IN THE COURT OF APPEAL OF NEW ZEALAND

CA24/2014
[2014] NZCA 407

BETWEEN	WILSON PARKING NEW ZEALAND LIMITED Appellant
AND	FANSHAWE 136 LIMITED First Respondent
	136 FANSHAWE LIMITED Second Respondent
	FANSHAWE CAPITAL LIMITED Third Respondent

Hearing:	4 and 5 June 2014
Court:	Ellen France, Randerson and White JJ
Counsel:	D J Goddard QC and J Long for Appellant N R Campbell QC and W A McCartney for First and Second Respondents No appearance for Third Respondent
Judgment:	21 August 2014 at 10:00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents costs for a complex appeal on a Band A basis and usual disbursements, including travel and accommodation costs for both counsel. We certify for second counsel.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] This appeal raises issues as to the appropriate basis for equitable relief in cases of estoppel. It is concerned with competing agreements for the sale and purchase of a property at 136 Fanshawe Street, Auckland. The property was acquired in 2005 by Viaduct Square Ltd, a company controlled by Mr Mohsen Haghi. We will refer to the company as Viaduct. The property was leased to the appellant (Wilson) as a carpark. The lease contained a right of first refusal (ROFR) in favour of Wilson in the event that Viaduct wished to sell the property.

[2] Mr Haghi proposed to develop the property to include new retail office space, apartments and a carpark. In 2007 he obtained resource consent to enable the development to proceed. However Mr Haghi and companies associated with him later encountered financial difficulties. In August 2012 he negotiated an arrangement which he described in his evidence as a "warehousing" of Viaduct's

property. This involved a sale of the property to ASAP Finance Ltd (ASAP) and a second agreement under which a company associated with Mr Haghi (Fanshawe 136 Ltd) would buy back the property by September the following year at a price that allowed ASAP to recover a return on the funds it had invested.

[3] The buy-back agreement was replaced not long afterwards but with a new vendor, Fanshawe Capital Ltd (Capital), a company associated with ASAP. Fanshawe 136 Ltd later nominated another company associated with Mr Haghi (136 Fanshawe Ltd) as purchaser under the buy-back agreement. Unless otherwise stated, we will refer to Fanshawe 136 Ltd and 136 Fanshawe Ltd as Fanshawe.

[4] Both agreements for sale and purchase under the warehousing arrangement were subject to Wilson waiving its ROFR.[1] No issue arose about this in relation to the sale to ASAP/Capital because Wilson waived its ROFR. However, a dispute arose over the buy-back agreement and whether Wilson had failed to honour a promise to waive its ROFR in relation to that transaction.

[5] Fanshawe relied on a letter from Wilson dated 20 September 2012 (the waiver letter)[2] to Mr Haghi's representative, Mr Lloyd Parrant in these terms:

> Further to our letter to you dated 21 August 2012 [the waiver letter for the sale to ASAP] we confirm that if Mr Haghi or a related party were to repurchase the property at 136–142 Fanshawe Street, Wilson Parking would waive our Right of First refusal to purchase the property, subject to the clause remaining in effect for any further sales of the property.

[6] Mr Haghi alleged that in reliance on this letter, he and Fanshawe spent money, time and effort on the development of the property and incurred substantial costs in connection with the finance needed to fund the buy-back. His evidence was that the waiver letter as well as Wilson's conduct thereafter encouraged him in the belief that Wilson was not interested in buying the property itself and that Wilson would waive its ROFR. At the time the waiver letter was given, Wilson's principal interest was to ensure that the development would generate sufficient customers for its carpark.

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1 We use the term "warehousing arrangement" for convenience even though the agreements stipulated that the arrangement was not to be viewed as such.

2 The letter is referred to as a waiver letter since it uses that term but the case in the High Court proceeded on the basis of estoppel.

[7] In July 2013, Mr Haghi learned that Capital had offered to sell the property to Wilson. He sought confirmation that Wilson would waive its ROFR in terms of the waiver letter so that the buy-back arrangement could proceed as proposed. Wilson did not provide a waiver of its ROFR. Without further advice to Mr Haghi, Wilson accepted Capital's offer to sell the property to it instead. The purchase price was the same as that payable by Fanshawe under its buy-back agreement. It is not in dispute that this price was at least $3 million below the then market value of the property.

[8] Neither the buy-back agreement nor Capital's agreement to sell the property to Wilson has proceeded in consequence of caveats lodged and proceedings issued by Fanshawe against Capital and Wilson.

[9] The primary relief sought in the proceedings was an order for specific performance requiring Capital to sell to Fanshawe under the buy-back agreement or damages in lieu. Declarations were also sought. First, that Fanshawe had an equitable interest under the buy-back agreement in priority to any equitable interest Wilson may have had under its agreement to buy the property from Capital. Secondly, a declaration that Wilson was estopped from denying it had waived its ROFR or from asserting an interest in the property in priority to that of Fanshawe.[3]

[10] In the High Court, Katz J found in favour of Fanshawe.[4] She made declarations in the terms sought by Fanshawe and ordered Capital to specifically perform the buy-back agreement and sell the property to Fanshawe. She also ordered that Wilson's caveat on the title to the property be removed or allowed to lapse.

[11] Wilson appeals against the orders made on two main grounds:

(a) While accepting that the waiver letter encouraged an expectation on Fanshawe's part, the sale to 136 Fanshawe under the buy-back agreement did not come within the scope of the expectation encouraged. In particular, 136 Fanshawe was not a "related party" of

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3 Wilson also lodged a counterclaim but this is no longer material.

4 *Fanshawe 136 Ltd v Fanshawe Capital Ltd* [2013] NZHC 3395.

Mr Haghi. As well, Fanshawe did not provide information establishing that the development would be substantially the same as that earlier proposed.

(b) Even if the sale was within the scope of that expectation, and an estoppel arose, the appropriate relief to satisfy the equity was a reliance-based award of equitable compensation, not fulfilment of that expectation by an order for specific performance.

[12] Two other matters that were in issue in the High Court are no longer in dispute. First, the parties agree that if Wilson is effectively obliged to honour its promise to waive its ROFR under the buy-back agreement then there is no reason not to uphold the order for specific performance made in the High Court in favour of Fanshawe. Secondly, in that event, it is also agreed that the order removing Wilson's caveat from the title should be upheld.

[13] Capital did not appear in the High Court having reached agreement with the other parties. The High Court was informed that Capital would abide the Court's decision provided that the only relief sought against it was an order for specific performance in favour of Fanshawe. In this Court, Capital initially advised it would abide the Court's decision but later filed a memorandum raising certain issues about the form of relief. The conclusions we have reached in this judgment make it unnecessary to address those issues.

The detailed facts

[14] The basic facts of this case are not in material dispute. The summary that follows draws largely upon documentary evidence and the facts found in the High Court.

The ROFR and related agreements

[15] At the time of trial, the property consisted of some retail shops and a carpark. Wilson's lease of the carpark at the property is dated 1 June 2011. The ROFR was expressed in standard terms:

> 10.9 If the Lessor wishes to sell the Land to any person during the term of this Lease it shall before offering the Land to any other person, give written notice to the Lessee offering to sell the Land to the Lessee on such terms and conditions as the Lessor sees fit.

[16] The succeeding clauses in the lease were also expressed in conventional terms. Wilson as lessee had one month from receiving the notice contemplated by cl 10.9 to either accept or reject the offer. If no notice of acceptance or rejection of the offer was received in that period, Wilson would be deemed to have rejected it. Viaduct as lessor would then be free to offer to sell the property to others but was obliged to re-offer the land to Wilson if it wished to sell the property on more favourable terms.

[17] Two other agreements were entered into between Viaduct and Wilson on the same date as the lease. The first was a Heads of Agreement and the second was a Site Management Agreement. The first is not material but under the latter, Wilson agreed to manage the property on Viaduct's behalf. Amongst other things, Wilson agreed to use best endeavours to inform Viaduct on any matters relating to the Resource Management Act 1991 affecting the property. Wilson also agreed to assist Viaduct if requested in the preparation and processing of any application for consent under any scheme or application for re-zoning the property.

The first waiver letter on the sale to Capital

[18] After encountering financial difficulties due to the global financial crisis Mr Haghi's business adviser Mr Parrant met with Wilson's CEO, Mr Evans on 20 August 2012. It is not in dispute that Mr Parrant was acting at all times as agent for Mr Haghi and Fanshawe. Mr Parrant informed Mr Evans of Mr Haghi's difficulties. He also told Mr Evans that Mr Haghi needed to refinance three properties including the subject property. Mr Evans was requested to provide a waiver of Wilson's ROFR to enable the property to be sold to a finance company.

[19] Wilson provided the requested waiver on 21 August 2012 subject only to the ROFR continuing to bind the new owner. Although Mr Haghi contemplated buying the property back again at a later date, a waiver of the ROFR in relation to a buy-back agreement was not then obtained. Mr Haghi accepted that, in hindsight, it

would have been prudent to have obtained a waiver for the sale and the buy-back agreement at the same time. However, the more pressing issue at the time was the sale to the finance company in order to raise funds to satisfy Mr Haghi's major creditor.

