SUPREME COURT OF QUEENSLAND

CITATION:	*Morgo's Leisure Pty Ltd & Ors v Toula Holdings Pty Ltd & Ors* [2013] QSC 325
PARTIES:	**MORGO'S LEISURE PTY LTD (ACN 143 902 836)** **(First Plaintiff)** **and** **GRANT RYAN MORGAN and ASHLEE GAI HASSETT** **(Second Plaintiffs)** **v** **TOULA HOLDINGS PTY LTD (ACN 059 859 684) and DANTE (NQ PTY LTD (ACN 100 998 169)** **(First Defendants)** **and** **TOULA CASSIMATIS** **(Second Defendant)** **and** **DAVARK PTY LTD (ACN 165 706 856)** **(Third Defendant)**
FILE NO:	S634 of 2013
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court, Townsville
DELIVERED ON:	21 November 2013
DELIVERED AT:	Townsville
HEARING DATES:	12 and 13 November, 2013 (Mackay), 15 November 2013 (Townsville)
JUDGE:	North J
ORDER:	**1. Declare the registered lease dealing number 715146498 (a copy of which is exhibit 11) between the First Defendants as Lessor and the First Plaintiff as Lessee and the guarantee thereof by the Second Plaintiffs is void ab initio.**

2. Liberty to the Plaintiffs to apply for any further order necessary to give effect to the declaration.

3. The Plaintiff's claim for other relief is adjourned to a date to be fixed for further directions.

CATCHWORDS:	MISLEADING AND DECEPTIVE CONDUCT – whether lease and guarantee should be declared void ab initio.
LEGISLATION:	Section 18 *The Australian Consumer Law*
	Section 243 *The Australian Consumer Law*
CASES:	*Oraka Pty Ltd & Anor v Leda Holdings Pty Ltd* [1997] FCA 297 *Gould v Vaggelas* (1985) 157 CLR 215 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109
COUNSEL:	DA Savage QC for the plaintiffs
	AW Collins for the first defendants and second defendant
SOLICITORS:	Connolly Suthers for the plaintiffs
	Lee Turnbull & Co for the first defendants and second defendant

[1] Townsville's Newmarket Hotel is on the corner of Flinders and Blackwood Streets in the city. The first defendants own the land and improvements constructed on the land. Until March 2013 the first named first defendant ("Tula Holdings") owned and conducted the business of the hotel. The second defendant is the sole director and shareholder of the first defendant companies. The second plaintiffs are husband and wife and directors of the first plaintiff.

[2] By a lease and guarantee bearing an execution date of 19 March 2013 the first defendants leased to the first plaintiff the land and the second plaintiffs guaranteed the obligations of the first plaintiff under the lease.[1] On 19 March 2013 Tula Holdings settled a sale of its hotel business to the first plaintiff.[2]

[3] In the amended statement of claim[3] the plaintiffs allege:

> "3. Prior to execution of the lease and the guarantee by the parties, the Second Defendant on behalf of the First Defendants informed the first named Second Plaintiff Grant Ryan Morgan on behalf of the First Plaintiff and the Second Plaintiffs in the following terms ('the representations'):-
>
> (a) the lease would be for a term of 30 years;

[1] Exhibit 11. Exhibit 11 records that the lease was registered in the Queensland Land Registry on 18 June 2013.
[2] See exhibit 7 as evidence of the settlement of the sale of the business.
[3] Filed 18 October 2013.

(b) the lease rental would be in the amount of $180,000 per annum;

(c) the lease arrangements of the lease for 30 years and rental of $180,000 were only to last for a period of 3 years;

(d) the hotel business would be sold to the First Plaintiff for $1.00;

(e) the First Defendants would pay for the outgoings of the lease for the first three years and in any subsequent agreement reached;

(f) the First Defendants would offer the First Plaintiff the right to purchase the real property if the First Defendants determined to sell same;

(g) after three years of the lease at $180,000 per annum, and assuming the First Plaintiff had not purchased the real property from the First Defendants, the First Defendants would cancel the lease and enter into a new lease at a rental in the order of $120,000 per annum.

Particulars

The representations were made during the course of a conversation between the first named Second Plaintiff, Grant Ryan Morgan, and the Second Defendant, which conversation took place at the hotel on a date in February 2013.

4. Acting in reliance upon the representations, and induced thereby:-

(a) the First Plaintiff entered into the lease;

(b) the Second Plaintiffs entered into and provided the guarantee;

(c) **the First Plaintiff effected renovations to the hotel ('the hotel renovations') costing in the order of $300,000.00 ('the hotel renovation costs'), the costs of which an ordinary lessee would not otherwise have effected and which the First Plaintiff effected only as a consequence of the representations and in the expectation that it would in due course and in accordance with the representations be the registered proprietor of the real property and the hotel.**

…

7. The representations were false in that:-

(a) The First Defendants had no intention of cancelling the lease and entering into a fresh lease (paragraph 3(c) and (g) hereof);

(b) The First Defendants had no intention of offering the First Plaintiff the first right of purchase in respect of any sale of the real property (paragraph 3(f) hereof);

(c) The First Defendants had no intention of paying for, and has not paid, the outgoings of the lease (paragraph 3(e) hereof).

8. The conduct of the First Defendants and the Second Defendant in making the representations:-

(a) was in trade or commerce within the meaning of Section 18 of the Australian Consumer Law ('ACL'); and
(b) was misleading or deceptive in contravention of Section 18 of the ACL.

9. By reason of the misleading or deceptive conduct on the part of the First Defendants and the Second Defendant, and in contravention of Section 18 of the ACL, the First Plaintiff and the Second Plaintiffs have suffered loss or damage.

Particulars

(a) the First Plaintiff would not have entered into the lease and be bound by the terms therein;

(b) the Second Plaintiffs would not have entered into the guarantee and guaranteed the obligations of the First Plaintiff of and incidental to the lease.

[4] It is common ground between the plaintiffs and the first and second defendants that by a contract of sale dated 20 September 2013 the first defendants agreed to sell to the third defendant the land and improvements.[4] That contract has not settled. The third defendant has indicated an intention to abide the order the court and has not taken any active part in the proceedings to date.

[5] The relief claimed in the amended statement of claim includes:[5]

"B. An order, pursuant to Section 18 of the ACL, declaring the whole of the lease void ab initio, by reason of the contravention by the First Defendants and the Second Defendant of Section 18 of the ACL;

C. An order, pursuant to section 236 of the ACL, and by reason of the contravention by the First Defendants and the Second Defendant of Section 18 of the ACL, that the First Defendants and the Second Defendant pay to the First Plaintiff and by way of damages an amount representing the value of the hotel renovation costs;

D. **An order, pursuant to section 236 of the ACL, and by reason of the contravention by the First Defendants and the Second Defendant of Section 18 of the ACL, that the First Defendants and the Second**

[4] See exhibit 27 and exhibit "A" to the affidavit of Mr Turnbull.
[5] The relief also seeks an injunction restraining the first defendants and the third defendant from settling the contract for sale of the land. Depending upon the outcome of the plaintiff's claim for other relief it may be unnecessary to further consider this issue.

