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 SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Can an ambiguous representation found a promissory estoppel?

3 Can a representor be estopped from departing from an assumption or expectation which the representee never actually had as a result of the representation?

4. Can a promissory estoppel be made out by proving only the making and resiling from a representation (whether ambiguous or not)?

Part III: Section 78B of the *Judiciary Act 1903*

4 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

5 The reasons for judgement of the Court of Appeal of the Victorian Supreme Court (VCA) dated 22 December 2014 (**first VCA reasons**) and 8 April 2015 (**second VCA reasons**) have not been reported. The medium-neutral citations are [2014] VSCA 353 and [2015] VSCA 56.

6 The reasons for judgement (**VSC reasons**) of the trial judge, Hargrave J, are not reported. The medium-neutral citation is [2013] VSC 614.

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7 The primary reasons for judgement (**Tribunal reasons**) of the Victorian Civil and Administrative Tribunal (**the Tribunal**) dated 24 February 2012 are not reported. The medium-neutral citation is [2012] VCAT 225. Other unreported reasons were delivered on 19 September 2012 ([2012] VCAT 1407) and 8 February 2013 ([2013] VCAT 106).

Part V: Facts

8 The Appellant (**Crown**) owns the Melbourne Casino and Entertainment Complex (**Complex**) at Southbank. The Complex includes numerous restaurants. Between 1997 and 2005 companies associated with Mr Nick Zampelis operated two restaurants at the Complex, one called Café Greco and the other called Waterfront.

9 Each restaurant was subject to a separate lease, both of which were due to expire on 7 May 2005. Negotiations began in early 2005 for new leases with the Respondents, being different companies also associated with Mr Zampelis. Crown was only prepared to grant five-year lease terms for each restaurant with no option to renew. It also required the Respondents to undertake a major refurbishment of each restaurant at their expense. In May 2005 Crown sent the Respondents documents which included comprehensive summaries of the terms and conditions of the proposed new leases.[1] On 29 June 2005 Crown gave in principle approval to the Respondents' refurbishment concept plans and stated that the new leases would start on 1 September 2005 and that refurbishment would have to be completed and trading would have to commence by 1 December 2005. Mr Zampelis sent an email on 22 July 2005 in which he confirmed 'our acceptance of your offer unconditionally.'[2] On 2 September 2005 Crown sent unexecuted leases to the Respondents that reflected the summary documents (**Leases**).[3] The Leases were executed by the Respondents in November 2005 and Crown was informed of this, but the signed originals were not then returned.[4]

10 The Leases contained clause 2.3 which required the Appellant to provide a notice to the Respondents at least 6 months but no more than 12 months prior to expiry of the leases, stating whether:

(a) the Appellant would renew the lease, and on what terms (clause 2.3(a));

(b) the Appellant would allow the Respondents to occupy the premises on a monthly tenancy after expiry (clause 2.3(b)); or

(c) the Appellant will require the Respondents to vacate the premises on expiry (clause 2.3(c)).

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[1] Tribunal reasons [44] (A typographical error records the date as 2003, not 2005.)
[2] Tribunal reasons [46]
[3] Tribunal reasons [48]
[4] VSC Reasons [3]

11 The Respondents alleged and Crown denied that in order to induce the Respondents to enter into the Leases, a series of oral statements were made by Crown's employees and (alleged)[5] agents to Mr Zampelis between 1 September 2005 and 18 March 2006.[6] The Respondents' collateral contract case in the Tribunal was that these statements constituted a promise to renew the Leases on the same terms. During oral closings in the Tribunal, this was amended to a promise to renew the Leases for five years *mutatis mutandis*.[7]

12. Mr Zampelis gave evidence that he understood the oral statements were 'about a further five year term' and that he delayed handing over the signed lease documents in the hope of 'written confirmation of the additional five year term.'[8]

13 The Tribunal found that only one statement was made and that, on a date which was probably 6 December 2005, Mr Boesley of Crown said to Mr Zampelis to the effect that if Mr Zampelis spent the money that, under the Leases, the Respondents were required to spend to achieve a major refurbishment to a high standard, he would be "looked after at renewal time" (**Statement**) and that the leases had been limited to a five year term only because they would thereby be aligned with other Crown leases. The Tribunal was not satisfied that any of the other alleged statements were made.

