SUPREME COURT OF QUEENSLAND

CITATION:	*Weipa Hire Pty Ltd v Commonwealth of Australia (No 2)* [2015] QSC 242
PARTIES:	**WEIPA HIRE PTY LTD (ACN 065 053 009)** (Plaintiff) **v** **COMMONWEALTH OF AUSTRALIA** (Defendant)
FILE NO/S:	SC 512 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	19 August 2015
DELIVERED AT:	Cairns
HEARING DATE:	5 May 2015
JUDGE:	Henry J
ORDERS:	**1. The application for summary judgment or alternatively striking out is dismissed.** **2. I will hear the parties as to the costs of that application.** **3. The plaintiff pay the defendant's costs of the application filed 25 June 2014 on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiff claims a contractual debt or remuneration for the provision of services to the defendant – where the defendant makes an application for summary judgment pursuant to s 294 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the plaintiff has a real as opposed to fanciful prospect of succeeding on all or part of the claim – whether the court can be satisfied there is no need for a trial – whether there is a high degree of certainty that the claim would fail – where the application for summary judgment is dismissed.

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the defendant seeks to strike out material paragraphs of the plaintiff's application pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the plaintiff's pleadings are reasonably arguable – whether the material facts to support the plaintiff's allegations have been pleaded – where the strike out application is dismissed.

Uniform Civil Procedure Rules 1999 (Qld) r 171, r 293

Agar v Hyde (2000) 2001 CLR 552, applied

Brenner v First Artists' Management Pty Ltd [1993] 2 VR 221, cited

Deputy Commissioner of Taxation v Salcedo (2005) 2 Qd R 232, applied

LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105, applied

Lumbers v W Cook Builders Pty Ltd (2008) 232 CLR 635, cited

Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, cited

Programmed Total Marine Services Pty Ltd v Ships "Hako Endeavour" and Ors [2014] FCAFC 134, considered

Weipa Hire Pty Ltd v Commonwealth of Australia [2014] QSC 254, cited

COUNSEL: Dr MA Jonsson for the Plaintiff
A Wheatley for the Defendant

SOLICITORS: MacDonnells Law for the Plaintiff
Clayton Utz for the Defendant

[1] The plaintiff claims $1.8 million for the alleged continued provision of accommodation and other services at the old Weipa Hospital to the defendant's Department of Immigration and Citizenship after the defendant's staff were no longer in occupation of the accommodation and no longer using any of the plaintiff's services.

[2] Last year, when it seemed the plaintiff's pleaded case was vaguely founded upon the defendant's failure to return the keys to the accommodation, I struck out the then

statement of claim.[1] I gave leave for the filing of an amended statement of claim ("ASOC"). It has since been filed.

[3] Now the defendant applies for summary judgment and in the alternative to strike out material paragraphs of the ASOC.

Background

[4] The plaintiff leased the old Weipa Hospital from the Queensland Health Department. The defendant wanted accommodation for its personnel, who were operating the Scherger Immigration Detention Centre.

[5] The plaintiff and defendant entered into a written agreement on 20 April 2011.[2] Pursuant to the agreement the plaintiff contracted to provide the defendant with accommodation, meals, cleaning and laundry facility services at the old Weipa Hospital.

[6] The agreement's description of the accommodation services required the plaintiff, as the so called "Provider", to "make available no less than 91 rooms" including 38 bedrooms in the ex-hospital block, 13 bedrooms in the ex-administration block and 40 single ensuited bedrooms in dongas on site, along with common access facilities such as ablution and kitchen facilities and common area tea rooms and lounges with televisions and internet access. The description of the accommodation services included a provision that the plaintiff was not required to provide exclusive use of its premises to the Department or its personnel.

[7] In respect of meals services the agreement provided:

> "2.1 The Provider must facilitate the following daily meals services to the Department and its Personnel:
>
> (a) Breakfast, Lunch (that can be made and packed by individual staff members from the menu at breakfast) and
> Dinner 7 days a week in the SPQ Dining facility.
>
> 2.2 The Provider must also undertake to provide within reasonable time access to the Department and its Personnel free of charge kitchen and tea room facilities within the accommodation facility that are accessible 24-hours, 7 days a week."

[8] As to cleaning services the agreement required:

> "3.1 The Provider must:
>
> (a) provide a twice weekly cleaning service, twice weekly towel change and twice weekly toiletries replacement to each occupied room;
> (b) clean, and otherwise service, rooms before and after occupation by the Department or its Personnel;
> (c) empty common bins daily;
> (d) clean the grounds weekly; and
> (e) clean common areas, kitchens and tea rooms daily."

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1 *Weipa Hire Pty Ltd v Commonwealth of Australia* [2014] QSC 254.

2 Second affidavit of Lana Kelly Ex LSK11.

[9] It is noteworthy that the requirement to clean rooms as distinct from common areas only arose in circumstances where the rooms were being occupied.

[10] As to laundry facility services the agreement obliged the plaintiff to provide 24 hour access to a laundry facility for use by up to seven persons at the same time with free or coin-slot washing machines and clothes dryers, clothes lines and irons and ironing boards in the laundry rooms.

[11] The agreement stipulated fees to be paid by the defendant for the accommodation services, nominating daily and weekly rates in respect of the ex-hospital rooms, the ex-administration rooms and the donga rooms. The agreement specifically provided that the room charges covered other costs included cleaning:

> "1.3 The Provider's cleaning services costs, electricity consumption costs, water consumption costs are incorporated into its room fee."

