Wilson Parking Ltd v Fanshawe 136 Ltd:
The Approach to Relief in Cases of Equitable Estoppel

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I: Introduction

This dissertation provides an analysis of the 2014 Court of Appeal judgment in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd and others*[1] (*Wilson Parking*). The case was heard by Ellen France, Randerson and White JJ, with judgment given by Randerson J. The issue at the centre of the appeal was the appropriate reward, an equitable estoppel already having been established in the High Court[2]. Wilson Parking argued that the reliance measure should be used, instead of the order for specific performance awarded by Katz J. Counsel for Fanshawe argued that the expectation measure was most appropriate given the facts.

This dissertation considers the judgment in *Wilson Parking* and considers the law from Australia and England, as well as the earlier New Zealand jurisprudence on the topic of relief in cases of equitable estoppel. The analysis chapter focuses largely on the interplay between equity and the law of contract, particularly in a commercial context as in the case of *Wilson Parking*.

The final part of this dissertation summarises issues which potentially arise as a result of the judgment and considers the jurisprudential bases for these. Finally, this dissertation proposes an alternative approach which the Court of Appeal could have adopted, and examines the significance of the *Wilson Parking* decision.

[1] *Wilson Parking Ltd v 136 Fanshawe Ltd* [2014] NZCA 407
[2] *Fanshawe 136 Ltd v Fanshawe Capital Ltd* [2013] NZHC 3395

II: Equitable estoppel generally

The elements which give rise to an estoppel are not contested. There are four requirements[3]:

1. A belief or expectation encouraged by words or conduct
2. The belief or expectation is unequivocal
3. Reliance on the representation was reasonable and to the claimant's detriment
4. Departure from the representation by the promisee would be unconscionable

As noted by Elizabeth Cooke, English law "has not evolved any formal rules about how the claimant's estoppel equity is to be satisfied".[4] Instead, the principles have developed on a case-by-case basis. Consequently, estoppel has evolved differently in England, Australia and New Zealand.

The issue which emerges from the case law (and is examined in *Wilson Parking*) is whether the court should adopt a reliance-based or expectation-based approach to relief. The court may protect the reliance interest by compensating the claimant for the loss or harm he has already incurred as result of having relied on the estopped party's representation or promise. Alternatively, the court may protect the expectation interest by requiring specific performance; thereby satisfying the claimant's expectation and putting him in the position in which he expected to be, having relied on the representation.

The most important factor in determining the most appropriate remedy is the ascertainment of the purpose that equitable estoppel pursues. There is some debate in the case law as well as in the commentary as to what the purpose of equitable estoppel actually is. The rationale is significant because it informs the appropriate remedy. If the purpose of equitable estoppel is to hold parties to the agreements or promises they have made, then the appropriate remedy is likely to be expectation-based. In the case of promissory estoppel, this is likely to be specific performance as in *Wilson Parking*. Conversely, if the purpose is to prevent harm from occurring when an expectation is departed from, then the reliance measure is an adequate way of quantifying the relief.

[3] *Wilson Parking*, above n 1, at [44]. See also *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.

[4] Elizabeth Cooke "Certainty and Discretion in Property, Equity and Unjust enrichment" in Michael Bryan (ed) *Private Law in Practice and in Theory* at 187.

III: Pre-*Wilson Parking* case law

The joint judgment in *Wilson Parking*[5] focuses largely on the purpose of the doctrine of equitable estoppel, with an eye to informing the appropriate remedy. The decision surveyed the more recent case law on the topic from New Zealand and the common law world.

As the judgment in *Wilson Parking* notes, the doctrine equitable estoppel has undergone change[6] and there is variation in the approach that the courts have taken to the appropriate remedies in such cases. Jurisdictions vary slightly in their approach to equitable estoppel, particularly in regard to the rationale of the doctrine in general. I have considered the case law from New Zealand, Australia, and the United Kingdom. It is this law that *Wilson Parking* cites as promoting and supporting a flexible approach in New Zealand.[7]

A *New Zealand Authority*

The case law on equitable estoppel in New Zealand is not extensive. Unlike Australia and England, New Zealand's appellate courts have not have cause to consider the doctrine's rationale and its application in New Zealand comprehensively, specifically with regard to the appropriate remedy.

New Zealand has a unitary approach to estoppel,[8] meaning various species of estoppel are recognised together and treated as a fundamental doctrine. For example, instead of different rules for estoppels that are proprietary or promissory, the doctrine has been unified and the applicable law is consistent.[9] This is an approach that was advocated by Lord Denning MR in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank*[10], in which he proposed a "general principle [of equitable estoppel] shorn of limitations"[11]. It was also suggested by Scarman LJ in *Crabb v Arun District Council*.[12] However, a unitary approach has not yet been adopted in either England or Australia. According to the learned authors of "Equity and Trusts in New Zealand", the modern unified doctrine is referred to just as "equitable estoppel".[13]

The earlier case law, although not pertaining directly to equitable remedy, emphasised unconscionability. The most thorough discussion on estoppel was in *National Westminster*

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[5] *Wilson Parking*, Above, n 1.
[6] At [72].
[7] At [75].
[8] *National Bank of Westminster Ltd v Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA). See also *Gillies v Keogh* [1989] 2 NZLR 327 (CA).
[9] The Hon Justice Miller "Equitable Estoppel" in The Hon Justice Hammond (ed) *The Law of Obligations – Contract in Context* (New Zealand Law Society, Wellington) 51 at 51.
[10] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank* [1982] QB 84, [1981] 1 All ER 923.
[11] At 122.
[12] *Crabb v Arun District Council* [1975] EWCA Civ 7
[13] James Every-Palmer "Equitable Estopppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington 2009) 601 at 612.

Finance v National Bank of New Zealand[14], in which Tipping J described equitable estoppel as a "broad rationale, to stop a party from back on his word … when it would be unconscionable to do so".[15]

It is the case law's approach to relief which is most significant for the purposes of this dissertation. The New Zealand courts have a broad and flexible discretion to grant relief[16]. In *Dale v Trustbank Waikato Ltd*,[17] Penlington J noted that whether the fulfilment of the expectation or restitution of expenditure is most appropriate would depend on the facts of a given case. His Honour cited McGechan J in *Stratulos v Stratulos*:[18]

"It is not effective equity to create a wide jurisdictional basis and then take a narrow view as to the available relief".

In *Stratulos v Stratulos,* the High Court reviewed the Australian cases before stating that it preferred "to avoid cluttering the available remedies by arbitrary rules".[19] This was echoed in the *Wilson Parking* judgment, which restated that quote with approval.[20]

In terms of remedial approaches in New Zealand, the measure of "[relief] necessary … to cure the unconscionable conduct"[21] from *Stratulos* has been used, as well as Scarman LJ's "minimum equity to do justice" from *Crabb v Arun District Council*[22]. In *Dale v Trustbank Waikato Ltd*, Penlington J stated that the purpose of the award is to "cure the underlying unconscionability".[23]

Prior to *Wilson Parking*, James Every-Palmer had stated that support for the reliance approach had been found in a "number of case".[24] However, the joint judgment in *Wilson Parking* actually expressly rejected a reliance-based approach. Instead, the Court propounded proportionality as the key consideration when determining any remedy under equitable estoppel. That proportionality is as between the remedy, the expectation and the detriment,[25] thereby instituting an increasingly more flexible approach in New Zealand. This will be revisited in chapter five of this dissertation.

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[14] *National Westminster Finance*, above n 8.
[15] At 549.
[16] See *Day v Mead* [1987] 2 NZLR 443, *Dowell v Tower Corporation* (Christchurch CP 54/86, unreported judgment, 27 August 1990, Williamson J).
[17] *Dale v Trustbank Waikato Ltd* 18/12/92, Penlington J, HC Hamilton CP 169/90 at p42
[18] *Stratulos v Stratulos* [1988] 2 NZLR 424 (HC) per McGechan J at 438.
[19] At 438
[20] *Wilson Parking*, above n 1, at [120].
[21] *Wilson Parking*, above n 1, at [78] citing *Stratulos*, above n 18, at 438.
[22] *Crabb*, above n 12 at 198.
[23] Above, n 17 at 42.
[24] James Every-Palmer, above n 13, at 638 citing *McDonald v AG* 20/6/9, Holland J, HC Invercargill CP 13/86.
[25] *Wilson Parking*, above n 1 at [78].

