High Court of Australia

# Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd [2016] HCA 26 (20 July 2016)

Last Updated: 14 October 2016

**HIGH COURT OF AUSTRALIA**

FRENCH CJ,

KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

CROWN MELBOURNE LIMITED APPELLANT

AND

COSMOPOLITAN HOTEL (VIC) PTY LTD &

ANOR RESPONDENTS

*Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd*

[2016] HCA 26

*20 July 2016*

M253/2015

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside orders 2 to 6 of the Court of Appeal of the Supreme Court of Victoria made on 8 April 2015, and in their place order that the appeal to that Court be dismissed with costs.*

3. *Special leave to cross-appeal granted, limited to ground 4 of the Notice of Cross-Appeal dated 24 December 2015.*

4. *Cross-appeal dismissed with costs.*

On appeal from the Supreme Court of Victoria

**Representation**

B W Walker SC with N D Hopkins QC for the appellant (instructed by Minter Ellison Lawyers)

M R Pearce SC with R S Hay QC for the respondents (instructed by Mills Oakley Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

**CATCHWORDS**

**Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd**

Contract – Collateral contract – Where tenants held five year leases under which they operated two restaurants – Where clause of leases required landlord to give notice that leases were to be renewed or continued or the premises were to be vacated – Where in course of negotiations for further leases landlord made statement to tenants that they would be "looked after at renewal time" – Where landlord required tenants to vacate premises on expiration of leases – Whether statement gave rise to collateral contract – Whether statement promissory in nature – Whether obligation uncertain.

Estoppel – Whether statement to tenants that they would be "looked after at renewal time" could give rise to estoppel – Whether statement capable of conveying to reasonable person that tenants would be offered further lease – Whether expectation acted upon by tenants.

Appeals – Procedure – Where question whether statement amounted to binding contractual promise – Whether question of fact or question of law.

Words and phrases – "certainty", "collateral contract", "oral contract", "promissory estoppel", "proprietary estoppel", "question of fact", "question of law", "reasonable correspondence", "remittal".

*Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s 148.

1. FRENCH CJ, KIEFEL AND BELL JJ. In proceedings brought by the respondents ("the tenants"), the Victorian Civil and Administrative Tribunal ("the VCAT")[1] found that the appellant ("Crown") made a statement to the tenants in the course of negotiations for their leases, to the effect that the tenants would be "looked after at renewal time". The VCAT determined that the statement gave rise to a collateral contract which obliged Crown to offer a renewal of the leases for five years on terms to be decided by Crown. The VCAT further determined that should that conclusion be wrong, it would have also accepted the tenants' submission that Crown was estopped from denying the existence of the collateral contract. It ordered that Crown pay the first respondent[2] $467,505.00 and the second respondent[3] $1,143,167.00 in damages for breach of that agreement.

2. The primary judge[4] and the Court of Appeal of the Supreme Court of Victoria[5] held that the VCAT was in error and that the statement did not give rise to an enforceable obligation pursuant to a collateral contract. The primary judge also held that no estoppel arose. However, the Court of Appeal ordered that the matter be remitted to the VCAT for further determination on the issue of what relief could be given, on the basis that the statement founded a promissory estoppel.

3. For the reasons which follow, the Court of Appeal was correct to conclude that there was no collateral contract but it was in error in remitting the issue of estoppel. The tenants could not succeed on that issue.

Background

4. Crown is the owner of the Melbourne Casino and Entertainment Complex. The tenants held leases of two areas in the Complex in which, after 1 September 2005, they operated two restaurants. Before 1 September 2005, other companies controlled by Mr Zampelis (director of the tenants) had operated those restaurants under leases from Crown which expired at the end of May. In early 2005 negotiations commenced between the tenants and Crown for new leases. It may reasonably be inferred from the discussions which followed that the representatives of both parties were experienced in negotiations of this kind.

5. The new leases which were offered by Crown were limited to a term of five years and did not contain an option for renewal. Clause 2.3 of each lease provided only that Crown was to give at least six months notice to the tenants prior to the expiration of the lease stating whether:

"(a) the Landlord will renew this Lease, and on what terms (this may include a requirement to refurbish the Premises or to move to different premises ...);

(b) the Landlord will allow the Tenant to occupy the Premises on a monthly tenancy after the Expiry Date; or

(c) the Landlord will require the Tenant to vacate the Premises by the Expiry Date."

6. It was a condition of the leases that a major refurbishment of the premises be undertaken by the tenants. Mr Zampelis, the tenants' representative in the negotiations, was concerned about the cost of the refurbishment and sought to obtain a commitment from Crown to enable the tenants to continue to trade for a further five years. Crown, for its part, was unwilling to offer any further term on the lease. Leases in the terms offered by Crown, and limited to a term of five years, were signed by the tenants in November 2005 but were not delivered to Crown until March 2006 when Crown demanded them ("the 2005 leases").

7. In October 2008 Crown invited tenders for new leases of the premises and the tenants put in tenders in March 2009. In December 2009 Crown gave notice, pursuant to cl 2.3(c), requiring them to vacate the premises on the expiration of the 2005 leases, 31 August 2010.

8. In July 2010 the tenants brought proceedings in the VCAT in which they alleged that a series of representations had been made by representatives of Crown to Mr Zampelis, to the effect that the tenants would be given a further term of five years following the expiration of the 2005 leases. These representations were said to amount to a promise that Crown would exercise its power under cl 2.3(a) of the 2005 leases and offer a renewal for a further five year term. The tenants claimed to have been induced by the representations to execute the leases and to carry out the refurbishments. Two, alternative, legal consequences were said to follow from the promise: a collateral contract, by which Crown was obliged to offer the tenants further five year leases, came into existence, or an estoppel arose which prevented Crown from denying that obligation. Importantly, the terms of the further leases were said to be the same (or the same, mutatis mutandis) as for the 2005 leases.

9. The VCAT did not find**[6]** that Crown's representatives had made representations in the terms claimed, but it did find**[7]** that the statement referred to at the outset of these reasons gave rise to a collateral contract. The compensation which it ordered that Crown pay for breach of its obligation, to offer a renewal of the leases for a further term of five years, was assessed**[8]** by reference to the profits the tenants would have made under hypothetical renewed leases.

10. The decision of the VCAT was set aside on appeal to the Supreme Court of Victoria**[9]**. The Court of Appeal**[10]** granted the tenants leave to appeal but dismissed the appeal save with respect to the estoppel issue, which it remitted to the VCAT for determination of "what equitable relief, if any, should be granted", in accordance with the Court of Appeal's reasons.

The evidence and the VCAT's findings

11. Mr Zampelis gave evidence before the VCAT that in meetings with Mr John Williams and in a chance encounter with Mr Lloyd Williams, both representatives of Crown, Mr Zampelis had been assured that the 2005 leases would be renewed after their five year term. Mr Zampelis said that in a further meeting between himself and another Crown representative, Mr Boesley, in December 2005, at which others including Mr Zampelis' bank manager were in attendance, Mr Boesley gave him the same assurance. He said that Mr Boesley repeated this assurance in a telephone conversation following the meeting and in

another conversation in February 2006, shortly prior to the executed leases being handed over to Crown.

12. The VCAT did not accept Mr Zampelis' evidence of having received assurances in these terms. It considered[11] that Mr Zampelis was prone to embellishment and exaggeration about Crown's statements. It gave[12] detailed reasons for its finding that it was improbable that Crown made the alleged promise to grant a renewal for the further term. It did accept[13] that Mr Zampelis sought assurances from Crown about a longer lease term, because he believed that a longer trading period was necessary to recoup the substantial costs of refurbishment. And it accepted that a meeting took place in December 2005.

13. The VCAT preferred[14] to rely upon evidence of a hand-written note, which had been made by Mr Zampelis' bank manager, of the conversations which had taken place at the December meeting. It accorded, to an extent, with aspects of Mr Zampelis' version of what had been said. On the basis of this evidence, the VCAT found[15] that on or about 6 December 2005 Mr Boesley made a statement to the effect that:

"if Mr Zampelis spent the money that, under Crown's leases, the tenants were required to spend to achieve a major refurbishment to a high standard, he would be 'looked after at renewal time', and that the leases had been limited to a five year term only because they would thereby be aligned with other tenants' leases."

The VCAT made[16] a specific finding that Crown had not expressly stated that it would renew the 2005 leases, but that Mr Boesley had said only that Mr Zampelis (and therefore the tenants) would be looked after at renewal time.

The VCAT's reasoning

14. It is the process of reasoning which the VCAT then undertook which is in issue. It first determined[17] that the statement that Mr Zampelis would be "looked after at renewal time" was promissory in nature. Whilst it accepted[18] that the words "looked after", viewed in isolation, were vague, it considered that in context and objectively, a reasonable person would consider that the statement amounted to a promise that Crown would give a notice under cl 2.3(a) that it would renew each of the 2005 leases. This was held to be sufficient to give rise to a legal obligation.

15. Because the promise to renew was of an existing five year lease, the VCAT considered[19] it to be necessarily implied that the renewal would be for the same period. This was the only term which the VCAT identified as present in the offer which Crown was obliged to make; Crown was otherwise able to stipulate the terms. It rejected[20] the tenants' claim that the promise meant that the leases were to be renewed on the same terms and conditions as the 2005 leases, or on the same terms and conditions as the 2005 leases with necessary changes (mutatis mutandis).

16. In the VCAT's view, the promise Crown made did not require Crown to offer any particular terms to the tenants, other than the five year term. The terms which Crown was to offer were at its discretion. The VCAT did not suggest that there was any criterion by which the discretion was to be exercised.

17. The VCAT did not accept**[21]** Crown's argument that any such obligation on Crown's part was too uncertain to be enforceable. It considered that the terms and conditions could be ascertained with certainty when Crown provided them in the notice for renewal pursuant to cl 2.3(a). That is to say, it did not matter that the terms were whatever Crown decided them to be, it was sufficient for an enforceable agreement that they would be ascertainable at that point.
18. The VCAT appears to have been of the opinion that commercial realities would produce acceptable terms. It accepted that the terms of the promise left Crown with the right to impose terms and conditions which were so onerous that the tenants could not accept them. However, it went on to say**[22]**:

"No doubt that is an unrealistic scenario, because the stipulation of unreasonably onerous terms in notices of renewal would jeopardise Crown's tenancies generally. One would expect a notice of renewal to stipulate terms and conditions that had reasonable correspondence with terms and conditions that had appeared in the lease that Crown was proposing to renew."

The VCAT did not identify the basis for this view. No evidence was identified to support it.

19. The VCAT assessed the damages to which the tenants were entitled by reason of Crown's failure to renew the lease for a further five years on the basis of the profits the tenants would have made in that period. That was the measure of damages which the tenants had claimed, but of course on the basis of the collateral contract for which they contended.
20. For reasons which are not entirely clear, the VCAT did not make orders for damages at the conclusion of its reasons. It had a further hearing**[23]** where it "ruled" on Crown's submission that its findings permitted an award of only nominal damages. It rejected that submission and, at a later hearing, awarded damages as it had previously assessed, which is to say for loss of profits in the sums referred to above**[24]**.
21. The VCAT dealt with the issue of whether the statement could also be said to found a promissory estoppel as an alternative to the conclusion it reached concerning a defence raised by Crown that the collateral contract was unenforceable by reason of s 126(1) of the *Instruments Act* 1958 (Vic). That provision required that a disposition of an interest in land be in writing. The VCAT held**[25]** that s 126 did not apply to the collateral contract because the collateral contract was not one for an interest in land, but for a notice that Crown would renew a lease. Alternatively, an estoppel**[26]** of the kind referred to in *Waltons Stores (Interstate) Ltd v Maher***[27]** was made out, because the promise made created an expectation upon which the tenants relied in entering into the leases and they suffered a detriment when that expectation was not fulfilled.

A collateral contract?

22. In *Hospital Products Ltd v United States Surgical Corporation* Gibbs CJ explained**[28]** that a representation made in the course of negotiations may result in an agreement collateral to the main agreement if it can be concluded that the parties intended that the

representation be contractually binding. It may be so concluded if the representation has the quality of a contractual promise, as distinct from a mere representation. The question of intention is adjudged by reference to the words and conduct of the parties, but it is an objective test – of what a reasonable person in the position of the parties would necessarily have understood to have been intended.

23. In the Supreme Court of Victoria, Hargrave J considered**[29]** that a reasonable person in the parties' situation could not have understood the statement that the tenants would be "looked after at renewal time" to amount to a binding contractual promise to renew the 2005 leases for a further five years. The statement was no more than "vaguely encouraging". The Court of Appeal agreed with his Honour's assessment**[30]**. That assessment is plainly correct.

24. On the appeal before Hargrave J the tenants conceded that the question to which Gibbs CJ referred in *Hospital Products* was one of mixed fact and law. That is clearly correct. Whilst regard is had to the facts – what was said and done – questions as to what a representation objectively may be taken to convey, and whether it has the qualities which the law requires for it to amount to a binding contractual promise, are questions of law.

25. In a passage in his speech in *Heilbut, Symons & Co v Buckleton*, Lord Atkinson said**[31]** that the existence or non-existence of the intention in the mind of the party who warrants the truth of a fact is a question for the jury. The question of fact to which his Lordship referred was one as to the subjective intention of a party, which is relevant in making out a fraudulent misrepresentation. Viscount Haldane LC**[32]**, with whom Lord Atkinson concurred**[33]**, and Lord Moulton**[34]** were clearly of the opinion that the question whether there was an intention to create a collateral contract was a question of law.

26. The tenants applied to this Court for special leave to cross-appeal on the ground that no question of law was involved in the question whether there was a collateral contract (or an estoppel) and therefore no appeal to the Supreme Court lay under s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic). That application was heard with argument on the appeal and was refused. In the course of argument the tenants contended that any question respecting the construction of an oral contract is a question of fact and therefore questions as to the promissory nature of the statement made by Crown were only questions of fact for the VCAT.

27. The tenants' submissions in this regard proceeded upon a misapprehension of what the authorities they relied upon actually say. It is certainly the case that the question as to what was actually agreed between the parties, which is to say the terms of the consensus reached, is a question of fact**[35]**. That is what is meant by the reference in those cases to the "construction" of the contract. Questions as to the terms of any offer and any consensus reached, including the subject matter of any agreement**[36]**, are questions of fact. But questions whether a statement has a quality which the law requires and whether, objectively, it could be said to be intended to be contractually binding are questions of law.

28. The statement found to have been made by Crown's representative, that the tenants would be "looked after at renewal time", could not possibly have been understood to bind Crown to offer a further five year lease. It did not have the quality of a contractual promise of any kind.

29. It is possible that the statement could be understood as addressed to the tenants' concerns about whether they would not recoup the costs of the refurbishment that the 2005 leases, which they were about to enter into, required. Crown was aware of these concerns. But this was not the case the tenants pursued. Their case depended on a promise by Crown that it would do much more than ensure that the tenants were not out of pocket.

30. Hargrave J also held**[37]** that even if Crown came under the obligation which the VCAT identified as arising from the statement, the obligation was illusory and unenforceable, because it contained no criteria by which Crown was to exercise its discretion or by which the terms could be ascertained. It was no answer to say, as the VCAT did, that it would have been commercially unrealistic to stipulate onerous terms. A further issue with which his Honour also dealt**[38]**, whether the obligation to offer to renew under cl 2.3(a) was inconsistent with the choices given to Crown in cl 2.3 of the 2005 leases**[39]**, may be put to one side. It is not necessary for the determination of this appeal.

31. The problem regarding the enforceability of the obligation which the VCAT considered arose from the statement is not so much one concerning the uncertainty of its terms as the lack of them**[40]**. On basic principles, there can be no enforceable agreement to renew a lease, breach of which sounds in damages, unless at least the essential terms of such a lease have been agreed upon**[41]**.

32. In their submissions on this appeal, the tenants sought to rely upon that part of the VCAT's reasons**[42]** which suggested that Crown was likely to stipulate terms that had a "reasonable correspondence" with the terms and conditions of the 2005 leases. The tenants further submitted that there was no real difference between what the VCAT found that Crown was able to do pursuant to cl 2.3 – dictate the terms of the renewed lease as it saw fit – and the argument the tenants had put to the VCAT – that the existing terms would apply mutatis mutandis. The difficulty with this latter submission is that the VCAT expressly rejected**[43]** this argument. The collateral contract which it identified clearly reserved the terms to be offered to Crown's discretion.

33. The views that the VCAT expressed about the terms of the renewed leases bearing a "reasonable correspondence" with the 2005 leases were mere conjecture, made in passing. As Whelan JA observed**[44]**, they were not findings as to Crown's future conduct. Although the VCAT subsequently sought to explain**[45]** its assessment of damages by reference to these statements as "findings" relating to expectation damages, that is clearly incorrect. As the VCAT itself acknowledged, the tenants had not advanced a case for damages based upon an agreement of this kind. In any event the views were expressed by the VCAT in the context of its discussion of the agreement reached between the parties, not its assessment of damages. Finally, as a matter of law**[46]**, there was no evidence to support a finding about what Crown might do.

34. It remains to add that the tenants' claim was not based upon an agreement whereby Crown would make an offer on terms at its discretion. No such agreement is identified in the VCAT's reasons. During argument on this appeal the tenants acknowledged that the agreement identified by the VCAT was not one in the nature of an agreement to make an offer, such as a right of pre-emption. The damages it awarded are not referable to such an

agreement, as such damages could only have been nominal. It assessed damages for loss of profits on the basis of an enforceable agreement for the renewal of the leases for a further term of five years.

Estoppel?

35. It has long been recognised that for a representation to found an estoppel it must be clear**[47]**. In *Low v Bouverie*, it was said**[48]** that the language used must be precise and unambiguous. This does not mean that the words used may not be open to different constructions, but rather that they must be able to be understood in a particular sense by the person to whom the words are addressed. The sense in which they may be understood provides the basis for the assumption or expectation upon which the person to whom they are addressed acts. The words must be capable of misleading a reasonable person in the way that the person relying on the estoppel claims he or she has been misled**[49]**. The statement that the tenants would be "looked after at renewal time" is not capable of conveying to a reasonable person that the tenants would be offered a further lease.

36. In submissions on this appeal the tenants for the first time sought to characterise the estoppel for which they contended as a proprietary estoppel. The tenants may have been encouraged to do so by the reasons of Warren CJ**[50]**, where reference was made to cases where a party was held to be estopped from resiling from their promise to grant a proprietary interest notwithstanding the lack of precise detail in the promise**[51]**. This is not a case of that kind. It appears that the tenants sought to characterise the estoppel as proprietary because they considered that a less stringent view is taken for the test for certainty of the representation in cases dealing with promises with respect to interests in land than is the case with respect to other interests.

37. The tenants conceded that a consideration of the requirements of proprietary and promissory estoppels might require the resolution of a question, as yet unresolved, as to whether there is a single, unified doctrine of estoppel**[52]**. They did not explain how that resolution is to be achieved.

38. This is not the case to consider these questions. Whether the estoppel claimed is proprietary in nature has never been an issue in these proceedings and has not been the subject of any substantial argument. It has never been the tenants' case that the estoppel in question was proprietary rather than promissory. It is to be inferred from the VCAT's decision**[53]** concerning s 126(1) of the *Instruments Act* that it was the tenants' submission that the subject matter of the promise in question was not an interest in land.

39. In any event, the tenants' case fails at another level. Not only must the representation be such as to be able to create the assumption or expectation in question, it must be shown that that assumption was in fact acted upon**[54]**. This derives from the basal purpose of the doctrine of estoppel, which is to avoid a detriment by compelling the party who has created an assumption, or expectation, on which the innocent party has acted, to adhere to it**[55]**. Attention is then directed to the expectation said to have been created by Crown and whether Mr Zampelis acted upon it.

40. The expectation the VCAT said Crown engendered in the tenants was that they would be offered further five year leases at renewal time on terms to be decided by Crown. But

that is not what the tenants submitted that Mr Zampelis was led to believe. They submitted**[56]** that he said that he assumed that there would be a renewal of the leases, or an offer of renewal, on the same terms and conditions as the 2005 leases. That is what the tenants argued induced him to hand over the executed leases. It was not his evidence, and it was no part of the tenants' case, that he had acted on the basis of an expectation in the terms identified by the VCAT.

Remittal?

41. Whelan JA**[57]** was cognisant of this problem for the tenants' case. However, his Honour did not proceed simply to dismiss their appeal but instead remitted the issue of estoppel to the VCAT for further determination. The basis for doing so was said to be that the parties had not had the opportunity to make submissions on the basis of the VCAT's findings. This was undoubtedly correct, but the point is that submissions were not made because it was not part of the tenants' case that a more limited promise was made by Crown to Mr Zampelis.

42. His Honour did not suggest that either of the parties had been denied procedural fairness; rather his Honour seemed to think that the tenants' case could be regarded as encompassing Crown being estopped from resiling from whatever representation it was found to have made**[58]**. Such an approach encourages the prolongation of litigation, litigation which is intended largely to be concluded in the VCAT.

43. His Honour considered**[59]** that the only matter to be dealt with by the VCAT on remittal was what relief, if any, should be granted with respect to the promise it found. His Honour said that the representation has been found and Crown has resiled from it. That left only the issue of relief. This reasoning overlooks the requirement, essential to a conclusion that a party is estopped from denying a promise made, that the expectation it engendered was in fact acted upon by the person to whom it was made.

