SUPREME COURT OF QUEENSLAND

CITATION:	*Harro Group Pty Ltd v Aspire Pty Ltd* [2019] QSC 189
PARTIES:	**HARRO GROUP PTY LTD ACN 108 581 353** (plaintiff) **v** **ASPIRE PTY LTD ACN 600 332 063** (first defendant) **BRADLEY CHARLES HOPPER** (second defendant)
FILE NO/S:	BS 13208/18
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	8 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2019
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application is dismissed.** **2. The costs of the application are reserved.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the defendants applied to strike out paragraphs of the statement of claim – where the defendants alleged no reasonable cause of action or that the causes of action were made without reasonable grounds – where the disputed question was a question of law – where the matter would proceed to trial even if defendants were successful on application – where the application was dismissed to allow the question to be decided at trial CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the plaintiff claimed an implied term existed in a lease requiring the defendant to pay market rent if the defendant did not trade from the property – whether the implied term was necessary to give business efficacy to the contract – where the alleged implied term is inconsistent or contradicts an express term of the contract –

where the alleged implied term does not satisfy the requirements of obviousness and clarity

RESTITUTION – REMEDIES – GENERALLY – where the contract is legally effective and remains on foot – where the plaintiff claims damages for breach of contract up to the present time – where rent is to be determined as a percentage of turnover – where trading never commenced - whether a restitutionary cause of action is available

Common Law Practice Act 1867 (Qld)
Distress for Rent Act 1737
Uniform Civil Procedure Rules 1999 (Qld), r 171

Attorney-General v De Keyser's Royal Hotel [1920] AC 508, cited
Australian Provincial Assurance Association Ltd v Rogers (1943) 43 SR (NSW) 202, cited
Barnes v Eastenders Cash & Carry [2015] AC 1, cited
Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256, cited
BP Refinery (Westernport) v Shire of Hastings (1977) 180 CLR 266, applied
Breen v Williams (1996) 186 CLR 71, cited
Broadway Pty Ltd v Lewis [2012] WASC 373, cited
CA & CA Ballan Pty Ltd v Oliver Hume (Australia) Pty Ltd (2017) 55 VR 62, cited
Clark v Macourt (2013) 253 CLR 1, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337, considered
Collett v Curling (1847) 10 QB 785, cited
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, considered
Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226, cited
Dey v Victorian Railways Commissioners (1948) 78 CLR 62, cited
Frinty Pty Ltd v Landmax Developments Pty Ltd (2010) 272 ALR 412, cited
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Gibson v Kirk (1841) 1 QB 850, cited
Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd [1995] 2 Qd R 350, cited
Johnson v Agnew [1980] AC 367, cited

Lampson (Australia) Pty Ltd v Fortescue Metals Group Plc Ltd [No 3] [2014] WASC 162, cited
Lumbers v W Cook Builders Pty Ltd (in liquidation) (2008) 232 CLR 635, cited
Mann v Paterson Constructions Pty Ltd [2018] VSCA 231, cited
Mann v Paterson Constructions Pty Ltd [2019] HCATrans 92, cited
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457, cited
Mutton v Baker & Anor [2014] VSCA 43, cited
Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd [2006] VSCA 6, cited
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, cited
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17, cited
R & C Mazzei Nominees Pty Ltd v Aegean Food Import Export Pty Ltd [2006] VSC 210, cited
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, cited
Robinson v Harman (1848) 1 Exch 850 at 855 [154 ER 363 at 365], cited
Roxborough v Rothmans of Pall Mall (2001) 208 CLR 516, considered
Sanders v Cooper [1974] WAR 129, cited
Sanders v Snell (1998) 196 CLR 329, cited
Scientific Management Associates (Australia) Pty Ltd v Australian Capital Territory [1999] ACTSC 17, cited
Shirlaw v Southern Foundries (1926) Ltd (1939) 2 KB 2016, cited
Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510, cited
Specktor v Lees [1964] VR 10, cited
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272, cited
The Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, cited
Wharf St Pty Ltd v Amstar Learning Pty Ltd [2004] QCA 256, cited
Young v Queensland Trustees Ltd (1956) 99 CLR 560, cited
Zegir v Woop [1955] VLR 394, cited

COUNSEL:	N Ferrett QC for the applicant/defendants D Clothier QC and G Coveney for the respondent/plaintiff
SOLICITORS:	Woods Prince for the applicant Shand Taylor for the respondent

JACKSON J:

Introduction

[1] The defendants apply to strike out paragraphs of the statement of claim (and the relevant parts of the claim for relief) on the ground that two of the alleged causes of action do not disclose a reasonable cause of action or are made without reasonable grounds either under the rules of court or for the purposes of the inherent jurisdiction of the court.[1]

[2] The claim arises from a lease of commercial premises located at 22 Wellington Road, East Brisbane granted by the plaintiff to the first defendant. The lease is for a term of 15 years, commencing on 1 October 2017 and ending on 30 September 2032.

