although they serve essentially the same functions), the effect of Allianz's response to para 6 was that the Owners

Corporation's allegation (among others) that the policy as endorsed applied to works undertaken under the D&C contract was admitted (because Allianz did not answer it). There was no qualification to that deemed admission. It follows that if Allianz is allowed to "plead" that the policy as endorsed only applied to work done under the D&C contract up until 31 December 2003, there would be a partial withdrawal of that admission.

14 Mr Lynch of Senior Counsel, who appeared with Mr Ahmed of Counsel for Allianz, said that all that Allianz wished to do was to introduce a contention that such work as Austin did under the D&C contract continued only up until 31 December 2003. He suggested a rewording of the proposed response, to read that the endorsement covered residential building work done by Austin under the D&C contract and then add "(which the defendant contends concluded on or about 31 December 2003)".

15 This recasting of the form of the amendment does not answer the complaint made by Mr Pesman of Senior Counsel, who appeared for the Owners Corporation. At present, Allianz admits that work done by Austin under the D&C contract was insured. There are no issues as to when it ceased to perform work under that contract or as to whether some of that work was not insured. The effect of the amendment, even as Mr Lynch recast it in the course of submissions, would be to introduce for the first time an issue that as to work done by Austin under the D&C contract, it is only work performed up until 31 December 2003 that was insured.

16 The significance is that, on Mr Lynch's argument, no building work was done under the D&C contract after 31 December 2003. Although Austin thereafter performed construction management services, which fall within the definition of residential building work[1], it did so pursuant to the CMA. The period of insurance relevant to the D&C contract, as specified in the policy, would (Mr Lynch submitted) come to an end on 31 December 2010: some time before the claim was notified to Allianz.

17 Mr Lynch accepted, as I have said, that construction management work undertaken by Austin under the CMA would be insured. He accepted, also, that

[1] See s 3 of the HB Act, "residential building work".

despite the defective wording of the endorsement itself, work done by contractors engaged by Syvic (and managed by Austin) would be insured. However, he submitted, there was an available inference that the defects of which the Owners Corporation complains were likely to have resulted from work done by Austin itself by, at the latest, 31 December 2003.

18 Whether or not that argument is correct is a difficult question. Section 103B(2) of the HB Act, as it stood when Syvic and Austin entered into the D&C contract, provided that a contract of insurance must provide cover for at least seven years from the completion of the work "or the end of the contract relating to the work…, whichever is the later". The D&C contract continued in existence, although heavily modified, after 31 December 2003. Arguably, it did not come to an "end" until completion of the work, issue of a certificate of occupation and completion of defects rectification. But whether the contract, as heavily amended, can be described as "the contract relating to the work" (as Mr Pesman submitted), or whether it ceased to "relate" to that work once it was amended with effect from 31 December 2003 (as Mr Lynch submitted), are difficult questions. They are not questions that I would attempt to answer on an interlocutory application of this nature.

19 The second contentious amendment (as to the response to para 7 of the list statement) raises essentially the same issue. At present, it is admitted that the common property "Work" was residential building work done under the "Contracts". Allianz wishes to withdraw the admission that the work was "done under the Contracts" and, instead, not to admit that allegation.

20 As to para 13, it is presently admitted that the period of insurance expired after 12 August 2011. That is important, because it is common ground that on that date, the Owners Corporation gave a number of documents to Allianz setting out details of what the Owners Corporation said were defects in the common property. Allianz accepts that it was given those documents on that day. The Owners Corporation says that this constituted the making of a claim under the policy. Allianz does not accept that the claim was valid.

21 Mr Pesman accepted that Allianz should be free to amend to contest the characterisation of the letter of 12 August 2011 as a claim for the purposes of

the policy. However, he submitted, it should not be allowed to withdraw its admission that the letter (whatever its proper character might be) was given to Allianz before the period of insurance expired.

Principles relating to withdrawal of admissions

22 Proceedings in the Technology & Construction List are commenced by summons, and a plaintiff's case is articulated by a list statement. As I have said, a list statement is not a "pleading" as that term is defined in the dictionary to the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR). Thus, in terms, UCPR r 12.6(2) does not apply. Nonetheless, the parties accept that Allianz had made formal admissions, and that it requires the leave of the court to withdraw them. It is clear that the principles relating to withdrawal of admissions in pleadings should be applied by analogy (likewise, the principles relating to voluntary admissions of fact made otherwise: UCPR r 17.2).