44. Mr Zampelis did not have an expectation of the kind to which the VCAT's findings refer. The tenants could never make out an estoppel unless they were given the opportunity to alter Mr Zampelis' evidence. There was no utility in the order for remittal. It should not have been made.

Conclusion and orders

45. The appeal from the Court of Appeal should be allowed. We agree with the orders proposed by Keane J.

46. GAGELER J. Substantially for the reasons given by Gordon J, I would grant special leave to cross-appeal on the ground that there was a binding and enforceable collateral contract between Crown and each Tenant as found by VCAT, allow the cross-appeal on that ground, and make consequential orders reinstating the decision of VCAT. That disposition of the cross-appeal operating to remove the substratum of the appeal, I would dismiss the appeal accordingly.

47. The collateral contract found by VCAT comprised a promise made by Crown to each Tenant in consideration of the Tenant entering into that Tenant's lease with Crown for a term of five years. Crown's promise was that, at least six but no more than 12 months before the expiry date of the lease, Crown would give the Tenant a notice under cl 2.3(a) of the lease. The notice would state that Crown would renew the lease, which in the context of a notice under cl 2.3(a) would mean that Crown would renew for a further term of five years. The notice would go on to state the terms on which Crown would renew the lease. The choice of the terms to be included in the promised notice was to be left to Crown**[60]**. Like any other notice under cl 2.3(a) of the lease, the promised notice was to constitute an offer to renew the lease which the Tenant could in turn choose to accept within 60 days by giving notice to Crown under cl 3.1 of the lease.

48. Crown's promise under the collateral contract was therefore a promise to make an offer on terms which, if accepted by the Tenant, would result in a new agreement for lease for a further term of five years.

49. Crown's argument that the collateral contract was inconsistent with the lease was accepted by the primary judge**[61]** and by the Court of Appeal**[62]**. The argument is met in this Court by the reasoning of Nettle J**[63]** and of Gordon J**[64]**. Their reasoning, with which I agree, makes redundant the Tenants' invitation to reopen and overrule *Hoyt's Pty Ltd v Spencer***[65]** and *Maybury v Atlantic Union Oil Co Ltd***[66]**.

50. The critical point of distinction between the present case and each of those cases is that cl 2.3 of the lease did not operate to confer a contractual discretion which is circumscribed by the collateral contract. The clause operated instead to impose a contractual obligation on Crown to give notice of a decision to be made by Crown outside the terms of the lease. Crown's obligation to give notice under the collateral contract did not conflict with its obligation to give notice under the lease. To the contrary, the two obligations operated in harmony: performance of the obligation to give notice under the lease was necessary to constitute performance of the obligation to give notice under the collateral contract; giving one notice would satisfy both obligations.

51. Crown's separate and logically anterior argument denies the existence of the collateral contract. Crown's grounds of appeal from VCAT to the Supreme Court articulated the argument in terms that "the 'promise' [found by VCAT to have been made by Crown] was uncertain and/or incomplete and/or illusory". That argument too was accepted by the primary judge**[67]** and by the Court of Appeal**[68]**. Although now also accepted by other members of this Court, I consider it to be answered by the reasoning of Gordon J**[69]**. I write separately to expose my understanding of the principles which inform my support for the answer given by her Honour.

52. Blurred from the outset, the various strands of Crown's argument denying the existence of the collateral contract are related, but conceptually distinct**[70]**. One strand asserts want of contractual certainty. Another asserts want of contractual completeness. The last involves the assertion of "the illusion of a contract where there is none"**[71]**. I will consider those strands separately in that order.

53. Crown's assertion of want of contractual certainty is in substance an assertion that what was said by Mr Boesley, as agent for Crown, to Mr Zampelis, as agent for the Tenants,

was so obscure or imprecise as to be incapable of supporting attribution to Crown and to the Tenants of any particular contractual intention**[72]**. The contractual intention required to provide contractual certainty, of course, is not the subjective intention of either or both of the parties but such mutual contractual intention as the words and conduct attributed to the parties might convey to a reasonable person having the background knowledge reasonably available to both of them.

54. What the words of Mr Boesley and the conduct of Mr Zampelis would have conveyed to a reasonable person who had the background knowledge reasonably available to Crown and to the Tenants is a question of fact**[73]**. That is precisely the question of fact which VCAT considered and answered in concluding that the words of Mr Boesley that Mr Zampelis would be "looked after" when the time came for Crown to consider renewing the leases, and the conduct of Mr Zampelis in subsequently returning the executed leases, gave rise to the collateral contract under which Crown promised to give a notice under cl 2.3(a) in consideration of each Tenant entering into the lease.

55. Whatever view might be taken were VCAT's conclusion of fact to be the subject of a hypothetical appeal by way of rehearing, I do not consider VCAT's conclusion to have been flawed in any way which would make that conclusion susceptible to being overturned on an appeal to the Supreme Court on a question of law under s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic). That the finding was open on the evidence before VCAT is demonstrated by the reasoning of Gordon J**[74]**. The careful and detailed analysis of the evidence before VCAT undertaken by the primary judge, as endorsed by the Court of Appeal and explained by Nettle J**[75]**, does not in my opinion support the drawing of an inference that VCAT either failed to take any part of that evidence into account or failed to consider that evidence in its totality.

56. Before recording its findings of primary fact, in particular its findings as to exactly what Mr Boesley said and exactly what Mr Zampelis subsequently did, VCAT acknowledged that there were features of the evidence which would support a view that it was "improbable" that Crown promised to renew the leases**[76]**. There could be no suggestion that VCAT did not take those features of the evidence into account in making the findings it did as to what was said and done. Equally, however, nothing in the structure or content of the balance of VCAT's reasons provides any basis for inferring that VCAT either forgot or ignored those same features of the evidence, or any other feature of the evidence, in going on to make findings about contractual intention which VCAT recorded in terms of what a reasonable person with knowledge of the facts and circumstances would have concluded from the words and conduct earlier found**[77]**. That deals with Crown's assertion about contractual certainty.

57. Crown's conceptually distinct assertion of want of contractual completeness is an assertion which necessarily attempts to build on the incontestable understanding that a contract can arise only if parties have reached a present agreement "upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations"**[78]**, it being "implicit in the very notion of consensus that the minds of the parties should have met *in praesenti* and not merely that it is hoped or expected that they will meet *in futuro*"**[79]**.

58. Consistently with that understanding[80]:

> "It is established by authority, both ancient and modern, that the courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future. Consequently, if [a] lease provided for a renewal 'at a rental to be agreed' there would clearly be no enforceable agreement."

Crown's assertion of want of contractual completeness seems to be that, if the law will not recognise an agreement to agree, the law will not recognise an agreement to make an offer.

59. I cannot accept that to be so. There is a material difference between an agreement to agree and an agreement to offer. To agree to agree is to defer the whole or some part of an agreement to the future. To agree to offer is to enter into a present agreement to propose terms capable of resulting in a further future agreement if accepted. The agreement to make an offer is an agreement that is complete in itself. So much has been recognised in numerous cases in which a right of first refusal or pre-emption has been recognised as enforceable[81].

60. That leaves just one of the three conceptually distinct strands of Crown's argument remaining to be considered: the assertion that the collateral contract found by VCAT is illusory because it leaves the choice of the terms on which Crown will renew the lease to Crown. It is important to be clear about the root principle sought to be invoked. The principle, as classically stated, is as follows[82]:

"wherever words which by themselves constituted a promise were accompanied by words which showed that the promisor was to have a discretion or option as to whether he would carry out that which purported to be the promise, the result was that there was no contract on which an action could be brought at all. The doctrine was an old one. In *Leake on Contracts*, 3rd ed, p 3, it was expressed thus:—'Promissory expressions reserving an option as to the performance do not create a contract.'"

61. The principle is thus one which has application where parties have reached a present agreement but where their present agreement has "left to the option of one party not only the mode of performance but whether there shall be any performance at all"[83]. But while "[i]t is an objection to a contract if one party is left to choose whether he will perform it", "it is an entirely different matter if there is an obligation to do a specified thing of a general description but it is left to the party who is to perform it to choose the particular thing that he will do in performance of it"[84]. A hypothetical illustration of that critical distinction is that "[a]n arrangement with an artist that he should for a specified fee paint a portrait of a particular person if the artist, upon seeing the proposed sitter, should decide to do so would be no contract to paint a portrait whereas an arrangement that the artist would for a specified fee paint a portrait of such person as he, the artist, should choose would be a contract"[85].

62. What the illustration demonstrates is that, in order to determine whether or not an agreement has left a party with a choice as to whether or not to perform a promise, it is first necessary to be quite clear about the content of the promise in question. Where, as here, the promise is no more and no less than a promise to make an offer, the promisor cannot be said to be left with a choice as to whether or not to perform the promise merely because the terms of the offer to be made are left to the promisor.

63. The orthodoxy of that ultimate proposition can in turn be given concrete illustration by reference to the facts and outcome of a first instance English decision noted by Gordon J**[86]**. There a provision in a written contract for the conveyance of land was interpreted as imposing an obligation on the vendor, "should she wish to sell ... to make an offer to the purchaser at the price and at no more than the price at which she is, as a matter of fact, willing to sell". The obligation was held to be binding and enforceable. In explaining the operation of the contractual obligation, it was said in that case that "[i]f that offer is accepted by the [purchaser], then there will be a purchase at a figure which has been agreed upon"; "[i]f the offer is rejected, then cadit quaestio"**[87]**.

64. Crown's obligation under the collateral contract found by VCAT was to give each Tenant a notice amounting to an offer which the Tenant would be able to accept. That was the long and the short of it. The fact that the choice of the terms on which Crown would make that offer was left to Crown did not render the obligation to make an offer illusory: that Crown could choose the terms did not contradict its obligation to make an offer.

65. Finally, it is necessary to note two potentially important issues which were not raised in the appeal or the cross-appeal to this Court and to which no argument has been directed. One issue concerns whether Crown might have been constrained by an implied obligation to act honestly or honestly and reasonably in choosing the terms on which it would offer to renew the leases**[88]**. The other issue concerns the measure of the Tenants' damages for Crown's breach of its obligation to make an offer. Neither is without difficulty, and the two are interrelated. I say nothing about either.

66. KEANE J. Two issues are presented for determination by the Court. The issue on which special leave was granted to appeal to this Court from the Court of Appeal of the Supreme Court of Victoria is whether an assurance given by the appellant landlord ("Crown") that the respondent tenants ("the tenants") would be "looked after at renewal time" could lead to further leases by way of estoppel.

67. The second issue, which arises only on the tenants' cross-appeal, but which is logically anterior to the issue raised on appeal, is whether an enforceable collateral contract came into force between Crown and the tenants whereby Crown was obliged, on the expiration of the leases, to grant the tenants a new lease on terms having a reasonable correspondence with the terms of the original leases. This issue was resolved in favour of the tenants by the Victorian Civil and Administrative Tribunal ("the Tribunal"), but against the tenants by the primary judge in the Supreme Court of Victoria and then by the Court of Appeal. The tenants require a grant of special leave to raise this issue**[89]**.

68. The second issue is so closely related to the first that it would be distinctly unjust to determine the first issue without also determining the second**[90]**. Accordingly, special leave should be granted to allow that part of the cross-appeal to proceed.

69. The tenants also sought to cross-appeal to argue that the appeal by Crown to the Supreme Court from the decision of the Tribunal was not "on a question of law" as required by s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) ("the VCAT Act"). This argument had not been raised before the primary judge; it was raised for the first time in the Court of Appeal and resolved against the tenants unanimously in that Court**[91]**. The conclusion of the Court of Appeal in this regard is consistent with that of the Full Court of the Federal Court of Australia in *Haritos v Federal Commissioner of Taxation***[92]**. This Court refused an application for special leave to appeal against the decision in *Haritos***[93]**. In these circumstances, the interests of justice do not warrant the grant of special leave. Accordingly, the Court refused special leave to raise this issue on the tenants' cross-appeal**[94]**.

The proceedings

70. The tenants commenced proceedings in the Tribunal**[95]**, claiming that Crown assured them that, if they entered leases in respect of certain restaurant premises for a five year term, Crown would offer to renew the leases for a further five year term. That assurance was said to amount to a collateral contract between Crown and the tenants. It was also claimed that Crown was estopped from denying that it had promised to offer the tenants a further term of five years. These claims were based on statements, to which reference will be made later in these reasons, allegedly made by representatives of Crown to Mr Nicholas Zampelis, as representative of the tenants, in the course of negotiations for the leases. The tenants claimed that, acting in reliance on the assurance that Crown would grant them further five year leases on the same terms as the original leases, they undertook a major refurbishment of the premises in the expectation that they would thus be able to recoup the cost of the refurbishment**[96]**. Crown denied that the alleged statements were made.

71. The tenants also claimed that Crown had engaged in misleading or deceptive conduct or unconscionable conduct in contravention of the *Retail Leases Act* 2003 (Vic) or the *Fair Trading Act* 1999 (Vic) ("the statutory claims"). It is common ground that the statutory claims were not the subject of separate consideration in the Tribunal, in the Supreme Court or in the Court of Appeal. They were not agitated in this Court.

72. The tenants sought to recover the loss of profit that they would have made during the term of the further leases which they contended Crown was obliged to grant them. The tenants did not pursue any claim based on their inability to recoup expenditure made on refurbishments under the original leases, and in this Court expressly disavowed such a claim. The relief they sought was that sum of money necessary to put them in the position they would have been in had Crown kept what was advanced as a promise having contractual force**[97]**.

73. The Tribunal upheld the tenants' claim based on collateral contract**[98]**, and ordered that Crown pay damages of $1.6 million plus interest calculated from the commencement of the proceedings**[99]**.

74. Crown appealed to the Supreme Court. The primary judge (Hargrave J) granted leave to appeal and overturned the decision of the Tribunal**[100]**. The tenants appealed to the Court of Appeal. The Court of Appeal (Warren CJ, Whelan and Santamaria JJA) allowed the appeal and ordered that the proceeding be remitted to the Tribunal for further determination**[101]**. Crown appealed to this Court pursuant to special leave to appeal granted by Keane and Nettle JJ on 11 December 2015.

75. The Tribunal upheld the tenants' claim on the basis of lost profits, finding an enforceable collateral contract between the parties that Crown would offer further leases to the tenants, and then assessing their loss on the basis that the offers would have led to leases on the terms assumed by the Tribunal. For the reasons which follow, the primary judge and the Court of Appeal were correct to conclude that the Tribunal erred in law in failing to appreciate that the contract by reference to which it assessed damages was illusory. The cross-appeal should be dismissed.

76. As to the estoppel issue raised on the appeal to this Court, the parties were at odds as to whether the tenants had invoked promissory estoppel or proprietary estoppel as the alternative basis for their claim. Their dispute was driven by the apprehension that the requirement of certainty of the promise relied upon by the representee is less stringent in the case of proprietary estoppel than in the case of promissory estoppel. The dispute as to taxonomy need not be resolved in order to determine the estoppel issue in this case.

77. On the findings of fact made by the Tribunal, the tenants' refurbishment of the premises was not, in fact, induced by an expectation of the grant of further five year leases on terms corresponding to the original leases. The statement found to have been made by Crown was not that which Mr Zampelis said he relied upon; and the statement which was found to have been made could not reasonably have engendered the expectation on which he claimed to have acted. Accordingly, the claim made by the tenants is not made out. They did not seek to establish any lesser claim, and so the Court of Appeal erred in remitting for further consideration by the Tribunal a claim that had not been advanced or litigated by the tenants. Crown's appeal should be allowed.

78. In order to explain these conclusions more fully, it will be necessary to examine in some detail the reasons of the Tribunal, the primary judge and the Court of Appeal. Before turning to consider those reasons, it is desirable to set out the relevant background.

## Background

79. Crown owns the Melbourne Casino and Entertainment Complex. From 1 September 2005 to 31 August 2010, the tenants each operated a restaurant at the Complex. Mr Zampelis was a director of each of the tenants.

80. Prior to 1 September 2005, other companies controlled by Mr Zampelis operated the two restaurants as the lessees of the restaurant premises. The leases in respect of the restaurant premises were due to expire in May 2005, and so negotiations began at the start of 2005 in respect of new leases between Crown and the tenants.

81. The tenants each entered into a deed of lease, expressed to operate from 1 September 2005. Each lease provided for an expiry date of 31 August 2010. Clause 2.3 of each lease provided:

"At least 6 months, but no more than 12 months before the Expiry Date, the Landlord must give notice to the Tenant stating whether:

> (a) the Landlord will renew this Lease, and on what terms (this may include a requirement to refurbish the Premises or to move to different premises ...);
>
> (b) the Landlord will allow the Tenant to occupy the Premises on a monthly tenancy after the Expiry Date; or
>
> (c) the Landlord will require the Tenant to vacate the Premises by the Expiry Date."

82. Clause 3.1 of each lease provided that:

"If the Landlord gives the Tenant a notice under clause 2.3(a) and the Tenant wishes to renew this Lease, the Tenant must, within 60 days of that notice, give notice to the Landlord that the Tenant agrees to renew this Lease and accepts the Landlord's terms."

83. Part N of each lease concerned the tenants' obligations to undertake work, repairs, maintenance and refurbishment of the restaurant premises. Clause 85 of each lease, titled "Major Refurbishment", provided:

"85.1 The Tenant must complete a Major Refurbishment of the Premises, at it's [sic] own cost and to the full satisfaction of the Landlord, before 1st December 2005

> 85.2 The Major Refurbishment must be undertaken in full compliance with Part N of this Lease including all necessary approvals by the Landlord."

84. "Major Refurbishment" was defined in cl 1 of each lease to mean a comprehensive renovation of the restaurant premises in accordance with the tenants' design concept.

85. The refurbishment of the restaurant premises was intended to be completed before the Commonwealth Games were held in Melbourne in March 2006. The works were carried out by the tenants and completed shortly after the commencement of the Commonwealth Games at a cost of approximately $4.65 million.

86. During the negotiations for the leases, the tenants proposed that the leases should be for a term of 10 years or, alternatively, that they should contain an option in their favour to renew for a further five year period. The incorporation of one of those options was said by Mr Zampelis, who conducted the negotiations on behalf of the tenants, to be necessary to ensure that the tenants would have sufficient time to recover the capital expenditure on the refurbishment of the restaurant premises. What was said in these negotiations was controversial, and will be discussed in relation to the decision of the Tribunal.

87. The leases were signed by the tenants in November 2005. The tenants did not deliver the signed leases to Crown until March 2006. It is to be noted that a period of four months

elapsed between the signing of the leases by the tenants and the delivery of the leases to Crown. This period was occupied by the tenants' continuing attempts to obtain Crown's agreement to a lease term that extended beyond the expiry date or an option to renew. Crown declined to amend or include a provision in the leases to reflect the tenants' concerns, and in March 2006, at Crown's insistence, the tenants returned the signed leases, unaltered, to Crown.

88. In October 2008, Crown commenced a tender process for new leases of the restaurant premises. The tenants submitted a tender. In December 2009, Crown informed the tenants that their tender was unsuccessful and provided the tenants with notice, in accordance with cl 2.3(c) of the leases, requiring them to vacate the restaurant premises at the expiration of the leases.

The decision of the Tribunal

89. Before the Tribunal, the tenants' case was that representatives of Crown made statements to Mr Zampelis which amounted to a promise that Crown would offer new leases to the tenants for a further term of five years by giving notice under cl 2.3(a) that it would renew the leases**[102]**. Mr Zampelis' evidence was that in the course of negotiations between the tenants and Crown in December 2005, Mr Boesley, a representative of Crown, said that if the tenants spent money on refurbishment that resulted in a high quality finish to the two restaurants, there would be leases for a further term and the tenants would be looked after at renewal time**[103]**. Mr Boesley denied making such a statement**[104]**.

90. The Tribunal did not accept Mr Zampelis' evidence in its entirety, observing that "Mr Zampelis was prone to embellish and exaggerate when giving evidence about statements or conduct of Crown."**[105]** The Tribunal resolved the conflict of testimony by reference to a note written on a page of a copy of one of the leases in the margin adjacent to the "Expiry Date" by Mr Craig, an employee of the tenants' bank. The Tribunal accepted Mr Craig's evidence that he had written the note within one or two weeks of a meeting with Mr Boesley**[106]**. The note said, relevantly:

"whilst this is a 5 yr term this is standard for Crown and aligns with other venues. Have however been with [Mr Zampelis] at several meetings when discussions have confirmed that further terms will be provided as they have in the past. [Mr Boesley] (Crown) was talking to [Mr Zampelis] one time and intimated that fit out should be high quality as this would reflect well and not to worry as he would be looked after at renewal time. So he should complete fit-out with this in mind and not scrimp on finishing to save a few dollars just because of the lease term."

91. The Tribunal concluded that, given Mr Craig's role as the tenants' banker and the context in which the note was made, the note was likely to be a "careful and reasonably accurate record of the substance of what Mr Boesley said to Mr Zampelis"**[107]**.

