

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/12/2018 4:15:10 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application - Form 15 - Rule 8.01(1)
File Number:	VID180/2018
File Title:	DAVARIA PTY LIMITED v 7-ELEVEN STORES PTY LTD & ORS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Dated: 7/12/2018 4:28:18 PM AEDT

A handwritten signature in blue ink, appearing to read 'Warwick Soden'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Further Amended Originating application starting a representative proceeding under Part IVA of the Federal Court of Australia Act 1976

(filed pursuant to leave granted by Middleton J on 20 November 2018)

No: VID180/2018

Federal Court of Australia
District Registry: Victoria
Division: General

Davaria Pty Limited

Applicant

7-Eleven Stores Pty Ltd and others named in the Schedule

Respondents

To the Respondents

The Applicant applies for the relief set out in this application which has been amended pursuant to Order of Middleton J of ~~9 July~~ 20 November 2018.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Federal Court of Australia
Law Courts Building
305 William St, Melbourne

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of:	The Applicant
Prepared by:	Stewart A Levitt, Levitt Robinson Solicitors
Tel	02 9286 3133
Email	711@levittrobinson.com
Address for service	PO Box 850, Darlinghurst NSW 1300



Details of claim

Terms defined in the [Further Amended Statement of Claim \(Statement of Claim\)](#) carry the same meaning when used in this [Further Amended Originating Application](#).

On the grounds stated in the Statement of Claim, the Applicant claims:

1. Damages against the First Respondent ([Franchisor7-Eleven](#)):
 - (a) for breach of contract;
 - (b) pursuant to section 236 and/or section 243 of the *Australian Consumer Law* (Cth) set out in Schedule 2 of the *Competition and Consumer Act 2010 (CCA)*, as applicable pursuant to section 131 of the CCA, and/or its cognates as applicable, pursuant to legislation in the States and Territories of Australia (collectively, **ACL**), or alternatively section 82 and/or 87 of the *Trade Practices Act 1974* (Cth) (**TPA**) for misleading or deceptive conduct within the meaning of section 18 of the ACL or section 52 of the TPA respectively;
 - (c) pursuant to sections 82 and/or 87(1) and (2) of the CCA for contravention of an applicable industry code within the meaning of section 51ACB of the CCA;
 - (d) pursuant to section 236 and/or section 243 of the ACL for unconscionable conduct within the meaning of section 21 of the ACL.
2. Orders against the Third Respondent (**Bank**) pursuant to section 12GM of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* that the Bank Loan Contracts of the Applicant and/or some or all of the Bank Franchisees be varied or set aside.
3. Further or alternatively to 2 above, damages against the Bank:
 - (a) for breach of contract;
 - (b) pursuant to section 12GF and/or section 12GM of the ASIC Act for unconscionable conduct within the meaning of section 12CB of the ASIC Act.
4. Declarations as against ~~the Franchisor7-Eleven~~ and the Second Respondent (**Master Franchisor**), in respect of the Applicant and, to the extent applicable, following an initial trial of the Applicant's claims and particularisation of any claims by the Franchisees, for the benefit of the Franchisees:
 - (a) as to the proper construction of the material terms of the Franchise Agreements alleged in paragraphs 9 to 24 of the Statement of Claim;



- (b) that the Relevant Terms of the Franchise Agreements referred to in paragraph 36 of the Statement of Claim are:
- (i) unfair terms within the meaning of section 24(1) of the ACL; and
 - (ii) void by reason of section 23(1) of the ACL.
5. Declarations as against the [Franchisor7-Eleven](#), in respect of the Applicant and, to the extent applicable, following an initial trial of the Applicant's claims and particularisation of any claims by the Franchisees, for the benefit of the Franchisees:
- (a) that [the Franchisor7-Eleven](#) breached section 18 of the ACL, or alternatively section 52 of the TPA, by reason of the matters pleaded in paragraphs 41 to 105 of the Statement of Claim;
 - (b) that [the Franchisor7-Eleven](#) contravened section 51ACB of the CCA by reason of the matters pleaded in paragraphs 64 to 67 of the Statement of Claim;
 - (c) that [the Franchisor7-Eleven](#) breached section 21 of the ACL by reason of the matters pleaded in paragraphs 106 to 121 of the Statement of Claim.
6. Declarations as against the Bank, in respect of the Applicant and, to the extent applicable, following an initial trial of the Applicant's claims and particularisation of any claims by the Franchisees, the Franchisees:
- (a) as to the proper construction of the material terms of the Bank Loan Contracts between the Bank and each of the Franchisees alleged in paragraphs 130 to 135 of the Statement of Claim.
7. Interest.
8. Costs.
9. Such further order as this Honourable Court deems fit or the nature of the case requires.

