

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP421/2018

CATCHWORDS

Licence agreement – alleged oral agreement to lease – alleged duress – alleged unconscionable conduct – sections 4, 4H, 8 and 182 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic)

APPLICANT	Melbourne Anglican Trust Corporation (ABN 82 862 724 352)
RESPONDENT	Brunswick Town Hall Kebab Pty Ltd (ABN 71 621 011 667)
WHERE HELD	Melbourne
BEFORE	H Nash, Member
HEARING TYPE	Hearing
DATE OF HEARING	24 July 2018
DATE OF ORDER	12 September 2018
CITATION	Melbourne Anglican Trust Corporation v Brunswick Town Hall Kebab Pty Ltd (Building and Property) [2018] VCAT 1413

INTERIM ORDER

- 1 The respondent occupies the premises pursuant to the terms of the Licence Agreement dated 10 August 2017 and not pursuant to an agreement to lease as alleged by the respondent.
- 2 The respondent must vacate the premises on or before 12 September 2018.
- 3 The parties are to provide written submissions to the Tribunal as to:
 - (a) arrears of licence fee owing to 12 September 2018 (or the date on which the respondent vacates the premises); and
 - (b) costs,on or before **25 October 2018**.

H Nash
Member

APPEARANCES:

For Applicant

Ms V Plain, of Counsel

For Respondent

Mr Qureshi, solicitor

REASONS

1. The applicant, Melbourne Anglican Trust Corporation (the **Church**) is the owner of land situated at 260 Sydney Road Brunswick (the **Land**). The respondent, Brunswick Town Hall Kebab Pty Ltd (**BTHK**) is currently occupying part of the Land.
2. The Church says that BTHK is occupying the Land without its consent. The Church says that in March 2018 it terminated the licence to occupy granted to BTHK in respect of having its kebab van on the Land.
3. BTHK says that it is entitled to continue to occupy the Land because there is an oral agreement for a lease from the Church to it to occupy the Land for 3 years.
4. The issue to be determined between the parties is whether there is an oral lease to BTHK to occupy the Land for 3 years.
5. The Tribunal's jurisdiction arises as the Church's claim is a consumer and trader dispute within the meaning of section 182 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (**ACLFTA**). It is the supply, by the Church, of services¹ in relation to real property².

BACKGROUND

6. The Land is next door to the Anglican Church situated on the corner of Sydney Road and Glenlyon Road in Brunswick, Victoria.
7. In about May 2017 the Church entered into a contract to purchase the Land. Settlement of the purchase occurred on 20 July 2017. It was a term of a contract that the vendor provide to the Church vacant possession of the Land at the time of settlement of the purchase.
8. BTHK was on the Land pursuant to a lease with the vendor, but that occupation was terminated by the vendor and BTHK removed the kebab van prior to settlement.
9. Prior to August 2017, BTHK's business was operated by Mr Abou Ahmed Ahmed (**Mr Ahmed**) personally rather than through BTHK, the respondent company.
10. In August 2017, the Church entered into a written licence agreement with BTHK for a 6 month licence to use and occupy a part of the Land. The licence agreement expired on 10 February 2018 (the **Licence**). At the time that the Licence expired, at the request of BTHK, the Church agreed to extend the Licence until 10 March 2018.
11. BTHK says that at some time between May and July 2017 Mr Ahmed was orally promised a three year lease of the Land by the Church. Mr Ahmed says further that the only reason he agreed to the Licence was because he was unduly pressured to enter into the Licence.

¹ Within the meaning of section 4 of the *Australian Consumer Law (Victoria)*

² section 4H

12. The Church denies that any promise or representation was made to BTHK that it could have a three year lease of the Land, and further denies that anyone on behalf of the Church unduly pressured Mr Ahmed to enter into the Licence.
13. The Church served a Notice to Vacate on BTHK on 9 February 2018 requiring BTHK to vacate the Land on or before 10 March 2018.
14. The Church says that since 10 March 2018 BTHK has continued to occupy the Land without the consent of the Church and has not paid any licence fee (rent) for occupying the Land since March 2018.
15. The Church called two witnesses to give evidence on its behalf. The first witness was Mr Adrian Nye who is a church warden and the nominated property warden for the Church. The second witness was Bishop Lindsay Urwin the incumbent priest at the church. A further statutory declaration made by retired Reverend Terry was relied on by the Church to refute conversations Mr Ahmed alleged he had with Reverend Terry.
16. The Church also called Mr Angelo Cristodoulakis, a real estate agent who gave evidence about his contact with Mr Ahmed regarding the Licence.
17. Mr Ahmed was the only witness on behalf of BTHK.

