

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP851/2018

CATCHWORDS

RETAIL LEASE: application of party to vary undertaking given in support of injunction application in June 2018; consideration of *Adam P. Brown Male Fashion Pty Ltd v Philip Morris Inc* [1981] HCA 39; (1981) 148 CLR 170; application dismissed.

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| APPLICANT | APCO Service Stations Pty Ltd (ACN: 007 229 898) |
| FIRST RESPONDENT | Mouzaya Pty Ltd (ACN: 078 597 038) |
| SECOND RESPONDENT | Fauzi Eid |
| WHERE HELD | Melbourne |
| BEFORE | C. Edquist, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 9 October 2018 |
| DATE OF ORDER | 19 October 2018 |
| CITATION | APCO Service Stations Pty Ltd v Mouzaya Pty Ltd (Building and Property) [2018] VCAT 1642 |

ORDERS

- 1 The applicant's application to vary the terms of the third undertaking given on 14 June 2018, as amended by the Orders made on 22 June 2018, is dismissed.
- 2 The respondent's costs of the application are reserved.

C. Edquist
Member

APPEARANCES:

For Applicant

R Heath QC

For Respondents

Mr C. Henderson of Counsel

REASONS

- 1 The applicant has applied for an order enabling it to vary the terms of the undertaking given in June of this year in support of an application for an injunction against the respondents.
- 2 The background to the application can be briefly stated.
- 3 The applicant (“**APCO**”) is a company which retails petroleum products at service stations throughout Victoria. APCO’s relationship with the first respondent (“**Mouzaya**”) arises out of franchise agreements relating to service stations at 228-234 Settlement Road, Thomastown (“**the Thomastown Premises**”), and 878-834 High Street, Epping (“**the Epping Premises**”).
- 4 The second respondent (“**Mr Eid**”) is a director of Mouzaya.
- 5 APCO entered into a written franchise agreement in respect of the Thomastown service station on 1 December 2013 (“**the Thomastown Franchise Agreement**”). On the same day a sublease of the Thomastown Premises was entered into by APCO as sub-landlord to Mouzaya.
- 6 APCO entered into a franchise agreement with Mouzaya in connection with the Epping service station on 1 July 2014 (“**the Epping Franchise Agreement**”). On the same day a deed of sublease of the Epping Premises was entered into between APCO as sub-landlord and Mouzaya.
- 7 Breaches of both the Thomastown Franchise Agreement and the Epping Franchise Agreement were alleged, and a Breach Notice regarding both Franchise Agreements was subsequently issued by APCO on 19 April 2018. Both Franchise Agreements were terminated on 24 May 2018. By reason of the termination of the Franchise Agreements, the respective subleases also came to an end.
- 8 APCO asserts that Mouzaya did not challenge the Breach Notice or the respective terminations of the Franchise Agreements.¹ Certainly, no application was made promptly after 24 May 2018 by Mouzaya to the Tribunal for any relief in respect of either of the subleases or either of the Franchise Agreements.
- 9 In June of this year, APCO applied to the Tribunal for an injunction on the basis that it asserted that Mouzaya and its agents since 24 May 2018, had been occupying each of the Thomastown Premises and the Epping Premises without its consent.
- 10 The application made by APCO was unusual because it was the landlord, but it was not seeking an order for possession. An application for such an order would, in normal circumstances, equate with final relief. The application was for orders that included injunctions that Mouzaya and Mr

¹ Affidavit of Jeremy Rupert Hallett sworn 12 June 2018 at [29]

Eid vacate and not re-enter either the Thomastown Premises or the Epping Premises.

- 11 In order to obtain an injunction, APCO of course had to give the usual undertaking as to damages. This was the first undertaking given. In addition, APCO gave a second undertaking to take such action as it deems necessary or appropriate to protect and secure the Thomastown Premises and the Epping Premises until the proceeding is determined or resolved by private agreement or until further order of the Tribunal. Furthermore, APCO gave an undertaking not to recommence trading at the Thomastown Premises or the Epping premises, or sell or otherwise transfer the business the subject of each Franchise Agreement, or lease either Premises, until the proceeding is determined, resolved or further order (“**the third undertaking**”). A fourth undertaking was given not to deal with stock at either of the Premises until a stocktake had been undertaken (“**the fourth undertaking**”).
- 12 By consent, the fourth undertaking and the third undertaking were amended slightly by orders made on 22 June 2018.
- 13 As it is the third undertaking which is the subject of the present application, it is appropriate to refer to its full terms. Under the third undertaking APCO agreed not to recommence trading at the Thomastown Premises or the Epping Premises, or sell or otherwise transfer the business the subject of each Franchise Agreement, or lease or otherwise encumber either Premises, until the proceeding is determined or resolved by private agreement or until further order of the Tribunal.

