VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP260/2016

CATCHWORDS

Retail Leases Act 2003 – alleged oral agreement for lease - whether concluded agreement – whether evidenced in writing – *Instruments Act* 1958 – s.126 - note or memorandum must contain all material terms - commencement date not stated - promissory estoppel – whether landlord estopped from denying the existence of a lease – written lease given by landlord to tenant signed by tenant and returned - conduct of landlord in causing the Applicant to believe that lease was executed –Applicant spending large sums on premises and forgoing income under misapprehension that lease executed – landlord's duty to correct misapprehension – - whether conduct unconscionable - extent of relief – what is "minimum equity" – order confined to what is necessary to avoid inequity created by Respondent – necessary in the circumstances to order granting of lease to avoid inequity

APPLICANT	Risi Pty Ltd (ACN 108 095 790)
RESPONDENT	Pin Oak Holdings (ACN 006 304 710)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	27 - 28 June 2016
DATE OF ORDER	4 July 2016
CITATION	Risi Pty Ltd v Pin Oak Holdings (Building and Property) [2016] VCAT 1112 (4 July 2016)

ORDERS

1. Order that the Respondent execute the lease documents that have been already executed on behalf of the Applicant, such documents not to include the additional provision in Item 22 entitling the lessor to terminate the lease in the circumstances there described.
2. Order that the Applicant remove the picket fence and other fixtures and items that it has constructed or installed on the common property in front of the Premises within 30 days of the date of this order and reinstate the common property to its former condition.
3. Liberty to apply in regard to giving effect to the orders made.
4. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr J. Isles of Counsel
For the Respondent	Mr M. Gurvich of Counsel

REASONS

Background

1. The Respondent is the owner of a three-storey building at 28 to 30 Young Street Mooney Ponds. Part of the ground floor of this building is an area ("the Premises") which is used by the Applicant to conduct a restaurant business. The director of the Respondent is a Mr Lastrina, who has an office on one of the upper floors of the building. The director of the Applicant is Miss Tuminello.

2. This proceeding concerns the nature of the Applicant's occupancy of the Premises. The Respondent has claimed that the Applicant is a monthly tenant and has given a notice to vacate the Premises. In its counterclaim it seeks an order for possession.

3. The Applicant claims to be entitled to a three-year lease expiring 1 November 2017 and to the benefit of two further options of renewal, each for a period of five years. The first ground of the claim is what is alleged to have been an agreement for lease entered into orally and confirmed by email. The second ground is equitable, based on the allegation that, having led the Applicant to believe that it had a valid lease of the Premises the Respondent allowed the Applicant to expend a large sum of money on renovating and upgrading the Premises without correcting this belief. The Applicant seeks declaratory relief to the effect that it has the tenancy that it claims.

The hearing

4. The matter came before me for hearing on 27 June 2016 with two days allocated. Mr J Isles of Counsel appeared for the Applicant and Mr M Gurvich of Counsel appeared for the Respondent.

5. Evidence was given on affidavit. Affidavits were filed by the Applicant's present solicitor, Mr Salinger and by the Applicant's director, Miss Tuminello.

6. For the Respondent, an affidavit was filed by its director Mr Lastrina and also by his wife Mrs Lastrina. Mr Salinger was not required for cross examination but the other three deponents were cross-examined and Miss Tuminello gave some further evidence in chief in response to the Respondent's affidavits.

The witnesses

7. Although Miss Tuminello appeared to have a poor recollection of dates and the precise order in which some events occurred, she impressed me as being an honest witness.

8. I thought Mr Lastrina was less impressive. In regard to the exercise of an option, he denied that he agreed that the Applicant could stay in the Premises until 2017. When asked about his email of 21 August 2012, he appeared defensive, saying that in agreeing to the exercise, he had assumed that there was an option available at the time to be exercised. I asked him whether he checked the lease at the time and said that he did not do so. As it turned out, there was an option to be exercised.

9. When he was questioned about why he kept the lease documents that Miss Tuminello had signed on his desk for many months without signing and returning them to his solicitors he appeared evasive. He said that he wanted to see how things turned out but was unclear what he meant by that. It seems likely that he wanted to keep his options open in regard to his intended renovation of the building so that he would be able to not execute the lease if it did not suit him to do so. In the meantime, he was quite content to leave Miss Tuminello believing that she had a lease and allow her to expend the substantial sums on the Premises that she did.