[3] The lease contains terms that the only permitted use of the premises is for a bar and restaurant and associated uses, that the first defendant must obtain and keep current during the term the consent of any authority needed for the permitted use and that the first defendant must keep the premises open for trade during hours consistent with the industry standard for the permitted use.

[4] After the lease was granted and the first defendant was put into possession of the demised premises, it was to obtain relevant planning and building permissions, fit out the premises and start trading.

[5] Simplifying, a separate incentive deed provided, in effect, for a rent free period of 12 months from the commencement of the term to facilitate that process. After 12 months, in effect, the lease provided that the first defendant would pay rent calculated as a percentage of the turnover from trading.

[6] As matters transpired, and for whatever reason, the first defendant did not fit out or start to trade from the bar and restaurant. Accordingly, no rent became payable under the express contractual mechanism under the lease for the payment of rent.

[7] The second defendant is the guarantor of the first defendant's obligations under the lease.

[8] The plaintiff started the proceeding claiming rent and damages for breach of contract.

[9] The breach of contract alleged is of the terms that the first defendant would fit out and trade from the premises. As presently pleaded the plaintiff alleges that the breach caused loss or damage measured by the rent that the plaintiff alleges would have been payable had the first defendant started and continued to trade.

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1 *Uniform Civil Procedure Rules* 1999 (Qld), r 171(1)(a) and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 127-129; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 266 [10].

[10] The rent is claimed under an alleged implied term of the contract comprised in the lease that if the first defendant did not fit out and trade from the premises it would pay market rent, at least during the period that it does not trade.

[11] In Australian common law it is accepted that the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases.[2] It is appropriate, therefore, to refer to the relevant provisions as terms of the contract comprised in the lease.

[12] Simplifying slightly, by amendment the plaintiff alleges an additional cause of action that the first defendant is obliged to make restitution to the plaintiff for the benefit of the use and occupation of the premises measured by the market value of rent for the premises, not the amount that would have been payable as the agreed percentage of turnover as rent had the first defendant started and continued to trade.

The terms of the lease

[13] The relevant terms of the lease are as follows:

> "**3.1 Rent**
>
> (a) The Lessee must pay the Rent in accordance with for the first Lease Year, clause 3.6; and each Lease Year thereafter:
>
> (i) [blank]
>
> (ii) clause 3.7; or
>
> (iii) clause 18
>
> as the case may be.
>
> **3.6 Turnover Rent – first Lease Year**
>
> (a) The Lessee must pay the Turnover Rent to the Lessor.
>
> (b) The Turnover Base amount for the first Lease Year is the amount set out in Item 14(a) of the Reference Schedule.
>
> **3.7 Turnover Rent – subsequent years**
>
> (a) On and from the second Lease Year, the Lessee must pay the Turnover Rent to the Lessor for each month during the Term (or any extension or further term).
>
> (b) The Turnover Base amount for the first Lease Year is the amount set out in Item 14(b) of the Reference Schedule.
>
> **3.17 Interest on overdue payments**
>
> If the Lessee fails to make any payment under this lease within 14 days of the due date, the Lessor may charge the Default Interest to be calculated on a daily basis, from and including the day after payment is due until payment is made. The Lessor's right to interest is in addition to all other remedies for breach of this lease, including termination, and interest continues to run until payment is received, notwithstanding termination of this lease.
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> **5.1 Use of premises**

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2 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 29, 38, 40 and 56.

(a) The Lessee must only use the Premises for the Permitted Use stated in Item 10…
(b) The Lessee must obtain and keep current during the Term, the consent of any Authority needed for the Permitted Use.
(c) If the Lessee fails to obtain any necessary consents, the Lessee must still pay Rent and comply with this lease.
(d) The Lessee must keep the Premises open for trade during hours consistent with the industry standard for the Permitted Use.
(e) Without in any way derogating from the generality of the provisions of this clause 5.1, the Lessee acknowledges and agrees that the Lessee's restaurant must serve breakfast, lunch and dinner 7 days a week.

