



Neutral Citation Number: [2022] EWHC 3337 (KB)

Case No: QA-2022-000001

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No: F5QZ98JC

ON APPEAL FROM
THE COUNTY COURT AT CENTRAL LONDON
RECORDER WRIGHT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

MRS JUSTICE HILL DBE

Between :

IRINA IDJATULINA

**Claimant/
Appellant**

- and -

FINISHING TOUCHES (SPMU) LTD

**Defendant/
Respondent**

Arfan Khan for the **Appellant/Claimant** (instructed through the Direct Access Scheme)

Rebecca Hodgkin for the **Respondent/Defendant** (instructed through the Direct Access Scheme)

Hearing date: 5 December 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 21/12/2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

Introduction

1. This is an appeal against an order made on 29 October 2020 by Recorder Wright in the County Court at Central London. By that order he dismissed the Appellant's claims for breach of contract and misrepresentation after a trial. The Appellant appeals his order with permission granted by Soole J on 25 May 2022.
2. By an application notice dated 26 September 2022 the Appellant also seeks to adduce fresh evidence on the appeal.
3. The hearing of the Appellant's application and the appeal took place before me on 5 December 2022. I was greatly assisted by both counsel who were instructed directly by the otherwise unrepresented parties.

The parties' cases

4. The claim arose from a contract between the parties by which the Appellant agreed to pay for a Scalp Micropigmentation ("SMP") course to be provided by the Respondent. The Particulars of Claim described micropigmentation as "a non-surgical cosmetic technique that uses tattoos to add designs to the skin including artificial eyebrows, and in the case of the scalp, the appearance of hair".
5. The Appellant paid £3,186 inclusive of VAT for the SMP course. The deposit was paid on 23 January 2019 and the balance on 14 February 2019. The Appellant also purchased a 'Vogue' micropigmentation machine from the Respondent, for which she paid £2,640 inclusive of VAT on 25 February 2019. She commenced the SMP course on 13 March 2019.
6. The Particulars of Claim asserted that:
 - (i) The following were express terms of the agreement between the parties: (a) training on meso skin rejuvenation and a certificate in respect of the same would be provided; and (b) theory and practical training relating to permanent and semi-permanent inks would be given;

- (ii) The training was not provided as agreed in that: (a) it did not include any training on meso skin rejuvenation; and (b) it included only very little theory training, and no practical training, on semi-permanent inks; and
- (iii) Due to training not having been provided, the Appellant was unable to make full use of the machine, which she had been induced to buy by the representations about the course content.

On that basis, the Appellant claimed that there had been breaches of the contract and/or misrepresentations such that rescission of the contract and/or damages should be ordered.

7. The Defence denied both claims on the basis that:

- (i) The agreement between the parties was that the Appellant would be shown meso skin rejuvenation for the purpose of scalp preparation only;
- (ii) The agreed training was provided in that: (a) the Appellant was shown meso skin rejuvenation for the purpose of scalp preparation; and (b) both online and in-class training were provided in respect of semi-permanent ink, and the implantation method for the two pigments is exactly the same, such that the Appellant received practical training on both types of ink;
- (iii) The Appellant had received a certificate to practise in scalp micropigmentation and was currently in the case study period of the training; and
- (iv) She had made an independent decision to purchase the machine, irrespective of the training.

8. Although not explicit in the Particulars of Claim, it became apparent that the Appellant's claim in relation to meso skin rejuvenation related to such treatment for the face. The terms "facial rejuvenation" and indeed "skin rejuvenation" have been used interchangeably to refer to this treatment, at times causing confusion. Indeed the Respondent submitted that this interchangeability of language may have led to the Appellant misunderstanding the various contemporaneous email communications between the parties, and that this led to her bringing the claim. For consistency I will refer herein to this treatment as "facial rejuvenation" as the learned Recorder did.

The trial before the Recorder

- 9. The trial took place by way of a video hearing via Skype. The Appellant was assisted by a lay representative (Mr Carrod) and the Respondent was represented by Ms Hodgkin. The Recorder had been provided with a 133 page trial bundle, a copy of which I have seen.
- 10. The bundle included various emails between the Appellant and the Respondent, on which the Appellant relied to support her case. At the outset of the hearing the Recorder sought to clarify the issues with the parties, saying the following:

“I think, ultimately, that this case really comes down to a question of interpretation, in other words by me, of the meaning and content of emails, the effect of them and, arguably, some specific findings in relation to what’s actually covered on the course” (transcript, page 8).

Mr Carrod and Ms Hodgkin both indicated that the Recorder’s analysis was correct.

