SUPREME COURT OF QUEENSLAND

CITATION:	*Yarwood v Smith* [2018] QSC 279
PARTIES:	**JOSEPH WILLIAM SMITH** (applicant) **v** **MICHAEL DERMOTT YARWOOD** (respondent)
FILE NO/S:	BS No 5866 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 November 2018, Delivered orally
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2018
JUDGE:	Martin J
ORDER:	**1. The Applicant have Judgment against the Respondent on the Respondent's Claim;** **2. Application for Summary Judgment in respect of part of the Counterclaim, namely $1,650,000.000, is adjourned for further directions.** **3. The parties will be heard as to costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the applicant seeks summary judgment on the plaintiff's claim – where plaintiff claims monies due and payable following the alleged termination of an agreement – where inconsistent and contradictory evidence has been presented – whether there is a triable issue of law or no real prospect of succeeding PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the applicant seeks summary judgment on the applicant's counterclaim – where monies were withheld by the State on retention – where an agreement provided that the amount was to be paid to the Applicant – whether the court is persuaded to the high degree of certainty necessary to give judgment

Haggarty v Wood (No 2) [2015] QSC 244
Uniform Civil Procedure Rules 1999 (Qld), rr 292, 293

COUNSEL:	D Marks QC and C D Coulsen for the applicant M Yarwood for the respondent
SOLICITORS:	QBM Lawyers for the applicant Respondent is self-represented

[1] There are two applications before the Court by the first defendant, Mr Smith. In the first, he seeks judgment against the plaintiff on his claim on a summary basis, or, alternatively, that the statement of claim be struck out. Secondly, he seeks judgment on part of his counterclaim in the amount of $1.65 million.

[2] I will deal first with the application under rule 293 of the *Uniform Civil Procedure Rules* 1999 (Qld), which allows for judgment in favour of a defendant against the plaintiff. The principles are well known. As with rule 292, an applicant for summary judgment must satisfy the court that:

(a) the respondent has no real prospect of succeeding on all or part of its claim; and

(b) there is no need for a trial of the claim or the part of the claim.

[3] These rules have been considered in the number of cases and the principles which emerge may be summarised in the following way:

- the issues raised in proceedings will be determined summarily only in the clearest of cases;

- the words "no real prospect of succeeding" directs the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success;

- if there is a triable issue of law, the application should be refused; and

- there must be a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

[4] Mr Yarwood claims an amount of about $1.95 million as monies due and payable following the alleged termination by Mr Smith of what is referred to as the Management and Administrative Services Agreement or MASA. The MASA was an agreement whereby Mr Yarwood provided general assistance and management needs with respect to the businesses of Mr Smith.

[5] Mr Yarwood pleads that Mr Smith terminated the agreement by notice in writing on 26 May 2018. He particularises the writing as consisting of three emails, each of which was from a Mr Garlick, who, it appears, was acting as Mr Smith's agent. Two of the emails were sent on 26 May and one on 27 May.

[6] He goes on to plead that, by letter of 29 May 2018, he accepted Mr Smith's unlawful repudiation of the agreement. Mr Smith claims privilege against disclosure of two of those emails on the basis that they were marked without prejudice. Neither of those emails were produced in order that a determination could be made as to their nature, and Mr Yarwood did not dispute the claim for privilege made by Mr Smith. Mr Yarwood did not seek to provide those emails. The email which was produced was sent by Mr Garlick on 26 May 2018.

[7] Mr Garlick describes himself as a barrister, or, on some occasions, as a corporate doctor. In the email, he seeks information about the removal of files, the surrender of a vehicle, and a contract for the purchase of some property in Victoria. The contents do not relate in any way to the MASA, nor can they be construed in any way as repudiating that agreement.

[8] Mr Yarwood seeks to rely upon a letter he wrote on 29 May to Mr Smith. In it, he notes that he has received correspondence from Mr Garlick. He then makes a series of assertions about the conduct of various parties and, so far as is relevant, says the following:

> "18. Mr Garlick's correspondence is controversial, adversarial and purports to lay out factual matters that have no co-relation to reality or indeed what is evidenced by the files and correspondence exchanged between you, this office and your other advisers;

19. Given the tenor of the correspondence, the false allegations and the refusal to meet to advance not only your matters under management but your concerns, is evidence of your repudiation of the MASA;

…

21. This firm therefore as a consequence of those publications and your repudiatory conduct will suffer loss and damage. The quantum of the damages occurring under the MASA are now being calculated and a demand will be forwarded in coming days;

22. We have introduced a third parties to you and you have engaged them, those parties relying on our assurances and placing faith in your association with this office. We call upon you to affirm each of those agreements. All third party dealings have either been with your direct authority and involvement or pursuant to the Power of Attorney with your involvement and copied to you;

…

26. We have not acted in a manner that would entitle you to terminate the MASA therefore it follows, your repudiatory conduct requires damages paid to us as provided for in the MASA."

