IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No M 253 of 2015

Between

CROWN MELBOURNE LTD (ACN 006 973 262)

Appellant

and

COSMOPOLITAN HOTEL (VIC) PTY LTD (ACN 115 145 198)

FISH AND COMPANY (VIC) PTY LTD (ACN 115 145 134)

Respondents

APPELLANT'S REPLY

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Reply Argument

2 The respondents seek to set aside the estoppel findings of the VCA and to reinstate the collateral contracts and/or an estoppel 'as found by the Tribunal'. Those contracts obliged Crown to give notices under clause 2.3 of the existing leases that it would renew each lease for five years on whatever other terms Crown wished to stipulate. If the collateral contract case fails for the reasons set out in the judgement of Hargrave J and upheld by the VCA, there are three insurmountable difficulties with the alternative estoppel case.

3 Firstly, there was no final determination of estoppel. The Tribunal commented *obiter* that if s.126 of the *Instruments Act* applied, it would have found that the appellant was estopped from denying the existence of the collateral contract.. However, the Tribunal held that s.126 of the *Instruments Act* did not apply. There is no free-standing estoppel judgment of the Tribunal in the respondent's favour which can be restored.

4 Secondly, the Tribunal expressly held that it would have accepted the respondents' *promissory* estoppel case (even though it never grappled with the expectation issue discussed in [58] – [61] and [64] of the appellant's primary submissions). Yet in this Court that case has been abandoned in favour of a proprietary estoppel argument, which the respondents contend was what the Tribunal actually upheld. That submission is made in the face of the promissory estoppel case advanced at all levels below and the respondents' submission during the special

Filed on behalf of the Applicant
Minter Ellison
Rialto Towers
525 Collins Street
Melbourne VIC 3000

Date of Filing 4 March 2016
Tel **Minter Ellison**
Fax Rialto Towers
DX 525 Collins Street
Ref Melbourne VIC 3000

leave hearing that, if the case were remitted to the Tribunal, they would continue to advance a promissory estoppel case.[1]

5 Thirdly, Mr Zampelis never had an expectation consistent with the collateral contracts found by the Tribunal, which held that his understanding of the Statement was unreasonable.[2] Thus there is no basis for any estoppel claim, however classified. It is unclear what Crown would be estopped from denying.

6 **Facts** – The respondents' recitation of facts in their submissions (**RS**) is inconsistent with the Tribunal's findings in material respects, although most inconsistencies are of no consequence as the key factual finding was as to the content of the Statement. However it is relevant to note the following:

(a) As to RS8 – The assertion that there were 'sticking points' in the negotiations is a gloss. The respondents accepted the proposed terms of the leases 'unconditionally' in July 2005 and had executed the leases without any amendment by November 2005.

(b) As to RS9 – Although it is undisputed that Lloyd, John and Nick Williams and Mr Boesley had conversations with Mr Zampelis, the Tribunal expressly found that they did not make the statements pleaded against them.[3] The finding in respect of Mr Rafinello was actually to the contrary of the respondents' submission.[4]

(c) As to RS11 – importantly, the Tribunal did not accept Mr Craig's evidence that Mr Boesley said anything about a further lease term. It found that it was: "not satisfied that Mr Boesley spelt out specifically a phrase like 'the further lease term' or 'a further term'..."[5] The criticism of the VCA in the last sentence of RS23 is misplaced and is an attempt to rewrite factual findings. That criticism nevertheless forms the basis for the incorrect submission in RS24 to 33 that the VCA decided the case on a 'narrower' basis than the Tribunal.

