SUPREME COURT OF QUEENSLAND

CITATION:	*Goodhew v Rachinger & Anor* [2013] QCA 348
PARTIES:	**ROSS VIVIAN GOODHEW** (applicant) **v** **JEANETTE ANN RACHINGER** (first respondent) **VIVAD PTY LTD ACN 066 705 646 AS TRUSTEE UNDER INSTRUMENT 706385483** (second respondent)
FILE NO/S:	Appeal No 2407 of 2013 DC No 138 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	22 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2013
JUDGES:	Margaret McMurdo P, Gotterson JA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the applicant entered into a contract to purchase a tutoring business from the second respondent – where, as a condition of the business contract, the applicant required a new lease of the premises which was granted to him by the respondents – where the applicant left the premises prior to the end of the term of the lease – where the respondents retook possession and commenced proceedings to recover damages and loss for breach of the lease – where, at trial, the key issue was whether the applicant established that the first respondent had made a misrepresentation that induced him to complete the purchase of the business and enter into the lease – where a magistrate found for the respondents and ordered the applicant pay the respondents damages for breach of lease together with interest and costs – where the applicant's appeal to the District Court was dismissed with costs – where the

applicant seeks leave to appeal from the decision of the District Court judge – whether the District Court judge was in error and the interests of justice warrant this Court's intervention

District Court of Queensland Act 1967 (Qld), s 118(3)
Magistrates Courts Act 1921 (Qld), s 45
Trade Practices Act 1974 (Cth), s 52

COUNSEL: The applicant appeared on his own behalf
S M Gerber for the respondent

SOLICITORS: The applicant appeared on his own behalf
Bosscher Lawyers for the respondent

[1] **MARGARET McMURDO P:** On 13 July 2012, a magistrate ordered the applicant, Ross Goodhew, to pay the first respondent, Jeanette Rachinger, and the second respondent, Vivad Pty Ltd as Trustee under Instrument 706385483, a company controlled by Ms Rachinger, damages of $29,911.36 for breach of lease, together with interest and costs.[1] He appealed against that order under s 45 *Magistrates Courts Act* 1921 (Qld) to the District Court. His appeal was dismissed with costs on 8 February 2013.[2] He sought to pursue a further appeal in this Court but first he requires leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld). Instead of an application for leave to appeal, he completed a notice of appeal which was mistakenly accepted by the registry on 7 March 2013, within the statutory appeal period.

[2] At the hearing in this Court, in the interests of justice, expedition and finality, this Court ordered that the notice of appeal be treated as an application for leave to appeal. The Court also gave the applicant leave to amend his application to add the second respondent as a party.

[3] As the applicant has already had the benefit of a trial and an appeal, this Court will ordinarily give leave to conduct a further appeal only where the District Court judge is shown to be in error and the interests of justice warrant this Court's intervention.

[4] The applicant was self-represented for most of the trial in the Magistrates Court, at the District Court appeal and in this application. His proposed grounds of appeal, if given leave to appeal, traverse 18 handwritten pages and amount to a lengthy outline of argument rather than succinct grounds. As supplemented by his oral submissions at the hearing, they raise, in essence, nine principal contentions to the effect that, first the magistrate and then the judge, erred in their findings of fact and law.

[5] Before discussing his contentions, I will summarise the District Court judge's decision, which the applicant must successfully impugn if leave is to be granted.

The District Court decision

[6] The District Court judge began by setting out the background to this matter:

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1 *Rachinger & Anor v Goodhew*, unreported, Magistrates Court, Noosa, No 81 of 2011, 13 July 2012.
2 *Goodhew v Rachinger & Anor* [2013] QDC 16.

"[1] On 24 March 2008 Ross Goodhew (Mr Goodhew) entered into a contract to purchase a tutoring centre at 1/25 Thomas Street, Noosaville (the premises) known as Aldon Tutoring Centre – Noosa District (the business) from Vivad Pty Ltd as trustee for the Vivad Trust (the company) for $96,500. As a condition of that contract Mr Goodhew required a new lease of the premises, and a lease was granted to him by the company and Jeanette Ann Rachinger (Ms Rachinger) for three years with options, the initial term to expire on 15 April 2011. There is some confusion in both the business contract and the lease as to proper description of the company and its status but nothing turns on this and Mr Goodhew has never raised it as an issue. Ms Rachinger was a director of the company and clearly acted on its behalf at all relevant times.