B *Australian Authority*

The case of *Commonwealth of Australia v Verwayen*[26] was the Australian High Court's first opportunity since *Waltons Stores (Interstate) v Mayer*[27] to examine the operation of estoppel in detail.

The facts of the case are straightforward. In 1964, the respondent sustained injuries resulting from a warship collision in the course of his employment with the Royal Australian Navy. He subsequently sued the Commonwealth of Australia for damages for negligence in 1984. At that time, the Commonwealth had a policy relating to the collision in question not to contest liability, nor to plead a limitations defence. In 1986 the policy changed and the Commonwealth obtained leave to amend its pleadings to rely both on the Limitation of Actions Act and to state that it owed no duty of care to Verwayen.

On appeal, Verwayen asserted that the Commonwealth had either waived both defences or was estopped from relying on them. The Commonwealth accepted that it had previously agreed not to plead a limitations defence, but that the agreement had not been subject to consideration, and was therefore unenforceable. It asserted that in case of a successful claim of estoppel, the only available remedy would be a detriment-based one. On the facts of *Verwayen*, the detriment-based relief would take the form of a costs order.

By a majority of four to three, the High Court held that the Commonwealth was not entitled to rely on its defence. That majority was split equally as to whether the operating doctrine was estoppel or waiver. The three judges in the minority held that Verwayen had successfully made out an estoppel, but that for the Commonwealth to pay costs would be sufficient. Somewhat problematically, those that gave the minority judgment were therefore actually in the majority relating to estoppel.

In his Honour's obiter dicta, Deane J stated that the purpose of estoppel is to "preclude departure from the assumed state of affairs".[28] In the context of gratuitous promises, that state of affairs is presumably the content of the promise. Under such an approach, the appropriate remedy would be to fulfil the expectation. Deane J advocated this as the prima facie solution, with regard 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 … he would sustain".[29] His Honour was firmly in the minority here; Mason CJ labelled reliance and expectation loss "narrow" and "broad" detriment respectively[30]. His Honour advocated a narrower construal of the detriment, and held with the majority that costs would be sufficient

[26] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.
[27] *Waltons Stores (Interstate) v Mayer* (1988) 164 CLR 387.

[28] At 335.
[29] At 357.
[30] At 547.

remedy against the Commonwealth's change of position.[31] Gaudron J agreed with the majority that the reversal of detriment should be the prima facie remedy, but indicated that justice may justify the enforcement of the promise[32] and flexibility may be necessary.

In terms of the remedy available, six of the judges held that equitable estoppel aims to satisfy the equity and does so by ensuring that a promisee does not suffer detriment as a consequence of the promise made or expectation encouraged[33]. The remedy is the reversal of the detriment. This is a fairly narrow construal (compared to that in *Wilson Parking*) and seems to point to the reliance measure as a prima facie solution.

The judgment does not provide significant insight into the purpose of estoppel remedies. Two options appear:

1. Vindication of the expectation created by the estopped party's conduct
2. Protection of the claimant from the detriment he incurred having relied on the expectation.

In 1999, High Court of Australia case *Giumelli v Giumelli*[34] again addressed the issue of the estoppel doctrine, with a particular focus on the appropriate remedy in light of *Verwayen*.

The judgment reconciled the *Verwayen* decision with the possibility of awarding the expectation measure. The factual matrix was set within a domestic context in which Mr & Mrs Giumelli promised a property to their son in exchange for work on the family owned orchard. Having completed the work, Mr & Mrs Giumelli failed to transfer the property. The court was unanimous, with a joint judgment delivered by Gleeson CJ, McHugh, Gummow and Callinan JJ establishing a prima facie presumption in favour of the expectation measure[35]. Prima facie, a successful establishment of an equitable estoppel requires the estopped party to make good the content of the expectation created or encouraged. This award may be tempered if unfair to the estopped party.

Judgment from the Supreme Court of New South Wales in *Delaforce v Simpson Cook*[36] affirmed that the prima facie entitlement of a claimant is the fulfilment of his expectation; the detriment is not intended to be the price paid for the promise, rather it is a "unilateral element of estoppel"[37]. Equity, held Allsop J, "has always had a place in keeping parties to

[31] At 416.
[32] At 487.
[33] Per Brennan J at 345, McHugh J at 397, Gaudron J in obiter at 387, Toohey J in obiter at 379. Dawson J declined to give a view on the appropriate remedy for a unitary doctrine at 363. He agreed with Mason CJ and Brennan J.
[34] *Giumelli v Giumelli* [1999] HCA 10.
[35] At 125.
[36] *Delaforce v Simpson Cook* [2010] NSWCA 84
[37] At [43] per Handley AJA.

representations and promises"[38]. This was demonstrated once again in the most recent case *Sidhu v Van Dyke*[39] in which the High Court of Australia held the appellant to the promise he had made to the detriment of the respondent.

The Australian approach can be condensed as one which purports to remove the detriment (the object of an estoppel) by fulfilling the expectation. The Court's starting point is the value of the disappointed expectation, but the remedy awarded will not always be one of specific performance.

C *English Authority*

The English approach is different to the Australian one: the English courts have taken a more flexible approach than Australia, which more closely reflects the one adopted in *Wilson Parking*[40]. Both the Privy Council and the Supreme Court of England and Wales (formerly the House of Lords) have ruled on the issue.

Although Scarman LJ described the purpose of equitable estoppel to satisfy "the minimum equity to do justice"[41] in 1975, the English courts have not interpreted this statement as authority that the courts may award reliance-based relief only. The 2001 Court of Appeal judgment in *Gillett v Holt*[42], written by Robert Walker LJ and concurred with by Waller and Beldam LJJ, emphasised that detriment is not a narrow concept (measured by, say, purely financial loss). It highlighted the importance of a broad inquiry considering all the relevant circumstances.[43] In this sense, the approach is more global than Australia's.

The second relevant judgment is the Privy Council's in *Henry v Henry*[44] on appeal from St. Lucia which regularly cited *Jennings v Rice*[45], a decision of the Court of Appeal of England and Wales from 2002. In *Henry v Henry*, the Privy Council held that an inquiry into the detriment suffered (and thereby informing the remedy) should take into account the entire context, including the nature of the parties' conduct and the quality of the assurance[46], affirming *Jennings v Rice*, in which a broad assessment was advocated. To quote Robert Walker LJ, "[detriment] is not a narrow or technical concept"; it need not be quantifiable as long as it is "substantial".[47]

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[38] At [3].
[39] *Sidhu v Van Dyke* 2014 HCA 19.

[40] Above, n 1.
[41] *Crabb v Arun Disrict Council,* above n 12, at 198.
[42] *Gillett v Holt* [2001] Ch 210 (CA).
[43] At 232.
[44] *Henry v Henry* [2010] PC 3.
[45] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.
[46] At [55].
[47] *Gillett v Holt*, above n 42, per Walker LJ at 232.

Jennings v Rice set out four key principles in relation to the remedy. Noting that the court cannot exercise a completely unfettered discretion, the judgment posited proportionality as the key referent. This implicitly recognises the rights of the estopped party in addition to those of the claimant. As in *Wilson Parking*, Sir Jonathan Parker's judgment refers to the elements of estoppel; the quality of the assurance and the extent of detrimental reliance, in combination creating the unconscionability. [48]

The four key principles in *Jennings* (affirmed in *Henry* and cited with approval in *Wilson Parking*[49]) are:[50]

1. The Court cannot exercise completely unfettered discretion[51]
2. Proportionality is essential. This implicitly recognises the rights of the defendant; after all, the essence of an estoppel "is to do what is necessary to avoid an unconscionable result", and a disproportionate award cannot achieve that.[52]
3. Minimum equity to do justice[53]
4. The elements that give rise to estoppel are the key considerations when moulding the relief[54]

The English cases thus far discussed were cited in the *Wilson Parking* judgment. One case which was not, but is relevant, is the 1981 House of Lords decision in *Amalgamated Investment and Property v Texas Commercial International Bank*[55], in which the court stated that it the purpose of a remedy under estoppel is to "give the claimant such remedy as the equity of the case demands".[56] The English concern is with reversing the detriment and "satisfying the equity"[57]. Although a broad investigative approach is emphasised, all the English cases cited satisfied the expectation, in part or fully.[58] The law discussed emphasises the significance of flexibility in any equitable remedy and the fact-specific nature of awards flowing from an estoppel.