10. When the lease document that Miss Tuminello signed was tendered, Mr Lastrina identified it in the witness box and in the course of doing so referred to a demolition clause which is now contained within the document. When I asked him whether that clause was in the document when Miss Tuminello signed it he did not at first answer directly but said that it was there now.

11. Mrs Lastrina was not able to give much evidence that bore on the issues in the case. She agreed that she had spoken to Miss Tuminello about the possibility of holding a kitchen tea for her daughter in the restaurant although there was a dispute between the two women as to when this took place.

The evidence

12. The Premises were originally leased to a company called Larry Legend Pty Ltd which assigned its leasehold interest to another company called Finch Enterprises Pty Ltd from which the Applicant purchased the restaurant business conducted in the Premises. The original lease was for a period of five years commencing on 23 November 2002 with an option for a further period of five years.

13. When the Applicant purchased the business in 2004, a transfer of lease was executed by the former tenant, the Applicant and the Respondent. By the terms of this document the Applicant was entitled to two further terms of five years each, provided that it was only entitled to the second of these further terms if it remained in occupation of the Premises for three consecutive years from the transfer date. Since that requirement was satisfied, the Applicant was entitled to the original term, which expired on 23 November 2007, a further term which expired on 23 November 2012 and an option for a further term to expire on 23 November 2017.

14. Sometime before 21 August 2012, Miss Tuminello gave written notice to Mr Lastrina that she wished to exercise the Applicant's option to renew the lease for a further term of five years from 23 November 2012. Her written notice was acknowledged by Mr Lastrina in writing on 21 August 2012. The effect of this renewal was to create an entitlement to a further five year term which would expire on 23 November 2017.

The new lease

15. Sometime before September 2014, Miss Tuminello and Mr Lastrina agreed that the Respondent would grant the Applicant a new lease of the Premises for an

initial period of three years with two further option periods of five years each. It is unclear whether this was related to a possible sale of the restaurant business but that appears likely, since around this time the chef who was employed in the business had expressed an interest in buying it from the Applicant.

16. On 4 September 2014 the Applicant's solicitor Mr Comito sent an email to Mr Lastrina in the following terms:

> "Dear Sir,
>
> We understand that you have agreed to grant a new lease for a period of three years with two further options of five years with a commencing rental of $4,828.95 plus GST plus outgoings with an increase of 3% yearly, the first increase to be effected November this year.
>
> We also confirmed that the tenant will pay or reimburse 50% of water usage.
>
> Regards
>
> Tony Comito".

17. On the same day, Mr Lastrina replied with an email in the following terms:

> "From: Charlie Lastrina
> Sent: Thursday 4 September 2014 1:13 PM
> To: Annalisa Comito
> Re: RISIS PTY LTD LEASE - 28 YOUNG STREET MOONY PONDS.
> Hello Tony
> I confirm the amounts and conditions for a new lease as per your email.
> Regards
> Charlie Lastrina
> Director
> Pinoak Holding Pty Ltd" (sic.)

18. According to Miss Tuminello, the lease period was to commence on 1 November 2014 but this is not stated in either email.

19. On 10 September 2014 the Applicant's solicitor, Mr Comito, wrote to the Respondent's solicitors to say that the Applicant had sold the restaurant business subject to the Respondent granting the incoming tenant a new lease upon the terms referred to above.

20. On 12th September Mr Comito wrote again to the Respondent's solicitors enclosing some lease documentation, which appears to have been a copy of the current lease, and saying that the purchaser's solicitors had requested an initial period of three years with two further options five years and with no outgoings payable other than 50% of water usage.

21. By an email dated 15 September 2014 the Respondent's solicitors informed Mr Comito that the landlord was prepared to grant a new lease of the Premises to an incoming purchaser upon those terms. On the same day Mr Comito replied saying that the negotiations for the sale may not proceed and requesting that the lease be prepared in favour of the Applicant and that, if the sale were to proceed then the Applicant would seek the Respondent's consent to a transfer.