23 Regardless of the characterisation of a list statement or list response, it is clearly a "document in the proceedings" in which it is filed, and thus subject of s 64 of the *Civil Procedure Act 2005* (NSW) (CP Act). It is doubtful, but unnecessary to decide, whether a list statement or a list response is an "originating process" for the purposes of s 65 of the CP Act, which deals with amendment of originating process after expiry of a limitation period.

24 I set out s 64:

> **64 Amendment of documents generally**
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> (cf SCR Part 20, rules 1 and 4; DCR Part 17, rules 1 and 4)
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> (1) At any stage of proceedings, the court may order:
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> (a) that any document in the proceedings be amended, or
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> (b) that leave be granted to a party to amend any document in the proceedings.
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> (2) Subject to section 58, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.
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> (3) An order under this section may be made even if the amendment
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> would have the effect of adding or substituting a cause of action that has arisen after the commencement of the proceedings but, in that case, the date of commencement of the proceedings, in relation to that cause of action, is, subject to section 65, taken to be the date on which the amendment is made.

> (4) If there has been a mistake in the name of a party, this section applies to the person intended to be made a party as if he or she were a party.
>
> (5) This section does not apply to the amendment of a judgment, order or certificate.

25 In considering whether to grant leave to amend, the court must consider and seek to give effect to the overriding purpose of the CP Act and the UCPR: "to facilitate the just, quick and cheap resolution of the real issues in the proceedings". That follows, in this case, from ss 56, 58 and 64 of the CP Act. As s 64(2) states, the power to amend must be exercised "subject to s 58".

26 In considering whether to grant leave to amend a pleading, reference is often made to the decision of Santow J in *Drabsch v Switzerland General Insurance Co Ltd*[2]. His Honour there said[3]:

> "1. Where a party under no apparent disability makes a clear and distinct admission which is accepted by its opponent and acted upon, for reasons of policy and the due conduct of the business of the court, an application to withdraw the admission, especially at appeal, should not be freely granted; *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 per Rogers CJ Comm D, followed in *IOL Petroleum Ltd v O'Neill* per Young J (Young J, 17 November 1995, unreported) and *Apex Pallett Hire Pty Ltd v Brambles Holdings Ltd* (full Supreme Court of Victoria, 8 April 1988, unreported), and in that respect not following *H Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694 at 703.
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> 2. The question is one for the reviewing judge to consider in the context of each particular appeal, with the general guideline being that the person seeking on a review to withdraw a concession made should provide some good reason why the judge should disturb what was previously common ground or conceded; *IOL Petroleum Ltd v O'Neill* (supra), in the context of withdrawing a concession made before the Registrar.
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> 3. Where a court is satisfied that admissions have been made after consideration and advice such as from the parties' expert and after a full opportunity to consider its case and whether the admissions should be made, admissions so made with deliberateness and formality would ordinarily not be permitted to be withdrawn; *Coopers Brewery Ltd v Panfida Foods Ltd* (supra) at 745 and 748. Thus a court will not lend its approval to the withdrawal of admissions where, by analogy with the making of amendments, this is actuated by purely tactical reasons; compare *Devae Prufcoat Pty Ltd v Altex Industrial Paints Ltd* (Cole J, 15 March 1989, unreported).
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> 4. It will usually be appropriate to grant leave to withdraw an admission where it is shown that the admission is contrary to the actual facts. Leave may also be appropriate where circumstances show that the admission was made inadvertently or without due consideration of material matters. Irrespective of whether the admission has or has not been formally made, leave may be

[2] Supreme Court of New South Wales, 16 October 1996, unreported; BC 9604909.
[3] At 7-8.

> refused if the other party has changed its position in reliance upon the admission; *H Clark (Doncaster) Ltd v Wilkinson* (supra), in that respect not doubted.
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> 5. Following *Cohen v Mc William and Anor* (1995) 38 NSWLR 476, a court is not obliged to give decisive weight to court efficiency, such that a party who wishes to defend its claim is entitled to a hearing on the merits, with cost orders being available as a means of compensating the other party for any costs thereby unnecessarily incurred or not fairly visited on the other party."