In fact, in *Jennings v Rice*, Aldous LJ commented that in English courts, the reliance loss where only be appropriate where "a higher measure would amount to overcompensation"[59]. *Henry v Henry*[60] is notable for its middle ground award, which is something I will return to in Chapter 5b. The case law is concerned with reversing the detriment, but "where there is a mutual

[48] *Henry v Henry*, above n 44 at [40] citing *Jennings v Rice* above n 45.
[49] *Wilson Parking*, above n 1, at [109].
[50] Jennings *where?*
[51] At [43] per Walker LJ.
[52] At [56] per Walker LJ, [38] per Aldous LJ.
[53] At [15] per Aldous LJ
[54] At [44] per Walker LJ.
[55] *Amalgamated Investment*, above n 10, at 122.
[56] At 122.
[57] *Jennings v Rice*, above n 45, at [49].
[58] *Henry v Henry*, above n 44; *Gillett v Holt*, above n 42; *Jennings v Rice*, above n 45.
[59] *Jennings v Rice*, above n 45, at [54].
[60] *Henry v Henry*, above n 44.

understanding in clear terms, the court's natural response is to fulfil the claimant's expectation."[61]

The Court in *Wilson Parking* also omitted reference to *Cobbe v Yeoman's Row Management Ltd*[62]. In that case, equitable estoppel was considered, but the court declined to use it due to the commercial context of the case. Lord Foscote wrote that "an estoppel bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law that stands in the way of some right claimed by the person entitled to the benefit of the estoppel."[63] This was obiter dicta, but is an indication that the purpose of estoppel is to prevent reliance on the right; that is, force the estopped party to waive it. This would suggest that an award measured by a party's expectation interest the preferred approach in the United Kingdom.

[61] *Wilson Parking*, above n 1 at [109] citing *Henry v Henry*, above n 39 at [50].
[62] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55
[63] At [14].

IV: The Decision in *Wilson Parking v Fanshawe 136 Ltd*

A *The Facts*

Mr Haghi's company Viaduct Square owned a car park at 136 Fanshawe Street, Central Auckland. Viaduct Square leased this to Wilson Parking, and the lease contained a right of first refusal in favour of Wilson Parking. Having encountered financial difficulties following the global financial crisis, Mr Haghi's business adviser met with the Wilson Parking and explained that Mr Haghi intended to refinance the property by way of a buy-back agreement. Viaduct Square would sell the property to ASAP/Capital Finance at a price below the market rate, in order to repurchase it at a future date for the same prince. In order to facilitate both the sale and purchase agreements, Wilson was asked for a waiver of its right of first refusal. Wilson did so in relation to the sale to ASAP/Capital. After the sale to ASAP/Capital had settled, Mr Haghi sought the second waiver of Wilson's right of first refusal. Wilson provided a letter to Mr Haghi confirming that it would waive its right if Mr Haghi or a related party were to repurchase the property.

Following the sale of the property, Mr Haghi and his company Fanshawe pursued plans for its extensive redevelopment in reliance on the waiver letter. Mr Haghi planned to build a hotel on the site, as well as apartments and office buildings. The redevelopment would also include a two level underground car park; thereby increasing the potential revenue for Wilson Parking. In the process, Mr Haghi expended both effort and money; he employed various architects, consultants, planners and other consultants, and had secured an agreement with a hotel operator. Significantly, Mr Haghi discussed his actions with Wilson as he took them. This culminated in a letter from Wilson to Mr Haghi, in which Wilson outlined its wish to lease and manage the facility.

Some time later, Capital offered to sell the property to Wilson on the same terms, and at the same price, as the buy-back agreement it had with Fanshawe. Wilson accepted on the basis that although it had waived its right of first refusal when the property was sold to Capital, it had not actually waived its second right of first refusal for the second sale back to Mr Haghi. As the lease Wilson held on the property was still operative, it still had a right of first refusal available to exercise. The difference between the market value of the property and the price under the buyback agreement was accepted to be $3 million[64]. In addition, Mr Haghi had entered into a loan with a non-refundable $500,000 fee, while labouring under the assumption that he was to repurchase the property. The amount expended on services was approximately $40,000.

B *The Decision*

The structure of the judgment is a general overview of the relevant case law, followed by application to the facts. Their Honours concluded that the case law required a "broad consideration of relief

[64] At [132].

necessary to achieve a just and proportionate outcome"[65]. Their Honours also affirmed that the said "broad assessment" includes losses which cannot be measured economically[66]. In *Wilson Parking*, this meant the time and effort that Mr Haghi had expended in reliance on Wilson's waiver letter. The outcome of the case was that the Court of Appeal held the appropriate measure of the damages was the expectation measure. On the facts, this meant specific performance of the buy-back agreement between Capital and Fanshawe.

The judgment approaches as two options on opposite ends of a spectrum; reliance measure on one end and the expectation measure on the other. Based on the facts, the difference was significant even in purely financial terms; the expectation award would allow Mr Haghi approximately $3m more. The relevant expectation was that Wilson Parking would waive its right of first refusal for the second sale under the buy-back arrangement (from the finance company back to a company associated with Mr Haghi). The alternative (reliance award) would only have recompensed Mr Haghi for the money expended in the process of his development up until the point at which Wilson Parking agreed to a sale and purchase with Capital Finance.

Their Honours held that the inquiry is to focus on what is necessary in all circumstances to "address the equity arising from reliance on the relevant assurance, promise or conduct".[67] This affirms the approach taken by Tipping J in *National Westminster Finance*, in which he held that the policy rationale behind estoppel is to prevent a party going back on his word, when to do so would be unconscionable.[68] The purpose of equitable estoppel is to eliminate the unconscionability and "satisfy the equity" which has arisen in the claimant's favour.[69] In this sense, the view taken in *Wilson Parking* is slightly broader than the one previously taken in New Zealand; the award that the court can confer is not limited to the very minimum to avoid the detriment.

The approach adopted by the Court of Appeal in *Wilson Parking* is similar in kind to the English one. Both England and New Zealand have rejected a prima facie presumption in favour of any type of remedial quantifier, and emphasised the flexibility of the equitable jurisdiction. This is summed up in the following quote from the ruling in *Wilson Parking*:

"Our preference is to *avoid cluttering the available remedies by arbitrary rules.*[70]

…

The modern approach to equitable relief places emphasis on ***satisfying the equity*** arising rather than addressing detriment construed in a narrow sense."[71]

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[65] At [117].
[66] At [118].
[67] Joel Maynam "Equitable estoppel and unconscionable conduct in commercial transactions" [2015] NZLJ 48 at 52.
[68] *National Westminster Finance*, above n 8 at 549.
[69] *Wilson Parking*, above n 1 at [73].
[70] At [120].
[71] At [122]

1 *No prima facie presumption*

The judgment in *Wilson Parking* expressly rejects any prima facie presumption in favour of either the reliance or expectation measure[72]. In fact, the court considered the doctrine of equitable estoppel so variable that it declined to attempt "any definitive or exhaustive statement of the principles"[73] because such principles were likely to be "elusive and may not be helpful".[74] The court emphasised the fact-dependent nature of estoppel remedy.[75] To do so would be inconsistent with the flexible approach the judges chose to pursue.

The judgement expressly rejects counsel's suggestion that reliance-based relief is the preferred starting in New Zealand, reiterating that the "modern approach" to relief is the satisfaction of the *equity*, not the detriment.[76] While implicitly acknowledging that satisfaction of the claimant's expectation may be the only way to satisfy the equity, the court clearly does not adopt any express position in favour of any measure of relief. The justification is that focus on the equity is broad and any prima facie presumption in favour of the reliance measure runs the risk of too narrowly construing the harm suffered by the claimant. The court is not concerned by the fact that this may result in the enforcement of non-contractual promises. This is in stark contrast to the English courts, which have been very reluctant to enforce non-contractual agreements, particularly outside family contexts.[77] In *Wilson Parking*, New Zealand takes a slightly direction to the English; one that is less cautious in commercial contexts than other jurisdictions. This is discussed further in chapter 5a of this dissertation.

2 *Elements relevant to relief*

The Court discussed factors which will be relevant to the "broad assessment"[78] taken. These are the same factors which make up the elements of estoppel. That is, the quality and nature of the assurance which originally created the expectation, the nature of detrimental reliance, and the unconscionability of the promisor departing from the assurance he provided.[79]

(a) The quality of the assurance

The more unequivocal and assurance, the more likely the Court will award relief measured by the claimant's expectation[80]. This is because an express, unequivocal representation is more likely to engender an expectation in the claimant. It is clear from the case law that the plaintiff's reliance on the representation must have been reasonable. *Attorney General of Hong Kong v Humphrey's Estate*

[72] At [119].
[73] At [113].
[74] At [113].
[75] At [112].
[76] At [122].
[77] See *Cobbe v Yeoman's Row Management Ltd*, above n 62; *Attorney General of Hong Kong v Humphries Estate (Queen's Gardens) Ltd* [1987] 2 All ER 387.
[78] *Wilson Parking*, above n 1 at [118].
[79] All at [114].
[80] *Wilson Parking*, above n 1 at [115].