Defendant pay to the First Plaintiff and by way of damages an amount representing the lease outgoings paid by the First Plaintiff".[6]

[6] At the trial the parties agree that I could have regard not only to the evidence of the witnesses called at the hearing and the documents tendered but also to the affidavits sworn and filed for the purposes of earlier interlocutory hearings. It was also agreed that the hearing before me was to be a trial of the claim to avoid ab initio the registered lease. Depending upon my findings and order a further hearing concerning damages and other monetary relief may be necessary.[7]

[7] The second plaintiff Mr Morgan gave evidence that he had known the second defendant since 2002. He had worked in various capacities in a number of licensed establishments owned and operated by the second defendant and her late husband. He said that in about 2005 he moved to Brisbane for a number of months before returning to Townsville and working for the Cassimattis entities at the Newmarket Hotel up until about November 2006. In recent years he had lived in Newcastle where together with his wife, the other second plaintiff he had operated a restaurant night club owned by the first plaintiff. He said that in about mid 2012 he was contacted by the second defendant. Initially she rang to speak to him about the hotel seeking advice about menus. He said that between the middle of 2012 and approximately November 2012 there might have been well over 40 telephone calls between them concerning the Newmarket Hotel.[8] In evidence he said that the discussions concerning the possible lease or ownership of the Newmarket Hotel commenced in or about November 2012 at about the time of a visit he made to Townsville that month.[9] Following those discussions Mr Morgan returned to Newcastle. On 29 November 2012 he sent an email to the second defendant and her son Yianni[10] in which he made an offer to purchase the business of the hotel and take a lease of it. The proposal outlined in the email was that the first plaintiff would purchase the business and take a lease upon the following terms:

> "Newmarket Hotel – Morgos Leisure Pty Ltd T/A Trustee of the Morgan Family Trust
>
> PROPOSAL
>
> PURCHASE AMOUNT
> Purchase of business – $1.00
>
> LEASE PERIOD
> Would like a period of 30 years starting Monday the 4th of February 2013
>
> OPEN TO PURCHASE
> If Toula or the family decide to sell the Newmarket Hotel, I am given the 1st opportunity to purchase the hotel before it's offered to the open market.

[6] I apprehend that the reference to s 18 of the ACL in the first line of B is intended to refer to s 243.
[7] See for example T3-25/26. To that end the schedule and documents comprising exhibit 1 was tendered as evidence of detriment consequent upon reliance not as proof of damage.(See T3-26 and T1-19/21)
[8] T1-15.
[9] T1-17.
[10] Exhibit 2.

RENT
Amounts for consideration
1st Year $135,000.00 Including GST
2nd Year $150,000.00 Including GST
3rd Year $160,000.00 Including GST
After the 3rd year of lease rent increase will be in line with CPI

Let me know your thoughts"

[8] By email dated 3 December 2012 sent by Yianni Cassimatis on behalf of his mother, the second defendant, the defendants counter offered.[11] Materially the counter offer proposed a purchase price of business at $1.00 plus stock at valuation, a lease period of 30 years commencing 4th February 2013 and a "rent schedule" as follows:

"RENT SCHEDULE

1st Year $160,000.00 Including GST ($14,000 under our last tenant)

2nd Year $170,000.00 Including GST ($4000 under our last tenant)

3rd Year $180,000.00 Including GST (only in the 3rd year would we actually meet and slightly exceed the rent we enjoyed during the past years.)

After the 3rd year of lease, rent increased will be in line with CPI.

After the 5th year of lease, rent will be determined by a market review and set for a following 5 years where additional annual increase will be limited to CPI increases only."

With respect to the option to purchase proposed by the second plaintiff the defendants counter offer in exhibit 3 said:

"OPTION TO PUCHASE

For various reasons, we would prefer not to have a contractual obligation to issue you 'first right of refusal'. Of course our courtesy would dictate that we inform you of any intent to sell and you would always be free to make an offer to us at any time. The building would not be sold before you could place an offer. Legally your lease would be permanently set irrespective of owner in any event.

In addition to this, legally we of course would be obliged to inform you if any sale was imminent. The building will essentially always be on the open market. We will always be fielding and actively considering offers. We have a few genuine offers right now.

The way we would market the freehold would make any real 'first right of refusal' clause redundant, but that does not preclude you from making offers to us".

[11] Exhibit 3.

[9] On 4 December Mr Morgan emailed in reply to Yianni Cassimatis accepting the counter offer on the "proposed lease arrangements" adding "please proceed with contracts being drawn up".[12] Consistently with this in December 2012 instructions were given to a firm, Strategic Lawyers, to draw a lease containing terms similar but not identical to the "rent schedule" contained in exhibit 3.[13]

[10] Some time after Mr Cameron Turnbull was retained by the first defendants to prepare a contract and lease. Mr Turnbull gave unchallenged evidence[14] that on 3 January 2013 he received instructions from the second defendant (for whom he had acted on occasions for a number of years) and as a consequence he drew a business contract and a lease which he forwarded to Mr Morgan on 10 January.[15] Mr Turnbull received a telephone call from Mr Morgan who had issues about a number of matters including the rent which was stipulated as exclusive of GST, the security bond, the right of the landlord to inspect books and records and air conditioning ducting. Mr Turnbull took instructions about these matters and on 21 January 2013 he sent copies of a revised business contract and lease to both Mr Morgan and his client.

[11] Both documents were subsequently signed by both parties.[16] The contract for the sale of the business stipulated 18 February 2013 as the date of completion (and the lease that date as its commencement) but the completion was conditional upon written notification from the liquor licensing authority of approval of the transfer of the liquor licence from the seller to the buyer. That approval was not forthcoming until a date in March with the consequence that settlement occurred on 19 March 2013.[17] To allow for this delay a lease was engrossed changing the date of commencement to 19 March 2013 and changing the rent review dates. This was executed and subsequently registered.[18] Mr Turnbull said that when settlement occurred at his office on 19 March Mr Morgan and the second defendant were present. He gave both a copy of the settlement statement.[19] He gave evidence that at settlement there was a discussion concerning insurance, there was an issue with respect to the payment of insurance. Because of that, he caused a note to be included at the foot of the settlement statement exhibit 7. His recollection was that at settlement Mr Morgan passed the cheque for the settlement figure directly to Mrs Cassimatis.

[12] The hotel did not trade immediately after settlement. Mr Morgan gave evidence that the first plaintiff did not trade until 10 April 2013. In the course of proceedings I was informed that notwithstanding approval had been given for the transfer of the licence the transfer was not effected for some time thus preventing the first plaintiff from trading the hotel. During this period the first plaintiff took the opportunity to effect some repairs or renovations.

[13] The foregoing is substantially uncontentious. What follows is a summary of the evidence given by the witnesses that bears more directly upon the claim made by the plaintiffs.