14 In early January 2006 the refurbishment of the restaurants began. It finished in early March.

15 In early March 2006 Mr Zampelis was given an ultimatum by Mr Boesley: the Respondents would not be allowed to trade unless he signed and returned the leases.[9] Mr Zampelis returned the previously executed leases on 7 March 2006. The Tribunal found that the ultimatum caused him to hand the leases over, but the Statement was the reason for him having handed them over at all.[10]

16 The restaurants thereafter operated at the Casino Complex until 31 August 2010, when the leases expired. The Respondent made profits each year.[11]

17 In 2008 Crown commenced a tender process in respect of the premises. The Respondents lodged unsuccessful tenders. In December 2009, Crown gave notices pursuant

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[5] Neither Lloyd Williams or Nick Williams were officers of Crown. Contrary to the findings of Warren CJ in [89], no assurances were sought or obtained by Mr Zampelis from directors of Crown. See [14]-[17] of the Tribunal reasons.
[6] Tribunal Reasons [8], [13]-[17], [49]-[64]
[7] Tribunal reasons [137]. VSC Reasons [10] and [94]
[8] VSC Reasons [93]
[9] Tribunal Reasons [65]
[10] Tribunal Reasons [151]-[153]
[11] See transcript of hearing in the Tribunal, page 237, line 32 – 47, page 238, line 1 – 15 (cross-examination of Mr Zampelis) and page 178, line 25 – 30 (Respondents' closing submissions). See also [2012] VCAT 1407 at [17] and [21].

to clause 2.3(c) requiring the Respondents to vacate. The Respondents then contended that they were entitled to further five-year lease terms and commenced proceedings in the Tribunal. The Respondents vacated the premises in August 2010 at the end of the lease terms.

18 The Respondents' Further Amended Points of Claim dated 4 May 2011 advanced various claims, including a collateral contract that Crown would 'offer to renew the Lease for a further 5 year term', misleading or deceptive conduct in contravention of the *Fair Trading* Act, unconscionable conduct and the following two estoppel pleas:

(a) it was unconscionable for Crown to deny that it was obliged to offer the Respondents a further lease of the premises for a term of 5 years on the terms of the original lease and it was estopped from doing so;

(b) if the alleged collateral contract was unenforceable, Crown was estopped from denying its existence.

19 In their written and oral closing submissions in the Tribunal the Respondents expressly submitted that the estoppels were promissory and prevented the Appellant from denying the existence or obligation of the collateral contract (which at this point was no longer said to be a promise to offer new leases on the *same* terms as the original leases, but to offer new leases for 5 years on terms *mutatis mutandis)*. Their closing submissions at [27] stated "If the Tribunal decides that the collateral contract was not enforceable because it was not in writing, the [Respondents] will rely on principles of promissory estoppel."

20 The Tribunal held that the Statement was a promise that gave rise to a collateral contract requiring Crown to give a notice under clause 2.3(a) that it would renew each lease for five years on whatever terms Crown saw fit.[12] The Respondents would be free to accept or decline that offer.

21 The Tribunal also stated that if (contrary to its findings) the collateral contract was unenforceable by reason of the *Instruments Act*, it would accept the alternative submission that promissory estoppel would prevent Crown from denying the collateral contract. The Tribunal referred expressly to Brennan J's reasons in *Walton Stores*.[13]

22 Crown appealed the Tribunal's findings to the Victorian Supreme Court, including the promissory estoppel finding. The appeal was heard by Hargrave J.

23 Before Hargrave J, the Respondents submitted that their estoppel claim 'was a general claim, not confined to the particular defences that [Crown] ran at the tribunal below'[14] and that

[12] Tribunal Reasons [139]-[141]
[13] Tribunal Reasons [172]
[14] Transcript of hearing before Hargrave J, page 116, line 27 – page 117, line 3.

'the elements of promissory estoppel, well known as set out in *Walton Stores*, was satisfied in this case'.[15] On the final day of the hearing, the Respondents sought and obtained leave to file a notice of contention, which provided that if the contract contended for was unenforceable because it was inconsistent with the leases, the Tribunal's decision should nevertheless be affirmed on the basis that Crown was estopped from denying the collateral contract.

24 Hargrave J gave judgment for Crown on various grounds including that the Statement was not promissory in nature and that the collateral contract found by the Tribunal was illusory and inconsistent with the Leases and thus unenforceable. In his reasons he also:

(a) observed that the conclusion reached by the Tribunal about the application of the *Instruments Act* was 'probably correct' but it was unnecessary to decide;[16]

(b) found that, as the Respondents had raised in submissions the reasoning of the Tribunal in relation to the *Instrument Act* claims in order to defeat the inconsistency and uncertainty/illusory issues, he would allow the Respondents to raise the estoppel issue as it was capable of supporting the result in the Tribunal;[17] but

(c) held that no estoppel existed for reasons that are considered further below.[18]

25 The Respondents appealed all aspects of Hargrave J's judgment to the VCA and also raised, for the first time, an argument that Crown's appeal to Hargrave J involved questions of fact and/or mixed questions of fact and law, contrary to section 148 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) (**VCAT Act**), so that leave should have been refused. There were eight grounds of appeal.[19] (Each of these grounds now appear to be encapsulated within the broader proposed grounds of cross-appeal contained in the proposed Notice of Cross-Appeal filed by the Respondents in this court on 24 December 2015.)

