No collateral contract or estoppel found to arise from landlord's statement that tenants would be "looked after at renewal time"

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Introduction

1. The High Court of Australia in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*,[1] by majority, has found that a statement made during lease negotiations by a landlord to tenants to the effect that the tenants would be "looked after at renewal time" did not give rise to a binding and enforceable collateral contract which obliged the landlord to offer a renewal of the leases. The majority judges further found that the statement did not give rise to an estoppel which prevented the landlord from denying that it was obliged to offer a renewal of the leases.

2. Although in submissions made to the High Court, the tenants claimed that the estoppel advanced by them was a proprietary rather than a promissory estoppel, possibly because they thought that a less strict approach to the requirement for certainty of the representation was taken in proprietary estoppel cases, most of the members of the majority considered that the estoppel asserted by the tenants in the proceedings had always been a promissory estoppel and that the case was not the occasion on which to resolve the question as to whether there was a single, unified doctrine of estoppel.

Background

3. In 2005 and early 2006 the respondents ("**Tenants**") were involved in negotiations with the appellant ("**Crown**") over leases for two restaurants in Crown's casino and entertainment complex. Other companies controlled by the director of the Tenants ("**Director**") had previously operated the restaurants under leases from Crown.

4. Crown wanted the Tenants to agree to leases which were limited to a five year term and which required the Tenants to undertake major refurbishments of the restaurant premises at their own cost. Given the significant expenditure involved in the refurbishments, the Tenants sought to be given a 10 year term or, alternatively, an option to renew for a further five year period. However, Crown was unwilling to offer any further term on the leases.

5. The Tenants eventually executed leases in November 2005 ("**2005 leases**") and informed Crown of the execution but only delivered the 2005 leases to Crown in March 2006 when Crown demanded them. The 2005 leases contained a major refurbishment term, were limited to a five year term and did not contain an option for renewal. Each of the 2005 leases, however, included a cl 2.3 which provided that

[1] [2016] HCA 26.

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 ...);*
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> *(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. In late 2008, Crown invited tenders for the grant of new leases of the restaurant premises and the Tenants submitted tenders but were unsuccessful. In late 2009, Crown gave notice pursuant to cl 2.3(c) of the 2005 leases, requiring the Tenants to vacate the premises upon expiration of the leases.

History of the proceedings

VCAT[2]

7. The Tenants commenced proceedings against Crown in the Victorian Civil and Administrative Tribunal ("**VCAT**") alleging that, during the lease negotiations, Crown representatives had made a series of representations to the Director to the effect that the Tenants would be given a renewal of the 2005 leases for a further five year term on the same terms and conditions, or the same terms and conditions mutatis mutandis, as in the 2005 leases. It was further alleged that these representations had induced the Tenants to enter into the 2005 leases and to carry out the refurbishments. The Tenants claimed that a collateral contract had come into existence or, alternatively, an estoppel had arisen which prevented Crown from denying its obligation to grant the renewal.

8. VCAT was not satisfied that representations had been made in the terms alleged by the Tenants but found that, after the execution of the 2005 leases and prior to their delivery to Crown, a Crown representative had made a statement to the Director to the effect that if the Director spent the money that the Tenants were required to spend to refurbish the restaurants to a high standard, he would be "looked after at renewal time" ("**Statement**").

9. VCAT held as follows:

   - The Statement was "promissory in character" because it was a statement about what Crown would do in the future and was sufficiently certain to give rise to a collateral contract which obliged Crown to give a notice under cl 2.3

[2] *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225; *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Limited* [2012] VCAT 1407; *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Limited* [2013] VCAT 106; *Fish and Company (Vic) Pty Ltd v Crown Melbourne Limited* [2013] VCAT 105.

of the 2005 leases that it would renew the leases for a further term of five years on terms and conditions to be decided by Crown at its discretion.

