SUPREME COURT OF QUEENSLAND

CITATION:	*Toula Holdings Pty Ltd & Ors v Morgo's Leisure Pty Ltd & Ors* [2014] QCA 320
PARTIES:	**TOULA HOLDINGS PTY LIMITED** ACN 059 859 684 (first appellant) **DANTE (NQ) PTY LTD** ACN 100 998 169 (second appellant) **TOULA CASSIMATIS** (third appellant) **v** **MORGO'S LEISURE PTY LTD** ACN 143 902 836 (first respondent) **GRANT RYAN MORGAN** (second respondent) **ASHLEE GAI HASSETT** (third respondent) **DAVARK PTY LTD** ACN 165 706 856 (not a party to the appeal)
FILE NO/S:	Appeal No 12198 of 2013 SC No 634 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	2 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Muir and Gotterson JJA and Henry J Judgment of the Court
ORDERS:	**1. The sum of $40,000 paid into court by the appellants on 21 March 2014 as security for the respondents' costs of the appeal together with all accretions thereon be paid to the solicitors for the appellants.** **2. Supreme Court proceeding number SC No 634 of 2013 is dismissed with costs.** **3. The appeal is allowed with costs.**

CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – JURISDICTION TO GRANT NEW TRIAL AND OTHER MATTERS – where on 22 August 2014 this Court allowed an appeal against orders of the primary judge made on 21 November 2013 after a trial in Townsville – where this Court set aside a declaration made by the primary judge declaring the lease void *ab initio* and directed that the parties file and serve submissions as to any further orders that should be made to reflect the reasons of this Court including orders as to costs – where the appellants submitted that the proceedings should be dismissed – where the respondents submitted that a retrial should be ordered – whether there should be a retrial *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12, followed *Toula Holdings Pty Ltd & Ors v Morgo's Leisure Pty Ltd & Ors* [2014] QCA 201, considered *Water Board v Moustakas* (1988) 180 CLR 491; [1988] HCA 12, considered
COUNSEL:	No appearance for the appellants, the appellants' submissions were heard on the papers No appearance for the respondents, the respondents' submissions were heard on the papers
SOLICITORS:	Russells Lawyers for the appellants Connolly Suthers Lawyers for the respondents

[1] **THE COURT:** On 22 August 2014 this Court allowed an appeal against orders of the primary judge made on 21 November 2013 after a trial in Townsville. The proceeding was in respect of a lease of the Newmarket Hotel in Townsville entered into between the first appellant, Toula Holdings Pty Limited and the second appellant, Dante (NQ) Pty Ltd as lessors and the first respondent, Morgo's Leisure Pty Ltd as lessee. The second respondent, Grant Morgan and the third respondent, Ashlee Hassett guaranteed the obligations of the first respondent under the lease.

[2] The respondents alleged in their statement of claim that prior to the execution of the lease and guarantee, the third appellant on behalf of the first and second appellants represented to the second respondent on behalf of the first respondent, himself and the third respondent that:

(a) the term of the lease and the rental would be fixed for only three years;

(b) the corporate appellants would pay for the lease outgoings for the first three years "and in any subsequent agreement reached"; and

(c) after the first three years of the lease, assuming that the first respondent had not purchased the Hotel premises from the corporate appellants, they would cancel the lease and enter into a new lease "at a rental in the order of $120,000 per annum".

[3] It was further alleged that the first respondent entered into the lease and the second and third respondents entered into the guarantee in reliance on and induced by the representations which were false.

[4] On 22 August 2014 this Court set aside a declaration made by the primary judge on 21 November 2013 declaring the lease void *ab initio* and directed that the parties file and serve submissions as to any further orders that should be made to reflect the reasons of this Court including orders as to costs.