26 In their written submissions to the VCA, the Respondents argued that: "Furthermore, even if the collateral contract should be regarded as void for uncertainty, promissory estoppel is the answer to that defence."[20] The VCA upheld the Respondent's appeal on the promissory estoppel ground. Whelan JA delivered reasons with which Santamaria JA agreed. Warren CJ delivered separate reasons in which her Honour would also have allowed the appeal on the promissory estoppel ground, but for different reasons.

Part VI: Argument

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[15] Transcript of hearing before Hargrave J, page 149, line 22 – 23
[16] VSC reasons at [82]
[17] VSC reasons at [85]
[18] VSC reasons at [83]-[95]
[19] VCA reasons at [39]
[20] Paragraph [15] of the Respondents' submissions.

27 The decision below involves three fundamental and overlapping errors:

(a) first, all judges found that the Statement was ambiguous but, contrary to *Legione v Hately*,[21] also held that it could still found a promissory estoppel;

(b) second, all judges found that Crown could be estopped from departing from an expectation of something less than new five year leases even though Mr Zampelis never held such an expectation;

(c) third, the majority found that all that was required to found a promissory estoppel was the making of, and resiling from, a representation.

28 These errors arose because of a failure to clearly identify and consider the specific requirements for promissory estoppel and, perhaps, from a misplaced reliance on concepts drawn from proprietary estoppel. As Meagher JA said in *DHJPM Pty Ltd v Blackthorn Resources Ltd*,[22] it is accepted by this court that: 'the "familiar categories" of promissory and proprietary estoppel identify different characteristics of circumstances in which equitable estoppels will arise',[23] and that because of this it is 'necessary ... to attend carefully to the identification of the assumption or expectation which the object of the estoppel is said to be estopped from denying or asserting. This also directs attention to the relevant doctrine which must then be applied in a disciplined and principled way."[24]. This did not occur in the decision below.

29 It is also evident that the Respondent's case would take promissory estoppel into new territory. Putting to one side the vague nature of the Statement in this case, the Respondent's contention argued at special leave would have the effect that Party A, which was *expressly refused* a contractual right by Party B in negotiations on the terms of a proposed contract, can execute the written contract that does not include the right and immediately contend that Party B is estopped from denying that Party A has the excluded right.[25] It is hard to see how it is unfair or unjust for Party B to deny the right[26].

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[21] (1983) 152 CLR 406
[22] (2011) 83 NSWLR 728
[23] (2011) 83 NSWLR 728 at [43]
[24] (2011) 83 NSWLR 728 at [44]
[25] Crown refers to the facts of this case set out above. Relevantly the Respondents were provided with the unexecuted leases after they had sent an email to Crown confirming 'our acceptance of your offer unconditionally.' The Respondents then executed the Leases before the Statement was made, informed Crown they had been executed, but did not return them.
[26] Cf per Lord Walker in *Cobbe v Yeoman's Row Management* [2008] 1WLR 1752 at 1785-1787 [81], 1788-1789 [91], [92]

30. Such a result would also be contrary to (and outstrip) this court's doctrine in *Hoyt's v Spencer.*[27] This point was made by Handley JA in *Saleh v Romanous.*[28]

31 It is relevant to briefly review the fundamental elements of promissory and proprietary estoppel, and particularly the differences in respect of the certainty required in the representation.

Promissory and proprietary estoppel

32 As Mason and Deane JJ observed in *Legione,*[29] the comments of Lord Cairns LC in *Hughes v Metropolitan Railway Co* are generally seen as the source of an equitable doctrine of promissory estoppel, which precludes departure from a representation by a person that he will not enforce his strict contractual rights. *Legione* is, however, the relevant starting point for the doctrine in Australia. Its original context was limited to the restriction of the exercise of existing rights between the parties, although the doctrine has since been extended to circumstances where no such rights pre-existed[30].

33 Proprietary estoppel restricts a party with proprietary interests from asserting those proprietary rights against another party, in circumstances where the first party has allowed or encouraged the second party to assume that they had rights in connection with that property. It includes estoppel by encouragement (*Dillwyn v Llewelyn)*[31] and estoppel by acquiescence or standing by (*Ramsden v Dyson*).[32]

34 As equitable estoppels, proprietary and promissory estoppel have elements in common. In particular, both proprietary and promissory estoppel are concerned with the assumptions engendered by the conduct of another party. Both have a shared 'basal purpose', being to protect a person from suffering detriment which 'would flow from a party's change of position if the assumption (or expectation) that led to it were deserted'.[33]

35 Self-evidently, in a proprietary estoppel, that assumption will be associated with the acquisition of proprietary rights, while in a promissory estoppel, it will be associated with the non-enforcement by another party of their strict legal rights (be they contractual or otherwise) against the party forming the assumption.

