To Hope or Hurt? Clarifying Remedial Objectives in Proprietary Estoppel

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Abstract—This article examines how domestic case law up to and including that decision has characterised the doctrine of proprietary estoppel and, in particular, how close it has come to identifying a remedial objective. It further analyses the positions adopted in foreign jurisdictions as well as those advanced by academic commentators, with particular emphasis on the relevance of (i) expectation, (ii) detrimental reliance, and (iii) proportionality to the exercise of the courts’ remedial discretion. Comparing and contrasting the merits of each approach, it is argued that the objective of fulfilling an aggrieved claimant’s expectations should, in principle, be the presumptive starting point in giving effect to proprietary estoppel claims. Subject to proportionality review according to the clarity of assurances made and severity of detriment suffered, it would be desirable for the Supreme Court to clearly endorse this objective in its upcoming judgment.

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Introduction

On December 2nd, the Court of Appeal’s 2020 decision on the proprietary estoppel claim in Guest v Guest\(^1\) was challenged in oral argument before the Supreme Court. The case is one of several classic ‘farming cases’ that the courts have dealt with in the field of proprietary estoppel, and yet the core contentious issue – namely, what the courts’ aim and approach in fashioning a remedy for an aggrieved claimant ought to be – has not been adequately resolved to date. Guest v Guest is but one example of how the lack of a clear remedial objective in the English law of proprietary estoppel can complicate litigation and render the underlying equitable doctrine less transparent than it could otherwise be. Despite having had several chances to adopt clear remedial approaches based on a claimant’s expectations or their detrimental reliance, the courts have so far refrained from committing themselves to any particular guiding principle.

The following discussion will analyse the current state of the law on proprietary estoppel remedies in three parts: firstly, the decision in Guest v Guest, and, in particular, the questions it leaves unanswered, will be contextualised within the broader domestic position; secondly, that position will be contrasted with foreign jurisprudence on the relevance of expectation, detriment and proportionality in remedial approaches to proprietary estoppel claims; and thirdly, the relative merits of a detriment-focused and an expectation-based remedy will be compared in light of the Supreme Court’s present opportunity to review them. This article will demonstrate that the remedial framework for proprietary estoppel claims ought to be clearly reorganised around a rebuttable presumption of expectation-based relief. This

\(^1\) [2020] EWCA Civ 387.
presumption should be tempered by a proportionality review of varying strength and intensity, scaling with the certainty of the expectation at hand and the general severity of the potential detriment, which will determine where it should not apply.

### A. Proprietary Estoppel and *Guest v Guest*

#### I. Facts and Appellate History

The factual circumstances surrounding the dispute in *Guest v Guest* highlight some of the difficulties which courts have experienced at the remedial stage of a proprietary estoppel claim. In brief, they can be summarised as follows:

> The claimant (Andrew) is the defendants’ eldest son. He left school at 16 to work, full time and for little reward, on his parents’ dairy farm expecting that he would inherit part of it upon their deaths. However, his parents later altered their wills after a falling out with Andrew, excluding any entitlement on his part to any part of the farm or its dairy business. Andrew then left the farm after having worked there for a total of around 33 years, before bringing a claim founded on proprietary estoppel for a declaration that he was entitled to a beneficial interest in the farm.

> At first instance, the trial judge found that during the 33-year period Andrew had repeatedly been assured that he would inherit a ‘substantial share’ of the farm, and ordered that a lump sum payment be made to Andrew of 50% of the market value of the farming business and 40% of the farm’s market value. It appeared that the defendants would have to sell the farm entirely

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2 ibid [8]-[46] (Floyd LJ).
in order to satisfy Andrew’s claim. On appeal, the defendants contended that the trial judge’s order placed too much emphasis on the claimant’s subjective expectations, that it went beyond the extent of relief which proprietary estoppel requires, and that it would suffice to compensate Andrew for the detriment he incurred in relying on the assurances. According to the defendants, no particular interest had ever been agreed upon between the parties, such that the trial judge ought to have found that Andrew was only entitled to compensation for detriment incurred in consequence of his reasonable reliance.

Despite these submissions, Floyd LJ dismissed the appeal. His Lordship found that the doctrine of proprietary estoppel afforded the court ‘broad judgmental discretion’ when it came to determining an appropriate remedy. While both the claimant’s expectation and their detrimental reliance thereupon would be relevant considerations in exercising this discretion, the overarching remedial objective in proprietary estoppel cases is simply to do ‘what is necessary to avoid an unconscionable result’. On the facts, the trial judge had not exceeded his discretionary powers in furtherance of this objective, and the Court of Appeal upheld his original order.