- The collateral contract was not inconsistent with the main contract, the 2005 leases, because Crown, as landlord, already had the right to elect between any of the three options set out in cl 2.3 of the 2005 leases independently of the leases and so cl 2.3 did not itself confer upon Crown any right or discretion to elect between the options which was being impinged upon or removed by the collateral contract.

- The Tenants evinced an intention to be bound by the 2005 leases only when they delivered them to Crown in March 2006 and entered the leases by delivery in reliance upon the collateral promise made by Crown.

- The collateral contract was not required to be in writing and so was not unenforceable by reason of s 126(1) of the *Instruments Act 1958* (Vic) because it was not a contract for the disposition of an interest in land but a contract under which Crown was obliged to send a notice specifying that it would renew the 2005 leases. However, if this conclusion was wrong, Crown was estopped from denying the existence of the collateral contract as the Tenants had proved the requirements for a promissory estoppel as set out in *Waltons Stores (Interstate) Ltd v Maher* ("**Waltons Stores**").[3]

10. VCAT further held that Crown had breached the collateral contract by serving notices requiring the Tenants to vacate the restaurant premises when it was obliged to offer a renewal of the 2005 leases.

11. VCAT subsequently assessed the damages for the breach by reference to the profits that the Tenants would have earned if they had been able to accept an offer of a renewed lease for 5 years. In assessing the damages, VCAT considered that Crown would probably have stipulated terms and conditions in the notice of renewal that had a reasonable correspondence with those that had appeared in the 2005 leases.

Trial division of the Supreme Court of Victoria[4]

12. Crown appealed to the Supreme Court of Victoria which set aside VCAT's orders and, in lieu thereof, ordered that the proceeding in VCAT be dismissed. In coming to this conclusion, the trial judge held as follows:

    - There was no binding and enforceable collateral contract because the Statement was not promissory in character.

    - In any event, the supposed collateral contract was illusory and unenforceable for want of certainty as to the terms of the renewed lease.

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[3] [1988] HCA 7; (1988) 164 CLR 387.
[4] *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614.

- Even if the collateral contract had been sufficiently certain, it was unenforceable because it was inconsistent with cl 2.3 of the 2005 leases.

- No estoppel arose.

Court of Appeal[5]

13. However, an appeal by the Tenants to the Victorian Court of Appeal (Warren CJ, Whelan and Santamaria JJA) was allowed on the ground that the Statement gave rise to an estoppel although the Court agreed with the trial judge that there was no binding and enforceable collateral contract.

14. In concluding that the Statement founded an estoppel, Warren CJ said that:

    - there was a lower standard of certainty for estoppel than in contract law and, having regard to all the circumstances of the case, the Statement was sufficient to give rise to a claim of estoppel;
    - although there was a disconformity between the interpretation of the representation by the Tenants and by VCAT, this did not mean that the assumption by the Tenants that they would be looked after at renewal time was unreasonable;
    - Crown had induced the Tenants to adopt the assumption; and
    - the Tenants had placed reliance on the assumption by expending the funds on the refurbishment and had acted to their detriment.

15. Warren CJ held that the Tenants were only entitled to the minimum relief sufficient to satisfy their equity and, that, therefore, they would need to establish what was the "lower limit" of the representation and what they were entitled to in order to achieve equity.

16. Whelan JA (with whom Santamaria JA agreed) also recognised that there was a disconformity between the representation which VCAT had found and the assurance upon which the Director had claimed he had relied but said that that was not the end of the matter. His Honour considered that a representation which was too uncertain to constitute a contractual obligation could found a proprietary or promissory estoppel provided it was shown that the representation was of such a nature that it would have misled any reasonable person (assuming it was subsequently resiled from) and that the representee was in fact misled by it. His Honour said that if there was a "grey area" in what was represented, but it was reasonable for the representee to interpret it as extending at least to the "lower limit" of that "grey area"' and to act in reliance on it as so understood, then the representation should be regarded as sufficiently certain up to this lower limit.