92. The Tribunal did not accept Mr Zampelis' evidence that Mr Boesley gave the tenants an assurance of a further lease term. The Tribunal found that the statement that Mr Boesley actually made to Mr Zampelis was to the effect that**[108]**:

"if Mr Zampelis spent the money that, under Crown's leases, the tenants were required to spend to achieve a major refurbishment to a high standard, he would be 'looked after at renewal time', and that the leases had been limited to a five year term only because they would thereby be aligned with other tenants' leases."

93. The Tribunal concluded that the statement found to have been made by Crown through Mr Boesley was "promissory in character"**[109]**.

94. Mr Zampelis' evidence of the expectation upon which the tenants acted did not reflect the statement found to have been made on behalf of Crown. That evidence was that the tenants acted upon the expectation that Crown would renew each lease on the same terms and conditions as the original lease. The Tribunal noted that at the hearing the tenants' case as to the assurance given by Crown moved from that starting position to the position that the promise was to renew each lease on the same terms and conditions as the original lease, *mutatis mutandis***[110]**. The Tribunal rejected both of the tenants' positions, concluding that Crown could stipulate whatever terms it saw fit, including terms "so onerous that the tenant[s] would be compelled not to accept them."**[111]**

95. The Tribunal did not regard the promise as lacking sufficient certainty to give rise to an enforceable collateral contract**[112]**, stating that:

"the way in which terms and conditions of a renewed lease could be ascertained with certainty was by Crown stipulating in its notice given under clause 2.3 what they were to be."

96. The Tribunal held**[113]** that, although the phrase "looked after" was "vague"**[114]**, in the context in which the statement was made:

"[a] reasonable person would have concluded that the promise ... carried with it the consequence that the terms and conditions of the renewed lease would be those specified in the notice, whatever they were."

97. The Tribunal held that the collateral contract was not inconsistent**[115]** with the written terms of the main contract, being the leases. The Tribunal reached that conclusion on the basis that cl 2.3 did not confer any new right on Crown that it did not already enjoy as lessor at the expiration of the leases**[116]**.

98. In the upshot, the Tribunal held that the representation gave rise to a collateral contract obliging Crown to give a notice to the tenants that it would renew each of the leases**[117]**, and that the tenants entered into the leases in reliance upon that promise**[118]**. It is to be noted that the Tribunal regarded the terms of any offer of renewal as a matter for Crown. In particular, it is to be noted that, at this stage of the Tribunal's reasons, there was no suggestion that Crown's liberty to stipulate the terms on which it would be willing to grant a further lease was constrained by considerations of reasonableness or by what might be acceptable to the tenants. Consistently with the terms of cl 3 of each lease, Crown was entitled to set the terms of the new leases, and the tenants could take or leave them.

99. The Tribunal then proceeded to assess the damages recoverable by the tenants on the basis that Crown "probably would have offered terms and conditions that had reasonable

correspondence with those that had been in the expired lease."**[119]** On this basis, the tenants were held to be entitled to damages for breach of contract which reflected the profit that they would have made from the further term**[120]**. It is apparent that the assumption on which damages were assessed involved a substantial departure from the Tribunal's earlier conclusion that "the terms and conditions of the renewed lease would be those specified in the notice, whatever they were." The Tribunal's earlier conclusion recognised that Crown was fully entitled to stipulate the terms of the renewed leases having regard to its own commercial interests; but the assessment of damages assumed the contrary for reasons which cannot satisfactorily be explained as a finding of fact on the evidence before the Tribunal. Nor is the assessment of damages for the loss of expected profit satisfactorily explained on the basis that Crown is bound by the conduct of its case to accept that the tenants were entitled to recover damages measured by reference to their expectations. While Crown contested the quantification of the tenants' damages by reference to their expectation loss, Crown's primary case was always that the tenants should not recover anything by way of damages, assessed by reference to the tenants' expectations or otherwise.

100. The Tribunal's view as to the terms of renewal that Crown would probably have stipulated was not a finding of fact based on evidence of Crown's likely attitude. Moreover, the assumption on which the Tribunal proceeded was inconsistent with cl 3 of each lease, which entitled Crown to act in its own interests in setting the terms of the new leases. In light of the circumstance that Crown did not wish to renew the tenants' leases, it is likely that it would have stipulated onerous terms as the price of surrendering its commercial preference to terminate its relationship with the tenants. The tenants might well have found such terms unacceptable. Be that as it may, given that Crown was not obliged to be "reasonable" in stipulating the terms of the further leases, it is, at best for the tenants, entirely speculative whether the terms of the offer would have been acceptable to, and accepted by, the tenants. On no view of the Tribunal's findings of fact was there a sufficient basis in law for the assessment of damages which the Tribunal proceeded to make.

101. The Tribunal seems to have imposed upon the parties a "reasonable" solution to their unresolved differences in order to measure the damages to which the tenants were entitled. In proceeding in this way, the Tribunal was not engaged in an exercise in fact-finding. The solution which the Tribunal imposed did not reflect the Tribunal's finding of fact as to the assurance that was actually given by Crown to the tenants. An assurance that Crown would offer each tenant a lease on terms acceptable to Crown which might be so onerous that the tenants would not accept them, even if contractually binding, would hardly be of any value at all. In any event, perhaps not surprisingly, the tenants did not seek damages measured on this basis. It was simply no part of the tenants' case that they were entitled to damages representing the value of the opportunity to consider an offer of further leases.

102. It is also to be noted that the award of damages was not calculated by reference to any suggestion that the tenants were worse off because they entered the leases with Crown and carried out the refurbishments than if they had walked away from the negotiation. No comparison was made between the tenants' financial position at the expiration of the leases and their position had they not obtained the leases and traded

under them. The tenants did not seek to show, for example, the value of expenditure on refurbishment the cost of which had not been recouped during the term of the leases.

103. The Tribunal also noted that if its conclusion as to the existence of a collateral contract were wrong, it would accept the tenants' alternative submission based on estoppel. The Tribunal said that it would hold that Crown was "estopped in equity from denying the existence of the collateral contract."**[121]**

104. Relevant to an aspect of Crown's argument in this Court is the Tribunal's rejection of a submission by Crown that the tenants could not succeed in the proceedings because the collateral contract was not in writing. Such a requirement is imposed on contracts for the sale or other disposition of an interest in land by s 126(1) of the *Instruments Act* 1958 (Vic) ("the Instruments Act"). The Tribunal held that the collateral contract was not for the disposition of an interest in land, but rather for an option to renew**[122]**.

The appeal to the primary judge

105. As the Tribunal was not constituted by its President or a Vice President, it was uncontroversial that Crown could appeal from the orders of the Tribunal to the Trial Division of the Supreme Court with leave of the Trial Division pursuant to s 148(1)(b) of the VCAT Act.

*Collateral contract*

106. The primary judge held that the Tribunal's conclusion in favour of the existence of a collateral contract advanced by the tenants did not accommodate its factual findings relating to the negotiations between the parties**[123]**. The primary judge concluded that a reasonable person in the position of the tenants would not have understood the representation found by the Tribunal as a promise by Crown to take any particular action**[124]**. The representation was**[125]**:

"too vague to found any objectively reasonable understanding to the effect found, and Mr Zampelis did not give evidence that he understood the statements in that sense."

107. The primary judge concluded that the putative collateral contract that obliged Crown to make an offer to the tenants to renew the leases was not sufficiently certain to be enforceable**[126]**. His Honour also held that if he were wrong on the certainty point the collateral contract was unenforceable by virtue of its inconsistency with the leases**[127]**.

*Estoppel*

108. On the estoppel issue, the primary judge addressed**[128]** the requirements for an estoppel summarised by Brennan J in *Waltons Stores (Interstate) Ltd v Maher***[129]**. The primary judge concluded that**[130]**:

"the meaning which the Tribunal attributed to the statements was not that which a reasonable person in the position of the parties in the relevant surrounding circumstances would have understood the statements to mean".

109. His Honour said that[131]:

"In determining whether a representation is sufficiently precise to support an estoppel, the Court examines the sense in which the representee understood the representation and relied upon it, and then determines whether, in the context of the facts of the particular case, it was reasonable for the representee to understand and rely upon the representation in that sense."

110. On the issue of the tenants' understanding of the representation, the primary judge observed that[132]:

"An analysis of the evidence and the Tribunal's findings demonstrates that there was a disconformity between Mr Zampelis's evidence of his understanding of the statements and the meaning which the Tribunal gave to those statements."

111. The primary judge held that this "disconformity" meant that the sense in which Mr Zampelis said he understood the statement was "wholly unreasonable ... [s]o the estoppel case falls at the first hurdle."[133]

The decision of the Court of Appeal

112. The Court of Appeal granted leave to appeal from the decision of the primary judge, and allowed the appeal.

*Collateral contract*

113. Warren CJ accepted that the primary judge was right to hold that the collateral contract was illusory and unenforceable for want of certainty as to the terms of the renewed leases[134]. Her Honour also agreed with the primary judge that the terms of the alleged collateral contract were inconsistent with the leases[135].

114. Whelan JA, with whom Santamaria JA agreed, held that the Tribunal failed to conduct an objective assessment of the parties' intentions from the totality of the evidence, and so incorrectly applied the legal principles relevant to a determination of what the parties' intentions were[136]. His Honour further held that "[t]he statement which [the Tribunal] found was made is not capable of bearing the meaning [the Tribunal] attribute[d] to it."[137] This was said to be because the phrase "looked after" could have many meanings. Whelan JA agreed with Warren CJ that the legal obligation imposed by the collateral contract as defined by the Tribunal was illusory[138]. His Honour also agreed with the primary judge and Warren CJ on the inconsistency issue[139].

*Estoppel*

115. As to whether Crown was estopped from denying the existence of a collateral contract, Warren CJ held that the primary judge was correct to hold that the Tribunal did not analyse the claim on the basis of the meaning attributed to the statement by the tenants, but on the basis of the meaning that the Tribunal attributed to the statement[140].

Her Honour held that the Tribunal should have considered the sense in which the tenants understood the representation and whether it was reasonable for them to rely upon it**[141]**. Warren CJ went on, however, to hold that the primary judge was wrong to hold that the requirement for certainty to found a promissory estoppel was not satisfied**[142]**.

116. In this regard, Warren CJ referred to observations by Hodgson JA in *Sullivan v Sullivan***[143]** to the effect that a promise or representation may support an estoppel even though it is not sufficiently certain to operate as a contract.

117. Warren CJ stated**[144]**:

"there is a lower standard of certainty for estoppel than in contract law and therefore the fact that the representation was not sufficiently certain to establish a collateral contract does not mean that it is not sufficiently certain for estoppel."

118. Her Honour concluded that, while the promise was open to different interpretations, it was sufficiently certain to give rise to an estoppel**[145]**. Her Honour held that the tenants "would be entitled to the minimum equity", and to that end "they would need to establish what was the lower limit of the representation made to them and then, what they are entitled to in order to achieve equity."**[146]** On that footing, her Honour would have allowed the appeal and remitted the matter to the Tribunal.

119. It may be said immediately that there is a twofold difficulty with applying her Honour's approach in this case: first, there is the disconformity between the finding of fact as to what was actually said to Mr Zampelis and the expectation which he claimed was engendered by Crown; and secondly, there is no identification of any basis for a lesser entitlement than that which the tenants claimed.

120. On this issue, Whelan JA took a somewhat different approach from that taken by Warren CJ. Whelan JA held that the primary judge's analysis of the Tribunal's approach to estoppel was correct in that the disconformity between the promise that the Tribunal found and the understanding of the promise on which the tenants claimed to have relied was "irreconcilable"**[147]**. Whelan JA went on to conclude, however, that the estoppel issue needed to be addressed "more widely"**[148]**.

121. His Honour held that the Tribunal and the primary judge had failed to analyse the tenants' claim by reference to the "lower limit" of what was meant by "looked after". On the basis that neither party had made submissions "by reference to the 'lower limit' of what was meant by 'looking after' the tenants at renewal", his Honour held that the matter should be remitted to the Tribunal for further consideration of "the claim formulated in that way" **[149]**. His Honour said that**[150]**:

"The issue of what the representation was has been determined. Crown has resiled. The issue to be determined on remittal is what equitable relief, if any, should be granted."

122. On the face of these observations, it might be said, and Senior Counsel for Crown did say, that the order for remittal to the Tribunal proceeded upon the unorthodox basis that the mere resiling from a representation is enough to establish an estoppel of some kind. It is

apparent, however, that Whelan JA recognised the need for the tenants to establish detrimental reliance. In this regard, Whelan JA went on to say**[151]**:

"to require Crown to provide a renewed lease would be to do more than is necessary to avoid the detriment. ... [The] enquiry would involve an analysis of what Crown should do to relieve [the tenants] from the detriment they have suffered because Crown resiled from its representation. ... It would not involve some surrogate for such a renewed lease such as the profits that might have been earned under a renewed lease."

123. The difficulty with this approach is that the only detriment ever identified by the tenants was the loss of the profit that would have been earned under the renewed leases; there was no attempt to show that the tenants were prevented from recovering expenditure on refurbishment which they would not have incurred but for the statement Crown was found to have made. The only case made by the tenants failed, and so the litigation was concluded, there being no contention which might be the subject of further litigation. It is significant in this regard that while Whelan JA explained what the further enquiry would not involve, his Honour did not positively identify the basis on which Crown "should do" something to relieve the tenants from "the detriment they have suffered". Nor is there an identification of that detriment, save that it is something other than "the profits that might have been earned under a renewed lease."

124. As already noted, the primary judge and the Court of Appeal also rejected the tenants' collateral contract case on the ground that the collateral contract contended for would be inconsistent with the terms of the leases, and, in particular, cl 2.3**[152]**. Their Honours referred to this Court's decision in *Hoyt's Pty Ltd v Spencer***[153]**. The tenants argued that cl 2.3 of the leases did not add to Crown's rights at the conclusion of the leases but merely regulated the manner of their exercise; and so the putative collateral contract was not inconsistent with the leases. While that may be so, and it may therefore be said that the collateral contract found by the Tribunal was not inconsistent with cl 2.3 of the leases, it is at the stage of the Tribunal's assessment of damages by reference to the terms of the leases which would be granted that the assumption on which that assessment proceeded can be seen to be inconsistent with cl 3 of each lease. However that may be, it is unnecessary to resolve the issue.

125. It is convenient now to deal with the issue as to collateral contract raised by the tenants' cross-appeal.

The collateral contract

126. The tenants submitted that the focus of the courts below on Crown's freedom to stipulate whatever terms it chose in the renewal notices paid insufficient regard to the promise to "look after" the tenants at renewal time. It was said that the courts below incorrectly discerned a dichotomy between Crown's freedom and the promise to "look after" the tenants, concluding on that basis that the promise was not capable of bearing the meaning attributed to it by the Tribunal**[154]**. The tenants' contention should be rejected. Both the primary judge and the Court of Appeal were right to conclude that, on the findings

of fact made by the Tribunal, the parties had not made an enforceable agreement for the offer or grant of further five year leases.

127. The formulation of the tenants' case in their pleadings is instructive. There, it was asserted that the collateral contract obliged Crown to make an offer of a lease. But to say that the collateral contract was to make an offer of a lease, and no more, is distinctly not to identify a basis for the approach to the assessment of damages adopted by the Tribunal. No objective standard by which the terms of such an offer might be fixed was alleged or proved. That deficit in the tenants' case could not be made good by the legally unorthodox approach adopted by the Tribunal, which gave the tenants the benefit of a contract that was never made between the parties. The Tribunal had no authority to force upon Crown such terms as might seem to the Tribunal to be reasonable. The Tribunal erred in law in its appreciation of the legal effect of the facts as to what actually passed between Mr Boesley and Mr Zampelis.

128. On one view, it might be said that the terms of the putative renewed leases were left to further agreement so that there is no binding agreement at all as to the renewal**[155]**. The issue of rent could be expected to have loomed large; and no basis for resolving that issue had been agreed or was identifiable. Nor was there any basis for concluding that differences between the parties on the terms of the renewed leases were likely to have been resolved upon terms acceptable to the tenants, much less that Crown was obliged to reach agreement on that basis. And the tenants did not seek, or advance any basis for the recovery of, damages for the loss of the opportunity to receive an offer from Crown.

129. On another view, it might be said that the indication of a willingness to "look after" Mr Zampelis at the end of the leases could reasonably be understood as an indication of an intention to reimburse the tenants for any enduring disadvantage enuring to the tenants as a result of the refurbishment. What that might involve could range from some form of monetary recompense to favourable consideration in relation to new opportunities. In the case advanced by the tenants, none of these possibilities was litigated.

130. To say either of these things, however, is merely to emphasise that because Crown was left legally free to act in its own interests in negotiating the terms of any further lease, and indeed free to stipulate for rent and other terms which might be unacceptable to the tenants, no agreement had been concluded. On either view of what might be involved in Crown's "looking after" the tenants at renewal time, the terms on which an agreement might be made could never be more than unresolvable speculation. Accordingly, even if the assurance that the tenants would be "looked after" by Crown at the expiration of the leases had actually been incorporated as a term of the leases signed by the tenants, it would not have been sufficiently certain to be enforceable as a promise of the grant of further leases.

131. It has been noted that the Tribunal's error was not an error of fact. Where the terms of an oral representation have been established as a fact, its construction is a question of law**[156]**. Similarly, the question whether the communications which have taken place between the parties to an alleged contract are so vague or incomplete that the alleged contract is illusory is a question of law. By way of example, in *Horton v Jones***[157]**, the plaintiff in an action heard by judge and jury was non-suited, notwithstanding her evidence of a promise by the deceased to make a will and leave his "fortune" to her in return for her

promise to make a home and to give up everything to look after him for the rest of his life. It was held that, while the content of what passed between the plaintiff and the deceased was a matter of fact, the question whether it was "too vague or uncertain to afford a consideration for" the deceased's promise was a question, not of fact for the jury, but of law for the judge**[158]**.

132. For these reasons, the primary judge and the Court of Appeal were right to conclude that the collateral contract for which the tenants contended was illusory.

Estoppel

*Contract and equity*

133. The tenants submitted that they have always contended that their claim that Crown is estopped from denying the existence of the collateral contract was founded upon proprietary estoppel because performance of the collateral contract would have secured further five year leasehold interests for the tenants. They argued that it was only in the reasoning of the Court of Appeal that their claim was categorised as one of promissory estoppel. It was said that this occurred only because the Court of Appeal attributed an artificially narrow meaning to the statement made by Crown. It may also be noted here that the tenants' argument proceeded on the assumption that promissory and proprietary estoppel are distinct doctrines. The argument between the parties proceeded upon this assumption, which was not challenged by any suggestion that proprietary estoppel is a doctrine which is, or ought to be, subsumed within promissory estoppel**[159]**.

134. Crown submitted that it was not open to the tenants to assert that they have always grounded their claim in proprietary estoppel. In this regard, Crown argued that the tenants denied that s 126 of the Instruments Act applied to the contract, and the Tribunal expressly accepted that the collateral contract was not a contract for the disposition of an interest in land. On that basis, it was said that it cannot now be said that the estoppel for which the tenants contend is a proprietary rather than a promissory estoppel. There is force in this contention. There is also force in Crown's contention that the tenants' case was litigated as a matter of promissory estoppel, as is evident from the Tribunal's conclusion that Crown was estopped "from denying the existence of the collateral contract." Further, the Tribunal's conclusion echoes this Court's conclusion in *Waltons Stores*, a case identified by Mason CJ and Wilson J as an example of promissory estoppel**[160]**.

135. It is important here to observe the differences between *Waltons Stores* and the present case. The most important difference for present purposes is that in *Waltons Stores* there was no question as to the certainty of terms of the agreement between the parties; the dispute was as to whether the parties were bound to those terms. In *Waltons Stores*, the parties had been negotiating the terms of a lease from the Mahers to Waltons. The Mahers proposed to demolish existing buildings on the land to be leased and to construct a new building to suit Waltons' purposes. Waltons' solicitor assured the Mahers' solicitor that the terms of the proposed lease were agreed and the Mahers executed the final form of the lease, sent it to Waltons and began the construction work. Waltons did not sign the lease but said nothing to the Mahers about its reluctance to do so even though it knew that the

demolition work had begun. Waltons did not inform the Mahers that it did not want to complete the transaction until the new building was 40 per cent complete.

136. At trial, and in the Court of Appeal of the Supreme Court of New South Wales, it was held that Waltons was estopped from denying that there was a contract of lease between the parties. In this Court, a majority held that Waltons had not represented that it had, in fact, executed the lease, but was nevertheless estopped from resiling from its promise to execute the lease**[161]**. The estoppel precluded the putative lessee from denying that the terms of the lease had been**[162]**, or would be**[163]**, agreed. If the putative lessee were not so precluded, the lessors would be left having wasted their outlays on the construction of premises for the lessee.

137. In addition, in the present case, in contrast with *Waltons Stores*, the issue whether the tenants would have been left worse off at the end of the leases depends on findings of fact that were not made by the Tribunal and which it was not invited to make. Most importantly, the tenants did not seek to litigate the contention that the original leases were not long enough to enable them to recoup, with or without profit, their outlays on refurbishment or, more precisely, the outlays they would not have made but for the statement Crown was found to have made to Mr Zampelis.