The agreement also provided that it was for the Provider to directly arrange or facilitate a suitable fee or non-fee arrangement with the Department's personnel in relation to meals, telephone, television and internet services or usage.

[12] The term of the agreement was initially stipulated to be 12 months. The agreement did however contemplate that the agreement might be extended or varied by a deed of variation:

> "21.4 No Agreement or understanding varying or extending this Agreement will be legally binding on the Provider or the Department unless it is in writing and signed by both parties, in the form of a Deed of Variation".

[13] The parties entered into a deed of variation of the agreement on 19 August 2011. It required an additional 16 single ensuited dongas to be provided and accordingly varied the overall obligation on the plaintiff so that it was to "make available no less than 107 rooms". Also the term of the agreement was varied by fixing the end date as 30 June 2012 subject to any option period.

[14] The agreement gave the Department the sole option to extend the initial term for a further period of six months. The option could be exercised by the defendant giving notice in writing no less than 30 days prior to the end of the term.

[15] No written notice exercising the option was ever given. Nor was any further deed of variation to the end date ever entered into.

[16] Nonetheless the end date of 30 June 2012 came and went without any change to the status quo. The defendant's staff remained in occupation using the plaintiff's services. The plaintiff continued to invoice for the provision of its services, though pursuant to a revised fee regime involving a slight overall increase.[3] The defendant continued to pay the amounts it was invoiced.

[17] The parties were well aware that the term of the written agreement had expired. On 17 July 2012 the defendant's Ms Gray emailed the plaintiff's Mr Wallin a template for a new agreement, saying:

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[3] The defendant counter claims for the amount of repeated payments of this increase, allegedly paid in error.

> "As discussed, the current agreement we had with Carpentaria has now expired and we need to enter into a new agreement."[4] (the plaintiff traded as "Carpentaria Contracting")

[18] The plaintiff's responses show it then cooperated in attempting to settle a new agreement but the process did not appear to advance materially on the defendant's side after 20 July 2012 when the defendant's new manager, Mr Rogers, wrote of the proposed new contract:

> "I've discussed with Canberra and we're looking at the new contract."[5]

The plaintiff did forward some revised drafts of the new agreement, the last on 14 August 2012,[6] but no further progress was made.

[19] The evidence is silent on why the process of initiating a new written agreement petered out. However as the second half of 2012 progressed the parties somehow came to regard themselves as having agreed the plaintiff would continue to provide its accommodation and other services to the defendant until the end of the year.

[20] For instance on 20 September 2012 the plaintiff's Mr Wallin emailed the defendant's Mr Rogers asking him to advise on a number of items listed in the email, including:

> "1. Accommodation capacity increase ex hospital site we still have 16 room complex available…
> 3. The new agreement has not progressed <u>currently finishes end of this year</u>. …"[7] (emphasis added)

[21] Mr Rogers' email in response on 5 October 2012 advised, inter alia:

> "1. Accommodation capacity increase ex hospital site we still have 16 room complex available
> - At the present time, the Department is not in a position to further progress an expansion at the former Hospital site. Changes to Scherger task force arrangements as a result of the government's implementation of the Houston Report and in particular, offshore processing and the no advantage test for clients have freed additional accommodation within our broader Weipa property portfolio. …
>
> 3. The new agreement has not progressed currently finishes end of this year.
> - As previously discussed in light of continuing changes to the Department's detention operations network, the development of a new accommodation agreement for the former Hospital site will be reviewed <u>closer to the existing expiry date</u>. My decision to will be based upon the Department's requirements at that time. …" (emphasis added)[8]

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4 Affidavit of Vance Wallin Ex VJW24 p152.
5 Affidavit of Vance Wallin Ex VJW26 p187.
6 Affidavit of Vance Wallin Ex VJW30 p229.
7 Affidavit of Vance Wallin Ex VJW31 p249.
8 Affidavit of Vance Wallin Ex VJW31 p247.

[22] These exchanges clearly show the parties' representatives believed the agreement had been extended but had only been extended to the end of the year. The facts which gave rise to that subjective belief are not apparent from the materials.

[23] Mr Wallin deposes that there was some further discussion about a new agreement on or about 15 November 2012 when he met with Mr Rogers:

> "It was agreed that, subject to formal approval, the Agreement would be extended for all areas for a further two years up to 30 June 2014 at the same pricing except that the Plaintiff would be responsible for mould removal."[9]

[24] It is not suggested that any "formal approval" to such a lengthy extension was forthcoming. To the contrary within the ensuing days it appeared the defendant, who it will be recalled had "freed additional accommodation" at Weipa, was manoeuvring to immediately extricate itself from its commercial arrangement with the plaintiff.

[25] This development was heralded by an email on 16 November 2012 from the defendant's Ms Dillon to the plaintiff's accounts receivable assistant requesting "a copy of the asbestos register for the old hospital" because Ms Dillon was "following up on some health and safety tasks outstanding from earlier in the year".[10]

[26] Mr Wallin's affidavit exhibits an email later sent by him to Mr Beck of Queensland Health reviewing the events which followed. He wrote that after the defendant's email requesting a copy of the asbestos register:

> "[W]e returned their email advising where the register was located.
> They were concerned in relation to a hole out the front on room 32. (Actually said that it was in his room)
> This hole was an access panel, which had been removed for routine maintenance for the fire system, as well as three others.
> The asbestos register and contractors logbook had been maintained on site on the Old Hospital prior to occupancy. We have conducted maintenance on this property for over 20 years, for Cape York Health and for ourselves.
>
> We were informed by one of our staff members that one of the guests was surveying the hospital taking photos and commenting to our staff member that it was nothing personal, but I just want to get better accommodation. He has previously explained his disappointment about being moved from the dongas, to the Old Hospital main building.
>
> We have also received feedback this guest had been staying in premium accommodation in Darwin and Weipa wasn't up to his standards or expectations."[11]

[27] Mr Wallin deposed that on the evening of 19 November 2012:

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9 Affidavit of Vance Wallin [135].
10 Affidavit of Vance Wallin Ex VJW32 p251.
11 Affidavit of Vance Wallin Ex VJW37 p294.