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[5] *Cosmopolitan Hotel (Vic) v Crown Melbourne Limited* [2014] VSCA 353; (2014) 45 VR 771.

17. As VCAT had not considered the lower limit of what could be done for the Tenants consistently with the limited representation which VCAT had found was made by Crown - that the Tenants would be looked after at renewal - Whelan JA ordered that the matter be remitted to VCAT to determine what equitable relief, if any, should be granted.

Appeal to the High Court

18. There was then an appeal by Crown to the High Court and a cross-appeal by the Tenants on, amongst other things, the collateral contract issue. The substantive issues before the High Court were:

    - Did the Statement give rise to a binding and enforceable contract collateral to the leases?
    - If not, did the Statement found an estoppel?

19. The High Court (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ dissenting) allowed the appeal and dismissed the cross-appeal. The majority held that the Court of Appeal was correct to conclude that there was no binding and enforceable collateral contract between Crown and the Tenants but was in error in remitting the issue of estoppel because the Tenants could not make out an estoppel.

Majority judges

Collateral contract claim

20. French CJ, Kiefel and Bell JJ in a joint judgment ("**Joint Judgment**") identified the circumstances in which a representation made in the course of negotiations could give rise to an agreement collateral to the main agreement as follows:

    - Such a representation could give rise to a collateral contract if it could be concluded that the parties intended that the representation be contractually binding.
    - A conclusion that the parties intended that the representation be contractually binding would follow if the representation had the quality of a contractual promise, as distinct from a mere representation.
    - The parties' intention was to be determined from their words and conduct but the test was objective – what a reasonable person in the parties' position would necessarily have understood to have been intended.[6]

21. The Joint Judgment said that the question of whether a representation created a collateral contract was one of mixed fact and law. While what was said and done and actually agreed to by the parties were questions of fact, questions as to what, objectively, a representation could be taken to convey and whether it had the

[6] Above, n 1, at [22], citing *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 61-62.

qualities required by the law for it to amount to a binding contractual promise were questions of law.[7]

22. The Joint Judgment agreed with the trial judge and the Court of Appeal that a reasonable person in the parties' position could not have understood the Statement to amount to a binding contractual promise to renew the 2005 leases for a further five years because the Statement was no more than "vaguely encouraging"[8] and "did not have the quality of a contractual promise of any kind."[9] In this regard, the Joint Judgment noted that the Tenants had not claimed that the Statement could have been understood as an assurance that the Tenants would not be out of pocket because they would not be able to recover the costs of the refurbishment required by the 2005 leases.[10]

23. In any event, even if the Statement had amounted to a binding contractual promise obliging Crown to offer to renew, the Joint Judgment considered that the obligation was illusory and unenforceable because of the lack of any terms. The Joint Judgment said that the essential terms of an agreement to renew a lease had to be agreed upon for it to be enforceable.[11] The difficulties for the Tenants were that:

    - the supposed collateral contract clearly reserved the terms to be offered to Crown's discretion;
    - VCAT's views about the terms of the renewed leases bearing a reasonable correspondence with the 2005 leases were "mere conjecture, made in passing" and not findings as to Crown's future conduct; and
    - as a matter of law, there was no evidence to support a finding about what Crown might do.[12]

24. Finally, the Joint Judgment said that, as the Tenants themselves had acknowledged, the agreement identified by VCAT was not one in the nature of an agreement to make an offer, such as a right of pre-emption, because the damages VCAT had awarded were not referable to such an agreement, as such damages could only have been nominal.[13]

25. Keane J, another member of the majority, also took issue with VCAT's assumption, made when it was assessing damages, that Crown would probably have stipulated terms of renewal similar to those in the 2005 leases. His Honour said that this was not a finding of fact based on evidence of Crown's likely attitude, that VCAT had given the Tenants the benefit of a contract that was never made between the parties