14.1 Events of default
Each of the following constitutes a default by the Lessee:
(a) the Rent or any money payable by the Lessee under this lease is unpaid for 7 days, whether or not a formal demand for payment has been made;
(b) the Lessee has not affected the repairs required by any notice within the time reasonably specified in the notice;
(c) the Lessee fails to comply with any of the covenants or obligations under this lease.

14.7 Lessor's entitlement to damages
(a) If the Lessee's conduct (whether acts or omissions) constitutes:
(i) a repudiation of this lease (or of the Lessee's obligations under this lease);
(ii) a breach of any lease covenants;
(iii) a breach of an essential term of this lease, being those terms requiring the Lessee to pay money and those contained in clauses 3 to 7, 9, 11 and 15 of this lease,
and the Lessor terminates this lease on any of these grounds, the Lessee agrees to compensate the Lessor for the loss or damage suffered by the Lessor as a consequence of the repudiation or breach, whether this lease is or is not terminated for the repudiation, breach or on any other ground.

18.1 Minimum Market Rent Value
If, on each anniversary of the Commencement Date commencing on 1 October 2020, the Turnover Rent does not equal or exceed the estimated market value of rent for the Premises as provided by a real estate agent's appraisal (Estimated Market Rent), the Lessor may give written notice to the Lessee that the Rent is less than the Estimated Market Rent and the Lessee must either advise the Lessor within 10 Business Days:
(a) that the Estimated Market Rent is accepted as the new Rent for the current Lease Year in which case the Rent payable by the Lessee for that year will be increased accordingly; or
(b) that the amount of the Estimated Market Rent is disputed, in which case clause 18.2 applies; or

(c) that the Estimated Market Rent is not accepted as the new Rent in which case the Lessor may by written notice to the Lessee terminate this Lease taking effect 60 days after the date of that notice. If the Lessor does not terminate within a further 10 Business Days, the Rent remains the same for the current Lease Year."

Implied term

[14] The statement of claim alleges the following implied term:

> "Further or in the alternative to paragraphs 13 and 14 above, it was an implied term of the Lease that, if the defendant did not trade from the Property as required by clauses 5.1(d) and (e), the defendant would pay market rent to the plaintiff from 1 October 2018."[3]

[15] The form of the pleading[4] follows the legal formula for implying a term ad hoc or in fact, as propounded by the Privy Council[5] and later adopted[6] and recently repeated[7] by the High Court:

> "(1) it must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (3) it must be so obvious that 'it goes without saying';
>
> (4) it must be capable of clear expression; and
>
> (5) it must not contradict any express term of the contract."[8]

[16] The defendants submit that the plaintiff's cause of action for rent (whether claimed as a debt or damages for non-payment of that rent) under the implied term is flawed because there is no reasonably arguable basis in law for the alleged implied term.

[17] The plaintiff submits that the implied term is necessary to give business efficacy to the contract comprised in the terms of the lease because the amount of the market value of the rent for the premises is both readily ascertainable and recoverable as a debt, whereas the assessment of damages for breach of the first defendant's promise or obligation to trade from the premises, is or may be complex. The plaintiff submits that a right to recover rent as a debt is superior to a right to damages.

[18] Students of legal history might think it odd to describe an action for debt, which fell into disfavour because of the unsatisfactory defence of wager of law when the alternative action for indebitatus assumpsit became available, as superior. It may be accepted that there are distinctions between an action for debt and one for damages for breach of contract, formerly brought in indebitatus assumpsit. Some of them have been essayed recently in the context of explaining the rise of assumpsit and its

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3 Amended statement of claim, paragraph 15.
4 Amended statement of claim, paragraph 16.
5 *BP Refinery (Westernport) v Shire of Hastings* (1977) 180 CLR 266, 267.
6 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 347.
7 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 185-186, [21]-[22].
8 *BP Refinery (Westernport) v Shire of Hastings* (1977) 180 CLR 266, 267.

relationship to modern restitution law.[9] And there is a vigorous argument in favour of the virtues of debt in some academic writing.[10] The distinction may matter in the context of the onus of proof of payment of a debt,[11] and in some other cases. But it has not figured in the context of a reason in favour of implying a term ad hoc, or in fact, as far as I am aware. In any event, the superiority relied upon by the plaintiff lies in the suggestion that the market value of the rent of the premises is more readily ascertainable than the amount of rent that would have been payable if the first defendant had commenced to trade. Perhaps it is, but that is not a reason that supports the implication of the alleged term, in my view.