27 White J considered the position in *SLE Worldwide v WGB & Others*[4]. After referring to what Santow J had said in *Drabsch*, White J said[5] that the discretion to grant leave to amend was to be exercised for the purpose of ensuring that there would be a fair trial. His Honour continued:

> 56 This remains a correct statement of the relevant principles after *Queensland v JL Holdings Pty Ltd*. (*Jeans v Commonwealth Bank of Australia* (2003) 204 ALR 327 at 330-331; *Silver v Dome Resources NL* [2005] NSWSC 265 at [8]-[9]). In *Jeans v Commonwealth Bank of Australia,* the Full Court of the Federal Court said that there was no principle that admissions might or might not be withdrawn, but that the court had a broad discretion to weigh up all matters, with the overall question being to ensure there was a fair trial. (At 330 [18]). Nonetheless, I approach the task of assessing what fairness to the parties requires, guided by the principles expounded by Santow J in *Drabsch*. It is legitimate and it may be necessary to consider whether the party making the admission did so deliberately, or whether he did so in error, whether the significance of the admission has changed since it was made, for example by reason of other amendments, (*Silver v Dome Resources NL* at [12]), or whether new evidence has come to light. In this case there is no suggestion that the admission was made in error. There has been no change to the pleadings which has altered the significance of the admissions. It is not suggested that new evidence has come to light which justifies their withdrawal. Where a party, who is legally advised and does not suffer any disability, deliberately and without mistake, admits liability in whole or in part, and there are no relevant changes of circumstance, prima facie, justice or fairness to both parties does not require that it be allowed to change its mind. That is why admissions made with deliberateness and formality are not ordinarily permitted to be withdrawn.

28 Having said that, his Honour said[6], the starting position was "that the admissions deliberately and formally made should not be permitted to be withdrawn, unless sufficient cause is shown why they should be".

29 There are many judicial statements to the effect that a party seeking leave to amend so as to withdraw an admission should explain why the admission was made and why it is now sought to be withdrawn. Tobias JA said as much in

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[4] [2005] NSWSC 816.
[5] At [56].
[6] At [57].

Maile v Rafiq[7]. The same position emerges from decisions of other intermediate appellate courts: see for example *Sangora Holdings Pty Ltd v Dunstan*[8] and *Rigato Farms Pty Ltd v Ridolfi*[9]. It may be said that s 56 of the CP Act now provides the primary guide to the exercise of the discretion. That is correct. Nonetheless, as Harrison J recognised in *NM Rural Enerprises Pty Ltd v Rimanui Farms Ltd*[10] (a very different case on its facts), the statements remains relevant.[11]

Decision

30 I accept that the decisions to which I have referred, and many others, establish the importance, in a general sense, of an explanation by the party seeking leave to withdraw an admission. Nonetheless, as s 64 of the CP Act makes clear, as long as the overriding purpose is observed, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.

31 At present, there is no question, let alone real question, in the proceedings, as to whether:

(1) the relevant residential building work was done under one or other of the "Contracts" (the D&C contract or the CMA);

(2) residential building work done under those contracts, and indeed under the contracts made between Syvic and contractors, was covered by the policy as endorsed; and

(3) the period of cover under the policy expired before 12 August 2011.

32 If Allianz is given the leave that it seeks, all of those presently admitted states of affairs will become contentious.

33 The broad discretion given in relation to amendments, and in relation to withdrawal of admissions, cannot be controlled by statements of principle emerging over the years from decided cases. The interests of justice, and the overriding purpose of the CP Act, must be considered in their application to the

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[7] [2005] NSWCA 410 at [75].
[8] Supreme Court of Western Australia, Full Court, 13 April 1999, unreported; BC9901667.
[9] [2001] 2 Qd R 455, [26] – [29] (McPherson JA).
[10] [2010] NSWSC 969.
[11] See at [11] to [14].

facts of the particular case. Nonetheless, where broad statements of principle can be collected from decided cases, and where those broad statements of principle have been acted on over the years, it would be unwise to exclude them from consideration. On the contrary, both experience and the public interests in certainty and clarity of objective decision-making suggest that such statements of principle must be taken into account.

34 The striking feature of this application is that Allianz has offered no evidence whatsoever to seek to explain why the admission was made when it was made. It is self-evident that Allianz is a very well resourced, very experienced and very sophisticated litigant. It has always had available to it so much legal advice, of the highest quality, as it wishes to call upon. The obvious inferences are that the admissions in question were made after due consideration of all facts known to Allianz, and taking into account such advice as Allianz thought it proper to receive, and that Allianz gave instructions to make the admissions because it considered that the pleaded facts were correct. Mr Lynch did not contend otherwise.