II. Legal Context and Background

The Court of Appeal’s support for a broad judgmental discretion to take necessary steps for avoiding unconscionability frames the remedial objectives of the doctrine of proprietary estoppel in very

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3 Supreme Court, Case details - Guest and another v Guest <https://www.supremecourt.uk/cases/uksc-2020-0107.html> accessed 28 December 2021.
4 Guest (n 1) [65] (Floyd LJ).
5 Guest (n 1) [74] (Floyd LJ).
6 ibid [74].
general and opaque terms. Of course, one may have to concede that an equitable doctrine which finds application in highly fact-sensitive and individualistic circumstances naturally lends itself more to practicality and discretion than it does to rigidity and doctrinal elegance. Nonetheless, if the requirements of ‘avoiding an unconscionable result’ are not linked to some principled point of reference common to all proprietary estoppel cases, the objective of the doctrine itself is obscured: after all, the courts acknowledge that no ‘yardstick’ for the assessment of unconscionability is inherent in that concept itself.\(^7\) Importantly, this issue is not merely of academic concern, nor are its practical implications limited to rule of law concerns.\(^8\) As Mee points out, the absence of a clear remedial objective in the courts’ treatment of proprietary estoppel claims may encourage lengthy litigation and thereby exacerbate intra-familial disputes.\(^9\) Viewed against this background, the fact that the decision in \textit{Guest v Guest} has now been appealed to the Supreme Court indicates a pressing need for authoritative guidance on the proper remedial framework to proprietary estoppel claims.

Of course, the issue is not a novel one in the context of appellate litigation: for example, the Court of Appeal’s seminal judgment in \textit{Jennings v Rice}\(^10\) considered the matter at some length. Specifically, two factors underlying the concept of unconscionability were examined as potential guiding principles for remedial discretion, those being (i) the claimant’s expectation, as induced by assurances relating to their future rights regarding

\(^7\) \textit{Taylor Fashions Ltd v Liverpool Trustees Co} [1982] 1 QB 133, 151-152.
\(^10\) [2002] EWCA Civ 152.
specific property; and (ii) the claimant’s detrimental reliance upon said assurances. In other words, where the court is called upon to ‘avoid an unconscionable result’, it could (i) fulfil the claimant’s expectation as far as possible because it would be unconscionable to allow the promisor to renege on their assurance, or (ii) compensate the claimant for detriment incurred that would make such reneging unconscionable. Both the expectation-based remedial approach and the detriment-focused approach identify a purpose, albeit opposing ones, underlying the remedial approach to proprietary estoppel claims – and yet the Court in *Jennings v Rice* did not firmly or unanimously adopt either one. Instead, Aldous LJ did not state the remedial objective any higher than ‘to do justice’ in light of a given case’s circumstances, which would require having regard to both expectation and detriment, but not give either factor determinative weight.11

Subsequent decisions have not attempted to go much further, and reluctance on the courts’ part to identify the remedial objective in proprietary estoppel cases as either fulfilling expectations or compensating detrimental reliance has become a feature of recent jurisprudence. When this dichotomy was raised again in *Davies v Davies*,12 the Court of Appeal refused to resolve it despite acknowledging the conceptual merits of the detriment-focused approach.13 Similarly, in cases which appeared to lean towards the opposite remedial approach, members of the Court only offered tentative support for it rather than firmly rooting their analysis in an expectation-based measure. For example, although Robert Walker LJ in *Jennings v Rice* seemed to suggest that he considered fulfilment of expectations a ‘natural response’ to proprietary estoppel claims arising in so-called ‘bargain cases’,

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11 ibid [36].
12 [2016] EWCA Civ 463.
13 ibid [39].
his judgment emphasises that the proper remedial approach still involved a wide judgmental discretion to which several, non-exhaustive factors might be relevant.\(^\text{14}\)

Turning back to the decision in *Davies*, which is exemplary of this ambivalence, Lewison LJ treated expectation and detriment as relevant considerations in much the same way as Aldous LJ’s judgment in *Jennings v Rice* had. His Lordship merely added that, if sustained for lengthy periods of time or relied upon with great detriment, a claimant’s expectations might be weighted more heavily at the remedial stage.\(^\text{15}\) Again, however, the lack of commitment *ab initio* to either expectation or detriment obscures the purposes served by affording the claimant with a remedy. Further, as HHJ Paul Matthews’ comments on the *Davies* decision in *James v James*\(^\text{16}\) demonstrate, the additional fluidity introduced by his Lordship’s ‘sliding scale’ method of weighting expectations even casts doubt upon the centrality of disappointed expectations and detriment in establishing unconscionability. In any case, such evaluative flexibility at the remedial stage does not clarify the purposes of a subsequent remedy at all.

Taking the authorities on proprietary estoppel at face value, then, their remedial approach to alleviating unconscionability appears to be couched in discretion rather than being clearly committed to either expectation or detriment as a guiding principle. What *is* unequivocally borne out by the authorities, by contrast, is that even a remedy constructed on the basis of expectation must not be disproportionate to the detriment incurred in reliance upon it.\(^\text{17}\) The Court of Appeal’s judgment in *Jennings v Rice*, as well as decisions in both earlier and

\(^{14}\) *Jennings* (n 10) [50]-[52].

\(^{15}\) *Davies* (n 13) [41].

\(^{16}\) [2018] EWHC 43 (Ch) [52].