22. Miss Tuminello said that, when the sale did not proceed, she told Mr Lastrina "pretty well straight away".

23. By an email dated 25 September 2014 from the Applicant's solicitors, Mr Comito informed the Respondent's solicitors that Miss Tuminello would guarantee the terms of the lease on behalf of the lessee company, confirmed that there were two car spaces include in the demised Premises and stated that he would await receipt of the documentation.

The documents for the new lease

24. On 14 October 2014 Mr Comito wrote to the Respondent's solicitors asking for advice regarding progress with respect to the lease documentation. Another email to the same effect was sent to the Respondent's solicitors on 27 October 2014.

25. On 27 October 2014 the Respondent's solicitors informed Mr Comito as follows:

> "Lease is with client for approval. I anticipate it will be with you shortly".

26. On 1 December 2014 Mr Comito wrote to the Respondent's solicitors asking again for advice about the lease documentation. On the following day, the Respondent's solicitors sent the following email to Mr Comito:

> "Thanks for your email chasing documents for the above.
>
> I understood that our client was going to arrange execution of documents with your client directly. Documents had been sent to our clients some time ago.
>
> If this has not occurred please let me know."

27. In early December 2014 Mr Lastrina came to the restaurant and gave Miss Tuminello two copies of a form of lease for execution. Mr Lastrina said in the witness box that he thought that it was his bookkeeper who gave the documents to Ms Tuminello but he appeared to be uncertain about that. I prefer Miss Tuminello's evidence. The form of lease that she was given was for an initial period of three years, expiring on 1 November 2017 with two five year options for renewal.

28. Miss Tuminello said that, at this time, she spoke briefly with Mr Lastrina about the renovations that she proposed to carry out. She said that he told her that, while the floor was up, he might have to reinforce the pillar near the coffee machine. She said that he handed two copies of the lease document to her with a disclosure statement and asked her to take them to her solicitor, have them signed and sent back. She said that she did that.

29. From the foregoing it is apparent that the lease documents were prepared by the Respondent's solicitors and given to Mr Lastrina for approval sometime before 27 October 2014. He held onto them until early December when he gave them to Miss Tuminello. According to the email from the Respondent's solicitors, they were with him for approval. The fact that he gave them to Miss Tuminello and asked her to execute the documents and return them demonstrates that he had approved of them.

30. Miss Tuminello alleged that, when she spoke to Mr Lastrina about the renovations that she wished to do in the restaurant, she told him that, because of the extended tenure that she had of the Premises, she proposed to replace the floor and put in a pizza oven and give the Premises a facelift. She said that he approved of the renovations, although it was not suggested that he was ever given a plan of what was proposed or that he gave any written consent to the work.

31. Mr Lastrina denied that Miss Tuminello told him that, because of the extended tenure that she had, she wanted to do upgrades to the restaurant or the kitchen. I prefer Ms Tuminello's evidence. Not only do I consider her to be a more reliable witness but the proposed works were likely to cost a lot of money and I think it unlikely that some reference was not made during the conversation to the time the Applicant had in the Premises. It is clear from the evidence that Miss Tuminello wanted to give the restaurant a facelift in order to improve business but it is most unlikely that she would have gone to the expense of doing that if she had not believed that she had the benefit of the lease that she had signed. Her evidence was that, if she had not believed that she had the three year term followed by the two five year options, she would never have spent this money on the Premises. That is plausible evidence and I accept it

32. Miss Tuminello said that the day after speaking to Mr Lastrina about the renovations his wife arrived at the restaurant to discuss the possibility of their daughter having her kitchen tea there. Miss Tuminello said that she told Mrs Lastrina that if it were to be held in March, the renovations would not have been done by then. According to Mrs Lastrina this conversation took place in late 2014. Whichever version is correct is not relevant to any matter that I have to decide.

33. On 18 February 2015 the Applicant's solicitors sent an email to the Respondent's solicitors noting that the lease and disclosure statement executed by the tenant had been forwarded to them on 9 December 2014 for execution by the landlord and asking when the executed documents would be received back. It does not appear to be any reply to this email.