11. The Recorder heard witness evidence from the Appellant and two witnesses for the Respondent, Emma Furlong and Gemma Hutchings. He also considered the written evidence of Julie Spriggs on which the Respondent relied. She confirmed the training she had received on the SMP course.
12. The Appellant’s case at trial remained, in summary, that (i) it had been agreed that the SMP course would include training in facial rejuvenation; (ii) she had not been properly trained in the use of semi-permanent inks; and (iii) she had only purchased the Vogue machine because of what she had been told.
13. The Respondent’s position was that (i) facial rejuvenation was taught as a separate workshop, entirely differently to the SMP course for which the Appellant had paid; (ii) the semi-permanent inks were showcased and described in the training and the implantation methodology which was the same as for permanent inks was fully taught; and (iii) the Appellant had purchased the Vogue machine having attended at their stand at a beauty show and she had not been induced to buy it by any misrepresentation by them.

The Recorder’s judgment

14. The Recorder gave an *ex tempore* judgment at the end of the hearing. Transcribed it runs to 20 paragraphs.
15. He dealt first with the alleged express term in relation to the provision of facial rejuvenation training.
16. He referred to emails from the Respondent to the Appellant dated 10 and 21 January 2019 and evidence alluding to the cost of an additional skin rejuvenation workshop. He then concluded as follows:

“[14] The inference...arising from that is that this would be something over and above what was to be included expressly within the course content.

[15] Accordingly in my judgment, it may have been a misunderstanding as to course content by the claimant, but the defendant company through the emails, in my judgment, persistently sought to reinforce what was included and what was not.

[16]...the chain of emails in my judgment demonstrate that prior to entering into the agreement, it did not expressly extend to the inclusion of training for skin rejuvenation. I refer to that positive inclusion within the 10th of January email. It is an additional

workshop and further, that it is something that would be included essentially if there was time later in the day of the course itself.”

17. Next he addressed the issue of training on permanent and semi-permanent inks. He referred to the evidence of Ms Furlong (a hair loss micropigmentation practitioner) to the effect that the method of application for the two inks is precisely the same. He observed that this was “fairly consistently through the paperwork”. He then found:

“[18]...As a matter of logic, it therefore seems to me that being taught for one on a practical basis must mean that it covers both”.

18. He then reached the following conclusion:

“[21]...taking all of that evidence on board...in my judgment, all that was expressly agreed upon as regards teaching was in fact taught”.

19. Turning to the issue of the machine, he noted the Appellant’s evidence that she had gone to the show before the course and had decided to buy the machine even before the show. He referred to the fact that she had accepted that buying the machine was not a precondition for attending the course and then held as follows:

“[24]...it seems to me that the claimant understandably was, in essence, trying to get ahead of the game, if you like, by being in a position immediately following the course to implement what she had learned on it by the purchase of the machine. It is clear from the communications within emails that a number of different machineries [sic] were discussed and, in fact, at one point, there was I think discussion of - I think the machine is called a [Vytal] or something like that, and there was positive disclosure to the claimant by the defendant on the basis it effectively would be sufficient for what it was that she would be undertaking on the course, namely the SMP, so clearly, there was an enormous amount of review investigations undertaken in relation to the machine itself.

[25] [It is a]lso clear from the evidence of the claimant that she was undertaking a review from the manufacturer’s site and that featured in her decision to make the purchase of the machine in question”.

20. He concluded:

“[26] In those circumstances, it seems to me that there was no misrepresentation at all in relation to the machine itself, whether related to the other two express terms as asserted in relation to which I have ruled or indeed separate to that on the basis of any other misrepresentation that could be applied to”.

21. On that basis he dismissed all the claims.

The fresh evidence

22. The fresh evidence which the Appellant sought to admit in the appeal comprised a further statement from herself dated 26 August 2022 with a series of appendices. Much of the statement reiterated her evidence at trial and some of the appendices to her statement duplicated documents that had been before the Recorder. The only truly fresh evidence that had not been before the Recorder consisted of the following:

Appendices 4 to 7: emails between the Appellant and other SMP training providers about their training on semi-permanent inks;

Appendix 8: emails between the Appellant and an insurance provider about cover for providing treatments on semi-permanent inks;

Appendix 9: further communications between the Appellant and Respondent about their courses in August 2022; and

Appendix 10: the Appellant's certificate of attendance on the SMP course and evidence suggesting that on 31 May 2019 she had submitted her case studies.

23. The application notice, completed by the Appellant herself, submitted that the evidence should be admitted because she had not been legally represented at the trial and was not aware of the relevance of all the evidence. The evidence had only become available after the trial. It was relevant, credible and should be admitted in the interests of justice.

The grounds of appeal and the parties' positions in overview

24. The initial grounds of appeal, which had not been prepared by Mr Khan, were rather discursive, running to some 56 paragraphs. They asserted that the Recorder had erred in various respects in relation to his findings on the issues of facial rejuvenation, training on permanent/semi-permanent inks, the machine and the certificate.
25. Mr Khan, in his Skeleton Argument prepared after the grant of permission, helpfully distilled the Appellant's arguments into two broad grounds of appeal:

Ground (1): The Recorder was wrong to hold that there had been no breach of contract, when on the relevant evidence it was clear that there had been ("**the breach of contract ground**"); and

Ground (2): The Recorder failed to apply the correct legal test for misrepresentation and had he done so, and applied that to the relevant evidence, he would have upheld the Appellant's misrepresentation claim ("**the misrepresentation ground**").