36 There are also well established differences between the two doctrines.

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[27] (1919) 27 CLR 133

[28] (2010) 79 NSWLR 453 at [73], and also per Handley AJA in *DHJPM* at 83 NSWLR 750 [93]

[29] (1982) 152 CLR 406 at 432-3

[30] At least arguable, such as when formal validity requirements are not met in contract. See also per Handley JA in *Saleh* at 79 NSWLR 460-461 [64]-[70], 462 [74], AND IN *DHJPM* AT 83 NSWLR 750 (94), 750-751 [106].

[31] (1862) 4 De G F& J 517; 45 ER 1285

[32] (1866) LR 1 HL 129

[33] *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674–5, *Legione* at 437 and *Giumelli v Giumelli* (1999) CLR 101 at 124.

37 In *Legione*, Mason and Deane JJ affirmed that a representation must be 'clear' before it can found an estoppel.[34] . They referred to observations by Isaacs ACJ in *Western Australian Insurance Co Ltd v Dayton*[35] that such a representation must be unambiguous, and to Lord Denning in *Woodhouse Ltd v Nigerian Produce Ltd*[36] who held that for an estoppel to be effective, the representation must be clear and unequivocal.

38 As to the expectation to be drawn from the representation, Mason and Deane JJ also referred to *Low v Bouverie*[37] where Kay LJ said that:

> It is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it.

10 **39** Nothing in the subsequent High Court authorities that have built on *Legione* in developing the modern doctrine of equitable estoppel (including *Walton Stores (Interstate) v Maher*,[38] *Foran v White*[39] or *Commonwealth v Verwayen*[40] has detracted from or been inconsistent with these requirements. Indeed, since the judgment was delivered, the 'clear and unambiguous' test set down in *Legione* has been consistently applied in numerous decisions by courts across Australia without apparent difficulty or qualification. These decisions have been delivered before[41] and after[42] after *Sullivan v Sullivan*[43], which introduced the novel concept of a 'gray area' and which is considered further below. Relevantly, the Respondents have not sought or obtained leave to reopen *Legione* nor filed any Notice of Contention regarding the findings of the VCA that the Statement was ambiguous.

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[34] *Legione* at 436
[35] (1924) 35 CLR 355 at 375
[36] [1971] 2 QB 23 at 60
[37] [1891] 3 Ch 82 at 113. See also Bowen LJ at page 106 who said that: "It must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."
[38] (1988) 164 CLR 387
[39] (1989) 168 CLR 385
[40] (1990) 170 CLR 394
[41] See, for example: *Ocean Shipping Co Ltd v P S Chellaram & Co Ltd* (1990) 28 NSWLR 354 at 379, *Minister For Immigration, Local Government And Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 108, *Mineral & Chemical Traders Pty Ltd v T Tymczyszyn* (1994) 15 ACSR 398 at 410, *Baillieu v AEC (1996)* 33 IPR 494 at 508, *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited* [2003] FCA 50 at [437] and [449], *Tarongo Land Pty Ltd v Lyons* [2005] VSC 491 at [218], *Green v Amp Life Ltd* [2005] NSWCA 354 at [28]
[42] See, for example, *Qld Alumina Ltd v Alinta DQP P/L* [2007] QCA 387, *Hamersley Iron Pty Limited v The National Competition Council* [2008] FCA 598 at [148], *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374, Apollo *169 Management Pty Ltd v Pinefield Nominees Pty Ltd; Victorian Securities Corporation Ltd v Apollo Resort Pty Ltd* [2010] VSC 40, *Summer Hill Business Estate v Equititrust* [2010] NSWSC 776 (upheld on appeal), *Casella v Casella* [2011] WASC 153 at [11], *Associated Retailers Ltd v Toys Unlimited Pty Ltd* [2011] VSC 297 at [168], *Ausmezz Pty Limted v Goldberger* [2011] VSC 640, *Gibbins Investments Pty Ltd v Savage* [2011] FCA 527, *Paramount Lawyers Pty Ltd v Maneschi* [2012] NSWSC 877 at [117], *National Australia Bank v Caporale* [2012] NSWSC 1014 at [99], *Commonwealth Bank of Australia v Carotino (Australia) Pty Ltd* [2011] SASC 42, *Summer Hill Business Estate v Equititrust* [2010] NSWSC 776 (upheld on appeal)
[43] [2006] NSWCA 312

40 The insistence on a 'clear and unambiguous' representation reflects a concern about the intrusion of promissory estoppel into the law of contract. In *Legione,* Mason and Deane JJ repeated[44] the concerns of Lord Halisham and Lord Denning MR in *Woodhouse* that to permit a party to be estopped as a result of an ambiguous representation would allow that party to obtain an outcome via the doctrine of promissory estoppel which that party would not obtain under the conventional law of contract – an outcome which Lord Halisham considered astonishing.

