SUPREME COURT OF QUEENSLAND

CITATION:	*Foodco Management P/L & Anor v Go My Travel P/L* [2001] QSC 291
PARTIES:	**FOODCO MANAGEMENT PTY LTD** (ACN 007 192 529) (First Plaintiff) **and** **DIAZ KEINERT PTY LTD** (ACN 071 166 777) (Second Plaintiff) **v** **GO MY TRAVEL PTY LTD** (ACN 006 196 434) (Defendant)
FILE NO:	S 3549/01
DIVISION:	Trial Division
PROCEEDING:	Application for summary judgment
DELIVERED ON:	10 August 2001
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2001
JUDGE:	Wilson J
ORDER:	**The defendant's application for summary judgment on the plaintiffs' claim and its application for judgment on the counterclaim are dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – application for summary judgment – meaning of "no real prospect of succeeding" – whether issues between the parties should proceed to trial *Civil Procedure Rules* (UK), r 24.4 *Trade Practices Act* 1974 (Cth), s 51AA, s 51AB, s 51AC *Uniform Civil Procedure Rules* 1999 (Qld), r 293 *Swain v Hillman* [2001] 1 All ER 91, followed.
COUNSEL:	M.D. Martin for the applicant defendant S.S.W. Couper QC for the respondent plaintiffs

SOLICITORS: Steindl Bell for the applicant defendant
Nicol Robinson Hallets for the respondent plaintiffs

[1] **WILSON J:** This is an application by the defendant for summary judgment on the plaintiffs' claim and for summary judgment against the first plaintiff on the counterclaim for $12,669.32 together with damages to be assessed and interest.

[2] The defendant is the lessor of shop premises in Travel House, 243 Edward Street, Brisbane. The building is on the corner of Edward and Adelaide Streets. The first plaintiff is the lessee of shop 4 on the ground floor pursuant to a registered lease for 5 years from 1 November 1998 and the franchisor of "Muffin Break" outlets. The second plaintiff is the franchisee of the outlet in shop 4 and the occupier of those premises pursuant to a franchise agreement and a licence agreement both dated 2 February 1999. The plaintiffs vacated the premises on 2 August 2001.

[3] The lease from the defendant to the first plaintiff contains the following clause -

> "21.1 Exclusivity
> Notwithstanding anything herein to the contrary the Lessor will not in future lease any part of the building to a tenant whose core business operating from such premises is a specialty muffin shop."

[4] On 28 August 2000 Gosh Coffee Pty Ltd commenced trading from shop 12, also on the ground floor. It subsequently took a lease of shop 12 for 5 years from 1 November 2000, in which the permitted use of the demised premises is described in this way -

> "The retail sale of a variety of coffee, tea, soft-drinks, juices, cakes, biscuits, slices and bulk coffee beans, coffee-based cold drinks, coffee associated products, coffee making equipment and a limited range of prepared food."

[5] The Muffin Break premises are on the southern side of Adelaide Street about 10 - 15 metres from the intersection. The Gosh Coffee premises are at the Edward Street/Adelaide Street corner of the building. The direction of pedestrian traffic flows is such that a significant amount of pedestrian traffic passes the Gosh Coffee premises before it passes the Muffin Break premises.

[6] On 20 April 2001 the plaintiffs commenced these proceedings claiming:

> (a) that the defendant breached clause 21.1 of the Muffin Break lease by leasing shop 12 to Gosh Coffee, a tenant whose core business is that of specialty muffin shop, which amounted to a repudiation of the lease that was then accepted by the plaintiff;

(b) that the defendant engaged in misleading and deceptive conduct in having its solicitors write a letter dated 21 October 1998 agreeing to the inclusion of clause 21.1 in the lease;

(c) that the defendant made negligent misstatements in the letter of 21 October 1998;

(d) that the defendant engaged in conduct that was misleading and deceptive, unconscionable and or in breach of ss 51AA, 51AB and or 51AC of the *Trade Practices Act* 1974 (Cth).

[7] The defendant denies the allegations, and alleges that the core business of Gosh Coffee is not that of a specialty muffin shop. It counterclaims for arrears of rent as at 2 April 2001 ($12,669.32) and damages on the basis that the plaintiffs wrongly repudiated the lease (such wrongful repudiation having been accepted by the defendant)

[8] In order to succeed on its application for summary judgment, the defendant must persuade the Court that the plaintiffs have "no real prospect of succeeding" on all or a part of their claim and that there is no need for a trial of the claim or part of the claim: *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*) r 293(2). This is a new rule, which is similar to r 24.4 of the *Civil Procedure Rules* (UK). In *Swain v Hillman* [2001] 1 All ER 91 at 92 Lord Woolf MR said of the UK rule -

> "The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or ... they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."
>
> .....
>
> And at 95:
>
> "[Part 24 of the *CPR*] .. is not meant to dispense with the need of a trial where there ate issues which should be investigated at the trial."

