

## Detrimental reliance on a promise (equitable estoppel) in New Zealand

In *Wilson Parking New Zealand Limited v Fanshawe 136 Limited* [2014] NZCA 407 the Court of Appeal confirmed detrimental reliance as the basis for the enforcement of a (non-contractual) promise. Further, the Court confirmed that relief in this context could extend beyond monetary damages for losses suffered by the promisee, to enforcement of the promise itself.

\* Stuart Dalzell, Partner and Richard Hutchison, Solicitor discuss.

### Background

The case concerned a commercial property in Fanshawe Street, Auckland (**the property**). The property was acquired by a company controlled by Mr Haghi in 2005. Part of the property was a car park, which was leased to Wilson Parking New Zealand Limited (**Wilson**). The lease contained a right of first refusal clause in favour of Wilson if the property were to be sold.

In September 2012, in order to raise funds, Mr Haghi entered into an agreement to sell the property to a finance company. Although the property was valued at \$14.5–\$15.5M, the purchase price was \$10M, being the finance Mr Haghi needed. The parties also entered into another agreement for Mr Haghi to buy the property back about a year later for \$11.483M, being the \$10M purchase price plus interest and a fee (**the buy-back agreement**).

The effect of the transaction as a whole was referred to as a "warehousing" of the property, and both agreements were expressed as subject to Wilson waiving its right of first refusal.

Wilson waived its right in relation to the first sale of the property. Subsequently, Wilson's CEO, Mr Evans, wrote a letter to Mr Haghi's agent confirming in

unequivocal terms that Wilson would waive its right of first refusal if Mr Haghi or a "related party" were to repurchase the property (**the waiver letter**).

Mr Haghi, in reliance on this letter, incurred about \$40,000 making plans to develop the property while it was owned by the finance company. Wilson was aware of at least some of the work Mr Haghi was doing. Mr Haghi also obtained finance to repurchase the property, which led to him becoming liable for a non-refundable lending fee of \$500,000.

Despite the waiver letter, in June 2013 Wilson became interested in purchasing the property itself. Wilson contacted the finance company, which told Wilson about the buy-back agreement and offered to sell the property to Wilson on the same terms. At this point Wilson realised that it could purchase the property at over \$3M lower than its market value, and began to actively pursue a purchase.

In July 2013 Mr Evans met on separate occasions with Mr Haghi and his agent, and discussed the finance company's offer to Wilson and the waiver letter. Mr Evans gave no indication that Wilson may attempt to deny the validity of the waiver letter and go through with a purchase itself.

In September 2013 Wilson entered into an agreement to purchase the property. Mr Haghi objected and brought proceedings in the High Court. The High Court agreed with Mr Haghi that Wilson should be precluded (estopped) from denying it had waived its right of first refusal. The Court ordered the finance company to sell the property to Mr Haghi. Wilson appealed to the Court of Appeal.

### Decision

The Court of Appeal began by setting out the elements required to establish an estoppel: (1) that a belief or expectation has been created or encouraged by words or conduct of the defendant; (2) to the extent an express representation is relied on, this should be unequivocally expressed; (3) the plaintiff reasonably relied to its detriment on the representation; and (4) it would be unconscionable for the defendant to depart from the belief or expectation.

If a plaintiff can establish these requirements, an 'equity' is said to arise in favour of the plaintiff. The Court will then consider what if any relief may be appropriate. Because the remedy is an equitable remedy rather than a contractual remedy, relief is discretionary.

### Wilson estopped

The Court of Appeal upheld the High Court's finding that Wilson should be estopped from denying it had waived its right of first refusal. There was an unequivocal representation giving rise to an expectation that Wilson would waive its right of first refusal if Mr Haghi or a related party repurchased the property. Mr Haghi reasonably relied on this representation to his detriment when he entered into the loan agreement and became liable for a \$500,000 payment. In the circumstances, it was unconscionable for Wilson to simply disregard Mr Haghi's expectations. Therefore, an equity arose in favour of Mr Haghi.

