SUPREME COURT OF QUEENSLAND

CITATION:	*Vo v Rawlings & Anor* [2014] QCA 236
PARTIES:	**HUYEN HA VO** (appellant) **v** **JON MORRIS RAWLINGS** (first respondent) **MARILYN ACUSHLA BOLGER** (second respondent)
FILE NO/S:	Appeal No 11442 of 2013 DC No 2540 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2014
JUDGES:	Fraser and Gotterson JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondents' costs of the appeal on the standard basis.**
CATCHWORDS:	TORTS – MISCELLANEOUS TORTS – INTERFERENCE WITH CONTRACTUAL AND OTHER RELATIONS – OTHER CASES – where the appellant purchased a business from the respondents in July 2005 – where the purchase price was $52,000 together with an amount for stock-in-trade to be valued at the date of completion – where the business was unprofitable and was closed in January 2008 – where the appellant alleged deceit through fraudulent misrepresentations made to her by or on behalf of the respondents – where the trial judge dismissed the claim – whether the respondents knowingly made fraudulent misrepresentations *Djaw Pty Ltd v Schmitz & Ors* [2002] QDC 168, distinguished *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, distinguished
COUNSEL:	The appellant appeared on her own behalf The respondents appeared on their own behalf
SOLICITORS:	The appellant appeared on her own behalf The respondents appeared on their own behalf

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** On 1 November 2013, the claim made by the appellant, Huyen Ha Vo, against the first respondent, Jon Morris Rawlings, and the second respondent, Marilyn Acushla Bolger, in District Court proceedings BD2540/2009, was dismissed with costs. The appellant had sought an award of damages arising out of a purchase by her from the respondents of a health food business which the respondents had conducted at Manly Harbour Village under the business name "Health Foods 2000".

[3] The appellant purchased the business under a written contract of sale signed by the parties in July 2005. The purchase price was $52,000 together with an amount for stock-in-trade to be valued at the date of completion and subject to a maximum of $20,000. The nominated completion date was 5 August 2005. The business was carried on in leased premises. The then current lease was for a term ending on 30 April 2008. The contract required the vendor-respondents to assign their interest as lessees to the appellant and the contract was subject to both the lessor and the mortgagee of the premises consenting to such an assignment.

[4] The appellant acted for herself in the purchase. The respondents engaged a firm of solicitors to act for them in the transaction. Completion took place on 9 August 2005. Thereafter the appellant operated the business until 31 January 2008. The trading was unprofitable resulting in the closure of the business and termination of the lease.

[5] At trial, both the appellant and the respondents acted for themselves in the proceedings commenced by the appellant in 2009. The pleadings underwent a series of amendments which it is unnecessary to detail. The matter was tried over two days in early 2013 within a framework of pleadings consisting of a further amended statement of claim filed on 28 June 2012[1] but further amended in part on 11 September 2012,[2] a further amended defence[3] filed on 2 October 2012 and an amended reply[4] filed on 11 October 2012.

[6] The appellant's claim was for damages for deceit based upon alleged fraudulent misrepresentations made to her by or on behalf of the respondents prior to the contract. The damages claimed included some $49,536.75, being the difference between the contract price and the amount paid for stock, on the one hand, and the amount which the appellant claimed was the true value of the plant and equipment and the stock she took at completion, on the other. As well, the appellant claimed damages for interest on a borrowing she made in order to purchase the business, for loss of opportunity of investing elsewhere, and for "insult". These other heads of damage together were for an amount of approximately $646,000.

The judgment under appeal

[7] The misrepresentations on which the appellant relied at trial fell into several categories. There were those as to projected profitability of the business set out in a single-page leaflet provided to her by the respondents' agent, Gil Wright & Associates.[5]

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1 AB703-708.
2 AB718-719.
3 AB727-737.
4 AB739-743.
5 Part of Exhibit 1; AB163.

There were also those as to expenses and profit of the business in past years as set out in a single-page document headed "Profit and Loss Account for Year Ended 30 June 2004".[6] This document had been prepared by the accountants for the business, Lynch & Co. It listed revenue and expense items, as well as net trading profit for six months of 2000, for 2001, for 2002, and for 2003, as well as for 2004. It and other accounts for the business were also provided to her by the agent with the leaflet. In addition, there were three oral misrepresentations which the appellant alleged the first respondent had made to her at a meeting in early June 2005 prior to contract.