\(^{17}\) *Jennings* (n 10) [36] and [38].
later cases, have emphasised that the prevention of unconscionability does not require giving effect to disproportionate expectations of proprietary interests – going further, authority suggests the court cannot give effect to a disproportionate expectation, as this would go beyond the prevention of an unconscionable result.\(^{18}\) However, the stringency with which this proportionality-based limitation ought to be applied is not obvious – attempts by the courts to establish a standard do not offer much more than a restatement of the core principle of proportionality. Again, it seems as though this too is attributable to the lack of commitment to a particular remedial objective which might have shed light on the proper role of the proportionality inquiry: whereas the aim of compensating detriment inherently produces a proportionate remedy, the aim of fulfilling expectations does not. Indeed, as regards the latter aim, proportionality may contribute little more than a ‘safety check’ mechanism, which is reflected in the Court of Appeal’s *Suggitt v Suggitt* decision: in her judgment, Arden LJ suggested that this limitation would only respond to situations where a claimant’s expectation is ‘out of all proportion’ to the detriment suffered.\(^{19}\) By contrast, Lewison LJ in *Habberfield v Habberfield* characterised proportionality as the basis for a flexible ‘judgmental discretion’ inherent in all proprietary estoppel cases, notwithstanding Arden LJ’s comments.\(^{20}\) In light of dicta like these, it is difficult to specify the need for and intensity of proportionality analyses under the present law.

For these reasons, there is considerable pressure on the Supreme Court in *Guest v Guest* to provide authoritative guidance on which remedial principle, detriment or expectation, ought to

\(^{18}\) See *Ottey v Grundy* [2003] EWCA Civ 1176 [57], [58] and [62].
serve as the guiding principle for proprietary estoppel claims, and how strongly a proportionality test ought to feature in the analysis. Khai Liew points out that the ‘obvious non-equivalence’ between the two approaches, and the distinctiveness of factors relevant to a proportionality inquiry, necessitate a decision; maintaining a split approach or not definitively selecting a starting point endangers the fundamental principle of *stare decisis*.\textsuperscript{21} It is additionally the case that the very premise of ‘starting points’ invokes status quo bias\textsuperscript{22} – wherein factfinders seek evidence sufficient to depart from, but not to retain, a given position – that would impact cases unequally if the starting point was not uniform.\textsuperscript{23}

\section*{2. Detriment, Reliance, and Proportionality in Other Common Law Jurisdictions}

In light of this pressing need for guidance, it will be helpful to view the doctrine of proprietary estoppel through a comparative lens. The directions in which the same legal sources have been

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\textsuperscript{23} Y Khai Liew (n 21) 116. See also Gardner (n 8).
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interpreted and developed by judges of different nationalities and backgrounds can provide a useful touchstone for analysing the tensions that remain in the English variant of proprietary estoppel, and how they might be resolved.

A. Australia

The Australian position can be generally explained as one in which it is settled that equity will be satisfied through expectation rather than reliance relief.\(^{24}\) The development of this view can be traced in two parts – (i) the initial engagement with reliance-based relief, and (ii) the subsequent move away from this perspective.

To explore the Australian dalliance with the reliance-based view, one might start with Brennan J in Walton Stores (interstate) Ltd. v Maher.\(^{25}\) He argued that:

> The object of the equity is not to compel the party bound to fulfil the assessment or expectation: it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or abstain from acting thereon.\(^{26}\)

This view of the equity is a negative one, wherein the relief provided by the court is premised upon the juristic need to prevent the consequences of unconscionable conduct. This scheme of reliance-based relief was considered by the High Court of Australia in the later case of Vervayen v Commonwealth of Australia.\(^{27}\) Adjudicating once again, Brennan J explained that the unconscionability of conduct was both the factor that engaged the

\(^{24}\) Sidhu v Van Dyke (2014) 251 CLR 505 [83]-[85].


\(^{26}\) ibid 423 (emphasis added).

\(^{27}\) (1990) 170 CLR 394.
jurisdiction of the court and the guiding principle when it came to the shaping of the equity.28 Mason CJ added to his analysis by casting the discretionary exercise as one controlled by proportionality. He stated that the remedy provided had to be proportionate to the detriment that it is designed to mitigate, as providing a disproportionate ‘making good of the relevant assumption’ would be ‘wholly inequitable and unjust’.29 But even in Verwayen, the cracks in the edifice of the reliance-based approach to relief were beginning to show. Robertson noted that the remedy granted to Mr Verwayen had the effect of fulfilling his expectations,30 which undermines the value of the decision as support for the reliance view.

More recent Australian cases demonstrate a shift away from the reliance-based approach. Biehler argues that the Australian courts have moved away not only from this model for shaping the equity but also from the concept of seeking to satisfy the proportional ‘minimum equity’.31 The new paradigm was expressed by the High Court of Australia in the case of Giumelli v Giumelli,32 wherein a prima facie entitlement to the ‘assumed state of affairs’ was favoured.33 A new approach to proportionality was also taken, with the court indicating that this prima facie entitlement could be limited where it would ‘exceed what could be justified by the requirements of conscientious conduct and

28 ibid 429-431.
29 ibid 413.
33 ibid 123.
what would be unjust to the estopped party'. The methodology is illustrated by the decision of Delaforce v Simpson-Cook. The court argued that where the estopped party gave rise to an expectation that could be defined with certainty, the process of shaping the equity must take this as the starting point. Biehler notes that the function of proportionality is now negative, limiting the starting point where necessary, as opposed to the position in Walton Stores and Verwayen where it positively set the terms of relief. The developed principle can be seen in the case of Sidhu v Van Dyke, wherein the court held that:

where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party’s detriment… the relief… is usually that which reflects the value of the promise.

