

**COURT OF APPEAL**

**GOTTERSON JA**

**Appeal No 12198 of 2013  
SC No 634 of 2013**

**MORGO'S LEISURE PTY LTD  
ACN 143 902 836**

**First Applicant**

**GRANT RYAN MORGAN**

**Second Applicant**

**ASHLEE GAI HASSETT**

**Third Applicant**

**DAVARK PTY LTD  
ACN 165 706 856**

**Not a party to the application**

**v**

**TOULA HOLDINGS PTY LTD  
ACN 059 859 684**

**First Respondent**

**DANTE (NQ) PTY LTD  
ACN 100 998 169**

**Second Respondent**

**TOULA CASSIMATIS**

**Third Respondent**

**BRISBANE**

**DATE 19/02/2014**

**JUDGMENT**

- [1] **GOTTERSON JA:** On 30 January 2014, Morgo's Leisure Pty Ltd ("Morgo's"), Grant Ryan Morgan and Ashlee Gai Hassett filed an application for security for costs in respect of an appeal brought against a judgment given in the Supreme Court at Townsville on 21 November 2013. The judgment was given in proceedings initiated by those three parties as plaintiffs against Toula Holdings Pty Ltd and Dante (NQ) Pty Ltd, as first defendants, Toula Cassimatis, as second defendant and Davark Pty Ltd, as third

defendant. In these reasons it is convenient to refer to the three applicants for security collectively as “the applicants” and to the respondents to the application collectively as “the respondents”.

- [2] The judgment declared *void ab initio* a registered lease executed by Morgo’s, as lessee, on 19 March 2013 whereby Toula Holdings and Dante, as lessors, being the owners of the Newmarket Hotel premises in Townsville, granted a lease over the premises for 30 years to Morgo’s. Earlier, on 29 January 2013, Morgo’s and the other parties had executed a lease of the premises. Processing of an approval of a liquor licence had the consequence that the lease was re-engrossed and executed in materially the same terms (except as to commencement date), later, on 19 March.
- [3] Performance of the lease by Morgo’s was guaranteed by Mr Morgan and Ms Hassett pursuant to the terms of the guarantee also executed by them on 29 January 2013.
- [4] The learned trial judge found that Mrs Cassimatis, a director of both Toula Holdings and Dante, had, on their behalf, made oral representations to Mr Morgan which were false and misleading or deceptive, in reliance upon which the applicants entered into the above legally binding agreements.
- [5] A relevant consideration for this application are the prospects of success that the appeal has. His Honour made findings of fact that the representations were made. In doing so, he accepted the evidence of Mr Morgan and rejected that of Mrs Cassimatis. These findings of fact therefore depended on credit findings that his Honour had made within days after hearing the evidence at trial. An appellant who challenges findings based upon assessments of credit usually faces an imposing challenge.
- [6] The respondents to this application point to affidavit evidence of Mr Morgan led at trial that the representations were made to him at a meeting that occurred at a hotel in February 2013 attended also by a Mr Muller. They point out that the applicants did not call Mr Muller in their case and that evidence led at trial to account for this omission was not comprehensive. The fact that the respondents, who had access to Mr Muller, also failed to call him, rather robs the point of much force.
- [7] Of somewhat more significance, in my view, is that the applicant’s pleaded case was that the representations were made in February 2013. Any date in that month was, of course, after the date of execution of the lease (before its re-engrossment) and the guarantee. Notwithstanding the pleading and his affidavit evidence, Mr Morgan gave oral evidence that the meeting at which the representations were made had taken place in January 2013.
- [8] The timing of the representations was relevant to the issue whether they induced the applicants to act in a way that was detrimental to them. His Honour was not prepared to hold the applicant’s to their pleading.
- [9] Had the appeal involved solely challenges to assessments of credit by the learned trial judge, I would have regarded the appeal’s prospects of success as minimal at best. However, the issue to which I have just referred, does add a dimension to the appeal which can fairly be regarded as worthy of argument. Whilst I do not regard the prospects of success overall as substantial, they ought not be dismissed as negligible.
- [10] Also of relevance to the application is the respondents’ financial position. Mrs Cassimatis has sworn an affidavit dated 13 February 2014 to which she has exhibited financial

statements of Toula Holdings and Dante as at 30 June 2013. The substantial asset of each company is its net equity in the Newmarket Hotel premises, put respectively at approximately \$422,150 and \$221,601. Mrs Cassimatis candidly stated in her affidavit that neither company has ready funding to meet any adverse costs order on the appeal. I would add that Mrs Cassimatis also states that an order for security for such costs would stifle the appeal by these two companies. That statement does not sit well with evidence given during the hearing of this application that the respondents' solicitors that have been put in funds sufficiently to prosecute the appeal, although the ultimate source of the funding was not disclosed.

- [11] During the course of the hearing, attention was directed to the financial resources of Mrs Cassimatis. That is because the respondents maintain that an order for security is unnecessary because of her claimed capacity to meet an adverse costs order. I need say it once that the evidence concerning her financial capacity is unconvincing. It consists of a single page document headed "Statement of Assets and Liabilities as at June 2013". It therefore lacks currency by some eight months.
- [12] A number of additional criticisms were made of the reliability of the statement. On its face, the statement suggests that Mrs Cassimatis then had a net asset position of almost \$1,833,000.
- [13] One of the assets was a superannuation balance of \$300,000. However, there was no evidence as to the form of the superannuation fund investments or the accessibility to Mrs Cassimatis of the superannuation. Another asset, a unit at North Ward, was shown by other evidence to have been disposed of by her in May 2013.
- [14] Lastly, the Newmarket Hotel was shown with a value of \$1,950,000 in September 2010. That figure is quite unreliable. In 2013, the Hotel was under contract to Davark for \$1,450,000. The contract was terminated. Now the Hotel is unleased and its value adversely affected in consequence. Further, the value does not reconcile with the net equities in the Hotel of Toula Holdings and Dante to which I have referred.
- [15] Furthermore, the statement does not reconcile with evidence given by Mrs Cassimatis at the trial that at the time when she was negotiating with Mr Morgan, she was "bleeding" and "flat broke".
- [16] Accordingly, I am unable to accept Mrs Cassimatis' assertion that there is no reason for suspecting that she would be unable to meet any costs order in favour of the applicants in respect of this appeal.
- [17] In addition, it is of relevance that any financial incapacity to meet costs on the part of each of the respondents is not due to conduct on the part of the applicants.
- [18] For these reasons, I consider that the relevant considerations weigh in favour of an exercise of the discretion conferred by r 772 of the *Uniform Civil Procedure Rules* in favour of making an order for security for costs. I note that at trial the applicants were represented by senior counsel who acted without the assistance of a junior. The amount of the security should be fixed with that in mind.
- [19] The orders of the Court are that in Appeal No 12198 of 2013:

1. That by 4 pm on 21 March 2014, Toula Holdings Pty Ltd, Dante (NQ) Pty Ltd and Toula Cassimatis provide security for the costs of the appeal in the amount of \$40,000 in a form satisfactory to the Registrar;
2. That the costs of this application be costs in the appeal.