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[12] Exhibit 4. He also requested a change to the proposed commencement of the lease to Monday 18 February 2013 because the sale of his business was to be 13 February.
[13] See exhibit "E" to the affidavit of Yianni Cassimatis filed 9 October 2013.
[14] See also his affidavits filed 9 October 2013 (exhibit 26) and 10 October 2013 (exhibit 27).
[15] See exhibit 26 and particularly exhibit "A" thereto.
[16] Exhibit 6.
[17] See the special condition to the business contract in exhibit 6.
[18] Exhibit 11.
[19] Exhibit 7.

[14] Mr Morgan said that in July 2012 he and his family holidayed in Townsville. He took the opportunity to "drop in" to see the second defendant. Subsequent to that visit there were telephone conversations with the second defendant concerning the hotel. Later in November 2012 he visited Townsville and over four days he had discussions with the second defendant about a possible purchase by him of the business.[20] After these discussions, which included some review of the books and trading performance of the hotel, Mr Morgan returned to Newcastle from where he sent the proposal of 29 November 2012.[21] Thereafter the email correspondence followed[22] and in late December 2012 or early January 2013 he received a copy of a lease that had been drawn by Strategic Lawyers after which he was told the defendants were waiting for the return of Mr Turnbull from holidays.[23] Mr Morgan said that he returned to Townsville at the end of January 2013 for about a week to find out where the parties "were at" with the preparation of the lease and to consider what needed to be done in renovating the hotel. He said he was in town for about a week.[24] He was told by he second defendant that matters had been held up because her bank would not agree to a lease at the negotiated rental, that the rental would have to be $180,000 annually "for the deal to go through". She told him that the bank needed the rent to be that high so that she could service her debt.[25] His evidence was that he said "If you agree to the terms of paying the outgoings, I'll agree to the lease".[26] His evidence was that this was agreed in a conversation in the office at the hotel on an occasion when an insurance agent, Mr Muller, was present.[27] In evidence concerning discussions at the time of the visit in November Mr Morgan said there was a discussion with the second defendant concerning his eventual purchase of the hotel.[28] It was with this in mind that he wanted a "first right to buy"[29] for he wanted "an incentive to come back to Townsville" as the purchase of the lease would require selling his business in Newcastle and relocating his family.[30] In evidence he said the second defendant said, concerning the sale of the hotel and the business, "Don't ever worry, Grant, you'll always get the hotel".[31] To that end he said that the second defendant told him that after three years of the lease, when she had settled her debts with her bank, the lease would be changed. This was important to him he said as the proposed CPI increases in rent after three years made the lease unattractive in light of the trading of the hotel at the time of purchase.[32] Mr Morgan's evidence was that the three year period was significant. His hope was that then, if his plans to improve trading paid off, he would be able to finance the purchase of the hotel.[33] In late February he moved to Townsville. Mr Morgan said that at no time after February 2012 did the second defendant or any one on her behalf tell him that the hotel was on the market or that the first defendants proposed to enter into a contract for sale. Upon being told of the sale by a Mr James Pascoe he said that he promptly consulted his solicitors. When asked if prior to entering into the hotel lease he had been told that he would not be

[20] T1-17/18
[21] Exhibit 2.
[22] Exhibits 3, 4 and 5.
[23] T1-23 l 12-29.
[24] T1-23.
[25] T1-22 l 46.
[26] T1-24 l 20.
[27] T1-26 l 6 ff.
[28] T1-18 l 17-26.
[29] T1-22 l 15.
[30] T1-22 l 17-22.
[31] T1-24 l 25.
[32] T1-25 l 15-45.
[33] T1-26 l 1-5.

told about a proposed sale or invited to make an offer he said he would never have moved to Townsville. When asked if he were told that the rent of $180,000 was payable for the full 30 years of the lease without the prospect of being able to buy the hotel he said he never would have entertained it.[34]

[15] When cross-examined Mr Morgan agreed that he was experienced in hotel businesses and that he understood how leases worked. This was the second occasion in which he had been personally involved with a lease of premises.[35] He agreed that he had asked for a long lease, a 30 year lease and that there were commercial advantages for a tenant in having such an asset.[36] He was cross-examined about the date of the meeting when he said the second defendant made the representations to him. It was put to him that he had sworn in an affidavit that the representations were made in the presence of a Mr Tony Muller (an insurance agent).[37] His evidence was that he thought the representations had been made at a meeting in January[38] but after being shown his affidavit he accepted that the meeting may have occurred in February consistently with his affidavit and that may have been after he signed the contract to purchase the business which is exhibit 6.[39] When asked to give an estimate of the weight he placed upon the significance of the representations he said were made in the presence of Mr Muller he said that it would be "20 per cent part of everything else that was involved"[40]. In cross-examination he was challenged upon his evidence that he was unaware the defendants were marketing the hotel until he was told that a contract had been entered into by Mr Powell. It was put to him that he had been told of that earlier by a Mr Bill Cusack. Mr Morgan's evidence was that he could recall Mr Cusack and two others attending the hotel and that Mr Cusack had booked a table for lunch. He denied that Mr Cusack told him that he had been appointed by the second defendant to sell the hotel and that the purpose of Mr Cusack's visit was to show the hotel to a prospective purchaser. Mr Morgan's evidence was that Mr Cusack asked him to show a gentleman around but that he was not told that he was a prospective purchaser.[41] However Mr Morgan did say that he told the gentleman he showed around that he had a "first right to the hotel".[42] Mr Morgan's evidence was that the only communication he had from Mr Cusack concerning his involvement with the second defendant was his appointment as managing agent and that occurred when he received exhibit 13 the day after the meeting at the hotel.[43] When cross-examined Mr Morgan agreed that at the settlement he had paid some outgoings[44] being rates which were adjusted to take account of a pre-payment by the vendor.[45]

[16] The second named second plaintiff, Ms Hassett gave evidence that she did not have any discussions with the second defendant concerning the lease or the negotiations for

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[34] T1-27 l 30-39.

[35] T1-30 l 20-26.
[36] T1-37.
[37] See generally the affidavit of Mr Morgan filed 8 October 2013 at paragraphs 13, 14 and 15. In this regard note the particulars to paragraph 3 of the amended statement of claim at para [3] above.
[38] T1-32 l 30-43.
[39] See further T1-33 l 25-30 and T1-34 l 22-40.
[40] T1-31 l 35.
[41] See generally T1-63 l 26 - 65 l 15.
[42] T1-64 l 45.
[43] T2-10 l 13.
[44] T1-69 l 15.
[45] See the settlement statement, exhibit 7.

the sale of the hotel business. The information she received came from her husband.[46] Her evidence was that she was attracted to the prospect of buying the business of the hotel with the possibility of purchasing the hotel as she regarded it as a good business decision for her family and financial future.[47] When asked whether on 20 March 2013[48] she had been told that there was no prospect of being offered the freehold of the hotel, she said that she would not have signed the lease and guarantee and that if the obligation to pay $180,000 annually for rent was not for three years but for 30 years with later CPI increases she would not have signed.[49]

