VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. **BP59/2017**

CATCHWORDS

RETAIL LEASES–whether, on a proper construction of Heads of Agreement in respect of an alleged lease, and having regard to the conduct of the parties after the date of the Heads of Agreement, the parties were contractually bound by the Heads of Agreement, such that it amounted to an enforceable lease– found that the parties were not so bound–proceeding dismissed.

APPLICANT	Casdar Pty Ltd (ACN: 005 282 495)
RESPONDENT	Mr Joseph Fanous
WHERE HELD	Melbourne
BEFORE	A. Kincaid, Member
HEARING TYPE	Hearing
DATE OF HEARING	26 July 2017
DATE OF ORDER	26 July 2017
DATE OF WRITTEN REASONS	12 September 2017
CITATION	Casdar Pty Ltd v Fanous (Building and Property) [2017] VCAT 1464

ORDER

1. For the reasons given orally, the respondent must pay $6,448.75 to the applicant.
2. Costs reserved. Should neither party make application for costs by 17 August 2017, there will be no order as to costs.
3. If an application is made by a party for costs, the principal registrar is directed to list the application for hearing before Member Kincaid, allow 30 minutes.

A. Kincaid
Member

APPEARANCES:

For Applicant	Mr J. Korman of Counsel
For Respondent	Mr A. Felkel of Counsel

REASONS

1 I heard this proceeding on 26 July 2017, and gave my decision orally, with reasons. By email dated 18 August 2017, the applicant requested written reasons and, by Originating Motion dated 23 August 2017 filed in the Supreme Court of Victoria, it also seeks leave to appeal.

2 The following reasons are a transcript of my oral reasons, save for minor changes to syntax and layout.

3 The proceeding concerns a dispute arising out of arrangements in regard to retail premises, intended to be used by the respondent as a café, at Heatherton Road, Endeavour Hills (the "**premises**").

4 The parties signed an agreement called "Heads of Agreement" dated 29 July 2015 (the "**Heads of Agreement**"), the terms of which are as follows (emphases added):

HEADS OF AGREEMENT

PREMISES	Part of shop 6/51 Heatherton Road, Endeavour Hills.
SHOP DESCRIPTION	[left blank]
LESSOR	Casdar Pty Ltd [address set out]
LESSOR SOLICITOR	[solicitor's details set out]
LESSEE NAME	Joseph Fanous [handwritten]
LESSEE ADDRESS	[Mr Fanous's address set out]
CONTACT NUMBER	[Mr Fanous's contact number set out]
LESSEE COMPANY NAME	TBA [handwritten]
LESSEE SOLICITOR	TBA [handwritten]
COMMENCING RENTAL	$350 per square metre x 201 square metres=$70,350 per annum/12=$5862.50 per month +GST+ outgoings.
DEPOSIT	$5,862.50 (one month rent)
TERM	3 years with 2 options of 3 years each

RENT REVIEW	Annual increases of CPI including all options
OUTGOINGS	All outgoings and GST pertaining to the premises payable by the lessee, Electricity, telephone, gas, grease trap maintenance (if applicable) council rates, water rates, building insurance to be paid 100% by the tenant.
COMMENCEMENT DATE FOR LEASE	**From signing of Heads of Agreement (to be signed within 7 days).**
COMMENCEMENT DATE FOR RENTAL	2 months from landlord completion of building works
COMPLETION OF BUILDING WORKS	01 September 2015

SPECIAL CONDITIONS TO THE **AGREEMENT FOR LEASE**

1.	The shop already has a planning permit in place for a restaurant. The Lessee should apply immediately for any approval from Council after signing hereof.
2.	The Lessor, its associates, and subsidiaries covenant that the Permitted Use shall be sole and exclusive to the Lessee at 51-53 Heatherton Road Endeavour Hills (Centre) and within 5 km of the Centre.
3.	**Agreement for Lease and Lease subject to lessee's lawyer's final approval within 7 days after the lessor provides the Heads of Agreement [to the] Lessee.**
4.	The Lessor is responsible for and agrees to pay all costs for the completion and installation of Fittings and Fixtures to the facility including • All floor coverings (non-slip flooring, tiles etc) in accordance with Occupational Health & Safety requirements. • Installation of gate/door attached to the roller door. • Light fittings. • Heating and cooling system. • Gas location to be extended to ceiling of shop.

