SUPREME COURT OF QUEENSLAND

CITATION:	*Toula Holdings Pty Ltd & ors v Morgo's Leisure Pty Ltd & ors* [2019] QSC 196
PARTIES:	**TOULA HOLDINGS PTY LTD** ACN 059 859 684 **DANTE (NQ) PTY LTD** ACN 100 998 169 (applicants) **v** **MORGO'S LEISURE PTY LTD** ACN 143 902 836 (first respondent) **GRANT RYAN MORGAN** **ASHLEE GAI HASSETT** (second respondents)
FILE NO/S:	SC No 634 of 2013
DIVISION:	Civil
PROCEEDING:	Application
DELIVERED EX TEMPORE ON:	20 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2019
JUDGE:	Holmes CJ
ORDER:	**The application is dismissed, with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – where the applicants were successful on appeal in an action brought by the respondent plaintiffs concerning the lease of a hotel – where the applicants seek leave to proceed pursuant to r 389 of the *Uniform Civil Procedure Rules* in an application for compensation for damages pursuant to r 264(3) or r 900(3) of the *Uniform Civil Procedure Rules* – where the trial judge made orders setting timetables for the action on the respondents' undertaking in the usual form as to damages and the applicants' undertaking not to sell the hotel – where the trial judge subsequently made freezing orders against the applicants on the respondents' undertaking as to damages – whether the respondents breached their undertakings for the purposes of r 264(3) or r 900(3) – whether r 264(4) has any application

	Uniform Civil Procedure Rules 1999 (Qld), r 264(3), r 264(4), r 389, r 900(3)
COUNSEL:	M Eastwood for the applicants R D Green for the respondents
SOLICITORS:	Simmons and McCartney for the applicants Connolly Suthers Lawyers for the respondents

[1] The applicants, who were the first defendants to an action brought by the respondent plaintiffs, seek leave to proceed pursuant to r 389 of the *Uniform Civil Procedure Rules* 1999 in an application for compensation for damages said to have been sustained in connection with the proceeding, in which the plaintiffs had given the usual undertaking as to damages.

[2] The background to the application, put briefly, is that the first plaintiff was the lessee of the applicants' hotel, with the lease guaranteed by its directors, the second plaintiffs. They sought a declaration that the lease be declared void and damages for misleading or deceptive conduct. The applicants had entered into a contract for the sale of the hotel on 20 September 2013 at a sale price of $1,450,000, with the completion date 21 days from the date of contract. The plaintiff's action was commenced on 8 October 2013, naming as defendants, in addition to the applicants, their (sole) director, Ms Cassimatis, as second defendant and the prospective purchaser of the hotel as third defendant.

[3] On 10 October 2013, a judge made an order setting dates for the filing of pleadings, disclosure and trial. It was made on the usual undertaking as to damages by the plaintiffs and the undertaking of the applicants and the third defendant to extend the completion date of the contract. A further order, made a week later, set out a revised list of dates and was made on the continuance of the plaintiffs' undertaking and on the prospective buyer's undertaking to agree an extension of the completion date for the contract to 22 November 2013 and the undertaking of both it and the applicants not to complete before then. On 21 November 2013, the primary judge gave judgment, declaring the lease void.

[4] The purchaser declined to complete the contract on the basis of that declaration, because the contract had provided for an assignment of the lease, although it appears that it did not formally terminate the contract until January 2014. Subsequent to judgment, the plaintiffs applied for freezing orders against the applicants and Ms Cassimatis. Those orders, made on 4 December 2013, prevented disposition of their property unless they paid $300,000 into Court or a solicitor's account, or provided security in that amount. Again, the plaintiffs gave an undertaking as to damages. The primary judge's declaration was set aside on appeal in August 2014 and the substantive action was dismissed by order of the Court of Appeal in December 2014. The last action taken by the applicants, on 26 February 2015, was to have the freezing orders set aside and a caveat removed.

[5] When the declaration was made in November 2013 that the lease was void, the applicants evicted the plaintiffs from the hotel, and Ms Cassimatis set about running it herself. Still wanting to achieve a sale of the hotel, the applicants listed it again with a real estate agent in mid-2014. No satisfactory offers were made; ultimately, that real estate agent had his retainer concluded in December 2015 and a new agent was appointed. A contract was entered in 2016, but was not completed for want of finance, and a similar fate befell a

further contract in June 2017. Eventually, a contract for the sale of the property was completed on 26 September 2017 for a sale price of $850,000. It may reasonably be supposed that the lack of a lessee for the hotel had a significant impact on the price achieved.