[19] Although the defendants make a number of submissions as to why the implied term is not reasonably arguable in law, the two best arguments are that the alleged term is inconsistent with or contradicts the express terms of the lease as to the payment of turnover rent and that it does not satisfy the related requirements of obviousness and clarity.

[20] As to requirement (5), not contradicting an express term of the contract, the cases show that one form of inconsistency is where the contract deals with the relevant subject matter in terms that would operate inconsistently with the proposed implied term because the matter is already sufficiently dealt with by the express terms.[12]

[21] The implied term in the present case would operate inconsistently with the express term as to turnover rent. It is common ground that it is a breach of contract for the first defendant not to (fit out and) start to trade. It is also not contentious that the principle on which the damages for that breach are to be assessed is that damages are compensatory and are to be measured by the amount of money that would restore the plaintiff to the position as if the first defendant had performed the contract.[13]

[22] An important corollary to that principle is that a plaintiff is not entitled, by an award of damages for breach of contract, to be placed in a superior position to that in which he or she would have been had the contract been performed.[14] If the first defendant had started to trade unsuccessfully from the premises, the plaintiff would not have received as rental an amount equal to market rent, but something less.

[23] Accordingly, the alleged implied term, that if the first defendant does not trade the first defendant will pay a market rent for the non-trading period, would give an inconsistent entitlement to an amount of rental as the plaintiff's entitlement to damages for breach of contract for not trading for the same period. In my view, that inconsistency, prima facie, repels the alleged implied term as a matter of law.

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9 Ian M Jackman, *The Varieties of Restitution* (Federation Press, 2nd ed, 2017), 15-30.

10 CJR Duncan and James A Watson, "A Note on the Curious Incidents of Debt" in Justin T Gleeson, James A Watson, Ruth C Higgins and Elisabeth Peden (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 2, 26-49.

11 *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 and *Frinty Pty Ltd v Landmax Developments Pty Ltd* (2010) 272 ALR 412.

12 For example, *Sanders v Snell* (1998) 196 CLR 329, at 337–338. See LexisNexis Butterworths, Carter on Contract, [11-100].

13 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13]. See also *Robinson v Harman* (1848) 1 Exch 850 at 855 [154 ER 363 at 365].

14 *Clark v Macourt* (2013) 253 CLR 1, [27]; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82.

[24] Together with requirement (2) of necessity to give business efficacy, requirement (3), obviousness, and requirement (4), clarity, are often hurdles at which a suggested implied term ad hoc or in fact falls.[15]

[25] The plaintiff submits, among other things, that the answer to these arguments against the implied term lies in the proper construction of the contract comprised in the lease. The plaintiff submits that the proper construction of the lease is that the obligation to pay rent is conditional on the first defendant starting to trade. The plaintiff submits further that there can be no doubt that the parties did not intend that nothing would be payable if the first defendant did not start to trade. The plaintiff submits that leaves a gap to be filled as to the payment of rent, in the event that the first defendant fails to trade. Accordingly, the plaintiff submits, those circumstances give rise to the implied term. Whilst those submissions have some attraction, in my view there are points in answer to them that are persuasive.

[26] The text of the provisions of the lease as to payment of rent are not conditional. On the ordinary meaning of the text, it is provided that the first defendant will pay rent measured by turnover and on the proper construction of the term as to trading hours the first defendant is obliged to trade from the premises.

[27] Accordingly, as is common ground, the first defendant's failure to start trading was and is a breach of the lease sounding in damages for breach of contract. It may be accepted that the parties did not intend that nothing would be payable if the first defendant did not start to trade. But that situation is not a gap in the provisions of the contract comprised in the lease for the payment of rent. It is a breach of contract sounding in damages measured by the amount that would have been payable for the rent if trading had started and continued. There is no gap to be filled, in my view.

[28] In any event, acceptance of the proposition that the parties did not intend that nothing would be payable if the first defendant did not start to trade only goes part of the distance required before the term alleged by the plaintiff could be implied. Nothing particularly supports the conclusion that, if the parties had been asked whether in that event a market rent would be payable, they would have answered: "Of course."[16] A market rent is not the same thing as the rent the parties contracted for. It is by no means obvious that the parties would have agreed to market rent in lieu of the contractual measure or some other amount.

[29] In my view, the plaintiff's arguments as to the alleged implied term should be rejected and the cause of action for rent in the amount of the market value of rent for the premises should be struck out as not disclosing a reasonable cause of action. However, there would be no utility in making that order if the plaintiff is entitled to proceed to trial, in any event, on its restitutionary cause of action, for reasons I will explain.