	• All gas, electricity, water, phone and fire alarm systems are available. To be connected by tenant. • Double power points, maximum of five (5). • If tenant wish (sic) to be part of (sic) the neon sign, a location to be provided by the landlord and to be paid by the tenant.
NOTE	**If the lease is under a company name, the landlord will require a guarantee from the two owners.**

[SIGNED BY THE PARTIES, BEING ALSO DESCRIBED AS LESSOR AND LESSEE]

5 Mr Korman of Counsel, who appeared for the applicant, submits that the Heads of Agreement has all the necessary elements of a lease of the premises. He contends that, properly construed as a whole, the Heads of Agreement demonstrates that the parties intended to be immediately bound by its terms, there being "no reference anywhere in the [Heads of Agreement] to an obligation on the parties to draw up and execute a second document".[1]

6 He submits that the respondent wrongfully terminated the lease on the 19 November 2015,[2] and that the applicant was then unable to relet the premises until 1 April 2017. The applicant claims $93,800 damages, plus interest of $8,539.71, details of which are contained in a schedule that was tendered by Mr Korman during the hearing.

7 Mr Felkel of Counsel, who appeared for the respondent, submits that properly construed, the Heads of Agreement reflect the complete terms of a bargain between the parties from which they did not intend to add or depart, but that performance was nevertheless conditional upon execution of a lease. He contends that the arrangement is therefore of the type described within the second category of the decision of *Masters v Cameron*.[3] He says that whilst the respondent occupied the premises until October or November 2015 (the exact date is in contention), a lease as anticipated by the Heads of Agreement was never entered into, and therefore the claim by the applicant for damages must be dismissed.

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1 Applicant's written Closing Submissions at [21].

2 I gave leave to the respondent to rely on a letter, tendered during closing submissions, from his lawyers to the lawyers for the applicant dated 19 November 2015, informing them that the respondent "no longer wishes to proceed with the terms set out in the Heads of Agreement and now seeks a full refund of money and damages incurred from this failed transaction".

3 (1954) 91 CLR 353. Mr Felkel also tendered a report of *Castle Co Pty Ltd trading as Redcliffe Hospital Courtyard Coffee Shop v State of Queensland* [2014] QCAT 514 which, he submitted, provided at paragraph [37] a formulation of the *Masters v Cameron* second category upon which he relied.

8 Having carefully considered the submissions of the parties, I am not persuaded that the Heads of Agreement should be construed in the way submitted on behalf of the applicant. My reasons follow.

9 First, the document is "Heads of Agreement". I recognise that simply because a document is headed "Heads of Agreement" is not determinative of the question whether an agreement is legally binding or not. However, I find this aspect to be relevant, when considered with the other aspects, to which I will now refer.

10 Second, the Heads of Agreement provides the COMMENCEMENT DATE FOR LEASE clause refers to a document "to be signed within 7 days". I consider that reasonable business people in the position of the particular parties would have taken this clause to mean that a lease would be agreed and "signed" within 7 days of the date of the Heads of Agreement. It is difficult to consider what else might be referred to, in the circumstances. The applicant submits that this is a reference to the Heads of Agreement itself being signed within 7 days. Although, from the language used, there may be room for such a submission, in effect it amounts to a proposition that the parties signed a document entitled "Heads of Agreement" on 29 July 2015 which, by its very terms, contemplated that the same Heads of Agreement would be signed within 7 days thereafter. That is not, in my view, the construction to be preferred.