Australian courts are yet to fully settle the law, however, per Khai Liew, it is not clear whether the prima facie entitlement provides a strong or weak starting point. He suggests that recent cases indicate a tendency by New South Wales courts to trivialise the importance of proportionality and view expectation as a ‘strong default position’. In contrast, judges in other states have interpreted the starting point as a weak position, giving proportionality a much more significant role.

This distinction relates to English law, where proportionality analyses do not seem to be conducted in detail on

34 The court drew from Verwayen (n 26) 442.
36 ibid, at [63].
37 H Biehler (n 32) 87.
38 Sidhu v Van Dyke (2014) 251 CLR 505 [85].
39 Y Khai Liew (n 22) 114-115.
40 ibid.
a regular basis. Conversely, significant time was spent addressing the role of proportionality during oral argument in the outstanding appeal of Guest v Guest, perhaps indicating a ’stronger’ future position.

B. New Zealand

The position of the New Zealand legal system, which draws on that of its Australian neighbour, on the detriment-expectation divide is comprehensively addressed by the New Zealand Court of Appeal in the case of Wilson Parking New Zealand Ltd. v Fanshawe 136 Ltd. In it, Randerson J considered the three main elements of a proprietary estoppel claim relevant to relief. These were: (i) the nature of the assurances giving rise to the expectations, (ii) the extent and nature of the detrimental reliance and (iii) the ability of the claimant to demonstrate that it would be unconscionable for the promisor to resile.

In identifying these factors, Biehler argues that Randerson J has given the courts the flexibility of moving between approaches to fashion the fairest outcome in a given case. Where assurances are certain and clear, the court will tend towards granting expectation-based relief. Further, where the detriment suffered by the promisee is significant, the court will tend to hold the promisor to their word rather than pursue some alternative scheme of remedy. Randerson J also accounted for the role of proportionality in a distinct fashion. He accepted that awarding expectation-based relief could in some instances produce a result that was disproportionate to a promisor. However, the determination of proportionality per his judgement was not limited to “[simply comparing] in an arithmetical


\[\textit{[2014] 3 NZLR 567.}\]

\[\textit{ibid [114].}\]

\[H. Biehler (n 32) 89.\]
manner’, but instead included a ‘broad assessment of all relevant circumstances… [including those] which cannot be quantified or measured in monetary terms’.\textsuperscript{45} Therefore, the position in New Zealand resembles that of traditional equity, placing considerable discretion in the hands of the courts.

C. Hong Kong

The courts of Hong Kong view the detriment/expectation dichotomy from yet another angle. Similarly to New Zealand, judges enjoy great flexibility in determining the appropriate remedy for an established claim of proprietary estoppel,\textsuperscript{46} in relation to both the nature and the extent of relief.\textsuperscript{47} Khai Liew suggests that the courts of Hong Kong seldom overtly recognise that the reliance-based and expectation-based approaches are juristic alternatives, choosing instead to hint at applications of either approach without engaging extensively with it.\textsuperscript{48} Thus, the approach to remedy espoused in this jurisdiction is a less inherently principled discretion that accords the utmost flexibility to the courts. A seminal case on proprietary estoppel – which Khai Liew refers to - can serve as evidence for this. In \textit{Lee Bing Cheung v Secretary for Justice}\textsuperscript{49} the court chooses to refer in passing to Megarry & Wade and \textit{Jennings v Rice} as support for the boundaries of its remedial framework, rather than cases detailing the critical engagement of the Hong Kong Courts.\textsuperscript{50} This

\textsuperscript{45} Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd [2014] 3 NZLR 567 [118].
\textsuperscript{46} Y. Khai Liew (n 22) 111.
\textsuperscript{47} Hui Wan Memorial Hall Ltd v Kam Pak Li Investments Ltd [2018] HKCFI 718 [44].
\textsuperscript{48} Y. Khai Liew (n 22) 111.
\textsuperscript{49} HCA 1092/2010.
\textsuperscript{50} ibid [45].
approach prevents coherent case law from developing and presents problems for consistency of practice and the rule of law.

D. Singapore

Might it be possible to employ a discretionary approach in the same vein as Hong Kong, without the corresponding issues of consistency? Khai Liew points out the cases of Lim Chin San Contractors Pte Ltd v Shiok Kim Seng\(^{51}\) and Low Heng Leon Andy v Low Kian Beng Lawrence.\(^ {52} \) In the former, Phillip Pillai J held that the court could adopt either the reliance-based or expectation-based approach depending upon the facts of the case at hand.\(^ {53} \) But in the latter, the Singapore jurisdiction employs a unique method of determining the application of each method. As a matter of ‘practice’, a plaintiff must decide a starting point to frame and adduce the evidence necessary to build their case,\(^ {54} \) which will then be used to as a metric for adjudication. Therefore, the court can in theory build separate jurisprudence for each approach and eliminate issues of inconsistency in judicial application. The issue here arises outside the courts, however, insofar as a split framework surrounding choices made by the plaintiff raises difficulties of predictability for potential defendants who seek clarity in the law as a means to guide their behaviour.