> "I received a phone call from Mat Rogers advising me of complaints at the Old Weipa Hospital accommodation and that the Defendant was moving out of the hospital and nurses quarters. I asked if they were moving out of the dongas and he said that they were staying in the dongas and he would re-consider the occupancy of the hospital down the track. Mat Rogers asked if I could attend a walk through of the Old Weipa Hospital with other members of his team from Canberra the next day at 11 am."[12]

[28] On 20 November 2012 Mr Wallin, Mr Beck, Mr Rogers and a number of other representatives of the defendant walked through the plaintiff's premises. The defendant's representatives took a variety of photographs including of restricted areas not accessible by the defendant's personnel. The defendant's representatives indicated that the rooms in the hospital building were not fit for use and occupation by the defendant. At the conclusion of the inspection Mr Rogers told Mr Wallin he would provide a list of the concerns to Mr Wallin but that did not occur.[13]

[29] Between 19 and 21 November the defendant's personnel vacated the ex-hospital and ex-administration rooms.

[30] On 21 November 2012 Mr Wallin emailed Mr Rogers asking for his urgent advice as to what the defendant was "doing regarding the accommodation abandonment".[14]

[31] On 22 November 2012 Mr Rogers telephoned Mr Wallin and advised the defendant wanted to continue occupying the dongas but not the old hospital.[15]

[32] On 27 November 2012 the plaintiff discovered that four persons, working for or with asbestos assessment firm Robson Effective Environmental Solutions and or the defendant had entered the plaintiff's premises without the plaintiff's permission. One of those persons advised he had been engaged by the defendant to perform a full asbestos and mould audit and would be accessing ceiling space, lifting floor tiles and performing destructive testing. On questioning by the plaintiff's staff the men acknowledged they had observed the asbestos warning signs on entering into the premises but could not on request produce their work method statements or statement of safety procedures. Nor had they signed into the contractors' sign-in register or viewed the asbestos register or undertaken a site induction. The contractors had not installed any barricading or any signage depicting that asbestos work was being undertaken. It is therefore unsurprising that Mr Wallin directed them to stop work, leave and seek proper approval following submission of work method statements, job safety procedures and a list of activities that was intended to be undertaken.[16]

[33] After the men's departure the plaintiff discovered the Robson contractors had already engaged in some destructive testing, pulling away some external cladding and filing and scraping surfaces, exposing asbestos beneath.

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12 Affidavit of Vance Wallin [141].
13 Affidavit of Vance Wallin [144]-[145].
14 Affidavit of Vance Wallin Ex VJW34 p254.
15 Affidavit of Vance Wallin [155].
16 Affidavit of Vance Wallin [162]-[167].

[34] Communications between the plaintiff's representatives and Mr Rogers ensued on 27 November. Mr Rogers asserted permission for the Robson contractors to enter the site had been given by a representative of the Queensland Health department but this was disputed when Mr Wallin contacted Mr Beck. That afternoon Mr Rogers advised the plaintiff that the defendant intended "on exercising its rights under clause 24.4 of the accommodation agreement to appoint an expert to provide a written opinion to the safety of the accommodation particularly in relation to hazardous substances".[17] Mr Rogers' email on the topic went on to assert:

> "Under clause 24.4, the Department is not required to provide a notice to you as the Provider of our intention however in order to meet building industry standards and site specific requirements I hereby advise I have appointed Robson Environmental to conduct a non intrusive asbestos survey of the site and attached the Safe Work Method Statement for your review.
>
> The Department's appointed expert has confirmed he is willing to conform to all site requirements … I seek your compliance in allowing the survey to proceed within the next 24 hours and seek your confirmation of any additional requirements before work is undertaken."[18]

[35] The hazard clause, wrongly identified by Mr Rogers as clause 24 but which was in fact clause 20, provided:

> "20. Hazardous Substance or Hazardous Disease
>
> 20.1 If any Hazardous Substance or Hazardous Disease is at any time discovered in the Premises, and the presence of the Hazardous Substance or Hazardous Disease is not attributable to the act or omission of the Department, the Provider must promptly notify the Department and promptly and in a safe manner remove or eradicate the Hazardous Substance or Hazardous Disease.
>
> 20.2 If the Department elects to vacate the Premises until such time as the Hazardous Substance or Hazardous Disease is removed or eradicated and the Premises are rendered safe:
>
> a. the Provider must pay the reasonable relocation expenses of the Department; and
>
> b. from the time the Department vacates the Premises and until the Premises are again rendered safe, the fees and all other amounts payable by the Department will be suspended and cease to be payable by the Department.
>
> 20.3 The Department may, by notice to the Provider, terminate this Agreement if:
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> a. the Department's use or occupation of the Premises is rendered unsafe because of the presence of a Hazardous Substance or Hazardous Disease in the Premises; and

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17 Affidavit of Vance Wallin Ex VJW41 p342.