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[7] Above, n 1, at [24]-[27]. Section 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), permits a party to a proceeding before VCAT to appeal on a question of law from an order of VCAT, if given leave.
[8] Above, n 1, at [23].
[9] Above, n 1, at [28].
[10] Above, n 1, at [29].
[11] Above, n 1, at [31].
[12] Above, n 1, at [32]-[33].
[13] Above, n 1, at [34].

and that VCAT had no authority to force upon Crown such terms as VCAT regarded as reasonable.[14]

26. His Honour also said that no agreement had been concluded because Crown had been left legally free to act in its own interests in negotiating the terms of any further lease and could specify terms which could be unacceptable to the Tenants. Thus, the terms on which any agreement might have been made "could never be more than unresolvable speculation."[15]

27. His Honour noted that VCAT's error was an error of law[16] and, accordingly, concluded that the trial judge and the Court of Appeal were correct in finding that there was no binding and enforceable collateral contract because the contract was illusory.[17]

28. Nettle J, the other member of the majority, said that there was no binding and enforceable collateral contract for the following reasons:

    - Having regard to the circumstances of the case, the trial judge and the Court of Appeal were correct in holding that a reasonable person in the Director's position could not have construed the Statement as a binding promise to offer a further term of five years. Any understanding the parties might have come to about a renewal was inchoate. The words which the parties used were not "the language of obligation or contract".[18]

    - In any event, as the trial judge and the Court of Appeal correctly concluded, any such promise would be illusory and unenforceable because, apart from the five year term, it left the selection of the terms and conditions of the renewed leases entirely to Crown's discretion. It was not open to construe the Statement as importing reasonable terms and conditions. There was no basis for VCAT's conjecture that Crown would probably have stipulated terms and conditions that had a reasonable correspondence with those that had appeared in the 2005 leases. Nor was it open to infer from the supposed promise to offer to "renew" the 2005 leases that the offer would be to renew them for a term of five years.[19]

29. His Honour, however, did express a view contrary to that of the trial judge and the Court of Appeal, that if the Statement had been a promise to grant a further five year term, the promise would not have been inconsistent with cl 2.3 of the Leases.[20]

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[14] Above, n 1, at [99]-[101]; [127].
[15] Above, n 1, at [130].
[16] Above, n 1, at [131].
[17] Above, n 1, at [75], [132].
[18] Above, n 1, at [196], quoting from *Horton v Jones* [1935] HCA 7; (1935) 53 CLR 475 at 489.
[19] Above, n 1, at [198]-[202]. His Honour considered that the decision in *Lewis v Stephenson* (1898) 67 LJQB 296 which had been approved in *Trade Practices Commission v Tooth & Co Ltd* [1979] HCA 47; (1979) 142 CLR 397 had no application in the circumstances of the case.
[20] Above, n 1, at [203]-[205].

Estoppel claim

30. Crown had submitted that the estoppel advanced by the Tenants was a promissory estoppel while the Tenants had submitted that they had always claimed a proprietary estoppel.

31. The Joint Judgment, however, said that it was only in the submissions to the High Court that the Tenants had sought to characterise the estoppel as proprietary estoppel and that the Tenants may have done this because they considered that a less strict approach to the requirement for certainty of the representation was taken in the case of proprietary estoppel than in the case of promissory estoppel. The Joint Judgment was satisfied that the case was not one of proprietary estoppel, that it had never been an issue in the proceedings that it was one of proprietary estoppel and that the case was not the occasion on which to resolve the question as to whether there was a single, unified doctrine of estoppel.[21]

32. The Joint Judgment said that it had long been recognised that for a representation to found an estoppel it had to be clear in the sense that the language used had to be precise and unambiguous.[22] The Joint Judgment explained that this did not mean that the words used could not be open to different constructions, but that the words had to be able to be understood in a particular sense by the representee because this provided the basis for the assumption or expectation upon which the representee acted. According to the Joint Judgment, the words had to be capable of misleading a reasonable person in the way that the representee claimed he or she had been misled.[23]