The agreements for sale and purchase

[20] Immediately after receipt of the 21 August 2012 letter, Viaduct entered into two agreements with ASAP:

(a) A sale agreement under which Viaduct agreed to sell the property to ASAP for $10 million; and

(b) A buy-back agreement under which ASAP agreed to sell the property back to Viaduct or its nominee for $11,330,000 with settlement on or before 13 September 2013.

[21] The sale price under the first agreement represented the amount Fanshawe required to satisfy its major creditor. The buy-back price was calculated based on the $10 million sale price plus ASAP's interest costs and a fee of $1 million. There was also an adjustment for rent that ASAP would receive for the one year period. Both the sale and buy-back agreements were expressed to be conditional upon Wilson waiving its ROFR. The sale agreement also acknowledged that the buy-back agreement had been entered into.

[22] By agreement of the parties, the buy-back agreement was replaced on 10 September 2012 by a fresh agreement between Capital and Fanshawe 136. The purchase price was increased to $11.483 million but the settlement date remained at 13 September 2013 or earlier at the election of the purchaser. As with the earlier buy-back agreement, the fresh agreement was conditional upon Wilson waiving its ROFR. The property was transferred from Viaduct to Capital on 10 September 2012. On the same date, Wilson was advised this had occurred.

The waiver letter on the buy-back agreement

[23] Soon afterwards, on 20 September 2012 Mr Parrant met again with Mr Evans. He provided Mr Evans with a draft waiver letter in relation to the buy-back agreement. Mr Evans made a few small minor changes to the draft and then sent a signed copy of the waiver letter to Mr Parrant in the terms set out above at [5].

[24] The Judge found that Wilson was not aware of the existence of the buy-back agreement at the time Mr Evans signed the waiver letter. However, she found that Mr Evans knew the property was being sold to a financier due to Mr Haghi's financial difficulties. Mr Evans was also aware that Mr Haghi intended to repurchase the property once he had resolved his financial problems.

Events after the waiver letter

[25] After the sale of the property to Capital, Mr Haghi and Fanshawe pursued plans for the redevelopment of the property. Mr Haghi was working towards a variation of the resource consent. The overall plan for the site was a hotel, separate apartment and office buildings and a two-level underground carpark for Wilson. Mr Haghi already had an agreement with a hotel operator and he employed an architect, a planner, a project manager and other consultants to assist with plans for the redevelopment and the variation of the resource consent. Necessarily, costs were incurred in that work.

[26] The Judge found that Mr Evans was aware of at least some of the work that was being undertaken as he continued to discuss and review the development plans for the property with Mr Haghi and Mr Parrant on a regular basis. Mr Evans was provided with or shown various documents including architect's plans, a development summary and a valuation of the property prepared by Darroch Ltd valuing the property at $15.5 million as at 21 February 2012.

[27] Importantly, the Judge found that Mr Evans entered into negotiations with Mr Haghi about Wilson's interest in leasing or managing the carparking facilities in the proposed new development. This culminated in a letter of intent from Wilson

dated 7 March 2013 outlining in detail Wilson's proposed involvement in leasing and/or managing the carparking facilities. Wilson's existing lease continued in force throughout notwithstanding the sale to Capital.

[28] We pause here to observe that Wilson's actions during this period could only be construed as encouraging Mr Haghi and Fanshawe in the belief that Wilson was supportive of the development. There was no indication that Wilson was itself interested in purchasing the property or that it would not honour the commitment it had given in the waiver letter.

[29] As the Judge noted, Mr Evans was aware by the time of the letter of intent that Mr Haghi intended to use 136 Fanshawe as the buy-back vehicle since the letter was addressed to that company. The Judge also found that Mr Evans dealt with Mr Haghi on the basis that Mr Haghi had some form of ongoing proprietary interest in the property and was not simply a former owner of it.

[30] Mr Haghi continued to incur expense including the costs of incorporating 136 Fanshawe and obtaining an extension of the lapse date for the 2007 resource consent for the proposed development. In the period after the letter of intent, Mr Haghi also explored options for joint venture partners to assist Fanshawe in completing the proposed development.[5]

Wilson changes its mind

[31] On 27 June 2013, Wilson's solicitors searched the title for the property and discovered that a caveat had been lodged by 136 Fanshawe in reliance on the buy-back agreement. In consequence, Wilson not only knew of the existence of 136 Fanshawe but it was also aware by this date of the buy-back agreement. Contrary to its earlier lack of interest in buying the property, Wilson began to show interest in acquiring the property itself. Mr Evans explained there had been a change in company policy that involved Wilson's international shareholders beginning to relax their property purchasing criteria.

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[5] We note that Wilson pleaded that Fanshawe's intention was to buy back the property and sell it at a profit. This allegation is inconsistent with Mr Haghi's evidence of the steps he was taking to progress the development and with Wilson's encouragement.

[32] On 28 June 2013 Wilson wrote to Capital expressing interest in purchasing the property. In response, Capital informed Wilson by letter of 9 July 2013 (copied to Mr Haghi) of the key terms of the buy-back agreement. Capital offered to sell the property to Wilson on the same terms as Fanshawe's buy-back agreement. The offer was expressed to be subject to a formal agreement for sale and purchase being entered into and Wilson formally waiving its ROFR which remained as a term of the lease. The letter ended in these terms:

> Please accept this letter as formal notice offering to sell the property on the above key terms to Wilson subject to FCL [Capital] and Wilson entering into a standard Agreement for Sale and Purchase of Real Estate.
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> Independent of the above notice we are advised by the solicitor for [Fanshawe 136] that his client [Mohsen Haghi] has had a discussion with Steve Evans (CEO – Wilson) whereby Mr Evans has agreed to waive the ROFR. We are not privy to this discussion or agreement and will require Wilson to write back to us formally waiving its ROFR.

[33] Wilson was already aware of the Darroch valuation of the property at $15.5 million but it was not until the letter of 9 July 2013 that Wilson became aware that the property could be acquired for $11.483 million. Mr Evans immediately emailed his superior in Perth, Mr Koch, the vice-chairman and executive director of Wilson. Mr Evans expressed excitement about the opportunity to acquire the property "at this heavily discounted price".

[34] Mr Koch responded on 10 July 2013 raising a question about Capital's advice in the letter of 9 July 2013 that Mr Evans had agreed to waive the ROFR. Mr Koch wanted to know what the impact of this would be on Wilson's ROFR and asked:

> How vanilla is this transaction?

[35] Mr Evans' response to Mr Koch the same day was:[6]

> *I have not had the discussion with Mosen [Haghi] the letter refers to. That said we agreed last year to set aside our ROFR when Mosen [Haghi] sold to Fanshawe Capital and to allow Mosen [Haghi] to repurchase the property. Other than that, our ROFR prevails.*
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> Mosen's put option expires on 14 September and he has no capacity to buy it back without financial backing.

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[6] Emphasis added.

> We believe the offer from Fanshawe Capital is to try and force us to waive our right so they can offer it to others. The property is being pursued by Mansons, the TP boys and several others – all waiting for Mosen to tip over or the 15th of September to roll around.

[36] On the same date (10 July) Fanshawe received an offer of finance from New Zealand Mortgages and Securities Ltd (NZMS) of $12 million with a lender's fee of $500,000. Through 136 Fanshawe, the offer was accepted. We will return to this topic later.

[37] An important meeting took place between Mr Evans and Mr Parrant in early July 2013. The meeting was held at Mr Haghi's request because, as the Judge found, Mr Haghi was puzzled by Wilson's delay in formally confirming to Capital that it had waived its ROFR. He thought there had possibly been a misunderstanding within Wilson since Wilson's letter to Capital of 28 June 2013 had been signed by Mr Court (Wilson's development manager) rather than Mr Evans. Mr Haghi thought Mr Court might not have been aware that Mr Evans had provided the waiver letter in relation to the buy-back agreement.

[38] Evidence about the meeting was given by Mr Parrant and Mr Evans as well as Mr Haghi and his lawyer Mr Carson (to whom Mr Parrant had reported after his meeting with Mr Evans). The Judge's findings as to what most likely occurred at the meeting were:[7]

> [33] Mr Parrant asked Mr Evans if he had received Capital's offer to sell the Property to Wilson and he confirmed that he had. Mr Parrant also asked Mr Evans whether he remembered providing the Waiver Letter in September 2012. Mr Evans, in what was no doubt a very carefully worded response, confirmed that he did recall the letter. There was no discussion as to exactly what the letter meant, as Mr Parrant did not realise that there was any issue regarding that, or that Wilson may be intending to assert that the letter was not binding.
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> [34] Mr Parrant (erroneously) took Mr Evans' statement that he could recall giving the Waiver Letter as, in effect, an acknowledgement that Wilson would waive its first right of refusal. He most likely assumed that Mr Evans would now correct any internal misunderstanding within Wilson (on the part of Mr Court) and confirm to Capital that Wilson had indeed waived its rights.

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7 *Fanshawe 136 Ltd v Fanshawe Capital Ltd*, above n 4.