18 Ibid.

b. in the written opinion of an expert (or appropriate practising professional) the Premises is unlikely to be rendered safe within three months from the date of that opinion; or

c. the Provider fails to render safe the Premises within three months from the date on which the presence of the Hazardous Substance or Hazardous Disease is identified.

20.4 The Department is not required [to] provide notice to the Provider before appointment of an expert to provide a written opinion about to (sic) the safety of the premises.

20.5 If the Department terminates the Agreement under this clause the termination will not prejudice the rights or claims of either party in existence prior to that termination." (emphasis added)

[36] It is noteworthy that clause 20.2's suspension of the obligation to pay applies where there has been a vacation of the premises "until" remedial action is taken. It is by no means clear that the premises were vacated on that basis. Further in the events which ensued there does not appear to have been a subsequent written notice of termination by the defendant pursuant to clause 20.3.

[37] On 28 November 2012 Mr Wallin emailed Mr Rogers in response, saying:

"

- Mat, as you know, the contract expired and was terminated by you, by your advice to me on the 19th November of DIAC's immediate departure from our facility.
- Therefore clause 24.4 no longer applies and permission is denied to access or enter the buildings and the areas in or around those buildings vacated by you on the 19th November 2012.

However:

- Attached is a copy of the current asbestos audit following the modification work.
- The audit was conducted by an independent 3rd party, completed on behalf of the Queensland State Government.
- I trust that this satisfies your requirements."[19]

[38] On 29 November Mr Wallin discovered the defendant's personnel were in the process of vacating the balance of the plaintiff's accommodation and Mr Wallin emailed Mr Rogers asking what was going on.[20]

[39] On 30 November 2012 Mr Rogers emailed Mr Wallin saying, inter alia:

"I refer to the written agreement (the Agreement) between the Department of Immigration and Citizenship (DIAC) and Weipa Hire … for the provision of accommodation services (the Services) in the

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19 Affidavit of Vance Wallin Ex VJW43 p346.

20 Affidavit of Vance Wallin Ex VJW46 p365.

> former hospital facility located at Lot 1, 12 Central Avenue, Weipa … (the Premises).
> As you are aware, DIAC was undertaking a survey … to identify potential asbestos risk in the Premises. Asa King and you, representatives from Weipa Hire, gave a direct mandatory and aggressive instruction on Tuesday, 27 November 2012 to the DIAC and contractor personnel to immediately vacate the premises. Due to the strict time limits imposed by Weipa Hire, DIAC did not have any real opportunity to complete the Survey prior to vacating the Premises.
> As the director for DIAC in Weipa, I wrote to Asa on 27 November 2012 … to request Weipa Hire to approve DIAC's completion of the Survey … You emailed back … to confirm that Weipa Hire did not intend to authorise DIAC's access to the premises to complete the Survey. You also confirmed that Weipa Hire had interpreted DIAC's vacating of the premises (excluding the TAU's) as implicit termination of the Agreement. DIAC rejects any assertions by Weipa Hire that vacating the premise based on the directions of Weipa Hire constitutes a termination of the Agreement by DIAC.
> DIAC now urgently seeks that Weipa Hire approve access to the premises to enable completion of the survey …
> DIAC cannot solely rely on the 'asbestos register for the (Queensland Government) Department of Health' (as attached to your email to Mat Rogers on 28 November 2012…) to comprehensively confirm the existence and likelihood of any health risk or issues, but must make our own enquiries now that the situation has been brought to our attention. … If DIAC receives no, or no satisfactory response, DIAC will pursue legal options to gain access. …"[21]

[40] Two points ought be noted in respect of this email. Firstly it incorrectly conflated Mr Wallin's assertion in his email of 28 November 2012 that the defendant had terminated the contract by reason of DIAC's immediate departure from the facility with the departure from the premises of the contractors associated with Robson Effective Environmental Solutions. Secondly and more significantly it continued to insist on a right of access to the premises it had earlier asserted arose under the hazard clause of the agreement. That is, its assertion of a right of access was premised on the continued existence of the agreement.

[41] In the months following the events of late November 2012 there were various exchanges of communications between the parties, including the plaintiff's solicitor, negotiating the identity of an acceptable nominated assessor to test the plaintiff's premises for asbestos hazards on behalf of the defendant. This drawn out process culminated in a site inspection being conducted on 19 April 2013 by Mr Don Ross of Parsons Brinckerhoff.[22]

[42] While the notion of such an inspection being undertaken on behalf of the defendant was, in late November, something the defendant asserted it was non-negotiably entitled to do under the agreement between the parties, the eventual inspection five

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21 Affidavit of Vance Wallin Ex VJW48 pp367, 368.

22 Amended Statement of Claim [36], Amended Defence and Counterclaim [37].

months later appears to have been the product of negotiation between the parties. The evidence is unclear as to at what point, if any, during this timeframe the defendant moved from seeking such an inspection as of right under the agreement, to merely seeking the plaintiff's consent to such an inspection to help the defendant meet its obligations as an employer.