138. It is difficult to see that the case of estoppel advanced by the tenants in the Tribunal and the courts below could fairly be said to be other than a case of promissory estoppel given that it was advanced as an alternative to the collateral contract case, that it was concerned to bind Crown to a promise to make an offer, and that the tenants argued that they were not seeking to establish an interest in land. That having been said, however, it is not necessary to resolve the taxonomical dispute between the parties.

139. In *Giumelli v Giumelli***[164]**, this Court observed that difference of views in the decided cases as to whether there is a single unified or unifying doctrine of estoppel has yet to be resolved. This case is not the occasion to resolve that difference. Broadly speaking, however, the categories of promissory and proprietary estoppel serve a common purpose of protecting a party from a detriment which "would flow from a party's change of position if the assumption (or expectation) that led to it were deserted."**[165]** Giving effect to this purpose may require different approaches in different contexts, but the purpose which underpins both iterations of the doctrine of estoppel was explained in *Grundt v Great Boulder Pty Gold Mines Ltd***[166]**. There, Dixon J said that:

"The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations."**[167]**

140. Dixon J described the "basal purpose of the doctrine" as being**[168]**:

"to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting."

141. It is because the "opposite party" is responsible for creating the assumption on which the party asserting the estoppel acted that the estoppel comes into play to prevent that party suffering a detriment. For the purposes of the present case, it may be accepted that the separate categories of promissory and proprietary estoppel allow for different approaches to the determination of whether the "opposite party" is responsible for creating that assumption in different contexts**[169]**.

*Promises and property interests*

142. Crown relied upon the proposition affirmed by Mason and Deane JJ in *Legione v Hateley***[170]** that a representation must be "clear", "unequivocal" and "unambiguous" before it can found a promissory estoppel. Nothing in the subsequent decisions of this Court has detracted from that requirement, which addresses the concern that a doctrine which is apt to preclude a party to a contract from relying upon its terms should not be so broad in its operation as to deny the party the benefit of its bargain by dint of representations which are so equivocal**[171]** or ambiguous**[172]** that they could not be given effect as terms of a contract. This concern was acknowledged in *Legione***[173]** by Mason and Deane JJ, who cited with approval the speech of Lord Hailsham of St Marylebone LC in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd***[174]**:

"it would really be an astonishing thing if, in the case of a genuine misunderstanding as to the meaning of an offer, the offeree could obtain by means of the doctrine of promissory estoppel something that he must fail to obtain under the conventional law of contract. I share the feeling of incredulity expressed by Lord Denning MR in the course of his judgment in the instant case when he said**[175]**:

'If the judge be right, it leads to this extraordinary consequence: A letter which is not sufficient to *vary* a contract is, nevertheless, sufficient to work an *estoppel* – which will have the same effect as a *variation*.'"

143. It would tend to reduce the law to incoherence if a representation, too uncertain or ambiguous to give rise to a contract or a variation of contractual rights and liabilities, were held to be sufficient to found a promissory estoppel. Practical considerations such as the need of commerce for certainty, both as to the terms to which parties have agreed to be bound, and as to whether their bargaining process has concluded, also provide strong support for this approach.

144. The decision in *Waltons Stores* was coherent with the law of contract. Indeed, the result which was reached in *Waltons Stores* by the application of equitable principles fully accords with the result which might have been reached by a contractual analysis, so far as the making of a binding contract is concerned where no question of uncertainty of terms arises**[176]**. In this regard, as long ago as *Brogden v Metropolitan Railway Co***[177]**, it was held that where terms of agreement were drawn up by the plaintiff in the action and presented to the defendant in the action, who filled in some parts left blank, wrote "approved" on the document, and returned it to the agent of the plaintiff, who put the document in his desk, and the parties later traded on the terms of the document, the

circumstance that it had not been formally executed by either party was no obstacle to the conclusion that the parties had indicated by their conduct that they had bound themselves to a contract in the terms of the document**[178]**. It is pertinent to observe that *Brogden* was a decision to which very great chancery judges in Lords Cairns, Hatherley and Selborne were party, along with Lord Blackburn, the greatest common law judge of his time.

145. The principal practical difference between promissory and proprietary estoppel arises from the circumstances in which each is deployed: the former operates in relation to contracts, whereas the latter is concerned with the recognition of interests in property by way of relief against unconscionable conduct**[179]**.

146. Proprietary estoppel affords relief against unconscionable conduct where departure from an assurance means that the representor's conduct is to be regarded as contrary to good conscience. In proprietary estoppel, it is necessary to consider both the subjective reliance of the representee and the extent to which the representor can, in good conscience, be held to be responsible for the representee's actions. The representor is not acting contrary to good conscience in refusing to conform its conduct to the predicament produced by the representee's unreasonable misunderstanding of a representation made to it.

*Certainty and conscience*

147. Where a contractual right or liability is to be altered, coherence in the law requires that the representation which is said to bring about that alteration should be no less certain in its terms than would be required for an effective contractual variation. Accordingly, Warren CJ erred in holding that "there is a lower standard of certainty for estoppel than in contract law" in so far as her Honour was dealing with a claim of promissory estoppel. Her Honour erred in treating what was said by Hodgson JA in *Sullivan* as applicable to such a case. In *Sullivan*, Hodgson JA said**[180]**:

"Generally, a promise or representation will be sufficiently certain to support an estoppel if it was reasonable for the representee to interpret the representation or promise in a particular way and to act in reliance on that interpretation, thereby suffering detriment if the representor departs from what was represented or promised. Generally, if there is a grey area in what is represented or promised, but it was reasonable for the representee to interpret it as extending at least to the lower limit of the grey area and to act in reliance on it as so understood, I see no reason why the court should not regard the representation or promise as sufficiently certain up to this lower limit."

148. Hodgson JA made these observations in relation to a claim for proprietary estoppel where, although the representee's understanding that she was being promised accommodation for life was an unreasonable understanding of the representation made to her, it was reasonable of her to understand that she would be no worse off by altering the circumstances of her accommodation. It is apparent that Hodgson JA proceeded on the basis that the terms on which the representee was to occupy the house offered by the representors were to be no less favourable to her than the representee's current

arrangements, which she gave up in reliance on the representation made to her. His Honour concluded that the representee's action "was what the [representors] intended she should do, and it was reasonable for her to do it."**[181]**

149. The concern that estoppel should not operate incoherently with the law of contract does not arise where proprietary estoppel is invoked precisely because there is no charter of contractually based rights and obligations governing the parties' relationship. Even in such cases, however, as Hodgson JA held, the assurance or representation on which the party claiming the benefit of the estoppel relies must be sufficiently clear that the expectation which that party asserts was both actually, and reasonably, engendered by the assurance or representation.

150. In *Giumelli***[182]**, this Court explained the doctrinal basis of relief by way of proprietary estoppel as involving the recognition of a constructive trust of property whereby the legal title of the owner of property is subjected by order of the court to limitations necessary to meet the requirements of good conscience. Where the expectation of the party asserting the estoppel which led to detrimental reliance was not reasonably attributable to the conduct of the "opposite party", then the conscience of the opposite party is not fixed with an obligation not to resile from the expectation.

151. In *Low v Bouverie***[183]**, Bowen LJ said:

"an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."

152. In *Woodhouse***[184]**, Lord Hailsham LC explained that these observations by Bowen LJ excluded:

"far-fetched or strained, but still possible, interpretations, whilst ... insisting on a sufficient precision and freedom from ambiguity to ensure that the representation will (not may) be reasonably understood in the particular sense required."

153. Observance of this limit on the operation of estoppel in equity ensures that it is not allowed to operate to underwrite unrealistic expectations or wishful thinking. Such an operation would be especially pernicious in a commercial context; but even in a non-commercial context estoppel should not be allowed to operate as an instrument of injustice.

154. The tenants, in their argument invoking proprietary estoppel, submitted that the Tribunal found as a matter of fact that Crown's statement meant that an interest in land would be granted. The tenants emphasise that the Tribunal found that they "expected that there would be an offer of a renewed lease, at renewal time, that they would be free to accept."**[185]** In the tenants' submission, the Court of Appeal was wrong to depart from that finding, and to attribute a narrower meaning to the representation.

155. In truth, this finding of the Tribunal highlights the flaw in the tenants' case. That is that the expectation found by the Tribunal was not of a grant of an interest in land but of an offer

on terms which they would be "free" to accept. The obvious problem is that such an offer might well come to nothing because Crown was entitled to give full effect to its own self-interest in setting the terms of the offer. And any interest in land to be granted to the tenants necessarily depended on reaching an agreement upon the terms of an enforceable agreement for a lease**[186]**. The difficulties with this aspect of the tenants' argument are not avoided by categorising the tenants' case as one of proprietary, rather than promissory, estoppel.

156. Mr Zampelis' evidence was that he was assured of the grant of further five year leases and that it was this assurance that he acted upon. This evidence was not accepted. The tenants' case, based on Mr Zampelis' evidence, was that they were induced to act by the assurance of five year leases on the same terms as the original leases. That case was rejected as a matter of fact by the Tribunal; as was the tenants' alternative case, adopted late in the day, that the assurance was of five year leases on the same terms *mutatis mutandis*. In addition, no one in Mr Zampelis' position could reasonably have understood the statement found to have been made to him as an assurance of such an outcome. One thing that was unequivocally clear from the course of negotiations as found by the Tribunal was that Crown was refusing to bind itself to such an outcome. No other basis was suggested as the basis for holding that Crown was conscience-bound to hold its title subject to an interest in favour of the tenants.

157. As to the Court of Appeal's reliance on *Sullivan***[187]**, Senior Counsel for Crown said of the observations by Warren CJ and Whelan JA that their Honours did not identify what the "grey area" or "lower limit" was, or, indeed, that the tenants had any expectation within the "grey area" or the "lower limit". No case had been advanced by the tenants of a "grey area" or a "lower limit" of what was meant by "looked after". These submissions should be accepted.

158. In none of its manifestations does estoppel operate by imputing to the party asserting the estoppel an expectation or reliance which might be thought to be a proportionate or fair response to the statement of the opposite party**[188]**. In *Sidhu v Van Dyke***[189]**, French CJ, Kiefel, Bell and Keane JJ said:

"Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact. It is actual reliance by the promisee, and the state of affairs so created, which answers the concern that equitable estoppel not be allowed to outflank *Jorden v Money***[190]** by dispensing with the need for consideration if a promise is to be enforceable as a contract**[191]**. It is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise. In *Giumelli v Giumelli***[192]**, Gleeson CJ, McHugh, Gummow and Callinan JJ approved the statement of McPherson J in *Riches v Hogben***[193]** that:

'It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise.'"

159. The tenants placed substantial reliance upon the decision of the Victorian Court of Appeal in *Flinn v Flinn*[194]. In truth, that decision does not assist them. The putative collateral contract asserted in that case was held to be too uncertain to be enforceable: it was held that a promise to leave property by will on condition that the donee pay a reasonable sum to a third person could not give rise to an enforceable contract because there was no criterion by which to determine what was reasonable[195]. There is "no general standard of reasonableness"[196] to which appeal might be made to solve the problem. In *Flinn* the expectation that was held to ground the estoppel that the Court of Appeal enforced was informed by explicit descriptions of the property to be granted under the will and articulation of the conditions on which the grant would be made[197].

Conclusion

160. In summary, in the course of the negotiations, a promise of a renewal of the leases had been explicitly rejected. It was clear beyond reasonable misunderstanding that Crown refused to bind itself to renew the leases on terms acceptable to the tenants, or, indeed, at all[198]. On the findings made by the Tribunal as to the expectation engendered by Crown's statement to Mr Zampelis, he did not act upon an expectation that the tenants would be granted renewed leases on terms acceptable to them. In addition, no one in his position could reasonably have expected a renewal of the leases for five years on the same terms and conditions as had been agreed in the leases or on terms reasonably corresponding to those terms. That being so, any claim based on estoppel was bound to fail. And the tenants had advanced no other basis for such a case.

Orders

161. Special leave should be granted in respect of ground 4 of the Notice of Cross-Appeal dated 24 December 2015; otherwise, special leave should be refused. The cross-appeal should be dismissed. The tenants should pay Crown's costs of the cross-appeal.
162. Crown's appeal should be allowed. Paragraphs 2 to 6 of the orders of the Court of Appeal should be set aside, and in their place the tenants' appeal to the Court of Appeal should be dismissed. The tenants should pay Crown's costs of the appeal and of the appeal to the Court of Appeal.

163. NETTLE J. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of Victoria[199]. It concerns two leases of restaurant premises in the Melbourne Casino and Entertainment Complex in Southbank, Melbourne. Each lease was for a term of five years with no right of renewal and together the leases required the respondents ("the tenants") to spend in the order of $5 million refurbishing the premises to bring them to what was described as "world class" standard.
164. Before they entered into the leases, the tenants were apprehensive of being unable to recover the costs of the refurbishments within the term of five years. Accordingly, they attempted to persuade the appellant ("Crown"), the lessor, to include in the leases a right of renewal for a further term of five years. Crown refused to do so. Nevertheless, after the

tenants had executed the leases but before they delivered the executed leases to Crown, and shortly before they began to outlay funds on the refurbishments, Crown represented to the tenants that, if they spent the money, they would be "looked after at renewal time".

165. Acting in reliance on that representation – in the belief it meant that, when renewal time came, Crown would offer to renew the leases for a further term of five years on the same terms and conditions as the existing leases – the tenants delivered the executed leases to Crown and carried out the refurbishment works at a total cost of some $5 million. When it came to renewal time, however, Crown did not offer to renew the leases for five years or at all and the tenants were not otherwise looked after. The tenants immediately became insolvent due to write-downs of more than $2 million in the value of the refurbishments.

166. The principal question in this appeal is whether the Court of Appeal were correct to remit the matter to the Victorian Civil and Administrative Tribunal ("VCAT") on the basis that Crown was estopped from departing from the tenants' assumption or expectation that Crown would offer to renew the leases for a further term of five years. Due to the way in which the tenants put and conducted their case before VCAT, that question should be answered, no.

167. There is also an application for special leave to cross-appeal. The principal question in that application is whether the Court of Appeal should have found that Crown's assurance constituted an enforceable collateral contract to renew the leases for a further term of five years. That question should also be answered, no.

The facts

168. Crown owns the Melbourne Casino and Entertainment Complex. Between 1997 and 2005, two companies associated with Mr Nicholas Zampelis leased and operated two restaurants in the complex, called respectively "Cafe Greco" and "Waterfront". Each lease was due to expire on 7 May 2005. Early in 2005, Mr Zampelis began negotiations on behalf of the tenants with Crown for the grant of new leases of the restaurants. Crown signalled that it was prepared to grant a new lease of each restaurant but only for a term of five years with no option for renewal, and only on condition that the tenants undertake major refurbishment works on each restaurant premises. In May 2005, Crown sent Mr Zampelis comprehensive summaries of the terms and conditions of the proposed new leases.

169. On 29 June 2005, Crown gave in principle approval to the tenants' refurbishment concept plans for the restaurants and stated that the new leases would start on 1 September 2005, and that the refurbishments would have to be completed and trading would need to commence by 1 December 2005. On 22 July 2005, Mr Zampelis replied by email to Crown confirming "our acceptance of your offer unconditionally". On 2 September 2005, Crown sent unexecuted leases to the tenants which accurately reflected the summary documents ("the Leases"). In November 2005, each tenant executed its Lease, and informed Crown that it had done so, but the tenants did not then deliver the executed Leases to Crown.

170. Clause 2.3 of each Lease required Crown to give notice to the tenant at least six months, but not more than 12 months, before the expiry of the Lease, stating whether

Crown would:

> (a) renew the Lease, and if so on what terms (cl 2.3(a));
>
> (b) allow the tenant to occupy the premises on a monthly tenancy after expiry (cl 2.3(b)); or
>
> (c) require the tenant to vacate the premises on expiry (cl 2.3(c)).

171. Being concerned that the tenants might not recover the refurbishment costs within the term of five years, Mr Zampelis made a further attempt to persuade Crown to extend the term of the Leases to 10 years or to include in each Lease an option to renew for a further term of five years. Once again, however, he met with resolute resistance. Crown was keen to have the executed Leases and for the refurbishments to be completed ahead of the approaching Commonwealth Games in Melbourne, and it put considerable pressure on Mr Zampelis to deliver the Leases and to get on with the refurbishment works. But Crown also made clear that the only basis on which it would deal was on the basis of the executed Leases. The only concession was that at a meeting on 6 December 2005, Mr Boesley of Crown said to Mr Zampelis that the Leases had been limited to a term of five years so that they would align with other Crown leases and that, if Mr Zampelis spent the money required to refurbish the restaurants to a high standard, he would be "looked after at renewal time" ("the assurance").

172. The tenants began the refurbishment works just over a month later, and the refurbishments were completed two months after that in March 2006. At much the same time, Mr Boesley gave Mr Zampelis an ultimatum that, if he did not deliver the executed Leases to Crown, he would not be allowed to trade. On 7 March 2006, the tenants delivered the executed Leases to Crown.

173. In October 2008, Crown put out a tender for the grant of leases of the restaurants following the expiration of the Leases and sent the tenants a "request for proposal". The tenants each submitted a proposal but were unsuccessful. In December 2009, Crown gave notices pursuant to cl 2.3(c) of the Leases requiring the tenants to vacate the leased premises upon the expiration of the Leases.

The proceedings in VCAT

174. On 30 July 2010, the tenants commenced a proceeding in VCAT seeking, inter alia, interlocutory relief to restrain Crown from re-entering the premises. Crown re-entered the premises on 31 August 2010, before the application for an interlocutory injunction was heard. The proceeding continued, however, to a final hearing and, on 24 February 2012, VCAT found that the assurance constituted a collateral contract that, as consideration for the tenants entering into the Leases and carrying out the refurbishment works, Crown would offer to renew the Leases for a further term of five years on such terms and conditions as Crown might choose pursuant to cl 2.3(a) of the Leases**[200]**.

175. VCAT also held that, by reason of the tenants having acted in reliance upon the collateral contract to their detriment, Crown was estopped from denying the existence of the collateral contract and thus that the collateral contract was enforceable notwithstanding that it was not evidenced in writing as was thought might otherwise have been required by s 126(1) of the *Instruments Act* 1958 (Vic).

176. VCAT found that by failing to offer a further term of five years in accordance with the collateral contract, Crown caused the tenants loss and damage by way of the loss of profits which it was anticipated would have been generated during the further term of five years. VCAT quantified those losses of profits, in the case of the first respondent, in the amount of $467,505 plus interest and, in the case of the second respondent, in the amount of $1,143,167 plus interest.

The appeal at first instance

177. From that decision, Crown appealed successfully to the Supreme Court of Victoria**[201]**. The primary judge (Hargrave J) held that VCAT erred in finding that the assurance was sufficiently promissory to constitute a collateral contract and in any event that, because the supposed collateral contract provided for Crown to offer to renew the Leases for a term of five years on such terms and conditions as Crown might choose, it was illusory and unenforceable. His Honour further held that, because a reasonable person in the position of the tenants would not have understood the assurance as meaning that Crown would offer a further term at renewal time on the same terms and conditions as the existing Leases, the tenants' estoppel case failed *in limine*.

The appeal to the Court of Appeal

178. The Court of Appeal upheld the primary judge's finding that there was no collateral contract but allowed the appeal in relation to the estoppel claim.

179. Warren CJ agreed with the primary judge that the supposed collateral contract was so uncertain as to be illusory and unenforceable. Her Honour took a different view, however, concerning estoppel. She referred to authorities supporting the view that a lower standard of certainty is required to establish an equitable estoppel than is necessary to establish the existence of a contract**[202]** and, on that basis, reasoned that the fact that the assurance was not sufficiently certain to establish a collateral contract did not mean that it was incapable of founding an equitable estoppel. As VCAT had found, the tenants had taken the assurance to mean that they would be offered a further term. By giving the assurance, Crown had induced the tenants to adopt that assumption or expectation. It was not unreasonable for the tenants to adopt that assumption or expectation. On that basis, her Honour held that it would be unconscientious for Crown to be permitted to resile from that assumption or expectation and hence that Crown was estopped. But, her Honour said, it did not follow that the tenants were entitled to relief calculated by reference to the position in which they would have been if they had been granted further leases of five years' duration. The tenants were only entitled to the minimum relief sufficient to satisfy their equity. Her Honour held therefore that the matter should be remitted to VCAT to enable the

tenants to establish "what was the lower limit of the representation made to them and then, what they are entitled to in order to achieve equity"**[203]**.

180. Whelan JA, with whom Santamaria JA agreed, concurred with the primary judge that the supposed collateral contract was so uncertain as to be illusory and unenforceable. Whelan JA was also at one with the primary judge in observing that there was an "irreconcilable disconformity" between the representation which Crown had been found in fact to have made – "to make a renewal offer under cl 2.3(a) on whatever terms Crown chose"**[204]** – and Mr Zampelis' subjective understanding that the effect of the representation was that Crown would offer to renew the Leases for a further term of five years on the same terms and conditions as the existing Leases. But Whelan JA considered that that was not the end of the matter. In his Honour's view, it was "necessary to address the estoppel issue more widely than the narrow terms of VCAT's conclusion on estoppel" **[205]**, because the tenants had pleaded their case in VCAT in estoppel in wider terms than that; VCAT's findings were expressed in wider terms than that; and ground 8 of the Notice of Appeal was in wider terms than that. It was necessary to consider estoppel on the basis of VCAT's findings "by reference to the 'lower limit' of what was meant by 'looking after' the tenants at renewal"**[206]**.