> [35] Mr Parrant then reported back to Mr Haghi and Mr Carson. He said that Mr Evans had received the Capital offer, but recalled giving the Waiver Letter. Mr Parrant informed Mr Haghi and Mr Carson that Wilson would now contact Capital (Mr Patel) to confirm that Wilson waived its right of first refusal. Mr Carson's clear recollection (which differed from Mr Parrants') was that Mr Parrant reported back something along the lines of "No problem, all sorted, [Mr Evans] will contact [Mr Patel] to confirm". I found Mr Carson's evidence on this issue to be both credible and reliable. It was corroborated by Mr Haghi's recollection, which was to similar effect.

[39] The Judge found that after the meeting between Mr Parrant and Mr Evans, Mr Haghi believed Mr Evans would confirm to Capital the waiver of the buy-back agreement in favour of Fanshawe. When Mr Evans did not do so, Mr Haghi himself went to see Mr Evans. He thought that perhaps Mr Evans did not realise that 136 Fanshawe was a company associated with him. The Judge's findings as to what happened at the meeting and in its aftermath were:

> [37] Mr Haghi met with Mr Evans on 23 July 2013 and showed him a copy of the company registration for 136 Fanshawe. Mr Evans asked if Fatemeh Haghi was his sister. Mr Haghi confirmed that she was. Mr Haghi's evidence was that Mr Evans "appeared satisfied with what I told him".
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> [38] Mr Haghi also took to the meeting a draft letter of "confirmation" which he wanted Mr Evans to sign so that he could provide it to Capital. Mr Evans said that he would take the letter to Wilson's lawyers and that he would come back to Mr Haghi that afternoon. Mr Evans gave no indication that Wilson would deny that it had given a waiver, or would assert that the Waiver Letter was not legally binding.
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> [39] Mr Evans did not revert to Mr Haghi that afternoon. Nor did he respond to a number of texts from Mr Haghi. Indeed he did not reply to Mr Haghi until 6 August 2013, when he informed Mr Haghi that everything would now have to go through the lawyers.

[40] In the meantime, Wilson had been actively pursuing the opportunity to acquire the property for itself. An internal report described the opportunity to acquire the property as "compelling". The report recorded that the property had a valuation of over $15 million and recent purchase offers had ranged between $14.5 million and $15 million. The existence of the resource consent (including for a 234 bay basement carpark building) was highlighted and the prospects of future demand for carparking in the vicinity were emphasised. The executive summary of the internal report ended in these terms:

> Wilson can purchase for $11.483 m today and sell tomorrow for $14.5 m – no capital gains tax or stamp duty in New Zealand.

[41] On 29 July 2013 Mr Evans wrote to Capital accepting the offer to purchase the property in terms of the offer. Internal Wilson emails suggested that Wilson intended to hold the property rather than "flip it for circa 30% return". Mr Koch noted in an email that "the deal may still have some interesting twists". Mr Evans was congratulated by Mr Koch on his "fine piece of fly fishing!".

[42] Initially, Capital's position was that the buy-back agreement with Fanshawe was at an end because the waiver had not been provided. However, after being supplied with a copy of the waiver letter, Capital changed its mind and advised it would complete the buy-back agreement with Fanshawe. Capital's solicitors described the waiver letter as "quite unequivocal". Ultimately however, Capital changed its mind again and said it would settle with Wilson. Nevertheless Capital's solicitors described Wilson's actions as "opportunistic and of no substance".

Capital and Wilson sign an agreement to buy the property

[43] A formal agreement for sale and purchase was executed between Capital and Wilson on 4 September 2013 at the price of $11.483 million. The agreement was subject to the removal of Fanshawe's caveat. The agreement also recorded that the parties had agreed that Wilson would apply for a declaratory judgment disposing of Fanshawe's claims to an interest in the property. Should those proceedings be decided in favour of Fanshawe, the sale to Wilson would be at an end and neither Capital nor Wilson would have a claim against the other.

Estoppel principles

[44] The Judge set out the elements required to establish the estoppel pleaded by Fanshawe. These are not in dispute. In brief, it must be shown that:[8]

(a) A belief or expectation by Fanshawe has been created or encouraged by words or conduct by Wilson;

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[8] See *Burbery Mortgage Finance and Savings Ltd (in rec) v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) at 361 and *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86.

(b) To the extent an express representation is relied upon, it is clearly and unequivocally expressed;

(c) Fanshawe reasonably relied to its detriment on the representation; and

(d) It would be unconscionable for Wilson to depart from the belief or expectation.

The terms of the waiver

[45] Mr Goddard QC on behalf of Wilson submitted that the terms of the waiver letter were not fulfilled. In particular, he submitted that 136 Fanshawe was not a "related party" to Mr Haghi. In addition, considered in the context of discussions at the time, the waiver letter was given on the understanding that the development of the property would be substantially the same as that earlier proposed. The waiver letter did not itself constitute a waiver. Rather, it was looking to the future possibility of a buy-back agreement, the details of which were not given to Wilson at the time of the letter.

[46] It does not appear that the "substantially the same" limb of Mr Goddard's argument was put in the High Court although as we note below, Mr Parrant was questioned on that issue. Rather, the argument appears to have focused on whether 136 Fanshawe and Fanshawe 136 were parties related to Mr Haghi in terms of the waiver letter. On this point, the Judge's conclusions are best set out in full:

> [59] … Related parties are therefore persons whom Wilson must have intended or contemplated would be reached and influenced by the representation … . The issue therefore is whether the plaintiffs fall within the definition of "related parties". The phrase "related party" must be interpreted objectively, taking into account the relevant factual matrix.
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> [60] Mr Parrant told Mr Evans at their 20 September 2012 meeting that Mr Haghi "intended to buy the property back so that he could carry on with the development that he had planned, which included around 300 car parks". Mr Evans' evidence was that it had always been intended that Wilson would lease the car parks in the new development if it went ahead, so from Wilson's perspective it would benefit from any development of the Property by Mr Haghi. It was not known at the time precisely what vehicle would be used for the "repurchase". Mr Parrant informed Mr Evans, that Mr Haghi would likely need to bring in a partner or co-venturer to help fund the development. Mr Evans was satisfied that "provided it was still Mr Haghi

who would be purchasing and developing the property (whether by himself or through a partnership) Wilson should not have a problem with that".

[61] Wilson's key concern was clearly that, whatever entity was used as the repurchase vehicle, Mr Haghi was to be the directing mind and will of the development project. That is because Wilson was supportive of Mr Haghi's development plans for the Property. It saw a commercial opportunity for itself in his proposed development. What plans, if any, an unrelated third party may have for the Property was an unknown quantity.

[62] Against this background, I have no difficulty in concluding that Fanshawe 136 falls squarely within the category of "related party" category in terms of the Waiver Letter. Mr Haghi is the sole director and shareholder of that company. If Fanshawe 136 were to own the Property there is no doubt that Mr Haghi would be the directing mind and will of the development. Fanshawe 136 is a relevant representee.

[63] As for 136 Fanshawe, Mr Haghi's sister, Fatemeh Haghi, is the sole director and shareholder of that company. 136 Fanshawe is the trustee for the 136 Fanshawe Trust, of which Mr Haghi's children and Mr Haghi himself are beneficiaries. Although the formal trust documents were only executed in July 2013 (backdated to October 2012) Fatemeh Haghi's evidence (which was unchallenged) was that she always understood that she was holding the Property in trust. Further, as she did not know how legal and financial arrangements work in New Zealand, having only recently moved here from Iran, the intention was that she would rely on Mr Haghi to manage the land and the associated hotel development himself.

[64] Accordingly, in my view, 136 Fanshawe is also a related party in terms of the Waiver Letter. Both Fanshawe 136 and 136 Fanshawe, given their very close connection to Mr Haghi, are persons whom Wilson must have intended or contemplated would be reached and influenced by the representation, and they were so reached. They therefore both have standing to bring a claim in estoppel.

[47] The Judge then went on to consider whether the representation was clear and unequivocal. She found that its meaning must be assessed objectively by the standard of a reasonable person in the position of the representee. It was, she said, necessary to examine the circumstances in which the representation was made as well as the language used in the waiver letter itself.

[48] On this point, the Judge's conclusions were:

[68] Mr Evans' evidence was that the letter was in essence, a "letter of comfort," to enable Mr Haghi to proceed with trying to make the development happen. Wilson was not interested in purchasing the Property at the time and saw greater benefit to it in allowing Mr Haghi to develop the Property. Mr Evans conceded in cross-examination that, on his interpretation, the phrase "would waive" could equally read "would not waive". The letter would have the same legal effect.

> [69] I find it difficult to see what possible "comfort" Mr Haghi could take from a waiver letter that was not intended to have any legal effect or bind Wilson in any way. There is nothing in the letter, viewed in the context of the surrounding circumstances, which would have caused a reasonable person in the position of the representee to believe that it was not intended to be binding.
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> [70] As I have stated, the test is what a reasonable person in the position of the representee would take from the letter, rather than a reasonable person in the position of the representor. It is, however, of note that Mr Evans' own understanding of the letter in July 2013 appears to accord with the plain meaning of the letter. In his email to Mr Koch of 10 July 2013 he stated that:
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> > "... we agreed last year to set aside our right of first refusal when Mohsen sold to Fanshawe Capital and to allow Mohsen to repurchase the property. Other than that, right of first refusal prevails."
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> [71] I fail to see how the letter can be interpreted as meaning anything other than what it says. It is in plain English. It confirms that if "Mr Haghi or a related party were to repurchase the property at 136-142 Fanshawe Street, Wilson Parking would waive our right of first refusal to purchase the property, subject to the clause remaining in effect for any further sales of the property". There is nothing on the face of the letter, or in the surrounding facts, which would have led a reasonable person in the position of the representee to believe that the letter does not mean exactly what it says.
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> [72] The objective meaning of the letter is that if Capital proposed to sell the Property to Mr Haghi or a related entity Wilson would waive its right of first refusal, to enable that transaction to proceed. The use of the word "would" ensured that Wilson retained the right to review any proposed transaction to satisfy itself that it came within the terms of the waiver. However, if it did (because the proposed purchase was by Mr Haghi or a related party) Wilson committed itself in the Waiver Letter to not exercising its right of first refusal.