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\(^{51}\) Lim Chin San Contractors Pte Ltd v Shiok Kim Seng (trading as IKO Precision Toolings) [2013] 2 SLR 279.

\(^{52}\) Low Heng Leon Andy v Low Kian Beng Lawrence (Administrator of the Estate of Tan Ab Ing, Deceased) [2018] SGCA 48.

\(^{53}\) Lim Chin San Contractors (n 53) [33].

\(^{54}\) Low Heng Leon Andy (n 54) [30].
3. The Choice before the Supreme Court

Against the background of these four distinct common law approaches, which range from a strong principled position (Australia) to one motivated by basic practicality (Singapore), the core question of remedial approach left unanswered in Guest v Guest can be addressed. It is submitted that the above examples demonstrate clearly that a choice, either in favour of detriment or expectation, must be clearly made. This article takes the position that the Supreme Court should use the opportunity of Guest v Guest to elucidate a clear framework for the analysis of the applicable remedy. In this section, we will justify the view that expectation-based relief should form this starting point – in the form of a rebuttable presumption - for the purposes of English law.

A. Detrimental Reliance

One approach available to the court, in line with the appellant’s oral submissions, would be defining the remedial objective in proprietary estoppel cases as protecting the claimant’s reliance interest.\(^\text{55}\) In other words, the task which the Court of Appeal understood as ‘preventing an unconscionable result’ might be rephrased by the Supreme Court as ‘providing compensation for detriment suffered in reliance on a promise’. While this would certainly be a bold assertion of principle in light of the equivocal, flexible approach taken so far, it does not wholly lack prior judicial support: notably, Lewison LJ’s judgment in the Davies case

contemplates the detriment-focused remedial approach rather favourably.\textsuperscript{56}

As his Lordship rightly noted, there is an obvious attraction in viewing compensation for detriment as the goal of proprietary estoppel. Given that detrimental reliance on an expectation is an essential requirement for any successful claim, the removal of that detriment by means of compensation ought simultaneously to remove the basis for the claim. To adopt the Court of Appeal’s phraseology, if a situation can (for the present purposes) only be unconscionable where the aggrieved party has suffered detriment in reliance upon a promise, but that detriment is remedied, there remains no possible unconscionable result which the court would otherwise have to prevent. McFarlane illustrates this principle by postulating a situation where, upon changing their mind about certain assurances relating to land, a hypothetical promisor revokes the assurances and voluntarily compensates the disappointed promisee for detriment suffered.\textsuperscript{57} Since it seems that this should preclude any proprietary estoppel claim on the promisee’s part, involuntary compensation for detriment pursuant to a court order should have the same effect.

Conceptually, the detriment-focused approach fulfils the same core function as a strong proportionality test (where the two factors between which proportionality is found are detriment and relief)\textsuperscript{58}: particularly in cases where the detriment suffered is readily quantifiable, it leaves little scope for the court to award any remedy beyond the monetary value of detriment incurred. Incidentally, this approach would probably lend itself to supervision by appellate courts, which could be conducive to

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\item \textsuperscript{56} Davies (n 13) [39].
\item \textsuperscript{57} B McFarlane, “The Law of Proprietary Estoppel (2nd ed)” (Oxford University Press, 2020), [7.51].
\item \textsuperscript{58} Gardner (n 8) 498.
\end{itemize}
creating some predictability and consistency in the shaping of equities by proprietary estoppel. Where two claims arise in similar factual circumstances as far as detriment is concerned, neither the scope of one claimant’s disappointed expectation, nor the subsequent appreciation or depreciation in one property’s market value, would allow one claimant to receive greater protection under the doctrine of proprietary estoppel than the other. To some extent, this remedial approach seems faithful to the spirit of Scarman LJ’s often-cited dictum in *Crabb v Arun DC* that the court is not required to provide any more than ‘the minimum equity to do justice to the plaintiff’.

Nonetheless, even proponents of the detriment-focused model acknowledge that its potential advantages may not be easily realised in practice. Given that the appraisal and quantification of detriment is crucial to providing adequate compensation for it, courts applying this remedial approach are likely to face difficulties in many typical proprietary estoppel cases wherein the claimant suffered mainly non-financial detriment, or detriment which is difficult to quantify for some other reason. As is abundantly clear from Robert Walker LJ’s judgment in *Gillett v Holt*, however, evidence of such forms of detriment is still admissible for the purpose of establishing a claim: where this is central to the factual circumstances of a particular case, a remedial objective of compensating detriment could easily become unrealistic. This is especially true in relation to losses of opportunities which cannot be framed as traditional ‘reliance losses’, and Robertson lists emotional investment in a property, lost opportunity for financial gain and significant personal

59 B McFarlane (n 59) [7.51].
60 [1976] Ch 179, 198.
61 B McFarlane (n 59) [7.43].
decisions as examples of such qualitative forms of detriment. Incidentally, the Court of Appeal of New South Wales held in *Delaforce v Simpson-Cook* that expectation relief, not a detriment-based approach, would allow the court to avoid forcibly converting such forms of detriment to cash and consider the case in a more holistic sense.