Relevant law

- 14 The parties agree that the relevant, legal principles are expressed by the High Court in *Adam P. Brown Male Fashions Proprietary Limited v Philip Morris Inc.*² The majority, comprising Gibbs CJ, Aickin, Wilson and Brennan JJ, addressed the question of whether a court has power, otherwise than in the case of mistake operative of the time of giving it, to release a party from an undertaking in the absence of consent of the other party, in these terms:

But in our opinion a court undoubtedly has such a power. Just as an interlocutory injunction continues “until further order”, so must an interlocutory order based on an undertaking. A court must remain in control of its interlocutory orders.

- 15 As to the circumstances in which a court ought to vary an undertaking, the majority said:

A further order will be appropriate whenever, inter alia, new facts come into existence or are discovered which render its enforcement unjust: [references omitted]. Of course, the changed circumstances must be established by evidence: [references omitted].

² [1981] HCA 39; (1981) 148 CLR 171

- 16 The task falling to me accordingly is to determine whether new facts have come into existence or been discovered since the giving of the undertaking which render its enforcement unjust.

APCO's submissions

- 17 In summary, APCO's submissions are that circumstances have changed in these respects:
- (a) there has been a delay in filing and serving a defence and counterclaim of eight weeks, and that delay is unreasonable;
 - (b) it is clear from the defence and counterclaim that has been filed that Mouzaya and Mr Eid are not grappling with APCO's contentions and are merely "stonewalling";
 - (c) Mouzaya and Mr Eid have not filed any material countering APCO's contention that it is insolvent;
 - (d) a creditor's petition has been issued by a third party against Mouzaya, which has not been the subject of any application to set aside;
 - (e) it is now clear from the defence that Mouzaya is saying that if its accounts are inaccurate, that is the fault of either the accountant or of Mr Eid's daughter.
 - (f) If the third undertaking is varied so as to enable APCO to start trading in each of the Thomastown Premises and the Epping Premises, there will be a "win-win" as there will be benefits to APCO on the one hand and Mouzaya and Mr Eid on the other.
- 18 I now deal with each of these submissions in turn, taking into account, where relevant, the submissions made on behalf of Mouzaya and Mr Eid.

The delay in filing and serving a defence and counterclaim

- 19 On 10 August 2018 the Tribunal ordered, by consent, that Mouzaya and Mr Eid must file and serve Points of Defence by 24 August 2018 and could file a counterclaim by that date. This order was made in the context that APCO was to file Amended Points of Claim by 8 August 2018. APCO filed its Amended Points of Claim early, on 3 August 2018, but Mouzaya and Mr Eid missed their deadline.
- 20 This breach of orders on the part of Mouzaya and Mr Eid prompted an application by APCO to vary the third undertaking so as to enable APCO to take possession of both Premises and recommence trading. At a Directions Hearing on 13 September 2018 that application was adjourned for determination today, and Mouzaya and Mr Eid were given an extension of time until 1 October 2018 to file Points of Defence and a counterclaim.
- 21 Mouzaya and Mr Eid met this amended timetable.
- 22 If the delay to the timetable is assessed as the difference between 24 August and 1 October 2018, the delay is five weeks and three days. If the delay is

measured as the difference between 24 August and 9 October 2018, it is just short of seven weeks. It is not clear APCO contends that a delay of eight weeks to the prehearing program flows from the default of Mouzaya and Mr Eid.

- 23 Whether the delay is characterised as five weeks or eight weeks, it is not a delay of such a magnitude that I consider that it constitutes changed circumstances for the purposes of APCO's application to vary the third undertaking. The situation here cannot be closely compared with that which arose in *Mondous v Canzoneri*,³ a decision of the Supreme Court of Victoria to which I had been referred by APCO on 13 September 2018.
- 24 There, in the context of Mareva relief sought by the plaintiffs, the defendants had given on 3 November 2016 an undertaking to the Court that they would not deal with, dispose of, or further encumber, inter alia, certain land in Truganina, subject to effecting a contemplated refinancing arrangement. The defendants in April 2018 sought to vary the undertaking to exclude the Truganina land, submitting the proceeding had not progressed expeditiously which has frustrated the defendants' expectation that the land would be unencumbered by the time settlement occurred on 27 April 2018. The plaintiff resisted the variation. Digby J allowed the application to vary the undertaking on the basis that the enforcement of the undertaking as it stood would be unjust in the light of certain factors. They included that when the defendants gave the undertaking in November 2016, Digby J was satisfied that the defendants expected the proceeding would be finalised expeditiously, and that expectation had been frustrated principally by the postponement of the trial. When the undertaking was given, the defendant's expectation was that the dispute would be resolved within 18 months. At the time the application to vary the undertaking was made, pleadings had not closed.
- 25 A delay in the resolution of this proceeding of eight weeks is not to be compared to a further delay of months before a trial in *Mondous v Canzoneri* could take place, in circumstances where almost 18 months had already elapsed since the undertaking had been given by the defendants.