[17] Mr Gregory Powell gave evidence. He is experienced in the liquor industry and provides consultancy services to the liquor and hospitality industry specialising in clubs, restaurants, hotels and major events. His evidence was that he was familiar with the Newmarket Hotel. His evidence was that he travelled to Townsville in connection with his business on the first Tuesday and Wednesday of each calendar month. He could recall travelling to Townsville in particular late in 2012 in December.[50] On this occasion his purpose was to meet the second defendant at the Newmarket Hotel at the request of Mr Morgan.[51] It was Mr Powell's understanding that Mr Morgan was interested in purchasing the hotel.[52] On the day he visited Townsville, he first called upon a Mr Gavin Thompson at the Centenary Hotel at Pimlico. In discussions with Mr Thompson Mr Powell said that he was told by Mr Thompson that he had had a conversation with the second defendant in relation to a potential purchase of the hotel.[53] Later that day he met the second defendant at the Newmarket Hotel. He could recall that she had told him she had no money and that she wanted out of the hotel.[54] In the course of the discussions Mr Powell mentioned to the second defendant his conversation with Mr Thompson. His evidence was that he said or words to the effect: "You do know that Gavin Thompson's a client of mine? I understand he's been down here; you're trying to sell him the hotel?" Mr Powell's evidence was that very quickly the second defendant responded negatively saying "I want Grant to have it".[55] Mr Thompson's evidence was that he understood the second defendant was referring to the freehold of the hotel in this conversation.

[18] The second defendant gave evidence of her long association with the Newmarket Hotel and of involvement (for many years with her late husband) in the ownership and management of licensed premises in or about Townsville. Her evidence was that she had owned both the freehold and the business of the Newmarket Hotel but that in 2008 or 2009 she had sold the business to other interests who operated licensed premises in Townsville. She said that in 2011 she bought the business back from those proprietors but that by 2012 economic circumstances had changed so that the Newmarket Hotel was trading very poorly.[56] She gave evidence that by 2012 and through that year she was increasingly under financial stress. Her other business, a clothing boutique was trading badly[57]. She described her situation as "bleeding" and

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[46] T1-77 l 33.
[47] T1-74.
[48] The day she signed the lease exhibit 11.
[49] T1-76 l 24-34.
[50] T1-45.
[51] T1-40 l 35.
[52] T1-42 l 23.
[53] T1-42 l 12.
[54] T1-44 l 2.
[55] T1-45 l 1-6.
[56] T2-25 l 40.
[57] T2-26 l 7.

that there were "no more funds".[58] Her evidence was that the bank was very concerned about her financial circumstances and that she was anxious to keep her bank happy. So dire were her circumstances that, were the proposed sale of the business interest to the plaintiffs not to proceed the only avenue available to satisfy the bank's demands might have been to expose her superannuation[59]. More particularly as at 3 December 2012, when the defendant's counter offer email[60] was sent her evidence was that the hotel had bleak prospects for the future unless management changes were successful[61].

[19] The second defendant's evidence was that when in 2012 she determined that it was in her interest to sell the hotel or her interest in the business her preference was to sell the business but keep the freehold of the hotel.[62] She said that discussions with Mr Morgan commenced in about August 2012 but that it was when he visited in November 2012 she realised that he was serious in purchasing the business. She was happy to sell to him as she thought that his experience would mean he would be a good tenant.[63] Her evidence was that discussions occurred with Mr Morgan over two days, probably the 27th and 28th November, in the office in the hotel. The discussions were between herself and Mr Morgan but sometimes her son, Yianni participated.[64] She gave evidence that she told Mr Morgan that she was prepared to sell the hotel and she mentioned a price at around $1.9 million. He showed no interest in purchasing the hotel at that price.[65] So the discussions focussed upon a sale of the business. Her evidence was that she told Mr Morgan she required an annual rental at $180,000 but in return for that she was prepared to sell the business to him for $1.[66] Her evidence was that in their discussions the only rental mentioned was at $180,000 per annum.[67] Significantly she said that the rents proposed in the counter offer of exhibit 3 sent by her son Yianni contained a mistake and that it did not represent her discussions with Mr Morgan.[68] She said that the inclusion by Yianni of different rents was due to what she described as a "typographical" error when inserting words into a "template".[69] When challenged under cross-examination to produce the template no document was produced.[70] The second defendant said that when she discovered the "typographical error" she called Mr Morgan some time between the 4th and 8th of December and explained to him that there was an error in the counter offer. She told Mr Morgan that the bank would only accept a rental of $180,000 per annum and he indicated that he would be prepared to accept that.[71]

[20] The second defendant said that Mr Morgan agreed to pay outgoings under the lease[72] and that she never agreed to pay the outgoings.[73] She denied ever promising or

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[58] T2-33 l 33.
[59] See more generally concerning the second defendant's stressed financial circumstances at T2-68 l 1-2-69 l 37.
[60] Exhibit 3.
[61] T2-62.
[62] T2-27 l 25.
[63] T2-28 l 20.
[64] T2-29 l 1-5
[65] T2-29 l 35.
[66] T2-29 l 8-30.
[67] T2-50 l 10-18
[68] T2-30 l 34.
[69] T2-59 l 20 ff.
[70] T2-61 l 46.
[71] T2-30 l 40-47.
[72] T2-33 l 31.
[73] T2-37 l 1-5.

saying that the lease would last for only three years.[74] And she denied ever agreeing to renegotiate the lease after three years.[75] Her evidence was that the only meeting with the insurance agent, Mr Muller, occurred after settlement of the sale on 19 March 2013.[76] In evidence she said that she was not prepared to give Mr Morgan a "right of first refusal"[77] that she wanted to be free to sell the unit at any time.[78]

[21] The following transcript of the cross-examination of the second defendant concerning exhibit 3 and the defendant's response concerning the request made by Mr Morgan in exhibit 2 for an "Option to Purchase" is revealing:[79]

> "Now, can we deal, then, please, with the first contentious issue, which appears under the heading, "Option to purchase." Do you see that in the middle of the page?---Yes.
>
> Now, the language there, it's your language, isn't it?---Yes.
>
> "For various reasons, we would prefer to not have a contractual obligation to issue first right of refusal." Do you see that first sentence?---Yes.
>
> "First right of refusal." How long have you been in business in Queensland?---Most of my adult life.
>
> So shall we say at least 30 years?---On my own, a good 20 years.
>
> All right. And part of your business concerns the purchase and sale of real property?---Yes.
>
> The exploitation of it for capital profits by renting it out, and the like?---Yes.
>
> And so you know what is meant by the term "contractual obligation"?---Well, yes, I do.
>
> A contractual obligation is one in which the parties agree, mostly in writing, and sign up to some obligations?---Yes, some obligations.
>
> Now, you see that in this paragraph, "option to purchase," you say that you would prefer not to have a contractual obligation to issue what you term a first right of refusal. You see that?---Yes.
>
> Have you ever granted someone what is referred to here as a first right of refusal?---Not that I can remember. This is the first time.
>
> And have you ever had any dealings with anybody who has issued a first right of refusal, to use the language in this sentence?---No, I think we had

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[74] T2-36 l 42.
[75] T2-37 l 15.
[76] T2-37 l 45.
[77] T2-37 l 7.
[78] T2-31 l 29 – 32 l 16
[79] T2-55 l 43 – 2-59 l 14 (omitting some lines between 2-57 l 45 and 2-58 l 5).

that at The Criterion. The lease was we had the first right of refusal, we as tenants.