[9] The letter finishes with the following:

"We call upon you to confirm the termination of our firm and the MASA. We remain ready, willing and able with full disclosure to meet with you and your representatives."

[10] In the absence of any evidence of what was said in the privileged emails referred to in paragraph 7 of the statement of claim, there is no evidence of the alleged repudiatory conduct. The statements made by Mr Yarwood in his letter did not evidence repudiation, and they do not provide support, if repudiation is assumed, for an acceptance of it. Acceptance of repudiation must be clear, and the statements made in the letter of 29 May are inconsistent and contradictory. In particular, the final sentences of the letter do not

support a finding that there had been a repudiation, for if there had been a repudiation, there would be no need to seek its confirmation.

[11] Further, while the plaintiff seeks to recover outstanding management fees calculated in accordance with the MASA, he does not do so in accordance with the terms of that agreement. Clause 9.3 of the MASA provides:

> "In the event of termination of the management services during the undertaking of any of the projects identified herein, the client shall be obliged to pay out the fee payable for the whole of that project to completion to MYM."

[12] MYM is a reference to the plaintiff. Mr Yarwood does not plead termination "during the undertaking of any of the projects identified" in the agreement, but rather the undertaking of certain works through to 22 May 2018. Mr Yarwood did not engage with the argument advanced from Mr Smith that termination could not have occurred under clause 9, as no condition required for such termination had been pleaded. It was argued by Mr Smith that clause 9.3 may well constitute a penalty and be unenforceable, but as that clause is not pleaded by Mr Yarwood, that need not be further considered.

[13] An alternative to giving judgment is to strike out the pleading and give leave to re-plead. In *Haggarty v Wood (No. 2)* [2015] QSC 244, Jackson J. referred to this alternative and said:

> "Sometimes a pleader's skill may be the problem, but the facts otherwise proved or indicated by the evidence will give pause to a Judge acting under rule 293 UCPR. However, in other cases, the difficulty will lie in the absence of a factual stratum to make a necessary allegation, not in the failure to allege it in the pleading."

[14] Where a prima facie case for judgment is established, then the evidentiary burden switches to the respondent. Mr Yarwood, in his affidavit material, does not provide the necessary factual stratum to justify giving him an opportunity to re-plead. Mr Yarwood's case depends upon his being able to establish that Mr Smith repudiated the MASA. His pleaded case is that the repudiation is evidenced by three emails. As I have noted, he did not seek to put into evidence the emails for which Mr Smith claims privilege, and the

other email does not contain anything which amounts to a repudiation. In the absence of anything to suggest that Mr Yarwood has a case, the applicant is entitled to judgment.

[15] I turn now to the second part of Mr Smith's application, which is for judgment on part of his counterclaim. Putting the matter as briefly as I can, it concerns the resumption of land owned by Mr Smith by the Department of Transport. Mr Yarwood was appointed as agent in respect of that resumption. The land was sold at an agreed price with an amount of $2 million being withheld by the Department of Transport because, at least in part, there was a need to clear the resumed land.

[16] In this transaction, another solicitor, Mr Evans, was retained by Mr Smith. The transaction also involved the second defendant, but for these purposes, I need only refer to Mr Smith. A bank statement for Mr Yarwood shows that on 9 December 2016, an amount of $1.65 million was deposited into an account controlled by him. The reference on the bank statement is: "TRANSPORTMAINROA" which might reasonably be assumed to be a reference to the Department of Transport and Main Roads. Before that deposit was made, Mr Yarwood and Mr Evans exchanged emails about the identity of the account into which a payment was to be made. The subject of those emails was:

> "Re Joseph William Smith action against State of Queensland – refund of money."

[17] Mr Yarwood did not provide any material which relates to that deposit, and I am asked to draw the inference that that sum represents, at least in part, payment of the retention sum. At the hearing of this matter, Mr Yarwood said that all these issues could be explained, and that the amount could be accounted for. Mr Yarwood had, the day before the hearing, disclosed some thousands of documents he said were relevant to these proceedings.

[18] I am not persuaded that the high degree of certainty necessary to give judgment is apparent on this part of the application. I am not minded, though, to dismiss this part of the application, but rather to adjourn it and to give Mr Yarwood leave to file such material as he is advised with respect to the deposit of $1.65 million into his account. I will hear the parties on costs and on further directions.