(d) As to RS14 – The Tribunal did not find that a reasonable person would understand the Statement to involve five year terms, this was said to be an implication of law.[6] Further, whether the lease terms would have a 'reasonable correspondence' to the previous leases is a topic the respondents continue to misunderstand. Whelan JA observed that the respondents' submissions 'repeatedly mischaracterised'[7] this issue. The Tribunal did not find that 'commercial reality' meant that Crown would stipulate terms that had a

[1] Page 13 of the special leave transcript.
[2] Tribunal reasons [141]
[3] Tribunal reasons [104] and [106] (John Williams), [108] (Lloyd Williams) and [112] (Nick Williams)
[4] Tribunal reasons [87]. The Tribunal found that nothing was said about a new lease, but that he approved the level of the finishes.
[5] Tribunal reasons at [84]
[6] See Tribunal reasons [135] at about line 30 and [139].
[7] VCA reasons at [157]

reasonable correspondence with the existing lease. As Whelan JA observed, "VCAT found that the promise made was to give a notice under clause 2.3(a) on such terms as Crown might determine in its unfettered discretion." The submission in RS14 that reasonable correspondence ought be inferred is both a new and unexplained argument and one that is expressly in the face of the Tribunal's findings.

7 **Categorisation** – The 'categorisation' of the estoppel has not mattered until now because at every level the respondents have expressly advanced a promissory estoppel case.[8] That is why 'the tribunal and judges below have described the estoppel as promissory'.

8 The submission that the respondents have always claimed a proprietary estoppel and this was (or should have been) clear because they cited *Flinn* is not tenable. The respondents also cited promissory estoppel cases such as *Wright* and *Gray*. The respondents cited *Flinn* because they mistakenly thought it had relevance to the issue of certainty.

9 The proprietary estoppel argument is without merit substantively. For instance, the respondents have always denied that the alleged promise was caught by s.126 of the *Instruments Act*. The Tribunal agreed, expressly finding that: "The collateral contract contended for was not a contract for the disposition of an interest in land."[9] The Tribunal said the promise was only as to the sending of a contractual notice.[10] RS20 wrongly asserts performance of the collateral contracts would have 'secured further five year leasehold interests' when it would in fact have secured offers on terms at Crown's discretion. RS21 quotes the Tribunal's finding of an expectation of an 'offer', which the respondents would be free to accept (or reject). This contradicts rather than affirms any suggestion of a proprietary estoppel. The last sentence of RS22 is unreferenced and the basis for it is unknown.

10 It is also incorrect to suggest that the appellant's arguments surrounding estoppel start and end with the issue of certainty. The appellant's primary submissions make clear that the other elements of the estoppel are contested.[11] It is notable that the respondents' submissions do not address these additional points.

11 The key doctrinal point advanced by the respondents seems to be that promissory and proprietary estoppel are 'interchangeable'. With respect, the authorities are to the contrary and Brennan J was not using them interchangeably in the passage of *Waltons* cited at RS19.

12 **Promissory Estoppel** - The second and third sentences of RS26 are not supported by the authorities cited,[12] but in any event, Crown is not seeking to 'isolate' the Statement nor is

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[8] See the appellants primary submissions at [67] to [68]
[9] Tribunal reasons [173]. Hargrave J said at [82], obiter, that this finding was probably correct.
[10] Tribunal reasons [171]
[11] See [58] – [66]
[12] Lord Wright did not make the statement attributed to him at all, while the observation by Isaacs ACJ at 372 of *Dayton* was not directed to the concept of considering the elements 'in combination'.

this what Hargrave J did. To the contrary, Crown submits that, in context, it was not reasonable for Mr Zampelis to form the view (if he did) that 'being looked after at renewal time' meant the respondents would get new leases on the same terms as the old leases when Crown had expressly refused to include such a term in the proffered leases. The Tribunal found that a reasonable person would have 'no reasonable basis for putting that gloss on it'.[13]

13 The argument in RS29 to 32 that identifying the representation with clarity is all that is required even if it is inherently ambiguous is incorrect, if not unclear. Nor is it supported by the authorities cited. In fact *Legione*, a case in which the representation was clearly identified, directly contradicts it. The basis upon which it is asserted in RS32 that *Legione* is a case 'where a representation which was capable of more than one meaning was nevertheless held to be sufficiently certain to found a promissory estoppel' is not known. The case is well understood to stand for the opposite proposition. The other cases cited do not support the proposition either.[14] Finally, the argument in RS31 was rejected in terms by Drummond AJA in *Bell.*

14 **Cross Appeal** - No special leave points arise or are identified in the submissions, which are characterised by formalism, a misapprehension as to the reasoning of the VSC and VCA, and a failure to acknowledge earlier concessions.