181. As Whelan JA noted, however, although a claim couched in those terms may have been within the case as pleaded and, in that sense, as put at VCAT, it had not been adjudicated upon by VCAT. Thus, in his Honour's view, it was necessary for the matter to be remitted to VCAT "for this aspect of the tenants' case to be ruled upon and determined" **[207]**. It remained for VCAT to decide what, if any, equitable relief should be granted to the tenants, consistently with the "lower limit"**[208]** of what was meant by the assurance.

The appellant's contentions

182. Before this Court, Crown contended that all members of the Court of Appeal erred in holding that the assurance was capable of founding a promissory estoppel. Crown submitted that it was established by the judgment of Mason and Deane JJ in *Legione v Hateley***[209]** that, for a representation to found a promissory estoppel, the representation must be clear and the representation must have been such as to cause a reasonable person in the position of the representee to have relied upon it as the representee is alleged to have done. In Crown's submission, those principles have been followed in numerous cases since *Legione* and should continue to be adhered to, especially given that the tenants did not challenge VCAT's finding that the assurance was objectively ambiguous and did not seek to re-open *Legione*.

183. Crown further contended that the Court of Appeal erred in treating the arguably lower level of certainty required to found a proprietary estoppel as if it were applicable to promissory estoppel. In Crown's submission, the Court of Appeal were in error in following what Crown characterised as the relatively small number of recent decisions in New South Wales and Victorian courts which have treated the lower standard of certainty applicable to proprietary estoppel as if it were applicable to promissory estoppel.

184. In any event, in Crown's submission, the notion of some "lower limit" of the "grey area"**[210]** was misconceived and, on the facts of this case, devoid of application. Since the

only case advanced by the tenants was that they assumed the assurance meant they would be offered new leases of five years' duration on the same terms and conditions as the existing Leases, it did not matter if the assurance might reasonably be considered to have had some other meaning less favourable to the tenants. In Crown's submission, since the heart of promissory estoppel is the subjective state of mind of the promisee and the part which the promisor has played in bringing that about, it is not to the point to suppose what a reasonable promisee might reasonably have understood a promise to mean and then to pretend that the actual promisee acted on the basis of that supposed understanding. According to Crown, given that the Court of Appeal found that the assurance was ambiguous, and therefore had no decisive reasonable meaning, it followed ineluctably that the appeal to the Court of Appeal should have been dismissed.

The respondents' contentions

185. By way of their application for special leave to cross-appeal, the tenants contended that the primary judge and the Court of Appeal were in error in failing to uphold VCAT's decision that there was a binding collateral contract that Crown would offer a further term of five years on the same terms and conditions as the existing Leases, and that the tenants were entitled to damages for breach of the collateral contract equal to the profits which it was said they had forgone.

186. The tenants further contended that VCAT was correct in holding that Crown was estopped from denying that it promised to offer further leases of five years' duration, and right to award equitable compensation equivalent to the profits which it said were forgone as the result of Crown's refusal to grant a further term of five years to each tenant.

187. According to the tenants, Crown's reliance on the difference between the degrees of certainty required for promissory estoppel and proprietary estoppel was also misplaced. Crown had not invoked any such distinction when before VCAT or the primary judge or the Court of Appeal, and, in any event, it was submitted, in the circumstances of this case, there was no relevant difference. Properly characterised, the estoppel for which the tenants contended was a proprietary estoppel.

188. The tenants embraced Warren CJ's conclusion that VCAT was correct in finding that the tenants took the assurance to mean that they would be offered new leases of five years' duration on the same terms and conditions as the existing Leases, and her Honour's finding that the tenants acted in reliance on that assumption to their detriment. But, contrary to Warren CJ's reasoning, the tenants contended that it followed that Crown was estopped from denying that it had agreed to grant new leases of five years' duration on the same terms and conditions as the existing Leases. On that basis, it was submitted, the tenants were entitled to equitable compensation equal to the profits forgone and there was no occasion to consider whether any lesser measure of relief was appropriate or, therefore, to remit the matter to VCAT.

189. Alternatively, the tenants contended, if the meaning that Crown would offer new leases of five years' duration on the same terms and conditions as the existing Leases or on the same terms and conditions *mutatis mutandis* was not a meaning that could reasonably be attributed to the assurance, the fact remained that that was the way in which

the tenants had construed the assurance and the basis on which they had acted to their detriment, and thus, as Whelan and Santamaria JJA had held, the matter should be remitted to VCAT for determination of the relief to be accorded to the tenants having regard to the meaning which a reasonable person in the position of the tenants would have attributed to the assurance.

The collateral contract

190. It is a remarkable feature of this matter that, although the tenants' claim before VCAT was essentially one for damages for breach of collateral contract, the claim ultimately upheld in the Court of Appeal was a claim in equitable estoppel for relief not previously sought. It is no less remarkable that, in this Court, the tenants demonstrated very little interest in supporting the Court of Appeal's reasoning or conclusion regarding estoppel and instead devoted the bulk of their submissions to an attempt to establish that the primary judge and the Court of Appeal were wrong to reject their claim for damages for breach of collateral contract, or alternatively in holding that the tenants were not entitled to equitable compensation in the same amount.

*No binding promise*

191. As has been noticed, VCAT decided the collateral contract claim on the basis of what it perceived to be the objective or reasonable meaning of the assurance that, if Mr Zampelis spent the money required to refurbish the premises to a high standard, he would be "looked after at renewal time". VCAT found that a reasonable person in Mr Zampelis' position would have understood that to be a promise that, if the tenants delivered the executed Leases and paid the costs of the fit out works, Crown would make an offer to grant a further term of five years on such terms and conditions as Crown might choose in its discretion. VCAT also held that the assurance was a sufficiently certain promise that, once accepted by the delivery of the executed Leases and payment of the fit out costs, it gave rise to a binding and enforceable collateral contract.

192. The primary judge took the opposite view. His Honour held that VCAT had erred in law in reaching its conclusion by failing to take the following relevant considerations into account:

> (1) In October and November 2004, before the expiry of the previous leases, Mr Boesley wrote to Mr Zampelis to enquire about his intentions to enter new leases, and specifying terms on which Crown would allow a holding-over.
>
> (2) When, by email in reply dated 8 November 2004, Mr Zampelis' personal assistant suggested that Crown had represented to Mr Zampelis that there would be a further term under the previous leases, Mr Boesley expressly denied any such representation by email dated 10 November 2004.

(3) On 11 May 2005, when the time came to negotiate the terms of the Leases, Mr Boesley sent "comprehensive summaries of the terms and conditions of proposed new leases"**[211]** to the tenants, including the five year term and major refurbishment clause.

(4) On 29 June 2005, Mr Boesley informed Mr Zampelis by email that his concept proposals for refurbishment of the restaurants had been approved "in principle"**[212]**, and sought confirmation from Mr Zampelis that he would accept the proposed terms under the Leases.

(5) Mr Zampelis replied by email to Mr Boesley on 22 July 2005, confirming the tenants' "acceptance of your offer unconditionally" **[213]**. That offer was for two five year leases, with no right of renewal, each commencing on 1 September 2005, under which major refurbishments were to be completed and trading was to commence by 1 December 2005.

(6) By email dated 3 November 2005, Mr Zampelis' personal assistant advised Mr Boesley that the Leases had been signed.

(7) On 23 November 2005, Mr Boesley sent an email to the tenants demanding that the executed Leases be returned to Crown and threatening to lease the restaurants to other restaurateurs if this was not done.

193. The primary judge reasoned, and the Court of Appeal agreed, that those and other matters revealed a background of commercial negotiations between parties experienced in commercial leasing, in which important matters were documented, against which a reasonable person in Mr Zampelis' position would have understood the assurance as being no more than "some vaguely encouraging words from Mr Boesley about the strength of the parties' relationship and Crown's willingness to see the restaurants prosper beyond the end of the five year term"**[214]**.

194. Before this Court, the tenants attacked the primary judge's reasoning at a number of levels but principally on the basis that it was not correct that VCAT failed to have regard to the listed matters. It followed, it was said, that the judge was wrong in holding that VCAT erred in law and thus wrong in substituting his own view of the facts for VCAT's findings.

195. That argument should be rejected. VCAT did not have regard to at least some of the listed factors and did not give adequate consideration to any of them. Whether VCAT had regard to factors (1) and (2) is perhaps debatable. They are described in VCAT's reasons as "features of these cases that would support a view that it is improbable that Crown made the alleged promise to renew for a further term"**[215]**. But there is no analysis anywhere in the reasons of what, if anything, VCAT perceived to so much outweigh those factors that

the assurance could objectively be discerned as a binding promise by Crown to offer a further term of five years. The position is even clearer in relation to factors (3), (4), (5), (6) and (7). None of them is described in the reasons as "features of these cases that would support a view that it is improbable that Crown made the alleged promise to renew for a further term"**[216]**. Factor (3) is mentioned later in VCAT's reasons**[217]**, but only as an historical introduction to statements which Crown was alleged to have made and were found not to have been made. Factors (4) and (5) are also mentioned**[218]** but only as part of the historical narrative. Factor (7), and implicitly factor (6), are mentioned**[219]**, but without any consideration of their implication that Crown was not prepared to deal on a basis other than the terms of the executed Leases.

196. When proper regard is had to each of those factors, it is apparent that the primary judge and the Court of Appeal were correct in holding that a reasonable person in the position of Mr Zampelis could not have construed the assurance as a binding promise to offer a further term of five years. To adopt and adapt the words of Lord Wright in *Scammell (G) and Nephew Ltd v Ouston (H C and J G)*, the parties did not "in intention nor even in appearance"**[220]** make or accept any promise about a renewal. Such, if any, understanding as they may have come to on the point was inchoate. They might have considered that there should be some form of renewal. But they never went on to make an agreement regarding renewal, by settling between them on what terms the renewal was to be. The furthest point they reached was an understanding that they would agree upon terms of renewal. The words which they used were not "the language of obligation or contract"**[221]**. VCAT's contrary finding was untenable.

197. That is sufficient to dispose of the proposed cross-appeal on the collateral contract claim. But, given the way in which the matter was argued, it is appropriate also to mention something of the primary judge's and the Court of Appeal's further reasoning that, in the event that the assurance could objectively be regarded as a promise to offer a further term of five years, the promise was not made in sufficiently certain terms to be contractually binding.

*Illusory promise*

198. As has been seen, the primary judge concluded, and the Court of Appeal affirmed, that, assuming the assurance were a promise, it was illusory and unenforceable because, apart from the term of five years, it left the selection of the terms and conditions of the renewed leases entirely to Crown's discretion.

199. That conclusion was correct. Although a lease which leaves the determination of the rent to a nominated third party, or provides for a reasonable rent, may be sufficiently certain to be enforceable**[222]**, an agreement to lease at a rent to be determined in the discretion of the lessor is not enforceable**[223]**. And, since a contract to lease on such terms is unenforceable, a promise to make an offer to lease on such terms is illusory.

200. In this case, the assurance did not provide for the rent to be determined by a third party. Nor was it a case of a right of first refusal in which the requisite certainty is said to be provided by the terms on which the promisor is prepared to deal with a third party**[224]**. As the primary judge held and the Court of Appeal affirmed, it was not open to construe the

assurance as importing reasonable terms and conditions. Nor did it assist that, when VCAT set about assessing damages for breach of the supposed collateral contract, VCAT conjectured by way of what it described as a matter of probability that, if Crown had appreciated it was bound to offer a further term, it would have stipulated terms and conditions that "had reasonable correspondence with those that had appeared in the existing lease"**[225]**. That was not the effect of the assurance. To the extent that the assurance presaged anything about the terms and conditions of the further term, it was implicit that it would be on such terms and conditions as Crown could choose in its discretion.

201. The primary judge appears to have accepted a submission by the tenants that, because the supposed promise was to offer to "renew" the Leases, it could be inferred that the offer would be to renew the Leases for a term of five years. That was thought to follow from the decision in *Lewis v Stephenson***[226]**, which was later approved by this Court in *Trade Practices Commission v Tooth & Co Ltd***[227]**, that, where a lease of land contains an option to renew which is silent as to the term of the renewal, it is to be inferred that the parties intended the renewal to be for the same term as the lease. That, however, was not correct.

202. Although it makes no difference to the outcome of this matter, it is to be observed that the principle which informs *Lewis v Stephenson* and *Tooth & Co* applies to written contracts. Consistently with the precept that courts should endeavour to construe a formal legal document in order to avoid frustrating the parties' intentions, and therefore should be loath to hold that a written condition is bad for uncertainty, it can often be inferred that parties intended that a provision for "renewal" of a lease on unspecified terms and conditions is a provision for renewal on the same terms and conditions as the existing lease. But that principle has little if any application to the objective interpretation of oral assurances. The latter depends on the words of the assurance and the circumstances in which the assurance is given. If the assurance had been given in terms that Crown would grant a renewal, it might have been inferred that what was intended was a renewal for the same term as the Leases. But, since the assurance was no more specific than that the tenants would be looked after at renewal time, it was not open to infer that it meant a further term of no less than the existing term.

*No inconsistency*

203. The primary judge also held that, if the assurance could reasonably be construed as a promise to grant a further term of five years, the promise would be inconsistent with cl 2.3 of the Leases, and therefore unenforceable because of the rule in *Hoyt's Pty Ltd v Spencer***[228]** and the decision in *Maybury v Atlantic Union Oil Co Ltd***[229]**. The Court of Appeal affirmed that view of the matter. But that was not correct either. Although it makes no difference to the outcome in this matter, it is apparent that there would not have been an inconsistency.

204. Certainly, as was earlier noticed, cl 2.3 of the Leases provided for Crown to give notices at a set period before the expiration of the Leases in one of three possible forms:

(a) in the form of an offer to renew;

(b) in the form of an offer to allow the tenant to remain in possession as a tenant from month to month; and

(c) in the form of a notice to quit.

205. But Crown's rights to offer to renew the Leases or to permit occupation on a monthly tenancy or to require the tenant to vacate the demised premises, and Crown's discretion to choose between courses, were not created by the Leases. Those rights arose by operation of law as rights in reversion upon the expiration of the Leases**[230]**. The only effect of cl 2.3 was to require Crown to give notice of its choice. Absent cl 2.3, a collateral promise by Crown to choose among its common law rights as reversioner**[231]** would not be in any sense inconsistent with the terms of the Leases. Equally, since the only effect of cl 2.3 was to require Crown to give notice of its choice between its common law rights as reversioner, such a collateral promise would not be inconsistent with cl 2.3.

Estoppel

206. When this matter was before VCAT, the tenants put their claim in estoppel as an alternative to their claim in collateral contract. So put, it was that because Mr Boesley gave the assurance and the tenants acted in reliance upon it to their detriment, Crown was estopped from denying that it was bound to offer to renew the existing Leases for a term of five years on the same terms and conditions as the existing Leases, or at least on the same terms and conditions *mutatis mutandis* as the existing Leases. By contrast, VCAT's conclusion on estoppel was that Crown was not so estopped but estopped only from denying that it was bound to offer to renew the Leases for a further term of five years on such terms and conditions as it might choose in its discretion.

207. As will be recalled, the primary judge held that the claim of estoppel failed because, on the facts as found by VCAT, the assumption or expectation which a reasonable person in Mr Zampelis' position would have formed on the basis of the assurance was that Crown would offer to renew the Leases on such terms and conditions as Crown might choose in its discretion, as opposed to the same terms and conditions as the existing Leases, and because there was no evidence or determination by VCAT of whether Mr Zampelis would have been induced to act as he did if he had understood that the assurance meant no more than that Crown would offer to renew the Leases on such terms and conditions as Crown might choose in its discretion.

208. Each member of the Court of Appeal held that that was not correct, although for different reasons. Warren CJ reasoned that the primary judge was in error in approaching the matter on the basis of what the assurance would have meant to a reasonable person in Mr Zampelis' position. Her Honour considered that the claim was to be determined by a process of four steps. The first was to ascertain what Mr Zampelis took the assurance to mean. The second was to ascertain whether it was reasonable for Mr Zampelis to have interpreted the assurance in that fashion. The third was to determine whether the tenants

had acted in reliance on the assurance to their detriment. The fourth was to determine the minimum equity. Her Honour accepted that Mr Zampelis took the assurance to mean that Crown would offer to renew the Leases for a term of five years on the same terms and conditions as the existing Leases. Her Honour also found that, although the assurance was capable of a range of meanings, it was not unreasonable for Mr Zampelis to construe it as he did. Her Honour further found that the tenants had acted in reliance on the assurance and suffered detriment by incurring expenditure on the fit out works. On that basis, Warren CJ held that the matter should be remitted to VCAT for determination of the measure of relief to be accorded to the tenants, which her Honour posited should be at the "lower limit of the representation"**[232]**; meaning, presumably, in accordance with the least onerous to Crown of the several possible meanings which could reasonably have been drawn from the assurance.

209. Whelan and Santamaria JJA considered that the primary judge was correct in holding that VCAT made an error in failing to "analyse or consider what [VCAT] had found as to what had been said to Mr Zampelis and as to what that meant"**[233]**. But their Honours were also of the view that VCAT and the primary judge were at fault in that "[n]either VCAT nor the [primary] judge have addressed estoppel on the basis of the factual findings which VCAT made but by reference to the 'lower limit' of what was meant by 'looking after' the tenants at renewal"**[234]**. Like Warren CJ, therefore, although for a different reason, Whelan and Santamaria JJA concluded that the matter should be remitted to VCAT to determine "what equitable relief, if any, should be granted"**[235]**. Their Honours said that the "enquiry [should] involve an analysis of what Crown should do to relieve [the tenants] from the detriment they have suffered because Crown resiled from its representation"**[236]**, but that it should not extend to the grant of new leases or anything in the nature of expectation loss.

*Certainty of the representation*

210. Crown attacked the Court of Appeal's reasoning at a number of levels. Its starting point was to contend that the tenants had put their estoppel claim in VCAT as a claim of promissory estoppel and that, because the assurance lacked contractual certainty, the claim was bound to fail. Counsel for Crown called in aid Mason and Deane JJ's statement in *Legione* that "[t]he requirement that a representation must be clear before it can found an estoppel is ... applicable to any doctrine of promissory estoppel"**[237]**, and their Honours' reference with apparent approval to the statement of Lord Denning MR in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd***[238]** that a higher standard of clarity is required to found a promissory estoppel than is required to found an agreed variation of contract. In *Woodhouse AC*, Lord Denning stated that was so because it was clear from *Low v Bouverie***[239]** and *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd***[240]** that a representation must be clear and unequivocal in order to work an estoppel.

211. Crown's contention should not be accepted. The notion that it takes a representation of contractual certainty to found a promissory estoppel is misplaced. As Warren CJ observed, what is determinative in cases of promissory estoppel is whether the party sought to be estopped has played such a part in creating an assumption or expectation in

the mind of a claimant, in reliance on which the claimant has acted to the claimant's detriment, that it would be unconscionable for the estopped party to depart from the assumption or expectation before allowing the claimant reasonable time in which to revert to the *status quo ante* or, in some cases, at all**[241]**.

212. Mason and Deane JJ's statement in *Legione* that the requirement that a representation must be clear before it can found an estoppel is to be understood in that sense. So are Lord Denning's references in *Woodhouse AC* to *Low v Bouverie* and *Canada and Dominion Sugar Co*. Neither of the latter cases supports the proposition that a statement must be objectively unambiguous in order to found a promissory estoppel, still less that it must be more certain in terms than is required to found an agreed variation of contract**[242]**.