[49] We agree with the conclusions reached by Katz J on this issue substantially for the reasons she gave. It is not in dispute that the waiver letter was not itself a waiver. Rather, it made it clear that Wilson would waive its ROFR if Mr Haghi or a related party were to repurchase the property. The only condition attached was that the ROFR would remain in effect for any further sales of the property.

[50] It is not in dispute that Wilson had no interest in buying the property at that time. Rather, its interest was in supporting Mr Haghi's development proposal. Wilson saw merit in the development because it was likely to generate greater demand for carparking and enhanced revenue for Wilson. So long as Mr Haghi or a party related to him was involved in the development, Mr Evans on behalf of Wilson

had no concerns about granting the waiver in the event of a buy-back. There is nothing in the evidence to suggest that Wilson had any concerns or made any inquiries about the terms of the buy-back arrangement until the following year when it became interested in purchasing the property itself. Wilson's stance at the time of the waiver letter and in the months that followed was consistent with its concerns being limited to the ongoing viability of its carparking facility and the prospect that its return from the property from that source would be increased.

[51] As to the "related party" issue, there is nothing to suggest that this expression was intended to be treated in a similar way to the definition of "related company" under the Companies Act 1993.[9] The word "company" is not mentioned at all. Rather, we are satisfied that the expression was intended to refer to any person or entity with which Mr Haghi was associated and which he had the ability, whether formally or otherwise, to control. Or, as Mr Campbell QC put it for Fanshawe, the expression was intended to refer to any party connected with Mr Haghi. What was important to Wilson was that Mr Haghi should continue to be involved in the development of the property. The entity through which that was achieved was not a matter of moment to Wilson.

[52] Although Mr Haghi had no formal power of control over 136 Fanshawe (his sister Ms Fatemeh Haghi was the sole director and shareholder), the company was owned by the 136 Fanshawe Trust of which Mr Haghi's children and Mr Haghi himself were beneficiaries. As the Judge noted, Ms Haghi gave unchallenged evidence that she always understood she was holding the property in trust. Further, she relied on Mr Haghi to manage the land and the associated developments. No suggestion was made at any time that 136 Fanshawe was not a related party until after Wilson signed the agreement with Capital a year after the waiver letter and the dispute between the parties had arisen.

[53] In any event, we accept Mr Campbell's submission that Fanshawe 136 was undoubtedly a party related to Mr Haghi in terms of the waiver letter since he was its sole director and shareholder. The buy-back agreement of 10 September 2012 described the purchaser as Fanshawe 136 and/or its nominees. As such, the buy-

[9] Section 2(3).

back agreement could have proceeded with either of the Fanshawe companies as purchaser.

[54] Mr Goddard referred us to Mr Evans' evidence that Mr Parrant told him that Mr Haghi might need to bring in a partner or co-venturer to help fund the development. Mr Evans said that, provided it was still Mr Haghi who would be purchasing and developing the property, whether by himself or through a partnership, Wilson should not have a problem with that. Mr Parrant accepted Mr Evans' account on this point. Mr Goddard also drew our attention to Mr Parrant's evidence that he understood it would be necessary to go back to Wilson once the detail of any funding arrangements or co-venturers were established.

[55] We are not persuaded that Mr Parrant's acceptance of these points was in any way intended to give Wilson the opportunity to decline to grant the waiver for reasons beyond the terms of the waiver letter itself. Mr Parrant's acknowledgement that it would be necessary to provide further detail to Wilson was nothing more than the letter itself contemplated. The letter required that the buy-back of the property would be made by Mr Haghi or a related party. If Wilson were to be obliged to grant the waiver, Wilson would have to be satisfied on this point.

[56] Mr Parrant accepted in cross-examination that the project would need to be fundamentally the same as originally proposed. His evidence on this point and the related issue of whether the development would be controlled by Mr Haghi is captured in the following passage from Mr Parrant's cross-examination:

> Q. Paragraph 13 [of his brief], you talk about your understanding and you say, "My understanding was that when Mohsen raised finance to complete the buyback I probably would go back to Steve Evans to tell him that the repurchase by Mohsen is going ahead and to tell him who the purchasing company was and how it was related to Mohsen and that it would be the same development." And then you say, "But my understanding was that if the repurchase was within the terms of the letter of 20 September Wilson would not have the ability to say no to such a transaction." Do you remember giving that evidence?
>
> A. Yes I do.
>
> Q. So your evidence is in essence provided these conditions are met then there's no option but for Wilsons to give it a tick.

A. I couldn't say there was no option. What I can say is that I thought we'd met all the criteria, that it was a Mohsen controlled project, it was fundamentally the same as it had originally been thing and we were able to fund it. I guess that would – that would be up to Wilsons to make that final decision but I thought that we'd met all the requirements.

Q. You would always need to go back to them though.

A. Yes.

Q. So it's not a case of probably. There's always going to be a need for a follow up, yes?

A. Yes.

Q. And I suppose the critical question is on that follow up what would have been legitimate reasons for Wilsons to say no?

A. I believe if we'd completely changed the development, that Mohsen wasn't in control of the development. Yeah, that – they were the main two.

[57] We are not persuaded that Wilson's agreement to provide the waiver explicitly depended upon the development being fundamentally the same. We accept Mr Campbell's submission that Mr Parrant's understanding that the development was to be fundamentally the same as originally planned was effectively a proxy for the requirement that the buy-back agreement and the proposed development would be undertaken by Mr Haghi or a party or entity connected or effectively controlled by him.

[58] We also accept Mr Campbell's submission that there is an air of unreality about the submission on Wilson's behalf that the "fundamentally the same development" argument was a separate condition of Wilson's agreement to provide the waiver. The undisputed evidence is that Mr Evans was kept aware of the development proposals in the ensuing period after the waiver letter and continued to support Mr Haghi's proposals including, importantly, by the letter of intent on 7 March 2013. We also note that Mr Haghi applied on 8 July 2013 for an extension of the lapse date attaching to the 2007 resource consent. This was granted on 10 September 2013. No alteration was sought to the plans of the development as originally approved in 2007 and varied in 2011 (prior to the warehousing arrangements being entered into).

[59] Nor is there any evidence that Wilson raised any concern about this issue at any time prior to agreeing with Capital to buy the property for itself. Indeed, as we have already noted, when Wilson was approached by Mr Haghi to give the waiver it had earlier agreed to provide, Wilson indicated it would consider the request but it did not respond to Mr Haghi's request before signing the agreement with Capital and did not give any reasons at that time for its failure to provide the promised waiver.

[60] Our conclusions to this point are that the waiver letter amounted to an unequivocal representation by Wilson that it would waive its ROFR in the event of Mr Haghi or a related party repurchasing the property, subject only to the ROFR remaining in effect under Wilson's lease in relation to any future sales of the property.

The Judge's findings on the steps taken by Mr Haghi and Fanshawe in reliance on the waiver letter

[61] It is not in dispute that, through Mr Haghi, Fanshawe continued to progress plans for redevelopment of the property including engaging relevant consultants, undertaking budgeting and financial work, continuing its discussions with Wilson about the development proposals and Wilson's interest in those, and attempting to find an equity partner. The costs incurred in relation to external consultants amounted to approximately $40,000.

[62] Of greater significance however, was the acceptance by 136 Fanshawe of the NZMS loan offer of $12 million on 10 July 2013. A $5,000 deposit was paid to NZMS and 136 Fanshawe became liable for a non-refundable fee of $500,000 upon acceptance of the loan offer.

[63] It was submitted in the High Court and also before us that Fanshawe accepted the NZMS loan offer despite being aware that Capital had written to Wilson the previous day formally offering the property to Wilson. The Judge's finding on this issue was:[10]

> In my view, however, nothing turns on that. The Buy Back Agreement was not subject to finance, but only to Wilson waiving its right of first refusal.

[10] At [77].

> Wilson had not advised the plaintiffs at that time that it would not be standing by the Waiver Letter, or that it did not believe it to be binding. Accordingly, on the assumption that Wilson had committed to waiving its right of first refusal, it was imperative that 136 Fanshawe raise the necessary finance to settle the transaction. The only financing offer forthcoming was that from NZMS.

[64] The Judge accepted there was detrimental reliance by Fanshawe in entering the loan arrangements with NZMS even though the loan fee of $500,000 was not paid. The Judge reasoned that 136 Fanshawe had nevertheless accepted an obligation to pay that sum.