41 By contrast, courts have long recognised a more flexible approach to the requirement of certainty when dealing with a proprietary estoppel. In *Flinn v Flinn*[45], Brooking JA recognised the different approach as to certainty between promissory and proprietary estoppel, noting that there was a 'general rule' that a representation had to be clear and unambiguous in order to sustain a promissory estoppel. Brooking JA quoted a passage of Slade LJ in *Jones v Watkins,*[46] which expressly identified the different level of certainty required of a representation in order to create a promissory estoppel as compared to a proprietary estoppel. Unsurprisingly, because he was dealing with proprietary estoppel, Brooking JA did not refer to *Legione* (or for that matter *Walton Stores, Foran* or *Verwayen*).

42 The distinction between the level of certainty required in a proprietary and promissory estoppel was recognised by Bathurst CJ (McColl and Meagher JJA agreeing) in *Ashton v Pratt,*[47] who observed[48] that proprietary estoppel does not require complete certainty in the promise or representation whereas for a promissory estoppel the certainty of the promise in questions seems to assume particular importance.[49]

43 Despite this well established difference in approach to the standard of certainty, a small number of relatively recent decisions of the New South Wales and Victorian Courts of Appeal have confused the two and have applied the lower standard of certainty required in proprietary estoppel to cases concerning promissory estoppel. These decisions were relied upon by the VCA below and appear to have contributed to the first error. These decisions are briefly considered below.

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[44] at 436
[45] [1999] 3 VR 712
[46] [1987] CAT 1200. The quote is at page 742 of *Flinn*
[47] [2015] NSWCA 12
[48] at [123]
[49] See also *DHJPM Pty Ltd v Blackthorn Resources Ltd (Formerly Called Aim Resources Ltd)* (2011) 83 NSWLR 729 at 742.

44 *Australian Crime Commission v Gray and Anor*[50] – *Gray* concerned a claim by the defendant that he was promised that he would be 'looked after' and 'would not be financially disadvantaged' if he agreed to give evidence and enter a witness protection program. The defendant entered the program, during which he suffered various financial losses. He asserted a promissory estoppel. Ipp JA (with whom the other members of the Court agreed on this issue) held[51] that the representation was sufficiently unambiguous to create a promissory estoppel. His Honour further observed, *obiter*, that even if he had not so found, it could be enforced by a promissory estoppel, stating that he did not consider the clear and unambiguous test laid down in *Legione* to be an absolute rule.[52] His Honour was heavily influenced by what he described as the 'illuminating judgment' of Brooking JA in *Flinn*. Ipp JA cited the instances detailed by Brooking JA where representors were not able to escape responsibility because of ambiguity or lack of clarity in the relevant representations, without appearing to appreciate that each of those instances involved a proprietary estoppel. He also considered that *Waltons Stores* provided support for his conclusion because the various judgments attributed different meanings to the representation.[53]

45 *Galaxidis v Galaxidis*[54] – *Galaxidis* was a proprietary estoppel case involving a family dispute over land. Tobias JA delivered the majority judgment and, in the course of considering whether the particular representations were sufficiently clear to found a proprietary estoppel, referred with approval to *Gray* and to Ipp JA's reliance on *Flinn* in respect of promissory estoppel.

46 *Sullivan v Sullivan*[55] - *Sullivan* seemed to assume particular importance in Whelan JA's reasons. It was a proprietary estoppel case, involving a written promise in a Christmas card that a sister would 'have a home for life' and would be provided with a home 'to live in as long as you like'.

47 Hodgson JA (with whom McColl JA agreed) said that 'in some respects' more certainty is required for an estoppel than a contractual variation, citing *Woodhouse* and *Legione* but also said that a promise or representation may support estoppel even though it is

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[50] [2003] NSWCA 318
[51] at [188]
[52] [192]
[53] [196]-[199]
[54] [2004] NSWCA 111
[55] [2006] NSWCA 312

not sufficiently certain to operate as a contract. He cited *Gray* and *Galaxidis*[56] in support of this observation, and summarised his views as follows:[57]

> 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.

48 Hodgson JA cited no authority for the above paragraph, the first part of which appears to be an adaption of Ipp JA's test in *Gray* (a promissory estoppel case) and Tobias JA's test in *Galaxidis* (a proprietary estoppel case). The second part – the lower limit of a grey area test – is a new test unsupported by authority. *Sullivan* may be contrasted with *Ashton v Pratt* where the NSWCA analysed equity's requirement for clarity by reference to *Legione*, without introducing the concept of a grey area.