[8] The leaflet was provided by the agent to the appellant well before 30 June 2005. Evidently it had been prepared a good while prior to that date. It contained projections for the year ended 30 June 2005 of gross sales of $222,084, of gross profit of $91,054, and of "owner's operator income" of $54,476. The evidence of the second respondent indicated that the leaflet had been prepared by the agent. She said at the time when the agents were engaged, perhaps in January 2005, she provided them with a letter from Lynch & Co dated 21 October 2004 to which were attached accounts (profit and loss accounts and balance sheets) for the business for the years ended 30 June 2000 to 2004 inclusive.[7]

[9] The learned trial judge observed that the appellant alleged that the representations in the leaflets were false because the accounts subsequently prepared for the year ended 30 June 2005[8] showed that the gross sales and gross profit for the year were much less than the respective projections, and even less than they had been for 2004.[9] His Honour rejected the deceit claim based on the projections. He did so for the following reasons:[10]

> "[26] The difficulty here for the plaintiff is in showing that the defendants knew that the projections were false, or made the projections recklessly and without caring whether they were true or false. Assuming that the projections were prepared by the agent, the defendants could well have taken the view that the agent must have regarded those projections as reasonable in the light of the information available: p 52. In circumstances where it is difficult to see that any particular implied representation of fact has been made by putting forward these projections, there is really not a proper evidentiary basis upon which I could be satisfied that the defendants knew that in this respect the contents of the leaflet were not true.
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> [27] The plaintiff's approach is really based on the proposition that the projection was not true because it proved to be inaccurate, and it is well established that a statement of opinion as to a future matter is not shown to be a misrepresentation merely because it proves not to be fulfilled.[11] That case is really bad at law, and I do not think

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6 Also part of Exhibit 1; AB164-165.

7 AB136; Tr2-52 LL6-21. The appellant said in evidence that the agent supplied her with copies of these accounts and the leaflet at the beginning of April 2005: AB12; Tr1-12 LL34-35.

8 Exhibit 8; AB204-205.

9 Reasons [11].

10 Reasons [26]-[27].

11 *du Boulay* v *Worrell* [2009] QCA 63 at [51].

> that the plaintiff could properly mount on the evidence available an alternative case based on an implied representation of an existing fact, since the defendants have not been shown to know that any such representation was false."

[10] With respect to the alleged misrepresentations as to expenses in prior years, the learned trial judge accepted that in the single page document headed "Profit and Loss Account for Year Ended 30 June 2004", certain expenses were not listed and hence not deducted in calculating net trading profit for each of the years 2000 to 2004; however, he also accepted evidence that those expenses had been excluded on advice from the respondents' accountants to the effect that they were personal to the situation of the respondents and therefore appropriately excluded.[12]

[11] In rejecting the deceit claim based on the omission of expenses, his Honour said:[13]

> "[32] What this account says, properly understood, is that trading profit in specified amounts is achieved on the basis of deducting nominated expenses. Viewed in this way, the accounts were not false. But even if they are treated as being 'false' because the defendants for their accounting purposes in fact took into account additional expenses, in circumstances where the accounts are presented in this way on the basis of an accountant's opinion to the effect that this is an appropriate way to present them in conjunction with a proposed sale of the business, the defendants are not acting dishonestly, that is they are not deliberately putting forward figures known to be false, or acting with reckless indifference as to whether the figures put forward are true or false.[14] This basis of the plaintiff's claim therefore also fails."

[12] In the case of the alleged oral misrepresentations, the learned trial judge found that, in each instance, the representation was made. He also accepted that the appellant believed each of the representations[15] and that they were relied upon by her in entering into the contract for purchase of the business.[16]

[13] However, the learned trial judge also concluded that the appellant had not established that the first representation, namely, that rich people reside in Manly, was untrue.[17] As to the second of them, namely, that the majority of the income of the business was generated from the retail part,[18] his Honour found that it was truthful.[19] On these findings, neither of the first or the second representation was proved to be a misrepresentation of fact.