[2] It is common ground that Mr Goodhew left the premises on 15 December 2009 and that Ms Rachinger and the company retook possession the following day. They commenced proceedings against Mr Goodhew on 12 May 2011 to recover damages and loss for breach of the lease agreement. At a time when Mr Goodhew was represented by solicitors he filed a defence and counterclaim on 1 July 2011. Essentially his defence and counterclaim was based on what was pleaded to be a misleading and deceptive representation made to him by Ms Rachinger in contravention of s 52 of the *Trade Practices Act* 1974, during the negotiations with the company for the purchase of the business. Essentially, Mr Goodhew's pleaded case was that he was induced by misleading and deceptive conduct in that Ms Rachinger represented to him 'that the average weekly number of enrolled students was 105': 5.5 Amended Defence and Counterclaim filed 14 November 2011.

[3] The trial proceeded over two days. Evidence was received on 11 May 2012 and addresses conducted on 29 June 2012 in the Noosa Magistrates Court. On 13 July 201[2] his Honour Magistrate Hodgkins dismissed Mr Goodhew's counterclaim and awarded the company and Ms Rachinger $29,911.36 damages for breach of lease together with interest and costs assessed on the indemnity basis. Mr Goodhew has appealed to this court against that judgment."

[7] The appeal was by way of rehearing.[3] The applicant sought to produce in the appeal the tax returns of his family trust from 2009 to 2011 and other related evidence which was all available at trial.[4] The applicant had told the magistrate that his tax returns were with him in court and that they related to his losses. The magistrate told him that was a matter for evidence.[5] In his amended counterclaim, the applicant sought an amount which exceeded the jurisdictional limit of the Magistrates Court. He elected, however, to accept the jurisdictional limit and ultimately did not seek an adjournment to apply to transfer the proceedings to the

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3 Above, [4].
4 Above, [5], [7].
5 Above, [8].

District Court. He told the magistrate he wanted to call two witnesses who were unavailable that day. When the magistrate explained that an adjournment may mean he would face an adverse costs order, he did not pursue the adjournment application.[6]

[8] The key issue at trial was whether the applicant established that Ms Rachinger had made the following representation which the applicant pleaded in para 5.5 of his counter-claim as being deceptive and misleading:

> "5. During the course of negotiating with the [respondents] for the purchase of the business:
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> …
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> 5.5 the [respondents] disclosed to the [applicant] that the average weekly number of enrolled students was 105 ('**the representation**');
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> … ."[7]

[9] The applicant pleaded that this representation led him to complete the purchase of the business and enter into the lease.[8] The only witnesses who gave evidence at trial were the applicant and Ms Rachinger. The magistrate accepted Ms Rachinger's evidence over the applicant's on this key aspect; finding that at no time did she tell him that she had an average weekly enrolment of 105 students. The magistrate noted that the applicant admitted during the hearing that Ms Rachinger did not represent during negotiations that the average weekly number of enrolled students was 105.[9] The judge pointed out that the applicant did make those admissions during cross-examination.[10]

[10] He alleged in para 5.6 of his counter-claim that Ms Rachinger told him "that the goodwill component of the purchase price, being $63,000, was calculated on the basis of $600 per average weekly number of enrolled student [*sic*] … or 105 students x $600."[11] Whilst he did not plead that this alleged representation was deceptive or misleading, it became the focus of his case at trial and on appeal. He also raised in the appeal a new issue, which was not pleaded, that Ms Rachinger, through her silence on behalf of the second respondent, had engaged in misleading and deceptive conduct.[12]

[11] Ms Rachinger gave evidence that she provided the applicant with her company's profit and loss statement for the year ending 30 June 2007[13] and the business summary.[14] He worked as a tutor at the business prior to 24 March 2008 when he signed the business contract.[15] He had access to papers and records of the business. To Ms Rachinger's surprise, he did not ask to see student figures for 2007 and previous years. The business summary included:

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6 Above, [9].
7 Above, [10].
8 Above, [11].
9 Above, [12] and see [40] of *Rachinger & Anor v Goodhew*, unreported, Magistrates Court, Noosa, No 81 of 2011, 13 July 2012.
10 *Goodhew v Rachinger & Anor* [2013] QDC 16, [13].
11 Above, [14].
12 Above, [15].
13 Ex M, AB 252.
14 Ex O, AB 256.
15 Ex A, AB 202.

