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) and

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

Respondents

RESPONDENTS' REPLY ON THE CROSS-APPEAL

Part I: Certification

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

Part II: Reply Argument

2. Appellant's Reply (AR) 6(a): The appellant appears to dispute that the related issues of the lease terms and the quality of the refurbishments were "sticking points" in the negotiations for the leases. However, it offers no other explanation for why its negotiations with Mr Zampelis (described by Mr Boesley as a "strategic master of delaying tactics to suit his own needs"[1]) took so long or why, after the conversation on 5 December, the respondents began the refurbishments to the quality required by the appellant. The appellant's own evidence-in-chief showed that there were protracted negotiations about the quality of the refurbishments in the second half of 2005.[2] This was after the "unconditional" acceptance by Mr Zampelis of the appellant's proposal, which proposal was, in any event and in Mr Boesley's own words, a "conditional plan of action."[3] The appellant's evidence-in-chief also showed that it understood the connection between the quality of the refurbishments and the length of the lease terms.[4]

3. AR 6(b): The Tribunal found that Mr Boesley and Mr Rafaniello used the word "assurance" in the conversation in February 2006.[5]

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[1] Witness statement of David Kenneth Boesley, para 79.
[2] Boesley witness statement, paras 90-164.
[3] Boesley witness statement, para 84.
[4] Witness statement of Anthony Rafaniello, paras 23, 25 and 30.
[5] [2012] VCAT 225 at [87].

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4. AR 6(c): It is true that the Tribunal was not satisfied that Mr Boesley in the 5 December statement spelt out specifically a phrase like "the further lease term" or "a further lease term".[6] But the appellant ignores the Tribunal's findings of fact, in [2012] VCAT 225 at [135] and [139], that what Mr Boesley said did mean to a reasonable person in Mr Zampelis's position that the appellant would give the respondents notices to renew the leases, that the renewal terms would be five years and that, while the appellant would be free to stipulate the other terms of the renewed leases, one would expect the terms to bear a reasonable correspondence with the original lease terms. The appellant's case depends on ignoring those critical factual findings.

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5. AR 18: The appellant's submission that the judges of the Supreme Court did not impose a different meaning to the 5 December statement is not tenable in the light of what Hargrave J said at [2013] VSC 614 at [39], [42] and [88], what the Chief Justice said at [2014] VSCA 353 at [61], [65] and [78] and what Whelan JA said at [2014] VSCA 353 at [182], [183], [184] and [191]. The judges repeatedly said that the meaning attributed by the Tribunal to the 5 December statement was wrong and that it either carried some other meaning or had no real meaning.

6. AR 6(d): The respondents do not submit that it should be inferred there was a finding that there would be a reasonable correspondence between the renewed lease terms offered by the appellant and the
20 terms of the original leases. That finding was made expressly by the Tribunal in [2012] VCAT 225 at [139] and again in [2012] VCAT 1407 at [35]. The Tribunal made that finding because it would be an "unrealistic scenario" for the appellant to stipulate unduly onerous terms as that would jeopardise the appellant's tenancies generally. What the respondents say should be inferred is an alternative (and more cogent) basis for the finding of reasonable correspondence, namely the words actually spoken by Mr Boesley on 5 December that the appellant would "look after" the respondents at renewal time.

7. AR 5: It is a distortion of the Tribunal's finding at [2012] VCAT 225 at [141] to say that it found Mr Zampelis's understanding of the 5 December statement to be unreasonable. In deciding there what a reasonable person in Mr Zampelis's position would have understood the statement to mean, the
30 Tribunal made no finding that Mr Zampelis's (only slightly) different understanding of the statement was unreasonable. The same fallacy is found in Hargrave J's reasons at [2013] VSC 614 at [88] and [94].

8. AR 16, 17: It is telling, but unsurprising, that although the appellant submits that the questions of law were adequately identified in its notice of appeal to the Supreme Court, it still does not specify which of the 12 questions in the notice were the basis of the grant of leave to appeal and the appeal and

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[6] [2012] VCAT 225 at [84].

which of the 18 grounds of appeal can be said to have succeeded. It still makes no attempt to relate the questions in the notice of appeal to the list of eight "issues" stated by Hargrave J or to the five different questions stated respectively by the Chief Justice and Whelan JA. At this third stage of appeal from the Tribunal's orders, the basis of the appeal to the Supreme Court, and thus the Court's jurisdiction, still remain unclear. This is not a procedural quibble: it goes to jurisdiction.

9. AR 15: The respondents' concessions about questions of law made before Hargrave J were withdrawn in the Court of Appeal.[7] They could not bind the respondents because they went to jurisdiction.[8]

10. AR 18: It is important to observe that an appeal under s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act), is from an order of the Tribunal and not from its reasons.[9] The order, in each proceeding, was that the appellant pay the respondent damages for breach of contract. Implicit in the orders was a finding that there were enforceable collateral contracts and the Tribunal's reasons make that clear. Error of law in the orders could be established if the Tribunal could be shown to have found, for example, that the 5 December statement was not promissory, or that the contracts were uncertain or that they were inconsistent with the leases.[10] The reasons of the Tribunal might be examined to see if error of that kind was made but in this case the reasons show no such error.

11. Otherwise, error of law could be established if there was no evidence to support the Tribunal's factual findings in its reasons that the 5 December statement was promissory, or that the contracts were certain or that they were not inconsistent with the leases.[11] But no such error was ever established in the Supreme Court. Instead the judges ignored the requirements of s 148, treated the appeal as a rehearing, picked over the Tribunal's reasons for factual findings they disagreed with and substituted their own findings for those of the Tribunal.