I respectfully apply his Lordship's observations to r 293 of the *UCPR*.

[9] The plaintiffs allege that the defendant breached clause 21.1 of the Muffin Break lease by entering into the lease with Gosh Coffee. In support of the application for summary judgment, counsel for the defendant submitted that there had been no such breach: the sale of muffins was not a permitted use of shop 12 and moreover it had been expressly forbidden in pre-lease correspondence; if Gosh Coffee was operating as a specialty muffin shop (which, he submitted, had not been established), it was doing so in breach of its lease.

[10] The defendant submitted that the Court ought to have regard to certain pre-lease correspondence which passed between Gosh Coffee and the defendant in construing the Gosh Coffee lease. By letter dated 22 August 2000 Gosh Coffee sought the inclusion of "muffins" in the list of food and drinks in the permitted use of shop 12. The defendant's solicitors replied on 25 August 2000 that "muffins" were to be deleted. They said -

> "Permitted Use: There is currently another tenant in the building which carries on business as a speciality [sic] muffin shop.
>
> Whilst the current tenant remains in occupation, our client is not permitted to allow you to sell muffins or to operate as a speciality muffin shop.
>
> Your requested description of "permitted use" is acceptable to our client provided that the reference to "muffins" is deleted. If the speciality muffin shop vacates the premises or has its Lease terminated our client is prepared to allow you to sell muffins."

[11] I doubt that the fact that the sale of muffins is neither expressly allowed nor expressly prohibited under the Gosh Coffee lease gives rise to an ambiguity of the type which would allow recourse to the matrix of facts to ascertain the true meaning of a commercial contract: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337. It is fairly arguable that it simply means that the sale of muffins was permissible if it came within the scope of the permitted use, and it is further arguable that "muffins" come within "cakes". Be that as it may, I accept the submission of senior counsel for the plaintiffs that I ought not to construe the lease in the context of only those two letters because at trial the plaintiffs would argue that the matrix of facts was much broader than those two letters.

[12] The central issue of fact on the breach of contract argument is whether, at the commencement of the Gosh Coffee lease, the core business of Gosh Coffee was that of a specialty muffin shop. In my view the plaintiffs have raised a sufficient basis for me to conclude that this issue ought to go to trial. Ms Gloria Keinert, a director and the company secretary of the second plaintiff, has deposed to her observations of the Gosh Coffee business since it commenced operation on 28 August 2000. She has deposed -

> "On numerous occasions, I have observed muffins being sold from the Gosh Coffee outlet. I have observed the Gosh Coffee outlet selling muffins more or less constantly since that time. I have observed up to six different types of muffin being sold from the Gosh Coffee outlet, including blueberry, apple cinnamon, choc chip, double choc and other flavours which I cannot now recall, virtually constantly since 28 August 2000.
> .....

I attended at the Gosh Coffee Premises in or about January 2001 and took some photographs of a "spruiker" promoting the sale of muffins from the Gosh Coffee outlet."

On 18 January 2001 she wrote to the defendant's agent in these terms -

"18 January 2001

Ms. Rowena Walsh
Property Consultant
CB Richard Ellis
Riverside Centre,
123 Eagle Street
Brisbane, Qld. 4001

Dear Rowena,

I would like to make a formal complaint in regards to GOSH Coffee Shop Muffin and coffee promotion they are currently doing. Yesterday 17 January 01 they did the promotion coffee and muffin for $3.00. Many times in the past you have assured me that they are not allowed to sell muffins as per their lease but they always sell them. Previously the muffins are only displayed at their display cabinet, but yesterday they have a table on the doorway full of muffins and a man on the PA system announcing the promotion. For your info the muffins are not even covered for health safety standard. Enclosed please find a photograph of their display.

I am really very upset about this, as you are aware of the difficulty I am experiencing more so since they opened.

Your sincerely,

Gloria Keinert
Franchisee
Muffin Break Travel House"

[13] The plaintiff's claim based on misleading and deceptive conduct in the sending of the letter of 21 October 1998 has been pleaded as follows:

"**15.** The Bells Letter amounted to a representation by the defendant, through its solicitor that:

(a) the defendant had, as at 21 October 1998, no present or future intention to grant a lease to any tenant in Travel House, whose core business was that of a speciality [sic] muffin shop;

(b) the defendant had, as at 21 October 1998, decided not to grant a lease to any tenant in Travel House, whose core business was that of a speciality muffin shop;

(c) the defendant had, as at 21 October 1998, formed a present and future intention not to grant a lease to any tenant in Travel House, whose core business was that of a speciality muffin shop;

(d) there were no facts or circumstances of which it was aware tending to suggest that a lease would be granted by the defendant to any tenant in Travel House, whose core of business was that of a speciality muffin shop; and

(e) there were facts and circumstances of which it was aware, tending to suggest that a lease would not be granted by the defendant to any tenant in Travel House, whose core of business was that of a speciality muffin shop.