So can I suggest this to you: when one talks about a first right of refusal, there are a number of things involved. The first thing that's involved is communicating an intend that one wishes to sell the hotel, or whatever it is that's the subject of the first right of refusal. Do you agree with that?---Yes.

The second is in offering to the person who has the "right", in inverted commas, the hotel, on some or other conditions; correct?---Yes.

And the third is that one must await that person's decision about whether they want to purchase the hotel on whatever conditions are offered; yes?---Yes, that's the reason I didn't want Grant to have that right, because I didn't want to miss the moment of waiting to and fro to personal or other reasons that I would miss the opportunity. That's exactly the – that's the reason I wanted – I wanted to give him the courtesy, but I did not want to include first right.

Why?---Because of the lapse of time it would take in communications or personal differences, or whatever the future might bring.

So of the three components, you agree with me that those are the three components - - -?---Yes.

- - - of what you understood at the time this letter was written as being a right of first refusal?---Yes.

And of those, the significant point for you was the time it might take - - -?---In agreeance.

Yes?---Yes.

So that nothing else was objectionable to you, was it?---Not so, except that moment of time might be lost if this agreement arose or tardiness arose, and I would miss the opportunity.

That's right. So that that's why, can I suggest to you, that you included in this first paragraph under the option to purchase, these what I'll term "promises" about what you would do in the future if you ever came to sell the hotel. Do you agree with me?---Yes, I omitted that. I wanted to omit that, yes.

Now, you said in your evidence-in-chief, I think, and you said here in writing something to the effect of the second sentence, so let me just read it to you: "Of course, our courtesy would dictate that we inform you of any intent to sell"?---Yes.

So insofar as a first right of refusal involved the communication, as an element of that, of an intent to sell, you were promising him, were you

not – you were saying to him in this correspondence, "Of course, we'll tell you when we intend to sell"?---Yes, and I did so.

We'll come to that?---Okay.

And then can I – the second phrase of this second sentence: "and you would always be free to make an offer to us at any time"?---Yes.

And so the second element, that he could make an offer. You were content to accept that you would accept an offer for him?---I would consider an offer under normal circumstances, yes.

And then can I take you to the third sentence. Do you see: "The building would not be sold before you could place an offer." Do you see that? And that, again, is – I'm sorry. I know that it's unusual, I suppose, in everyday life, but you do need to answer, because - - -?---I'm sorry".

…

"So can I go back and ask you again?---Yes.

"The building would not be sold before you could place an offer"?---Yes.

This is what you said to him?---Yes, I did.

And, again, that's an element in what we've seen as your understanding of the first right of refusal, that - - -?---Yes.

- - - he'd have an opportunity to bid on the hotel. And then the fourth sentence: "Legally, your lease would be permanently set in respect of" – and that's just, as you understand it, the fact that once the lease is made and it's registered, it binds any further owner of the hotel?---Yes. Yes.

And then can I direct your attention, please, to the second paragraph under "option to purchase" in the words: "In addition to this, legally we, of course, would be obliged to inform you if any sale was imminent"?---Yes.

Now, before you wrote that, was it your understanding that as the owner of the freehold, it was your legal obligation – that is, it's to be found in some law or principle – that you had to tell your tenant - - -?---Yes.

- - - that you proposed to sell the freehold, the hotel land?---Yes. Yes.

Okay. So can I summarise it this way, and see if we agree with each other about this. The purpose of you sending this counter-offer was to say to Mr Morgan things which would induce him to accept what you were saying and enter into a business transaction?---Yes, yes.

Yes. And you understood that to be the case. You understood - - -?---I did too.

- - - these things were important to him?---Yes, I did too.

Yes. And you understood they were important because of all the negotiations that you'd had up until this time?---Yes. May I – may I say something or not?

No, no. I just want the answers to my questions. You're ably represented by your own barrister, and he will ask you anything he chooses. And so you chose, can I suggest to you, to put to him the things in this first paragraph which you considered important in persuading him to enter into the arrangement with you. Yes?---Yes.

And those things included what we've seen in these first three sentences?---Yes.

Okay. Now, what you had in mind was that instead of including these provisions in some contractual obligation, you would give him assurances which would make it unnecessary to have this provision in the contract. Isn't that the case?---I didn't need any more. We – we already had discussions that it was going to be a fact. It was going to happen, yeah.

Can I direct your attention, then, to the last paragraph on this page?---Yes.

What you said there: "The way we would market the freehold would make any first real" – quote – "first right of refusal clause redundant, but that does not preclude you from making offers to us," that is, "It was entirely unnecessary because we promise you that before – if we ever decide to sell, we'll tell you and you can make us an offer." That's the equivalent of it?---Under normal circumstances, yes. Yianni and I drafted this, and under normal circumstance, that's what would happen".

(Emphasis added)

[22] The second defendant gave evidence that until the end of May 2013 her relations with Mr Morgan were okay when by that time he had failed to pay insurance and rent was late.[80] She gave evidence of a confrontation with Mr Morgan at a meeting at the end of June 2013 where the failure to pay insurance was mentioned and she said that she told Mr Morgan of her intention to sell the hotel.[81] The next day she said that she instructed Mr Cusack to sell the hotel.[82] Exhibit 24 records that on 6 July 2013 Mr Cusack was appointed as an agent to sell the hotel and that on 6 August 2013 he was appointed managing agent in respect of the lease of the premises.

[23] In cross-examination it was suggested to the second defendant that the sole documentary evidence of the state of accounts between the first plaintiff and the

[80] T2-39 l 10-24.
[81] T2-39 l 40; T2-40 l 12-26.
[82] T2-40 l 30.

second defendants did not suggest that there was any default with respect to rent or on any other account as at May or June 2013.[83]

[24] With respect to the contract for the sale of the hotel by the first defendants to the third defendant[84] the second defendant said in evidence of that sale[85]:

> "Yeah?---It's a very stressed sale, and it came about because Grant wasn't paying rent. I was not really ready for making this sale. It was brought upon me by the lack of respect and rent and accumulated obligations he had refused to pay me. I ran dry of funds.
>
> So what you're really doing is selling the property for less than the bank valuation?---Absolutely.
>
> And you're selling it for about $1.25 million; aren't you?---Absolutely, sir, without a doubt. And it breaks my heart, but I have to keep the bank happy and I'm 60 and I've got no source of other income for them to service the loans I have".