APPLICANT'S EVIDENCE

18. Bishop Urwin was involved in the purchase of the Land and had some discussions with Mr Ahmed prior to the purchase of the Land and afterwards.
19. Bishop Urwin stated that when he saw a 'For Sale' sign had been erected on the Land he thought that it could be good for the Church to acquire it. He therefore began to develop a proposal to be put to the church council, to acquire the Land on behalf of the Church.
20. After some negotiation, a contract was entered into for the Church to purchase the Land. The 'Sold' sign then was placed over the 'For Sale' sign. About 10 days after the sold sign went up Mr Ahmed saw Bishop Urwin in the area and asked him did he know the identity of the purchaser of the Land. Bishop Urwin confirmed that the Church had bought the Land and told Mr Ahmed (who had been concerned about who would buy the Land) that he should "not worry", and that, generally, he should "try and relax".
21. Bishop Urwin recalls that prior to settlement of the purchase of the Land, that he did meet Mr Ahmed who suggested they go and have a coffee at Barkly Square. Bishop Urwin says that at no time during that conversation was the issue of a lease of the Land discussed, nor was the term of 3 years ever discussed. Both Bishop Urwin and Mr Ahmed agree they had a general discussion about life and international matters and the situation in Egypt, Mr Ahmed's home country.

22. Bishop Urwin says he would never have discussed nor agreed to a lease as that would have hampered the plans he had formulated for the Land which formed the proposal for the purchase of the Land.
23. The Church's position was that the Church had not agreed to grant to BTHK a 3 year lease at any time. BTHK was not a tenant or occupier of the Land when the Church became the owner of the Land.
24. One month after it became the owner of the Land, the Church offered to BTHK a 6 month licence to occupy the Land at a monthly fee of \$4,400.00. It was a written document which Mr Ahmed took to his solicitor for advice.
25. After speaking with his solicitor, Mr Ahmed, on behalf of BTHK, signed the Licence.
26. Therefore, the Church's position is that BTHK's occupation of the Land was under the terms of the Licence, and that the Licence was terminated by the service of the Notice to Vacate on 10 March 2018.
27. The evidence of Mr Nye and Bishop Lindsay was primarily directed to rebutting the evidence of Mr Ahmed (which was set out in an affidavit sworn by him on 27 March 2018).
28. Mr Nye explained that the Church had been given legal advice, prior to settlement, that they must ensure that at settlement the Land was handed over to the Church with vacant possession. The reason for this was because this would avoid the Church being bound by any leases or interests in the Land which may have existed with the vendor.
29. It was for this reason the Church insisted the vendor require Mr Ahmed to vacate the Land prior to settlement. This was done and Mr Ahmed vacated the Land in early July.
30. Bishop Urwin stated that he was aware that Mr Ahmed thought that he was leaving the land prior to position settlement occurring as a favour to the church.
31. It was at this time on 10 July 2017 that Mr Ragad on behalf of Mr Ahmed wrote an email to Nelson Alexander about Mr Ahmed wanting to stay on the Land. Bishop Urwin responded to that email stating that the Church required Mr Ahmed to vacate the Land prior to settlement. And that the Church "was willing to discuss [with Mr Ahmed] a proposed new licence for part of the property after settlement occurs."
32. Mr Nye confirmed that he was aware that Mr Ahmed was concerned about what he would do with BTHK after he left the Land. He didn't have a location where he could park the van away from the Land. Having been told by Mr Ahmed of this concern, the Church offered him the temporary use of some land owned by the Church around the corner from the Land. An offer was made to Mr Ahmed that he could move his kebab van to this empty block and store the kebab van there temporarily and free of charge for one month. This arrangement was written down and signed by both the Church and Mr Ahmed. Before signing this agreement, Mr Ahmed

obtained legal advice from Mr Mohammed Ragad, a solicitor based in Newport, Victoria.

33. In August 2017, Mr Ahmed attended at Nelson Alexander's office to collect the proposed licence agreement to take to get legal advice. Mr Christodoulakis stated that when Mr Ahmed attended at the office he said to Mr Christodoulakis, "I was told I would get a lease". Mr Christodoulakis responded by saying, "we don't know anything about a lease, we were told you were getting a licence for 6 months. Here's the licence agreement." Mr Ahmed then took the licence agreement with him to obtain legal advice, and then he signed the agreement and returned it to Nelson Alexander.
34. Mr Nye denied having any conversation with Mr Ahmed regarding a lease of the Land. He said that as he had no authority to grant any interest in the land on behalf of the Church and that he had no discussions about a lease at all.
35. At no stage, once the church became the owner of the land, did Mr Ahmed request a lease and at no time was the term of 3 years ever discussed. Bishop Urwin believed he had made it clear in his letter dated 12 July 2017 that the Church was open to discussing a licence only. Further, Bishop Urwin says the term of three years was never discussed with Mr Ahmed. In fact, no term was ever discussed, the Church just proposed the 6 month period for the licence after considering the timeframe before the Church could take steps towards its development of the Land as planned.
36. Mr Nye and Bishop Urwin also deny that either of them ever exerted any pressure on Mr Ahmed to sign the licence agreement. They both agree that Mr Ahmed had vacated the Land and that a licence agreement was the only circumstance on which Mr Ahmed would be allowed to use the Land again but otherwise there was no unconscionable conduct on the part of the Church to get Mr Ahmed to sign the Licence.