[14] The third representation, namely, that the net profit of the retail part of the business was equal to the price of the business which the respondents were prepared to sell for $52,000, was characterised by the learned trial judge as predictive of what the

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12 Reasons [31].
13 Reasons [32].
14 *Krakowski* v *Eurolynx Properties Ltd* (1995) 183 CLR 563 at 576-7.
15 Reasons [49].
16 Reasons [50].
17 Reasons [43].
18 It was this part of the business that the appellant purchased, opting not to acquire a naturopathic clinic that the respondents also operated.
19 Reasons [44].

appellant would achieve from the business rather than as representational of its current level of trade.[20] His Honour nevertheless viewed the prediction from the perspective of a possible implied factual representation within it as to the current level of net operating profit of the business.[21]

[15] Upon examination, his Honour held that, although such a representation would have been false, the appellant had not proved that the respondents knew of its falsity at the time. He continued:[22]

> "[45] … The difficulty here is really the same as the difficulty that arises in relation to the representation in the written leaflet about the owner operator's income projected for 2005: the difficulty is in showing that the representation was one which was known by the defendants to be false.
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> [46] On the basis of the figures prepared by the accountant for the purposes of the sale and included in Exhibit 1, the net trading profit of the business had increased significantly from 2001 to 2004. There were growth rates of 22% in 2002, 27% in 2003 and 14% in 2004. If the growth were to continue at an average rate of only 8.5%, by 2006 net trading profit, calculated on the basis in those accounts, would have exceeded $52,000.
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> [47] In these circumstances, it is plausible that the defendants could well have believed that there was a legitimate factual basis for an assumption that the business would grow to an extent which would permit the plaintiff to recover the purchase price by way of the trading profit in the first year. The only complication with that is that it assumes that the business will be generating the same level of net trading profit even though the plaintiff was not going to be able to sell those products which could only be sold by a naturopath. It may well be however that these products represented only a relatively small proportion of the turnover, and it is not at all clear to me that a representation on this basis would be regarded as fraudulent, that is to say one which was known to be false, merely because there had been a failure to be sufficiently careful about the extent to which allowance should be made for this factor. There is a difference between a negligent misrepresentation and a fraudulent misrepresentation, the plaintiff's case is, as it must be, based on fraud, and I am not persuaded that it has been shown that the defendants were fraudulent in making this representation."

[16] Immediately thereafter, his Honour made the observation that fraud is a matter which must be clearly proved, albeit it on the balance of probabilities, citing the joint judgment of Mason CJ, Brennan, Deane and Gaudron JJ in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.[23]

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20 Reasons [45].

21 *Ibid*.

22 Reasons [45]-[47].

23 (1993) 67 ALJR 170 at 170-171.

[17] In the result, the deceit claim based on the oral representations also failed and the appellant's action was dismissed. The learned trial judge proceeded to assess damages on a precautionary basis. He assessed them in the amount of $55,072.18.

The appeal

[18] The appellant filed a notice of appeal on 28 November 2013. The single stated ground of appeal is:

> "After viewing the judgment, delivered on 01 November 2013, the Applicant has learned the judgment was untrue, incomplete and/or unfair."

As with the trial, both the appellant and the respondents were self-represented in the appeal. The appellant and the second respondent made oral submissions.

[19] The appellant filed an amended outline of argument on 24 April 2014 and the respondents, an amended outline of argument on 7 May 2014. Earlier, on 14 February 2014, the appellant had filed a reply which the respondents answered with a supplementary outline also filed on 7 May 2014. At the hearing of the appeal, the appellant read from the reply and a prepared document titled, "Appellant's Submissions", copies of which were made available to the Court. It appears that she had some legal assistance in compiling both of the documents from which she read.

[20] At the commencement of the hearing of the appeal, the appellant sought leave to adduce some 40 documents which had not been tendered in evidence at the trial. All but two of them had been in existence at the date of trial. The two that were not, were, in any event, irrelevant. Leave was refused in respect of all documents.

Argument on appeal – alleged errors

[21] The ground of appeal, as formulated, is uninformative. It is deficient in that it does not contend for any error of law on the part of the learned trial judge at a level of application of the legal principles of the law of deceit or at the levels of fact finding or of drawing of inferences from facts as found. The amended outline of argument is a narrative of facts which is referenced not only to evidence given at trial, but also to documents for which leave to adduce on appeal was sought but refused. This document, it must be said, suffers from the same deficiencies as the ground of appeal. Thus, it is to the documents from which the appellant read that one must look in order to discern whether she has advanced any viable ground of appeal.

[22] The document "Appellant's Submissions" contains a section headed "The trial judge's errors". The discussion which follows it deals separately with the leaflet, the exclusion of expenses and resultant "overstated" profit, and the oral representation concerning the $52,000. The reply document had been devoted to these three topics and had traversed them in similar terms.