[5] The appellants submitted that the proceedings should be dismissed. The respondents submitted that a retrial should be ordered for the following reasons. The appeal was ultimately determined by the finding that the primary judge did not understand and had disregarded particular evidence regarding the third representation.[1] The ultimate reason for allowing the appeal is contained in paragraph 107 of this Court's reasons of 22 August 2014 but it does not decide any fact. The ultimate finding relevant to the appeal is to be found at paragraph 113. It is not concluded there that the respondents could not at a retrial make out the representation concerning, for example, rental after the first three years. Rather, whether or not such a finding should be made is said to require a re-assessment of the credibility of the respondents' principal witness, the second respondent, based on other findings concerning the making of the second and third pleaded representations.

[6] An order that there be a retrial was said to be supported also by:

(a) the observation at paragraph 112 of this Court's reasons that the trial was expedited and that the parties sought an urgent determination. The reasons were given expeditiously and the oral and documentary evidence was limited in a way that would be different on a retrial; and

(b) the fact that none of the points ultimately made in the appeal were significant points explored in the cross-examination of the respondents' witnesses and thus not agitated by the respondents in cross-examination of the appellants' witnesses, which would have occurred had the appellants conducted their case differently below.

[7] In order to succeed on any aspect of their case, the respondents had to prove the making of at least one of the three alleged misrepresentations as well as reliance on such misrepresentation or misrepresentations.

[8] The evidence in relation to each of the alleged misrepresentations was discussed in detail in the reasons of Muir JA, with whom the other members of the court agreed. It was concluded in relation to all of the representations that the primary judge "failed to use or has palpably misused his advantage" and acted on evidence which was "glaringly improbable" and "contrary to compelling inferences".[2] Elsewhere in the reasons it is implicitly, if not expressly, found that the alleged misrepresentations were not made out. See, for example, paragraph [120]. Consequently, the respondents did not succeed on any issue that would entitle them to any of the relief claimed by them.

[9] The observations in the reasons concerning the expedited trial and the manner in which the evidence was presented were advanced with a view to explaining the apparent gap between the primary judge's findings and the conclusions compelled by reference to objective facts. The matters on which the respondents rely do not support the conclusion that there should be a retrial. Trials, no matter how expedited and

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1 See paragraph [106] of *Toula Holdings Pty Ltd & Ors v Morgo's Leisure Pty Ltd & Ors* [2014] QCA 201.

2 *Toula Holdings Pty Ltd & Ors v Morgo's Leisure Pty Ltd & Ors* [2014] QCA 201 at [111].

conducted, are not held on a provisional basis. Parties are expected to adduce all of the evidence and present all of the arguments on which they intend to rely. Those requirements arise, in part, as a result of the strong public interest in favour of finality in litigation which was discussed as follows in *D'Orta-Ekenaike v Victoria Legal Aid*:[3]

> "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.
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> …
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> The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called 'fresh evidence rule') are all rules based on the need for finality. As was said in the joint reasons in *Coulton v Holcombe*: '[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial'."

[10] The following observation in the joint judgment in *Water Board v Moustakas*[4] is also relevant:

> "More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below."

[11] The appellants also sought orders in respect of orders made by the primary judge on 21 November 2013 which restrained the appellants from dealing with the land and which were also directed at securing the respondents' claims for damages and costs. There would appear to be no good reason for maintaining these orders but it is undesirable for this Court to deal with a matter not addressed in the course of the appeal without knowledge of what, if anything, has transpired between the parties in relation to the orders.

[12] Unless the parties can agree on a consent order, the outstanding matters should be dealt with by the primary judge.

Orders

[13] For the above reasons it is ordered that:

1. The sum of $40,000 paid into court by the appellants on 21 March 2014 as security for the respondents' costs of the appeal together with all accretions thereon be paid to the solicitors for the appellants.

2. Supreme Court proceeding number SC No 634 of 2013 is dismissed with costs.

3. The appeal is allowed with costs.

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3 (2005) 223 CLR 1 at [34] and [35].

4 (1988) 180 CLR 491 at [13].