26. Mr Khan made clear that the fresh evidence was only relevant to some elements of Ground (2). He invited me to admit certain fresh evidence, allow the appeal and enter judgment for the Appellant.
27. Ms Hodgkin for the Respondent did not oppose the application to admit fresh evidence but submitted that some of it assisted her client's position. She argued in

respect of Ground (1) that the Recorder's findings on the contract claim were ones he was entitled to make on the evidence. In response to Ground (2) she submitted that the Recorder's findings indicated that he had had the correct legal test for misrepresentation in mind and his factual findings on this claim were ones that were open to him on the evidence. On that basis, she invited me to dismiss the appeal.

The legal framework

28. CPR 52.21(1) provides that every appeal is limited to a review of the decision of the lower court unless (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
29. CPR 52.21(3) provides that the appeal court will allow an appeal where the decision of the lower court was "(a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court". The White Book 2021 at paragraph 52.21.5 explains that "wrong" in CPR 52.21(3)(a) means that the court below (i) erred in law or (ii) erred in fact or (iii) erred (to the appropriate extent) in the exercise of its discretion.

Fresh evidence on appeal

30. Under CPR 52.21(2) unless it orders otherwise, the appeal court will not receive evidence which was not before the lower court.
31. In deciding whether to admit fresh evidence on appeal applying the court should apply the interests of justice test, with the considerations set out in *Ladd v Marshall* [1954] 1 WLR 1489, CA being relevant, not as primary rules, but in the exercise of discretion following the overriding objective: see, for example, *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, *Banks v Cox* [2000] EWCA Civ 5565 at [39]-[42]; *Hamilton v Al Fayed (No 4)* [2000] EWCA Civ 3012 at [10] -[13]; and *Terluk v Berezovsky* [2011] EWCA Civ 1534 at [31]-[32].
32. The *Ladd v Marshall* considerations (previously the special grounds on which fresh evidence should be admitted on appeal) are that: (1) the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible.

Appeals relating to factual findings

33. There is a general presumption on appeal that the judge has considered facts unless it can be shown otherwise, but in deciding whether a judge's decision was wrong, the appellate court will consider the reliable evidence, including evidence in cross-examination and the available documents: see *Gangat v Jassat* [2022] EWCA Civ 604 at [32]-[33], [46]-[47].
34. If the first instance judge has gone materially wrong by not considering relevant evidence, considering irrelevant evidence, or coming to a conclusion that is wrong in law or not open by way of assessment on the evidence, the appellate court can

interfere: see, for example, *Aldi Stores v WSP Group Plc* [2008] 1 WLR 748 at 762 E; *Hadmore Productions Ltd v Hamilton* [1983] 1 AC 191 at 220.

35. If the appellate court concludes that the lower court's exercise of discretion must be set aside for one or other of these reasons, it is entitled to exercise an original discretion of its own: *Hadmore* at 220.

Ground (1): The breach of contract ground

36. Mr Khan's central submission on Ground (1) was that the Recorder was wrong to hold that there was no express term of the contract to supply facial rejuvenation training, because there was other evidence suggesting a contrary picture which the Recorder did not appear to have considered when evaluating the evidence.
37. As noted at [33] above there is a general presumption that a judge has considered facts unless it can be shown otherwise. In this case, the Recorder made clear that he had had regard to the 133 page trial bundle. He asked the Appellant several questions which illustrated his familiarity with the key issues (see, for example, pages 3 and 6-9 of the trial transcript). His judgment, albeit brief, engaged with the detail of the cases as they had been advanced before him and cited the key evidence, as explained in further detail below. Accordingly I do not consider that there is a fair basis for the general assertion that the Recorder had not taken into account all the evidence before him in reaching his decision.
38. The sole question is therefore whether he came to a conclusion as to the alleged express term which was simply not open to him on that evidence (*Aldi Stores* and *Hadmore*).
39. As set out at [16] above, in finding that there was no express term to provide facial rejuvenation training, the Recorder placed particular reliance on two emails sent from the Respondent.
40. The first was sent by Ms Furlong to the Appellant on 10 February 2019 (at 4.42 pm). This had been exhibited to the Appellant's statement and she had been questioned about it at the trial. In this email, Ms Furlong explained that:
- “The skin rejuvenation is a workshop that can be done following Scalp Training. It is a great treatment offer with SMP, we do cover the basics for scalp rejuvenation on the course as we use it to prep and treat scalps prior to treatment but the facial rejuvenation is an additional workshop”.
41. The second was sent by Ms Furlong to the Appellant on 21 January 2019 (at 3.43 pm). In this email, Ms Furlong stated that:

“In terms of the skin treatment we will be able to demonstrate this and if you are able to do the treatment you will get a certificate for the training on the day. It may mean we have to work a little later on one of the days but we will fit it in”.