213. *Low v Bouverie***[243]** was decided in the immediate aftermath of *Derry v Peek***[244]**. The beneficiary of a trust sought a loan from a client of a firm of solicitors on the security of the beneficiary's life interest in the trust and the solicitors sought advice from the trustee as to whether the trustee held any mortgage or knew of any other encumbrance over the beneficiary's interest in the trust. The trustee replied that he held a mortgage from the beneficiary for the charge of interest on money advanced to the beneficiary and two policies of life insurance on the beneficiary's life as security for the moneys advanced to him, both of which were mortgaged, but, in effect, that the trustee was not aware of any other security. Acting in reliance on the trustee's reply, the solicitors went ahead and made the loan to the beneficiary. When the beneficiary later defaulted in repayment of the loan, the solicitors discovered that the beneficiary's interest in the trust was in fact subject to six prior mortgages and that, although the trustee had notice of the prior mortgages, at least in the sense that they were receipted in the deed by which he was appointed as trustee some three years before, the trustee had forgotten of their existence when responding to the solicitors' enquiry. The client sued the trustee for breach of warranty and also for equitable relief on the basis that the trustee was estopped from denying that the only encumbrances on the beneficiary's interest in the trust were those which the trustee had mentioned. It was held that the claim for breach of warranty failed because there was no intention to enter into contractual relations, and that the claim of estoppel failed because the meaning which the solicitors sought to attribute to the trustee's reply went beyond the meaning that it could reasonably bear in the circumstances. Bowen LJ encapsulated the latter point as follows**[245]**:

> "[I]n order to entitle the Plaintiff to relief, we must find here such an estoppel as would justify a claim for relief based upon the hypothesis that the Defendant is precluded from denying the truth of the fact which he is supposed to have asserted. Now, an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. *That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the*

> *person to whom it is addressed*. ... I have come to the conclusion that the Defendant did not make any clear statement of the character which the Plaintiff alleges. I think that his language would be reasonably understood as conveying an intimation of the state of his belief, without an assertion that the fact was so apart from the limitation of his own knowledge; and therefore that no relief here can be granted." (emphasis added)

214. *Canada and Dominion Sugar Co***[246]** was to a similar effect albeit in a different context. It concerned a "received for shipment" bill of lading in respect of a quantity of sugar shipped on the respondent's steamship which stated that the sugar was received "in apparent good order and condition" but contained on the margin a stamped endorsement "[s]igned under guarantee to produce ship's clean receipt". In fact, the sugar had suffered damage before shipment and the ship's receipt stated "[m]any bags stained, torn and resewn". The appellant, which was the indorsee of the bill of lading, sued the respondent, alleging that it was estopped by the bill of lading from denying that the sugar was shipped in good condition. The claim in estoppel failed, although once again not because of any lack of contractual certainty. To the contrary, as the Privy Council observed with reference to the passage of the judgment of Bowen LJ in *Low v Bouverie***[247]** which is set out above: "[a] question ... of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities"**[248]**. The claim of estoppel failed because "the language of the bill of lading, read fairly, and as a whole"**[249]** did not bear the meaning which the indorsee sought to attribute to it. As the Privy Council observed**[250]**, if the statement "[r]eceived in apparent good order and condition" at the head of the bill of lading had stood alone, the bill of lading would have been a "clean" bill of lading and in the relevant context that would have meant that there was no clause or notation modifying or qualifying the statement as to the condition of the goods. But, because the bill bore on its face the qualifying words "[s]igned under guarantee to produce ship's clean receipt", it would reasonably have conveyed to a businessman that the statement as to good order and condition could not be taken to be unqualified.

215. Additionally, whatever degree of certainty might be necessary to found a promissory estoppel of the kind considered in *Legione* – and it is to be observed that, although the representation in that case was not certain, it was held by a majority to be sufficient to estop the vendor from rescinding – proprietary estoppels of the kinds exemplified in *Dillwyn v Llewelyn***[251]** and *Ramsden v Dyson***[252]** do not require any particular degree of objective certainty**[253]**; and proprietary estoppels of those kinds are a form of promissory estoppel**[254]**. As Lord Scott of Foscote (with whom Lord Hoffmann, Lord Brown of Eaton-under-Heywood and Lord Mance agreed) observed in *Cobbe v Yeoman's Row Management Ltd*, proprietary estoppel is a sub-species of promissory estoppel**[255]**:

> "The estoppel becomes a 'proprietary' estoppel – a sub-species of a 'promissory' estoppel – if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action."

216. Arguably, the present was a case of proprietary estoppel, because what was alleged was in effect that the tenants had acted to their detriment in carrying out the refurbishment works to a high standard on the faith of an assurance that, if they did so, they would be granted a further term. But, in any event, as Brennan J observed in *Waltons Stores (Interstate) Ltd v Maher*[256], unless cases of proprietary estoppel are to be attributed to a different equity from that which explains non-proprietary promissory estoppel, "[i]t does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others"[257]. And, although his Honour was there speaking of whether promissory estoppel can apply in cases in which there is no pre-existing legal relationship between the parties, the logic of the proposition applies equally to the degree of certainty required in each case.

217. The foundational principle on which equitable estoppel in all its forms is grounded is that equity will not permit an unjust or unconscionable departure by a party from an assumption or expectation of fact or law, present or future, which that party has caused another party to adopt for the purpose of their legal relations[258]. Consequently, the notion that there is or should be some *a priori* distinction between the degree of objective certainty required to found a promissory estoppel compared to a proprietary estoppel runs counter to principle. The idea of "one overarching doctrine of estoppel rather than a series of independent rules"[259] may not yet have "won general acceptance"[260]. But, in as much as the recognised categories of equitable estoppel are instances of the operation of the more general foundational principle, the determination of whether it is unconscionable for the charged party to depart from an assumption or expectation created in the mind of the claimant must always depend on the particular facts and circumstances of the case. The recognised applications of established categories of promissory estoppel are not necessarily exhaustive of the cases in which equity will intervene[261] and, even if they were, it would not follow that because it has been found in the context of one relationship that a designated level of certainty was required, the same degree of certainty would be necessary in the context of a different relationship or in different circumstances.

218. Finally on this aspect of the matter, as Warren CJ emphasised, since the object of equitable estoppel in all its forms is to prevent the detriment which a representee would suffer if the representor were unjustly or unconscionably to depart from the assumption or expectation created in the mind of the representee, relief should be accorded only to the extent of the minimum content of the assumed state of affairs from which it would be unjust or unconscionable for the representor to depart[262]. Frequently, that may not extend to compelling the representor to fulfil the assumption or expectation as opposed to compensating the representee for the detriment suffered[263]. Hence, although an equivocal or objectively ambiguous representation would be incapable of forming a binding contract, it may yet found a promissory estoppel. The equivocal or objectively ambiguous nature of the representation is but one, albeit important, consideration in the determination of whether and to what extent the assumption or expectation is fairly and reasonably to be attributed to the representation and thus the measure of relief which is to be accorded[264].

*Correspondence of the assumption or expectation with the representation*

219. Crown next contended that the claim in estoppel was bound to fail because of the disconformity between what VCAT found to be the objective meaning of the assurance and Mr Zampelis' subjective understanding of the meaning of the assurance.

220. That contention cannot be accepted in the broad terms in which it was stated. It follows from what has already been said about contractual certainty that it was not necessarily inimical to the tenants' claim in estoppel that VCAT found that Crown's representation could not reasonably have been taken to mean more than that Crown would offer the tenants a further term of five years on such terms and conditions as Crown might choose in its discretion in accordance with cl 2.3 of the Leases.

221. Certainly, as has been explained, before a party charged can be estopped by representation, the party charged must have played such a part in the adoption of the assumption or expectation on which the other party has acted to the latter's detriment that it would be unconscionable for the party charged to be left free to ignore that assumption or understanding**[265]**. But it does not follow that, because the claimant has made an assumption or reached an understanding of the meaning of the representation that goes beyond the meaning that could reasonably be attributed to it, the party charged is altogether free to ignore it**[266]**. Depending on the facts and circumstances of a given case, it may still appear that it would be unconscionable if the party charged were free to depart from the meaning that may reasonably be attributed to the representation.

222. In cases of proprietary estoppel, the approach which has been taken is that, where the court is satisfied that the level of a claimant's assumption or expectation is genuinely derived from the subject representation but goes beyond what could reasonably be attributed to it, and it appears that it would be unjust or unconscionable if the party charged were free to depart from some lower level of assumption or expectation that may fairly and objectively be derived from the representation, relief may be limited accordingly**[267]**. As Robert Walker LJ observed in *Jennings v Rice***[268]**, if a claimant's expectations are uncertain or extravagant or out of all proportion to the detriment suffered, the court can and should recognise that the claimant's equity is to be satisfied in another, generally more limited, way. For the reasons already expressed, the common principle which informs all species of equitable estoppel, including non-proprietary promissory estoppel, implies that the same approach should be taken in relation to cases of non-proprietary promissory estoppel.

223. On that basis, Crown would be chargeable with such assumptions or expectations as might reasonably be attributed to the assurance in the circumstances which obtained. Whether it would be unjust or unconscionable for Crown to depart from that level of assumption or expectation would then depend on whether, if Mr Zampelis had taken the assurance to mean no more than that Crown would offer new leases on such terms and conditions as Crown might choose under cl 2.3, the tenants would have been induced by that more limited assumption or understanding to deliver the Leases and undertake the refurbishment works.

224. If it were thus established that the tenants would have been induced by that more limited assumption or understanding to act as they did, and acting as they did caused them

detriment, it might fairly be said that Crown had played such a part in the tenants' change of position to their detriment that it would be unconscionable for Crown to depart from the lesser assumption or expectation. By contrast, however, if the facts were that the tenants would not have been induced by that more limited assumption or expectation to act as they did, there would be nothing apparently unconscionable about Crown departing from that more limited assumption or expectation.

The conduct of the case before VCAT

225. As Crown contended, the tenants' case before VCAT was an all or nothing claim of collateral contract or, in the alternative, estoppel preventing the denial of the existence of a collateral contract, with damages for breach of the collateral contract calculated by reference to the profits which it was supposed would have been generated during the renewed term of the Leases. The tenants did not plead or contend or attempt to prove that, if they were not entitled to be put in the position in which they would have been if a further term of five years had been granted, they were entitled to some lesser scale of relief to be moulded according to what might reasonably be regarded as the meaning of the assurance. It follows, Crown submitted, that the tenants cannot now succeed to some lesser measure of relief computed on that basis.

226. That contention should be accepted, and it is determinative of this appeal. Due to the way in which the tenants put and conducted their case before VCAT, VCAT did not make any findings as to whether the tenants would have been induced by a more limited reasonable assumption or understanding to act as they did. Nor did VCAT make any finding of detriment as such. It found that the tenants were induced by their assumption or expectation of the meaning of the assurance to deliver the Leases and to expend the funds necessary to complete the refurbishments. But there was no evidence or determination of how much of the costs of the refurbishments were not recovered out of profits generated during the five year terms of the Leases. As has been seen, there was evidence that, upon the expiration of the Leases and Crown's refusal to grant a further term, the value of the refurbishments in the tenants' books of account was written down immediately to nil, generating an accounting loss of close to $2 million. But there was no evidence of how much of that would have been recovered if a further term of five years had been granted. Perhaps it could have been contended that it was probable that depreciation during the second five year term would continue at the same rate as during the initial term. But that was not suggested or considered.

227. Nor was it appropriate for the Court of Appeal to order that the matter be remitted to VCAT for further hearing in order to make up those deficiencies. The tenants chose not to advance a lesser case for relief when the matter was before VCAT, even as an alternative to the claim as it was put, and there is nothing in the way in which Crown conducted its defence which warrants that the tenants should now be given a second opportunity. There should be an end to litigation**[269]**. Having successfully resisted the tenants' claim in the way in which it was put, Crown should not now be vexed with what, in effect, would be a second proceeding. That would be wrong in principle**[270]** and it would be unfair.

Conclusion

228. In the result, the appeal should be allowed with costs. Orders 2-6 of the Court of Appeal should be set aside. In lieu, it should be ordered that the appeal to the Court of Appeal be dismissed with costs. Special leave to cross-appeal should be granted but the cross-appeal should also be dismissed with costs.

229. GORDON J. The appellant ("Crown") provided draft leases with terms of five years to the respondents ("the Tenants") as prospective tenants. Clause 2.3 of the leases provided that "[a]t least 6 months, but no more than 12 months before the Expiry Date, [Crown] must give notice to the Tenant stating" whether – (a) Crown would renew the lease and on what terms, (b) Crown would allow the Tenant to occupy the premises on a monthly tenancy after the Expiry Date, or (c) Crown would require the Tenant to vacate the Premises by the Expiry Date.

230. The Victorian Civil and Administrative Tribunal ("VCAT") found that Mr Zampelis, the controller of the Tenants, believed that the Tenants needed a term longer than five years to recover the costs of refurbishments required by the leases and to make a profit. Crown acknowledged internally that the refurbishments would require considerable capital expenditure and was aware that Mr Zampelis would "push for very long leases". VCAT found that, on a date that was probably 6 December 2005, a representative of Crown made a statement to Mr Zampelis to the following effect**[271]**:

> "(a) the leases that Crown required [the Tenants] to execute were expressed to be for five years because Crown wanted them to be aligned with other tenants' leases;
>
> (b) Mr Zampelis should spend money on refurbishment that would result in a high quality finish for the two restaurants;
>
> (c) if Mr Zampelis did so he would be *looked after when the time came for Crown to consider renewing the leases*." (emphasis added)

231. VCAT found that a reasonable person in the position of Mr Zampelis would have concluded that the statement that he would be looked after at renewal time was a promise that Crown "would fulfil its obligation under clause 2.3 to give a notice, within the time specified in clause 2.3, stating that it would renew the lease for a further five year term", on the terms specified in the notice**[272]**.

232. The issue raised on appeal, and by an application for special leave to cross-appeal, was whether the statement made by Crown constituted a contract collateral to the leases, a representation that founded an estoppel, or neither.

233. For the reasons that follow, the dealings between Crown and the Tenants created a contract collateral to the leases, and that collateral contract was breached. The estoppel

issue is not reached. The appeal should be dismissed. Special leave to cross-appeal in relation to the existence of the collateral contract should be granted and the cross-appeal should be allowed. However, the Tenants should be ordered to pay Crown's costs of the appeal and the cross-appeal. As these reasons will explain, although there was a collateral contract which was breached, VCAT was asked to assess damages on an incorrect basis, and did so. It is not appropriate to remit the matter to allow the Tenants to make a wholly different damages case.

Facts

234. Crown owns the Melbourne Casino and Entertainment Complex. The complex includes several restaurants. Companies of which Mr Zampelis was a director operated two riverfront restaurants at the complex, each under a five-year lease from Crown. The leases expired in May 2005, with the companies holding over until September 2005.

235. Negotiations for new leases started in late 2004. The two restaurants were to be operated by the Tenants. Mr Zampelis was provided with a draft lease for each Tenant. The starting date for each was 1 September 2005. The "Expiry Date" was 31 August 2010. Neither lease contained an option to renew but both contained a cl 2.3 that provided:

> "*At least 6 months, but no more than 12 months before the Expiry Date*, [Crown] *must give notice to the Tenant* stating whether:
>
> (a) [Crown] will renew this Lease, and on what terms (*this may include a requirement to refurbish the Premises or to move to different premises* - see clauses 44 and 54);
>
> (b) [Crown] will allow the Tenant to occupy the Premises on a monthly tenancy after the Expiry Date; or
>
> (c) [Crown] will require the Tenant to vacate the Premises by the Expiry Date." (emphasis added)

236. Clause 3.1 of each lease provided that "[i]f [Crown] gives the Tenant a notice under clause 2.3(a) and the Tenant wishes to renew this Lease, the Tenant must, within 60 days of that notice, give notice to [Crown] that the Tenant agrees to renew this Lease and accepts [Crown's] terms".

237. Clause 85 of each lease, entitled "Major Refurbishment", provided that "[t]he Tenant must complete a Major Refurbishment of the Premises, at it's [sic] own cost and to the full satisfaction of [Crown], before 1st December 2005". "Major Refurbishment" was defined in each lease to mean "a complete removal of all existing fitout, fixtures, fittings, furnishings, plant and equipment from the Premises by the Tenant and replacement with a completely new fitout, inclusive of new fixtures, fittings, furnishings, plant and equipment, graphics and signage in accordance with the Tenant's refurbishment and redecoration concept for the Premises".

238. In December 2009, Crown gave notice to the Tenants that it would not renew the leases.

Collateral contract

*Applicable principles*

239. There may be a contract ("the collateral contract") for which the consideration is the making of some other contract ("the main contract")[273]. Each contract is complete. Each contract has an independent existence and legal effect. Like all contracts, the collateral contract alters the contractual relations of the parties, but it does not, cannot, and is not intended to, alter the terms of the main contract. The parties "shall have and be subject to *all* (not some only) of the respective benefits and burdens of the main contract"[274].

240. As Knox CJ explained in *Hoyt's Pty Ltd v Spencer*, a "distinct collateral agreement, whether oral or in writing, and whether prior to or contemporaneous with the main agreement, is valid and enforceable even though the main agreement be in writing, *provided* the two may consistently stand together so that the provisions of the main agreement remain in full force and effect notwithstanding the collateral agreement"[275] (emphasis added). To similar effect, in a passage later quoted in *Maybury v Atlantic Union Oil Co Ltd*[276], Isaacs J said in *Hoyt's*[277]:

> "The truth is that a collateral contract, which may be either antecedent or contemporaneous ... being supplementary only to the main contract, **cannot impinge on it, or alter its provisions** or the *rights created by it*". (emphasis in bold added)

241. Some discontent has been expressed with what is often referred to as "the rule in *Hoyt's v Spencer*"[278]. The Tenants submitted that, if necessary, *Hoyt's* and *Maybury* should be reconsidered. However, as will become apparent, that question need not be addressed in this matter.

242. For a statement to form the basis of a collateral contract, the statement must be "promissory and not merely representational"[279]. A statement will be promissory if it was "reasonably considered" by the person to whom it was made as "intended" to be a contractual promise[280]. It must also be shown that the person to whom the statement was made "intended" to accept the statement as a contractual promise[281]. The relevant "intention" of the parties is to be judged objectively, that is, "deduced from the totality of the evidence"[282], by reference to what a reasonable person in the position of the parties would have understood[283]. And as with any contractual promise, the statement must be sufficiently certain[284].

243. As seen earlier, the consideration for the collateral contract may be the making of the main contract. Whether the making of the main contract was consideration for the collateral contract can be determined by considering whether the promisee relied upon the promissory statement in entering into the main contract[285].

244. Importantly for this matter, as is clear from the explanation by Knox CJ in *Hoyt's*, a collateral contract may be oral or in writing. This case concerns the former possibility.

245. Whether the parties have the requisite "intention" to create an oral contract[286], and, if so, the terms of that oral contract[287] and the interpretation of that oral contract[288], are questions of fact. Of course, if there is only one construction open, a judge is bound to treat the construction as a matter of law[289]. Those propositions have a historical basis – juries were often illiterate and could not interpret written contracts, but could interpret oral contracts – as well as a practical basis because of the different evidence admissible in relation to oral and written contracts[290].
246. The matters of primary fact or inferences from primary fact may include what was said, how that was understood, what was intended by the maker of the statements and how the statements should reasonably have been understood[291]. That is not to say that there are not questions of law involved in this matter. The *Hoyt's* issue – whether the collateral contract may consistently stand together with the main contract – is one. The questions of whether the terms as interpreted are legally incomplete, in the sense that essential or critical terms are yet to be determined, or whether the terms as interpreted are illusory, are two others.

*Issue and approach*

247. In light of the above principles, whether a collateral contract was formed may be addressed by asking four questions: (1) Was the statement promissory and sufficiently certain?; (2) Did Mr Zampelis rely upon the statement?; (3) Was the alleged collateral contract consistent with the leases?; and (4) Was the alleged collateral contract not illusory, but complete?
248. The answer to each question is "Yes". The Tenants and Crown made a collateral contract, which Crown breached.

*Promissory and sufficiently certain?*

249. The statement made by Crown's representative to Mr Zampelis was promissory and sufficiently certain[292]. To explain why, it is first necessary to consider cl 2.3 of each lease. Clause 2.3 is directed primarily to *when* Crown was required to give notice of how it proposed to deal with its reversionary interest, as lessor, under the leases.
250. A reversionary interest arises when the holder of an interest in land grants a lesser interest to a third party without disposing of his or her entire interest in the property[293]. The creation of Crown's reversionary interest as lessor was an essential part of the grant of each lease[294]. Those interests arose by operation of law, not express grant. As each lease had no option for the Tenant to renew, one aspect of Crown's reversionary interest was the right to offer and grant to the Tenant (or some third party) a lease that would commence after the determination of that Tenant's existing lease on such terms as Crown saw fit. Crown had that right throughout the term of each Tenant's lease, not only after the lease determined[295].
251. Clause 2.3 addressed the existence of Crown's reversionary interest, not by dealing directly with it, but by imposing a time period in which Crown was obliged to tell each Tenant how it proposed to exercise its rights about what would happen at the end of the

lease. Crown had no greater rights under the leases than it had as a result of its reversionary interest by the operation of law. The requirements imposed by cl 2.3 had no legal effect except to fix a time period within which Crown was required to tell the Tenant how it proposed to exercise its rights.

252. What, then, was the promise? As seen earlier, VCAT found that the statement made by Crown's representative was, in substance, a promise that Crown "would fulfil its obligation under clause 2.3 to give a notice, within the time specified in clause 2.3, stating that it would renew the lease for a further five year term", on the terms specified in the notice**[296]**. As that interpretation (including how the statement should reasonably have been understood) was a question of fact**[297]**, it was not open to challenge on appeal to the Supreme Court of Victoria, unless the finding was not open on the evidence**[298]**.

253. That finding was open on the evidence. It was a promise to give to the Tenants, within the stipulated time period, notice of the terms on which Crown would "renew" the leases for five years. Consistent with the lease terms and Crown's reversionary interest, Crown could have required a move to different premises or stipulated that further refurbishment was required. The promise was not a promise to agree. It was not a promise to enter into a new lease. More particularly, it was not a promise to enter into a new lease on substantially similar terms. It was not an offer of a right of pre-emption. It was not a right of first refusal. It did not purport to impose future contracts on the parties. The promise was, in its terms and effect, a promise to make an *offer* "to renew" the leases for five years on terms of Crown's choosing**[299]**. Nothing more, nothing less. That was the finding of VCAT**[300]**.