[25] The second defendant's son, Yianni Cassimatis gave evidence in the defence case. In late 2012 he was employed as an administrator helping his mother with book work paying wages and the like.[86] When he received the offer from Mr Morgan (exhibit 2) he gave it to his mother[87] and in response on behalf of his mother he created exhibit 3[88] and he sent it to Mr Morgan.[89] Referring to the counter offer (exhibit 3) he said that there was an error in the document relating to rent. His evidence was that in discussions between his mother and Mr Morgan at which he was present prior to the email exchange rent had been agreed at $180,000 per annum.[90] His account of how the error in the counter offer occurred was[91]:

> "What was the problem?---The document was a template, essentially, that contained various headings, photographs of the building, in order to provide a sale document in the event of entering negotiations with someone to purchase either (a) the building or (b) the business or both. In the course of events, we – **I repopulated that document with various specific bits of verbage** that were to reflect the negotiations that Toula had with Grant, the – also the aspects that she wanted included in the counter-offer. The typo specifically – the incorrect part that I did was I didn't actually check the rental before I sent it off to Grant. That rental was from a previous document that we thought we would perhaps try to achieve at that point when we were – Toula and I were discussing what she may or may not want as the rent. But that wasn't the final document. So unfortunately that page wasn't checked when I sent the final counter-offer that reflected discussion between Grant and Toula".

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[83] See T2-75 referring to the statement of account, exhibit "A" to the affidavit of the second defendant filed 9 October 2013.
[84] See exhibit 27 and exhibit "A" to the affidavit of Mr Turnbull.
[85] T2-65 l 18-28.
[86] T2-81 l 30.
[87] T2-82 l 37.
[88] T2-83 l 1-5.
[89] T2-82 l 44.
[90] T2-83 l 43.
[91] T2-83 l 9-20.

(Emphasis added)

[26] He was cross-examined extensively about the template and how the template compared with exhibit 3. He was unable to give a clear account specifically indicating what was in the template and what "repopulated verbage" he created after the receipt of exhibit 2 on 29 November 2012.[92]

[27] Mr William Cusack was called in the defence case. He is a commercial real estate agent in Townsville involved selling mainly hotels and motels.[93] He has known the second defendant since about 1998 and has acted in the various transactions concerning the Newmarket Hotel and the defendants' interests since 2003.[94] In late 2012 the second defendant approached him to discuss her possibly selling the freehold or the business of the Newmarket Hotel or both.[95] His evidence was that in late 2012 it was a "tough" market for hotels in Townsville and generally[96] and that the banks were not interested in lending on inner city hotels.[97] He said that very few hotels sold in 2012 and those that sold did at very low prices.[98] Specifically referring to the Newmarket Hotel Mr Cusack said that the disadvantages of the hotel in the market were that it did not have any poker machines, it did not sell packaged beer and there was no drive-in nor bottle shop.[99] His evidence was that he obtained one "sale" prospect in 2012 which involved a swap of home units for the hotel.[100] Mr Cusack gave evidence that around June 2013 he had further discussions with the second defendant concerning a sale of the freehold of the hotel.[101] Subsequently he received an approach from an agent Mr George who had a client purchaser Mr Simpson who was interested in inspecting the hotel.[102] Mr Cusack said that he made arrangements with Mr George for an inspection on a Monday, the 22nd of July 2013. To organise the inspection Mr Cusack said he called Mr Morgan on Friday 19th July 2013 and his account of the telephone conversation with Mr Morgan was[103]:

> "MR COLLINS: What did you do insofar as the Newmarket was concerned?---I rang Mr Grant Morgan on the 19th – Friday the 19th. Advised him that my name was Bill Cusack, that I was a licensed real estate agent, that I'd been engaged by Ms Cassimatis to sell the hotel. That I had a buyer who was coming on the Monday to inspect the property, and was that okay with him.
>
> All right. And what was his response to that?---He said yes. He began – he said something like good luck, you know, selling the hotel. Something about the lease, you know. He said good luck or something. Good luck with that lease or something. And I said look, I don't want to get into any discussion about the lease. I've read the lease, the prospective buyer's read the lease.

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[92] See generally T2-85ff.
[93] T2-93 l 8-14.
[94] T2-93.
[95] T2-93 l 43.
[96] T2-93 l 45.
[97] T2-95 l 1-5.
[98] T2-95 l 15-23.
[99] T2-94 l 30-38.
[100] T2-95 l 21-33.
[101] T2-95 l 35.
[102] T2-97 l 30-43.
[103] T2-98 l 9-21.

> He's happy with it. And all I really wanted to do was arrange the appointment. And he said that'll be okay, I'll be there on Monday".

[28] Mr Cusack gave evidence that he met Mr George and Mr Simpson and after driving them around Townsville he drove them to the Newmarket Hotel. On arrival they entered the dining room and Mr Cusack asked one of the staff present if he could speak to Mr Morgan. He said that when Mr Morgan arrived[104]:

> "I had not met Mr Morgan at that stage, and I said my name is Bill Cusack. This is John Simpson, the buyer. This is Richard George, his agent. And I suggested to Mr Morgan that for privacy purposes, it might be better if he take the prospective buyer around the hotel …"

[29] He gave evidence that Mr Morgan and Mr Simpson went off and upon their return[105]:

> "They basically just shook hands, I think exchanged cards, business cards, and Mr Simpson sat down and basically discussed how the inspection went."

[30] In cross-examination Mr Cusack conceded that he was agent for the sale of the hotel to the third defendant and that if that sale proceeded he stood to receive a commission of about $30,000.[106] He gave evidence that after he was appointed managing agent for the hotel he attended at the hotel and verbally demanded from Mr Morgan rent that was owing.[107] He was shown his email of 27 August 2013 giving notice of his appointment as managing agent to Mr Morgan. He conceded that although mention was made of plumbing and electrical issues there was no issue of outstanding rent raised by him in that communication.[108]

[31] There are a number of factual disputes that fall for determination. In large measure they depend upon credit and findings as to whose evidence is to be preferred. In some respects however, the contemporaneous documentation is of assistance.

[32] I was unimpressed with the evidence given by Mr Yianni Cassimatis much of which was glib. He was unable to give a satisfactory account of the differences between the "template" he spoke of and exhibit 3. It may be recalled that when, in the cross-examination of the second defendant, counsel for the plaintiffs called for the "template" it was not produced. The document has not been discovered. I do not accept his evidence that the rental figures included in exhibit 3 were a typographical error on his part.

[33] I do not accept his evidence that in the discussions that he witnessed between his mother and Mr Morgan prior to the exchange of emails commencing with exhibit 2 the rental figure of $180,000 had been mentioned. Nor do I accept the second defendant's evidence in this respect. The contemporaneous documents in December 2012,[109] mention annual rentals commencing at less than $180,000. The first

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[104] T2-98 l 44-47.
[105] T2-99 l 12-14.
[106] T2-100 l 12.
[107] T2-l04 l 30.
[108] Exhibit 13.
[109] For example exhibit 3 and exhibit "E" to the affidavit of Yianni Cassimatis, the lease prepared by Strategic Lawyers.

document suggesting an annual rental at $180,000 is the lease prepared by Mr Turnbull between 3 and 10 January 2013.[110]

[34] After receiving the draft contract and lease prepared by Mr Turnbull Mr Morgan raised issues to do with GST, the security bond and other matters.[111] Mr Turnbull's evidence is that after taking instructions from his client a revised contract and lease was forwarded to Mr Morgan on 21 January 2013. Neither Mr Morgan nor his wife signed the contract or lease until 29 January 2013 following Mr Morgan's visit to Townsville and meetings with the second defendant in late January.