49 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd*[58] - *Koko Black* involved a claim by a minority unitholder in a trust to restrain the majority unitholder from exercising its unqualified power under a trust deed to redeem of units. The estoppel claim was based on a representation made to the minority unitholder that the majority unitholders were in the investment 'for the long term'. The VCA overturned the trial judge's finding (Hargrave J) that the representations relied upon were insufficiently certain to operate as an estoppel. For reasons that are unclear, the VCA treated the estoppel as a proprietary estoppel.

50 Dodds-Streeton JA (with whom Ashley JA and Forrest AJA agreed), considered[59] that the trial judge's reliance on *Legione* and *Woodhouse*, in the absence of considering the analysis in *Flinn* and *Gray*, led the trial judge into error. Dodds-Streeton JA undertook a survey of a variety of proprietary and promissory estoppel authorities, without carefully distinguishing between the two and seemed to regard the test for certainty to be the same for both types of estoppel. This was particularly the case in her Honour's consideration of *Gray* and Ipp JA's reliance upon *Flinn*. Dodds-Streeton JA concluded that the passage of *Woodhouse* relied upon by the trial judge (being a passage similarly relied upon by this Court in *Legione*) in isolation was a potentially misleading articulation of equity's characteristically

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[56] at [84]
[57] at [85]
[58] (2008) 66 ACSR 325; [2008] VSCA 86
[59] at [131]

liberal approach to the construction of representations,[60] but this conclusion seemed primarily arrived at by reference to the proprietary estoppel cases. Her Honour concluded that in the case before her that the representation was capable of operating as an estoppel, finding that 'the long term' had not arrived (without determining precisely when that would be).[61]

51 A careful reading of these cases reveals an apparently unintended but nevertheless incorrect intermingling of the different requirements for certainty in promissory and proprietary estoppel. This error of reasoning was recently identified by Drummond AJA in a lengthy analysis in *The Bell Group v Westpac*.[62] Drummond AJA was careful to identify that *Flinn* is to be understood as a case concerned with the application of a proprietary estoppel by encouragement, that being a discrete head of equity with no application to promissory estoppel and that proprietary and promissory estoppel require differing levels of certainty. Contrary to Tobias JA in *Galaxidis*, Hodgson JA in *Sullivan* and Dodds-Streeton JA in *Koko Black*, Drummond JA expressly disagreed with Ipp JA's finding in *Gray* that an ambiguous promise could be enforced as a promissory estoppel,[63] and expressed the view that 'certainty of the representation or promise remains a requirement of promissory estoppel'. He was correct to make this observation. Likewise, he did not regard *Waltons Stores* as providing any support for the proposition that a representation capable of more than one reasonable meaning is sufficient for a promissory estoppel, making the point that each judge thought a particular representation was established.[64]

First error – certainty/ambiguity

52 The first task of the court was to establish what assumption the Respondents subjectively held and then consider whether adopting that assumption was reasonable. That analysis required the court to consider the certainty of the representation.[65]

53 Whelan JA noted[66] that Mr Zampelis' understanding of the assurances on which he relied was that he would be 'looked after' and would get a 'further lease term' of five years after the initial term. As set out above, Mr Zampelis' evidence in this regard was that the various statements allegedly made to him were 'about a five year term'.

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[60] At [177]
[61] At [182]
[62] (2012) 44 WAR 1 at [1744]-[1763]
[63] At [1751]
[64] See [1750]
[65] Warren CJ correctly identified this task at [78]-[80] of the VCA reasons
[66] At [191]

54 Whelan JA had already highlighted the inherent ambiguity of the Statement, holding that it could have various different meanings.[67] However, he never actually determined what it objectively meant, taking the view that this was a task for the Tribunal on remitter. In considering the potential remedy,[68] he implicitly expressed views about what the Statement *could not* mean, by disavowing any entitlement in the Respondents to the entry into a new lease or some surrogate for a new lease. However, the only case advanced by the Respondents was that their expectation was for a new five year lease.

55 Having concluded that the statement was inherently ambiguous, Whelan JA should have dismissed the relevant ground of appeal. Instead, in apparent reliance on *Sullivan*[69] he concluded that, because it was ambiguous, it founded an estoppel at the lower limit of the grey area, even though he did not determine what, objectively, the grey area encompassed, or what the lower limit was. He did not cite *Legione*.

56 Warren CJ concluded that the 'assumption was reasonable'[70] but it is not clear that her Honour ever actually identified what the assumption was. Moreover, her Honour expressly found that the Statement was 'vague'[71] and 'open to different interpretations'.[72] She did not dismiss the relevant ground of appeal but instead relied upon *Flinn*, *Sullivan* and *Koko Black* in considering the requirement for certainty by reference to proprietary estoppel requirements.[73]

57 The proper application of *Legione* to the present case ought to have lead to a rejection of the Respondents' promissory estoppel claim at the threshold given the finding by all judges of inherent ambiguity in the Statement.