Mouzaya and Mr Eid are merely "stonewalling"

- 26 The principal contention is that in their pleadings Mouzaya and Mr Eid have not substantively addressed the underlying alleged breaches of the respective Franchise Agreements. These include the failure of Mouzaya to provide "an accurate and complete annual profit and loss statement and balance sheet within 90 days of the close of the year ended 30 June 2017".⁴
- 27 APCO in its Amended Points of Claim at [14] acknowledges that purported financial statements for the years ending 30 June 2016 and 30 June 2017 were provided by Mouzaya. However, APCO contends at [15] that the

³ [2018] VSC 194

⁴ APCO's Amended Points of Claim filed 3 August 2018, paragraph 15

financial statements for the year ending 30 June 2017 were inaccurate because they did not disclose a certain debt of \$342,000, did not disclose other debts of \$200,000 and \$10,000, and did not disclose the extent of Mouzaya's debts to the ATO.

- 28 APCO also contends at [24] that it is not receiving access to information required for the purposes of an audit to determine Mouzaya's solvency from Mouzaya's accountant, despite Mouzaya undertaking on 26 April 2018 to provide to APCO's auditor immediate and unrestricted access to that information. APCO says it will now have to rely on the process of discovery to obtain access to the relevant documents.
- 29 Mouzaya's response to APCO's contention regarding inaccuracy in the accounts was that the failure to provide up-to-date accounts was not a new allegation, but had been the basis of the Notice of Breach issued in April 2018. In other words, it was a matter that had been ventilated well before 14 June 2018 when the third undertaking was originally given.
- 30 I accept this particular contention. I note Mouzaya's failure to provide accurate financial statements as at 30 June 2017 was central to the termination of the Franchise Agreements in May 2018.
- 31 I now turn my attention to the supporting proposition that the failure of Mouzaya's accountant to provide APCO and its accountants such information as is required to facilitate an audit of Mouzaya's financial position is also a new factor relevant to APCO's application.
- 32 I note that it is clear from APCO's Amended Points of Claim at [23] that by letter dated 27 April 2018 Mousaya advised APCO's solicitors that it had authorised its accountants Jack Yacoub & Associates to make available to Ferrier Hodgson financial records for the purposes of the audit. It follows that the failure of Jack Yacoub & Associates to make available the relevant information, if there is such a failure, is not a recently emerged matter.

Alleged insolvency of Mouzaya

- 33 In a letter addressed to APCO's solicitors dated 18 April 2018, Mr John Lindholm of Ferrier Hodgson expressed a preliminary view that Mouzaya was insolvent. That letter was provided to Mousaya on 19 April 2018 by APCO's solicitors in a letter which relevantly provided at [6]:
- You will note that on the basis of the documents provided by your client, Mr Lindholm formed the view that:
- (a) On a current asset to current liability basis, Mouzaya does not have the capacity to satisfy its obligations; and
 - (b) Mouzaya is insolvent;⁵
- 34 APCO complains that Mouzaya and Mr Eid have put forward no material to allay its concerns about insolvency.

⁵ Exhibit to the affidavit of Jeremy Rupert Hallett sworn 12 June 2018 at pp 182 and 183.

- 35 Under the Tribunal’s orders made on 13 September 2018, Mouzaya and Mr Eid were given until 5 October 2018 to file and serve any affidavit material upon which they intended to rely at this hearing, and that they had failed to file any such material. It was submitted that the Tribunal should draw an adverse inference against Mouzaya and Mr Eid under *Jones v Dunkel*⁶ to the effect that any affidavit material would not have been of assistance to their case.
- 36 Counsel for Mouzaya and Mr Eid met this submission head on, arguing that the only inference that could be drawn from the failure to file and serve affidavit material was that a forensic decision had been made that no such material was necessary. The reason behind this decision was that it was for APCO to prove there had been changed circumstances such as to justify the amendment of the undertaking.
- 37 I accept this submission, and decline to draw an adverse finding against Mouzaya and Mr Eid under *Jones v Dunkel*.
- 38 Returning to the principal issue, I observe that the allegation of Mouzaya’s insolvency has been an issue since at least April 2018. In my view, the failure by Mouzaya and Mr Eid to provide information rebutting the allegation of insolvency is not a changed circumstance which would justify allowing APCO to vary the terms of the third undertaking.

