

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP847/2018

CATCHWORDS

The return of an injunction and freezing order made ex parte – consideration of the parties’ respective affidavits and exhibits and submissions – directions.

APPLICANT	A & H Natoli Pty Ltd (ACN: 075 565 516)
SECOND APPLICANT:	Organic Oz Pty Ltd (ACN 100 160 094)
RESPONDENT	Teen Entertainment Enterprise Network Pty Ltd (ACN: 625 342 174)
WHERE HELD	Melbourne
BEFORE	Deputy President I. Lulham
HEARING TYPE	Return of the Applicants’ application for an injunction
DATE OF HEARING	14 June 2018
DATE OF ORDER	18 June 2018
DATE OF REASONS	18 June 2018
CITATION	A & H Natoli Pty Ltd v Teen Entertainment Enterprise Network Pty Ltd (Building and Property) [2018] VCAT 918

ORDER

1. The Respondent has leave to be represented by Bob Spaleta in today’s hearing.
2. Pursuant to section 119(1) of the *Victorian Civil and Administrative Tribunal Act 1998* the following correction is made to the Order made 8 June 2018:

On page 2, on the 3rd line of the paragraph commencing “This is a ‘freezing order’ ...” the expression “the undertakings by the Respondent” is replaced by “the undertakings by the Applicant”.

3. Noting that the Order made 8 June 2018 was expressed to have “effect to and including 14 June 2018 at 10:00am”, and that the Order contains injunctions, I record that at the conclusion of the hearing on 14 June 2016 I made an order orally extending that Order until such time as this written Order was issued to the parties.
4. I record that the Respondent has complied with paragraph 6(a) of the Order made 8 June 2018, by filing and serving the affidavit of Bob Spaleta sworn 14 June 2016 (paragraph 35).
5. The injunctions and orders set out in paragraphs 1 – 5, 6(b) – 8 and 10 – 12 of the Order made 8 June 2018 are extended so that they have effect until further Order.
6. This proceeding shall be transferred to the Civil Claims List, and the principal registrar is directed to notify the parties of the new proceeding number as soon as practicable.
7. The Particulars of Claim dated 13 June 2018 and filed at the hearing on 14 June 2018 stand as the Applicants’ Points of Claim.
8. By 12 July 2018 the Respondent must file and serve Points of Defence.
9. By 12 July 2018 the Respondent may file with the Tribunal and serve on the other parties a counterclaim. Any counterclaim by the Respondent must be by way of an Application in the Civil Claims List commencing a separate proceeding (with the fee payable). The counterclaim must contain Points of Counterclaim which set out clearly what claim is being made against which person, each amount that is claimed, how each amount is calculated or arrived at, details of loss or damage and the relief and remedy sought.
10. Any party served with a counterclaim must server Points of Defence to Counterclaim by 9 August 2018.
11. By 30 August 2018, each party shall file with the Tribunal and send to each other party a List of Documents, listing –
 - (a) in Part 1 of Schedule 1, all documents in the party’s possession, custody or power, relating to the questions in this proceeding;
 - (b) in Part 2 of Schedule 1, those documents which the party objects to produce for inspection on the ground of privilege, and the basis upon which privilege is claimed; and

- (c) in Schedule 2, documents relating to the questions in this proceeding which the party has had, but no longer has, in its possession, custody or power, and as to each such document when it was last in the party's possession, custody or power and the party's belief *as to what has become of it*.

A document "*relates to the questions in this proceeding*" if it is a document—

- (a) on which the party relies;
 - (b) that adversely affects the party's own case;
 - (c) that adversely affects another party's case; or
 - (d) that supports another party's case.
12. Upon having been given reasonable notice of the wish to inspect, each party shall permit any other party to inspect a document in Part 1 of Schedule 1 of its List of Documents. Each party shall supply a photocopy of any such document on request, with the party requesting the copy paying the photocopying cost.
 13. **This proceeding (and any counterclaim) is listed for a half day compulsory conference to be conducted by any Member at 1.30pm on 21 August 2018 at 55 King Street Melbourne.** Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions including those relating to the compulsory conference.
 14. All parties must attend the compulsory conference personally or be represented by a duly authorised person with personal knowledge of the issues in dispute, and who has, for all practical purposes, unlimited authority to settle. Costs may be ordered if a party's representative does not have unlimited authority to settle, or where a party refuses to negotiate in good faith at the compulsory conference.
 15. Each party has leave to be represented by a legal practitioner at the compulsory conference.
 16. At least 4 days before the date fixed for the compulsory conference, each party must provide to each other party a document of not more than 4 A4 pages summarising its position and must bring a copy to the conference for the presiding member. The position papers should be marked "Confidential and Without Prejudice". These documents will only be used for the compulsory conference and will not be placed on the Tribunal's file.
 17. Liberty to apply.