### Relief

As to relief, the Court observed that in cases of estoppel there was a broad choice of remedies between, on the one hand, a "reliance-based remedy",

and on the other, "expectation-based relief". A "reliance-based remedy" is aimed at putting the plaintiff in the position he or she would have been in if the representation had not been made and relied upon. An "expectation-based" remedy is designed to fulfil the expectation relied upon by the plaintiff.

The Court did not clearly lay out the circumstances in which a reliance or expectation-based approach should be taken. Nor did it say when relief might involve monetary compensation or specific performance of the promise.

Instead, the Court set out "a general approach", saying that the clearer and more explicit the assurance is, and the greater the degree and consequences of detrimental reliance by the claimant, the more likely it is that a court will be willing to grant expectation-based relief rather than award compensation for monetary losses.

The Court considered the purposes of the equitable doctrine concerning expectations/detriment. It observed that the doctrine "has moved away from the removal of detriment (if that term is construed in a narrow sense) to an inquiry into what is necessary in the circumstances to satisfy the equity arising from a departure from the expectation engendered by the relevant assurance, promise or conduct on the part of the defendant. An assessment of the nature and extent of the element of unconscionability forms part of the analysis."

In other words, a mathematical assessment of enduring economic loss does not determine the availability, nature or extent of equitable remedies. But nor will expectation-based relief follow in every case. The Court said, "the aim is not to satisfy the claimant's expectation (although that may be what the relief requires in appropriate cases) but to satisfy the equity that has arisen in the claimant's favour."

Clearly, then, the Court has mandated a very broad, flexible approach where remedies may be created and moulded

as necessary to achieve a "just and proportionate outcome."

#### Remedies – this case

The Court reasoned that the waiver letter was expressed in unequivocal terms, and that Wilson "positively encouraged" Mr Haghi in the belief that the waiver would be given. While knowing that Mr Haghi was incurring expenditure, Wilson "gave no indication" of its interest in purchasing the property. Furthermore, Mr Haghi "undoubtedly acted to its detriment in reliance on the waiver letter", by incurring costs of \$40,000 and assuming an obligation of \$500,000.

The Court noted that Wilson's conduct was "plainly opportunistic". It "saw the prospect of profiting to the extent of at least \$3 million if it bought the property itself and it grasped that opportunity with undisguised enthusiasm." It took a "calculated risk", knowing there was a question mark over its entitlement to purchase, and that litigation could ensue. Moreover, there was "a lack of good faith" on Wilson's part, in that it knew all the details of the buy-back agreement before it reneged on its promise to provide a waiver.

Accordingly, the Court upheld the Judge's finding that the "appropriate and proportionate remedy" was to declare that Wilson was precluded (estopped) from refusing to provide a waiver of its right of first refusal to enable the plaintiff's buy-back agreement to proceed.

#### Comment

Contract law is changing rapidly due to the growth of the equitable doctrine concerned with expectations and detrimental reliance.

This is not a new phenomenon, and in fact the Court of Appeal's discussion of the New Zealand and Australian authorities particularly since the late 1980s shows cases recognising detrimental reliance as a basis for the enforcement of promises, whether specifically or by awards of "equitable

compensation" fixed on the basis of the value of the promisee's expectation.

In this regard there has been a marked departure from English law, which has generally rejected the advances of equitable doctrines into contract law, and stated that commercial parties should be left to protect their own interests.

The Court dealt with this 'commercial certainty' issue by saying: "Although caution has been expressed about the risks to commercial certainty in invoking equitable doctrines in the business context, there is no reason in principle not to apply the notion of expectation-based relief for estoppel in commercial cases where appropriate."

Nevertheless, by confirming that detrimental reliance on a promise (equitable estoppel) may give grounds on which the promisor can be required to fulfil his or her promise, even in the absence of a contract, the Court of Appeal's decision in *Wilson Parking New Zealand Limited v Fanshawe 136 Limited*, is a significant development in New Zealand law.

Future cases will fall to be decided according to their facts but the principles outlined by the Court of Appeal will hopefully give the courts guidance in future cases.

We note that, underpinning the Court's assessment was its clear impression that Wilson had acted in breach of its duty in equity and good conscience to warn the other party of its true intentions and not to stand by and permit the other party to act to his or her detriment before asserting its true position.