254. A provision to like effect was to be included in cl 2.3(a) of the leases. Such a promise does not become uncertain simply because it forms part of an oral collateral contract. And it does not become uncertain because, at the time that the promise is made, it is not known whether the offer, when it is made, will be acceptable to the Tenants when it is served on them.

255. VCAT found that the statement by Crown's representative was a promise; a statement about what Crown *would* do in the future**[301]**. That VCAT found that the statement was a promise is unsurprising. That finding was supported by independent evidence from Mr Craig, formerly of the National Australia Bank, which VCAT accepted. Mr Craig's evidence was that, within one or two weeks of the 6 December 2005 meeting, he made a handwritten note of the meeting on a copy of the lease for one of the Tenants. The handwritten note stated**[302]**:

> "[W]hilst this is a 5 year term this is standard for Crown and aligns with other venues. Have however been with [Mr Zampelis] at several meetings when *discussions have confirmed that further terms will be provided as they have in the past*. David Boesley (Crown) was talking to [Mr Zampelis] one time and intimated that fit out should be high quality as this would reflect well and not to worry as he would be *looked after at renewal time*. So he should complete fit-out with this in mind and not scrimp on finishing to

> save a few dollars just because of the lease term. [Mr Zampelis] has also advised that he has had such conversation with Nick Williams and others so this should give bank comfort for longer term." (emphasis added)

256. VCAT found that the roughly contemporaneous note was likely to be a more reliable account of the conversation than evidence given by one or more of the meeting participants some six years later. Indeed, Crown's representative, Mr Boesley, gave evidence before VCAT in which he acknowledged that the meeting probably occurred and that parts of the evidence given by Mr Craig (and another witness) were probably correct.

257. What, then, of the complaint that the phrase "looked after at renewal time"**[303]** was too vague? That complaint should be rejected. As VCAT found, the statement could not be looked at in isolation. It had to be considered in context – by looking at the statement as a whole, the history of the negotiations and the terms of the leases including, in particular, cl 2.3. The question for VCAT was how a reasonable person in the position of the parties with knowledge of those facts and matters would understand the statement. As seen earlier, VCAT found that a reasonable person would conclude that the promise meant that Crown "would fulfil its obligation under clause 2.3 to give a notice, within the time specified in clause 2.3, stating that it would renew the lease for a further five year term", on the terms specified in the notice**[304]**. That finding was well open on the evidence and is anything but surprising. Before the expiration of each lease, Crown would have three options**[305]**. Under cl 2.3 of each lease, only one of those options – cl 2.3(a) – could align with "looked after when the time came for Crown to consider renewing the leases". And the one option which could align – cl 2.3(a) – was, in substance, consistent with Mr Craig's handwritten note of what Mr Zampelis had been told by Crown.

258. VCAT's analysis of the promissory nature and certainty of the statement was correct.

*Reliance*

259. The next question is whether Mr Zampelis relied upon the promise in entering into the leases. That required consideration of two issues: first, when the Tenants delivered the leases; and second, whether the Tenants delivered the leases in reliance on the promise.

260. The timing of the delivery was important because it was common ground that the Tenants had *executed* the leases before the promise was made by Crown's representative to Mr Zampelis. However, that fact was not conclusive. The question was whether the leases had been *delivered* before the promise was made**[306]**.

261. Whether there had been delivery, with the intention of being bound, was a question of fact**[307]**. VCAT found that the leases had not been delivered prior to the promise being made and that the Tenants evinced an intention to be bound by the leases when, but only when, the executed leases were handed over or "delivered" in March 2006**[308]**.

262. So, did the Tenants deliver the leases in reliance on the promise? That was also a question of fact. VCAT found that the delivery was made to Crown in reliance on the promise**[309]**. VCAT recognised that different interpretations of the evidence were open and explained why the finding made was preferable.

263. All of the above findings of fact were open on the evidence. The criticisms by the primary judge and the Court of Appeal of VCAT's approach to, and resolution of, the collateral contract question should not be accepted – they do not account for the factual nature of the relevant inquiries.

*Consistent with the leases*

264. The collateral contract was not inconsistent with, and did not impinge upon or alter, the rights under the leases. The collateral contract did not seek to impinge on, alter, or impair, the timing of the notice under cl 2.3. The collateral contract and each lease could "stand together"**[310]**. The collateral contract was additional to and stood outside the parties' rights and obligations under the leases. It was an agreement that the notice given, within the timing prescribed by cl 2.3, would be a notice which was directed to one of Crown's rights as a result of its reversionary interest, which existed independently of the leases, to offer to "renew" the leases for five years on the terms that Crown specified in the notice. In the context of these leases, that was an agreement which included the possibilities that under the offer the premises would alter or there would be a requirement to refurbish the premises.

*Not illusory but complete*

265. Contrary to the conclusions reached by the primary judge and the Court of Appeal, the collateral contract found by VCAT was not illusory**[311]**. As has been seen, it was an agreement to make an offer. Crown could fix the terms on which it would offer the new leases for five years. But Crown was under an obligation to make an offer of the kind promised. It could not refuse to make an offer at all**[312]**.

266. Nor were the terms of the collateral contract incomplete. Essential or critical terms of the agreement were not "left to be settled by future agreement of the parties"**[313]**. The collateral contract would have been concluded had Crown made the offer it was obliged to make. That offer must contain all the essential terms necessary for it to be complete upon acceptance**[314]**. But that does not mean, if there is a contract to make an offer, that those terms must be settled in advance of the offer being made. By its nature, an offer only reflects the will of one of the parties. Had the offer been accepted by the Tenants, a new and independent contract – a lease – would have come into existence at that point. That is not the same as the essential terms of the collateral contract being settled by further agreement between the parties at a later point.

267. Finally, the collateral contract – an agreement to make an offer, not a contract for the disposition of an interest in land – was not required to be evidenced in writing by s 126 of the *Instruments Act* 1958 (Vic).

*Other matters*

268. For the above reasons, VCAT correctly found that there was a collateral contract and correctly concluded that Crown breached that collateral contract when it failed, within the time specified in cl 2.3, to give the Tenants notice that it offered to "renew" the lease for a

further five year term on the terms specified in the notice. The Tenants lost the benefit of such an offer. It was a loss of an opportunity**[315]**. The value (if any) of that offer was the proper basis for assessment of damages. That was not the approach adopted by VCAT.

269. VCAT was asked to adopt, and adopted, what was described as an "agreed approach to assessment of damages" for breach of the collateral contract**[316]**. The damages were calculated by reference to the profits that would have been generated during the term of renewed leases. The Tenants did not contend, or prove, that they were entitled to damages, even nominal damages, for loss of an opportunity or detriment**[317]**. Indeed, because of the agreed approach to the assessment of damages, VCAT did not make any findings relevant to assessing the value, if any, of the loss of an opportunity or make any finding of detriment. Further, the subsequent assessment of damages by VCAT was the subject of appeal before the primary judge but the relevant appeal grounds were not addressed by his Honour. VCAT's assessment of damages was not relevantly the subject of challenge in the Court of Appeal or in this Court.

270. Having regard to the course taken in VCAT in relation to damages, it is not appropriate to remit the matter to VCAT to allow the Tenants to make a wholly different damages case. Nor is it necessary or appropriate to remit the matter to a single judge of the Supreme Court of Victoria to consider so much of the Tenants' application for leave to appeal to that Court as related to the damages issue.

Estoppel

271. Given the views formed in relation to the collateral contract claim, the estoppel claim does not arise for determination.

Result and orders

272. For those reasons, the appeal should be dismissed. The Tenants should be granted special leave to cross-appeal on the collateral contract issue, and the cross-appeal should be allowed. The Tenants should be ordered to pay Crown's costs of the appeal and the cross-appeal. Paragraphs 2, 3, 4, 5 and 6 of the Order of the Court of Appeal of the Supreme Court of Victoria of 8 April 2015 should be set aside and, in their place, order that the appeal be dismissed with costs.

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**[1]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225.

**[2]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2013] VCAT 106.

**[3]** *Fish and Company (Vic) Pty Ltd v Crown Melbourne Ltd* [2013] VCAT 105.

**[4]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614.

**[5]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771.

**[6]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [117]- [120].

**[7]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [173]- [176].

**[8]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [188].

**[9]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [98].

**[10]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [200].

**[11]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [69].

**[12]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [70].

**[13]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [40].

**[14]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [83].

**[15]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [84].

**[16]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [134].

**[17]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [133].

**[18]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [135].

**[19]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [139].

**[20]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [141].

**[21]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [140].

**[22]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [139].

**[23]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 1407 at [44].

**[24]** See [1] above.

**[25]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [171].

**[26]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [172].

**[27]** (1988) 164 CLR 387; [1988] HCA 7.

**[28]** *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 61-62; [1984] HCA 64.

**[29]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [38]- [39].

**[30]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 786 [59]- [60] per Warren CJ, 808 [179] per Whelan JA, 814 [206] per Santamaria JA.

**[31]** *Heilbut, Symons & Co v Buckleton* [1912] UKHL 2; [1913] AC 30 at 43.

**[32]** *Heilbut, Symons & Co v Buckleton* [1912] UKHL 2; [1913] AC 30 at 36-37.

**[33]** *Heilbut, Symons & Co v Buckleton* [1912] UKHL 2; [1913] AC 30 at 39.

**[34]** *Heilbut, Symons & Co v Buckleton* [1912] UKHL 2; [1913] AC 30 at 50-51.

**[35]** *Deane v The City Bank of Sydney* [1904] HCA 44; (1904) 2 CLR 198 at 209; [1904] HCA 44; *Carmichael v National Power Plc* [1999] UKHL 47; [1999] 1 WLR 2042 at 2049-2050; [1999] UKHL 47; [1999] 4 All ER 897 at 904. See also *Gardiner v Grigg* [1938] NSWStRp 40; (1938) 38 SR (NSW) 524 at 532; *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776 at 794-795 [58]; [2009] UKHL 18; [2009] 3 All ER 945 at 965.

**[36]** *Handbury v Nolan* (1977) 13 ALR 339 at 341.

**[37]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [72]- [74].

**[38]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [76]- [81].

**[39]** See *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133; [1919] HCA 64.

**[40]** See *Whitlock v Brew* [1968] HCA 71; (1968) 118 CLR 445 at 454; [1968] HCA 71.

**[41]** *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597 at 607; [1964] HCA 41; *Beattie v Fine* [1925] ArgusLawRp 38; [1925] VLR 363, referred to in *Placer Development Ltd v The Commonwealth* [1969] HCA 29; (1969) 121 CLR 353 at 360; [1969] HCA 29.

**[42]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [139].

**[43]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [141].

**[44]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 804 [157].

**[45]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 1407 at [35], [42].

**[46]** *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 at 418 [90]-[91]; [2010] HCA 32.

**[47]** *Legione v Hateley* [1983] HCA 11; (1983) 152 CLR 406 at 435; [1983] HCA 11.

**[48]** *Low v Bouverie* [1891] 3 Ch 82 at 106.

**[49]** *Low v Bouverie* [1891] 3 Ch 82 at 113.

**[50]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 790 [83].

**[51]** See, eg, *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10; *Wright v Hamilton Island Enterprises Ltd* [2003] QCA 36; (2003) Q ConvR 54-588.

**[52]** See *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101 at 112-113 [7].

**[53]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [171].

**[54]** *Low v Bouverie* [1891] 3 Ch 82 at 111.

**[55]** *Thompson v Palmer* [1933] HCA 61; (1933) 49 CLR 507 at 547; [1933] HCA 61; *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641 at 674-675; [1937] HCA

58; *Legione v Hateley* [1983] HCA 11; (1983) 152 CLR 406 at 437.

**[56]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [137].

**[57]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [198]-[200].

**[58]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 811 [195].

**[59]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [200].

**[60]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [133], [139], [141]-[142], [168], [173]-[176].

**[61]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [80].

**[62]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 787-788 [65]-[70], 809 [186].

**[63]** Reasons of Nettle J at [203]-[205].

**[64]** Reasons of Gordon J at [264].

**[65]** (1919) 27 CLR 133; [1919] HCA 64.

**[66]** (1953) 89 CLR 507; [1953] HCA 89.

**[67]** [2013] VSC 614 at [73].

**[68]** (2014) 45 VR 771 at 786-787 [62]-[64], 809 [185].

**[69]** Reasons of Gordon J at [265]-[266].

**[70]** See generally *Powell v Jones* [1968] SASR 394 at 397-403 (referred to with approval in *Godecke v Kirwan* [1973] HCA 38; (1973) 129 CLR 629 at 641-642; [1973] HCA 38); Carter, *Carter on Contract*, vol 1 (at December 2015, Service 43) at [04-090], [04-120].

**[71]** *Placer Development Ltd v The Commonwealth* [1969] HCA 29; (1969) 121 CLR 353 at 369; [1969] HCA 29.

**[72]** *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429 at 437; [1968] HCA 8.

**[73]** *Gardiner v Grigg* [1938] NSWStRp 40; (1938) 38 SR (NSW) 524 at 532 (citing *Maskelyne v Stollery* (1899) 16 TLR 97 and *Heilbut, Symons & Co v Buckleton* [1912] UKHL 2; [1913] AC 30).

**[74]** Reasons of Gordon J at [252]-[253].

**[75]** Reasons of Nettle J at [192]-[193].

**[76]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [70].

**[77]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [135], [141].

**[78]** *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14; [2010] 1 WLR 753 at 771 [45]; [2010] 3 All ER 1 at 18.

**[79]** *Powell v Jones* [1968] SASR 394 at 398. See also *Whitlock v Brew* [1968] HCA 71; (1968) 118 CLR 445 at 456, 460; [1968] HCA 71.

**[80]** *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* [1982] HCA 53; (1982) 149 CLR 600 at 604; [1982] HCA 53.

**[81]** See generally *Chitty on Contracts*, 32nd ed (2015), vol 1 at 279-280 [2-134].

**[82]** *Loftus v Roberts* (1902) 18 TLR 532 at 534; applied in *Beattie v Fine* [1925] ArgusLawRp 38; [1925] VLR 363 at 369 and *Placer Development Ltd v The Commonwealth* [1969] HCA 29; (1969) 121 CLR 353 at 356, 359-361, 369-370; and distinguished in *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597 at 605; [1964] HCA 41 and *Meehan v Jones* [1982] HCA 52; (1982) 149 CLR 571 at 581; [1982] HCA 52.

**[83]** *Powell v Jones* [1968] SASR 394 at 397.

**[84]** *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597 at 613.

**[85]** *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597 at 613.

**[86]** *Smith v Morgan* [1971] 1 WLR 803; [1971] 2 All ER 1500.

**[87]** *Smith v Morgan* [1971] 1 WLR 803 at 808; [1971] 2 All ER 1500 at 1504.

**[88]** Cf *Meehan v Jones* [1982] HCA 52; (1982) 149 CLR 571 at 581, 590-591.

**[89]** High Court Rules 2004 (Cth), r 42.08.4.

**[90]** cf *Director of Public Prosecutions v United Telecasters Sydney Ltd* [1990] HCA 5; (1990) 168 CLR 594 at 602; [1990] HCA 5.

**[91]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 785 [54]-[56], 807 [172]-[174].

**[92]** [2015] FCAFC 92; (2015) 233 FCR 315.

**[93]** [2015] HCATrans 337.

**[94]** [2016] HCATrans 103.

**[95]** Pursuant to s 89 of the *Retail Leases Act* 2003 (Vic), the Tribunal has exclusive jurisdiction to hear and determine a "retail tenancy dispute".

**[96]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [26].

**[97]** *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8; (2009) 236 CLR 272 at 286 [13]; [2009] HCA 8; *Clark v Macourt* [2013] HCA 56; (2013) 253 CLR 1 at 7 [10]- [11], 11 [26]-[27], 18-19 [59]-[61], 30 [106]; [2013] HCA 56.

**[98]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225.

**[99]** *Fish and Company (Vic) Pty Ltd v Crown Melbourne Ltd* [2013] VCAT 105; *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2013] VCAT 106.

**[100]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614.

**[101]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771.

**[102]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [8].

**[103]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [71], [84], [118].

**[104]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [79].

**[105]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [69].

**[106]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [75].

**[107]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [83].

**[108]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [84].

**[109]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [133].

**[110]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [137].

**[111]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [139].

**[112]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [139].

**[113]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [141].

**[114]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [135].

**[115]** See *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507; [1953] HCA 89.

**[116]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [145]-[148].

**[117]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [142].

**[118]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [168].

**[119]** *Fish and Company (Vic) Pty Ltd v Crown Melbourne Ltd* [2013] VCAT 105 at [53]; *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2013] VCAT 106 at [53].

**[120]** *Fish and Company (Vic) Pty Ltd v Crown Melbourne Ltd* [2013] VCAT 105 at [3]; *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2013] VCAT 106 at [3].

**[121]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [172].

**[122]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [171].

**[123]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [38]- [39].

**[124]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [39].

**[125]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [42].

**[126]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [73].

**[127]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [80].

**[128]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [87].

**[129]** [1988] HCA 7; (1988) 164 CLR 387 at 428-429; [1988] HCA 7.

**[130]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [88].

**[131]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [89].

**[132]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [93].

**[133]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [94].

**[134]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 786-787 [64].

**[135]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 787-788 [65]-[70].

**[136]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 808 [179].

**[137]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 808 [182].

**[138]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 809 [184].

**[139]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 809 [186].

**[140]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 789 [77].

**[141]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 789 [78].

**[142]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 790 [80].

**[143]** [2006] NSWCA 312; (2006) 13 BPR 24,755 at 24,768 [84].

**[144]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 790 [84].

**[145]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 791 [89].

**[146]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 792-793 [97].

**[147]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 810 [191].

**[148]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 810 [193].

**[149]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [198]-[199].

**[150]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [200].

**[151]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 814 [204].

**[152]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [76]- [80]; *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 787-788 [65]-[70], 809-810 [186]-[189].

**[153]** (1919) 27 CLR 133; [1919] HCA 64.

**[154]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [42]; *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 786-787 [64], 808-809 [182]-[183].

**[155]** *Loftus v Roberts* (1902) 18 TLR 532; cf *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597 at 601, 605, 607, 616; [1964] HCA 41.

**[156]** *Heilbut, Symons & Co v Buckleton* [1912] UKHL 2; [1913] AC 30 at 36. See also Handley, *Estoppel by Conduct and Election*, 2nd ed (2016) at 79-80 [4-001].

**[157]** (1935) 53 CLR 475; [1935] HCA 7.

**[158]** [1935] HCA 7; (1935) 53 CLR 475 at 477, 484-485, 488-489, 490-492.

**[159]** Difficulties with such a suggestion are noted in Handley, *Estoppel by Conduct and Election*, 2nd ed (2016) at 29-30 [1-034].

**[160]** [1988] HCA 7; (1988) 164 CLR 387 at 404.

**[161]** [1988] HCA 7; (1988) 164 CLR 387 at 399-401, 420, 423, 426, 428-429.

**[162]** [1988] HCA 7; (1988) 164 CLR 387 at 443, 464.

**[163]** [1988] HCA 7; (1988) 164 CLR 387 at 399-401, 428-429.

**[164]** [1999] HCA 10; (1999) 196 CLR 101 at 112-113 [7]; [1999] HCA 10. See also Handley, *Estoppel by Conduct and Election*, 2nd ed (2016) at 29-30 [1-034].

**[165]** *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387 at 419; see also *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641 at 674-675; [1937] HCA 58; *Legione v Hateley* [1983] HCA 11; (1983) 152 CLR 406 at 437; [1983] HCA 11; *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101 at 124 [44].

**[166]** [1937] HCA 58; (1937) 59 CLR 641 at 674.

**[167]** Since *Waltons Stores*, the assumption in question need no longer be as to a matter of fact.

**[168]** [1937] HCA 58; (1937) 59 CLR 641 at 674.

**[169]** *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387 at 404.

**[170]** [1983] HCA 11; (1983) 152 CLR 406 at 435-437.

**[171]** *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23 at 60.

**[172]** *Western Australian Insurance Co Ltd v Dayton* [1924] HCA 58; (1924) 35 CLR 355 at 375; [1924] HCA 58.

**[173]** [1983] HCA 11; (1983) 152 CLR 406 at 436.

**[174]** [1972] AC 741 at 757; see also at 768.

**[175]** [1971] 2 QB 23 at 59-60.

**[176]** [1988] HCA 7; (1988) 164 CLR 387, but note that there was no signed memorandum of agreement nor part performance to satisfy the requirements of the Statute of Frauds. These circumstances necessitated the invocation of equitable doctrines.

**[177]** (1877) 2 App Cas 666.

**[178]** (1877) 2 App Cas 666 at 680, 686, 690, 693.

**[179]** Handley, *Estoppel by Conduct and Election*, 2nd ed (2016) at 29-30 [1-034].

**[180]** [2006] NSWCA 312; (2006) 13 BPR 24,755 at 24,768 [85].

**[181]** *Sullivan v Sullivan* [2006] NSWCA 312; (2006) 13 BPR 24,755 at 24,769 [86].

**[182]** [1999] HCA 10; (1999) 196 CLR 101 at 111-114 [2]- [10]. See also *Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505 at 511 [2]; [2014] HCA 19.