[65] Mr Goddard submitted that the expenditure and liability incurred in respect of the NZMS loan could not be regarded as a detriment suffered in reliance on the waiver letter. In particular, he submitted that Mr Haghi had accepted in cross-examination that he would have gone ahead with the financing agreement whether or not the waiver letter had been provided. However, we accept Mr Campbell's submission that Mr Haghi's evidence that he would have gone ahead with the financing arrangement anyway cannot be viewed as an acknowledgement by Mr Haghi that he would have signed the NZMS loan documents even if the waiver had not been given.

[66] Rather, it is clear from Mr Haghi's evidence that he was referring to the fact that he had become aware on the day before he signed the NZMS loan documents that Capital had offered to sell the land to Wilson. The Judge accepted Mr Haghi's evidence that, despite this knowledge, he still believed that Wilson would honour the agreement to provide the waiver. Mr Haghi added, as the Judge also accepted, that it was imperative that 136 Fanshawe raise the necessary finance to settle the transaction. Mr Haghi's evidence was that negotiations had been proceeding for some time and that the offer by NZMS was the only finance offer available.

[67] We are satisfied that the Judge correctly found that Mr Haghi/Fanshawe reasonably relied on the waiver letter when accepting the NZMS loan offer and thereby acted to their substantial detriment.

Was the relief granted appropriate?

[68] Mr Goddard accepted that if we were to uphold the finding by the Judge that the purchase by Fanshawe came within the scope of the expectations created by Wilson's conduct and that Fanshawe reasonably relied on those expectations in the ways described, then an equity arose in favour of Fanshawe. Mr Goddard also accepted that it would then be unconscionable for Wilson to simply disregard those expectations.

[69] However, the essence of Mr Goddard's argument on this issue was that any element of unconscionability could be satisfied if equitable damages were awarded to reimburse Fanshawe for the expenditure and liability incurred in reliance on the waiver letter. Mr Goddard submitted that an award of equitable damages to that extent would be sufficient to remedy any unconscionability on Wilson's part.

[70] It followed, Mr Goddard submitted, that the Judge was wrong to order specific performance of the buy-back agreement between Capital and Fanshawe. The effect of this order was to require Wilson to fulfil a non-contractual promise. A remedy fulfilling Fanshawe's expectation that the promise would be honoured was inappropriate in the circumstances. It was also disproportionate because it went further than was necessary to remedy any element of unconscionability.

[71] Developing this argument, Mr Goddard submitted it was important to focus on what he called Fanshawe's "baseline" position immediately before the waiver letter was given. At that point, if Capital wished to sell, Wilson was fully entitled to purchase the property itself under the ROFR. If it had done so, Fanshawe would not have incurred any loss since it would not have been entitled to purchase the property from Capital under the buy-back agreement. Having given the waiver letter, Wilson was entitled to change its mind and refuse to grant the waiver at any point until Fanshawe acted in detrimental reliance on the waiver letter. Thereafter, if Wilson decided to renege on granting the waiver, Wilson's conduct could be regarded as being unconscionable but the extent of any remedy should be limited to the cost of restoring Fanshawe to the position it was in before the waiver letter was given. If Wilson were required to pay equitable damages equivalent to Fanshawe's reliance

expenditure, Fanshawe would be no worse off and any unconscionability on Wilson's part would have been satisfied.

Equitable remedies – principles

The purpose of the doctrine of equitable estoppel

[72] The doctrine of equitable estoppel has undergone much change, particularly over the last three decades. Equitable estoppel was described by Mason CJ in *Commonwealth of Australia v Verwayen* as "a label which covers a complex array of rules spanning various categories".[11] He saw all these categories as having the same fundamental purpose, namely "protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted."[12]

[73] Our review of the authorities suggests that the focus of the inquiry into an appropriate equitable remedy 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 all 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.

[74] This change has been reflected in this country. Delivering the judgment of this Court in *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd*, Tipping J described the rationale of the doctrine in this way:[13]

> The decisions of this Court in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 and *Gillies v Keogh* [1989] 2 NZLR 327 have emphasised the element of unconscionability which runs through all manifestations of estoppel. The broad rationale of estoppel, and this is not a test in itself, is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so.

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11 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 409.

12 *Verwayen*, above n 11, at 409 as cited in *Sidhu v Van Dyke* [2014] HCA 19, (2014) 308 ALR 232 at [1].

13 *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA) at 549.

A flexible approach

[75] It is common ground that the court adopts a flexible approach in determining the appropriate relief where an equitable estoppel is established.[14] While flexibility has been emphasised and supported, a principled approach is nevertheless required. As the learned authors of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* caution, "equity is concerned with good conscience, not a sentimental urge to render sinners virtuous."[15]

[76] And, as Robert Walker LJ put it in *Jennings v Rice*:[16]

> It cannot be doubted that in this as in every other area of the law, the court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case.

Choice of remedies

[77] The broad choice in remedies is between a reliance-based remedy on the one hand and expectation-based relief on the other.[17] The former 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. The latter is designed to fulfil the expectation relied upon by the plaintiff.[18]

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[14] See the observations in *Verwayen*, above n 11, at 442 per Deane J; Andrew Robertson "Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*" (1996) 20 MULR 805 at 819–820; *Stratulatos v Stratulatos* [1988] 2 NZLR 424 (HC) at 438; John McGhee (ed) *Snell's Equity* (32nd ed, Sweet & Maxwell, London, 2010) at [12–024]–[12–030]; Piers Feltham, Daniel Hochberg and Tom Leech (eds) *Spencer Bower: The Law Relating to Estoppel By Representation* (4th ed, LexisNexis, Wellington, 2004) at [XIII.10.1] and [XIV.3.13]-[XIV.3.14].

[15] R P Meagher, J D Heydon and M J Leeming (eds) *Meagher Gummow & Lehane's Equity Doctrines & Remedies* (4th ed, Butterworths, Australia, 2002) at [17–075].

[16] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501 at [43], a point he reiterated in emphatic terms when a member of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 at [59].

[17] Injunctive relief may also be given where appropriate but that is not in issue here.

[18] Sean Wilken and Karim Ghaly *The Law of Waiver, Variation and Estoppel* (3rd ed, Oxford University Press, New York, 2012) at [11.85].

[78] In abstract terms, the test for the remedy for estoppel has been variously described as "the minimum equity to do justice";[19] "that which is necessary to cure the unconscionable conduct: nothing more, nothing less";[20] and as requiring proportionality between the remedy, the expectation and the detriment.[21]

[79] In some Australian cases which we will shortly discuss in more detail, it has been held that expectation-based relief should be adopted as a starting point in framing a remedy, while in the United Kingdom a broader, more flexible approach has been adopted.

The Australian authorities

[80] Since the landmark decision in *Waltons Stores (Interstate) Ltd v Maher* in 1988,[22] the High Court of Australia has given detailed consideration to the doctrine of equitable estoppel on three occasions. Prior to *Waltons Stores*, it had been understood that the doctrine was generally available only as a shield rather than as a positive cause of action. The High Court's judgment swept that understanding away.

[81] The respondents Mr and Mrs Maher owned a property. They entered negotiations with the appellant Waltons Stores with a view to Waltons leasing the property. The Mahers proposed to demolish existing buildings on the site and erect a new one suitable for Waltons' purposes. The terms of a lease were agreed but no formal lease had been entered into before Waltons changed its mind and decided not to proceed with the lease. In the meantime, the Mahers had proceeded to demolish buildings on the site on the assumption that Waltons would execute the lease. The Court found that Waltons were estopped from retreating from its implied promise to complete the contract because, knowing the owner was exposing himself to detriment by acting on the basis of a false assumption, it was unconscionable for it to

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19 *Crabb v Arun District Council* [1976] Ch 179 (CA) at 198. Peter W Young, Clyde Croft and Megan Louise Smith *On Equity* (Thompson Reuters, Sydney, 2009) at [14.180] point out the confusion inherent in the term "minimum equity": is it the bare minimum required to atone for detriment or the award which would fully atone for unconscionable conduct of the defendant which has engendered an expectation in the plaintiff.

20 *Stratulatos v Stratulatos*, above n 14, at 438.

21 *Commonwealth of Australia v Verwayen*, above n 11, at 413. See also Jill E Martin *Modern Equity* (19th ed, Sweet & Maxwell, London, 2012) at [27–023] citing *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988 at [65]; *Jennings v Rice*, above n 16, at [50]; and Simon Gardner "The Remedial Discretion in Proprietary Estoppel – Again" (2006) 122 LQR 492 at 498.

22 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

adopt a course of inaction which encouraged the owners in the course they adopted.[23]

[82] In their joint judgment, Mason CJ and Wilson J addressed the objection that estoppel should not be allowed to outflank the doctrine of part performance or the enforcement of voluntary promises. They explained that although equitable estoppel may lead to the plaintiff acquiring an estate or interest in land, this depended on different considerations from those on which part performance depended.[24] Holding the representor to the representation was merely one way of doing justice between the parties. Something more than a mere failure to fulfil a promise was required. A departure from the basic assumptions underlying the transactions must be unconscionable. That element was fulfilled by the party encouraging the opposite party in the assumption that a contract would come into existence or a promise would be performed with knowledge that the other party was relying on that assumption to his or her detriment.[25]

[83] Brennan J said that:[26]

> The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy an equity varies according to the circumstances of the case.