33. The Joint Judgment then concluded, without more, that the Statement was not capable of conveying to a reasonable person that the Tenants would be offered a further lease.[24]

34. The Joint Judgment went on to say that, in any event, the Tenants' case failed because it had not been shown that the assumption or expectation created by Crown had in fact been acted upon.[25] VCAT had found that the expectation that Crown had created in the Tenants was that they would be offered further five year terms at the time of renewal on terms to be decided by Crown but it had not been the Director's evidence nor part of the Tenants' case that the Director had acted on the basis of such an expectation. The Tenants had submitted that the Director had assumed that there would be a renewal of the 2005 leases, or an offer of renewal, on the same terms and conditions as the 2005 leases and that it was this assumption or expectation which had induced the Director to deliver the 2005 leases to Crown.[26]

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[21] Above, n 1, at [36]-[38].
[22] Above, n 1, at [35], referring to *Legione v Hateley* [1983] HCA 11; (1983) 152 CLR 406 and *Low v Bouverie* [1891] 3 Ch 82.
[23] Above, n 1, at [35].
[24] Above, n 1, at [35].
[25] Above, n 1, at [39].
[26] Above, n 1, at [39]-[40].

35. In light of this, the Joint Judgment indicated that Whelan JA should have dismissed the Tenant's appeal rather than remitted the estoppel claim to VCAT for further determination. The Joint Judgment also commented that Whelan JA's approach, which appeared to assume that the Tenants' case could be treated as encompassing Crown being estopped from resiling from "whatever representation it was found to have made", encouraged prolongation of litigation which was largely intended to be concluded in VCAT.[27]

36. The Joint Judgment was also of the view that Whelan JA had been mistaken in considering that the only matter to be dealt with by VCAT on remittal was the relief, if any, that should be granted with respect to the representation which VCAT had found because this overlooked the requirement that the expectation it created had to have been acted upon by the representee.[28]

37. Accordingly the Joint Judgment concluded:

> "*[The Director] 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 [the Director's] evidence. There was no utility in the order for remittal. It should not have been made.*"[29]

38. Keane J also considered that the estoppel asserted by the Tenants in VCAT and the other courts had been a promissory estoppel but said that it was unnecessary to finally decide this or to resolve the question as to whether there was a single unified doctrine of estoppel. For the purposes of the case before him, his Honour accepted that the separate categories of promissory and proprietary estoppel permitted different approaches to the determination of whether the representor was responsible for creating the assumption on which the representee acted in different contexts.[30] .

39. His Honour then said, in substance, the following:

- A representation had to be "clear", "unequivocal" and "unambiguous" before it could found a promissory estoppel[31] because it would tend to reduce the law to incoherence if a representation which was too uncertain or ambiguous to give rise to a contract or variation of contractual rights and liabilities were held to be sufficient. Practical considerations, including the need of commerce for certainty as to the terms to which parties had agreed to be bound and as to whether their negotiations had concluded, also provided strong support for this approach. The decision in *Waltons Stores* was coherent with the law of contract.[32]

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[27] Above, n 1, at [41]-[42].
[28] Above, n 1, at [43].
[29] Above, n 1, at [44].
[30] Above, n 1, at [76], [138]-[141].
[31] Above, n 1, at [142], referring to *Legione v Hateley* (1983) 152 CLR 406.
[32] Above, n 1, at [142]-[144].