Questions common to claims of group members

10. The questions of law or fact common between the claims of the Applicant and the Franchisees as against [the Franchisor7-Eleven](#) and the Master Franchisor are:
- (a) whether the Franchise Agreements contained the implied terms pleaded in paragraphs 23 to 24 of the Statement of Claim;
 - (b) whether the Relevant Terms of the Franchise Agreements referred to in paragraph 36 of the Statement of Claim are unfair within the meaning of section 24 of the ACL.



11. The questions of law or fact common between the claims of the Applicant and the Franchisees as against ~~7-Eleven~~ ~~the Franchisor~~ are:

Contract Claims

- (a) whether at all times during the Relevant Period, ~~7-Eleven~~ ~~the Franchisor~~ engaged in the C-Store Practices described in paragraph 25 of the Statement of Claim;
- (b) whether at all times during the Relevant Period, ~~7-Eleven~~ ~~the Franchisor~~ engaged in the Inventory Practices described in paragraph 28 of the Statement of Claim;
- ~~(c) whether at all material times during the Relevant Period, the C-Store Prices agreed by the Franchisor with C-Store, and payable by or charged to the Franchisee Applicant and each of the Franchisees for stock ordered by them from C-Store exceeded the Independent Fair Wholesale Price and/or the Best Endeavours Wholesale Price for all, or alternatively a substantial number of, stock items;~~
- ~~(d) whether, at all times during the Relevant Period, by reason of the Wholesale Pricing Conduct, the Franchisor acted in breach of the Franchise Agreement as alleged in paragraphs 29 and 30 of the Statement of Claim;~~
- ~~(e) whether the Franchisor contravened section 18 of the ACL, or alternatively section 52 of the TPA, as referred to in paragraphs 41 to 105 of the Statement of Claim;~~
- ~~(f) whether the Franchisor contravened section 51ACB of the CCA as referred to in paragraphs 64 to 67 of the Statement of Claim;~~
- ~~(g) whether the conduct of the Franchisor was unconscionable in contravention of s.21 of the ACL by reason of any one or more, or all of, paragraphs 106 to 121 of the Statement of Claim;~~
- ~~(h) whether compensation or damages are recoverable in respect of any of the breaches of contract or breaches of duty set out in the Statement of Claim.~~

Misleading Conduct

- ~~(c) whether during the Relevant Period, 7-Eleven provided Franchisees with the “Introductory Pack” of information as alleged in paragraph 41(a) of the Statement of Claim;~~
- ~~(d) whether during the Relevant Period, 7-Eleven provided Franchisees who purchased Convenience Stores with the Franchising Disclosure Document as alleged in paragraph 41(b) of the Statement of Claim;~~



