

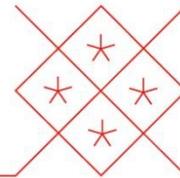
# Estoppel in New Zealand: Where We're At

April 2020

ADLS CPD



# Presenters



**Greg Blanchard QC**

**Barrister**

Shortland Chambers



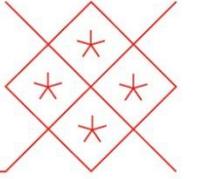
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**Senior Lecturer**

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University of Auckland

# Introduction – Liability

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NZ courts have said there is an overarching law of estoppel

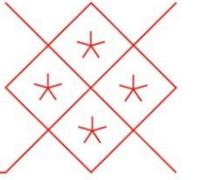
Elements to establish estoppel in NZ are:

- the creation or encouragement of a belief or expectation
- reliance on that belief or expectation
- detriment as a result of that reliance
- it would be unconscionable to depart from the belief or expectation

Recent CA decisions: *Mitchell v Trustees Executors* [2011] NZCA 519; *Wilson Parking v Fanshawe* 136 [2014] NZCA 407; *Hansard v Hansard* [2014] NZCA 562; *HHR Christchurch NTL v Crystal Imports* [2015] NZCA 283

# Development of the Overarching Estoppel

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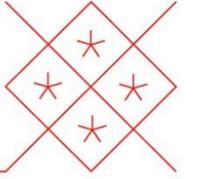


Types of estoppel previously recognised separately:

- common law estoppel (estoppel by representation)
- estoppel by convention
- promissory estoppel (equitable estoppel type 1) – *Central London Property Trust v High Trees House* [1947] KB 130; *Walton Stores v Maher* (1988) 76 ALR 513
- proprietary estoppel (equitable estoppel type 2) – *Thorner v Major* [2009] 1 WLR 776
- issue estoppel?

# Development of the Overarching Estoppel (cont'd)

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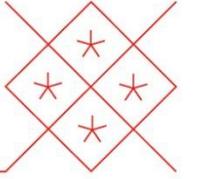
*Walton Stores v Maher* (1988)

NZ courts picked up the ball and ran – *Gillies v Keogh* [1989] 1 NZLR 641; *McDonald v AG* (HC Invercargill CP13/86, 20 June 1991); *Westminster Finance v National Bank* [1996] 1 NZLR 548

Meanwhile the UK and Australian courts have taken a more cautious approach

# Possible Drawbacks of the Overarching Estoppel

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It is relatively straightforward, but can one set of requirements adequately cover all situations?

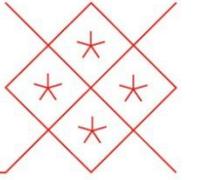
For example:

- estoppel by acquiescence
- estoppel by convention
- issue estoppel

Relevance of the type of estoppel to remedies

# Elements of the Overarching Estoppel Revisited

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Clear words or conduct

But estoppel by silence is also possible

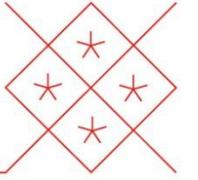
Close relationship between reliance and detriment

Unconscionability as the underlying basis of estoppel as well as an element

Intention and knowledge

# Limits on the Overarching Estoppel

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There are very few, at least in theory

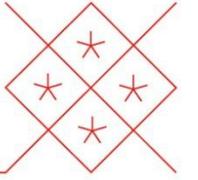
Clean hands – *Re Goile, Ex Parte Steelbuild Agencies* [1963]  
NZLR 666

Where the reliance and detriment can be reversed – *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria)* [1964] 3 All ER 556

Estoppel where a debt has already fallen due? – *Homeguard Products v Kiwi Packaging* [1981] 2 NZLR 322; *Collier v P & M J Wright* [2008] 1 WLR 643

# Practical Considerations

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Situations in which estoppel could arise

- contractual context – *Hickman v Turn and Wave* [2011] 3 NZLR 318
- property context
- novel contexts

Many successful claims come within acceptable categories of estoppel

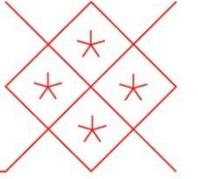
Judicial concern about estoppel running wild

Estoppel is not a “joker or wild card” – *Yeoman’s Row Management v Cobbe* [2008] 4 All ER 713

Overlap with other law, eg, s 9 of the Fair Trading Act 1986

# Introduction – Remedies

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What approach do the NZ courts take to estoppel remedies?