[43] When the defendant's personnel vacated, only eight keys to rooms were left at the premises and the plaintiff made email enquiries of the defendant as to the whereabouts of the many remaining keys.[23] On 30 November 2012 a representative of the defendant advised the plaintiff that the last of the keys were being sought out and would be delivered on the following Monday. Mr Wallin deposes that did not occur.[24] He deposes that some further keys were returned on 1 March 2013 but the master keys for the ex-hospital building, the nurses quarters, the ex-administration block and the dongas as well as the key for the main office, room keys for all rooms in the ex-administration building and 20 donga room keys remained outstanding. On 19 April 2013 the defendant returned all bar six of the outstanding keys.[25]

[44] The defendant paid the invoices rendered by the plaintiff up to 17 November 2012.[26] The plaintiff continued to issue tax invoices for the purported continued provision of accommodation and other services to the plaintiff up to the period ending 20 April 2013. Those invoices, which total $1,860,477.30, were not paid.

[45] Mr Wallin deposes that, even though the defendant's personnel were no longer at the premises:

> "210. During the period 18 November 2012 to 20 April 2013:
>
> (a) The Plaintiff continued to make available to the Defendant and its Personnel, 110 rooms with the facilities as required by the Agreement;
>
> (b) The Plaintiff facilitated a meals service in compliance with paragraph 2.1(a) of Schedule 1 of the Agreement. This meals service remained available at all times; and
>
> (c) The Defendant and its Personnel had 24 hours, seven days a week access to a laundry facility in accordance with paragraph 4 of Schedule 1 of the Agreement.
>
> 211. Further the Plaintiff attended to cleaning as required by paragraph 3 of Schedule 1 of the Agreement, having regard to the fact that the rooms were unoccupied. In this regard, the Plaintiff's employees performed 794 hours of cleaning during the period 19 November 2012 to 19 April 2013 with respect to the accommodation …
>
> 212. Tasks performed with respect to this cleaning included:
>
> (i) Inspection and any necessary cleaning of the common areas, kitchens and tea rooms, including emptying of common bins;
>
> (ii) Cleaning the grounds, at least weekly; and

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23 Affidavit of Vance Wallin Ex VJW61 pp490-492.

24 Affidavit of Vance Wallin [257].

25 Affidavit of Vance Wallin [260] (The year deposed to is 2014 but read in context that is clearly a typographical error).

26 Affidavit of Vance Wallin [54], [112].

(iii) Maintenance of the grounds, including mowing, sprinkling and chemical treatment of weeds."

[46] It is not suggested by Mr Wallin's affidavit that any of the defendant's personnel utilised any of the services during the abovementioned period. Thus, in reality, meals were not being provided to the defendant's personnel, the defendant's personnel were not using laundry facilities and nor were the defendant's personnel using any of the facilities such that there was any need to clean up after them. Doubtless the position of the plaintiff is that because its agreement with the defendant remained on foot it remained obliged to maintain the premises and stand ready to make available its services and rooms as the agreement obliged it to.

The plaintiff's case

[47] The plaintiff seeks to recover the amount claimed upon either a simple contractual indebtedness or as reasonable remuneration for services.

[48] As to its contractual claim it alleges that the conduct of the parties after 30 June 2012 gave rise to an extension of the existing agreement for an indefinite period. It pleads:

> "41. By the conduct of the parties … it was impliedly agreed between the Plaintiff and the Defendant that the term of the Agreement would be extended and the Agreement would remain in effect until either:
>
> (a) a new written Agreement or Deed of Variation was entered into between the parties; or
>
> (b) the Agreement was otherwise terminated, upon reasonable notice;
>
> (c) alternatively, the Agreement was otherwise terminated."

[49] The plaintiff's claim to contractual indebtedness is obviously premised on none of the above events having occurred during the era for which it continued to invoice.

[50] As to its claim for reasonable remuneration the plaintiff pleads it continued to make available the rooms, facilities and services described in the agreement and that its provision of those rooms, facilities and services was "at the express or implicit request of the defendant until 20 April 2013 and such provision was not gratuitous" or that it did so "with the defendant's acquiescence and knowledge that the services were not being rendered gratuitously".[27] Thus its claim for reasonable remuneration is alternatively "for the Plaintiff making available to the Defendant the rooms and facilities" or, alternatively, "for the Defendant's use of and benefit from the availability of those services".

The application for summary judgment

Relevant principles

[51] The defendant's application is brought pursuant to s 293 of the *Uniform Civil Procedure Rules* ("UCPR") which provides:

> **"293 Summary judgment for the defendant**

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27 Amended Statement of Claim [42]-[45].

> (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for a judgment against a plaintiff.
> (2) If the court is satisfied –
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
> (b) there is no need for a trial of the claim or the part of the claim;
> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and make any other order the court considers appropriate."

[52] The philosophy underpinning Rule 293 is that a plaintiff is not to be denied the opportunity to place his or her case before the court[28] unless the defendant satisfies the court that the plaintiff does not have a real as opposed to fanciful prospect of succeeding on all or part of the claim.[29] The requirement the court be satisfied a plaintiff has no real prospect of succeeding is to be applied in conjunction with the requirement that the court be satisfied there is no need for a trial, thus requiring there exists a high degree of certainty the claim would fail were it allowed to continue in the ordinary way.[30]

Discussion re contract claim

[53] The defendant's amended defence and counterclaim pleads that by the plaintiff's email of 18 November 2012 and the plaintiff's conduct in evicting the Robson contractors on 27 November the plaintiff was in fundamental breach of the agreement, evincing an intention to be no longer bound by the agreement.[31] The defendant pleads it accepted the plaintiff's alleged repudiation and terminated the agreement by vacating the balance of the accommodation on 28 and 29 November. That characterisation of events is in dispute and its determination requires proper ventilation of the facts. It is therefore unsurprising summary judgment is not sought on the basis of it.[32] Rather the plaintiff's main summary judgment argument relies on a simple argument about how the words of the agreement ought be construed.