(the "Bells Letter Representations").

16. In fact:

(a) the defendant had, as at 21 October 1998, a present or in the alternative, future intention to grant a lease to a tenant whose core business was that of a specialty muffin shop;

(b) alternatively, the defendant had, as at 21 October 1998, not decided whether or not to grant a lease to a tenant in Travel House whose core business was that of a speciality muffin shop;

(c) the defendant had not, as at 21 October 1998 formed a present or future intention not to grant a lease to a tenant in Travel House, whose core business was that of a speciality muffin shop;

(d) there were facts or circumstances of which the defendant was aware tending to suggest that a lease might be granted by the defendant to a tenant in Travel House, whose core business was that of a speciality muffin shop.

Particulars

The said facts or circumstances were that the defendant held a belief that retailers' traded more profitably if numbers of retailers were trading together in one location.

(e) there were no facts and circumstances of which the defendant was aware, defendant was aware, [sic] tending to suggest that a lease would not be granted by the defendant

to a tenant in Travel House whose core business was that of a speciality muffin shop.

Particulars

The plaintiffs repeat and rely on paragraph 16(c) above."

Each of the plaintiffs claims to have acted in reliance on such representations - the first plaintiff in entering the lease, the licence agreement and the franchise agreement and in incurring fitout costs; and the second plaintiff in entering the licence and franchise agreements and incurring capital costs.

[14] Whatever else may be said about this claim, it is a critical component of it that the core business of Gosh Coffee is that of a specialty muffin shop - an issue which I have already decided should go to trial. The same can be said of the claim based on negligent misstatement.

[15] The claim based on unconscionable conduct and breach of ss 51AA, 51AB and or 51AC of the *Trade Practices Act* 1974 (Cth) goes beyond the issue of the core business of Gosh Coffee. See paragraphs 26 - 30 of the statement of claim, which are in the following terms -

"Unconscionable conduct

26. Prior to the grant of the Gosh Lease, to the defendant's knowledge, the business operated from the Premises by the second plaintiff, was of marginal profitability with the level of turnover only sufficient to meet operating costs.

27. To the defendant's knowledge, the position of the Premises was such that the majority of the customers patronising the shop, came from passing pedestrian traffic and the comparative positions of the Premises and the Gosh Premises, were such that if a business which competed in any degree with the second plaintiff's business operated from the Gosh Premises, it was likely or probable that there would be a negative impact on the second plaintiff's turnover because a large proportion of pedestrian traffic past the Premises came from Edward Street and would have to pass the Gosh Premises before coming to the Premises.

28. To the defendant's knowledge, the business operated by the second plaintiff was a speciality muffin/coffee shop and as such, it sold a comparatively narrow range of products. To the defendant's knowledge, this fact made the second plaintiff's business uniquely and particularly vulnerable to competition from a business in close proximity, which sold one or more of the core products (muffins and coffee) in which the second plaintiff specialised.

29. To the defendant's knowledge, the first and second plaintiffs were critically concerned to ensure that the defendant would not grant a lease to a tenant which might operate in competition to the second plaintiff and, in order to induce the first plaintiff to enter into the Lease, the defendant offered to insert Special Condition 21.1 into the Lease and made the Bells Letter Representations.

30. To the defendant's knowledge, the first plaintiff had a critical commercial interest in the successful operation of the second plaintiff's business and if the second plaintiff's business failed or its turnover was significantly reduced, that would negatively impact on the first plaintiff."

In essence it is alleged that, with knowledge of reliance by the plaintiffs on a lack of a generally competing business, the defendant nevertheless let shop 12 to a tenant whose business competed substantially with that of the second plaintiff. I am satisfied that there are triable issues both as to whether the defendant acted in the manner alleged, and if it did, as to the proper characterisation of such conduct. Because I am not satisfied that the plaintiffs have no real prospect of making out the claim, I cannot grant the defendant summary judgment on this part of the overall claim. I merely underline that the test is that of "no real prospect" of success and not that of improbability of success.

[16] The counterclaim is for arrears of rent allegedly due as at April 2001 and damages. According to the plaintiffs' solicitor Mr Jenkins, that rent has been paid, and the only outstanding rent is for July and August. In the circumstances I cannot not grant judgment on the counterclaim for the rent claimed. It is beside the point that a similar but not identical amount has been admitted as owing for a later period.

[17] Insofar as the defendant seeks judgment on the counterclaim for damages to be assessed, I cannot determine on this application whether there was repudiation by the plaintiffs entitling the defendant to terminate and sue for damages.

Order

1. I dismiss the defendant's application for summary judgment on the plaintiffs' claim and its application for judgment on the counterclaim.

2. I will hear counsel on costs.