Of course, there may be some force in McFarlane’s contention that the difficulty of quantifying some forms of detriment ought not to discourage courts from trying their best to do so anyway. Still, an attempt to quantify untransparent, complex detriments like lost opportunities to pursue different career paths over the course of 33 years seems almost to border on an arbitrary evaluative exercise. In fairness, McFarlane persuasively argues that this problem need not arise in so-called ‘bargain cases’, i.e. where the promise relied upon was part of a clear quid-pro-quo arrangement. It will then likely be most appropriate to quantify the disappointed party’s detriment in performing their part of the bargain by what the promisor agreed to provide in return – in other words, the expectation interest.

However, where no clear bargain can be deduced from the facts, the difficulties in quantifying detriment persist and are amplified by the passage of time (while, ironically, the detriment itself typically becomes more serious too). That the unavoidable risk of under-compensation should be placed upon the disappointed party seems contrary to the spirit of the doctrine of proprietary estoppel. In such cases, the adoption of a detriment-based remedial approach would effectively encourage promisors

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64 (2010) 78 NSWLR 483.
65 B McFarlane (n 59) [7.48].
66 B McFarlane (n 59) [7.55].
who stand to benefit more from the actions of a promisee than that promisee would suffer in quantifiable detriment to renege on their promises. This, too, seems contrary to the doctrine’s spirit.67

A further practical difficulty with the detriment-focused model is that, except in the ‘bargain’ cases mentioned above, it appears to logically demand immediate relief by means of monetary payment.68 Since it frames the remedial objective of proprietary estoppel as compensating a claimant for detriment, the court ought to provide such relief immediately lest the claimant should remain stuck with both the detriment and the risk of incurring ancillary losses. In practical terms, this could increase the frequency of outcomes like that faced by the defendants in Guest v Guest, whereby compliance with a court order pursuant to a proprietary estoppel claim is only possible if the relevant property is sold. However, alienation of the disputed property to a third party rather than one of the interested litigants hardly seems a desirable outcome, which becomes particularly apparent if one considers that proprietary estoppel claims have traditionally arisen in the context of family-run farming businesses. Essentially, a choice is forced upon the promise between selling the land and recouping monetarily or surrendering any interest in the land whatsoever. It should be noted, of course, that the appellant’s submissions in the Supreme Court were sensitive to this difficulty, and that an alternative remedy was proposed;69 however, this alone demonstrates incompatibility between a conceptually elegant, detriment-focused remedial approach and the practical requirements of an equitable doctrine.

67 Y Khai Liew (n 22) 113.
69 ibid.
B. A Presumption of Expectation as the Ideal Starting Point

By contrast, a presumption of awarding relief based on the expectation of a promisee is submitted to be conceptually and practically the best starting point for analysing relief for proprietary estoppel claims, both for reasons of principle and on procedural justifications. Beginning with principle, Khai Liew posits that the expectation-based remedial approach better achieves justice between the parties, since it prioritises the innocent promisee’s perception over the promisor’s equitably ‘compromised’ interest. The compromised nature of the promisor’s interest can be established in two stages. By the time a proprietary estoppel claim reaches the remedial stage, the core ingredients have been successfully made out by the claimant. This is to say that a representation regarding property was definitively made and relied upon detrimentally, in circumstances which, in some way, render resiling from that representation an unconscionable act. Building on this, it is the nature of an interest in land - its enduring value as a historically recognised asset which for most people will constitute the bulk or even entirety of personal wealth in a lifetime - that a representation made regarding its acquisition will have special force. The compromised position of the promisor, therefore, arises from the unconscionability of leveraging an attractive real interest to affect the conduct of the claimant, and then seeking to resile from that act. In a similar fashion, Gardner recognises that those who induce expectations from such a position of power place themselves into a position of special responsibility, although he goes on to embrace neither expectation nor reliance but advocate

70 Y Khai Liew (n 22) 121.
71 S Gardner (n 8) 497.
correction of unconscionability as the unifying principle: an approach which falls short of making a true ‘decision’, as we have previously demonstrated is desirable.

On a more jurisprudential front, Khai Liew quotes Slavny’s view that, where a person harms another, there is a strong reason for the law to allow the cost to fall upon the party better placed to avoid the risk. This builds on the recognition that holding the interest in land places the promisor in a position of power, and that the law ought to respond to the weakened position of claimants by positioning the presumption closer to expectation (especially since proprietary estoppel claims are typically brought in the aftermath of significant detriment).

Furthermore, as Lewison LJ noted in Habberfield v Habberfield, recognition of expectation-based relief can uphold the autonomy of parties to ‘decide for themselves what a proportionate reward would be’. Though not strictly applicable to all forms of estoppel claim, this point strikes at the core relationship between promisor and promisee and demonstrates why expectation should form the foundational starting point for the process of determining remedies. Since reasonable expectation is derived from the conduct of both parties, this enables the courts to ground the eventual remedy in a proto-contractual manner.