35 Those circumstances are of particular importance in this case because Allianz has been an actor in the relevant events since 2003. It issued the policy. It negotiated and executed the deed of endorsement, under which it agreed to amend the terms of cover offered by the policy. And it then issued the endorsement which purported to give effect to the deed of endorsement. Quite clearly, at the relevant time, Allianz knew, to the extent that it wanted to know, what was happening as between Syvic, Austin (or its administrators or liquidators) and the contractors engaged to finish the work. The deed of endorsement itself shows that Allianz had been made aware of what was happening. In truth, Allianz knows far more about the events of 2003 and 2004 than the Owners Corporation does, or could ever hope to do.

36 I do not accept (as Mr Pesman submitted) that in those circumstances, I should approach the application with a predisposition that it should be refused. As I have said, the broad discretion (whatever its source) is not constrained by matters such as the need for an explanation. Nonetheless, the court is entitled to ask why the application is being made. It cannot be suggested (nor has it

been) that there has been any material change in the circumstances as known to Allianz. An available inference is that Mr Lynch, or someone else in his position, looked at the list response, in the light of the need to file an amended list response to answer the further amended list statement, and considered that there was an arguable basis for disputing the matters that had hitherto been admitted.

37 If Allianz were given the leave that it seeks, there would be no significant prejudice to the Owners Corporation in terms of time or costs. The relevant events happened a long time ago. However, proceedings were not commenced until 2014. The decision to delay so long in commencing proceedings was one taken by the Owners Corporation. It was not up to Allianz to insist that the Owners Corporation sue it. To the extent that the Owners Corporation has incurred costs that it would not have incurred had the admissions never been made, that is something that can be compensated.

38 There is however a specific matter of prejudice to which Mr Pesman pointed. I shall explain how it arises.

39 As I have said, one effect of the amendments, if made, would be to put in issue when the defective work was actually done. If it were done prior to 31 December 2003, and if Mr Lynch's arguments as to the proper construction and effect of s 103B(2) of the HB Act are correct[12], Allianz would not be bound to indemnify the Owners Corporation for the cost of rectifying those defects. The amount at stake is considerable (said to be in excess of $10 million.)

40 At present, there is no issue in the proceedings that would require the Owners Corporation to consider precisely when and by whom the allegedly defective work was done. However, if Allianz is given leave to withdraw the admissions in question, that will become a very live issue.

41 As one would expect, Syvic was required to appoint a Principal Certifying Authority (PCA). It did so. Presumably, the PCA was required to carry out critical stage inspections, to ensure that the work done conformed to the plans

[12] See at [16] to [18] above.

and specifications. Presumably, the PCA did so. Presumably, the PCA kept records of those inspections.

42 The PCA was deregistered on 1 May 2016: more than a year after the admissions were made. Thus, Mr Pesman submitted, the Owners Corporation had lost the opportunity that otherwise it would have had to procure the issue of subpoenas directed to the PCA, for the production of all records relating to its critical stage inspections. Those records might be expected to throw light on the question of when particular aspects of the work were done, and perhaps by whom.

43 Again, Syvic would be expected to have some records of work done, and specifically records of its contracts with the various contractors who, it appears, were engaged in 2004 to complete the work that Austin was required to perform under the D&C contract. Those contracts too, and the records relating to them, might throw light on when the work was done and by whom.

44 Syvic also has been deregistered: on 8 February 2016, somewhat under a year after the admissions were made. Again, Mr Pesman submitted, the Owners Corporation has lost the opportunity to procure records from Syvic.

45 Mr Lynch responded, as to Syvic, that its principal Mr Huang was still available, and indeed is a cross-defendant to a cross-claim that Allianz has brought. Mr Lynch suggested that Mr Huang might have some records still in his possession. That may be so, but in the absence of evidence on this point, I am disinclined to speculate.

46 It is not hard to imagine that if the Owners Corporation had been apprised in April 2015 of the need to work out what aspects of the defective work were done when, and by whom, it might have turned its attention to making inquiries of the PCA and Syvic. It might have turned its attention to the issue of subpoenas directed to those companies. Whether or not those subpoenas would have been fruitful is a matter on which only speculation is possible; and again, I am disinclined to speculate.

