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The Danger of a Notice to Admit Facts

Taree Truck Centre Pty Ltd v Kneeward Pty Ltd [2018] NSWCA 16 (15 February 2018)

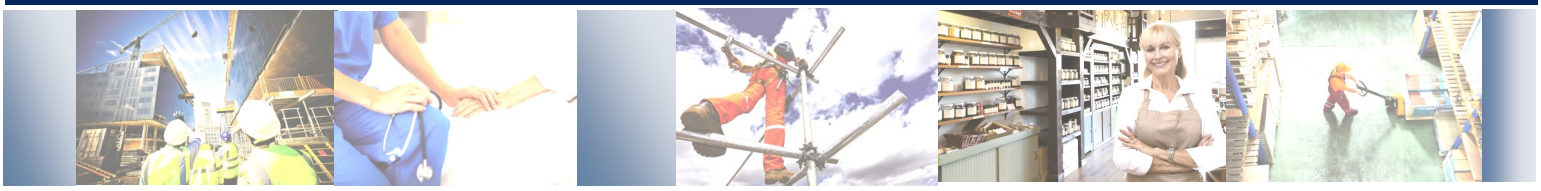
A win on an interlocutory issue for Rankin Ellison Lawyers. We acted for the Respondent in the above Summons Seeking Leave to Appeal. On behalf of our client, on or about 22 September 2015 we served a Notice to Admit facts stating: *'On a date prior to 20 December 2010 [Taree Truck Centre] was engaged by [Kneeward] to inspect, service, maintain and repair (the truck) as necessary and Taree carried out regular inspections, servicing and repair of the vehicle'.*

The Applicant's Solicitor at the relevant time did not respond to the Notice within the 14 day time period, and in fact, did not seek to respond to the Notice for over one year after service. The Applicant was therefore deemed to have admitted the content of the Notice to Admit Facts. The Applicant filed a Notice of Motion in December 2016 seeking leave to resile from those admissions, however, was unsuccessful in the first instance before Mahony DCJ. The Applicant then filed a Summons Seeking Leave to Appeal in the Court of Appeal.

The Applicant (Taree Truck Centre) is the Third Defendant in pending proceedings in the District Court. The primary judge had determined that no sensible explanation had been proferred by Taree Truck Centre as to why it did not respond to the Notice to Admit Facts. The primary judge found that having regard to the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings, leave should not be granted to withdraw the admission.

The Applicant sought leave to appeal on five bases, and Justices Payne and Gleeson determined that none of these were made out. It was apparent that the primary arguments on appeal (should leave have been granted) would have been whether there was the potential for conflicting factual findings within the same proceedings, the presence of prejudice, and the impact the admission would have on the apportionment of liability. The other bases of appeal were swiftly discarded.

Payne J stated that it is tolerably clear that the Plaintiff's pleadings do not raise the precise issue which the deemed admission addresses. Therefore, the admission remains as between the Applicant and Respondent, and only then if the Plaintiff establishes liability against both entities as tortfeasors. The potential for inconsistent findings did not arise. It follows that if the Plaintiff does not prove his case



against the Applicant and Respondent, then there will be no issue of apportionment. It was held that the Applicant did not identify any injustice, let alone one that is reasonably clear in the sense of being more than arguable, therefore no *House v The King* error was demonstrated.

It was also held that there was no evidence that Taree Truck Centre was an 'innocent client' being held to an error made by its legal representatives. There was voluminous material filed and none of that material addressed the central question of why Taree Truck Centre did not respond to the Notice to Admit Facts. It was common ground that Taree Truck Centre was legally represented at the time the Notice to Admit Facts was served, and it was also common ground that the Notice was served on the Company and also the Solicitors on Record.

Payne J noted that leave to appeal involving matters of practice and procedure is rarely granted, and this case failed at every hurdle. The Summons Seeking Leave to Appeal was dismissed with costs. The implication for the Applicant is that damages in respect of any contribution will be assessed in accordance with the *Civil Liability Act* 2002, although it was noted by his Honour when delivering Judgment that this was not the forum for a discussion about the different compensation regimes.

This case demonstrates the effectiveness of utilising a Notice to Admit Facts, and the stringent requirements to respond to same within time. Without the presence of an error of law, significant injustice or a matter of public principle, and also in circumstances in which no real explanation as to the reasons no Notice Disputing Facts is served, any application to withdraw an admission at a later date is likely to fail. It is therefore imperative that a Notice Disputing Facts be served within 14 days of receipt, to avoid being bound by unwanted deemed admissions.

If you have any questions regarding a particular liability matter, please contact a lawyer in our Insurance team by calling Sydney on (02) 8297 5900 or Newcastle on (02) 4929 9333.