"Current Franchise Purchase Price	$22,000
Enrolment value based on 105 students	$63,000
Walk-in Walk-out Equipment/Furnishing	$11,500
Purchase Price	$96.500."[16]

[12] The judge noted that the business contract did not value goodwill at $63,000 nor did the business summary refer to an average weekly enrolment of 105 students. In fact, 105 was the peak figure for student enrolments in 2007.[17]

[13] The applicant gave evidence that Ms Rachinger told him that goodwill in the franchised business was based on the calculation in the manual provided by the franchisor to the franchisee and gave him a copy of the manual during negotiations. The magistrate accepted Ms Rachinger's evidence that she did not do this. He found her to be a careful, credible and reliable witness. The judge noted that the applicant had a commerce degree, a masters in commercial law, was a qualified teacher and had knowledge of accounting theory and practice. The magistrate gave him every chance to explain his case during the trial. But the judge accepted Ms Rachinger's evidence that she followed the manual which required that a franchisee must not give the manual to anyone. By contrast, the applicant's evidence on this point was confusing.[18]

[14] After quoting from the applicant's evidence on this issue,[19] the judge noted that although the manual was not tendered it was common ground from Ms Rachinger's cross-examination that it stated:

> "The ATC believes a fair request would be at least $500 per the average number of students enrolled over the previous 12 months of your business plus the current value of equipment you had purchased for your franchise."[20]

[15] The magistrate found that this was a non-binding formula for calculating goodwill suggested by the franchisor. The magistrate accepted Ms Rachinger's evidence that she did not tell the applicant that she used the manual for this purpose. She calculated goodwill for the purpose of the business contract using the 2007 peak figure of 105 students and a multiplier of $600 because of the successful growth of her business.[21] The magistrate accepted Ms Rachinger's account.[22] This was supported by the applicant's three letters sent to her after settlement on 12 June 2008,[23] and 4[24] and 12 March 2009.[25] In none did he allege that the representation pleaded in 5.5 of the counter-claim was made.[26]

[16] It was common ground that, prior to the applicant abandoning the premises, Ms Rachinger's solicitors formally served him with two Notices to Remedy Breach

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16 Above, [17]; AB 259.
17 Above, [18].
18 Above, [19].
19 Above, [20].
20 Above, [21].
21 Above, [23].
22 Above, [24].
23 Ex R, AB 266.
24 Ex S, AB 268.
25 Ex T, AB 269.
26 Above, [25].

of the Lease. The breaches were remedied but the costs of preparing and serving the notices formed part of the respondents' damages claim. In responding to those notices, he did not allege deceptive and misleading conduct by either respondent.[27]

[17] The magistrate found that the applicant did not prove that the alleged misleading and deceptive representation was made, preferring the evidence of Ms Rachinger to the applicant's on all key issues. The magistrate had the advantage of hearing and seeing the two key witnesses. His findings were reasonable and supported by the evidence. Appellate courts are reluctant to interfere in findings of fact in these circumstances.[28]

[18] The applicant sought to challenge on appeal the finding that he commenced tutoring in late 2007, having chosen not to challenge it by reference to business records at trial. There was no merit in this point.[29]

[19] In the appeal, the applicant raised misrepresentation by silence or non-disclosure but this was not his pleaded case. His case was based on Ms Rachinger's alleged representation said to be deceptive and misleading which the magistrate rightly found was not made.[30]

[20] His Honour considered that, as there was no merit in the appeal, the applicant's case would not be assisted by the reception of further evidence. As it was available at the trial and would not have made any material difference to the outcome, the application to adduce the evidence should be refused.[31]

[21] The applicant did not clearly articulate how the tax returns, which he claimed would demonstrate that a diminution in his income from the business after he acquired it, could relate to Ms Rachinger's alleged misrepresentation. The magistrate found that his losses were related to the applicant's own business style and personality. This conclusion was reasonably open on the evidence.[32] For these reasons, the judge dismissed the appeal with costs.[33]

Conclusion

[22] The applicant's first contention is that the magistrate and the District Court judge should have accepted Ms Rachinger's testimony that she gave the applicant the manual prior to him signing the business contract.[34] This contention is misconceived and takes a small portion of Ms Rachinger's evidence out of context. As both the magistrate and the judge appreciated, Ms Rachinger's evidence considered as a whole was clearly that she denied she gave him a copy of the manual before the business contract was signed as the franchisor did not permit her to do this and the manual prohibited it. This contention is not made out.