- Where a contractual right or liability was to be altered, coherence in the law required that the representation claimed to bring about that alteration should be no less certain in its terms than would be required for an effective contractual variation. Thus, Warren CJ was wrong to hold that there was 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. The idea of a "grey area" and "lower limit" was relevant to a claim of proprietary estoppel, not promissory estoppel.[33]

- In the case of proprietary estoppel, the concern that estoppel should not operate incoherently with the law of contract did not arise because the parties' relationship was not governed by a charter of contractually based rights and obligations. Nevertheless, even in such a case, the representation had to be sufficiently clear that the expectation which the representee asserted had been both actually, and reasonably, created by the representation.[34]

- The Tenants had argued that they were claiming a proprietary estoppel but the expectation found by VCAT was not of a grant of an interest in land but of an offer on terms which the Tenants would be "free" to accept. Such an offer might have come to nothing because Crown could have fixed whatever terms it wished and any interest in land to be granted to the Tenants would have depended on an agreement being reached upon the terms of an enforceable agreement for a lease. These problems were not avoided by the Tenants categorising their case as proprietary, rather than promissory, estoppel.[35]

- Furthermore, VCAT had not accepted the Director's evidence that he was assured of the grant of further five year leases and that he had acted upon this assurance and had rejected the Tenants' case, based on that evidence, that the Tenants had been induced to act by the assurance of five year leases on the same or similar terms as the original leases. In addition, a reasonable person in the Director's position could not have understood the Statement as an assurance of such an outcome. It was clear from the negotiations between the parties that Crown had been refusing to bind itself to such an outcome. There was no other basis put forward by the Tenants for holding that Crown was conscience-bound to hold its title subject to an interest in favour of the Tenants. The Tenants had not advanced a case of a "grey area" or a "lower limit" of what was meant by "looked after" and so there was nothing to suggest that the Tenants had any expectation within the grey area or lower limit.[36]

- Finally, in none of its different categories did estoppel operate by imputing to the representee an expectation or reliance which could be considered to be a proportionate or fair response to the representation made by the other party.

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[33] Above, n 1, at [147]-[148].
[34] Above, n 1, at [149].
[35] Above, n 1, at [154]-[155].
[36] Above, n 1, at [156]-[157].

Reliance was a fact to be found and was not to be imputed on the basis of evidence which fell short of proof of the fact.[37]

40. Accordingly, Keane J concluded:

> "*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. On the findings made by [VCAT] as to the expectation engendered by Crown's statement to [the Director], 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.*[38]

41. Nettle J, in also concluding that the estoppel issue should not have been remitted to VCAT, took a somewhat different view of the level of certainty which was required and considered that the Tenant's case could possibly have been one of proprietary estoppel. His Honour's reasoning on the level of certainty required was to the following effect:

- A representation of contractual certainty was not necessary to found a promissory estoppel. What was determinative in such a case was whether the representor had played such a part in creating an assumption or expectation in the mind of the representee, in reliance on which the representee had acted to his or her detriment, that it would be unconscionable for the representor to depart from the assumption or expectation before allowing the representee reasonable time in which to revert to the status quo ante or, in some cases, at all. Statements in the authorities[39] that a representation had to be clear, unequivocal and unambiguous before it could found an estoppel were to be understood in that sense. There was no requirement that a representation had to be objectively unambiguous in order to found a promissory estoppel.[40]

- In addition, whatever level of certainty was necessary to found a promissory estoppel, proprietary estoppels of the kinds exemplified in *Dillwyn v Llewelyn*[41]and *Ramsden v Dyson*[42] did not require any particular level of

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[37] Above, n 1, at [158], citing *Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505.
[38] Above, n 1, at [160] (footnote omitted).
[39] His Honour referred to *Legione v Hateley* (1983) 152 CLR 406 and *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23.
[40] Above, n 1, at [210]-[214],
[41] [1862] EngR 908; (1862) 4 De G F & J 517; 45 ER 1285.
[42] (1866) LR 1 HL 129.

objective certainty. These kinds of proprietary estoppels were a form or sub-species of promissory estoppel.[43]

- Arguably, the present case was one of proprietary estoppel but, in any event, the foundational principle on which all categories of equitable estoppel was grounded was that equity would not permit an unjust or unconscionable departure by a party from an assumption or expectation which that party had caused another to adopt for the purpose of their legal relations. Therefore, it was contrary to principle for there to be some *a priori* distinction between the level of objective certainty required to found a promissory estoppel compared to a proprietary estoppel. While there might not yet be general acceptance of the idea of a single overarching doctrine of estoppel, in all categories of estoppel the determination of whether it was unconscionable for the representor to depart from an assumption or expectation created in the mind of the representee had to always depend on the particular facts and circumstances of the case.[44]