[35] I was impressed with Mr Morgan and with his wife Ms Hassett when they gave evidence. I accept the evidence of Mr Morgan that the second defendant gave an explanation to him in late January 2013 at one of their meetings that the reason for the increase in rental to $180,000 was to satisfy the requirements of the bank. I find that the second defendant had not mentioned to Mr Morgan a rental figure as high as $180,000 before January 2013.

[36] The plaintiffs put into evidence a number of documents subpoenaed from the Bank of Queensland.[112] They confirm that by late 2012 the finances of the first defendants were stressed. The companies controlled by the second defendant were relying upon the credit provided by the bank. In order to satisfy the bank the second defendant sold real property assets to reduce the indebtedness to the bank. The bank statements (Exhibit 15) are instructive. They show that between 13 October 2012 and 8 March 2013 the overdraft on the cheque account increased from $6,086.15 dr to $141,293.19 dr notwithstanding the realisation of some properties. The continued financial accommodation by the bank was dependent upon an updated valuation of the Newmarket Hotel.[113] That valuation assumed a 25 year lease commencing at an annual rental of $160,000.

[37] The evidence given by the second defendant of her finances in 2012[114] and the documents subpoenaed from the Bank of Queensland[115] persuade me that by November and December 2012 the second defendant knew that the financial position was deteriorating rapidly, that unless she secured a reliable tenant for the hotel who could operate the business and pay a commercial rental a forced sale of the hotel might occur. By January 2013 the situation was critical as her evidence demonstrates.[116]:

> "Sorry. I keep referring to the lease. After the contract of the sale of the business was prepared by Mr Turnbull on around the 10th of January there were some changes made to it. Are you familiar with the changes? It had to do with the GST?---The GST was a factor. Grant - it came to my attention that Grant wasn't happy with a GST being plus GST and - and also the bond and to - not to lose the contract I - I agreed that we will make the contract inclusive of GST at 180,000, inclusive of GST, and I was prepared to let go of the bond so that it would facilitate the sale. **Because by that time, your**

[110] See exhibit "A" to the affidavit of Mr Turnbull filed 9 October 2013 (exhibit 26).
[111] See para [10] above.
[112] Exhibits 14 to 21.
[113] Consider Exhibits 18 and 19.
[114] See para [18] above.
[115] Exhibits 14 to 21.
[116] T2-35 l 15-30.

> **Honour, you - it was very dicey for me. I was on the point of having the Bank of Queensland - I had run out of all moneys. My overdraft was way up because the infrastructure of the Newmarket still had to be met on a daily basis. So whether I earnt a lot of money or very little money, I still have the infrastructure to service. So having that and me running out of all my funds, it came clear that the bank - I was more or less on – almost on self – on a self – what's the word when they go into bankruptcy? Sorry. I – what actually happened was Jason Carol would not allow me to cut any cheques.** I would have to ask him permission to cut A, B, C, D or E cheques every day or every second day".
>
> (Emphasis added)

[38] The foregoing evidence of the financial circumstances of the defendants lead me to conclude that the second defendant was prepared to afford any assurance, accommodation or incentive to Mr Morgan providing he and those associated with him would commit to a lease of the business of the hotel on terms satisfactory to the defendants' bank; the second defendant was prepared to agree that the rental would be GST inclusive and to forego a requirement for a security bond. I accept Mr Morgan's evidence[117] that at a meeting prior to he and his wife signing the contract and the next lease (exhibit 6) he said to the second defendant that he would agree to the lease if she agreed to pay the outgoings and that she agreed to this.

[39] It is likely, in the view I take, that Mr Morgan would have sought to obtain the concession with respect to outgoings prior to committing to any contract and lease by signing it. The opportunity for these discussions arose in the meetings in late January at the hotel. Both Mr Morgan and the second defendant were then on friendly terms. He was interested in the business proposition but I accept that he was only prepared to agree to the increase in rent on the condition the defendants would accommodate him with respect to outgoings. I find that the representation was made at a meeting in late January.

[40] In his affidavit filed in the proceedings Mr Morgan deposed that the representations complained of in the statement of claim were made at a meeting that occurred at the hotel in February 2013 that was attended by Mr Tony Muller. Mr Muller has not sworn an affidavit in these proceedings nor was he called to give evidence by either party. Solicitors for both the plaintiffs and the first and second defendants sought to obtain an affidavit from Mr Muller.[118] In view of the contents of the affidavits I do not consider that either party can maintain that any inference should be drawn against the other party by reason of that party's failure to call Mr Muller.

[41] Notwithstanding the pleading that the representations were made in February Mr Morgan gave evidence[119] that the meeting occurred in January.[120] He was cross-examined about this and in response to questions, upon the assumptions put to him, agreed that the meeting may have been in February although that was not his recollection. In addresses Mr Collins suggested the plaintiffs' case should be restricted to the pleading as particularised but he did seek to take advantage of the

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[117] See para [14] above.
[118] See Exhibit 22, affidavit of Kristin Collins and Exhibit 27, the second affidavit of Mr Turnbull.
[119] T1-32 l 30-43.
[120] I have not overlooked that Mr Morgan swore in his affidavit that the meeting was in February. As to this see generally para [15] above.

inconsistency when addressing credit issues. For the plaintiffs Mr Savage QC responded by submitting that the issue litigated was the question of whether representations had been made that induced the registered lease (exhibit 11) executed on 19 March. Alternatively he submitted that he be given leave to amend the statement of claim. At the trial the issue litigated was whether or not the representations were made although the timing of them was relevant to reliance and credit. In the circumstances I am not prepared to hold the plaintiffs to the pleading that the representations were made in February.

[42] In making the finding concerning outgoings I have not overlooked that the settlement statement (exhibit 7) shows that the first plaintiff paid some outgoings for rates. However although Mr Morgan was cross-examined to the effect that he had paid them he was not challenged concerning this apparent inconsistency. In the circumstances I am not prepared to accord particular significance to this matter.

[43] Turning to the alleged representation of a first right to purchase the freehold of the hotel the plaintiffs' case relies upon the evidence of Mr Morgan and also the content of the email counter offer by the first defendants (exhibit 3) under the heading "Option to Purchase". I do not understand the defendants' case to be that any of the plaintiffs were given any prior warning that the third defendant had made an offer to the first defendants to purchase the hotel or that the first defendants proposed to enter into a contract to sell to the third defendant. As I understand the defendants' case the second defendant denies she personally gave any assurance of a right of first refusal or a first right to purchase the freehold and the content of exhibit 3 where it was made plain that no contractual right would be given.

[44] Nevertheless the cross-examination of the plaintiff[121] demonstrates that the second defendant appreciated that Mr Morgan might understand from the words used that he would be informed of any intention to sell, that he would be told when the defendants decided to sell, that the defendant would be legally obliged to inform him if a sale was imminent and that these matters might be understood to afford some comfort to Mr Morgan and induce he and those associated with him to enter into the transaction the subject of the communication.

[45] For the reasons substantially the same as those I outlined in relation to the issues concerning the payment of outgoings I prefer the evidence of Mr Morgan to the evidence of the second defendant upon this matter.