[84] He added:[27]

> The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.
>
> If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed.

[85] On the facts, Brennan J held that the equity was to be satisfied by treating Waltons as though it had done what it had induced the Mahers to expect it would do,

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23 Per Mason CJ, Wilson, Brennan and Deane JJ.
24 At 405.
25 At 406.
26 At 419.
27 At 423.

namely by treating Waltons as though it had executed and delivered the original deed.[28] We observe that Brennan J's subsequent reference to avoiding detriment extended, in the circumstances, to granting relief which amounted to fulfilling the Mahers' expectation. As this case demonstrates, fulfilling the expectation does not necessarily result in an order for specific performance. Rather, equitable compensation was fixed on the basis of the value of the expectation.

[86] The remaining members of the Court, Deane and Gaudron JJ, were in agreement with the outcome.[29]

[87] The next High Court case in the sequence was *Commonwealth of Australia v Verwayen*.[30] Mr Verwayen was injured while serving as a member of the Royal Australian Navy. He claimed damages for his injuries. The Commonwealth admitted liability in its defence leaving the issue of damages to be determined. The Commonwealth did not plead a limitation defence nor did it deny that it owed a duty of care to Mr Verwayen. The Commonwealth repeatedly stated both before and after it filed its defence that it had adopted a policy of not contesting liability or pleading a limitation defence in similar cases. Later the Commonwealth changed its mind and sought leave to amend its defence so as to raise both defences. The issue before the High Court was whether the Commonwealth ought to have been permitted to raise the defences on payment of Mr Verwayen's wasted costs or whether the Commonwealth should be estopped from resiling from its promise not to plead the relevant defences.

[88] The High Court split on the issue. Four of the Judges held that the Commonwealth should not be permitted to dispute its liability to Mr Verwayen for damages for the injuries he sustained nor should it be allowed to plead a limitation defence.[31] The other three members of the Court dissented, holding that the Commonwealth ought to be permitted to amend its pleading by raising the defences subject to payment of Mr Verwayen's wasted expenditure.[32]

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28 At 430.

29 At 451 per Deane J at 451 and 458 per Gaudron J.

30 *Commonwealth of Australia v Verwayen*, above n 11.

31 Deane and Dawson JJ found that an estoppel was established while Toohey and Gaudron JJ founded their judgments on waiver.

32 Mason CJ, Brennan and McHugh JJ.

[89] Some commentators have interpreted *Verwayen* as authority for the proposition that a reliance-based remedy was adopted by a majority of the Judges.[33] If this was intended, it is difficult to reconcile this interpretation with the outcome of the case in which the majority found that the Commonwealth ought not to be permitted to raise the relevant defences either by virtue of estoppel or waiver. And, as we discuss below, in its later decision in *Giumelli v Giumelli* the High Court observed that none of the judges sitting in *Verwayen* precluded the possibility of expectation-based relief in appropriate cases.[34] We note too that the dissenting judges in *Verwayen* were influenced by the pleading rule that, as a general approach, a party may be permitted to amend a pleading upon payment of any wasted costs incurred by the opposite party.[35]

[90] In *Giumelli* the High Court of Australia emphatically rejected the argument advanced by the appellants that *Verwayen* was authority for the proposition that the relief in estoppel cases should not extend beyond a reversal of the detriment occasioned by reliance on the promise founding an estoppel.

[91] *Giumelli* was a case of proprietary estoppel founded on promises made in a family context to provide a section for the plaintiff. It was held that the plaintiff had acted to his detriment in reliance on one of the promises made to him so as to entitle him to equitable relief. Although he had a prima facie entitlement to an order for conveyance of the section to him, the appropriate relief was an order for payment of a monetary sum representing the present value of his claim to the promised section, calculated so as to do equity between the parties to the proceedings and any relevant third parties.

[92] There are two topics of interest in *Giumelli* for present purposes. The first relates to concerns about the enforcement of non-contractual promises. The second is a discussion of detriment and the appropriate remedy. The principal judgment was given by Gleeson CJ, McHugh, Gummow and Callinan JJ. The joint judgment endorsed the following explanation by McPherson J in *Riches v Hogben* of the

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33 See, for example, the views expressed in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 601 at [19.6.2(2)].

34 *Giumelli v Giumelli* [1999] HCA 10, (1999) 196 CLR 101at [33].

35 See for example at 414 per Mason CJ.

distinction between equitable principles and the enforcement of contractual obligations:[36]

> What distinguishes the equitable principle from the enforcement of contractual obligations is, in the first place, that there is no legally binding promise. If there is such a promise, then the plaintiff must resort to the law of contract in order to enforce it, it being the function of equity to supplement the law not to replace it. The second distinguishing feature is that what attracts the principle is not the promise itself but the expectation which it creates … Finally, the equitable principle has no application where the transaction remains wholly executory on the plaintiff's part. It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise.

[93] The joint judgment referred to a submission made on behalf of the appellant that equitable relief should be limited "lest the requirement for consideration to support a contractual promise be outflanked and direct enforcement be given to promises which did not give rise to legal rights". In response to this the High Court endorsed observations made by Dawson J in *Verwayen* to the effect that the discretionary nature of the relief in equity was a further reason why concerns that promissory estoppel would undermine the doctrine of consideration were unwarranted.[37]

[94] The joint judgment also considered in some detail the judgments delivered in *Verwayen*.[38] It was pointed out that none of the members of the *Verwayen* court had rejected the proposition that the avoidance of the relevant detriment may require that the party estopped make good the assumption.[39] The joint judgment in *Giumelli* cited with apparent approval the following observations by Deane J in *Verwayen*:[40]

> Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded.
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> …

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36 At [35], citing *Riches v Hogben* [1985] 2 QR 292 (QSC) at 300–301.
37 At [34].
38 At [40]–[48].
39 At [63] Kirby J agreed that the principles established in *Verwayen* did not preclude the making of the orders proposed.
40 At [42], citing *Verwayen*, above n 11, at 443 and 445.

> … the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted.

[95] The joint judgment in *Giumelli* continued:[41]

> The prima facie entitlement to which his Honour had referred would be qualified if that relief would "exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party"; an appropriate qualification might be a requirement that the party relying upon the estoppel do equity.

[96] The approach adopted by the High Court in *Giumelli* has very recently been endorsed in another proprietary estoppel case, *Sidhu v Van Dyke*.[42] The High Court unanimously dismissed an appeal against the judgment of the Court of Appeal of the Supreme Court of New South Wales which had held that the claimant was entitled to equitable relief to preclude departure by the appellant from promises made to the respondent to the effect that a property would be transferred to her. An award of equitable compensation measured by reference to the value of the respondent's disappointed expectation was the appropriate form of relief.

[97] The High Court endorsed the finding in *Giumelli* that the relief granted may require the taking of active steps by the defendant including the performance of the promise and the performance of the expectation generated by it.[43] However, the Court went on to note that the requirements of good conscience may mean that in some cases the value of the promise may not be the just measure of relief.[44] The Court referred to Deane J's remarks in *Verwayen* about cases where the potential damage to the estopped party was disproportionately greater than any detriment sustained by the other party.[45] For example, where a claimant had been induced to make a relatively small, readily quantifiable monetary outlay on the fate of the estopped party's assurances, it might not be unconscionable for the estopped party to

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41 At [42].
42 *Sidhu v Van Dyke*, above n 12.
43 At [82].
44 At [83].
45 At [83], citing *Verwayen*, above n 11, at 441.

resile from promises made, on the condition that the claimant be reimbursed for the outlay.[46]

[98] The joint judgment in *Sidhu v Van Dyke* went on to comment upon the principle that the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct.[47] This principle was accepted but the approach to remedy was said to be that:[48]

> … where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.

[99] The fifth member of the Court was Gageler J who agreed with the outcome.

[100] Two decisions of the Court of Appeal of the New South Wales Supreme Court have shed further light on the issue of relief in estoppel cases. In *Delaforce v Simpson-Cook* Allsop P referred to the notion of enforcement of the "minimum equity" observing that the joint judgment in *Giumelli* appeared to remove this concept as a governing principle in the relief to be granted.[49] However, emphasising the broad assessment required, he added:[50]

> That, of course, does not make irrelevant matters that can assuage the detriment brought about by the resiling from the representation or encouragement by the party concerned. It does mean, however, that relief in such cases is not to be measured by weighing detriment too minutely in order that it be converted into some equivalent of cash or kind, as if one were measuring the consideration for a commercial bargain. Equity will look at all the relevant circumstances that touch upon the conscionability (or not) of resiling from the encouragement or representation previously made, including the nature and character of the detriment, how it can be cured, its proportionality to the terms and character of the encouragement or representation and the conformity with good conscience of keeping the party to any relevant representation or promise made, even if not contractual in character. Equity has always had a place in keeping parties to representations and promises …

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46 At [84].
47 See *Waltons Stores*, above n 22, at 419.
48 At [85].
49 *Delaforce v Simpson-Cook* [2010] NSWCA 84, (2010) 78 NSWLR 483 at [3].
50 At [3].