Second Error – 'the induced expectation'

58 All judges held that the Respondents were entitled to relief at the 'lower limit' of the representation made, without considering the actual expectation of the Respondents.[74] This goes even beyond the approach in *Sullivan*. Hodgson JA was prepared to find a representation was certain if it was reasonable for a person to interpret the statement as extending to the lower limit and act in reliance on it as so understood. [75]

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[67] At [182] to [183]
[68] at [204]
[69] see [197(c)]
[70] [92]
[71] [83]
[72] [91]
[73] [80]-[86]
[74] Warren CJ at [97], Whelan JA at [198]
[75] See *Sullivan* at [85].

59 Of course, Mr Zampelis gave no evidence of having formed any assumption or expectation at some 'lower limit' of the 'grey area'. The only case advanced by the Respondents was new five year leases on the same terms as the earlier leases, and the VCA rejected that case (as did Hargrave J and the Tribunal). Nevertheless, the Respondent's desire to support the VCA decision on this point led to the following exchange during the special leave application, which encapsulates the doctrinal difficulty:

> "**Nettle J**: So, even though [Mr Zampelis] did not have in his mind an expectation of something less, you say Crown can be estopped from departing from that which he did not expect.
>
> **Mr Pearce**: Yes, your Honour, yes, and that is within the terms of the representation made and Crown can be held to the reasonable terms of the representation. Your Honour is quite correct, that the case we have made always has been that he was promised a new lease term and that has been rejected by the Court of Appeal.
>
> ...
>
> **Nettle J**: So there can be an estoppel based upon an assumed conventional basis of dealing which never existed but which is perceived by a court ex post facto to be one which might reasonably have arisen.
>
> **Mr Pearce**: Quite so. What the court focuses on is the reasonable expectation or assumption engendered in the mind of the representee, whatever the actual assumption was."

60 The VCA's approach to the issue of the expectation or assumption of the representee may be contrasted with the orthodox approach taken by Hargrave J. His Honour considered that in order to assess whether the representation was sufficiently precise to support an estoppel, it was necessary to consider the sense in which Mr Zampelis understood the representation and relied upon it, and then determine whether, in the context of the facts of the particular case, it was reasonable for the representee to rely upon it in that sense. As Hargrave J held, the Respondent's case failed this analysis because of the disconformities between Mr Zampelis' subjective meaning of the Statement and its reasonable meaning.

61 In fact, in this case, it does not matter whether one attributes the meaning of the Statement found by the Tribunal (that the Appellant would make an offer for a 5 year renewal on terms it saw fit), Hargrave J (it was merely vaguely encouraging words which did not amount to a promise to do anything in particular) or even the VCA (it meant simply that the Respondents would be looked after in some non-specific 'lower level' way). None of these

understandings reflect the particular sense in which Mr Zampelis understood the representation, being the basis upon which he acted and the way in which the Respondents' cases were advanced. The heart of promissory estoppel, in equity, is surely the actual ie subjective state of mind of the party asserting it, and the other party's role in engendering that actual state of mind (thus the label "estoppel by encouragement".

Third error – other constituent elements of estoppel not considered

62 Whelan JA set out his finding as to the scope of the remitter at [200], stating that the issue to be determined on remittal is what equitable relief, if any, should be granted. This was predicated on a finding that 'Crown has resiled', which appears to mean resiled from the Statement. The remaining paragraphs of his Honour's reasons are expressly concerned with the fashioning of relief.

63 Whelan JA did not, however, actually consider any of the other constituent elements of a promissory estoppel case. Instead, he considered that issues such as the reasonable meaning of the representation, Mr Zampelis' reliance on the representation, Crown's knowledge of his reliance on the expectation and the nature of the detriment suffered the Respondents were to be addressed in the remedial enquiry. The effect of the finding at [200] is that all that is needed to establish a promissory estoppel is the making and resiling from a representation, including an ambiguous representation. This approach is contrary to authority and in error.

64 Establishing the actual assumption or expectation, the reasonableness of that expectation, inducement of the expectation, reliance, knowledge of reliance and detriment are constituent elements of establishing promissory estoppel. *Legione* required the VCA, for example, to consider whether Mr Zampelis had relied upon a reasonable understanding of the representation. This step is relevant not only to the assessment of the clarity of the representation, but also in the assessment of the assumption formed by Mr Zampelis and the reliance placed thereupon. In *Legione*, Mason and Deane JJ expressly stated that:[76]

> [The representee] did not give express evidence as to whether he had interpreted what [the representor] said as constituting a representation to the relevant effect or whether he had acted upon any such representation.