- Finally, since the object of equitable estoppel in all its categories was to prevent the detriment which a representee would suffer if the representor were unconscionably to depart from the assumption or expectation created in the representee's mind, relief had to be accorded only to the extent of the minimum content of the assumed state of affairs from which it would be unconscionable for the representor to depart. Therefore, although an equivocal or objectively ambiguous representation could not give rise to a binding contract, it could found a promissory estoppel because this would be only one of the considerations (albeit an important one) in determining whether, and to what extent, the assumption or expectation could fairly and reasonably be attributed to the representation and thus the relief which was to be accorded.[45]

42. Nettle J considered that it followed from the above analysis that just because the representee had made an assumption or reached an understanding of the meaning of the representation that went beyond the meaning that could reasonably be attributed to it, it did not mean that the representor was completely free to ignore it. His Honour said that, in the case of proprietary estoppel, if it appeared that it would be unconscionable for the representor to be allowed to depart from some lower level of assumption or expectation that could fairly and objectively be derived from the representation, the court's approach was to limit the relief accordingly. His Honour then said that the common principle which informed all categories of equitable estoppel implied that the same approach should be taken in the case of non-proprietary promissory estoppel.[46]

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[43] Above, n 1, at [215].
[44] Above, n 1, at [216]-[217].
[45] Above, n 1, at [218].
[46] Above, n 1, at [219]-[222].

43. Nettle J, however, noted that the Tenants had not pleaded or attempted to prove that, if they were not entitled to be put in the position in which they would have been if a further five year term had been granted, they were entitled to some lesser scale of relief to be determined according to what might reasonably be regarded as the meaning of the Statement and, accordingly, VCAT had not made any findings as to whether they would have been induced by a more limited reasonable assumption or understanding to act as they did. Nor had VCAT made any finding of detriment as such.[47]

44. In these circumstances, his Honour concluded that the Court of Appeal should not have remitted the matter to VCAT to enable these deficiencies to be corrected. Given that Crown had successfully resisted the Tenants' claim in the way in which the Tenants had chosen to put it, his Honour said that it would be wrong in principle and unfair if Crown was now to be faced with, effectively, a second proceeding.[48]

Minority judges

45. The view of the minority judges (Gageler and Gordon JJ) was that there was a binding and enforceable collateral contract between the Tenants and Crown which Crown had breached and that, accordingly, the estoppel claim did not arise for determination.[49]

46. After considering the principles applicable to collateral contracts,[50] Gordon J (with whose reasons Gageler J substantially agreed)[51] said, in substance, the following:

- VCAT's analysis of the promissory nature and certainty of the Statement was correct. Whether the Statement was promissory was a question of fact and so VCAT's finding that it was promissory was not open to challenge on appeal unless the finding was not open on the evidence. The finding was open on the evidence. The Statement was a promise to make an offer to "renew" the leases for five years on terms of Crown's choosing. The Statement was not too vague because it had to be looked at in context and VCAT had found that a reasonable person would have concluded that the promise meant that Crown would satisfy its obligation under cl 2.3 to give a notice stating that it would renew the lease for a further five year term on the terms specified in the notice. That finding was also well open on the evidence.[52]

- The requirement that there be reliance on the Statement was satisfied. Whether there had been delivery of the 2005 leases by the Tenants to Crown, with the intention of being bound, was a question of fact and VCAT had found that the Tenants had evinced an intention to be bound by the 2005 leases only when the

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[47] Above, n 1, at [225]-[226].
[48] Above, n 1, at [227].
[49] Above, n 1, at [233]; [46].
[50] Above, n 1, at [239]-[246].
[51] Above, n 1, at [46].
[52] Above, n 1, at [249]-[258].