[101] Allsop P added that the proportionality of the claimed interest or remedy to the prejudice or detriment was undeniably a relevant consideration and sometimes of considerable importance.[51] He warned however that proportionality should not become a necessary element of a cause of action to be pleaded or proved by the party seeking relief.[52] That would result in the equity becoming one of compensation for proved equivalent detriment. Allsop P reiterated that the equity was "a broader one based on the just and conscionable satisfaction in appropriate fashion of the equity arising from the expectation created".[53]

[102] Handley AJA reviewed the authorities both in Australia and in the United Kingdom in considerable detail. He was in general agreement with the approach adopted by Allsop P. In the case at issue, Handley AJA concluded that the promise made was clear and unambiguous. His view was that where the expectation was defined with certainty by the party estopped, that was where the court must start. There was no other principled starting point.[54] The third member of the Court, Giles JA, agreed with the observations made by both Allsop P and Handley AJA.

[103] In *Milling v Hardie* the Court of Appeal of the New South Wales Supreme Court was dealing with another proprietary estoppel case.[55] The principal judgment was given by Macfarlan JA with additional remarks by Sackville AJA. Beazley P agreed with the other members of the Court. The approach adopted in the Australian cases already discussed was broadly endorsed.

The approach to relief in estoppel cases in the United Kingdom

[104] We were referred to a 2002 decision of the English Court of Appeal, *Jennings v Rice.*[56] This was another case of proprietary estoppel. The leading judgment was given by Aldous LJ who rejected the Australian authorities to that date to the extent they appeared to lean towards the view that the relief granted should compensate the

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51 At [4].
52 At [4].
53 At [4].
54 At [90]–[92].
55 *Milling v Hardie* [2014] NSWCA 163.
56 *Jennings v Rice*, above n 16.

detriment.[57] Rather, Aldous LJ favoured a broader approach which he succinctly summarised in these terms:[58]

> There is a clear line of authority from at least *Crabb* to the present day which establishes that once the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment.

[105] As already noted, Robert Walker LJ emphasised in *Jennings v Rice* the need for a principled approach to remedy.[59] Commenting on Scarman LJ's reference in *Crabb* to "the minimum equity to do justice to the plaintiff", Robert Walker LJ said this did not require the court to be "constitutionally parsimonious".[60] Rather, it implicitly recognised that the court must also do justice to the defendant. Amongst other relevant considerations were the quality of the assurances which gave rise to the claimant's expectation; and the extent of the claimant's detrimental reliance on the assurances in cases. Another relevant consideration was whether the assurances and the claimant's reliance on them had "a consensual character falling not far short of an enforceable contract".[61] In such a case, the plaintiff's expectations and the element of detriment may be defined with reasonable clarity.[62]

[106] With reference to the means of satisfying the equity arising in estoppel cases, Robert Walker LJ said:[63]

> It is no coincidence that these statements of principle refer to satisfying the equity (rather than satisfying, or vindicating, the claimant's expectations). The equity arises not from the claimant's expectations alone, but from the combination of expectations, detrimental reliance, and the unconscionableness of allowing the benefactor (or the deceased benefactor's estate) to go back on the assurances.

[107] He added:[64]

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57 At [30].
58 At [36], referring to *Crabb v Arun District Council*, above n 19.
59 At [43].
60 At [48], citing *Crabb v Arun District Council*, above n 19, at 198.
60 At [43].
61 At [45].
62 At [45].
63 At [49].
64 At [50].

> To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.

[108] Robert Walker LJ agreed with observations made by Hobhouse LJ in *Sledmore v Dalby* that the need to demonstrate proportionality in the granting of relief:[65]

> ... is to say little more than that the end result must be a just one having regard to the assumption made by the party asserting the estoppel and the detriment which he has experienced.

[109] In *Henry v Henry* the Privy Council endorsed the principles identified in *Jennings v Rice* including in particular the observations that:[66]

(a) "The doctrine only applies if these elements, in combination, make it unconscionable for the person giving the assurances … to go back on them."[67]

(b) Where there is a mutual understanding in reasonably clear terms, the court's natural response is to fulfil the claimant's expectations.

(c) Where the expectations are uncertain, extravagant or out of all proportion, the court can and should recognise the claimant's equity in other, more limited ways.

(d) The court would look to all the circumstances in order to achieve the minimum equity to do justice to the claimant; and

(e) The court enjoys a wide discretion in satisfying an equity arising under the doctrine of proprietary estoppel.

[110] The Privy Council also supported Robert Walker LJ's remarks in *Gillett v Holt*:[68]

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65 At [56], citing *Sledmore v Dalby* (1996) 72 P & CR 196 (CA) at 209.
66 *Henry v Henry*, above n 21.
67 *Henry v Henry*, above n 21, at [40].
68 At [38], citing *Gillett v Holt* [2001] Ch 210 (CA) at 232.

> … the authorities also show that [detriment] is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement [for detriment] must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances … Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded …

[111] Before leaving this discussion of the authorities there are two other matters warranting mention. First, although a number of the cases discussed arise in relation to proprietary estoppel, there is no reason to suppose that the general principles relating to remedy do not also apply to other categories of equitable estoppel as we have already noted.[69] The standard texts proceed on this basis,[70] and there is academic support for the proposition that the remedies in proprietary estoppel cases depend on general equitable remedial principles.[71] So too, the view expressed by Tipping J in *National Westminster Finance*.[72]

[112] Second, 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.[73]

Equitable remedies – conclusions

[113] Our review of the authorities demonstrates the truth of Robert Walker LJ's observation in *Jennings v Rice* that the search for the right principles is unlikely to be short or simple.[74] The cases show a wide variation of approach to the grant of appropriate remedies in cases of equitable estoppel. To attempt any definitive or exhaustive statement of the principles is likely to be elusive and may not be helpful given the fact-dependent nature of the cases coming before the Courts.

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69 See above at [72].
70 See, for example, Butler, above n 33, at [19.1.3].
71 Ben McFarlane *The Law of Proprietary Estoppel* (Oxford University Press, Oxford, 2014) at [9.17].
72 See above at [74].
73 See, for example, *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd* [2004] VSCA 167, (2004) 50 ACSR 679: a case dealing with the sale and purchase of the shares in a mining company.
74 At [44].

[114] Nevertheless some principles may be stated with a degree of confidence even if the application of those principles in particular cases may be a matter of some difficulty. The three main elements relevant to relief stem from the ingredients necessary to establish equitable estoppel in the first place. These are the quality and nature of the assurances which give rise to the claimant's expectation; the extent and nature of the claimant's detrimental reliance on the assurances; and the need for the claimant to show that it would be unconscionable for the promisor to depart from the assurances given.

[115] As a general approach, the clearer and more explicit the assurance is, the more likely it is that a court will be willing to grant expectation-based relief. That is because a clear assurance is more likely to engender an expectation by the promisee that it will be fulfilled. Similarly, the greater the degree and consequences of detrimental reliance by the claimant, the more likely it is that the court will be prepared to hold the defendant to the promise rather than make an award (generally of a more limited nature) designed to compensate for reliance-based losses.

[116] Unconscionability is the third key consideration. As Brennan J explained in *Waltons Stores* unconscionability is the element which both attracts the jurisdiction of a court of equity and moulds the remedy.[75] In assessing the appropriate remedy, all the relevant circumstances are to be considered. 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.

[117] While some authorities continue to refer to relief as being the minimum necessary to satisfy the equity, the emphasis in more recent cases has been on a broad consideration of the relief necessary to achieve a just and proportionate outcome.

[118] Where the claimant's expectation is seriously disproportionate to the detriment suffered, the court will be unlikely to grant expectation-based relief. To do so would be to overcompensate the claimant and would be unjust to the defendant. In such a case, the court would consider whether there may be a means of satisfying

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[75] *Walton Stores*, above n 22, at 419.

the equity in another way. But that does not mean the court will simply compare in an arithmetical manner the extent of any reliance-based losses with the value to the claimant of the expectation. A broad assessment of all the relevant circumstances is to be made including losses or other detriment which cannot be quantified or measured in monetary terms.

[119] In choosing between reliance or expectation-based remedies, there is some support for the proposition that, subject to proportionality between the expectation and the detriment suffered, it will often be just to make an order to fulfil the expectation,[76] but we do not consider it is appropriate to adopt a presumptive or prima facie approach one way or the other. That would not be consistent with the flexible approach to equitable remedies consistently emphasised in the cases.

[120] We acknowledge that the Australian jurisprudence has adopted Deane J's approach in *Verwayen*: prima facie, the remedy is to preclude departure from the state of affairs or expectation created by the defendant's conduct. But our preference is to avoid cluttering the available remedies by arbitrary rules, as McGechan J put it in *Stratulatos*.[77]

[121] Mr Goddard referred us to the view expressed by the learned authors of *Equity and Trusts in New Zealand* that, while the goal of rectifying the unconscionable conduct should always be the final yardstick, reliance-based relief seemed the preferred starting point.[78] Three reasons were given. The first was that this approach would be more consistent with the need to show detrimental reliance and with the ability of a representor to avoid an estoppel by giving sufficient notice to avoid the detriment. The second was a concern that, to enforce a non-contractual promise, would threaten to "blow away" the doctrine of consideration. The third was a concern that the claimant might receive an unjustified windfall if the value of the expectation exceeded the value of the detrimental reliance.