Restitution

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15 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 241; *Breen v Williams* (1996) 186 CLR 71, 105.

16 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 241; *Breen v Williams* (1996) 186 CLR 71, 105

[30] The defendants submit that the restitutionary cause of action fails *in limine* because there is no power to award restitution upon a cause of action based on a consideration that has failed other than to return to the plaintiff a sum of money that the plaintiff has outlaid under the contract.[17] They submit that the only exception to that rule is the acceptance in 2015 by the Supreme Court of the United Kingdom in an English case that there could be restitution of a non-monetary benefit obtained by the defendant.[18] However, in my view, the defendants' argument, made at that level of abstraction, is too far removed from the facts that identify the relevant category or categories of case.

[31] The plaintiff submits that the principles of failure of consideration are not limited to a purely monetary benefit, relying on the English case and a judgment in the Supreme Court of Western Australia that rejected an argument that failure of consideration as the basis for a cause of action giving rise to unjust enrichment is mutually exclusive from a claim for quantum meruit.[19]

[32] In my view, the weakness of the plaintiff's argument on this point is better identified by recalling that historically at common law there was a common money count in an action either in debt or indebitatus assumpsit by a landlord against a tenant for payment for use and occupation by the tenant of premises with the agreement of the landlord,[20] including cases where no rent had been agreed for the use and occupation.[21] Neither of the parties referred to this form or cause of action. Perhaps that is not surprising, for it receives almost no attention in the wealth of modern textbooks that consider the common money counts in the context of the modern law of restitution.[22] But, for present purposes, the existence of the action tends to negate the broad submission of the defendants that there can be no restitutionary cause of action in respect of a non-money benefit provided by way of use and occupation of premises by a tenant from a landlord.

[33] Although the defendants make a number of other submissions as to why the restitutionary cause of action is not a reasonable cause of action in law in the present case, the two best arguments are that the cause of action is not analogous to the recovery of the value of services supplied upon a consideration that has failed and the restitutionary cause of action is inconsistent with the allocation of risk and rights agreed between the parties under the contract comprised in the terms of the lease which remains on foot.

[34] As to a restitutionary cause of action based on a failure of consideration, the starting point is that it is well recognised that a party to a legally ineffective contract for the supply of services who has provided a valuable benefit to the other party may be entitled to restitution for the value of the services upon a total failure of

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17 Ian M Jackman, *Varieties of Restitution* (Federation Press, 2nd ed, 2017), 42 [107], 102.

18 *Barnes v Eastenders Cash & Carry* [2015] AC 1.

19 *Lampson (Australia) Pty Ltd v Fortescue Metals Group Plc Ltd [No 3]* [2014] WASC 162, [92]-[96].

20 And therefore the tenant's occupation was not a trespass entitling the landlord to mesne profits.

21 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, 533-537; *Australian Provincial Assurance Association Ltd v Rogers* (1943) 43 SR (NSW) 202*; Zegir v Woop* [1955] VLR 394; *Specktor v Lees* [1964] VR 10, 18-19; *Sanders v Cooper* [1974] WAR 129; *Scientific Management Associates (Australia) Pty Ltd v Australian Capital Territory* [1999] ACTSC 17; *Wharf St Pty Ltd v Amstar Learning Pty Ltd* [2004] QCA 256, [6]; *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6, [22]; cf *Broadway Pty Ltd v Lewis* [2012] WASC 373, [85] ff.

22 An exception is Charles Mitchell, Paul Mitchell and Dr Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016), 127-128, [5-33] – [5-34].

consideration.[23] However, where the contract is legally effective the position is more complex. There is no question in the present case that the contract comprised in the terms of the lease is legally effective. The plaintiff alleges that the contract was made and that the first defendant breached and continues to breach the terms of the contract by failing to trade. The defendants admit those allegations.

[35] Some cases have considered the right of a plaintiff who has terminated a contract for breach of contract by the defendant to claim on a quantum meruit or quantum valebant for the value of the services or goods supplied under the contract while it was on foot. It will be necessary to mention those cases further. But it should be recognised at the outset that neither the plaintiff nor the defendant alleges that the contract comprised in the terms of the lease in the present case has been terminated. The plaintiff's cause of action for damages for breach of contract[24] is based on the fact that the lease remains on foot and the plaintiff is entitled to damages for breach of contract up to the present time.