18. Costs reserved.

I. Lulham
Deputy President

APPEARANCES:

Applicants	Mr. B. Karvela, legal practitioner
Respondent	Mr. B. Spaleta

REASONS

- 1 On 8 June 2018 the Tribunal granted an injunction and freezing order on an ex parte basis. Mr Bill Karvela, the Applicant's legal practitioner, had sworn an affidavit in support on 7 June 2018. The Order granted injunctions until 10:00am on 14 June 2018, and ordered that there be a further hearing at that time at which both parties could be heard on the question of whether the injunction ought be extended or dissolved.
- 2 Briefly, Mr Karvela had deposed that the Applicants are retail fruiterers; that the Respondent supplied management services to the Applicants and in that role, had taken control of the Applicants' money (described in the Order as the "proceeds from the conduct of the Applicants' businesses") and deposited it in a bank account solely controlled by the Respondent. Essentially the Order of 8 June 2018 froze the Applicants' money in the bank account and restrained the Respondent from exercising rights under a Deed of Charge affecting the Applicants' assets.
- 3 At the hearing on 14 June 2018 Mr Karvela appeared for the Applicants, pursuant to leave granted in paragraph 14 of the Order made 8 June 2018.
- 4 Mr Bob Spaleta produced a certificate of authority by the Respondent, authorising him to appear for it, signed by its sole director Ms Stefanija Posaric and dated 18 May 2018. The certificate complies with the requirements of section 62(7)(a) of the *Victorian Civil and Administrative Tribunal Act 1998*. Mr Spaleta is mentioned in the affidavit of Mr Karvela sworn 7 June 2018, in support of its application for an injunction, and Mr Spaleta has knowledge of the matters in dispute. I am satisfied that it is appropriate that the Respondent be granted leave to be represented by Mr Spaleta in the hearing on 14 June 2018.
- 5 Shortly before the hearing, Mr Spaleta filed an affidavit sworn 14 June 2018 with exhibits, and an Application for Directions Hearing or Orders which stated that the Respondent sought an order dissolving the injunction. Mr Spaleta served a copy of his affidavit on Mr Karvela at the commencement of the hearing. I offered to stand down to give Mr Karvela time to read the affidavit, but he elected to proceed.
- 6 As well as hearing the submissions made by Mr Spaleta and Mr Karvela, I have of course considered the affidavits and exhibits.

- 7 Clearly, the affidavit sworn by Mr Karvela was accepted by the Senior Member presiding on 8 June 2018 as sufficient to warrant the granting of an ex parte injunction. Mr Karvela expressly swore his affidavit “from (his) own knowledge and upon the basis of information and belief as set out (in the affidavit)” but the affidavit essentially exhibited a copy of an Application made by the Respondent to the Victorian Small Business Commission which outlined its perception of the dispute and sought mediation, a written Agreement between the parties dated 4 April 2018 which was central to that dispute, and a copy letter dated 18 May 2018 from Mr Karvela to the Respondent which stated the Applicants’ position that the Agreement was void and/or terminated. In the letter Mr Karvela referred to a Deed of Charge dated 7 May 2018, and said that it too was void and/or terminated, but the Charge itself was not exhibited¹.
- 8 As well as exhibiting those documents, Mr Karvela deposed to some factual matters. In paragraph 11 he deposed that the Respondent had never provided details of the bank account into which money had been deposited, paid suppliers as required by the Agreement, or given the Applicant details of the “management dues” which the Agreement says are payable to the Respondent. At paragraph 13 he deposed that between 4 April 2018 and 18 May 2018 the Respondent² had had control of the money and purportedly deposited it into a bank account, had not accounted to the Applicants in relation to the money, and that the Applicants did not know if the Respondent had applied any of the money to management dues. At paragraph 14 he deposed that the Respondent had registered a security interest over the Applicants and that “there is real risk the (Respondent) may seek to exercise rights under the security interest”.
- 9 So, to a limited extent Mr Karvela’s affidavit contains hearsay evidence. Section 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* provides that the Tribunal is not bound by the rules of evidence. Whilst that section is not a license to the Tribunal to accept all information no matter how presented, I am satisfied that it was appropriate for the Senior Member presiding on 8 June 2018 to accept the contents of Mr Karvela’s affidavit on the hearing of the application for an ex parte injunction, and that it was appropriate for me to consider it at the hearing on 14 June 2018.

¹ I mention the Charge because in the hearing on 14 June 2018 Mr Spaleta protested that the Charge had not been exhibited to Mr Karvela’s affidavit. Mr Karvela replied that he was confident that it had been. Mr Spaleta exhibited a copy of the Charge to his affidavit. I can state that whilst the Charge was not in the bundle of exhibits to Mr Karvela’s affidavit filed with the Tribunal, he had disclosed its existence to the Tribunal, both by referring to it in the letter of 18 May 2018 which was exhibited and by referring to it in paragraph 8 of his affidavit.

² In several places in his affidavit Mr Karvela calls the Respondent the ‘Applicant’, and vice versa. I gather this was caused by the Respondent having applied to the Victorian Small Business Commission for mediation before the VCAT proceeding was issued. In any event, it is an obvious error and as such is not confusing.