[54] Accepting for the purposes of its summary judgment argument that the original written agreement was extended as pleaded by the plaintiff, the defendant emphasises the words of that agreement. In particular it emphasises the repeated references in the agreement to the plaintiff's obligation to "provide" the services described. For example, clause 4 requires that the Provider must "provide" the services to the Department, clause 7 requires the Provider to "provide" the services to an appropriate standard and clause 10 provides an invoice will be correctly rendered if it inter alia outlines the services "provided". Consistently with this theme the defendant emphasises that clause 9 provides the Department will pay the Provider the fees invoiced subject to the services being "supplied" in accordance with the agreement.

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28 *Agar v Hyde* (2000) 201 CLR 552, 575-576.
29 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, [17].
30 *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105, [26]-[30].
31 Amended defence and counterclaim [34](j)-(k).
32 T1-19 L25.

[55] The defendant submits in the light of such wording that under the contract the plaintiff was obliged to actually provide or supply services not merely make them available. It submits in turn that because the claim relates to an era after which the defendant's personnel had vacated the premises, the claim cannot relate to services that were actually provided or supplied and thus it is doomed to fail.

[56] The flaw in this simple argument is that the agreement falls to be interpreted not merely by reference to the clauses highlighted by the defendant but also by reference to the description of the services described in schedule 1 of the agreement. Reference to that schedule shows that the argument must fail at the first hurdle. Clause 1.1 provides:

> "The Provider must make available no less than 91 rooms to the Department and its personnel …"[33] (emphasis added)

It will be recalled the subsequent deed of variation increased this requirement to no less than 107 rooms.

[57] There exists no express provision within the agreement that the Provider's entitlement to the fees outlined in schedule 2 thereof was premised on the rooms having to be occupied to attract the imposition of the fee. The argument that it ought be interpreted in that way by implication is not compelling. A more compelling and at least arguable interpretation is that the plaintiff's provision of the accommodation service required no more than that it made available the minimum nominated number and type of rooms during the period of the contract. That the rooms to be made available were specified as being "no less than" 91, or later 107, is consistent with that interpretation. It is also consistent with the unremarkable inference the defendant wanted to ensure in this remote township that at any given time during the duration of the contract there were at least 91, and later 107, rooms available for occupation by its personnel.

[58] The schedule's references to the meals and laundry facility services are also reasonably susceptible to the interpretation that the meals and laundry facilities needed only to be made available rather than actually used by personnel. Supporting that interpretation are the circumstances that under the agreement the washing machines and clothes dryers were to be either free or coin-slot operated and that personnel were to pay directly for any meals they consumed. It was no part of the agreement that the Department's personnel had to opt to use the defendant's laundry facilities or meals service any more than each of the at least 91, or later 107, rooms had to be occupied at any given time by the defendant's personnel.

[59] As to cleaning services it is true the requirement to actually clean the bedrooms only arose in connection with the bedrooms being occupied but their cost was incorporated into the fee structure in any event.

[60] On the face of the agreement it is, for example, reasonably arguable that after the commencement date of the agreement if the Department's personnel had not moved in until say a month later, the plaintiff was nonetheless entitled to invoice for the minimum 91 rooms it was contractually obliged to make available and to clean had they been occupied during that period. In a similar vein it is reasonably arguable that if the contract was still on foot after the defendant's personnel vacated in the latter part of November 2012, then so long as the plaintiff continued to make its accommodation and other services available pursuant to the agreement, it remained entitled to be

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[33] Second affidavit of Lana Kelly Ex LSK11.

remunerated under the agreement, notwithstanding that the defendant's personnel were not actually using those services.

[61] On the uncontradicted evidence before the court the plaintiff did continue to make available the accommodation and other services during the period in question.

[62] It is self evident the force of the plaintiff's argument that it made those services available pursuant to the agreement is considerably stronger for the period up to 31 December 2012 than it is for the period thereafter. As for the latter period, the plaintiff makes much of the fact that it continued to make the services available but this is of no moment unless the inference is available from some other evidence that the contract as extended continued beyond 31 December 2012.

[63] An argument against that inference derives from the apparently common belief of the parties reflected in the email correspondence of Mr Wallin and Mr Rogers in late September and early October 2012 that the agreement was due to expire on 31 December 2012. However the absence of evidence of the facts that must have grounded that subjective belief detracts from the force of that argument in this application.

[64] There are two areas of evidence supporting an argument that the contract extended as far as April 2013. The first is that the bulk of the keys to the premises remained in the possession of the defendant or its personnel despite requests for their return well into 2013. The second is that the defendant persisted in its request for its asbestos expert to inspect the premises well into 2013. In first insisting on its rights in that regard in November 2012, it did so in purported reliance on its rights under the contract and the evidence remains unclear as to at what if any point its persistence in seeking an inspection was founded upon some entitlement other than an ongoing agreement.

[65] These two factual circumstances are far from compelling as circumstantial evidence of the continued existence of an agreement. However the current absence of evidence of the facts that gave rise to the subjective view of Mr Wallin and Mr Rogers in September/October 2012 that the agreement was continuing but was to expire at the end of 2012 heralds the need for caution. The plaintiff's position that the agreement continued into 2013 appears weak but I cannot be satisfied it has no real prospect of succeeding on the point and that there is no need for a trial in respect of that component of the claim.