12. AR 14: Special leave to cross-appeal might be granted even though no special leave point is identified if it would do an injustice to determine the appeal alone.[12] There would plainly be injustice if leave to cross appeal were denied and the appeal were allowed, though the respondents would have succeeded on the cross-appeal had leave been granted.

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[7] [2014] VSCA 353 at [43] and [148].

[8] *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Dawson J at 393; per Toohey J at 403; per Gaudron J at 410.

[9] *Victoria Police v Burton* [1999] VSC 534 per Hedigan J at [5].

[10] cf, in a different statutory context, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 per Mason CJ at 340, 343; per Deane J at 367-8; per Toohey and Gaudron JJ at 384.

[11] cf, also in a different statutory context, *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 per French CJ at 410 [60]; per Hayne , Heydon, Crennan and Kieffel JJ at 412 [69].

[12] *DPP v United Telecasters Sydney Pty Ltd* (1990) 168 CLR 594 per Brenna, Dawson and Gaudron JJ at 602.

13. Anyhow, the course of the appeal in the Supreme Court shows why the High Court needs to reconsider s 148 of the VCAT Act and make clear the limited nature of appeals which it permits. Likewise, if the Supreme Court's finding stands that there was relevant inconsistency between the collateral contracts and the leases, the case squarely raises the question whether the rule in *Hoyt's Pty Ltd v Spencer*[13] and *Maybury v Atlantic Union Oil Co Ltd*[14] should be maintained or whether it can be circumvented by estoppel. The case also presents a suitable vehicle for the High Court to reconsider the requirements of certainty and intention to create legal relations for commercial contracts.

14. AR 19, 20: The respondents' substantive case in contract goes well beyond the proposition that the courts should not be destroyers of bargains, though that is a useful starting point, if not the one from which the Supreme Court embarked. The appellant submits that it was not the respondents' pleaded case that they had a bargain with the appellant for further five year lease terms nor was it the decision of the Tribunal. But the pleaded case was that the appellant agreed to offer to renew the leases for further five year terms[15] and the Tribunal's decision was that the appellant agreed to give notices offering to renew the leases for five year terms.[16]

15. AR 4, 7, 8: The appellant does not deny that it has raised uncertainty as a defence to the claim in estoppel for the first time in this Court. Since it did not rely on that defence below it did not matter there whether the estoppel was promissory or proprietary. The acknowledgment by counsel for the respondents in argument at special leave that, on the remitter to the Tribunal as ordered by the Court of Appeal, they would be confined to a case of promissory estoppel was an acknowledgment only of the terms of the remitter, not their correctness. The respondents' written and oral argument at special leave was that the estoppel was proprietary and foreshadowed that, if leave to appeal were granted, they would argue on the appeal that the estoppel was proprietary. The appellant's insistence that the respondents' case below was for promissory estoppel is based solely on the label they used at a time when the label did not matter, and ignores the substance of the claim.

16. AR 11: The respondents do not submit that promissory and proprietary estoppel are interchangeable, only that the overlap between them is so great that the expressions are often used interchangeably. The appellant's submissions in chief are an example, by erroneously categorising *Galixidis v Galixidis*[17] as a proprietary estoppel case when the expectation was ultimately held to be of a licence to use

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[13] (1919) 27 CLR 133.
[14] (1953) 89 CLR 507.
[15] Further Amended Points of Claim dated 4 May 2011 in each proceeding, paras 7B and 8A.
[16] [2012] VCAT 225 at [173] – [176].
[17] [2004] NSWCA 111.

property and not an interest in it. The elusiveness of the distinction is also demonstrated by *Wright v Hamilton Island Enterprises Pty Ltd*[18] where the estoppel was treated as promissory although the question whether the plaintiff expected a renewal of a lease or a licence of premises was unexplored.[19]

17. AR 9: There is no inconsistency between a finding that the collateral contracts were not unenforceable because of s 126 of the *Instruments Act* 1958 and a finding that the expectation created by the appellant's promise was the acquisition of an interest in property. A promise which gives rise to the expectation of acquiring an interest in land is not necessarily a promise to dispose of an interest in land, as the facts of the present case show.

18. AR 13: In *Legione v Hateley* the majority did not reject the claim of estoppel because the representation was ambiguous or uncertain but because the words spoken (which were clear) did not bear the meaning alleged by the plaintiff.[20] In the appeals in that case, unlike the present case, the appeal courts were at liberty to substitute their views of the meaning of the words spoken for those of the tribunal of fact.

19. AR 3, 10: The appellant may well contest the other aspects of the claim in estoppel apart from certainty but the Tribunal's findings, especially at [2012] VCAT 225 at [172], resolved all those questions (except possibly relief) against it, as the Chief Justice correctly concluded.[21] The majority view that other elements of the estoppel remain to be established is difficult to understand and the Court's reasons for the remitter order could only suggest that it might (hypothetically) be established that the respondents did not alter the finish of the refurbishments in reliance on the 5 December statement.[22] However, the Tribunal at [172] had already made the express finding that, in reliance on the statement, the respondents entered into the leases with the "Major Refurbishment" clause, which obliged them to fit out the restaurants to the finish required by the appellant.

Dated: 11 March 2016

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[18] (2003) Q ConvR ¶54-588.

[19] See, at first instance, *Wright v Hamilton Island Enterprises Pty Ltd* [1998] QSC 29 and *Grace v Hamilton Island Enterprises Pty Ltd* [1998] QSC 27.

[20] (1983) 152 CLR 406 per Mason and Wilson JJ at 440; per Brennan J at 452-4; cf per Gibbs CJ and Murphy J at 422-3.

[21] [2014] VSCA 353 at [92] – [97].

[22] [2015] VSCA 56 at [13].