The renovations

34. Between March 2015 and August 2015 the Applicant expended $114,613.36 on renovating the Premises. During this period the restaurant remained closed and, according to Mr Lastrina, the front was shuttered.

35. There is a dispute as to Mr Lastrina's knowledge of the extent of the renovations. I prefer Miss Tuminello's evidence that she told him that she was going to tile the walls, move the bar and put in a new pizza oven as well as pull-up and tile the floors. He was also aware that the restaurant was closed for a considerable period of time during the renovations with the front being shuttered. Quite obviously, the restaurant was not open for business and the Applicant was receiving no income from it. Mr Lastrina's office was in the same building and he would have seen what was taking place.

36. Miss Tuminello said that Mr Lastrina visited a few times while the works were in progress. On one such occasion he told her that he might need to take part of the kitchen but was unclear which part. On another occasion he suggested that he wanted to take half of the kitchen and all of the back section of the Premises. No definite proposal was made and it is not suggested that Miss Tuminello agreed or was asked to agree to give up any part of the Premises.

37. I am satisfied that it would have been apparent to Mr Lastrina from what he was told and from what he saw, that the scope of work was to be substantial and as a businessman he must have known that it would cost the Applicant a substantial amount of money to carry it out, both in terms of the cost of construction and the loss of income while the work was done.

The Respondent's proposed redevelopment of the building

38. According to Mr Lastrina, on 23 May 2014 the Respondent applied for a planning permit to redevelop the building of which the Premises form part. A permit was granted in June 2015.

39. Mr Lastrina said that during the course of his negotiations with the Council, he was uncertain how his proposed works might affect the Premises. He said that he raised the matter with Miss Tuminello who asked for details of what was proposed but appeared to be willing to cooperate. At that time they seem to have had a good relationship.

40. Mr Lastrina said that, after lengthy dealings with the Council, he was told that the plans would have to be altered to carry out more work than was initially anticipated on the ground floor of the building, including the Premises. He said that in about mid 2015 Miss Tuminello asked him what works would be required and he replied that he could not advise her until the builder had considered the plans in more detail.

41. On 15 September 2015 the Respondent's solicitors sent to Mr Comito an email stating that the Respondent required the insertion in the lease documents of a renovations clause. A copy of this clause is in evidence. It provides that the lessor has the right to refurbish, rebuild, renovate, redecorate, enlarge, demolish, consolidate with an adjoining property or redevelop the building, in which case it would be entitled to serve a six month notice in writing terminating the lease without there being any liability on the Respondent to pay any compensation to the Applicant. The disclosure statement that Mr Lastrina had provided earlier with the lease documents that he had given to Miss Tuminello stated that there were no plans for renovation or demolition works by the landlord and no proposal to relocate the tenant and the lease itself contained no such clause.

42. On 16 September 2015 Mr Comito informed the Respondent's solicitors by email that the clause was unacceptable and that if the development work were to proceed, the Applicant would require adequate compensation. There was some negotiation concerning compensation but no agreement was reached. Thereafter the relationship between the parties broke down.

Threat to re-enter

43. It appears that in order to proceed with its proposed renovation of the building the Respondent now requires possession of the Premises.

44. By a letter from its solicitors dated 10 February 2016, the Respondent demanded that the Applicant vacate the Premises by 10 March 2016 on the basis that the Applicant was, it was then alleged, only a monthly tenant. These proceedings were issued and a restraining order was made to prevent a re-entry by the Respondent. It is now acknowledged that the Applicant was not simply a monthly tenant but has a lease that does not expire until November 2017. Consequently, recovery of possession is not sought pursuant to the notice that was given.

The picket fence

45. As part of the renovations the Applicant constructed a picket fence to enclose a small forecourt area in front of the restaurant. Miss Tuminello had initially asked Mr Lastrina about this and there is a dispute as to whether or not he told her that it was unacceptable. According to Ms Tuminello whose evidence I generally prefer, Mr Lastrina told her, concerning the picket fence, at a wedding they both attended: "All good Maria"

46. A request was made by letter from the Respondent's solicitors dated 8 December 2015 that the picket fence be removed and the Applicant's solicitors replied, agreeing to remove it, but no response was then received. I am now told that the Applicant will remove it and I will so order.