[66] The defendant mounted an alternative argument that the component of the plaintiff's claim that relates to the ex-hospital rooms must fail because of clause 20 of the agreement in respect of hazardous substances. In short it contends given the presence of asbestos at the ex-hospital rooms it is not liable to pay the plaintiff for that part of the plaintiff's claim which relates to those rooms after they were vacated.

[67] The report furnished by Robson Effective Environmental Solutions dated 30 November 2012 confirmed the detection of the presence of asbestos in the ex-hospital and asserted the exterior wall and ceiling sheeting was in a poor condition and that there was evidence of recent cable installation works through asbestos cement sheeting. It recommended the remediation of all damaged areas by means of sealing or removal as soon as practicable.

[68] The defendant's argument about this at the summary judgment stage must fail because there is clearly an evidentiary contest looming as to whether the defendant actually elected to vacate the premises until such time as "the hazardous substance" was "removed or eradicated" and the premises were "rendered safe".

[69] The available evidence demonstrates there was signage revealing the presence of asbestos at the premises when inspected by the defendant prior to entering into the contract. This undermines the defence reliance on that clause of the contract by which its election to vacate was connected with the presence of the hazardous substance. There is also competing evidence to suggest other considerations were in play to explain the exodus.

[70] Further, the agreement's interpretation section relevantly provided:

> **"Hazardous Substance** means anything which may create a risk to the health or safety of the Department. The criteria for identifying whether a substance is a Hazardous Substance are those set out in the Australian Safety and Compensation Council document entitled "Approved Criteria for Classifying Hazardous Substances NOHSC: 1008 (2004)" published by the Australian Government Publishing Service, Canberra …"

[71] That definition of "hazardous substance" presumably encompasses asbestos. However, it is much less certain whether the agreement ought be interpreted on the basis that the mere presence of asbestos on site was sufficient to activate clause 20 or whether it was necessary that the asbestos was exposed or in serious risk of exposure. That the latter is at least reasonably arguable and that there will likely be a factual dispute about the safety of the state in which asbestos was present on the premises, provides further reason why this component of the claim is unsuitable for summary determination.

[72] It follows, despite the apparent weakness of that component of the plaintiff's contract case which claws beyond 31 December 2012, that the application for summary judgment in respect of the contract claim must fail.

Discussion re the reasonable remuneration claim

[73] It will be recalled the plaintiff's restitutionary claim, advanced in the alternative[34] to its claim pursuant to the contract, seeks reasonable remuneration for:

(a) "the Plaintiff making available to the Defendant the rooms and facilities…and further, or alternatively"
(b) "the Defendant's use of and benefit from the availability of those services".

[74] Thus the plaintiff's restitutionary claim mimics the first two of three categories alluded to by Gleeson CJ in *Lumbers v W Cook Builders Pty Ltd (In Liquidation)*[35] and discussed in the quantum meruit claim in *Programmed Total Marine Services Pty Ltd v Ships "Hako Endeavour" and Ors*[36] by Besanko J:

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34 As it must necessarily be, see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256.
35 (2008) 232 CLR 635, 652.
36 (2014) 315 ALR 66.

> "Turning now to the quantum meruit claim, the appellant submitted its claim fell within one or both of two recognised categories where one party provides work or services for the benefit of another, and the first party is able to recover reasonable remuneration for that work or those services. The categories are identified in general terms by Gleeson CJ in *Lumbers v W Cook Builders Pty Ltd* …, as a party providing services to another party at the request of the other party, or a party providing services to another party with that party's acquiescence and knowledge that the services were not being rendered gratuitously."[37]

[75] The defendant complains in essence that under either category there must be work or services actually provided, that is that there must be some benefit received by the defendant. In this context the "benefit" is considered by reference to the perspective of the recipient.[38] On that score the defendant submits the defendant received no benefit.

[76] This submission echoes the defendant's submission about the contractual claim. It does not allow for the reasonably arguable position that the benefit received by the defendant was the effective guarantee of the accommodation and other services being available for the use of the defendant's personnel. It ought be recalled that the defendant was requiring an apparently large number of its staff to work in a remote location where, in the absence of such an arrangement, the availability of accommodation and associated services for its staff may not be assured. The benefit to the defendant was therefore not limited to those circumstances where its personnel were actively using the plaintiff's services and at least arguably included the assured ongoing availability of those services.

[77] The argument that the availability of the services held some value post-occupation might have no real prospect of succeeding had the defendant extracted itself unambiguously from its commercial arrangement with the plaintiff in late 2012. Instead, while the argument is not strong, it remains reasonably open on the known facts.

[78] In a similar vein, it seems optimistic for the plaintiff to contend, as in effect it does, that the value of its service to the defendant post-occupation was worth the same as it was during occupation. Nonetheless it is reasonably arguable that the price hitherto paid for the plaintiff to make available the service is indicative of a reasonable value for continuing to make the service available.

[79] The defendant further complains that it had no reasonable opportunity to reject the plaintiff's purported making available to it of services during the era when the defendant's staff were not in occupation and not physically using the services. It is at least reasonably arguable that the defendant knew the plaintiff was making the services available and did not reject them. Indeed the uncontradicted evidence at present is that the plaintiff continued to invoice the defendant for those services without demurer by the defendant.

[80] That there exists a competing and more compelling view of the circumstances, namely that the defendant had by the extraction of its personnel from the premises rejected the

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37 Ibid [164] (citation omitted).