**[183]** [1891] 3 Ch 82 at 106.

**[184]** [1972] AC 741 at 756.

**[185]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [172].

**[186]** *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14; (1985) 157 CLR 17 at 29, 51; [1985] HCA 14; *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In liq)* [2013] HCA 51; (2013) 251 CLR 592 at 604 [39]- [40], 610-611 [61]-[62], 634-635 [151]-[152]; [2013] HCA 51.

**[187]** [2006] NSWCA 312; (2006) 13 BPR 24,755.

**[188]** *Maynard v Moseley* [1676] EngR 603; (1676) 3 Swans 651 at 655 [36 ER 1009 at 1011]; *Stern v McArthur* [1988] HCA 51; (1988) 165 CLR 489 at 514; [1988] HCA 51.

**[189]** [2014] HCA 19; (2014) 251 CLR 505 at 522-523 [58].

**[190]** (1854) 5 HL Cas 185 at 210, 212-213 [10 ER 868 at 880-881].

**[191]** *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 410, 416; [1990] HCA 39.

**[192]** [1999] HCA 10; (1999) 196 CLR 101 at 121 [35].

**[193]** [1985] 2 Qd R 292 at 301.

**[194]** [1999] VSCA 109; [1999] 3 VR 712.

**[195]** [1999] VSCA 109; [1999] 3 VR 712 at 733-734 [65].

**[196]** *Placer Development Ltd v The Commonwealth* [1969] HCA 29; (1969) 121 CLR 353 at 357, 360-361; [1969] HCA 29. See also *Hall v Busst* [1960] HCA 84; (1960) 104 CLR 206 at 216-217, 222-223, 234-235; [1960] HCA 84.

**[197]** [1999] VSCA 109; [1999] 3 VR 712 at 743-744 [94]- [95].

**[198]** cf *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352-353; [1982] HCA 24.

**[199]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771.

**[200]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [268].

**[201]** Pursuant to *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s 148; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614.

**[202]** *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101 at 121-122 [35] per Gleeson CJ, McHugh, Gummow and Callinan JJ; [1999] HCA 10; *Flinn v Flinn* [1999] VSCA 109; [1999] 3 VR 712 at 743 [95] per Brooking JA (Charles JA agreeing at 754 [134], Batt JA agreeing at 754 [135]); *Sullivan v Sullivan* [2006] NSWCA 312; (2006) 13 BPR 24,755 at 24,768 [84]- [85] per Hodgson JA (McColl JA agreeing at 24,771 [101]); *Evans v Evans* [2011] NSWCA 92 at [121] per Campbell JA (Giles JA agreeing at [1], Sackville AJA agreeing at [151]).

**[203]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 792-793 [97].

**[204]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 810 [191].

**[205]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 810 [193].

**[206]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [198].

**[207]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [199].

**[208]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [198].

**[209]** [1983] HCA 11; (1983) 152 CLR 406 at 436-437; [1983] HCA 11.

**[210]** *Sullivan* [2006] NSWCA 312; (2006) 13 BPR 24,755 at 24,768 [84]- [85] per Hodgson JA (McColl JA agreeing at 24,771 [101]).

**[211]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [38(3)].

**[212]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [38(4)].

**[213]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [38(5)].

**[214]** *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [39].

**[215]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [70].

**[216]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [70].

**[217]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [92].

**[218]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [46].

**[219]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [52].

**[220]** [1941] AC 251 at 269.

**[221]** *Horton v Jones* [1935] HCA 7; (1935) 53 CLR 475 at 489 per Starke J; [1935] HCA 7; see also *Whitlock v Brew* [1968] HCA 71; (1968) 118 CLR 445 at 456 per Kitto J; [1968] HCA 71.

**[222]** *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* [1982] HCA 53; (1982) 149 CLR 600 at 606 per Gibbs CJ, Murphy and Wilson JJ; [1982] HCA 53.

**[223]** *Beattie v Fine* [1925] ArgusLawRp 38; [1925] VLR 363 at 368-369; *Trustees Executors and Agency Co Ltd v Peters* [1960] HCA 16; (1960) 102 CLR 537 at 555-556 per Menzies J (McTiernan J agreeing at 542); [1960] HCA 16; *Placer Development Ltd v The Commonwealth* [1969] HCA 29; (1969) 121 CLR 353 at 356 per Kitto J, 359-360 per Taylor and Owen JJ, 371-372 per Windeyer J; [1969] HCA 29; *Godecke v Kirwan* [1973] HCA 38; (1973) 129 CLR 629 at 640 per Walsh J (Mason J agreeing at 648), 646-647 per Gibbs J; [1973] HCA 38; *Booker Industries* [1982] HCA 53; (1982) 149 CLR 600 at 604-605 per Gibbs CJ, Murphy and Wilson JJ.

**[224]** Cf *Smith v Morgan* [1971] 1 WLR 803 at 808; [1971] 2 All ER 1500 at 1504; *Goldmaster Homes Pty Ltd v Johnson* (2004) 12 BPR 23,167 at 23,175-23,176 [36]-[38] per Bryson JA (Mason P agreeing at 23,167 [1], Stein AJA agreeing at 23,177 [44]).

**[225]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 1407 at [5(c)].

**[226]** (1898) 67 LJQB 296 at 299-300 per Bruce J.

**[227]** [1979] HCA 47; (1979) 142 CLR 397 at 419-420 per Stephen J, 441 per Aickin J; [1979] HCA 47.

**[228]** (1919) 27 CLR 133; [1919] HCA 64.

**[229]** (1953) 89 CLR 507; [1953] HCA 89.

**[230]** *Woodfall's Law of Landlord and Tenant*, (Release 103), vol 1, pars 17.001, 17.002, 17.023-17.031; *Attorney-General of Ontario v Mercer* (1883) 8 App Cas 767 at 772.

**[231]** See, eg, *Messenger v Armstrong* (1785) 1 Term Rep 53 [1785] EngR 21; [99 ER 968]; *Cobb v Stokes* [1807] EngR 243; (1807) 8 East 358 [103 ER 380]; *Tayleur v Wildin* (1868) LR 3 Ex 303 at 305 per Kelly CB (Martin and Bramwell BB agreeing at 305); *Arnold v Mann* [1957] HCA 64; (1957) 99 CLR 462 at 475 per Dixon CJ; [1957] HCA 64.

**[232]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 792 [97].

**[233]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 810 [192].

**[234]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [198].

**[235]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 812 [200].

**[236]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 814 [204].

**[237]** [1983] HCA 11; (1983) 152 CLR 406 at 436.

**[238]** [1971] 2 QB 23 at 60.

**[239]** [1891] 3 Ch 82.

**[240]** [1947] AC 46.

**[241]** *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 411 per Mason CJ, 428 per Brennan J, 444 per Deane J; [1990] HCA 39.

**[242]** See also *Australian Crime Commission v Gray* [2003] NSWCA 318 at [183]- [207] per Ipp JA (Mason P agreeing at [3], Tobias JA agreeing with Mason P at [313]); *Workplace Safety Australia Pty Ltd v Simple OHS Solutions Pty Ltd* (2015) 89 NSWLR 594 at 623 [144] per Bathurst CJ (Basten JA agreeing at 627 [174]).

**[243]** [1891] 3 Ch 82.

**[244]** [1889] UKHL 1; (1889) 14 App Cas 337.

**[245]** [1891] 3 Ch 82 at 106.

**[246]** [1947] AC 46.

**[247]** [1891] 3 Ch 82.

**[248]** *Canada and Dominion Sugar Co* [1947] AC 46 at 55.

**[249]** *Canada and Dominion Sugar Co* [1947] AC 46 at 55.

**[250]** *Canada and Dominion Sugar Co* [1947] AC 46 at 54.

**[251]** [1862] EngR 908; (1862) 4 De G F & J 517 [45 ER 1285].

**[252]** (1866) LR 1 HL 129.

**[253]** See *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699; *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 604 per Priestley JA; *Giumelli* [1999] HCA 10; (1999) 196 CLR 101 at 121-122 [35] per Gleeson CJ, McHugh, Gummow and Callinan JJ; *Flinn* [1999] VSCA 109; [1999] 3 VR 712 at 738-744 [80]- [95] per Brooking JA (Charles JA agreeing at 754 [134], Batt JA agreeing at 754 [135]).

**[254]** *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387 at 424 per Brennan J; [1988] HCA 7.

**[255]** [2008] UKHL 55; [2008] 1 WLR 1752 at 1761 [14]; [2008] UKHL 55; [2008] 4 All ER 713 at 724.

**[256]** [1988] HCA 7; (1988) 164 CLR 387.

**[257]** [1988] HCA 7; (1988) 164 CLR 387 at 426.

**[258]** *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641 at 674 per Dixon J (McTiernan J agreeing at 682); [1937] HCA 58; *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 241-242 per Lord Denning MR; *Verwayen* (1990) 170 CLR 394 at 438, 445 per Deane J.

**[259]** *Verwayen* (1990) 170 CLR 394 at 410-411 per Mason CJ; see also at 443-446 per Deane J.

**[260]** *First National Bank Plc v Thompson* [1996] Ch 231 at 236 per Millett LJ. See, eg, *Giumelli* [1999] HCA 10; (1999) 196 CLR 101 at 112-113 [7] per Gleeson CJ, McHugh, Gummow and Callinan JJ; *Gillett v Holt* [2001] Ch 210 at 225-226 per Robert Walker LJ (Waller and Beldam LJJ agreeing at 238); *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 40-41 per Lord Goff of Chieveley; *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737 at 751-752 [38]- [39] per Sir Andrew Morritt V-C, 754-755 [53]-[56] per Judge LJ, 765-766 [95]-[99] per Mance LJ; *Cobbe* [2008] UKHL 55; [2008] 1 WLR 1752 at 1788 [92] per Lord Walker of Gestingthorpe (Lord Brown of Eaton-under-Heywood agreeing at 1789 [94]); cf at 1761 [14], 1762 [16] per Lord Scott of Foscote (Lord Hoffmann agreeing at 1754 [1], Lord Brown agreeing at 1789 [94], Lord Mance agreeing at 1789 [95]); [2008] UKHL 55; [2008] 4 All ER 713 at 718, 724, 725, 750, 751; *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776 at 797 [67] per Lord Walker of Gestingthorpe; [2009] UKHL 18; [2009] 3 All ER 945 at 967; *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764 at 1780 [63] per Lord Neuberger of Abbotsbury (Lord Hope of Craighead agreeing at 1766 [1], Lord Walker of Gestingthorpe agreeing at 1769 [10], Baroness Hale of Richmond agreeing at 1771 [20], Lord Mance agreeing at 1773 [28]); [2009] UKHL 41; [2009] 4 All ER 789 at 792, 794, 796, 798, 805; *DHJPM Pty Ltd v Blackthorn Resources Ltd* [2011] NSWCA 348; (2011) 83 NSWLR 728 at 739 [44] per Meagher JA (Macfarlan JA agreeing at 730 [1]).

**[261]** *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 145-155; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 at 103-104 per Robert Goff J, 122 per Lord Denning MR; *Waltons Stores* [1988] HCA 7; (1988) 164 CLR 387 at 420 per Brennan J; *Verwayen* (1990) 170 CLR 394 at 445 per Deane J; cf *Baird Textiles* [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737 at 751-752 [38]-[39] per Sir Andrew Morritt V-C, 754-755 [53]-[56] per Judge LJ, 765-766 [95]-[99] per Mance LJ.

**[262]** *Verwayen* (1990) 170 CLR 394 at 439 per Deane J.

**[263]** *Verwayen* (1990) 170 CLR 394 at 439.

**[264]** *Gillett* [2001] Ch 210 at 225-226 per Robert Walker LJ.

**[265]** *Grundt* [1937] HCA 58; (1937) 59 CLR 641 at 674-675 per Dixon J (McTiernan J agreeing at 682); *Legione* [1983] HCA 11; (1983) 152 CLR 406 at 437 per Mason and Deane JJ.

**[266]** See, eg, *Fontana NV v Mautner* (1979) 254 EG 199 at 203 per Balcombe J cited in Feltham, Hochberg and Leech, *Spencer Bower: The Law Relating to Estoppel by Representation*, 4th ed (2004) at 454.

**[267]** *Gillett* [2001] Ch 210 at 225-226 per Robert Walker LJ; *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8 at 113 [47], 114 [50] per Robert Walker LJ (Aldous LJ agreeing at 112 [39], Mantell LJ agreeing at 112 [40]); *Sullivan* [2006] NSWCA 312; (2006) 13 BPR 24,755 at 24,757 [16] per Handley JA, 24,768 [85] per Hodgson JA (McColl JA agreeing at 24,771 [101]).

**[268]** [2002] EWCA Civ 159; [2003] 1 P & CR 8 at 114 [50].

**[269]** *Interest reipublicae ut sit finis litium*: *CDJ v VAJ* (1998) 197 CLR 172 at 232 [186(4)] per Kirby J; [1998] HCA 67. See also *Young v Keighly* (1809) 16 Ves 348 at 351 [1809] EngR 541; [33 ER 1015 at 1016].

**[270]** *Nemo debet bis vexari pro una et eadem causa*: *Jackson v Goldsmith* [1950] HCA 22; (1950) 81 CLR 446 at 466 per Fullagar J; [1950] HCA 22.

**[271]** *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [118]; see also at [84].

**[272]** *Cosmopolitan* [2012] VCAT 225 at [176]; see also at [135], [139]-[141].

**[273]** See *Hoyt's Pty Ltd v Spencer* [1919] HCA 64; (1919) 27 CLR 133 at 145-148; [1919] HCA 64.

**[274]** *Hoyt's* [1919] HCA 64; (1919) 27 CLR 133 at 146 (emphasis in original).

**[275]** [1919] HCA 64; (1919) 27 CLR 133 at 139.

**[276]** [1953] HCA 89; (1953) 89 CLR 507 at 518; [1953] HCA 89.

**[277]** [1919] HCA 64; (1919) 27 CLR 133 at 147.

**[278]** See, eg, Seddon, "A Plea for the Reform of the Rule in Hoyt's Pty Ltd v Spencer", (1978) 52 *Australian Law Journal* 372.

**[279]** *J J Savage & Sons Pty Ltd v Blakney* [1970] HCA 6; (1970) 119 CLR 435 at 442; [1970] HCA 6; *Ross v Allis-Chalmers Australia Pty Ltd* (1980) 55 ALJR 8 at 10-11; 32 ALR 561 at 565-567.

**[280]** *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 61; [1984] HCA 64.

**[281]** *Hospital Products* [1984] HCA 64; (1984) 156 CLR 41 at 61.

**[282]** *Hospital Products* [1984] HCA 64; (1984) 156 CLR 41 at 61 citing *Heilbut, Symons & Co v Buckleton* [1912] UKHL 2; [1913] AC 30 at 51.

**[283]** *Hospital Products* [1984] HCA 64; (1984) 156 CLR 41 at 61-62.

**[284]** See, eg, *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597 at 607; [1964] HCA 41; *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429 at 436-437, 441; [1968] HCA 8.

**[285]** See, eg, *Savage* [1970] HCA 6; (1970) 119 CLR 435 at 442; *Ross* (1980) 55 ALJR 8 at 11; 32 ALR 561 at 567.

**[286]** See *Heilbut* [1912] UKHL 2; [1913] AC 30 at 43, 50-51; *Couchman v Hill* [1947] KB 554 at 558; cf *Oscar Chess Ltd v Williams* [1956] EWCA Civ 5; [1957] 1 WLR 370 at 375, 378; [1956] EWCA Civ 5; [1957] 1 All ER 325 at 328, 330-331.

**[287]** *Handbury v Nolan* (1977) 13 ALR 339 at 341; *Gardiner v Grigg* [1938] NSWStRp 40; (1938) 38 SR (NSW) 524 at 532, 537.

**[288]** *Deane v The City Bank of Sydney* [1904] HCA 44; (1904) 2 CLR 198 at 209-210; [1904] HCA 44; *Handbury* (1977) 13 ALR 339 at 346, 348-349; *Gardiner* [1938] NSWStRp 40; (1938) 38 SR (NSW) 524 at 537; *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776 at 794-795 [58], 800-801 [80]-[83]; [2009] UKHL 18; [2009] 3 All ER 945 at 965, 970-971 citing *Carmichael v National Power Plc* [1999] UKHL 47; [1999] 1 WLR 2042 at 2048-2051; [1999] UKHL 47; [1999] 4 All ER 897 at 902-905.

**[289]** See, eg, *Deane* [1904] HCA 44; (1904) 2 CLR 198 at 209; *Handbury* (1977) 13 ALR 339 at 346; *Gardiner* [1938] NSWStRp 40; (1938) 38 SR (NSW) 524 at 537; *Heilbut* [1912] UKHL 2; [1913] AC 30 at 36; *Oscar Chess* [1956] EWCA Civ 5; [1957] 1 WLR 370 at 375; [1956] EWCA Civ 5; [1957] 1 All ER 325 at 328. That was not the position in this case: see, eg, *Cosmopolitan* [2012] VCAT 225 at [71]- [85].

**[290]** *Carmichael* [1999] UKHL 47; [1999] 1 WLR 2042 at 2048-2049; [1999] UKHL 47; [1999] 4 All ER 897 at 902-903; *Thorner* [2009] UKHL 18; [2009] 1 WLR 776 at 800-801 [83]; [2009] UKHL 18; [2009] 3 All ER 945 at 971.

**[291]** *Thorner* [2009] UKHL 18; [2009] 1 WLR 776 at 800-801 [81]- [83]; [2009] UKHL 18; [2009] 3 All ER 945 at 970-971.

**[292]** See [230] above.

**[293]** See, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1 at 91; [1996] HCA 40; *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at 216-217 [482]- [483], 222 [501]; [2002] HCA 28.

**[294]** *Commissioner of Taxes (Q) v Camphin* [1937] HCA 30; (1937) 57 CLR 127 at 133; [1937] HCA 30.

**[295]** See, eg, *Fuller's Theatre and Vaudeville Co v Rofe* [1923] AC 435 at 438; *Green v Bowes-Lyon* [1963] AC 420.

**[296]** *Cosmopolitan* [2012] VCAT 225 at [176]; see also at [135], [139]-[141].

**[297]** See [245] above.

**[298]** cf s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic). See also *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* [2001] HCA 49; (2001) 207 CLR 72 at 79-80 [15]; [2001] HCA 49; *Osland v Secretary to Department of Justice [No 2]* [2010] HCA 24; (2010) 241 CLR 320 at 331-333 [18]- [20]; [2010] HCA 24.

**[299]** cf *Smith v Morgan* [1971] 1 WLR 803 at 807; [1971] 2 All ER 1500 at 1503; *Brown v Gould* [1972] Ch 53 at 58-59.

**[300]** *Cosmopolitan* [2012] VCAT 225 at [135], [139]-[141], [176].

**[301]** *Cosmopolitan* [2012] VCAT 225 at [133].

**[302]** *Cosmopolitan* [2012] VCAT 225 at [74].

**[303]** See [230] read with [255] above.

**[304]** *Cosmopolitan* [2012] VCAT 225 at [176]; see also at [135], [139]-[141].

**[305]** See [235] above.

**[306]** See *Xenos v Wickham* (1867) LR 2 HL 296 at 312; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609 at 619-620; *Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps* [1985] VicRp 7; [1985] VR 70 at 77-78; *Scook v Premier Building Solutions Pty Ltd* [2003] WASCA 263; (2003) 28 WAR 124 at 133 [25]; *Segboer v A J Richardson Properties Pty Ltd* [2012] NSWCA 253; (2012) 16 BPR 31,235 at 31,242-31,243 [52]- [60].

**[307]** See *Xenos* (1867) LR 2 HL 296 at 309, 311; *Ansett* [1985] VicRp 7; [1985] VR 70 at 78; *Segboer* [2012] NSWCA 253; (2012) 16 BPR 31,235 at 31,243 [59].

**[308]** *Cosmopolitan* [2012] VCAT 225 at [167].

**[309]** *Cosmopolitan* [2012] VCAT 225 at [168].

**[310]** *Hoyt's* [1919] HCA 64; (1919) 27 CLR 133 at 139.

**[311]** See *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [72]-[73]; *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at 786-787 [64], 809 [184]-[185].

**[312]** See *Thorby* [1964] HCA 41; (1964) 112 CLR 597 at 613; cf *Placer Development Ltd v The Commonwealth* [1969] HCA 29; (1969) 121 CLR 353 at 357; [1969] HCA 29.

**[313]** *Thorby* [1964] HCA 41; (1964) 112 CLR 597 at 607.

**[314]** See *Smith v Morgan* [1971] 1 WLR 803 at 807; [1971] 2 All ER 1500 at 1503.

**[315]** *Sellars v Adelaide Petroleum NL* [1994] HCA 4; (1994) 179 CLR 332 at 349; [1994] HCA 4 citing *The Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64 at

92, 102-104, 118-119; [1991] HCA 54.

**[316]** *Cosmopolitan* [2012] VCAT 225 at [21]- [24].

**[317]** cf *Amann Aviation* [1991] HCA 54; (1991) 174 CLR 64 at 119.