Was there a new lease or an agreement for a new lease?

47. The Applicant's primary argument is that an agreement was entered into for a new lease in the terms set out in Mr Comito's email of 4 November 2014. That email sets out Mr Comito's understanding that such a new lease had been agreed to in the terms stated. Mr Lastrina's reply, which confirmed the amounts and conditions for a new lease as per Mr Comito's email.

48. The first email appears to refer to an agreement that has already been entered into. If this is the correct interpretation then it is said that the reply email acknowledges that this is case. On the other hand if it is a mere offer to enter into such a lease, then the reply email is said to be the acceptance of that offer. The claim is pleaded according to the second interpretation but this is not a court pleading.

49. Mr Lastrina said that the agreement was to grant a lease to a purchaser of the business from the Applicant and that there was no agreement to grant a lease to the Applicant. In support of this contention reference was made by Mr Gurvich to the emails set out above concerning the proposed sale. Miss Tuminello denied that the lease was only to be to an incoming tenant and said that she required the new lease herself, whether or not she sold the business.

50. The first problem that I have with the assertion that the new lease was only to be to the purchaser is that Mr Comito did not inform the Respondent's solicitors

that the restaurant had been sold until 10 September 2014, almost a week after the exchange of emails relied upon. Further, the reply email refers to "RISIS PTY LTD LEASE", which suggests that the lease is to be to the Applicant, not to an incoming tenant. Also, after Mr Comito informed the Respondent's solicitors that the sale fallen through, the lease nonetheless proceeded with the Applicant as tenant.

51. Mr Gurvich submitted that not all of the requisite terms essential to an agreement for lease were contained in the exchange of emails and that the agreement was in any case unenforceable because there was no note or memorandum in writing signed by the Respondent as required by s.126 of the *Instruments Act* 1958.

52. Mr Isles submitted that the three essential ingredients for an agreement were set out in the email exchange that is, parties, subject matter and price. He referred me to the case of *Hall v. Buust* [1960] HCA 84.

53. Section 126 of the *Instruments Act* 1958 provides as follows (where relevant):

> "(1) An action must not be brought to charge a person …… upon a contract for the sale or other disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note.
>
> (2) It is declared that the requirements of subsection (1) may be met in accordance with the *Electronic Transactions (Victoria) Act* 2000."

54. The section applies to an agreement for a lease but not to an actual lease (see *Laserbem Pty Ltd v. Gainesville Investments Pty Ltd* [2004] VSC 620). That conclusion arises from the words "…a contract for…" preceding the words "…other disposition of an interest in land…" and also the requirement that the memorandum or note be "…of the agreement".

55. Insofar as the words used by the parties amounted to an agreement, that agreement is caught by the section but insofar as they might have operated to create an oral lease, the lease itself would not be caught by the section. It is open to parties to enter into an oral lease, subject to the restrictions in the *Property Law Act* 1958.

56. By sections 52 and 53 of the *Property Law Act* 1958, interests in land are required to be created in writing or by deed. However s.54 provides as follows

> "Creation of interests in land by parol
>
> (1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorized in writing, shall have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.
>
> (2) Nothing in the foregoing provisions of this Division shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine."

57. In the present case, the agreed initial term was three years and it is unlikely that the rental that was negotiated was not the best that Mr Lastrina could reasonably obtain. It is possible therefore that the parties entered into an oral lease on the terms stated if that is the proper interpretation of the evidence about what took place. However Mr Comito did not refer in his email to the granting of a lease but rather, to an understanding that Mr Lastrina has agreed to grant a new lease. Mr Lastrina then confirmed the amounts and conditions for a new lease. I think that the proper conclusion to be drawn from the emails is that the parties entered into an agreement for a new lease rather than an oral lease.

58. In those circumstances s.126 applies and there must be a note or memorandum of the agreement sufficient to satisfy it.

59. Mr Isles submitted that the reply email from the Respondent's solicitors amounted to a note or memorandum that contained the essential terms of the agreement or a lease namely, parties, rent and subject matter. However a note or memorandum must also specify any terms considered by the parties to be material and Mr Gurvich pointed out that the memorandum does not specify the commencement date of the new lease.