[36] Nevertheless, the plaintiff submits that it is entitled to recover on the alleged restitutionary cause of action because there has been a legally sufficient failure of consideration or basis by reason of the first defendant's failure to trade. The plaintiff submits that it is so entitled irrespective of the fact that it also maintains a claim to damages for breach of contract for the same period. Further, the plaintiff submits that it is so entitled notwithstanding that the contract remains on foot. The plaintiff submits that the restitutionary cause of action is not excluded because the parties allocated and agreed upon the relevant risks and rights by the contract comprised in the terms of the lease and notwithstanding that the restitutionary cause of action will or may result in a higher monetary judgment than the alternative cause of action for damages for breach of contract.

[37] The leading Australian case upon a restitutionary cause of action in respect of a failure of consideration where the "basis" of the contract has failed is *Roxborough v Rothmans of Pall Mall*.[25] In my view, *Roxborough* is binding authority in the Australia common law that a relevant failure of consideration to justify a restitutionary cause of action for money paid in exchange for the consideration, and by implication the value of services or goods supplied in exchange for that consideration must be a "total" failure of consideration,[26] but that a principle of severance may apply where there are discrete multiple considerations under the contract and a discrete corresponding exchange of payment or supply of services or goods for the failed consideration.[27]

[38] One question that may determine the availability of a restitutionary cause of action in the present case is whether the consideration moving from the first defendant comprised in the contractual obligation to pay rent has sufficiently failed. The plaintiff submits that it has, because the first defendant's failure to trade prevented any rent becoming payable under the contractual mechanism for the calculation of the rent. In putting the matter that way, the first defendant's failed performance of the obligation to start trading may be argued to be part of the relevant consideration that has failed, but there is at least some untidiness in that characterisation. If the

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23 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

24 Leaving aside the claim for rent upon the implied term.

25 (2001) 208 CLR 516.

26 (2001) 208 CLR 516, [173].

27 (2001) 208 CLR 516, [199].

promise to start trading were part of the relevant consideration, it has not failed, as is demonstrated by the plaintiff's claim that the promise still binds the first defendant and breach of it is a continuing breach of contract.

[39] A number of intermediate appellate court Australian cases have allowed recovery upon a restitutionary cause of action in the nature of a quantum meruit for the value of services or goods supplied under a construction contract that has been terminated by the builder for breach.[28]

[40] Two observations may be made about these cases. First, the question of the availability of a restitutionary cause of action where the contract has been terminated for breach of contract is currently the subject of an appeal to the High Court and judgment is reserved.[29] Second, in any event, it may well be critical to the authority of those cases that the restitutionary cause of action was brought where the contract was no longer on foot, because it had been terminated for breach.

[41] The seminal cases on which the intermediate appellate court Australian cases rely for the conclusion that a restitutionary cause of action is available were decided before modern contract law and theory clearly established that the termination of a contract for breach discharges the parties from the obligation to perform the terms of the contract in the future but does not discharge the contract ab initio or the rights and obligations that have accrued up to the time of discharge, including any rights to damages for breach of contract.

[42] Although the true legal consequences of termination for breach of contract were well recognised in earlier Australian case law,[30] the House of Lords recognised in 1980[31] that the legal heresy that termination of a contract rescinds the contract ab initio persisted in English law until the middle of the 20th century.

[43] It is not surprising, therefore, that the seminal cases relied on in the intermediate appellate court Australian cases allowed quantum meruit or quantum valebant recovery for services or goods supplied under a contract that had been terminated for breach, and did not recognise the potential inconsistency in doing so where the plaintiff also had a right to damages for breach of contract measured by the difference between the contractual price and the costs that the plaintiff had incurred and would have incurred in supplying the services or goods under the contract.

[44] Academic writers recognise the potential infirmity in the basis of this line of cases.[32] However, the plaintiff rightly submits that there is at present intermediate appellate court Australian authority that a cause of action in restitution may exist, where the contract has been terminated.

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28 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 276-278; *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350, 357, 361-362 and 371; *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510, 512-515 [5]-[12]; *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231, [90]-[97].

29 *Mann v Paterson Constructions Pty Ltd* [2019] HCATrans 92.

30 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476-478.

31 *Johnson v Agnew* [1980] AC 367, 393, 395 – 400.

32 Keith Mason and JW Carter, *Restitution Law in Australia* (LexisNexis Butterworths, 3rd ed. 2016) [1166]-[1168], [1428]-[1430]; Ian M Jackman, *The Varieties of Restitution* (The Federation Press, 2nd ed, 2017) 89, 117-118; James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 84.