The creditor’s petition

- 39 At the hearing on 9 October 2018, senior counsel for APCO handed up an affidavit sworn by Jeremy Rupert Hallett on 8 October 2018. Mr Hallett at [3] deposed that on 8 October 2018 he had received an email from the solicitor for Accredited Distributors Pty Ltd which attached a creditor’s statutory demand for payment of debt made by the company pursuant to s459E(2)(e) of the *Corporations Act 2001* (Cth) (“**the Corporations Act**”) and an affidavit sworn in support of the statutory demand.
- 40 I was advised from the bar table by APCO’s senior counsel that no application had been made by Mouzaya to set aside the statutory demand.
- 41 It was submitted on behalf APCO that under s459C of the *Corporations Act*, for the purposes of an insolvency application, the Court must presume that a company is insolvent if, during or after the 3 months ending on the day when the application was made, the company failed (as defined by section 459F) to comply with a statutory demand.
- 42 Mouzaya’s response was that there was no basis on which the Tribunal could presume insolvency, as the presumption created by s459C of the *Corporations Act* only arose in the context of an application for winding up.
- 43 It was further noted by Mouzaya’s counsel that the creditor’s position had only come to Mouzaya’s attention when Mr Hallett’s most recent affidavit had been received on the day before the hearing. It was asserted from the

⁶ (1959) 101 CLR 298; [1959] HCA 8.

bar table that Mouzaya was not insolvent and that any winding up application would be opposed.

- 44 It is not necessary for me in this decision to express a view as to whether the presumption of insolvency created by s459C of the Corporations Act binds the Tribunal in a hearing such as this. I am not prepared, for the reasons set out below, to take into consideration today the statutory demand issued at the behest of Accredited Distributors Pty Ltd.
- 45 When the application to vary the third undertaking was initially raised on 13 September 2018, reliance was placed on an affidavit sworn by Peter Joseph Anderson on 5 September 2018. On that day APCO's application was adjourned to today, and Mouzaya and Mr Eid were given the option of filing affidavit material in response by 5 October 2018. It follows that, although APCO was not expressly given leave to file and serve any further material, it is clear that any such material should have been filed and served a reasonable time before 5 October 2018.
- 46 To allow APCO to substantively rely on affidavit evidence of a statutory demand when the affidavit was only served the day before the hearing would be, in my view, to deny Mouzaya and Mr Eid natural justice. As highlighted by their counsel, there are questions about the statutory demand to be resolved, including the critical issues of whether the statutory demand has been properly served, or whether the alleged debt is actually due. Mouzaya and Mr Eid must be given a reasonable opportunity to investigate these matters. For those reasons, I put the statutory demand to one side for the purposes of today's hearing.

Mouzaya's accounts

- 47 In Mouzaya and Mr Eid's Points of Defence, it is admitted at [15] that Mouzaya's financial statements do not disclose the alleged debt of \$342,000, the alleged debts of \$200,000 and \$10,000, or the full extent of the alleged debt to the ATO. Despite these admissions, Mouzaya and Mr Eid deny the financial statements are in breach of the Franchising Agreements. They contend at [15(e)] that:
- [A]ny omission, inaccuracy or error in the Financial Statements was not a deliberate act of the Respondents and was due to the mistakes and/or other authorised act(s) or omission(s) of the First Respondent's employee(s) and/or agent(s) responsible for the financial affairs of the First Respondent.
- 48 In particulars subjoined to this paragraph, the relevant employee is identified as Mr Eid's daughter, and the relevant agent is identified as Mouzaya's external accountant.
- 49 APCO highlighted these matters when urging the Tribunal to vary the third undertaking.
- 50 I accept that if Mouzaya was, in its Points of Defence, acknowledging for the first time the existence of admitted debts that had not previously been

disclosed, and that its Financial Statements were for this reason inaccurate, then those concessions taken together would constitute new matters which ought to be taken into consideration in assessing whether APCO should be allowed to vary the third undertaking. They would be relevant for the reason that they would make it very difficult, if not impossible, for Mouzaya to contest the validity of the termination of the two Franchise Agreements.