60. At the time this agreement was entered into the Applicant was in possession of the Premises under a lease that did not expire until 23 November 2017. If the new lease was to take effect before that date it would have necessarily replaced the existing lease from the date upon which it was to take effect. Although Miss Tuminello said that the new lease was to commence on 1 November 2014, this is not set out in the emails. Further, she did not give evidence of the conversation she had with Mr Lastrina in which the agreement was struck and I am unable to determine whether this starting date was actually discussed or was simply an assumption that she made.

61. When the written lease documents were later prepared and given to Miss Tuminello to execute, they provided for a commencement date of 1 November 2014. The term of the new lease would therefore have expired on 1 November 2017, before the expiration of the term the Applicant already had, with two five-year options after that. Quite obviously, the commencement date of the new lease is a matter of great importance.

62. Since I cannot find that an essential term of any lease agreement was agreed upon I cannot find that a concluded agreement was reached. Moreover, since a commencement date is not contained in the note or memorandum relied upon, the note or memorandum is not sufficient to describe the subject matter of the agreement and so it does not satisfy s.126 of the Act. Accordingly, if there was an agreement it is unenforceable. It is unnecessary to further consider the application of the *Electronic Transactions Victoria Act* 2000 on the question of whether the email was signed or whether the email sent by Mr Lastrina otherwise amounted to a sufficient note or memorandum.

Estoppel

63. Mr Isles submitted that the Respondent is estopped from denying that the Applicant is a tenant of the Premises and relies upon the principles of equitable estoppel set out in the case of *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7. In particular, he referred me to the judgement of Brennan J in that case where his Honour said at para 12 of his judgment):

> "12. The nature of an estoppel in pais is well established in this country. A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to".

and at paragraph 34:

> "34. In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs."

64. In the same case in the joint judgement of Mason CJ and Wilson J their Honours said (at para 30 of the judgment):

> "30. One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it": per Dixon J. …Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption".

65. In the present case it is quite clear that, by;

(a) agreeing to grant a lease;

(b) providing Miss Tuminello with lease documents which he had approved of and which were in the agreed terms and asking her to sign and return them;

(c) receiving them back from her without any indication that he did not intend to execute them on behalf of the Respondent;

Mr Lastrina, who was at all times acting on behalf of the Respondent, induced Miss Tuminello, on behalf of the Applicant, to make an assumption namely, that the Applicant had a lease of the Premises for the term set out in the lease document together with two five-year options.

66. Mr Lastrina became aware that Miss Tuminello believed that she had the benefit of the lease and knew that, on the faith of that assumption, she was causing the Applicant to expend a large sum of money on extensive renovations to the Premises and to forego any income from the restaurant business for the period of the renovations.

67. In these circumstances, he was under a duty to correct her mistaken assumption but he did not do so. By not doing so Mr Lastrina has caused the Applicant to act to its detriment on the basis of the assumption that he induced. It would be unfair and unjust to allow the Respondent to ignore his conduct and its consequences.

68. The fact situation in this case is quite similar to what occurred in *Waltons Stores (Interstate) Ltd v Maher.* Mr Lastrina sat on the executed documents without informing Miss Tuminello that they were unexecuted, possibly waiting on the outcome of his dealings with the Council and the extent to which the Respondent would need to encroach upon the Premises for the purposes of its own proposed development.

69. The claim with respect to promissory estoppel is therefore established. The issue then becomes, what is the appropriate remedy?

Remedy

70. Proprietary estoppel does not operate to require the Respondent to make good the representation. The purpose of the principle is to avoid or prevent detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted.

71. In this regard Mr Gurvich submitted that the remedy should be confined to what he described as "the minimum equity", which he said was the money expended on the renovations. In this regard he referred me to the case of *Commonwealth v. Verwayen* 1990 HCA 39 were Mason CJ said (at para) 34:

> "It follows that, as a matter of principle and authority, equitable estoppel will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more."