47 Nonetheless, it seems to me, the loss (perhaps, “impairment” might be a better word) of the opportunity to investigate those matters through subpoenas to the

PCA and Syvic is a very real matter of prejudice to the Owners Corporation. It is prejudicial because, up until Allianz announced its intention to withdraw the admissions, the Owners Corporation had not been given any indication of the need to make such investigations. And it is no less prejudicial because the full extent of the loss or impairment cannot be ascertained. That is inherent in the nature of the prejudice.

48 It cannot be said that the lapse of time between the making of the admissions and the loss or impairment of the opportunity to investigate was so brief that in reality, there was no prejudice at all. On the contrary, there was a year in one case, and about 10 months in the other.

49 Other factors that are often considered, including greater costs and further delay, are not of great significance in this case, because the proceedings have not been set down for trial. I accept that if Allianz is given the leave that it seeks, it will cost the Owners Corporation more to prepare for trial, and take longer to do so. But those matters would have been applicable had the admissions never been made; that is to say, had Allianz first "pleaded" as it now wishes to plead. I accept that there is some loss of time, because of the delay in seeking the leave, but in the scale of overall delay in commencing proceedings, that does not seem to me to be significant, let alone dispositive.

50 The key factors that tell in favour of the exercise of the discretion seem to me to be the following:

(1) the issues that Allianz wishes, through the amendments, to raise, whilst difficult, are not obviously doomed to fail;

(2) thus, to refuse leave to withdraw the admissions would deprive Allianz of an arguable defence to a substantial claim;

(3) to the extent that granting leave would cause prejudice to the Owners Corporation in terms of time, that is not particularly significant given the delay in bringing proceedings and the relatively early stage at which the application has been made; and

(4) to the extent that granting leave would cause prejudice to the Owners Corporation in terms of costs wasted to date, that is capable of remedy by an appropriate costs order.

51 The key factors that tell against the exercise of the discretion seem to me to be the following:

(1) Allianz, the party having all the knowledge (and means of knowledge) of the true facts, chose deliberately and on advice to make admissions;

(2) it cannot be said that any facts have come to light which, had they been known when the admissions were made, might have inclined Allianz not to make them;

(3) Allianz has not offered any explanation at all as to why it made the admissions or of the circumstances that have prompted it now to seek to withdraw them;

(4) if Allianz were granted leave to withdraw the admissions, serious new factual issues would be raised;

(5) the Owners Corporation, the party presently having the benefit of the admissions, will be required to do what it can to investigate the new questions of fact; and

(6) the delay in seeking leave to withdraw the admissions would cause prejudice to the Owners Corporation were leave now to be granted, even though the precise extent or quality of that prejudice cannot be assessed with any certainty.

52 Allianz will suffer prejudice if the application is refused. The Owners Corporation will suffer prejudice if the application is granted. The weight or extent of the competing prejudices is incapable of present assessment. As to Allianz: the extent of the prejudice really depends on the strength of the arguments that it wishes to raise. In the case of the Owners Corporation, the extent of the prejudice depends on an assessment of the opportunity that has been lost. It is not possible to make a qualitative assessment of the extent of the prejudice either way.

53 Because there is prejudice each way, the absence of explanation for the failure to raise the point when the opportunity first presented itself (in April 2015) seems to me to be particularly significant. The court is left with the position that, on the face of things, Allianz, having the benefit of the knowledge and resources to which I have referred, took a deliberate decision to make the admissions.

54 In those circumstances, it seems to me, the party whose decisions and actions have given rise to the prejudice is the party that should bear the consequences. To put it another way, this seems to me to be a case where Allianz should be the one to suffer the consequences of its own decisions and actions.

55 I conclude that the proper exercise of the discretion requires that Allianz not be given leave to withdraw the admissions in question.

56 It follows that the notice of motion filed on 17 July 2017 seeking leave to withdraw the admissions should be dismissed with costs. Of course, dismissal of that notice of motion does not mean that Allianz should not file its list response to the second further amended list statement. What it means is that the list response to be filed should not withdraw the relevant admissions.

57 I make the following orders:

(1) order that the defendant's notice of motion filed on 17 July 2017 be dismissed;

(2) order the defendant to pay the plaintiff's costs of that notice of motion;

(3) give leave to have those costs assessed forthwith;

(4) direct the defendant to file and serve its list response to the second further amended technology and construction list statement by 1 September 2017;

(5) direct that the exhibits on the application be returned.

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