- (e) whether during the Relevant Period, 7-Eleven provided Franchisees who purchased Fuel Stores with the Oilcode Disclosure Document as alleged in paragraph 41(c) of the Current Statement of Claim;
- (f) whether during the Relevant Period, the 7-Eleven Brochure contained the statements alleged in paragraph 42 of the Statement of Claim;
- (g) whether during the Relevant Period, 7-Eleven offered assistance by preparing 7-Eleven supplier and merchandise lists together with recommended retail prices referred to in paragraph 42(f) of the Statement of Claim;
- (h) whether during the Relevant Period, the Franchising Code Disclosure Document contained the statements alleged in paragraph 43 of the Statement of Claim;
- (i) whether during the Relevant Period, the Oilcode Disclosure Document contained the statements alleged in paragraph 44 of the Statement of Claim;
- (j) whether 7-Eleven made any, and if so which, of the following representations:
- (i) the Business Opportunity Representation;
 - (ii) the 7-Eleven Business Opportunity Statements;
 - (iii) the Average Store Financials Accuracy Representation (to the extent it constituted an implied representation);
 - (iv) the Future Average Payroll Cost Representation (to the extent it constituted an implied representation);
 - (v) the Advertising Fund Representation;
 - (vi) the 7-Eleven Supplier Representation.
- (being the Misleading or Deceptive Conduct Representations);
- (k) whether any, and if so which, of the Misleading or Deceptive Conduct Representations were continuing representations;
- (l) whether any, and if so which, of the Misleading or Deceptive Conduct Representations were representations as to future matters;
- (m) whether the making and subsequent maintenance of any or all the Misleading or Deceptive Conduct Representations constituted conduct in trade or commerce;
- Unconscionability
- (n) whether 7-Eleven knew the matters in sub-paragraphs 106 (a)(i), (a)(ii), (a)(vi), (d), (g) and (j) of the Current VID180 SOC.



12. The questions of law or fact common between the claims of the Applicant and the Bank Franchisees as against the Bank are:
- (a) Whether the Bank Agreements-Loan Contracts contained the terms pleaded in paragraphs 130 to 135 of the Statement of Claim;
 - ~~(b) Whether the Bank, in advancing loan funds to the Applicant and each of the Bank Franchisees, breached one or more of the terms in (a) above; and~~
 - ~~(c) Whether the conduct of the Bank was unconscionable in contravention of s 12CB of the ASIC Act by reason of any one or more, or all of, paragraphs 122 to 170 of the Statement of Claim.~~
 - (b) whether the Tripartite Deed contained the terms pleaded in paragraph 125 of the Current VID180 SOC;
 - (c) whether the ANZ knew or ought to have known each of the matters in paragraph 127(a), (b), (g) – (i) and (k) of the Statement of Claim.
 - (d) Did the contractual obligations alleged in paragraphs 132 to 134 of the Statement of Claim require the Bank:
 - (i) to take into account the number of labour hours (whatever they may be) required by the prospective Franchisee to operate the store;
 - (ii) to take into account the award rates (whatever they may be) payable for labour by the prospective Franchisee to operate the store;
 - (iii) to have formed an opinion about the accuracy of the historical or forecasted payroll expense that would be incurred by the prospective Franchisee?”



Claim for interlocutory relief

The Applicant also claims interlocutory relief.

1. Upon the Applicant giving the usual undertaking as to damages, an order that the First Respondent, until further order, be restrained from terminating a Franchise Agreement with the Applicant or Group Members, without leave of the Court.

Representative action

The Applicant brings this application as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth)

The group members to whom this proceeding relates are **Franchisees** who:

- (a) at any time between 20 February 2012 and 19 February 2018 were or commenced to be franchisee parties (**Franchisees**) to a standard-form franchise agreement (**Franchise Agreement**) with the first respondent, 7-Eleven Stores Pty Ltd (**7-Eleven**); and
- (b) have not entered into a release of all of their claims against both 7-Eleven and the Bank arising out of the conduct of 7-Eleven and the Bank described in the Statement of Claim.

**Applicant's address**

The Applicant's address for service is

Stewart A Levitt, Levitt Robinson Solicitors

PO Box 850, Darlinghurst NSW 1300

711@levittrobinson.com

Service on the Respondent

It is intended to serve this application on the Respondents.

Date: 7/12/2018

A handwritten signature in blue ink, appearing to read "Stewart A Levitt", written over a horizontal line.

Stewart A Levitt

Solicitor for the Applicant

Signed by his Special Counsel Brett R Imlay



Schedule

No: VID180/2018

Federal Court of Australia
District Registry: Victoria
Division: General

Second Respondent: 7-ELEVEN INC
Third Respondent: ANZ BANKING GROUP LIMITED