11 Third, I construe Special Condition 3 as meaning, consistently with the COMMENCEMENT DATE FOR LEASE clause, that the lease would be signed within 7 days after the lessor signed the Heads of Agreement to the lease. I have carefully read paragraphs 23–33 of the submissions on behalf of the applicant to the effect that Special Condition 3 grants the respondent a 7 day "cooling off" period in respect of the "Agreement for Lease" and "Lease" obligations otherwise unconditionally assumed by the respondent in the Heads of Agreement. I am unable to accept this argument. In my view, it simply reads too many words into Special Condition 3 that are not there.

12 Fourth, the contents of the NOTE at the bottom of the Heads of Agreement contemplates that another document would be entered into. It is described as "the lease", and also contemplates that it may not be in the names of the respondent (the party to the Heads of Agreement) but in a "company name". In such event, the NOTE states, the applicant would require a guarantee from the "two owners [of the company]". The contents of the NOTE cannot, in my view, be regarded as referring to the Heads of Agreement. That was signed by the respondent alone, as the intending lessee. I have concluded that the terms of the NOTE make clear that the parties expressly contemplated that a lease would be entered into in the future and further, that in the event that the respondent wished it to be in the name of his company (as opposed to his own name), the applicant would agree, provided shareholder guarantees were also given.

13 I also accept the submission made on behalf of the respondent that, given that the Heads of Agreement contemplate a retail premises lease, there were various failures by the applicant, on the date of its execution, to comply with the provisions of the *Retail Leases Act 2003*. For example, no disclosure statement pursuant to section 17 of the *Retail Leases Act 2003* was provided by the applicant to the respondent. This, the respondent submits, militates against the proposition that it was a concluded retail premises lease.

14 The events subsequent to the Heads of Agreement also provide support for the proposition that the parties intended that their relationship would be regulated by a lease to be entered into in the future. The overwhelming weight of Australian authority supports the proposition in *Brambles Holdings Ltd v Bathurst City Council*[4] to the effect that post-contractual conduct is admissible on the question of whether a contract has been formed, as opposed to what the contract means.

15 My review of the correspondence in evidence shows that from 4 August 2015, the parties were negotiating the terms of a proposed lease. By an email of 21 September 2015, the agent of the landlord wrote to the applicant to the effect that the respondent had been advised by his solicitors not to take possession until he had a lease, and that the agent then observed to the landlord that "the leases should have been ready a while back". The landlord responded that he would "call [his] solicitors and will have the leases ready within a couple of weeks". A proposed form of lease was however provided to the respondent on 21 September 2015. By email dated 30 September 2015, the applicant's agents informed the respondent that as agents and body corporate managers of the premises, they would revoke all the invoices relating to [body corporate] expenses "until the leases are signed and an official start date is established". Subsequent correspondence from the respondent's solicitors to the applicant's solicitors dated 6 October 2015 and 27 October 2015 indicates that the parties were still negotiating the terms of the lease, and that the respondent did not then consider himself to be bound.

16 Having found that there was no enforceable lease as contended, it is unnecessary for me to deal with the applicant's damages claim.

17 The respondent contends that in early October 2015, he returned the keys to a person called "Jason", who occupied the premises next door. The applicant concedes that, at the landlord's agent's direction, the respondent first obtained the keys from this gentleman. I find however, there is insufficient evidence of the return of the keys in this manner, to justify a finding of termination at that point. I accept the applicant's contentions that the tenant continued to occupy the premises until 19 November 2015 when, the evidence shows, his lawyers gave notice of termination of the monthly

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4 *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163-164 [25]-[26]; see also Contract Formation, Contract Interpretation, and Subsequent Conduct (2006) 25 *University of Queensland Law Journal* 77.

tenancy that I find existed up until that time. I consider that reasonable notice in the circumstances was 30 days, and therefore I find that the tenant remains liable to pay a further one month's rent from 1 December 2015. I calculate this amount as $6448.75 including GST.

18 There will be liberty to apply for costs.

A. Kincaid
Member