15 As Warren CJ noted[15] concessions were made by the respondents before Hargrave J that key questions were points of law, or mixed fact and law and that this was sufficient. It is evident from the questions considered by Hargrave J and the judgments of the VCA that these concessions were correctly made. The hearing proceeded on the basis of them.

16 Neither *Osland* nor *Haritos* elevate 'the point of strict procedure' in the way suggested. The Full Court in *Haritos* took a substantive approach that is quite different to the respondents' argument and said, inter alia (at [105]): "... although questions of law are not to be distilled from the grounds of appeal ... this is a matter of practice and procedure rather than jurisdiction, and of degree, and should not be reduced to semantics at the expense of substance." Warren CJ correctly held that "if questions of law are not sufficiently identified in the notice, but are nonetheless identified, the court will address them."[16] Neither Warren CJ or Whelan JA (nor Hargrave J) found that there was no need to identify questions of law.

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[13] Tribunal reasons [141]

[14] For instance, the respondents refer to one sentence from the well known passage in the speech of Lord Bowen in *Low v Bouverie* (at 106). The prior and subsequent sentences make clear the different point that is being made, and this was recognised in *Woodhouse* by both Lord Halisham (at [1972] 2 All ER 271, 281) and Lord Salmon (at [1972] 2 All ER 271, 293). In *Foran*, only Deane J and Dawson J would have allowed the estoppel. Both Deane J and Dawson J did so on the express basis that the representation relied upon had a particular meaning (at 434 and 545). Mason CJ also held that, for the purposes of estoppel, the representation relied upon was 'clear and unambiguous' (at 411).

[15] VCA reasons at [42]-[43]. See also Whelan JA at [148]

[16] VCA reasons at [49]

17 In any event the questions of law were adequately identified in the notice of appeal and, to the extent they were restated by Hargrave J, this is not and should not be a fatal defect. In *Osland*, although the relevant questions were not identified specifically in the notice of appeal, this court nevertheless dealt with the substance of the appeal.[17]

18 Contrary to RS49, neither Hargrave J nor the VCA sought to determine the contractual or estoppel issues by imposing some different 'meaning' to the Statement. Hargrave J held that, on the meaning attributed by the Tribunal, the collateral contract was uncertain and illusory as well as being inconsistent with the main contract[18] (points with which Whelan JA agreed[19]) and the estoppel failed because Mr Zampelis' purported understanding of the Statement was unreasonable.[20]

19 **Collateral Contracts** – Beyond asserting that the Tribunal's reasoning ought be preferred, the respondents do not engage with the reasoning of either the VSC or VCA or attempt to identify a special leave point. . The argument rises no higher than the contention in RS63 that both courts effectively acted as the 'destroyers of bargains'.

20 There is no warrant to reopen *Hoyt's* and/or *Maybury* and no reasoned basis to do so is articulated in RS67. The submission that these cases have worked an injustice carries no weight in the context of this case and this is made good by the fact that the respondents incorrectly assert the basis for the 'injustice' was that the Tribunal found there was a 'bargain' to 'confer further five year terms'. This was not even the pleaded case, let alone the finding of the Tribunal.

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	Bret Walker		Nick Hopkins
Phone	(02) 8257 2527	Phone	(03) 9225 7229
Fax	(02) 9221 7974	Fax	(03) 9225 7728
Email	maggie.dalton@stjames.net.au	Email	nhopkins@vicbar.com.au

Counsel for the appellant

[17] (2010) 241 CLR 320, 333 – 335.
[18] VSC reasons at [42] at line 18, [73] (illusory/uncertain contract) and [80] (inconsistency)
[19] VCA reasons at [182] and [185] (illusory/uncertain contract) and [186] (inconsistency)
[20] VCA reasons at [94] at line 30 and [95].