RESPONDENT'S EVIDENCE

37. In 2006 Mr Ahmed entered into an agreement with the vendor of the Land to lease the Land. Mr Ahmed then started a carwash business on the Land. He paid for electricity and water to be connected at the Land. He originally leased the land for \$1,500 per month and lived in the back area.
38. Later he bought a caravan to start BTHK business. That business became the main business he operated from the premises. A few years ago the vendor had wanted to sell the Land but Mr Ahmed could not afford to buy it.
39. In about May 2017, the vendor decided to sell the Land and a 'For Sale' sign was erected on the Land. Mr Ahmed said he was very worried about who would buy the Land – "they might use it to build a multi-storey apartment building or something and then what would I do with my kebab van?"

40. Mr Ahmed said he spoke with Bishop Urwin after the 'Sold' sign went up and he said to Mr Ahmed, "Do not worry, you go home and relax, you will stay in the shop".
41. The next time Mr Ahmed said he spoke with someone from the Church was when he met Mr Adrian Nye at the front door of the Church. He said to him I want to speak to Bishop Urwin about the lease and that Mr Nye responded by saying, we should go and have a coffee to talk about this.
42. Mr Ahmed says both Mr Nye and Bishop Urwin promised him, at different times, over coffee at Barkley Square that he could have a lease of the land. He says the promise was made by each Mr Nye and Bishop Irwin telling him not to worry he would be ok and they would look after him. Mr Ahmed interpreted this to mean he would be given a lease of the land.
43. Mr Ahmed says he also had a conversation with "Mr Jeffrey" [Reverend Terry] the former priest at the Church who has since retired to New South Wales. Mr Ahmed says Reverend Terry told him "we can't give you six to nine years but we can give you 3 years" and that he said "we will try for more in another 3 years but can't promise you anything". Reverend Terry in his statutory declaration filed with the Tribunal disputes this conversation in its entirety.
44. Mr Ahmed denies ever seeing the letter from Reverend Urwin dated 12 July 2017. He says that he always understood that the Church was open to negotiations and that he believed this meant that the Church was open to giving him a lease as the Church had never said how many days, months or years. The Church had never said anything about length of time until he received the Licence.
45. Mr Ahmed did agree that he obtained legal advice when he signed the Licence and that his solicitor told him it was a licence for 6 months.
46. Mr Ahmed said he signed the licence agreement because if he didn't he wouldn't be able to run BTHK business from the land.

DISCUSSION AND FINDINGS

47. The Church submits that BTHK was only incorporated on 10 August 2017 therefore it could not have been promised a lease in July 2017 as alleged by Mr Ahmed. Mr Ahmed is the director of the respondent but he's not a party personally to this proceeding.
48. This issue was not put to Mr Ahmed during the course of his evidence. It is fair to say that Mr Ahmed's evidence did not differentiate between which entity was running the business at which time, and I think it is unlikely he had turned his mind to this aspect of his claim. He simply believed he would get a lease and did not differentiate between himself and the company.
49. I do not find that this in itself is a reason for BTHK's counterclaim, that there was an oral agreement for a lease, to fail.