42. As noted at [16] above the Recorder also referred to evidence about the cost of the additional skin rejuvenation workshop. Evidence that the cost of this workshop was £495 + VAT could be found in the Appellant's Exhibit ID1, which was an email from the Respondent sent to her on 24 May 2019 (at 10.27 am) and the Respondent's "Document 10", appended to Gemma Hutchings' witness statement, which was an email from the Respondent to the Appellant sent on 29 May 2019 (at 1.59 pm).
43. On its face, this evidence provides a sound basis for the Recorder to have accepted the Respondent's case that (i) the SMP course involved the Respondent demonstrating meso skin rejuvenation for the purpose of scalp preparation; but (ii) facial rejuvenation was taught as a separate workshop and was not part of the SMP course.
44. To illustrate his argument that this conclusion was simply not open to the Recorder on the evidence, Mr Khan pointed to several other items of evidence.
45. *First*, he argued that the Recorder's finding was inconsistent with other emails sent by the Respondent.
46. He relied on an email sent on 19 January 2019 (at 6.01 pm) stating "we will also show you meso skin rejuvenation on the course for scalp prep and treatment".
47. Ms Hodgkin contended that this was clearly specific to the rejuvenation element of the scalp training and not referring to facial rejuvenation. I agree with that reading of the email. However more pertinently for the purposes of an appeal, the Recorder was plainly entitled to adopt the interpretation of the email for which the Respondent contended.
48. Mr Khan also relied on a further email sent on 21 January 2019 (at 2.06 pm) saying "the skin rejuvenation treatment would be our plastic needle meso treatment, if we are able to complete the module you would get a certificate for it".
49. However as Ms Hodgkin highlighted, this was also consistent with the Respondent's case that facial rejuvenation was taught as a separate workshop and did not form part of the express terms of the contract to provide the SMP course.
50. *Second*, Mr Khan relied on the invoice for the training dated 26 February 2019. This simply refers to the "scalp Level 4" course and so does not provide support for the Appellant's case that this course was to include facial rejuvenation training.
51. *Third*, he referred to an email from the Respondent sent on 15 January 2019 (at 8.08 pm) stating that "with two trainers present we will be able to show you the meso scalp prep and rejuvenation treatments during the course".
52. Again this was consistent with the Respondent's case that what they were agreeing to provide was training on meso rejuvenation for the scalp. There is no basis for the suggestion advanced in the appeal that the presence of two trainers itself indicated that one trainer was agreed to be provided to provide specific training in facial rejuvenation. Further, as Ms Hodgkin explained, there was other evidence before the Recorder (from the 17 December 2018 email) that the Respondent operated the SMP course with a maximum of six trainees in a class and a ratio of three trainees to one

trainer. This provided positive evidence as to the reason why two trainers were needed for the SMP course, quite separately from any facial rejuvenation training.

53. *Fourth*, Mr Khan relied on the fact that the Appellant had purchased the most expensive machine which enabled her to perform facial rejuvenation. He argued that it would have made no commercial sense for her to have done so if facial rejuvenation was not going to be included in the course. Reliance was placed on an email from the Respondent sent on 17 December 2018 (at 3.38 pm) which said “All of our machines are versatile with the option of changing the needle configuration to offer additional micropigmentation and skin rejuvenation treatments”.
54. However, as Ms Hodgkin noted, there was further detail about the various machines given by the Respondent in different emails. A particularly significant email was sent on 21 January 2019 (at 2.06 pm) which said as follows:

“The Vytal machine for skin needling is not compatible with any micropigmentation needs as it is specifically a skin rejuvenation machine, therefore you cannot do SMP with it unfortunately [sic]. The SMP Vytal machine is an option however, the reason I did not recommend this one to you is that it is limited with the needles that can be used on the handpiece, so it is not versatile in terms of doing skin rejuvenation and all other micropigmentation treatments. It is specifically for entry level SMP so would allow you to do SMP treatments, but you may then need to upgrade if you wanted to do other treatments. It is definitely an option for you, the most cost effective is the Vytal, and the most cost effective longer term is the Nano” [emphasis added].

55. Ms Hodgkin submitted that this showed that there was evidence before the Recorder indicating that the Respondent had referred one machine to the Appellant – the Vytal – which would not enable her to do facial rejuvenation treatment at all. This supported the Respondent’s case that facial rejuvenation training was not an express part of the course to be undertaken by her.
56. I accept Ms Hodgkin’s submission. In my judgment the nature of the machine purchased by the Appellant does not illustrate that the Recorder’s conclusion about the lack of an express term to provide facial rejuvenation training was wrong.
57. Pulling these threads together, I conclude that the Recorder was fully entitled to accept the Respondent’s case that there was no express term that facial rejuvenation treatment was to be included in the SMP course. Ground (1) is therefore dismissed.