[6] As the basis for the application for compensation in respect of which they sought leave to proceed, the applicants pointed to r 264(3), which permits a party to apply for an order conditional on the assessment of damages if an undertaking as to damages is contravened. The undertakings given by the plaintiffs in this case were in each instance in the usual form, which, as defined in r 264(5), is, for Part 2 orders[1]:

> "… an undertaking to pay to a person … who is affected by the order an amount the Court decides should be paid for damages the person may sustain because of the order."

[7] This gives rather a circular quality to r 264(3), because it is difficult to see how such an undertaking can be contravened so as to give rise to an entitlement to seek damages unless there already exists an order conditional on the assessment of damages by which the party has failed to abide. At any rate it does not seem to me that there was any contravention of the relevant undertakings by the plaintiffs; there was no order to pay damages with which they had failed to comply. The applicants had also proposed an order pursuant to r 900(3) of the Rules; but again, I do not think it has any application because it permits an application for compensation where a party is in breach of an undertaking. Once more, there was no suggestion of such a breach by the plaintiffs.

[8] That leaves r 264(4), which permits the court to assess or direct the assessment of damages if it finds them to have been sustained because of a Part 2 order. The difficulty here is that the orders identified by the applicants as relevant were the October orders, which did no more than set dates for steps in the proceeding. Those orders were not Part 2 orders and did not cause the applicants to suffer any damage. What prevented the applicants from completing the contract, which was the identified cause of their loss, was their own undertakings. Those undertakings permitted completion on 22 November 2013, but it did not take place, not because of the orders in connection with which the undertakings had been given, but because of the declaration that the lease was void. There was no submission or evidence that the freezing orders made subsequently were the cause of the inability to complete.

[9] Consequently, I do not consider that either r 264 or r 900 has any application or, as a result, that the applicants have any prospect of success in the application for which leave to proceed is sought. I should say that had I thought that the applicant had a viable application for compensation under that rule, other factors would not have precluded a grant of leave. The plaintiffs argued delay: that the application for compensation could have been made at any time from the final orders of the Court of Appeal in 2014; that the compensation claimed was the result of the applicants' own actions in evicting the plaintiffs as tenants, thereby decreasing the value of the hotel; that there would also be difficulty given the lapse of time in assessing the difference made to the value of the asset. It was also relevant, they said, that the first plaintiff was now in liquidation, leaving the second plaintiffs to bear any liability alone. One of the second plaintiffs made an affidavit raising a concern of prejudice because of the likelihood of diminution in the memories of

---

[1] That is, freezing orders made under r 260A and search orders made under r 261A.

witnesses including the first real estate agent whose services were terminated and also pointing to the fact that he and his wife had moved on with their lives in the meantime.

[10] As to those matters, firstly, if I am correct in supposing that the entitlement to compensation is contingent on a finding that damages were sustained, my view is that an applicant is unable to seek compensation in the absence of actual, not prospective damage. It would be reasonable, therefore, for the applicants to wait until completing their efforts to resell the property in order to establish that damage had actually been sustained; and there is no suggestion that they delayed unreasonably in their efforts to effect a resale. The successful contract was completed on 26 September 2017, a demand for compensation made on 6 December 2017 and the application for leave to proceed filed on 16 May 2018. Thereafter, there seems to have been a variety of reasons why it took to this point to be resolved, but it does not seem attributable to the fault of either party. My conclusion is that there has been no inordinate delay by the applicants in bringing this application.

[11] Next, the submission that the applicants have been the cause of their own loss because they evicted the plaintiffs from the hotel does not, I think, have much merit. That eviction was the inevitable result of the declaration that the lease was void. The applicants were left with nothing which they could enforce against the plaintiffs, in circumstances where the latter were some $75,000 in arrears in rent. To have allowed that situation to continue could not have improved matters for the applicants in attempting to re-sell the property. It is true that the events surrounding the giving of the undertakings and the termination of the contract are now five to six years in the past, with some inevitable prejudice to both parties in the establishing of loss or otherwise; but given other considerations I would not have found that decisive. There may have been some prejudice to the second plaintiffs in the liquidation of the first plaintiff, but in the absence of any evidence as to the circumstances of its liquidation and whether it was ever likely to be in a position to contribute to any compensation ordered, I would not have placed any great weight on that matter.

[12] The difficulty for the applicants is that they cannot establish a basis for assessment of compensation under the rules. Given that lack of any prospect of success, the application for leave to proceed must be dismissed, with costs.