38 *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, 258.

benefit, is not to the point in the context of a summary judgment application. The drawing of a reliably informed conclusion about those factual circumstances requires them to be properly ventilated at trial.

[81] The application for summary judgment as to the claim for reasonable remuneration must therefore also fail.

The defendant's strike-out application

Relevant principles

[82] Rule 171 of the UCPR provides:

> "**171 Striking out pleadings**
>
> (1) This rule applies if a pleading or part of a pleading –
>
> (a) discloses no reasonable cause of action or defence; or
>
> …
>
> (e) is otherwise an abuse of the process of the court.
>
> (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis. …"

[83] The defendant relies principally upon Rule 171(a).[39] I have already found the two causes of action raised by the plaintiff's pleading are reasonably arguable. That detracts at the outset from the force of the strike-out application.

Discussion re the contract claim pleading

[84] The defendant's central complaint in relation to the pleading of the contract claim is that the material facts to support the alleged continuation of the contract and support the contract claim past 29 November 2012 are not pleaded. However, as the findings above in respect of the contract claim demonstrate, those facts have been pleaded. The real complaint is that those facts are not sufficient to support the claim. For reasons given above, they are sufficient.

[85] The defendant also complains the basis for the contract claim seemingly coming to an end on 20 April 2013 is vague and unclear. However this is not a contractual damages claim relying on some terminating event. It is a simple contractual debt claim. It is a matter for the plaintiff that it chose to end its quantification of the debt owed as at 20 April 2013. The eventual issue will be whether it can prove there is a debt owing for the period up to that date.

Discussion re the reasonable remuneration pleading

[86] As to the pleading of the reasonable remuneration claim the defendant again complains of a failure to plead material facts to support the allegation that a benefit was retained or received beyond 29 November 2012 have not been pleaded. Once again, the pleaded circumstances that support the inference the plaintiff continued to make the services available beyond that date have already been identified above as at least arguably sufficient.

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[39] Defendant's outline [53].

[87] The defendant complains more specifically there is no allegation pleaded that the mere retention of keys was of benefit to the defendant and that there is no attempt in the pleadings to try and value separately only the rooms for which the keys were said to be held. This does not appear to be a deficiency in the pleading. The retention of the keys is simply a circumstantial fact supporting an argument that the defendant was continuing to accept the benefit of the services. Further it is unnecessary for the pleading to attribute a separate value to the rooms for which keys were held. The pleaded case does not purport to confine the benefit received in that way. The defendant is under no disadvantage in seeking to so confine it because the defendant is already equipped with knowledge of the rates it hitherto paid in respect of the various categories of rooms.

[88] More significantly the defendant complains there is no pleading of the plaintiff's alleged expense in providing the alleged benefit. It points out, for instance, that the "expenses of cleaning and meals will be significantly reduced, when the premises are empty".[40] The premise of the complaint is that, if this component of the claim succeeds, the amount to be awarded ought be the actual costs incurred by the plaintiff in the direct provision of physical services on site such as cleaning and food costs. This overlooks the indirect cost to the plaintiff of having to make the accommodation and other services available, for instance its inability, while making its accommodation available to the defendant, to put its accommodation to some substantial alternative commercial use.

[89] The amount of the "reasonable remuneration" pleaded for making available the services or for the defendant's use and benefit from the availability of the services is the amount the pleadings allege was hitherto charged for that benefit when the defendant's staff were in physical occupation. It is at least arguable that the price the plaintiff contends was hitherto mutually agreed as the price for making the services available and which the defendant had previously paid represents the reasonable value of the service the plaintiff continued to make available. There obviously exists a competing argument that amount does not reflect the reasonable value of the services and is unreasonable for a period when the defendant's staff were not in occupation and actual operating costs must have been materially lower. However that does not oblige the plaintiff to plead the basis for some lesser quantum contended for by the defendant.

[90] None of these observations ought be taken to mean that information about the plaintiff's actual operating costs in making the services available is irrelevant for the purposes of disclosure. Such information is relevant. However the plaintiff does not rely on that information to quantify the amount it asserts is reasonable and is therefore not obliged to plead it.

[91] Finally the defendant complains there is no pleading of a reasonable opportunity, with the requisite knowledge, for the defendant to be able to reject the alleged benefit provided to it. The plaintiff's pleads that by reason of the circumstances pleaded as occurring after July 2012 the services were provided "with the Defendant's acquiescence and knowledge that the services were not being rendered gratuitously."[41] Those circumstances included the continued invoicing of the defendant, the continuing negotiations of arrangements for the asbestos inspection and the continuing retention of keys. In the circumstances the pleadings adequately identify the nature of the

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40 Defendant's outline of submission [45].

41 Amended Statement of Claim [45].

reasonable opportunity and knowledge that the defendant at least arguably had and held.

[92] It follows the strike-out application must also fail.

Orders

[93] In light of the above conclusions the applications for both summary judgment and the striking out of pleadings must fail.

[94] The application also sought an order for the defendant's costs of its strike-out application dealt with last year. The plaintiff did not submit other than that costs should follow the event in respect of that application. The defendant should have its costs of that application.

[95] As to the defendant's present application, I also incline to the view that costs should follow the event, so that the plaintiff should have its costs but the parties ought be given an opportunity to be heard on the point.

[96] My orders are:

1. The application for summary judgment or alternatively striking out is dismissed.
2. I will hear the parties as to the costs of that application.
3. The plaintiff pay the defendant's costs of the application filed 25 June 2014 on the standard basis.