Ground (2): The misrepresentation ground

58. Mr Khan summarised the elements of an actionable misrepresentation as follows: (i) there was an express or implied representation of fact which the Claimant understood was being made; (ii) the Claimant was induced by the representations, and the Defendant intended for the Claimant to be induced in the sense that the statement was an adducing cause; (iii) the representations were false or substantially false; and (iv) the Claimant is not precluded from advancing the claim (see for example, *Raifeisen*

Zentralbank Osterreich AG v Royal Bank of Scotland plc [2010] EWHC 1392 (Comm) at [80]).

59. He submitted that the Recorder had erred in law in failing to apply any legal test when deciding whether there had been any actionable representation; and that this much was apparent from the way he approached the evidence on each element of the claim.
60. Ms Hodgkin argued that the Recorder had specifically referred to the concept of misrepresentation within his judgment and his conclusions were compatible with having the relevant legal test in mind.
61. I agree with Ms Hodgkin's broad point. In my judgment the fact that the Recorder did not refer in terms to the legal test for misrepresentation does not mean that he was not applying it. Further, the fact that he had the elements of the test in mind is clear from the manner in which he approached the evidence on each of the alleged misrepresentations, for the reasons which follow.
62. Mr Khan framed the Appellant's misrepresentation claim as comprising three elements.

(i): The content of the training and the need for the machine

63. The Appellant's case was that the Respondent had misrepresented to her that she would be trained in facial rejuvenation for which a machine was needed and would be beneficial. This effectively comprises two elements: the content of the training and the need for the machine because of the course.

The content of the training

64. The Recorder found that the Respondent had not represented to the Appellant that the SMP training would cover facial rejuvenation, for the reasons he gave at [12]-[16] of his judgment. Accordingly although the Recorder did not expressly state as such, it is clear that this aspect of the misrepresentation claim failed because the Appellant could not satisfy *Raifeisen* element (i) (the representation alleged).
65. The Recorder was entitled to make this finding based on his acceptance of the Respondent's evidence, as explained above in relation to Ground (1).
66. Ms Hodgkin took a legal point that even taking the Appellant's case at its highest, what had occurred was a statement of future intent, conditional on time availability, about the facial rejuvenation workshop, rather than a statement of fact capable of amounting to a representation. However this was irrelevant given the Recorder's finding that the alleged misrepresentation had simply not been made.

The need for the machine

67. The Appellant's case was that the Respondent had misrepresented to her that she needed a particular machine in order to perform facial rejuvenation treatment on the course and as a result she had purchased the expensive Vogue machine.

68. The Recorder found that the Respondent had not made any false representation to the Appellant about the machine: see [26] of his judgment. Accordingly this aspect of the misrepresentation claim failed in law because the Appellant could not establish either of *Raifeisen* elements (i) or (iii).
69. Mr Khan submitted that various emails showed that the Respondent had in fact represented to the Appellant that the Vogue machine she purchased was needed for the course.
70. He relied on the email sent from the Respondent to the Appellant on 17 December 2018 (at 3.38 pm) referred to at [53] above, but this merely involved a rather general statement from the Respondent about the versatility of their machines.
71. He also pointed to an email from the Respondent sent on 9 January 2019 (at 10.40 am) which stated as follows:

“As mentioned in the previous email with one machine you can offer more than one treatment, with further training and different needle configurations you can offer the treatments listed above so it is a worthwhile investment with potential to grow your treatment portfolio for clients. Please see a direct link to the machines page on our website for more information”.

These assertions are again quite general and do not amount to a representation that the Appellant needed the Vogue machine for the course. On the contrary, the reference to the machines page on the Respondent’s website reinforces the Recorder’s conclusion that the Respondent was merely providing the Appellant with a series of options.

72. Moreover, these emails need to be seen in the full context of the communications between the parties. This included the mail from the Respondent sent on 21 January 2019 (at 2.06 pm) set out at [54] above, which showed that among the machine options being presented to the Appellant was one that would not enable her to do facial rejuvenation on the course (or at all).
73. Therefore, based on all the evidence before him, the Recorder was entitled to conclude that the Respondent did not represent to the Appellant that she needed any particular machine for the course and/or that any such representation was false. Accordingly his findings on *Raifeisen* elements (i) and (iii) were sound.
74. Further, as indicated at [19]-[20] above the Recorder’s judgment strongly suggests that he did not consider that the Appellant could satisfy *Raifeisen* element (ii) (inducement) either (although it was not strictly necessary for him to address this issue, the claim having failed on *Raifeisen* elements (i) and (iii) in any event).
75. The Recorder was entitled to conclude that the Appellant had not been induced into buying the Vogue machine by the Respondent, in light of (i) the totality of the email evidence, which showed that the Respondent did not “steer” her to buy any one machine; (ii) her acceptance at the trial that buying the machine was not a precondition for attending the course, but was only needed to complete the case studies after the course; (iii) her evidence that she would research reviews of various

machines, try the machines on the day of the course and then come to her own conclusion as to which to buy; and (iv) her agreement to undertake a review from the manufacturer of the particular machine she chose.