(Queen's Gardens)[81] ruled that mere hopes are not enough to create an estoppel, a point reiterated by Lord Gestingthorpe in *Cobbe*[82]. His Honour commented that this is particularly so in cases with a commercial flavour[83], a point which becomes significant later.

(b) The nature of the detrimental reliance

In *Wilson Parking*, the Court held that reliance resulting in greater detriment is more likely to result in an order for specific performance[84]. The Court did not expound on this. For example, it is not clear if a greater measurable loss would justify the expectation award, or just a greater award of costs measured by the reliance loss. It is, however, clear from the rest of the judgment that detrimental reliance which is considered intangible, cannot be measured, or relates to emotional strain is more likely to justify the expectation award. In *Wilson Parking*, the fact that Mr Haghi had expended time and effort in pursuit of developing the complex helped justify an order of specific performance.[85]

(c) Unconscionability

The Court of Appeal stated that while the factual matrix of any equitable estoppel case is highly relevant in determining the remedy, some factors are more important than others. Of the relevant considerations, the degree of unconscionability is key; it "moulds" the remedy.[86] In *Cobbe v Yeoman's Row*, Lord Walker described unconscionability as "unifying and confirming, as it were, the other elements".[87] It is the unconscionability which attracts the equitable jurisdiction, and the judgment makes it clear that the aim "is not to satisfy the claimant's expectation [but to] satisfy the equity" which has arisen[88]. That unconscionability is the keystone of equitable estoppel has been recognised since *Taylors Fashions*[89]and *Gillett v Holt*[90], in which Robert Walker LJ held that "unconscionable conduct permeates all the elements of the doctrine."[91] *Taylors Fashions* defined unconscionability as a party's denial "that …. Knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment"[92]. Every case should be assessed on its facts, as opposed to "inquiring whether the circumstances [of every case] can be fitted within the confines of some preconceived yardstick for every form of unconscionable behaviour".[93]

In *Wilson Parking*, the Court of Appeal agreed with Katz J of the High Court; the waiver was in unequivocal terms, and Wilson's assertion of its right of first refusal was "plainly opportunistic".[94]

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[81] Above, n 77.
[82] Above, n 77 at [66].
[83] At [66].
[84] At [115].
[85] *Wilson Parking,* above n 1 at [132].
[86] At [116] citing *Waltons Stores*, above n 27, at 419 per Brennan J.
[87] *Cobbe* ,above n 77, at [92].
[88] *Wilson Parking*, above n 1, at [116].
[89] *Taylors Fashions v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133.
[90] Above, n 42.
[91] At 225.
[92] At 151 per Oliver J.
[93] *Ramsden v Dyson* [1866] LR 1 HL 129 at 151-152.
[94] At [129].

Wilson knew it had promised to waive its right of first refusal, in contrast to cases such as *Humphrey's Estate*[95], in which the estopped party had not understood itself to be under a legal obligation at any point. In that case, the Privy Council held that the promisor (the Hong Kong Land Company) was not yet past the point of no return and that it was entitled to withdraw from the agreement it had made with the appellant.[96] Consequently, the Court declined to employ equitable estoppel.

3 *When the expectation measure is appropriate*

The court emphasises the need for proportionality in deciding the appropriate measure of relief. It cites *Verwayen*[97] as authority for the significance of proportionality[98]. In *Wilson Parking*, the proportionality required is to be between the expectation, the detriment, and the remedy.[99] This is slightly different to *Verwayen*, in which proportionality was required between the detriment and the remedy.[100] In *Delaforce v Simpson-Cook*[101], Allsop P referred to the appropriate remedy as weighed against the terms of the representation made and the "conformity of good conscience".[102] In that case Allsop P warned against proportionality simply between the remedy and the detriment[103]. This is in contrast to the Privy Council judgment of *Jennings v Rice*[104], in which Aldous LJ gave the leading judgment rejecting the Australian approach and instead recommending "proportionality between the expectation and detriment".[105]

I am inclined to agree with Allsop P; failure to include considerations superfluous to the detriment could result in the use of equity to blindly compensate detriment without reference to any principled doctrine. It may have been simpler to state that proportionality need be between the remedy and the inequity or unconscionability. This would support the Court of Appeal's comment that unconscionability is the element which actually attracts the jurisdiction of equity and "moulds the remedy".[106]

The most conspicuous problem with compensation of the expectation is that it could result in an unjustified windfall to the plaintiff. While a successful claimant may have a the right to have the other party estopped from denying their representation, that claimant may not be entitled to any surplus advantages that are associated with the full promise. The *Wilson Parking* judgment insisted that the proportionality requirement (between the unconscionability and the reward) would alleviate this issue,

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[95] Above, n 77.
[96] At 11.
[97] *Verwayen*, above, n 26.
[98] *Wilson Parking*, above n 1, at [78].
[99] At [78] citing *Stratulos*, above n 18 at 438.
[100] At 413 per Mason J.
[101] *Delaforce*, above n 36.
[102] At [3]
[103] *Wilson Parking*, above n 1, at [101].
[104] *Jennings v Rice*, above n 45.
[105] At [36]
[106] *Wilson Parking*, above n 1, at [116] citing *Waltons Stores*, above n 27 at [419].

if not eradicate it completely.[107] As stated in the judgment, "the task of the court is to do justice".[108] However, is not entirely clear which two points the proportionality is between. Randerson J refers to proportionality as between the expectation and the detriment[109]. This is not exactly the same as the authorities cited; it seems that the proportionality should instead be between the remedy, the detriment, the expectation and the unconscionability. Proportionality between the expectation and the detriment does not (by itself) adequately account for the estopped party's actions or rights.

In summary, a clear assurance is more likely to engender an expectation in the promisee that it will be fulfilled, and also makes it more foreseeable that the promisor would have known this. Similarly, greater detriment resulting from the reliance will be a reason to award the expectation, not just compensate the reliance.[110]

4 *When the expectation measure is not appropriate*

The Court goes on to discuss when the expectation measure will not be used. Presumably, this means the reliance measure will be used instead - although the judgment does not expressly state this anywhere. One reason not to use the expectation measure is if to do so would result in a reward disproportionate to the detriment suffered, and therefore create an unreasonable windfall for the claimant. Given the Court's emphasis on proportionality between the detriment, the unconscionability and the remedy, it is clear that the expectation measure will not be used where to do so would overcompensate the plaintiff.[111] Similarly, it will not be used where the result would be unjust to the estopped party. The Court of Appeal insists that any proportional remedy will successfully avoid the issue of unjustified windfalls.[112]

5 *Factors justifying the expectation measure in Wilson Parking*

The joint judgment lists various justifications as to why the expectation measure was appropriate on the facts of the case. The relevant factors were:[113]

- Mr Haghi's financial losses were substantial;
- Anything less than the expectation measure could not recompense for Mr Haghi's time, effort or disappointed expectation;
- The $3m difference between the price in the buy-back arrangement and the market value of the property was not a windfall to Mr Haghi. It reflected the equity in the property he had owned prior to the agreement;
- Any less than the expectation would an unjust windfall to Wilson Parking; allowing them to reap the economic benefit for behaviour that had already been recognised as unconscionable. Wilson Parking

[107] *Wilson Parking*, above n 1 at [122].
[108] At [104].
[109] At [118].
[110] At [115].
[111] At [118].
[112] At [122].
[113] At [114].

knew that it had provided its original waiver specifically to facilitate the buyback, and had actively encouraged the entire arrangement for its own benefit;

- Those benefits which stood to accrue to Wilson would remain anyway. The development was to result in notably increased parking revenue. The development project was to both parties' mutual advantage and Wilson Parking would retain its right of first refusal for all future sales. For Wilson to be held to its agreement was not unfair.