50. With respect to the substantive issue between the parties I am asked to determine whether or not there was an oral lease entered into between the parties.
51. This issue is a question of fact rather than of law. It is a question as to whether certain representations and conduct was sufficient to give rise to an oral contract.
52. There is no dispute between the parties as to the following facts:
 - a) The Church is the registered proprietor of the Land and became the registered proprietor of the Land on or about 20 July 2017.
 - b) BTHK entered into the Licence on or about 10 August 2017.
 - c) The Church gave BTHK a notice to vacate the land dated 9 February 2018.
 - d) BTHK remains in possession of the Land despite the notice to vacate.
 - e) BTHK has not paid the licence fee since March 2018.
53. Upon being asked to vacate the Land by the vendor, it appears from the evidence given by Mr Ahmed, that he did not understand that that brought an end to his lease of the Land. He believed he was just doing a favour for the Church. I find that it was this misunderstanding of what was occurring that prompted the email from Mr Ragad, his solicitor, to Nelson Alexander, and Bishop Urwin's response dated 12 July 2017.
54. This response is very clear that the Church requires Mr Ahmed to vacate the Land prior to settlement. This brought an end to his interest in the Land. The Church was open to discussing a future licence of the Land, but nothing had been agreed.
55. It was clear from this letter, which was sent to Mr Ahmed's solicitor that once Mr Ahmed vacated the Land, he had not right or entitlement to return to the Land.
56. The evidence indicates, and I find, that while Mr Ahmed was hopeful of being granted a lease of the property and considered that the Church was always open to negotiate that with him, at no time was there an agreement between him and the Church that he would be granted the lease.
57. There is no evidence from Mr Ahmed nor from the Church that a term of three years was ever discussed. Mr Ahmed acknowledged when giving evidence that that agreement had not been expressly discussed, but rather that because no length of time had been mentioned prior to the licence being given to him he always believed that it remained an option for him to be given a 3 year lease.
58. It appears that because Mr Ahmed's previous lease with the vendor was for three yearly periods (with options to renew) he assumed all leases would be for three years or a multiple of three years.
59. In order for parties to enter into a binding contract there must be a common intention of the parties to do so and the essential terms must have been

agreed so that there is sufficient certainty to the agreement reached. In this case, for Mr Ahmed to establish that a lease has been agreed to between the parties, the essential terms to be agreed would be the area of the Land to be let, the length of time of the lease and the rent payable.

60. There is no evidence before the Tribunal that any of these matters had been agreed between the parties prior to the Licence being presented to Mr Ahmed for his consideration. Rather than there being an oral lease agreed, the only agreement prior to this was, I find, an “agreement to discuss”.
61. Mr Ahmed was then provided with the proposed Licence. He took it away and obtained independent legal advice. At no stage did his solicitor assert to the Church that a lease had been agreed not a licence and in fact, Mr Ahmed signed the Licence.
62. I therefore find that there was no oral agreement to lease for a term of three years between the parties.
63. Although it was not argued before me, I also find from the evidence, for completeness, that there were no acts of part performance by BTHK specifically referable to the existence of the alleged agreement to lease. BTHK’s occupation of the Land is equally referable to the grant of the Licence, as extended. The claim as to the alleged agreement therefore fails by force of section 126 of the *Instruments Act 1958* (Vic).
64. In relation to Mr Ahmed’s allegations that he only signed the Licence because he was placed under undue pressure, I find that there is no evidence before me of any conduct by the Church directed to Mr Ahmed signing the Licence. In fact, it appears that the Church did not have any contact with Mr Ahmed concerning the Licence, it was given to him through Nelson Alexander who had all future contact with Mr Ahmed including serving the Notice to Vacate on 9 February 2018.
65. Further, Mr Ahmed did not give evidence of any undue pressure so as to amount to duress or unconscionable conduct by the Church, which caused him to sign the Licence.
66. It appears that the pressure Mr Ahmed refers to was simply the pressure he placed on himself because he was no longer occupying the land and wanted to return to the land in order to continue with his kebab van business. Mr Ahmed thought he was simply doing the Church a favour when he vacated the Land in early July 2017. He had obtained legal advice before he did so, but appears not to have accepted that once he vacated the Land he no longer had a right to occupy the Land unless the Church agreed to allow him back on the Land and if it did agree to, it would be on terms acceptable to the Church, not terms dictated by Mr Ahmed.
67. I find that his desire to operate a business from the Land, but had not been operating the business from the Land for over a month by the time the Licence was signed resulted in Mr Ahmed feeling that he was under financial pressure to begin trading again. This does not constitute pressure

from the Church causing him to enter into the Licence; any pressure that he felt was of his own making.

68. I therefore find that the Licence is a binding contract between the parties for a term of 6 months. Accordingly the notice to vacate dated 9 February 2018 is effective, and BTHK should have vacated the premises in accordance with that notice on 10 March 2018.
69. BTHK must vacate the premises and pay all outstanding licence fees.
70. I will order that:
 1. The respondent occupies the premises pursuant to the terms of the Licence Agreement dated 10 August 2017 and not pursuant to an agreement to lease as alleged by the respondent.
 2. The respondent must vacate the premises on or before 12 September 2018.
 3. The parties are to provide written submissions to the Tribunal as to:
 - (a) arrears of licence fee owing to 12 September 2018 (or the date on which the respondent vacates the premises); and
 - (b) costson or before **25 October 2018**.

H Nash
Member