(ii): The provision of a certificate confirming training in facial rejuvenation

76. The Appellant's case was that the Respondent had represented to her that upon completion of the facial rejuvenation course, she would be issued with a certificate for the training. Mr Khan argued that it is to be implied that the certificate would be for the course for which the Appellant enrolled, namely the Level 4 scalp micropigmentation and skin rejuvenation course.

77. The evidence shows that a certificate is issued for the facial rejuvenation workshop such that this statement was not false. However the provision of this certificate was irrelevant given that the Recorder had found that the Appellant has not represented to the Appellant that the SMP training would cover facial rejuvenation and that the two were separate courses, involving separate certificates.

78. The Appellant has only been issued with a certificate covering her attendance on the SMP course, not the full Level 4 certificate which is necessary to obtain the required licence from the local authority in order to perform micropigmentation as a practitioner. However the evidence makes clear that the Level 4 certificate is only issued by the relevant body after a process by which students return to the Respondent for an assessment day or submit certain case studies online which are then assessed.

79. Appendix 10 of the Appellant's fresh evidence showed that she had received a certificate of attendance on the SMP course and suggested that on 31 May 2019 she submitted her case studies by post (not on line). Applying the interests of justice test and bearing in mind the *Ladd v Marshall* criteria, I do not consider it appropriate to admit this evidence because:

- (i) The Appellant who otherwise presented the Recorder with detailed evidence and contemporaneous emails has provided no compelling explanation for why this material, which pre-dated the trial on 29 October 2020, was not placed before the Recorder;
- (ii) It will not assist in determining the issues on the appeal, let alone have an "important influence" on it: if the Appellant's case studies had been successfully assessed by the Respondent (and they deny receiving them), she may well have gone on to obtain the Level 4 certificate for the SMP course, but this is a separate matter to any certificate for a facial rejuvenation workshop, which she has not attended.

(iii): Training in permanent and semi-permanent inks

The Recorder's findings based on the evidence before him

80. Mr Khan's Skeleton Argument argued that the Appellant's case was that the Respondent had represented to the Appellant that she would be "adequately" trained

in permanent and semi-permanent inks, in theory and practice, and that this was false, as the training on semi-permanent inks was inadequate. In submissions he stated that what was meant was a representation that she would be trained “in depth” in both inks.

81. The Appellant’s case at paragraph 5.2 of her Particulars of Claim was that it was an express term of the contract that she would be trained “on both semi-permanent and permanent inks on both a theory and practical basis”. While it may well be fair to infer from this that the term she was asserting was a term that she would be trained “adequately” in both mediums, it is something of a stretch to say that her claim was that she had been told she would be trained “in depth” in both.
82. In any event the Recorder had before him a series of emails from the Respondent, referring to the training on semi-permanent and permanent ink. Mr Khan also relied on these emails in the appeal. The pertinent parts are as follows:
- (i) 7 January 2019 (at 9.40 pm): “[w]e teach with both semi permanent and more long lasting inks to cover all scenarios. Our approach is very holistic as our background is micropigmentation in all forms”;
 - (ii) 9 January 2019 (at 10.40 am): “...we do teach both the mediums (semi-permanent and permanent)”;
 - (iii) 9 January 2019 (at 2.20 pm): “...we teach with both semi-permanent and permanent inks, as a micropigmentation school we have historic experience and extensive knowledge of both inks”; and
 - (iv) 10 January 2019 (at 4.42 pm), sent in response to an email from the Appellant in which she had said “I am aware there are different techniques for permanent and semi-permanent inks” and asked “will student[s] work with both inks or just one of those?”, the Respondent said “[w]e teach practical with both, our semi-perm and perm inks have been developed so they can be implanted in the same way, so it’s a very practical way to work”.
83. The Recorder also had evidence before him from various sources to the effect that the training on semi-permanent inks had been provided and that the methodology for both types of inks was essentially the same, as follows:
- (i) The theory pages provided to the trainees before the course commenced which referred to “[p]igment v ink” as involving “same technique - different medium”;
 - (ii) The Appellant’s acceptance at the trial that the key difference between the two inks is the choice of colour and how long they remain visible (transcript, page 7);
 - (iii) The witness statement from Ms Furlong to the effect that (a) the implantation method was fully taught and carried out on at least one model by the Appellant; (b) both mediums are implanted in the same way; (c) the semi-permanent inks were taught in theory, showcased and fully described on day 2

of the course with advice given about the differences between the two inks in terms of the use of dilution/dispersion fluid;

- (iv) The live evidence from Ms Furlong adopting her statement and reiterating that the “technique” and the “practical application” was the same for both types of ink (transcript, pages 21 and 23); and
- (v) The written evidence from Julie Spriggs, who had attended the SMP course at around the same time as the Appellant, to the effect that (a) she had had semi-permanent inks explained and demonstrated to her; and (b) she and other students did not feel the need to take up the offer to use “practice mats” for these inks as they were all confident in the technique.