Wilson Parking makes relatively clear the perceived purpose of estoppel in New Zealand courts, and takes an approach similar to the one in English cases *Henry v Henry*[114] and *Jennings v Rice*[115]. The Court of Appeal's preferred approach is to satisfy the equity, as opposed to construing the detriment in any sense broad or narrow (as is often the terminology in the Australian cases)[116]. The focus is on a just outcome, not on the detriment. This is closely related to the proportionality requirement. That is, proportionality between the remedy, the expectation and the detriment. It could be argued that any remedy proportionate to both the expectation and the detriment is, in essence, proportionate to the unconscionability. This may be a simper conception.

[114] *Henry v Henry*, above n 44.
[115] *Jennings v Rice*, above n 45.
[116] *Wilson Parking*, above n 1 at [122].

V: Analysis of *Wilson Parking*

A *Policy Reasons to Prefer one Approach to Relief*

In a contractual breach context, there may be no particular reliance loss incurred by the promisee. Alternatively, the reliance loss may be indistinguishable from the original expectation. However, it is clear from the case law that there is generally an option in relation to which remedy to award. It is also apparent that there are situations in which it is simply not feasible to fulfil a claimant's expectation, or a case in which the detriment a claimant accrued only in reliance is difficult to identify.

In the cases surveyed thus far, awards fashioned on the reliance interest have generally resulted from a narrow construal of detriment with emphasis on the financial losses incurred. Conversely, the expectation interest results in a court order for specific performance, which is naturally considered greater relief than offered by the reliance measure.

Andrew Robertson has stated the issue as such: [117]

"The essential question … is whether estoppels by conduct are essentially concerned with the enforcement of certain types of promises, with preventing a certain type of unconscionable conduct, or with providing protection against harm resulting from reliance on the conduct of others, when those others depart from assumptions induced by their conduct".

1 *The minimum equity*

It is arguable that the reliance loss, considered a narrow construal of detriment, is more appropriate if the purpose of an estoppel is to satisfy the "minimum equity to do justice", a phrase which first appeared in the judgment of Lord Scarman in *Crabb v Arun District Council*.[118] In that decision, Scarman LJ said that in the absence of an enforceable contract, the court need only construe the detriment narrowly. While the claimant was to be awarded that "minimum equity", he actually got more than his expectation; because the respondent was estopped from denying his access right, he was not required to pay for that access right, and his expectation was met.[119] Cooke suggests that any references to Scarman LJ's judgment in support of the reliance loss theory are out of context.[120] This is accurate. Subsequently decisions have not interpreted Scarman LJ's words as authority for the premise that the English courts are to award reliance-based relief only.[121]

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[117] Andrew Robertson "Reliance and Expectation in Estoppel Remedies" (1998) 18 Legal Studies 360 at 362.
[118] *Crabb*, above, n 12 at 198.
[119] At 873.
[120] Elizabeth Cooke "Estoppel and the Protection of Expectations" (1997) 17 Legal Studies 258 at 266.
[121] *Baker v Baker* (1993) 25 HLR 408 at 412 per Dillon LJ, 415 per Beldam LJ and 418 per Roch LJ.

Perhaps a more accurate interpretation of Lord Scarman's "minimum" standard would be to say that the equity need be satisfied, but that courts should not go so far as to overcompensate the plaintiff at the expense of the estopped party.

2 *In favour of the expectation measure*

The general argument in favour of the expectation measure is that it better addresses the unconscionability, as well as acting prophylactically to deter future parties from acting badly. In addition, it actually fully prevents the unjust "departure from the assumed state of affairs" referred to by Deane J in *Verwayen*.[122] The only way to prevent the departure from the expectation is to satisfy the expectation. Of course it is possible to compensate the detriment accrued in reliance – but it does not get to the core in the way that the expectation does. This comes back to the prophylactic function of equity: if the concern is good conscience, it can be argued that equity need provide the incentive to behave morally. While a moral argument may not be appropriate in contract law or the private law generally, it is easily reconciled with the equitable domain.

3 *The commercial context*

Certainty is a cornerstone of commercial law. In 1774, Lord Mansfield ruled in *Vallejo v Wheeler*[123] that "in all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon".[124] Lord Bingham has recently affirmed this, writing in his very first paragraph in *Golden Straight Corporation v Nippon YKK ("The Golden Victory")*[125] that "the quality of certainty [is] a traditional strength and major selling point of English commercial law"[126]. It is clear then, that English law prefers to give effect to the reasonable expectations of those engaging in business negotiations, transactions and agreements. Law that is certain is easier to enforce, and more predictably enforced. Predictable commercial law facilitates the economic process, because parties know where they stand are more likely to engage in commerce generally.[127] Parties should not be unsure as to which voluntary obligations will be enforced and which will not. The fact that *Wilson Parking* occurred in a commercial context is therefore significant.

In his judgment in *Cobbe v Yeoman's Row Management*, Lord Walker of Gestingthorpe declined to employ the doctrine of equitable estoppel on the basis that to do so would "introduce considerable uncertainty into commercial negotiations".[128] Their Honours held that

[122] *Verwayen*, above n 26 at 443.
[123] *Vallejo v Wheeler* (1774) 1 Cowp 143.
[124] At [153].
[125] *Golden Straight Corporation v Nippon YKK ("The Golden Victory")* [2007] UKHL 12.
[126] At [1].
[127] See generally Baron Mance "Should the law be certain?" (Oxford Shrieval Lecture 2011, University Church of St Mary The Virgin, Oxford, 11 October 2011)
[128] *Cobbe*, see above n 62 per at [85].

if the appellant wished to rely on the agreement, he should have contracted for it. This is pertinent in commercial cases, in which mere hopes will not be enforced or rewarded.[129]

The facts of *Cobbe v Yeoman's Row Management* are as follows. Yeoman's Row was owned by Mr and Mrs Lisle Mainwaring, who put the section into a company. Mr Cobbe, a property developer, made an agreement with the Lisle Mainwarings in relation to that same section. The negotiations, subject to contract, were that Cobbbe could apply for planning permission, after which he would pay the Lisle Mainwarings £12m. The row would be demolished, a new section built, and upon the sale of the new section any profit over £24m would be shred. No formal contract was ever drawn up, and Cobbe spend three months working on the project. He obtained planning permission, after which the Lisle Mainwarings attempted to raise the sale price to £20m, with any profit over £40m to be shared. One argument advanced by Mr Cobbe's counsel was that the Lisle Mainwarings should be estopped from denying Cobbe's proprietary interest.

These facts are similar, although not identical, to those of *Chirnside v Fay*[130], but the New Zealand Court of Appeal did not consider *Cobbe* in that judgment, preferring to approach the property development as a joint venture instead.

It is true that *Cobbe* can be distinguished from *Wilson Parking.* Mr Cobbe did choose not to draw up a formal contract with the Lisle Mainwarings prior to the approval of planning permission; in contrast, Mr Haghi thought he *had* already contracted and that Wilson had already waived its right. Wilson acquiesced in this, as evidenced by its involvement in the development plans. In addition, in *Cobbe*, Mr Cobbe faced no impediment to formalising the arrangement and consciously ran a commercial risk, which was not the same as Mr Haghi's. In *Cobbe* perhaps Mr Cobbe wanted to leave himself the option of leaving the arrangement entirely, or negotiating further if the market changed. In *Wilson Parking*, the risk Mr Haghi chose to run was in relation to the buy-back agreement with Capital Finance, not the waiver from Wilson.

However, the two cases are still comparable. The fact remains that in *Cobbe*, as in *Wilson Parking*, both parties were commercially experienced and operating at arm's length from one another. They both had access to legal advice. Mr Cobbe was a very experienced businessman, which was a material consideration in the decision to decline the estoppel. Gestingthorpe LJ warned against uncertainty in commercial transaction, citing it as a "general principle" that the courts be slow to introduce equitable estoppel to commercial transactions.[131] This is in contrast to less commercial or familial cases in which equitable estoppel has been more readily employed by English courts.[132]

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[129] *Cobbe*, see above n 62, at [66].
[130] *Chirnside v Fay* [2006] NZSC 68.
[131] *Cobbe*, above n 62 at [81].
[132] See *Thorner v Major* [2009] UKHL 18 at [93-94].