- 51 However, Mouzaya does not go this far. The first point made on its behalf at the hearing is that in the Points of Defence it admits that the Financial Statements do not disclose the alleged \$342,000, the alleged debts of \$200,000, \$10,000, or the full extent of the alleged debt to the ATO, but it does not concede the alleged debts are owing. For this reason it does not concede that the Financial Statements are wrong.
- 52 The second argument regarding the Financial Statements appears in the Points of Defence, where in [15(e)] it is suggested that any omission, inaccuracy or error in the Financial Statements was not a deliberate act of Mouzaya, but is due to the mistakes and/or unauthorised acts of its employees or agents. This argument appears to be based on the proposition that for the purposes of the Franchise Agreements, the Financial Statements are accurate unless they contain deliberate errors. This may be highly contentious. However, it is an argument being relied on, and it reinforces that no concession is being made that the Financial Statements are inaccurate.
- 53 The upshot is that the accuracy of the Financial Statements is still in issue, as they were on the day that APCO gave its undertakings in June. For this reason, I do not think the concessions made by Mouzaya in the Points of Defence constitute new matters which justify allowing APCO to vary the third undertaking.

If the third undertaking is varied, there will be a “win-win”

- 54 The financial driver for the making of this application by APCO can be identified in the affidavit sworn by Mr Anderson on 5 September 2018. At [38] Mr Anderson deposes that between 24 May 2018 and 31 August 2018, at the Epping Premises, APCO lost income (calculated by totalling fuel margin, royalties from shop sales and revenue from the car wash, and deducting expenses) of \$468,684, or \$4,734 a day. At the Thomastown Premises, the total loss of income in this period was \$386,691, resulting in a loss per day of \$3,906. It follows that the daily losses from the two service stations total over \$8,600 a day.
- 55 APCO openly says that it is concerned that at the conclusion of this litigation, which it expects to win, it will not be able to recover anything from Mouzaya because of its insolvency. For this reason, it is keen to limit its losses by reopening the two service stations and starting to trade.

- 56 APCO says that the act of opening up each of the service stations will benefit Mouzaya because the losses which APCO is seeking to pass on to Mouzaya in this proceeding will be reduced. Also, goodwill would be re-established in each of the service stations when they are reopened, and this would be a benefit to Mouzaya in the event that it was successful in the proceeding and obtained an order for repossession of each of the Premises.
- 57 Furthermore, there would be a public benefit because each of the service stations would result in employment of approximately 19 individuals, and the reopening of the service stations would make a discount petrol supplier available to the respective Epping and Thomastown communities.
- 58 When I commented to APCO's senior counsel that all these matters appeared to be relevant to the balance of convenience, he responded that they were advanced as matters of changed circumstances.
- 59 I do not accept the submission that the financial burden upon APCO arising from the respective terminations of the Franchise Agreements is a new matter which the Tribunal ought to take into account in determining the application to vary the third undertaking. The fact that APCO would cease to receive income from each of the service stations following termination of the respective Franchise Agreements would have been clear to APCO before they were terminated. The resulting loss of income is not a new matter. It is only the particularisation of those losses which is new.
- 60 I also do not accept that the benefit that would accrue to Mouzaya in terms of limiting its exposure for damages is a new concept. It is a matter which ought to have been apparent at the time the undertakings were being negotiated.
- 61 The public benefits arising out of re-employment of old service station staff or the employment of new staff, and of having discount service stations reopened, are evident. They are not newly emerged matters to be brought into the equation.
- 62 I accordingly find that the factors referred to by APCO as creating a "win-win" situation are not new matters to be taken into consideration in determining whether to allow APCO to vary its third undertaking.

Final comments and conclusion

- 63 It is possible APCO now realises that by having given an undertaking not to recommence trading at either of the service stations will cost it almost \$9,000 a day and that the losses will continue to mount until the dispute with Mouzaya and Mr Eid is resolved by a determination of the Tribunal, by settlement, or by a further order of the Tribunal. That realisation is not, or at least should not be, new.
- 64 It may be that APCO also now appreciates that this proceeding will not get a hearing date until next year, and that because of its complexity the hearing

is likely to be lengthy, and that it is probable that the Tribunal will reserve its decision. None of these matters should come as a surprise to APCO.

- 65 APCO has not established to my satisfaction new facts that would justify allowing APCO to vary the third undertaking it gave to the extent required to enable it to recommence trading at the Epping Premises and the Thomastown Premises.
- 66 In these circumstances, it is not necessary for me to consider the second part of the test established by the High Court in *Adam P. Brown Male Fashions Proprietary Limited v Philip Morris Inc*, which is whether any new facts established render unjust the enforcement of the third undertaking.
- 67 I accordingly dismiss the application. Mouzaya and Mr Eid's costs of the application are reserved.

C. Edquist
Member