84. The Recorder made a clear finding in respect of permanent and semi-permanent inks that “all that was expressly agreed upon as regards teaching was in fact taught”: see [18] above. In other words, he agreed that the Respondent had represented that both types of ink would be taught, but held that the Respondent had provided that training. He was not satisfied that the Respondent’s representation as to this part of the training was untrue. Therefore this aspect of the misrepresentation claim failed in law because the Appellant could not establish *Raifeisen* element (iii) (falsity). However, Mr Khan argued that the Recorder’s conclusion as to falsity was wrong, because it is clear that the Respondent did not supply adequate theoretical or practical training on semi-permanent ink on the course.

85. He relied on an email exchange initiated by the Appellant on 2 July 2019 (at 6.18 pm) in which she asked why semi-permanent and permanent inks had not been taught on the course. Dawn from the Respondent (later described as the founder and CEO) replied in an email sent the same day (at 6.47 pm) that “long lasting is 90+% of SMP. Too confusing to absorb both lots of knowledge in one class. Which we know from years of experience”. The email said that if the Appellant had a model who wanted semi-permanent ink, she should book a place with Emma and that “[w]e don’t get short lasting pigment models as few people want short lasting”. Mr Khan argued that this email was inconsistent with the evidence of Emma Furlong and Julia Spriggs to the effect that training was provided in both permanent and semi-permanent inks.

86. The Recorder was clearly live to the fact that the email from Dawn raised some issues, as he mentioned it at [16] of his judgment, albeit in the context of the facial rejuvenation training issue. She was not called as a witness at the trial and there was no witness statement from her. However the content of her email was specifically put to Ms Furlong by Mr Carrod during the trial. In response, Ms Furlong gave the following explanation:

“...I can’t answer for Dawn. We did teach practical. I didn’t misrepresent it prior to Irina signing up. During the course we did teach practical with both. The pigment that I already said she could see, but every trainee I spoke to from this course has confirmed to me that we went over the five bottles of semi-permanent pigments and how to implant them in the same way and these students were offered practical time on practising. Practical with SMP and micropigmentation does not just refer to actual models and people. We also use practice skins to

hone our technique and develop our protocols. This opportunity was offered to all students on this course, but with the longer lasting pigments, which require much more knowledge, because it's one pigment which is diluted down...whereas with the short term, we use the product directly out of the bottle. We don't teach a huge range of semi-permanent colours because they're not applicable for SMP... Semi-permanent scalp is very limited because of the type of hair follicle that we're trying to match...

[Dawn's] referring to the (inaudible) make up range, What she's trying to say is that the technique's the same. We teach the same technique. The practical application is the same...

The implantation method is a pigment, how to do it, which is the practical part of the course. We covered that...Irina completed treatments of implantation into people's skin and on practice masks for the implantation method, which covers both mediums" (transcript, pages 23 and 24)

87. The Recorder plainly preferred this explanation that he had heard from Ms Furlong in person, the written account of Ms Spriggs and the rest of the evidence on this issue, summarised at [83] above to the limited content of the 2 July 2019 email. He was entitled to do so.
88. Mr Khan submitted that there are key differences between semi-permanent and permanent ink. For example, they require colour refresh "top up" treatments at different times (approximately every 9-12 months for semi-permanent ink but only every 2-4 years for permanent ink) and with semi-permanent inks it is particularly important to select the right colour. He argued that these differences fundamentally undermined the Recorder's finding that training in permanent ink implied training in semi-permanent ink. I disagree: the Recorder was entitled to accept the evidence summarised at [83] above to the effect that whatever differences there were between the inks, the methodology was the same and thus the training sufficed. Further, as Ms Hodgkin highlighted, there was no positive evidence that the implementation procedure for semi-permanent and permanent inks was different at time of the course.
89. Mr Khan argued that the Recorder did not appear to have considered the Appellant's evidence that she never saw any models with semi-permanent ink. However, the fact that no models were used in the training on semi-permanent ink was not apparently in dispute: rather, as set out at [86] above, Ms Furlong's evidence was that training on semi-permanent ink was achieved in other ways. The Recorder was entitled to accept this.
90. Mr Khan also submitted that the Recorder did not appear to have taken into account the Appellant's evidence that the kit she was provided with (apparently to enable her to complete the case studies) included only permanent ink. Again, this had been specifically raised by the Appellant at the end of Ms Furlong's evidence and the Recorder had formulated a question to Ms Furlong to this effect: "[I]s it right that as part of the skin kits only permanent ink [was] provided, but also...is there a significance arising from that?". She replied as follows:

“No. It’s a choice. If a student wants semi-permanent ink in their kit then they just have to request it and we accept case studies on both, long lasting semi-permanent or permanent.” (transcript, page 27).

Given that the Recorder himself asked the question about this issue it is unlikely that he did not take it into account, but in any event, he had received the Respondent’s evidence on it and plainly preferred that, as he was entitled to do.

91. Accordingly, the Recorder’s finding that the Respondent had not misrepresented the nature of the training on both types of ink to the Appellant was one he was fully entitled to make, based on the evidence before him.