[23] **The leaflet**: It will be recalled that in respect of the first matter, the second respondent gave evidence that the agent prepared the leaflet and the projections within it from the accounts they had received. The criticism made by the appellant is that the learned trial judge made an assumption, stated at paragraph 26 of the reasons, that the agent prepared the projections. The complaint made is that his Honour should not have done so in absence of evidence to that effect from the agent. The line of reasoning advanced is that it was the respondents' responsibility to call the agent in their case; that they failed to do so; that they did not explain his

absence as a witness; and that the learned trial judge should have taken the unexplained absence of the agent into account in deciding whether to accept the second respondent's testimony on the point.

[24] The argument invokes the rule in *Jones v Dunkel*.[24] Shortly put, that rule is that the unexplained failure by a party to call witnesses, or tender documents or other evidence, may, in appropriate circumstances, lead to an inference that the uncalled evidence would not assist that party's case.[25]

[25] It is, however, well settled that the rule applies only where a party is "required to explain or contradict"[26] something. Here, the evidence of the agent was not required to contradict anything put in issue by the appellant. In her further amended statement of claim, the appellant did not plead that the projections were prepared by any particular individuals, including the respondents. They, in their further amended defence, pleaded that the agent had prepared them.[27] That pleading was not put in issue by the appellant. Further, the second respondent gave the evidence to which I have referred. It was not put to her in cross-examination by the appellant that the agent had not prepared the projections. In these circumstances, application of the rule in *Jones v Dunkel* was not triggered.

[26] In the result, there was evidence from the second respondent which supported the allegation as to authorship of the projections pleaded in the amended further defence. No occasion arose for the learned trial judge to have regard for the absence of the agent as a witness in deciding whether to accept the second respondent's evidence on the issue.

[27] **"Overstated" profits**: The error for which the appellant contends here is similar in type to that for the leaflet. In the course of the second respondent's testimony, a letter from Lynch & Co to the respondents dated 21 October 2004 was tendered.[28] That letter said that it enclosed profit and loss accounts for each of the years ended 30 June 2000, 2001, 2002, 2003 and 2004. The letter contained the following statement:

> "It is understood that this statement is to assist with the proposed sale of the above business. Accordingly various expenses relating to the personal circumstances of the owners such as depreciation, interest, private motor vehicle (use), etc have been excluded as it would be appropriate for any prospective purchaser to substitute their own costs in any analysis."

[28] This statement was specifically pleaded by the respondents in the further amended defence.[29] The letter therefore proved what had been pleaded. It also supported the second respondents' evidence to that effect to which I have referred. The statement was not challenged by way of pleading, nor was it put to the second respondent during cross-examination that the personal expenses had been excluded other than on the advice of the accountants.

[29] The complaint made by the appellant is that the learned trial judge did not have regard to the unexplained absence of the author of the letter from Lynch & Co as

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24 (1959) 101 CLR 298.
25 At 308, 312, 320-1.
26 At 321.
27 At paragraph 15; AB732.
28 Exhibit 32; AB655-tendered at AB138; Tr2-54 L15.
29 Paragraph 15A; AB732.

a witness in deciding whether to accept the second respondent's evidence. Here, given the state of the pleadings and the course of cross-examination, evidence of the author was not required in order to contradict any challenge to the second respondent's evidence on the issue. This complaint also is ill-founded.

[30] **Oral misrepresentation**: The appellant contends that the learned trial judge erred in failing to find that the misrepresentation as to present fact that he found was possibly made, namely, that the current level of annual net operating profit of the business equated to the asking price for it of $52,000, was known to be false. It was submitted that the comparison of growth rates in trading profit over previous years and the conclusion drawn from them explained by the learned trial judge at paragraph 46 of the reasons was his own work;[30] that it had not been proved that either of the respondents had done a similar comparative exercise and drawn a similar conclusion; and that business activity statements ("BAS") monthly sales figures for the 10 months to April 2005 prepared by the respondents[31] revealed that a growth in sales necessary to maintain a growth in trading profit was not being achieved during the 2005 financial year.

[31] A point made by the appellant is that the first respondent did not testify. In consequence, there was no cross-examination of him as to his state of belief at the time when he made the misrepresentation. The appellant submits that the failure of the first respondent to testify, which was unexplained, ought to have been taken into account "when deciding to accept the evidence of the second respondent about issues" and that that amounted to judicial error.