[45] Nevertheless, that is not this case. The plaintiff has not terminated the lease. Accordingly, the intermediate appellate court Australian cases as to the availability of a cause of action in restitution where the contract has been terminated are not binding authority as to the Australian common law in the present case. It may also matter that the plaintiff has not abandoned its claim for damages for breach of contract for the first defendant's failure to trade measured by the amount to which the plaintiff alleges it would have been entitled had the first defendant started and continued to trade from the premises.

[46] From the view point of first principle, in my view, it probably should not be accepted in these circumstances that the same cause of action in restitution can arise as may have arisen had the lease and the contract comprised in its terms been terminated for breach of contract.

[47] However, that may be, in my view, the strongest argument that the alleged restitutionary cause of action is not a reasonable cause of action in the present case is that it would redistribute risks for which provision is made in the contract comprised in the terms of the lease and would overturn an allocation of risk and a limitation of liability provided for under that contract by the measure of damages that applies to the cause of action for damages for breach of contract for the first defendant's failure to trade.[33]

[48] The plaintiff does not shrink from the submission that the potential inconsistency between the amount that it may recover for damages for breach of contract and that it may recover by way of a judgment for the restitution of an amount measured by the market value of the premises is to be dealt with by the plaintiff's right to elect, at judgment, for the larger amount, if the amount of the judgment on the restitutionary cause of action exceeds the amount of the damages for breach of contract.

[49] I incline to the view that such an outcome would redistribute risks for which provision is made in the contract comprised in the terms of the lease and would overturn an allocation of risk and a limitation of liability provided for under that contract. If that conclusion is correct, the restitutionary cause of action is not available.

[50] Some insight as to the proper application of the relevant principles may be obtained from the 19th century cases on actions for use and occupation. I will refer to only two of them, given that neither of the parties referred to any such cases.

[51] In *Gibson v Kirk*[34] the plaintiff sued in debt for use and occupation. The claim was for 26 pounds for a year's rent. The plea in defence was a tender as to 13 pounds, with a payment into court and "*nunquam indebitatus"* as to the balance. It appeared that the premises had been let by a written demise not under seal reserving a rent of 26 pounds per annum payable half yearly. The defendant submitted that the plaintiff must be non-suited because debt for use and occupation did not lie where there was an actual demise. The plaintiff submitted that at common law the production of the demise would have non-suited the plaintiff but the statute 11

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33 *Lumbers v W Cook Builders Pty Ltd (in liquidation)* (2008) 232 CLR 635, 663 [79].

34 (1841) 1 QB 850.

George chapter 19, s 14[35] gave an action for use and occupation where the demise was not by deed and that the action was maintainable in debt not only as an action on the case in assumpsit.

[52] Lord Denman CJ observed upon the then relatively recent origin of the action for use and occupation and that it had been brought as an action for debt and for indebitatus assumpsit, but that until that case, no distinction was sought to be drawn between a mere occupation by permission for a reasonable remuneration and demises for a certain time for a certain rent. After further discussion of the history, his Lordship said:

> "The truth is that the occupation of land by a person bound to pay some remuneration for it, without the amount or the time of the payment being fixed, was, and is now, of rare occurrence. When it does occur, the implied contract is raised by law from the fact that land belonging to the plaintiff has been occupied by the defendant by the plaintiff's permission; the obligation is coextensive with, and measured by, the enjoyment … and as no express time is limited, the remuneration must necessarily accrue from day to day."

[53] After further discussion of the cases, Denman CJ concluded that an action of debt for use and occupation would lie where debt for rent would also lie. As to an action for indebitatus assumpsit for use and occupation, Denman CJ held that although s 14 of the statute only preserved an action on the case for use and occupation where there was a demise not by deed, it did not alter the availability of such an action for use and occupation brought in debt.

[54] In short, *Gibson* is authority against the conclusion that at common law the existence of a demise or lease was a complete defence to an action in debt for use and occupation, although it does not suggest that the amount of the debt would be calculated or assessed free from any reference to the amount of the rent provided under the demise.[36]

[55] On the other hand, in *Collett v Curling*,[37] the plaintiff sued in assumpsit for use and occupation of apartments. The plea in defence was *"non assumpsit"*. The particular demand was for 30 pounds for a quarter's rent due at December 1845. The plaintiff tendered a written demise not under seal for 12 months and thereafter during the plaintiff's ownership for a rent of 120 pounds per year. The defendant submitted that the agreement was for a yearly rent payable annually not per quarter, so the claim for use and occupation for a quarter's rent must fail. Denman CJ held that the plaintiff's claim failed.