65 In addition, the fourth requirement in Brennan J's formulation in *Waltons Stores* is that Crown knew the Respondents were acting in reliance on an expectation of a new five year lease. No such evidence exists and the Tribunal glossed over this requirement in its one-

[76] at 438

paragraph consideration of the estoppel case.[77] It is also unclear what Crown is said to have resiled from. It cannot be an obligation to offer a new five year lease, but it appears to be a generalised obligation to 'look after' the Respondents, the minimum content of which Whelan JA declined to determine, but which the VCA considered may not have caused the Respondents *any* detriment.[78] The question of why it was unconscionable or unfair for Crown to so 'resile' was not addressed by Whelan JA.

66 It might be recalled that the Respondents' special leave submissions expressly contended that the VCA did not actually hold that the Respondents have a complete claim in estoppel, but remitted the matter to the Tribunal for a determination on all issues of estoppel not just relief. This submission was obviously incorrect, but made good the point that the VCA failed to consider the constituent elements of the alleged estoppel. In fact, in those submissions, the Respondents simultaneously contended that the task for the Tribunal on remitter was to determine whether a cause of action in estoppel exists (including what assumptions the Respondents had been induced to adopt) whilst also contending that the VCA 'upheld' a (proprietary) estoppel.

'Proprietary Estoppel'

67 In their special leave submissions, the Respondents appeared to contend that the estoppel case they advanced and which was determined by the VCA was a proprietary estoppel. This was incorrect for the reasons set out above. The case advanced at all levels was expressly a promissory estoppel. At the special leave hearing Senior Counsel for the Respondents appeared to back away from the written submission when he said: "... notwithstanding the way the case was run below, the estoppel in this case was in fact proprietary..."[79]. Later in the hearing Senior Counsel contended that, although the estoppel case he wished to run in this court was proprietary, on the existing remitter to the Tribunal (by the VCA) the Respondents would be arguing promissory estoppel.[80]

68 No leave has been sought to advance a proprietary estoppel case for the first time in this court and no Notice of Contention has been filed. The point is futile anyway: the Statement was that the Respondents 'would be looked after'. That does not connote any interest in land. The estoppel found by the VCA was not directed to an interest in land, nor was the estoppel that the Tribunal would have found. The argument advanced by the Respondents in their special leave submissions was that their expectation was that Crown

[77] See Tribunal reasons at [172]
[78] Second VCA reasons at [13]
[79] Page 6 of the transcript [2015] HCATrans 335 (11 December 2015)
[80] Pages 12 and 14 of the transcript

would exercise its contractual power under clause 2.3(a) of the Leases to make the Respondent an offer to renew, which the Respondents would be free to accept or not. This underscores why the Statement was not capable of giving rise to a proprietary estoppel. Indeed, as mentioned above, Whelan JA expressly held that the estoppel did not entitle the Respondents to a leasehold interest in Crown's land or even a surrogate for such an interest.

Notice of Cross Appeal

69 The proposed notice of cross-appeal seeks to re-argue the numerous other grounds of appeal dismissed by the VCA.

70 No special leave point arises in those proposed grounds.

71 Further, the proposed grounds do not assist the Respondents.

72 For instance, the Respondents now wish to contend that the Tribunal's reasoning about the collateral contract ought to be vindicated. That is, the Respondents now contend that the objective or reasonable understanding of the Statement was that Mr Boesley, on behalf of Crown, was contractually promising to make the Respondents an offer for a further 5 years on terms that were at Crown's complete discretion – whatever that could mean, as a matter of fact or doctrine. This is at odds with the estoppel case. However, at no point have the Respondents ever contended that (a) Mr Zampelis assumed the words had this meaning or (b) acted in reliance on such a meaning. It is obvious Mr Zampelis would not have acted in reliance on such a promise.

Part VII: Legislation

73 Not applicable.

Part VIII: Orders sought

74 **The applicant's appeal be allowed.**

75 In lieu of the Orders of the Victorian Court of Appeal:

(a) the Respondents' appeals to the Victorian Court of Appeal be dismissed; and

(b) the matter be remitted to the Victorian Court of Appeal in respect of the costs of the appeal to the trial division and the application and appeal to the Victorian Court of Appeal.

76 The Respondents pay the Appellant's costs in this Court. Crown also wishes to make submissions, if it is successful in this appeal, that Mr Zampelis be personally ordered to pay its costs of this appeal based upon the principles in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178. The Respondents are in administration and have been so since October 2010. Mr Zampelis has played an active part in the litigation since its inception in the Tribunal and has a financial interest in its outcome.

Part IX: Time estimate

77 The appellant would seek no more than 2.5 hours for the presentation of the appellant's oral argument.

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