The issue of certainty in cases such as *Wilson Parking* and *Cobbe* pertains largely to the concern that expectation-based awards under equitable estoppel serve to enforce non-contractual promises in a commercial context (i.e. those agreements which contract law will not enforce). In *Wilson Parking*, the appellant argued that the effect of an order for specific performance would be to unjustly require it to fulfil a non-contractual promise. The Court of Appeal dismissed this as a concern in just one sentence *Wilson Parking*, stating that "there is no reason in principle not to apply the notion of expectation-based relief for estoppel in commercial cases where appropriate"[133]. The Court did not articulate further on the issue, except later in the judgment to state that the "distinction between contractual and equitable remedies is well understood"[134]. Despite this, in the interests of certainty, the law would undoubtedly be more predictable if the Court of Appeal had adopted a prima facie presumption in favour of either reliance-based or expectation-based relief. It would be clearer still if commercial partners could rely on the fact that, as in England, equity was likely to be invoked at all.

Fanshawe 136 did not have any action under the common law. In the law of contract, Wilson Parking still had its right of first refusal and was entitled to use it. Equity acts to supplement the common law, not to intervene it.[135] Accordingly, one argument in favour of the reliance measure, or at least a narrower (detriment focused) approach is that parties would not be forced to carry out obligations they had not contracted for. Contract law has its own stringent requirements; if a party is not entitled to a remedy under contract law, it is not clear why it should be entitled to a potentially greater remedy in equity. Furthermore, while good conscience is the domain of equity, it is not necessarily desirable that good conscience play a huge role in commerce. Contract law does contemplate good faith, but good conscience is arguably more subjective than good faith. Where equity interjects into contract law, it is arguably desirable that its reach is limited. As Holland J warned in *McDonald v Attorney General*,[136] "care must be taken not to extend [estoppel] further into a weapon of the nature of an atomic bomb that will destroy the existing framework of legal principle by way of provision for compensation in the fields of both contract and tort".[137]

Similarly, Lord Walker of Gestingthorpe has said in relation commercially experienced litigants that "[equity] is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side."[138] In *Cobbe* if Mr Cobbe had wanted to rely on the Lisle Mainwarings' agreement, he should have contracted for it. As held by Arden LJ in *Crossco No.4 Unlimited & Ors v Jolan & Ors Ltd*[139], if the law in general were to "provide scope for claims in respect of unsuccessful negotiation … [that law

[133] *Wilson Parking*, above n 1 at [112].
[134] At [112].
[135] See *Giumelli,* above n 34 at [34-35].
[136] *McDonald v Attorney General*, HC Invercargill, 20 June 1991.
[137] At 34.
[138] *Cobbe*, above n 62, at [46].
[139] *Crossco No. 4 Unlimited & Ors v Jolan & Ors Ltd* [2011] EWCA Civ 1619.

would] be likely to inhibit the efficient pursuit of commercial negotiations, which is a necessary part of entrepreneurial activity".[140]

It would be possible to limit equity's nuclear potential[141] by adopting a prima facie presumption in favour of the reliance measure, or limiting the use of the expectation measure to cases in which the reliance loss is difficult to identify or quantify. These approaches were what the authors of "Equity and Trusts in New Zealand"[142] would probably have predicted for the decision in *Wilson Parking*. James Every-Palmer's chapter on equitable estoppel preceded the *Wilson Parking* judgment, and offered various reasons why the preferred starting point for equitable relief should be reliance-based. The primary reason offered for reliance-based relief was that it is an approach more consistent with the doctrine of estoppel generally, which requires proof of detriment and some evidence that the estopped party could have prevented that detriment by giving the claimant sufficient notice. Every-Palmer continued: to "elevate non-contractual promises to the level of contractual promises" poses a threat to consideration, and the expectation benefit (often greater than the value of the detrimental reliance) provides the claimant with a windfall not justified by law. [143] All reasons were expressly rejected by the Court of Appeal in *Wilson Parking*.[144]

4 *The role of private law*

A second concern relating to the invocation of equity in commercial contract-like contexts is that equity has the capability of conferring greater awards than contract law, even though the agreements made potentially lack the intention to enter legal relations. The issue comes down to how far equity should go in enforcing agreements or obligations that contract law will not. It is clear that the aim of contract law is to put parties in the position they would be had the contract been performed, which gives the court guidance in terms of how to award relief. However, in cases of equitable estoppel, contract measurements are not the guiding principle. This is despite the fact that the law in which equitable estoppel intervenes is contractual.

Commerce requires certainty, for the reasons previously noted. In *Wilson Parking*, Wilson did actually have the right of first refusal, and was not contractually obligated to waive it. Contract law has its own set of criteria; offer, acceptance, consideration, and intention to enter legal relations. The purpose of these is to ensure that those entering contracts are doing so consensually and voluntarily; and it is then fair for the court to hold them to the obligations undertaken. The sanctity of contract dictates that one ought honour the (contractual) promises one enters into. In *Wilson Parking*, Wilson's promise to waive its right of first refusal was not actually contractual.

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[140] At [133].
[141] See *McDonald v Attorney General*, above n 136 at 34.
[142] James Every-Palmer, above n 13.
[143] At 638.
[144] At [121-122].

The concern is that equitable estoppel does not necessarily have the safeguards of contract law; only the threshold of unconscionability. It is true that expectation-based awards do preserve parties' performance interest and, in keeping with the sanctity of contract, ensures that parties are kept to obligations they have voluntarily assumed. However, the obligations enforced in an equitable estoppel are not contractual; awarding the expectation interest therefore risks enforcing obligations which do not meet the consensual and voluntary contract criteria. Holding parties to fulfil non-contractual promises seems to invoke an element of morality into an area of law which is generally not overly concerned with moral obligations. As noted by Alastair Iles, "the notion of unconscionable conduct is arguably incompatible with the self-interested actions of business people."[145] It is by conscience's very nature that it is subjective and vague. This was discussed by Lord Gestingthorpe in his judgment in *Cobbe v Yeoman's Row*: he referred to a "general principle" that the courts should be "very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts …That applies to commercial negotiations whether they are subject to contract or not".[146] His Honour continued: "[equity] is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side."[147]

5 *Jurisprudential reasons to prefer one approach to relief*

Ernest Weinrib's "The Idea of Private Law" discusses the justifications for the interplay between morality and the private law extensively. He refers to the proximity of legal parties to each other as a bipolar relationship, in the sense that a correlation exists between them. Weinrib propounds the theory that the role of private law is corrective justice; that is, it aims to return what has been lost. Corrective justice, an Aristotelian conception, is characterised by the maintenance and restoration of the notional equality with which the parties entered the transaction. The only considerations that conform to corrective justice are those that apply correlatively to both parties.

This is in contrast to distributive justice which deals with that which is divisible (e.g. goods) and divides a benefit in accordance with some criterion comparing the relative merits of the participants. According to Weinrib, private law is the doing of corrective justice. His concern is that the courts too readily involve morality when deciding private disputes. If "the sole purpose of private law is to *be* private law"[148], then the courts must not allow distributive justice to seep in; thereby making it public law. Weinrib uses this argument as a philosophical argument why private law liability should be strict, and why punitive damages should never be awarded under tort or contract law. He advises that the court should be cautious in the remedies they are

[145] Andrew Iles "Case Notes: *The Commonwealth v Verwayen*" (1991) 18 Melbourne University Law Review 186 at 198.
[146] *Cobbe*, above n 62 at [81].
[147] At [46].
[148] Ernest Weinrib *The Idea of Private Law* (Harvard University Press, 1995) at 8. See also Ernest Weinrib "The Insurance Justification and Private Law" (1985) 14 Journal of Legal Studies 681 at 686.

willing to award; and that the court has no justifiable role to play in the punishment of private litigants.

In this sense, Weinrib's theory of private law somewhat conflicts with equity, the realm of which is unconscionability. Kenneth Simons[149] and Jules Coleman[150] have both suggested a "mixed conception"[151] of law, in which morality is not treated as inadmissible. As Simons points out, "moral rights and duties are often the very basis of legal rights and duties"[152].

Oliver Wendell Holmes Jr. advocated compensation of the reliance interest only. It was in his seminal work *The Path of the Law*[153] that Holmes stated that the obligation assumed under a contract is to "pay damages if you do not keep [that contract] – and nothing else."[154] Fuller and Perdue's *The Reliance Interest in Contract Damages*[155] again attempted to place the focus of the law onto the reliance interest, instead of the performance interest. Holmes, Fuller and Perdue all reject the notion that any moral imperative to keep promises exists[156]. On such a view, a contract is without moral content and the relief available for a breach of it should be only compensatory. Daniel Friedman has vigorously disagreed with this.[157] Where Fuller and Perdue refer to a deprived expectancy as part of an "unstated *ought*"[158], Friedman refers to it as a lost "right"[159] worthy of full compensation by way of specific performance.