[46] I do not accept the evidence of the second defendant that she made it plain to Mr Morgan in a confrontational meeting in or about June 2013 that she intended to sell the hotel.[122] I do not accept the submission on behalf of the defendants that by the second defendant's words Mr Morgan was put on notice that the second defendant had in mid 2013 a present intention to sell the hotel on the best terms possible rather than wait three years to give Mr Morgan the opportunity to either purchase the hotel or renegotiate the lease.

[47] It is clear that Mr Cusack did attend at the hotel, probably on 22 July 2013 as he said, to show Mr George and Mr Simpson the hotel. I accept that at that time he was acting on instructions from the second defendant. However I have reservations concerning

[121] See para [21] above.
[122] See para [22] above.

the evidence of Mr Cusack to the effect that he put Mr Morgan expressly on notice that he was showing the hotel to a prospective buyer in the explicit terms he swore to.[123] Plainly Mr Morgan showed the gentleman about the hotel. Mr Morgan's evidence was that he mentioned to this gentleman that he had a "first right" to the hotel.[124] While that is evidence that Mr Morgan might have suspected that Mr Simpson was a prospective purchaser it does not demonstrate that Mr Morgan was on notice that the second defendant would sell without first informing him of the offer and giving him an opportunity to purchase.

[48] I also accept the evidence of Mr Morgan that in conversations with the second defendant she told him that after three years the lease could be cancelled or renegotiated.[125] I have already set out the reasons why the second defendant had a powerful incentive to induce Mr Morgan to commit to a 30 year lease at a rental starting at $180,000. For the reasons given by Mr Morgan that representation was important in inducing him and his wife to cause the first plaintiff to purchase the business, enter into the lease and move to Townsville.

[49] Curiously when he gave evidence Mr Morgan did not speak of the detail alleged in paragraph 3(g) of the statement of claim[126] that the renegotiated lease after 3 years would be at a market rental equivalent to, in today's terms, $120,000. However no point was taken concerning this at the trial and in the circumstance that it was agreed that the sworn affidavits were in evidence before me it is not a matter that I should regard as significant.

[50] The evidence of Mr Powell of his meeting with the second defendant in December 2012[127] fortifies me in the findings I have made upon the representations concerning the first right to purchase and the cancelling of or registration of the lease. The second defendant's response to Mr Powell's information that she had been in discussions with another concerning the hotel is consistent not only with her eagerness to assure an acquaintance of Mr Morgan of her desire to lease or to sell the hotel to him but also that he be assured that she would act consistently with that.

[51] The way in which the trial was conducted by both sides resulted in much evidence of conversations being given in very general or conclusory form. Neither party objected that the witnesses should be required to give evidence of their recollection of the actual words used. I mention this because in my summary of evidence and findings there are few references to the words actually spoken.

[52] In submissions it was not strongly contested that any of the three representations would be unlikely to induce a prospective tenant (and a future prospective purchaser).[128] I accept that both the second plaintiffs and their company the first

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[123] See para [27] above.
[124] See para [15] above.
[125] See para [14] above.
[126] And sworn to at paragraph 13(i) of his affidavit filed on 8 October 2013.
[127] See para [17] above.
[128] In submissions on behalf of the defendants Mr Collins of counsel sought to advance a submission that the plaintiffs did not act in reliance because of evidence given by Mr Morgan that certain representations he recalled being made in the presence of Mr Muller might have affected his decision making by the order of 20 per cent. Even if this equivocal evidence could be interpreted as a basis for a conclusion that the representations complained of were an inducement only to the extent of 20 per cent that is more than sufficient to form a basis for a finding of reliance and causation of loss: *Gould v Vaggelas* (1985) 157

plaintiff were induced by each of the representations to enter into the contract (exhibit 6) and later the lease (exhibit 11).

[53] I find that each of the representations made by the second defendant (on behalf of the first defendants) were false and misleading or deceptive[129]. The second defendant's intention in making the representations was not to honour them but to ensure that Mr Morgan and his wife (and through them their company) enter into a long term registrable lease of the hotel (in the case of the company) and a guarantee of the obligations under the lease (in the case of Mr Morgan and Ms Hassett). The second defendant was motivated so to act to satisfy the demands of her bank and to enhance the marketability of the freehold of the hotel by offering it for sale with a long term lease generating a substantial income. I find that it was the intention of the second defendant to sell the hotel on the best terms possible after securing the lease in order to pay off or reduce her indebtedness to the bank. She was not prepared to wait for up to three years and thereafter cancel or renegotiate the lease or to invite Mr Morgan or his interest such as the first plaintiff to make an offer to purchase in the event there was an attractive offer from a third party. It is likely that the defendant's intention with respect to the representations was formed by December 2012 or, at the latest, early January 2013 by which time it was apparent to her that she had to act quickly to secure a lessee.

[54] I find that the plaintiffs have suffered a detriment as a result of the conduct of the defendants. Exhibit 1 is evidence of costs incurred by the plaintiffs associated with the renovation of the hotel and the commencement of trading. The second plaintiffs are bound as guarantors under a long term lease with onerous obligations. The first plaintiff (unless relieved of its obligations) is bound to a long term lease of the hotel. All plaintiffs, unless this court otherwise orders, have suffered a detriment by being bound to the obligations under the lease that are materially different from those that they understood would apply by reason of the representations.

[55] In the circumstances the plaintiffs urged that I should declare the lease void ab initio pursuant to s 243 of the *Australian Consumer Law*. Mr Savage QC who appeared for the plaintiffs referred me to a decision of Burchett J in *Oraka Pty Ltd & Anor v Leda Holdings Pty Ltd*[130] where his Honour referring to the statutory predecessor of s 243 noted that there was authority that a court should not set aside an instrument such as a lease if it would affect the rights of an assignee who was not a party to the contravention. The third defendant did not seek to involve itself in the controversy between the first and second plaintiffs and the first and second defendants. The third defendant indicated that it would abide the order of the court. In the circumstance where the contract for sale to the third defendant has not settled I apprehend that were I to make the declaration sought by the plaintiffs the third defendant would not suffer any detriment, that it would have rights to either terminate the contract or to decline to perform the contract in the circumstance that it would not have the benefit of the registered lease as an assignee.[131]

CLR 215 at 238; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [29]-[31] and [57].

[129] See s 18 of the *Australian Consumer Law*.

[130] [1997] FCA 297 (4 April 1997).

[131] See further the contract of sale exhibit "A" to the affidavit of Mr Turnbull filed 10 October 2013 when read with the standard conditions of contract, exhibit 12.

[56] In the circumstances I propose to make an order declaring the whole of registered lease 715146498 between the first defendants as lessor and the first plaintiff as lessee together with the guarantee thereof by the second plaintiffs void ab initio.

[57] If the plaintiffs seek or require any further or ancillary order[132] I am prepared to entertain an application for such an order.

[58] The plaintiffs' claim for consequential relief should be adjourned to a date to be fixed.

[132] Such as an order requiring the defendants to take all necessary steps and sign any necessary documents so as to effect their removal of the said lease from the Queensland Land Registry.