Alongside principled justifications, there are two procedural reasons for beginning the enquiry with expectation relief. Firstly, as we have already considered, proprietary estoppel claims tend to only be brought when significant detriment has

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72 ibid 499.
75 Habberfield v Habberfield [2019] EWCA Civ 890 at [68].
been incurred, which frequently leads to expectation relief being awarded by the court.\textsuperscript{76} By way of empirical evidence for this, 19 of the 20 cases brought in Hong Kong between 2008 and 2019 in which a proprietary estoppel claim was successful saw the court make an award of expectation relief.\textsuperscript{77} Cooke also notes that, historically across multiple legal disciplines, ‘the usual measure of relief in estoppel is expectation rather than the compensation of the … reliance’.\textsuperscript{78} Thus, in a practical sense adopting expectation as an initial presumption aligns with more general legal principles and responds practically to the application of the doctrine. The case of \textit{Crabb v Arun DC}\textsuperscript{79} demonstrates further that, especially in the context of land, awards made \textit{in specie} have special value. Some rights, such as easements and occupation interests, can only reasonably be protected in such a way. Bright and McFarlane recognise that there are some cases where such enforcement would naturally be barred,\textsuperscript{80} but it is submitted that, on a conceptual level, placing a specific remedy at the forefront adequately recognises the importance of specific interests in land – \textit{Guest v Guest} is a clear indicator of the dissatisfaction monetary remedies can generate. Of course, it is true that the promisor likely attaches equal importance to specific interests in land – but they hold a ‘compromised’ equitable position after having leveraged those same proprietary interests as a ‘carrot’ to influence the promisee. Hence, it is justified for the counteracting ‘stick’ - the remedial response – to privilege the promisee in attaching importance to special interests in land over the promisor. In this

\begin{itemize}
\item \textsuperscript{76} ibid.
\item \textsuperscript{77} Y Khai Liew (n 22) 123.
\item \textsuperscript{78} E. Cooke, \textit{The Modern Law of Estoppel} (OUP, 2000) 151.
\item \textsuperscript{79} [1976] Ch. 179, 198.
\item \textsuperscript{80} S. Bright and B. McFarlane, ‘Proprietary Estoppel and Property Rights’ (2005) 64 \textit{Cambridge Law Journal} 449, 479.
\end{itemize}
regard, beginning with expectation is once again the most efficacious path to determining adequate relief.

C. Strong or Weak

We must now determine whether the presumption should be strong (rebuttal is only permissible in exceptional circumstances), or weak (rebuttal is more readily acceptable if circumstances suggest). There are, then, two vectors upon which we can determine the content of the expectation presumption and answer this question. These are i) the impact of the clarity and certainty with which the expectation can be defined, and ii) the impact of obvious disproportions between the expectation-based remedy and detriment, which is applied in a subsidiary common-sense form necessitated by its nature in contrast to the central role of expectation. We will argue that the presumption should be conceptualised as one of variable strength based on the influence of these vectors.

The English courts have already grappled with the issue of clarity and its relationship to the variety of contexts in which estoppel claims occur. In Thorner v Major,\(^81\) the House of Lords addressed a potentially estopped interest in a farm. It was argued that both the assurance and the identity of the promised property were too uncertain for a claim of estoppel to be made out.\(^82\) In response, Lord Walker held that the ‘clear and unequivocal’ test does not apply to assurances when dealing with proprietary estoppel.\(^83\) Moreover, he quoted with approval the judgement of Lord Hoffmann in Walton v Walton,\(^84\) which outlined how promises made in the family or social context are often subject to

\(^{81}\) [2009] UKHL 18.
\(^{82}\) ibid [30].
\(^{83}\) ibid [54].
\(^{84}\) [1994] CA Transcript C No 479.
‘unspoken and ill-defined qualifications’. Of additional note was the context in which the assurances took place:

The deputy judge heard a lot of evidence about two countrymen leading lives that it may be difficult for many city-dwellers to imagine taciturn and undemonstrative men committed to a life of hard and unrelenting physical work, by day and sometimes by night, largely unrelieved by recreation or female company.

Lord Neuberger’s observations also traced similar lines. He held that it would not serve to be ‘unrealistically rigorous’ in seeking clarity, and that the question of certainty must be considered practically and sensibly, as well as contextually. The conclusion that must be drawn from these judicial insights is that expectation-based relief as a starting point must be somewhat tempered by the practical reality of proprietary estoppel claims. The certainty of assurance, and therefore expectation as its natural consequence, waxes and wanes as a juristic requirement for establishing a claim depending upon the factual context. Therefore, it seems important to adapt the strength of expectation as the starting point. This is because in limited cases expectation will be too unclear to constitute the sole basis for remedy: indeed, as Robert Walker LJ considered in Jennings v Rice, expectation could be considered no more than a starting point. We need to marry the benefits of the expectation-based relief starting point with the need for flexibility along the vector of clarity. A solution has already been recognised partially in English jurisprudence. In particular, the case of Davies v Davies saw the suggestion of a

85 ibid [19].
86 Thorner (n 83) [59].
87 Thorner (n 83) [85].
88 Jennings (n 10) [47].
89 [2016] EWCA Civ 463.
sliding scale in which the weight to be accorded to expectation increased, among other things, as the certainty of the expectation did.\textsuperscript{90} Thus, we have isolated the first factor that will determine the variable strength of our starting point.