- 10 The affidavit of Mr Spaleta sworn 14 June 2018 is deficient in a number of very important respects. Those deficiencies are not “cured” by section 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 11 It is customary in an affidavit for the deponent to give their name address and occupation³. Mr Spaleta did not give an occupation, but merely described himself as a “representative”. During the hearing he said that he was not a legal practitioner. Mr Spaleta’s omission to depose to his occupation does not invalidate the affidavit, but the omission of the information is significant when considering the contents of the affidavit.
- 12 In paragraph 2 he deposed that he was swearing the affidavit in reply to the Applicants’ application for an injunction and Mr Karvela’s affidavit, but the balance of the affidavit is notable for its omission to actually reply. Instead, Mr Spaleta deposed to some pedantic points⁴; deposed to legal submissions as to the rules of evidence and a practice note of the Supreme Court of Victoria; asserted that because Mr Karvela had apparently sworn his affidavit “on instructions” and had not exhibited a copy of the Charge, the Applicants had not made full disclosure when seeking an ex parte injunction and had therefore sought to mislead the Tribunal; and stated that aspects of paragraphs 11 and 13 of Mr Karvela’s affidavit were “false” without stating the factual basis for that assertion.
- 13 The absence of facts makes Mr Spaleta’s denial of paragraph 13 of Mr Karvela’s affidavit in particular an exercise in wordplay. Mr Karvela made some broad statements: in 13(a) that “*all* proceeds from the conduct of the (Applicants’) business have been taken by the (Respondent)”; in 13(b) that “the (Respondent) has not accounted *in any way* as to moneys received”; and in 13(c) that “the (Respondent) has not accounted *in any way* as to” the payment of suppliers [*emphasis added*]. Accordingly, when at paragraph 42 Mr Spaleta deposes that “as to paragraphs 13(a), (b), (c) and (d) the claims are false” without substantiation or further explanation, it is unclear whether or not the denial goes to the entirety of the paragraph – for example in relation to paragraph 13(b), whether Mr Spaleta is deposing that he had properly and fully accounted to the Applicants, or whether he had accounted only in some minor way. The form of Mr Spaleta’s assertion of falsity is ambiguous and most unsatisfactory.

³ The *Victorian Civil and Administrative Tribunal Rules 2008* do not specify requirements for a document to constitute an affidavit. There is no VCAT Rule in the form of r43.01(2) of the *Supreme Court (General Civil Procedure) Rules*, which requires an affidavit filed in that Court to state the deponent's occupation “unless the court otherwise orders”.

⁴ For example, in paragraph 1, noting that in some places in the Applicants' documents they had called the Respondent the ‘Applicant’

- 14 Mr Spaleta exhibited some financial statements of the First Applicant from periods prior to 4 April 2018, and referred to what appear to be loan accounts. In the hearing Mr Spaleta submitted that these old figures were relevant to the Applicants' ability to meet their obligations under the undertaking as to damages underlying the Order made 8 June 2018. However, as Mr Spaleta had not deposed to his occupation, let alone his expertise in the interpretation of financial statements, this part of his affidavit was irrelevant even leaving aside the age of the accounting material.
- 15 In a similar vein, I note that clauses 1 and 2 of the Agreement dated 4 April 2018 assert that the Respondent provides "management consultancy services", and "services for retail and wholesale activities including but not limited to advertising [including social media], market research, procurement, purchasing and pricing of product and other goods and services, financial operations, cash flow management, sales and distribution strategy [including online], staff training, customer services, public relations and community involvement" – where again Mr Spaleta has not deposed to his occupation or expertise, and where the Respondent itself was incorporated on 30 March 2018, merely days before execution of the Agreement.
- 16 The affidavit of Mr Spaleta did at least provide the bank account details, pursuant to paragraph 6(a) of the Order made 8 June 2018.
- 17 In the hearing Mr Spaleta made some assertions as to what was negotiated around the time of the 4 April 2018 Agreement. However, he had not deposed to any of these matters.
- 18 Finally, in paragraph 53 of his affidavit Mr Spaleta deposed that the Tribunal should grant an injunction and make a freezing order against the Applicants, but did not depose to the Respondent's willingness to give an undertaking as to damages. When in the hearing I asked Mr Spaleta if the Respondent would give such an undertaking, he said that he would have to make an enquiry.
- 19 The affidavit of Mr Spaleta is so deficient and lacking in relevant evidence, that the Respondent raises no substantial grounds on which the injunction of 8 June 2018 should not be extended until further Order. On the other hand, I accept the Applicants' submission that because the Agreement of 4 April 2018 was expressed to last for the duration of a lease which has over 9 years more to run, and purported to entitle the Respondent to unspecified "management dues", the Respondent's registration of the Charge after the letter of 18 May 2018 had notified the Respondent that the Applicants considered the Agreement to be void and/or terminated put the Applicants at risk.

- 20 For these reasons I will extend the injunction until further Order.
- 21 After hearing the parties' submissions on the injunction, I heard their submissions on the directions that would be made for the future conduct of the proceeding, and I set out those directions in this Order.

I. Lulham
Deputy President

18 June 2018