IN THE SUPREME COURT OF NEW ZEALAND

SC 98/2014
[2014] NZSC 173

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

Court:	William Young, Arnold and O'Regan JJ
Counsel:	D J Goddard QC and J Long for Applicant N R Campbell QC and W A McCartney for First and Second Respondents
Judgment:	1 December 2014

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay the respondent costs of $2,500 and reasonable disbursements to be fixed by the Registrar.

REASONS

[1] The applicant, Wilson Parking New Zealand Ltd (Wilson), seeks leave to appeal against a decision of the Court of Appeal upholding a finding of equitable estoppel against Wilson and awarding an expectation-based remedy.[1] Wilson no

---

1 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567.

longer contests the finding of estoppel, but wishes to argue that the Court of Appeal erred in upholding an expectation-based remedy.

[2] The case arises from a transaction under which a company controlled by Mr Haghi sold a property to a finance company subject to a right for a company associated with Mr Haghi to later repurchase it. The transaction was a warehousing arrangement, designed to provide finance to Mr Haghi who had a cashflow problem. The appellant, Wilson, held a right of first refusal to purchase the property. It waived its right of first refusal in relation to the sale to the finance company and represented in a letter to an associate of Mr Haghi that if Mr Haghi or a related party were to repurchase the property it would waive its right of first refusal in relation to the buy-back transaction as well. However, it subsequently sought to purchase the property from the finance company and entered into an agreement to do so.

[3] Mr Haghi made arrangements to repurchase the building through a company controlled by his sister, 136 Fanshawe Ltd, the second respondent. This was found to be a "related party" of Mr Haghi. In the High Court Katz J found that Wilson had represented in its letter that it would waive its right of first refusal in relation to the repurchase transaction and an estoppel therefore arose.[2] Wilson was estopped from acting in a way that was contrary to the representation it made in the letter indicating that it would waive its right of first refusal. She also found that 136 Fanshawe had an equitable interest in the property under its buy-back agreement with the finance company, and that Wilson had no equitable interest in the property arising out of its agreement with the finance company to purchase the building.[3] She found that it was appropriate to order that the finance company specifically perform the buy-back agreement with 136 Fanshawe[4] and declared that Wilson was estopped from denying that it had waived its right of first refusal and from asserting an interest in the property in priority to that of 136 Fanshawe.[5]

[4] The Court of Appeal upheld the decision of the High Court. On the issue in respect of which leave is now sought, it found that an expectation-based remedy was

---

2 *Fanshawe 136 Ltd v Fanshawe Capital Ltd* [2013] NZHC 3395 at [131].
3 At [131].
4 At [132].
5 At [133].

appropriate in the circumstances. Wilson argued that the appropriate remedy was to restore Mr Haghi/136 Fanshawe to the position they were in immediately before Wilson represented that it would waive its right of first refusal. This could be achieved, it argued, by ordering Wilson to pay damages of about $545,000, representing the amount spent by interests associated with Mr Haghi in obtaining finance for the buy-back of the property and for the subsequent development of it. In contrast to this, the effect of the orders made by the High Court and upheld by the Court of Appeal was to deprive Wilson of a benefit worth approximately $3 million, being the difference between the price at which Wilson would purchase the property from the finance company (being the same price as the buy-back price for 136 Fanshawe) and the market value of the property.

[5] The Court of Appeal undertook a detailed consideration of authorities in New Zealand, Australia and the United Kingdom. It concluded that to attempt any definitive or exhaustive statement of the principles was likely to be elusive and potentially unhelpful, given the fact-dependent nature of cases coming before the courts.[6] However, it was able to identify four general principles.[7]

[6] Consistently with these principles, the Court said it did not consider it appropriate to adopt a presumptive or prima facie approach to a reliance-based remedy or an expectation-based remedy. That would not reflect the flexible approach to equitable remedies consistently emphasised in the cases.[8] It specifically rejected the approach that reliance-based relief was the preferred starting point and that expectation-based relief should generally be granted only in cases where the claimant's losses cannot readily be calculated or there are no obvious baselines against which to measure the position that the plaintiff would have been in.[9]

[7] Applying these principles to the present case the Court noted five features of the factual circumstances that it considered justified expectation-based relief.[10]

---

6 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*, above n 1, at [113].
7 At [114]–[116].
8 At [119].
9 See James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 601 at 638.
10 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*, above n 1, at [125]–[137].

[8] In its submissions in this Court, Wilson accepts that equitable remedies must remain flexible to a certain degree. But it argues that the proper approach is to restrict expectation-based remedies to exceptional cases where such a remedy is necessary to satisfy the equity arising from the estoppel. The starting point should as a matter of principle be a reliance-based remedy and should be departed from only where reliance losses cannot readily be assessed or there is no readily identifiable baseline against which to measure the position the promisee would have been in had the representation not been made. It emphasised that the remedy should be the minimum required to satisfy the equity and to do justice to the parties. It argued that the Court of Appeal was wrong to reject this approach.

[9] The respondents argue that the Court of Appeal's approach is consistent with the settled law of the United Kingdom and does not need further clarification. They argue that a flexible approach is needed to deal with the wide variety of factual circumstances giving rise to an equitable estoppel. They say that whatever approach is taken, the proposed appeal has no prospect of success given the factors identified by the Court of Appeal as justifying an expectation-based remedy.

[10] It is not in dispute that an estoppel of the kind established can result in expectation-based relief. While we recognise that there is scope for debate about aspects of the underlying principles, and particularly as to whether the starting point should be the avoidance of detriment, we are of the view that this case primarily turns on the application of broad principles to some very particular facts. For this reason, we are not persuaded that a point of general or public importance or of general commercial significance is involved. As well, there is no appearance of a miscarriage of justice.

[11] We therefore decline leave to appeal. We award costs of $2,500 to the respondents.

Solicitors:
Lee Salmon Long, Auckland for Applicant
Carson Fox Legal, Auckland for First and Second Respondents