[23] The applicant's second contention is that the District Court judge should have found that the magistrate erred in not concluding that Ms Rachinger's calculation of the sale price of the business other than strictly in accordance with the manual was

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27 Above, [26].
28 Above, [27].
29 Above, [28].
30 Above, [29].
31 Above, [30].
32 Above, [31].
33 Above, [33].
34 T1-40.58, AB 40.

conduct which breached s 52 *Trade Practices Act*. As the magistrate and the District Court judge explained in their separate reasons, the manual was not binding in this regard. Its terms[35] suggested this formula was but a starting point. In any case, this was not the applicant's pleaded case which was that Ms Rachinger misrepresented that the average weekly number of enrolled students was 105. The District Court judge rightly held that the magistrate was entitled to conclude from the findings of fact rightly made that there was no misleading or deceptive conduct in Ms Rachinger's calculation of the sale price of the business. The applicant apparently chose to accept these figures without prudent investigation. This contention is not made out.

[24] The applicant's third contention is that the judge should have concluded from the evidence before the magistrate that he responded to the Notices to Remedy Breach of the Lease by alleging deceptive and misleading conduct. In making that contention, he relied on a letter dated 1 May 2009. He did not place that letter before the magistrate and cannot now be relying upon it without leave of the Court to adduce further evidence. The letter recorded only that the applicant's then solicitors were "seeking instructions with respect to a counterclaim in relation to section 52 of the *Trade Practices Act* 1974".[36] The letter was available at trial. In any case, it is of no real assistance to the applicant. It does not matter if his lawyers discussed s 52 with him in May 2009, if, as the magistrate found and the District Court judge agreed, the alleged misrepresentation was not made. There is nothing in this contention nor in the applicant's reliance on the fact that the District Court judge referred to "deceptive and misleading conduct" instead of "misleading or deceptive conduct".

[25] The applicant's fourth contention concerns the tax returns which he wishes to adduce as further evidence in this Court to establish his pleaded loss and the cause of the downturn in student numbers after he purchased the business. As the District Court judge noted, unless the magistrate and the District Court judge erred in their conclusions that the alleged misrepresentation was not made, this evidence cannot assist him. In any case, the magistrate and the District Court judge were entitled to conclude that the lost income from the business after he acquired it was attributable to his own business style and personality and not Ms Rachinger's alleged misrepresentation. The applicant's demeanour in presenting his case in this Court does not cause me to doubt this aspect of their Honours' conclusions. This contention is not made out.

[26] The applicant's fifth contention is that the magistrate and the judge should not have accepted Ms Rachinger's evidence that she told him she had used the highest weekly enrolment of 105 students for 2007 as the basis for working out the goodwill of the business. This contention overstates the findings. The applicant was unsuccessful at trial and on the District Court appeal as he did not establish his pleaded case that Ms Rachinger misrepresented to him that the average weekly number of enrolled students was 105. The business summary, which he was given prior to signing the business contract, did not refer to an average weekly enrolment of 105 students. This contention is misconceived.

[27] His sixth contention is that the District Court judge should have found that Ms Rachinger made a misrepresentation by silence. The judge correctly rejected

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35 Set out at [14] of these reasons.

36 Attachment 1 to the application for leave to appeal, filed 7 March 2013.

this contention as it was not pleaded and the trial was not run on that basis. In any case, the magistrate's findings of fact with which the judge agreed did not support this contention.

[28] The applicant's seventh contention is that the District Court judge erred in not finding that the respondents did not take reasonable steps to mitigate their damages. He has not supported this contention by references to the evidence at trial. Contrary to the applicant's submissions, any omission by the judge to refer to passages of the transcript of the trial does not amount to an error. He has not made out this contention.

[29] The applicant's eighth contention challenged the finding of fact made by the magistrate and upheld by the District Court judge as to the date when he commenced tutoring in Ms Rachinger's business. He further disputed the judge's statement that he did not challenge this finding at trial by reference to business records. The fact remains that he had not successfully challenged the finding which was open on the evidence. In any case, I cannot see the relevance of this matter in light of the central findings rightly made at trial and on appeal.

[30] Finally, he contended that Ms Rachinger's solicitors knowingly provided false information as to when she received the franchisor's consent to transfer the business. He did not have evidence at the hearing of this application to support that assertion and, in any case, he has not demonstrated its relevance. As he commented during the hearing, any complaint about the conduct of the respondents' lawyers can be made to the Legal Services Commissioner.

[31] In light of the findings of fact made by the magistrate and rightly upheld by the judge, the applicant is not assisted by his numerous quotations from case-law relating to s 52 in both his written and oral submissions.

[32] The applicant has not demonstrated any error in the judge's reasons. He has not demonstrated that he has any prospects of success in his proposed appeal. It follows that the application for leave to appeal should be refused with costs.

[33] **GOTTERSON JA:** I agree with the order proposed by Margaret McMurdo P and with the reasons given by her Honour.

[34] **MARGARET WILSON J:** The application for leave to appeal should be refused for the reasons given by the President.