It is true that Holmes, Fuller and Perdue's jurisprudence relates to the law of contract, not the domain of equity. However, both are relevant to the context of cases such as *Wilson Parking*, in which the parties' relationship is principally contractual. The Courts' concern about the invocation of equity pertains almost solely to the consequences for the certainty of contract. To prefer the reliance interest is one way to curtail the disruptive effect of equity in the realm of contract.

Furthermore, equity's purpose is only to *supplement* the common law. This is another reason not to award the expectation measure where to do so would award more than the claimant has lost. In *Wilson Parking*, it is a matter of interpretation whether what Mr Haghi lost was the amount of money spent on contractors and on the non-refundable loan fee, or whether what he lost was the full difference between the market value and the agreed buy-back price. The Court

[149] Kenneth Simons "Justification in Private Law" (1996) 81 Cornell Law Review 698 .
[150] Jules L. Coleman "The Mixed Conception of Corrective Justice" (1992) 77 Iowa Law Review 429.
[151] Jules L. Coleman, above n 150.
[152] Kenneth Simons, above n 149, at 741.
[153] Oliver Wendell Holmes Jr. "The Path of the Law" (1897) 10 Harvard Law Review 457.
[154] At 467.
[155] L. L. Fuller and William R. Perdue Jr. "The Reliance Interest in Contract Damages: 1" (1936) 46 The Yale Law Journal 52.
[156] At 53.
[157] Daniel Friedman "The Performance Interest in Contract Damages" (1995) 111 The Law Quarterly Review 628 at 630.
[158] Above, n 128 at 53.
[159] Above, n 130 at 634.

of Appeal held that the $3m difference reflected the equity Mr Haghi already held in the property,[160] but it could equally have decided that it reflected a windfall to him.

A Weinribian[161] conception of corrective justice still permits the award of the expectation measure in *Wilson Parking*; the benefit which Wilson stood to gain (the property at a discounted price) exactly corresponded to the loss that Mr Haghi was to suffer. However, this is specific to the facts of *Wilson Parking*. In other cases, an estoppel could be awarded where the claimant had suffered detrimental reliance, but had not lost anything more than the fulfilment of the promise. In such cases, it would be more appropriate to award a reliance-based award.

6 *Inherent limits on the equitable jurisdiction*

Clearly reservations exist in relation to introducing morality (and estoppel) reservations to the commercial world. However, equity does have its own limits and is regularly employed in relation to other areas of commercial law already. As Neuberger LJ has stated, "equity is not a sort of moral US fifth cavalry riding to the rescue every time a claimant is left worse off than he anticipated".[162]For example, the doctrine of rectification is understood to be a reserve measure; the courts do not use it at every available opportunity. Similarly, the court's power to refuse to apply penalty clauses is recognised as supplementary; not a mainstay of contract law. In *Wilson Parking*, their Honours were emphatic that the decision did not interfere with commercial certainty, commenting that "the distinction between contractual and equitable remedies is well understood".[163] Dawson J commented in *Verwayen* that "the discretionary nature of the relief in equity marks a further reason why the fear of the common law that promissory estoppel would undermine [it] is unwarranted"[164].

The jurisdiction of equity is good conscience. It therefore need not be constrained by the same limits as the common law. "Unconscionability" is a high threshold. It refers not simply to mercenary business activity, but to something much more as is apparent from the case law. As stated in "Equity Doctrines and Remedies" and cited in the Court of Appeal judgment, "equity is concerned with good conscience, not a sentimental urge to render sinners virtuous".[165] Mason CJ commented in *Verwayen* that "the breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss… Something more than a broken promise is required."[166] Mason CJ advised caution; that "it is not correct to make an assessment of the

[160] *Wilson Parking*, above n 1 at [132].
[161] Weinrib, above n 148.
[162] Lord Neuberger of Abbotsbury "The Stuffing of Minerva's owl? Taxonomy and Taxidermy in Equity" 68 The Cambridge Law Journal 537 at 540.
[163] *Wilson Parking*, above n 1 at [122].
[164] *Verwayen*, above n 26 per Deane J at 394.
[165] *Wilson Parking*, above n 1 at [75] citing 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].
[166] *Verwayen*, above n 26 at 416.

moral rectitude of the actions of the parties in a manner divorced from a consideration of the legal consequences and attributes of those actions"[167]. In *Ramsden v Dyson*[168], Kingsdown LJ discussed this specifically in relation to the encouragement or creation of expectations by the promisor in the promisee.[169] The fact that the standard for the invocation of equity is that no person could have acted in that manner in good conscience makes it unlikely that the use of expectation-based relief would do much to unsettle commercial certainty. Unconscionable behaviour ought be sufficiently rare.

Furthermore, unconscionable behaviour by one party is tempered by clean hands jurisdiction. That "he who comes to equity must come with clean hands"[170] is trite, but this caveat on equity's jurisdiction potentially serves to alleviate concerns relating to the introduction of equitable estoppel into commercial cases.

B. *Alternatives to the Approach Adopted by the Court of Appeal in Wilson Parking*

In summary, the Court of Appeal did not adopt a New Zealand "approach" as such. The Court surveyed the England and Wales and Australian case law, before deciding not to adopt a prima facie presumption. The court did not preclude the invocation of equitable estoppel in a commercial context. Instead, their Honours continually emphasised the flexibility of equity – refusing to limit its employment, regardless of context.

One approach not mentioned in the judgement was the possibility of middle ground awards. If equity is so flexible, it need not be constrained by the typical contract law measures of reliance and expectation[171]. Perhaps the court could have entertained a middle ground award. It is true that the court did not expressly rule out the possibility of alternative relief, but the judgment contains no discussion on the topic. The judgment is set out as deciding between two remedies; reliance-based relief or expectation-based relief. In *Wilson Parking*, the difference in financial terms between the reliance measure and the expectation measure was $3m, but it is entirely possible that in other commercial cases it could be much, much greater. In such cases, perhaps it would make sense for the court to award the reliance measure, plus a nominal sum for additional time or effort included. Similarly, where to enforce the expectation measure would disadvantage third parties.

Second, if the New Zealand approach is not to limit the use of equitable estoppel in commercial cases, the law would undoubtedly be more certain and more predictable if the Court of Appeal were to have adopted a prima facie presumption in favour of either reliance based or expectation based relief. As is clear from the case law, the availability of equitable estoppel can

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[167] At 416
[168] *Ramsden*, above n 93.
[169] At 170.
[170] See generally *Johnson v Yellow Cab Transit Co* 321 US 383.
[171] William P. Rogerson "Efficient Reliance and Damage Measures for Breach of Contract" (1984) 15 The RAND Journal of Economics 39.

be crucial to a just decision, particularly in familial or domestic environments as can be seen from *Thorner v Major*[172] and *Henry v Henry*[173]. Not only was the employment of equitable estoppel crucial in these cases, but its application is clearly defined, well understood, and does not conflict with the law of contract.

In my opinion it would be preferable for the court to adopt a two-strand approach; the first for commercial cases and the second for all others. For those cases in which the litigants are experienced commercial players, the court should adopt a presumptive approach in favour of reliance-based relief. According to commentators such as Elizabeth Cooke, the link between the reliance loss theory and the unitary approach to estoppel (as adopted in New Zealand[174]) is thus:

> "Estoppel is a broad doctrine involving the enforcement of statements of intention. It is underpinned by unconscionability which is a flexible principle, and may require the enforcement of promises. If so, equitable estoppel runs the risk of conflicting with the law of contract".[175]

It is cases such as *Wilson Parking*, which focus on the intersection between contract law and equity, which add weight to the proposition a reliance-based presumption ought be adopted. A presumptive approach in favour of the reliance measure does not rule out any type of relief, but recognises the fact that in a commercial context it is contractual obligations which take precedence unless the circumstances are exceptional. If a party can show on the balance of probabilities that it would be unjust to receive anything less than an expectation-based award, the court could provide that relief (for example, by an order of specific performance). To quote *Jennings v Rice*, "where there is a mutual understanding in reasonably clear terms, the court's natural response is to fulfil the claimant's expectation".[176] A presumptive approach still permits the expectation award where both parties thought they were beyond the point of no return, and allows a contractual type interpretation as taken by Deane J in *Verwayen*.[177] This would maintain equity's flexible jurisdiction which the court so heavily emphasised in *Wilson Parking*,[178] yet it would also lend a fetter to that discretion. The fact that the court's jurisdiction must remain principled was also stated by Randerson J,[179] but the outcome did not particularly demonstrate this. To adopt a presumption in favour of reliance-based relief would alleviate equity's potential to disrupt commercial certainty, while ensuring it continues to mitigate the rigor of the common law by tempering unconscionability.