Deliberately vague, lacking in guiding principles

See comments in eg: *Hansard v Hansard* [2014] NZCA 562 at [30] and *H Investments (In Liq) v Official Assignee* [2018] NZCA 76 at [22]

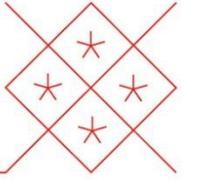
Flexible approach, not to “be cluttered with arbitrary rules”

So that the courts can “reach a just outcome” in line with the elements of estoppel

(*Wilson Parking* at [114], [119]-[120], [123])

# Remedial Approach – Introduction

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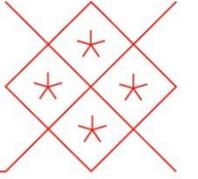
CA in *Wilson Parking* faced with choice between two approaches to remedies:

1. Protect the expectation interest; or
2. Award damages in accordance with the detriment that is suffered

The Court decided against either as starting point

# Expectation-based Remedy

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To preclude D from resiling from expectation created/promise made

Either through court order enforcing promise

Or through equitable compensation to put P in position they would have been in had promise been fulfilled

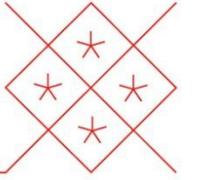
If promise is kept then no unconscionability can arise

Remedy is “forward-looking”, akin to remedies for breach of contract

Support in Australian cases: *Giumelli v Giumelli* [1999] HCA 10, (1999) 196 CLR 101 and *Sidhu v Van Dyke* [2014] HCA 19, (2014) ALR 232

# Reliance-based Remedy (cont'd)

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Remove detrimental reliance by quantifying it and awarding equitable compensation

Backward looking to the position the P occupied prior to relying on promise/expectation

Since estoppel only arises upon detrimental reliance, once remove reliance, nothing unconscionable remains

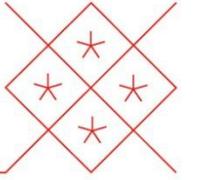
Thus, making promise in itself does not give rise to rights in estoppel (that is purview of contract law)

Academic support: Prof Andrew Robertson

Judicial support: Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 423; *Krukzeiner v Hanover Finance Ltd* [2008] NZCA 187 at [38]

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

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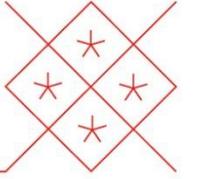


In *Wilson* itself the difference was stark:

- detrimental reliance damages: \$545,000
- expectation interest: property at c.\$3 million below market
- Court of Appeal enforced expectation interest but not as a rule
- lists a pot pourri of factors
- concern of granting a windfall to the D seems most convincing

# What do the Courts Look at?

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*Juzwa v Hill* [2007] NZCA 222

Promise to waive contractual provision making final payment of the essence

Remedy was that the D was held to that promise

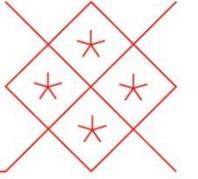
Detrimental reliance damages not practical

The P would not have purchased property without that promise

Could not buy replacement property

# What do the Courts Look at? (cont'd)

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*Hansard v Hansard* [2014] NZCA 562

Expectation interest protected

D by her conduct led P to believe that she had assumed liability for debt

Detrimental reliance damages inappropriate

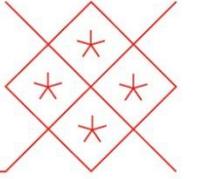
P had clear expectation that debt liability was assumed

Impractical for parties to reverse course (9 years had passed; third party company heavily indebted)

Concern that P would be granted a windfall

# Practical Take-away Points

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Proving detriment is vital for satisfying estoppel test but also for quantifying equitable compensation

If you wish to enforce expectation interest, emphasise the impracticability of returning to the status quo

It is an in personam remedy (although this can include orders to amend title to bind future owners, cf *Guo v Bourke* [2017] NZCA 609)

The starting point debate between detriment and expectation is not finished (see comments *Wilson Parking (SC)* and *Doig v Tower Insurance Ltd* [2019] NZCA 107)

# Questions and Answers

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