72. Mr Isles submitted that damages confined to the amount spent on the renovations would be quite inadequate because, had the Respondent not caused Miss Tuminello to believe that she had a lease on the agreed terms she might have chosen to move the Applicant's business elsewhere and expend the monies that she borrowed for the renovations on alternate premises where she had secure

tenure. He said that instead, she has spent the money on the Respondent's Premises and worked in building up the goodwill of the business that will now be lost when the current term expires next year.

73. I was referred to the case of *Giumelli v. Giumelli* [1999] HCA 10 where the detriment was assessed as being the value of the land promised.

74. Mr Isles also referred me to the Court of Appeal decision in *Donis v. Donis* (2007) 19 VR 577. In that case, the plaintiff had been induced by representations by the defendants that a house and 20 acres of land purchased by two of the defendants belonged to the plaintiff and the third defendant whom she later married and by whom he had she had a child. When her marriage broke up she was evicted from the house by the first two defendants who then sold it, together with the 20 acres of land and a similar sized adjacent holding they owned, to a developer for a very large sum of money.

75. The plaintiff brought proceedings claiming that the defendants were bound to make good their promise and that she should be entitled to one quarter of the share of the proceeds of sale. The trial judge ordered that she was entitled to $600,000, being the midpoint between one quarter of the value of the property at the time of separation and the value at time of sale, plus interest.

76. The trial Judge found that, on the face of the representations made, the plaintiff gave up the opportunities that she had to purchase her own house, continue her career and marry later or have children later, all of which would have improved her financial position. He found that those opportunities were lost when she was induced by the defendants' promises. The defendants appealed, alleging that the sum awarded bore no apparent relationship the detriment suffered by the plaintiff.

77. Court of Appeal said that the trial judge had correctly approached the problem, with the prima facie entitlement of the plaintiff being to have the promise made good. It said that the trial judge then looked at all the circumstances of the case and concluded that the full one quarter share needed to be adjusted by reason of a number of considerations which he specified, including a share of the burden of the mortgage following her marriage and interest from the date of separation. The court pointed out that the relationship between the promise and the remedy must be proportionate to the claimant's expectations.

78. I do not think that it makes any sense to talk in terms of a minimum equity. The cases are clear that the purpose of the award is to remove the inequity that the Respondent has brought about. It is not an award of damages or the enforcement of the promise. However the fact that the award is confined to removing the inequity and no more does not mean that the tribunal or a court should be parsimonious. In some cases, such as *Giumelli* and *Donis*, it might be necessary that the promise be made good in order to avoid the inequity that the Respondent has created.

79. In the present case Miss Tuminello through her company, the Applicant, was been induced to temporarily close her business, deprive herself of income for

several months and invest the money she was able to borrow in carrying out substantial renovations on the Premises. She also invested her time and effort since late 2014 in building up her business in the Premises. In doing so she has forgone the opportunity that she had to establish a business elsewhere and to invest her time and money in establishing a goodwill in premises where she had security of tenure.

80. In those circumstances, to simply award the Applicant the cost of the renovations would be quite inadequate to compensate for the detriment that it has suffered by relying on the assumption induced by the Respondent. Had she moved her business elsewhere, it is reasonable to suppose that she would have sought a lease upon terms similar to that which was sought by the party that negotiated to buy her own business from the Applicant, namely, an initial period of three years followed by two option periods of five years.

81. Further, when she expended the money on the Premises and went without several month's income, she did so on the basis that she would have the agreed period in which to amortise that cost and expenditure. Any lesser period would be to her disadvantage because she would have less time in which to recover her investment than the Respondent lead her to believe she would have.

82. For these reasons I think that to fully compensate the Applicant for the inequitable situation that the Respondent has created it is necessary to direct the Respondent to grant the lease that it agreed to grant.

Orders to be made

83. There will be an order that the Respondent execute the lease documents that have been already executed on behalf of the Applicant, such documents not to include the additional provision in Item 22 entitling the lessor to terminate the lease in the circumstances there described.

84. There will be an order that the Applicant remove the picket fence and other fixtures and items that it has constructed or installed on the common property in front of the premises within 30 days and reinstate the common property to its former condition.

85. The question of costs will be reserved but the parties will be aware of the limited circumstances in which costs can be awarded in retail tenancy matters.

SENIOR MEMBER R. WALKER