The second strand of cases are those that can be considered non-commercial. That is, those involving family members, friends or individuals not engaged in business together. For such

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[172] *Thorner v Major*, above n 132.
[173] *Henry*, above n 44.
[174] *National Bank of Westminster*, above n 8.
[175] Elizabeth Cooke, above n 120, at 264.
[176] *Wilson Parking*, above n 1, at [109] citing *Jennings v Rice*, above n 45 at [50].
[177] *Verwayen*, above n 26, at 335.
[178] *Wilson Parking*, above n 1, at [75], [119].
[179] At [75].

cases, the court could have an entirely open or non-presumptive approach, akin to the one in *Wilson Parking*.

A distinction between commercial and non-commercial cases already exists in some areas of contract law. One example is the area of undue influence. In *Royal Bank of Scotland v Etridge (No 2)*[180], Lord Justice Nicholls ruled that a bank is put on notice in every case where the relationship between the surety and the debtor is noncommercial. In *Stack v Dowden*[181], ruling in relation to property, Baroness Hale emphasised the significant difference which can exist between commercial and noncommercial contexts, ultimately commenting that "an outcome which might seem just in a purely commercial transaction may appear highly unjust [in a non-commercial context]". [182],

While none of the English judgments on equitable estoppel expressly create a distinction between commercial and noncommercial cases, *Cobbe*[183] can be construed as applying restrictively only to commercial cases. In *Thorner v Major*,[184] the House of Lords made it clear that proprietary estoppel would continue to play an important role in English law. Neuberger LJ stated that *Cobbe* did not affect "any aspect of the reasoning or decision of the Court of Appeal in *Gillett"*,[185] and it is evident that the majority of their Lordships wished that estoppel remain flexible, not curtailed by *Cobbe*. Instead of overruling *Cobbe*, the Court distinguished it on the basis that the facts in *Thorner* were non-commercial,[186] implying that this sort of approach already exists in English law.

Lord Neuberger of Abbotsbury gave judgment in *Thorner v Major* and has spoken on the issue extra-judicially. His Honour agreed that in a commercial context, the fact that parties do not have a contract to rely on usually results from their having taken a considered risk. Commercial parties operate at arm's length and have access to legal advice, but may have decided that it was simply not to their advantage to finalise a contract. This starkly contrasts with the facts of most familial cases, such as *Thorner v Major*. In that case, "formal contractual rights and obligations were simply not the stuff of the [parties'] relationship"[187]. In a familial context, there may be some social or emotional impediment to engaging lawyers, and the use of equitable estoppel may be the only way to provide a just result.

It is evident from the case law that the background against which the facts of a case sit hugely inform the appropriate approach from the Court. In addition, the issue of certainty does not arise in non-commercial cases. A two-strand approach distinguishing between cases that are

[180] *Royal Bank of Scotland v ETridge (No 2)* [2001] UKHL 44.
[181] *Stack v Dowden* [2007] UKHL 17.
[182] at [42].
[183] Above n 62.
[184] Above, n 132.
[185] At [100].
[186] *Cobbe*, above n 62 at [96].
[187] Lord Neuberger, above n 162 at 542.

commercial and those that are not could work to resolve the tension between equitable estoppel and the law of contract.

VI: Further Comment on the Case

Finally, some further comments on the case of *Wilson Parking v 136 Fanshawe Ltd*[188]. The quote which best sums up the approach of the Court of Appeal is this: [189]

"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."

Those principles are the elements of equitable estoppel:[190]

1. The clarity of the assurance
2. The level of detriment suffered in reliance upon the assurance
3. The unconscionability of the promisee reneging on his word

Greater clarity, greater detriment, and greater unconscionability are more likely to give rise to relief measured by the expectation. The Court of Appeal states the obvious. The more evident it is that equitable estoppel should be employed, the more likely a suffering party is to be awarded a greater remedy. In terms of fashioning positive advice for judges making decisions in the lower courts, their Honours have not provided much guidance. In fact, their Honours did not answer the question for any case other than one in front of them. Specifically, the Court did not make it clear whether the law or estoppel exists to remedy reliance loss, or protect and grant the expectation of a claimant. In 1983 Burrows wrote that "this is a question that the courts must decide once and for all, and … they must not shirk from providing an answer by pretending that that answer will vary according to the facts of each particular case".[191] This is exactly what the joint judgment in the Court of Appeal serves to do. It resolves the dispute between Mr Haghi of Fanshawe 136 and Wilson Parking Ltd, but (considering the judgment comes from an appellate court) it does not decide the status of the law in New Zealand, other than to say that it is flexible. In this sense, the Court of Appeal shunned its responsibility. While it did elucidate that no prima facie presumption exists in favour of either expectation-based or reliance-based awards, by choosing a middling path the Court did not really clarify the law in New Zealand at all. Cases of equitable estoppel, or equity generally, will always be fact specific. This is inevitable given the good conscience jurisdiction of equity.

Joel Manyam appears to agree.[192] He commented that the only significance of *Wilson Parking* is that it "serves as recognition that estoppel is applicable in respect of what essentially is a

[188] *Wilson Parking,* above n 1.
[189] At [120] (italics added).
[190] At [114].
[191] A Burrows 'Contract, Tort and Restitution - A Satisfactory Division or Not' (1983) 99 Law Quarterly Review 217.
[192] Above, n 67.

commercial transaction"[193]. This is "despite reservations … recently expressed in the House of Lords about the applicability of equitable principle"[194] in the same contexts.

Lastly, the judgment is at pains to point out that the preferred approach is flexible yet principled; the discretion is wide, but it is also fettered.[195] It is clear that some restraint must be exercised on the part of the courts. Equity must not be permitted to become an "atomic bomb" capable of destroying everything in its path, to use Holland J's metaphor.[196] However, the Court did not provide guiding principles other than those that are already the elements of estoppel. The judgment in *Wilson Parking* advocates an approach so flexible that it cannot set out the law going forth, nor does it offer any exhaustive or definitive statement to guide High Court judges ruling in future cases.

Wilson Parking demonstrates that in New Zealand, the court's aim is to satisfy the equity, gauged and tempered by the degree of unconscionability. Notably, here is no requirement that any equity be satisfied minimally. Other than this, the judgment may not assist judges making decisions in future. It seems that the significance of *Wilson Parking* will be determined by future cases. It remains to be seen whether subsequent judges cite *Wilson* as creating a precedent, or interpret it as relating only to the specific facts in which it occurred.

[193] At 51.
[194] At 51.
[195] *Wilson Parking*, above n 1, at [75-76], [119], [124].
[196] *McDonald*, above n 136 at 34.

VII: Conclusion

To conclude, on the specific facts of *Wilson Parking*, justice was achieved with the use of equitable estoppel. The correct choice between the reliance and expectation measure was made for several reasons. The most material factor was that Wilson had actually provided a waiver letter, and that the $3m difference between the reliance and expectation measures was interpreted as equity that Mr Haghi already owned in the car park complex. Possibly, the latter alone would be enough to displace a presumption in favour of the reliance measure, were the Court were to have adopted a presumptive approach that distinguished between commercial and non-commercial cases. This is in contrast to cases such as *Humphrey's Estate*[197], in which the estopped party had not understood itself to be under a legal obligation at any point. The evidence in *Wilson Parking* suggested that Wilson knew it would be difficult to enforce its right of first refusal given that it had provided a waiver letter.

The facts did justify specific performance, and anything less would not have adequately compensated Mr Haghi; the use of the reliance measure would have allowed Wilson to capitalise hugely from its unconscionable behaviour. Significantly, the expectation measure still allowed Wilson to receive financial benefits from the contractual agreement, and with an increase in revenue.

Problematically, it is foreseeable that the judgment in *Wilson Parking* could be interpreted as applying only to the facts to which it relates. Perhaps the facts of the case were not sufficiently difficult to force the Court to expel more guidance for High Court judges faced with similar cases in future. For now, the New Zealand approach is almost identical to the English one expounded in *Henry v Henry* and *Jennings v Rice*; the focus is on satisfying the equity and flexibility is key. Perhaps the Court of Appeal may have been more cautious to employ equitable estoppel in a commercial context had it considered the more recent English cases; namely *Cobbe* and *Thorner v Major*.

[197] Above, n 77.

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