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[76] Young, Croft and Smith, above n 19, at [12.310]; *Snell's Equity*, above n 14, at [12–014] and in reference to proprietary estoppel at [12–025].

[77] *Stratulatos*, above n 14, at 438. This approach was also adopted in *Boys v Calderwood* HC Auckland CIV-2004-404-290, 14 June 2005 at [78] and *McDonald v Attorney-General* HC Invercargill CP13/86, 20 June 1991 at 32.

[78] Butler, above n 33, at [19.6.2(2)].

[122] We are not persuaded by any of these grounds. As to the first, if any detriment were avoided by the giving of notice, an estoppel would not be established.[79] And the modern approach to equitable relief places emphasis on satisfying the equity arising rather than addressing detriment construed in a narrow sense. In respect of the second, the courts have shown no reluctance to enforce non-contractual promises provided the essential elements of equitable estoppel are properly established. The distinction between contractual and equitable remedies is well understood.[80] Third, concerns about unjustified windfalls are addressed by the need for proportionality as we have discussed.

[123] We do not accept that expectation-based relief should generally only be granted in cases such as those where the claimant's losses cannot be readily calculated or there are no obvious baselines as suggested in the same passage in *Equity and Trusts in New Zealand*. We agree with the authors however that the court should grant expectation-based relief where the minimum equity will not be satisfied by anything less than enforcing the promise.

[124] In the end, the courts must be free to fashion a just outcome guided by the general principles discussed, flexibly applied to the particular circumstances of the case.

This case

[125] Applying the principles to the present case, a convenient starting point is the nature of the promise and the expectation it reasonably engendered in Mr Haghi. We agree with the High Court Judge that the waiver was expressed in unequivocal terms. Mr Haghi was entitled to expect that if Fanshawe wished to buy the property back, Wilson would abide by its promise to waive its ROFR so long as an entity associated with Mr Haghi was involved as purchaser and provided that Wilson would retain its ROFR under the lease. Both these terms were fulfilled.

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[79] It was not suggested that any notice was given in the present case which would have avoided Fanshawe acting to its detriment.

[80] See the discussion above at [92].

[126] Given this assurance to Mr Haghi, Wilson gave no indication it intended to renege on its promise. To the contrary, it positively encouraged Mr Haghi in the belief that the waiver would be given if and when the buy-back proceeded. Wilson's encouragement is compellingly demonstrated by its letter of intent dated 7 March 2013. The Judge also accepted that Mr Evans continued to show an interest in Mr Haghi's plans to develop the site and gave no indication that Wilson was intending to buy it itself. Its only interest was in the development of the site in a way which would enhance the profitability of the carparking business it operated there.

[127] Even after Wilson became aware that Fanshawe had entered the buy-back agreement, it still gave no indication it had any interest in buying the property. Rather it stood by for at least nine months after the waiver letter knowing that Fanshawe was continuing with its development plans on the assumption Wilson would waive its ROFR as agreed. Wilson must be taken to have been aware that Fanshawe was incurring expenditure and applying continued effort to progress its development plans.

[128] Fanshawe undoubtedly acted to its detriment in reliance on the waiver letter. It incurred the expenditure on consultants to the extent of approximately $40,000 and it also assumed the obligation of $500,000 in respect of financing costs for the repurchase. As well, Mr Haghi undoubtedly put considerable time and effort into the development plans, obtaining an extension of the resource consent and the raising of finance. This continued from the date of the waiver letter , 20 September 2012, until July the following year when Wilson accepted Capital's offer to purchase the property.

[129] Wilson's conduct at this point 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. Wilson disregarded Fanshawe's interests entirely even though Mr Evans was still clearly of the view that Wilson had agreed to give a waiver. The views of his superiors obviously held sway and the agreement to buy the property from Capital was signed notwithstanding. When Wilson signed the agreement with Capital it took a calculated risk. It is evident that Wilson knew there was a question mark over its entitlement to proceed

and that litigation could well ensue. That is evident from Mr Koch's emails and from the terms of the agreement for sale and purchase between Capital and Wilson requiring an application to the High Court to obtain a declaration as to the validity of Fanshawe's interest in the property.

[130] We are satisfied there was a lack of good faith on Wilson's part in entering the agreement with Capital without responding to Fanshawe's request for advice about giving the waiver and without giving Fanshawe any reasons for not doing so. We do not accept the submission that Mr Haghi breached a duty of good faith in not giving Wilson details of the buy-back agreement or advising Wilson that it had been signed before the waiver letter was given. Wilson had not expressed any interest in the details of the buy-back agreement. Those details had no significance for Wilson since it was not interested in buying the property until very late in the piece. By that time, Wilson knew the details and had that knowledge before it reneged on its promise to provide a waiver.

[131] We are satisfied that Wilson acted unconscionably in all the circumstances by refusing to grant the waiver it had promised. The Judge was right to find that the appropriate and proportionate remedy was to rule that Wilson was estopped from refusing to provide a waiver of its ROFR to enable Fanshawe's buy-back agreement to proceed.

[132] We do not accept Wilson's argument that payment of equitable compensation for the direct financial losses sustained by Fanshawe in reliance on the waiver letter would be a sufficient remedy to address Wilson's unconscionable conduct in reneging on its promise. We reach that conclusion for these reasons. First, the direct losses incurred by Fanshawe were substantial by any measure. Second, a purely mathematical comparison of the direct losses to the value of Fanshawe's expectation is too narrow an approach given the circumstances we have already outlined. It would make no allowance for Mr Haghi's time and effort and would not approach just recompense for his disappointed expectation. Third, in purely economic terms, the value of Fanshawe's expectation could be assessed at about $3 million (the difference between the purchase price under the buy-back agreement and its then market value). But this did not represent a windfall gain to Fanshawe. It merely

reflected Fanshawe's equity in the property before the warehousing arrangement which Mr Haghi had fought hard to preserve by negotiation with his principal creditor and ASAP/Capital. On the other hand, it would be unjust to permit Wilson to take advantage of a windfall gain by reneging on its unequivocal promise to waive the ROFR. Fourth, the promise made did not confer benefits upon Fanshawe alone. Wilson anticipated benefits for itself in increased carparking revenue from the development and, of course, it would also retain its ROFR under the lease if the buy-back agreement proceeded. It follows that there was a distinct element of consensuality or mutual benefit in the transaction and the arrangements reached therefore had some analogy with contract. Fifth, Wilson knew that Mr Haghi's objective in entering the warehousing arrangement was to enable him to refinance in due course and to buy the property back. Wilson gave the waiver in order to facilitate that process, the effect of which would be to restore the status quo for both parties and to provide a real opportunity for the development of the site for their mutual advantage. Wilson can scarcely complain if it is held to the bargain it actively encouraged, in part for its own benefit.

[133] We acknowledge Mr Goddard's baseline argument. On a narrow view, the payment of equitable compensation for the losses Fanshawe incurred could be seen as putting Fanshawe back in the position it would have been in immediately before it began to act in reliance on the waiver letter. Such a remedy might have been appropriate if the expenses incurred were only minor and the expectation engendered was extravagant or disproportionate in comparison. But such a remedy would not in our view be a proportionate response in the circumstances of this case, any more than the mere payment of expenses incurred by Mr Verwayen would have been in his case or the payment of wasted costs would have been for the Mahers in *Waltons Stores*. Nor would the simple payment of compensation for Fanshawe's expenses be sufficient to satisfy the equity arising from Wilson's failure to honour its promise. Equity takes a broader view.

[134] Mr Goddard referred us to the judgment of Holland J in *McDonald v Attorney-General* where a reliance-based approach was adopted in a case involving

wheat prices.[81] This is clearly distinguishable since it concerned pure financial loss in a completely different factual context. Holland J also noted that he had not, in argument, had the benefit of any authorities on the question of relief.

[135] Nor do we consider Wilson's case derives any material assistance from the judgment of this Court in *BNZ Finance Ltd v Smith*.[82] Loan guarantors relied upon a representation that a finance company would apply a deposit to the payment of interest instalments. This Court found that a defence on this basis was inherently improbable in the circumstances and also pointed out that the effect of a waiver or estoppel was only to suspend the rights between the parties.[83] The promisor was bound by the promise or assurance unless and until the promisee had been given a reasonable opportunity to recover his position.

[136] This principle has no application in the present case. An unequivocal assurance was given that the ROFR would be waived and Fanshawe acted on that assurance to its detriment. No notice was given to Fanshawe that Wilson intended to renege on its promise and, in any event, the assurance was not given in terms suggestive of a conditional or temporary forbearance.

[137] Given Wilson's acceptance that an equity arose if the elements of estoppel were established, we are satisfied the Judge was clearly right to conclude that the appropriate remedy was to hold Wilson to its promise, there being no practical impediment to that outcome.

Result

[138] For these reasons, the appeal is dismissed.

[139] Counsel were agreed that costs should follow the event and that the appeal should be treated as complex. The appellants must pay the respondents costs for a complex appeal on a band A basis and usual disbursements including travel and accommodation costs for both counsel. We certify for second counsel.

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81 *McDonald v Attorney-General*, above n 77.
82 *BNZ Finance Ltd v Smith* [1991] 3 NZLR 659 (CA).
83 At 677–678 per Richardson J.

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