The fresh evidence said to be relevant to this issue

92. Appendices 4-7 of the Appellant’s fresh evidence comprised the following:

- (i) Appendix 4 was a series of emails between the Appellant and Craig Bottomley-High, who had been a trainer on the SMP course alongside Ms Furlong and who also has his own training centre, from August 2022. The Appellant enquired about the SMP course his centre offered and he sent her the schedule for their course. She asked him why his course material said that they did not use colour pigments on the scalp. He explained that on his course they did not use coloured inks. Rather, they use black permanent ink, diluted to match the hair follicles, which are always grey, and not the actual hair colour. Coloured inks can change as they fade down to their base and so are not suitable for SMP;
- (ii) Appendices 5 and 6 contained emails from August 2022 in which two further providers (Scalpology and LGS Hair Clinic) explained that they did not use coloured inks in SMP either; and
- (iii) Appendix 7 was a similar email exchange between the Appellant and Scalp Culture, dating from November 2020.

93. Applying the interests of justice test, and having regard to the *Ladd v Marshall* criteria, I do not consider it appropriate to admit this evidence for the following reasons:

- (i) The Appellant began contacting other providers shortly after the trial on 29 October 2020 and they all responded to her queries promptly. There is no persuasive evidence before me explaining why the Appellant could not, with reasonable diligence, have obtained this evidence for use at the trial;
- (ii) More significantly, the evidence would not have an important influence on the outcome of the appeal, as it does not show that the Recorder’s decision was wrong. This is because evidence of what one other provider did in November 2020 and what three others did in August 2022 does not assist in determining what this Respondent agreed to provide to the Appellant in early 2019 and what they did provide then;

- (iii) It is clear that practice changes in this area, as explained at [97] below, which is a further reason for not admitting the evidence in Appendices 4-6; and
 - (iv) The Recorder had the contemporaneous emails and witness evidence before him, and was fully entitled to reach his conclusions based on that evidence.
94. Appendix 8 was an exchange between the Appellant and an insurer from November 2020 in which she asked whether she would be covered to offer scalp micropigmentation treatment with semi-permanent inks given that she had not received practical training in those inks. The insurance agent replied that the Appellant would be covered for whatever treatment she is qualified for. I do not consider it appropriate to admit this evidence. Again no compelling explanation has been provided for why this was not obtained before the trial. It is also not directly relevant to the issues on the appeal: it simply confirms that the Appellant can obtain insurance cover for the treatments she is qualified for. As explained at [79] above the Appellant's case studies needed assessment, after which she might have received her Level 4 certificate which would have qualified her to perform the appropriate treatments.
95. Appendix 9 was a series of emails between a person described as Maria (but in fact the Appellant) and the Respondent, from August 2022, about the use of semi-permanent and permanent inks. The pertinent parts are as follows:
- (i) The Appellant asked whether colourful pigments such as dark brown or light brown were used to match the client's hair colour;
 - (ii) Tracey from the Respondent initially said that the 'Phantom' pigment was diluted and that even if the client had red hair stubble, the pigment would look grey;
 - (iii) She then explained that as at 10 August 2022 a new pigment was coming in, called 'Vytal', which was light, medium and dark brown with an orange corrector;
 - (iv) Tracey passed on a message from Dawn to the effect that the course involved teaching with Phantom ink and that the course was "a mix of online pre-course learning, loom learning, classroom live skills etc";
 - (v) Tracey then confirmed that the Vytal pigment was not taught on the beginners' course and that there was a further 'Advanced Hairlines and Tonal Pigment' 1 day course which could be undertaken after the SMP course, at a cost of £750 + VAT;
 - (vi) Dawn then said "We do not teach both techniques in the entry course. Our entry course is long lasting. We teach long lasting with Phantom ink..."; and
 - (vii) She then reiterated "Our advanced course are sold to trained by us students. Until you qualify with us we do not send info. It is not brown pigment

training. It is how to add short lasting pigmentation into your long lasting pigment portfolio. Theory based day. It's not on our website".

96. I do not consider it appropriate to admit this evidence. Evidence as to the nature of the courses offered and pigments used by the Respondent in August 2022 does not assist in assessing whether the Recorder was wrong in his approach to the issues before him, which related to the Respondent's practice in March 2019.
97. This is especially so given that, as the email summarised at [95(iii)] above illustrates, practice in this area changes regularly. This was reiterated in a document drafted by the Respondent for the purposes of the appeal (although not specifically relied upon by Ms Hodgkin) which explained that their training changes over time given the progressive nature of the industry and the fact that pigments, inks and other products alter with current trends and legal changes such as the 'EU REACH' legislation. The Respondent argued that this meant that this aspect of the fresh evidence was "not a true reflection of matters at the time of the contract and/or the course that was attended". I agree.
98. For these reasons Ground (2) is also dismissed.

Conclusion

99. Accordingly, for these reasons, despite the comprehensive submissions from Mr Khan, the appeal is dismissed.