

COURT OF APPEAL

**SOFRONOFF P
MORRISON JA
PHILIPPIDES JA**

**Appeal No 172 of 2018
DC No 1124 of 2017**

**FTTOA PTY LTD
ACN 093 572 000**

Appellant

v

**GREEN DOOR CAFÉ AND
GALLERY PTY LTD
ACN 151 066 830**

Respondent

BRISBANE

THURSDAY, 10 MAY 2018

JUDGMENT

PHILIPPIDES JA: The appellant, who is the defendant in a District Court proceeding, seeks leave to appeal against an order dismissing its application for security for costs against the respondent in relation to a proceeding brought by the respondent as plaintiff in the principal proceeding. That proceeding concerned the lease of a café from the appellant as lessor of the premises. There was no dispute that the jurisdiction to award security for costs was enlivened because *UCPR* r 671(a) had been met. That is, the respondent was a plaintiff corporation and there was reason to believe it would not be able to pay the appellant's costs as defendant if ordered to pay them.

In refusing to exercise the discretion in favour of the appellant and in dismissing the application, the primary judge considered the respondent's prospects of success and concluded that its claim was arguable, although the pleadings required some amendment. His Honour also had regard to the consideration that the making of an order would stifle the proceedings, and that the respondent should not be shut out of pursuing its claim.

There were three other matters argued before the primary judge. The first concerned whether the plaintiff's impecuniosity was attributable to the appellant's conduct. The claim was one for loss and damages arising, *inter alia*, from the respondent being locked out of the premises immediately following the giving of a notice under s 124 of the *Property Law Act 1974* (Qld). It was argued by the respondent that no reasonable notice had been given prior to the lock out. The respondent deposed to its impecuniosity was attributable to the appellant's conduct in two ways; in constraining by its conduct the cash flow of the respondent by using, *inter alia*, bond money provided to the appellant; and by locking the respondent out of the premises. The appellant's approach before the primary judge was to argue that there was no real connection between the conduct alleged against the appellant and the respondent's impecuniosity. It was argued that the respondent's contentions concerning cash flow constraints said to have resulted from certain conduct alleged against the appellant, *inter alia*, in using bond moneys, were unsustainable. In that regard, reference was made to provisions of the lease said to allow that conduct. Even so, it remains that the other matter raised by the respondent, as to the connection between its impecuniosity and its being locked out of the premises, which was the subject of affidavit evidence by the respondent, was not the subject of any contrary evidence.

A further matter raised before the primary judge concerned the appellant's delay in bringing the proceedings. The delay to February 2016 was explained in affidavit material before the Court. The delay thereafter, until the proceedings were instituted, was not specifically dealt with but was not a matter strongly pressed before the primary judge.

The remaining discretionary consideration which, it was argued, the primary judge failed to have proper regard to, concerned the question of the means of those standing behind the proceeding. As mentioned, there was no dispute that the respondent was impecunious. Some argument was directed to the means by which the litigation was being pursued by the respondent, a company that is a trustee for a family trust, and, in that context, a reference was made to a loan having been obtained by the director of the appellant. No inquiry was made, before the bringing of the application, as to the means of the beneficiaries of the trust, nor was any undertaking sought in from any beneficiary. In any event, the position of the beneficiaries was addressed in the respondent's affidavit evidence. It was not a matter that was such as to cause any concern in terms of whether there was a person of means standing behind the respondent.

The reasons given by the primary judge dealt succinctly with the real issues raised, and sufficiently for those issues to be identified and explained. In those circumstances, in my view, the appeal should be dismissed.

MORRISON JA: I agree.

SOFRONOFF P: I agree. The appeal is dismissed. Mr Johnstone, can you resist an order for costs?

MR JOHNSTONE: No, your Honour.

SOFRONOFF P: The appeal is dismissed with costs. Anything further?

MR JOHNSTONE: No, thank you, your Honour.

SOFRONOFF P: I thank counsel for their assistance in this matter. Adjourn until tomorrow, please.