[32] There was no direct evidence that the first respondent who made the misrepresentation, knew of its falsity when he made it. The case advanced by the appellant on the issue was a circumstantial one. As his Honour observed, fraud must be clearly proved. He was therefore correct to proceed upon the footing that in order to find fraud, it was necessary that the circumstantial evidence indicate clearly that the first respondent had the requisite knowledge of the falsity. His Honour undertook that exercise, also correctly in my view, by examining whether the circumstances yielded to an explanation of the misrepresentation as one that was made without knowledge of its falsity. He found such an explanation in the comparative exercise that he undertook. He even ventured, at paragraph 47 of the reasons, that the misrepresentation might have been negligently, rather than fraudulently, made.

[33] It is true that in undertaking the comparative exercise, his Honour did not advert to the BAS monthly sales figures. That is explicable on several counts. Those figures were directly concerned with levels of gross sales and not directly with profitability. Secondly, those figures had been disclosed to the appellant during the negotiation period. In any event, the fact that those figures did not reveal a growth in gross sales for the 2005 year would not, of itself, ground a clear inference that the first respondent knew that what he told the appellant about the net operating profit of the business was false.

[34] The fact that the first respondent did not give evidence is rather a distraction. It was always for the appellant to prove factual circumstances which pointed clearly toward fraud, including the element of knowledge of falsity. If the factual circumstances proved

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30 In oral argument the appellant challenged the mathematical accuracy of the calculations of growth rates set out in the paragraph. I am satisfied that based on the sales figures in the Profit and Loss Account in Exhibit 1, the calculations are correct.

31 Summarized at Reasons [15].

by the appellant for that purpose failed in that regard, it is not to point for the appellant to divert attention from that critical shortcoming in her case by speculation as to what further, if anything, might have been established, by concession or otherwise, had the first respondent testified.

[35] For these reasons, I am unpersuaded that the appellant has demonstrated that the learned trial judge erred in any of the ways suggested under the heading "Trial judge's errors".

Argument on appeal – other matters

[36] Apart from the errors proposed under that heading, the "Appellant's Submissions" document does not otherwise contend for any other legal error on the part of the learned trial judge in reaching the conclusions that fraud had not been proved to the requisite standard. Specifically, findings made that the appellant had not proved that any misstatements of fact made by the respondents were not known by them to be false when made, were not otherwise singled out and subjected to criticism for legal error.

[37] The remainder of the document essays the history of the transaction and the appellant's own unhappy experience in running the business after completion. This approach reflects her apparent misapprehension at trial, namely, that her lack of success in the enterprise was proof sufficient of fraud. As his Honour noted at paragraph 27 of the reasons, that clearly is not so.

[38] Several references are made in the document to the decision of Judge Alan Wilson SC, as his Honour then was, in *Djaw Pty Ltd v Schmitz & Ors*[32] in which a purchaser of a business successfully recovered damages for deceit against the vendors. His Honour found that there had been fraudulent misrepresentation by the vendors in circumstances where deemed admissions had been made by them that profit and loss statements provided to the purchaser contained false entries which significantly overstated the gross and net income of the business and understated the expenses; that the statements were intentionally manufactured by the vendors to be false; and that they did so with the intention that the purchaser rely on the false statements.[33] Factually, that case is very different from the present. To the extent that there was exclusion of expenses personal to the respondents from the document "Profit and Loss Account for the Year Ended 30 June 2004" in Exhibit 1, the exclusion was done on advice from Lynch & Co and not with an intention of deceiving the appellant. Moreover, the appellant was separately given the profit and loss accounts for each of the years which disclosed the excluded personal expenses.

Disposition

[39] The appellant has failed to demonstrate any viable ground of appeal. Her appeal must therefore fail. It remains to note that her lack of success in the litigation must be seen within a context of her having pleaded a case in deceit, and in deceit only. Thus it was the duty of the learned trial judge to confine consideration of her claim to deceit.

[40] The appellant did not broaden her claim to embrace any other cause of action.[34] That is not, of course, to say that any such claim would have succeeded. The point

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32 [2002] QDC 168.

33 At [3].

34 For example, negligent misstatement, or under the Australian Consumer Law provisions as applied by the *Fair Trading Act* 1989 (Qld).

to be made is that his Honour could not properly have considered such a claim on the case as pleaded.

Orders

[41] I would propose the following orders:

1. Appeal dismissed.
2. Appellant to pay the respondents' costs of the appeal on the standard basis.

[42] **PHILIPPIDES J:** I agree with the reasons of Gotterson JA and the orders proposed.