[56] Accordingly, in my view, there is nothing in the 19th century cases that would repel the conclusion I would have arrived at by application of first principle.[38]

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35 This statute, known as the *Distress for Rent Act* 1737, s 14, is not in force in Queensland upon the repeal of s 7 of the *Common Law Practice Act* 1867 (Qld): see *Report on the Property Law Bill*, QLRC 16, 78.

36 See Thomson Reuters, *Woodfall: Landlord and Tenant*, [10.001] and [10.036]; *Scientific Management Associates (Australia) Pty Ltd v Australian Capital Territory* [1999] ACTSC 17, [27]-[29] and [35]-[47].

37 (1847) 10 QB 785.

38 See, generally, Thomson Reuters, *Woodfall: Landlord and Tenant*, [10.001]-[10.040] and Butterworths, *Australian Tenancy Law and Practice*, [6.2.032]-[6.2.032A]. Compare *Ovidio*

Striking out under rule 171 or in the inherent jurisdiction

[57] The plaintiff submits that in the circumstances of the present case, the application should be dismissed because the answer to the question whether the restitutionary cause of action is a reasonable cause of action is not so clear as to justify a summary order preventing it from advancing the case at trial, relying on well-known authority as to the caution with which an order to strike out or stay should be made in advance of trial.[39]

[58] In particular, the plaintiff submits that should be the approach where the question is the sufficiency of a restitutionary cause of action in a developing area of the law.

[59] Against the cases relied on by the plaintiff, there is authority to the effect that where the disputed question is one of law, it may be appropriate to hear extended argument and to resolve the questions of law on an application to strike out or stay the proceeding.[40] Such an approach is also informed by the philosophy of r 5 of the *Uniform Civil Procedure Rules* 1999 and, by way of context, the expanded powers of the court to grant summary judgment under rr 292 and 293.

[60] The plaintiff also submits that the effect that evidence may have at a trial cannot be underestimated.[41] In some cases that is true, but not all cases. The plaintiff made no reference to any particular question that might be affected by evidence. The question raised for decision are substantially questions of law, as it appears to me. As a matter of generality, I do not accept that the court should be slow to decide a question of law if it will reduce the delay and costs of a prospective trial on all issues.[42]

[61] Although a potential detraction of a summary order under r 171, or in the inherent jurisdiction, is that if there is a successful appeal the proceeding will have been fractured by the appeal process and the time and expense of the appeal will have been imposed on the parties, it should be kept in mind that the Court of Appeal Division proceeds promptly in hearing and deciding such appeals.

[62] Having regard to the philosophy of r 5, it is relevant in the present case that a decision in the defendants' favour upon the present application will not quell the controversy between the parties, because the plaintiff's claim for damages for breach of contract will remain for trial. The defendants submit that nevertheless the relative strengths of the parties' positions would be better crystallised, and that may assist them in being able to negotiate a compromise of the proceeding. Perhaps it would, but in my view that is not a critical consideration.

[63] Apart from a successful appeal, the benefit to the parties and the court of deciding the questions raised by the application now is that, if the defendants succeed in striking out both the challenged causes of action, the trial of the proceeding would continue only upon the remaining claim for damages for breach of contract. Prima

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Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd [2006] VSCA 6 and *R & C Mazzei Nominees Pty Ltd v Aegean Food Import Export Pty Ltd* [2006] VSC 210, [35].

39 *Dey v Victorian Railways Commissioners* (1948) 78 CLR 62, 85.

40 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130.

41 *CA & CA Ballan Pty Ltd v Oliver Hume (Australia) Pty Ltd* (2017) 55 VR 62, 73.

42 Compare *Mutton v Baker & Anor* [2014] VSCA 43, [55], a case concerning the extent of the tort of malicious prosecution, a sometimes difficult question of law.

facie, evidence as to the market value of the rent of the premises would be irrelevant to any issue upon that cause of action. However, as the plaintiff pointed out in submissions, expert opinion evidence on that question has already been obtained by both sides.

[64] Although the parties did not provide estimates of the length of the trial on the question of the damages for the cause of action for breach of contract, that question may occupy some days, as it will depend on a potentially complex hypothetical counter-factual scenario as to the first defendant's turnover, if it had started and continued to trade from the premises.

Conclusion

[65] In the result, notwithstanding that in my view the defendants have the better of the argument on both the challenged causes of action, the application should be dismissed and directions should be made to progress the proceeding to trial.