leases were delivered in March 2006. Whether the Tenants delivered the 2005 leases in reliance on the promise was also a question of fact and VCAT had found that the delivery was made to Crown in reliance on the promise. These findings of fact were open on the evidence.[53]

- The collateral contract was not inconsistent with the 2005 leases. It was an agreement that the notice given under 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 2005 leases, to offer to "renew" the leases for five years on the terms that Crown specified in the notice.[54]

- The collateral contract was not illusory because it was an agreement to make an offer. While Crown could fix the terms on which it would offer the new leases for five years, it was obliged to make an offer of the kind promised. It could not refuse to make an offer at all. Nor were the terms of the collateral contract incomplete because the collateral contract would have been concluded if Crown had made the offer it was obliged to make. That offer had to contain all the essential terms necessary for it to be complete upon acceptance (they did not have to be settled beforehand) and had that offer then been accepted by the Tenants, a new and independent contract – a lease – would have been formed at that time. This was not a case where the essential terms of the collateral contract were being settled by further agreement between the parties at a later time.[55]

- The collateral contract was not required to be evidenced in writing by s 126 of the *Instruments Act 1958* because it was an agreement to make an offer and not a contract for the disposition of an interest in land.[56]

47. Gordon J also agreed with VCAT that Crown had breached the collateral contract when it failed to give the Tenants notice pursuant to cl 2.3 that it offered to "renew" the 2005 leases for a further five year term on the terms specified in the notice. However, her Honour found that VCAT had taken the wrong approach in the assessment of the damages for the breach because it had calculated damages by reference to the profits that would have been generated during the term of the renewed leases when the Tenants had in fact lost the benefit of the offer that Crown should have made to them, which was a loss of an opportunity.[57]

48. Her Honour said that the Tenants had neither claimed nor proved that they were entitled to damages for loss of an opportunity and so VCAT had not made any findings relevant to assessing the value of this and nor had this been addressed on appeal. Accordingly, her Honour concluded that it was not appropriate to remit the matter to permit the Tenants to now make a completely different damages case and proposed that orders be made that Crown's appeal be dismissed, the Tenant's cross-

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[53] Above, n 1, at [259]-[263].
[54] Above, n 1, at [264].
[55] Above, n 1, at [265]-[266].
[56] Above, n 1, at [267].
[57] Above, n 1, at [268].

appeal on the collateral contract issue be allowed and that Crown's costs of the appeal and cross-appeal be paid by the Tenants.[58]

49. Gageler J made a number of additional observations including the following:

- There was no contractual uncertainty because the question of what the Statement would have conveyed to a reasonable person was a question of fact and had been determined by VCAT. VCAT's finding was open on the evidence as demonstrated by Gordon J's reasoning.[59]

- There was contractual completeness because there was an agreement to offer, not an agreement to agree. Under an agreement to agree, the whole or some part of the agreement was deferred to the future. Under an agreement to offer, there was entry into a present agreement to propose terms capable of resulting in a further future agreement, if accepted. Such an agreement was complete in itself.[60]

- The collateral contract was not illusory. It did not leave to the option of one party not only the mode of performance but whether there would be any performance at all. Crown had made a promise to make an offer and it could not be said that Crown was left with a choice as to whether or not to perform the promise merely because the terms of the offer were left to Crown. That Crown could choose the terms did not contradict its obligation to make an offer.[61]

50. Gageler J proposed dealing with the matter by ordering that Crown's appeal be dismissed, the Tenant's cross-appeal on the collateral contract issue be allowed and that consequential orders be made reinstating VCAT's decision.

K Ottesen 18 August 2016

[58] Above, n 1, at [269]-[272].
[59] Above, n 1, at [53]-[56].
[60] Above, n 1, at [57]-[59].
[61] Above, n 1, at [60]-[64].