The second vector that ought to be addressed is the issue of proportionality. Hobhouse LJ (as he then was), in \textit{Sledmore v Dalby},\textsuperscript{91} held that proportionality between remedy and expectation was a relevant concept in English law.\textsuperscript{92} Biehler contrasts various English cases that engage with this proportionality analysis, arguing that there is a difference between cases following the traditional approach like \textit{Jennings v Rice}, in which a roundly proportionate result is sought, and subsequent cases like \textit{Suggitt v Suggitt}, in which Arden LJ held that the expectation-based remedy would be displaced if it could be said to ‘out of all proportion’ to the detriment incurred.\textsuperscript{93} While Mee argues that Arden LJ’s approach resulted in a disproportionate remedy compared to the detriment,\textsuperscript{94} she had already explicitly stated her view that there does not always have to be a relationship of proportionality between remedy and detriment.\textsuperscript{95} Her view was cited with approval by HHJ Paul Matthews in \textit{James v James}.\textsuperscript{96} He stated that, in some cases, ‘making the remedy proportionate to the detriment suffered would be to focus more on what B has lost, rather than on what B expected to obtain’, which would contrast with the ‘natural impulse... to require A to

\textsuperscript{90} ibid [41].
\textsuperscript{91} (1996) 72 P. & C.R. 196.
\textsuperscript{92} ibid 209.
\textsuperscript{93} H Biehler (n 32) 85-86.
\textsuperscript{94} J Mee, ‘Proprietary Estoppel and Inheritance: Enough is Enough?’ (2013) 77 Conv 280, 281.
\textsuperscript{95} \textit{Suggitt v Suggitt} [2012] EWCA Civ 1140 [44].
\textsuperscript{96} [2018] EWHC 43 (Ch).
make good the expectation’.\(^97\) Why do we permit this leeway given the potential conflict between proprietary estoppel and the traditional conceptions of estoppel in the contractual sense and the doctrine of consideration? The obvious answer lies in the special position that land has historically occupied in the accumulation of personal wealth. Proportionality still plays a role, of course, but it is clearly secondary to the importance of giving effect to expectations simply because of this centrality of real assets to wealth.

So how are we to rationalise this secondary role of proportionality in determining the applicability of this presumption? Existing law has told us that it is relevant and can operate either in a holistic role or in a more limited one if expectation is to be prioritised. The answer lies again in a variant of the sliding scale approach. Where the detriment is significant, we can align with the reasoning of Arden LJ and HHJ Paul Matthews in arguing that proportionality should play a diminished role in conditioning expectation. The relative equitable positions (adopting the ‘compromised position’ analysis) of the promisor and promisee are, in such a case, sufficient to justify expectation-based relief without engaging aggressive scrutiny through proportionality. Where detriment is smaller, the overpowering unconscionability that excludes proportionality in the previous case cannot be established as easily and thus proportionality can play a greater role. It should be noted that approach to proportionality is not dependent on a need to quantify detriment, but simply a common-sense assessment of its relative scale on the evidence. Lord Stephens recognised in oral argument in *Guest v Guest* that such common-sense appreciations are natural for the courts in other areas of law such as personal injury, but that these approximations ought to be limited to this secondary ‘checking’

\(^97\) ibid [51].
role rather than the primary role of determining the basis of remedy, for which expectation is more suited. The benefit of employing the above ‘sliding-scale-esque’ approach in lieu of a bare proportionality approach is the conditioning of proportionality, so as to acknowledge the promisor’s compromised position and privilege expectation accordingly. This leads to a more consistent application of relief by the courts and an overall more doctrinally coherent approach to proprietary estoppel: thus, the ideal starting point is a presumption of expectation-based relief, conditioned by certainty of promise and significance of detriment.

Conclusion

Comparing the current state of English law to other common law jurisdictions reflects that it is not alone in still operating on a more open, less strongly principled stance; but we have sought to demonstrate that failing to conclusively address the question undermines legal certainty and the equitable aims of the doctrine.

Building on this, we went on to show that if one approach is to be adopted, that of expectation is a conceptually and practically preferable starting point compared to its rival:

detriment is too difficult to quantify in a consistent and transparent manner, and hence is better suited to a supporting role in the process of ascertaining suitable remedies. Conversely, expectation is easier for the courts to engage with and allows for the principles of equity and responsibility to be borne out more clearly in the remedial framework.

It is not enough for the Supreme Court to select a starting point, however. It must elucidate its content and presumptive strength for the benefit of lower courts. We contend, in that regard, that a starting point of variable strength based on the clarity of assurances made and severity of detriment suffered in a given claim retains the flexibility of the open approach while providing a principled foundation for the future development of the law. To this end, the appeal in Guest v Guest could permanently reshape the current opaque framework while preserving the aims of proprietary estoppel – but whether the Supreme Court will realise this potential remains to be seen.