Choosing the Remedy for Proprietary Estoppel

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Abstract: This article considers the appropriate method of determining the remedy in proprietary estoppel cases. The relevant doctrine has been invoked increasingly in recent years, particularly but not exclusively in the context of promises of testamentary benefit in the farming context. The question arises as to whether, in choosing a remedy for a successful plaintiff, the court should normally give effect to the expectation that has been reasonably created in the plaintiff by the defendant's promise. Or, on the other hand, is the underlying aim of the remedy to erase the detriment that the plaintiff would otherwise suffer as a result of having relied upon the defendant's promise? The article examines the English case law, leading up to the recent decision in Guest v Guest, where the UK Supreme Court rejected, by a narrow majority, the idea that the purpose of the remedy was to erase the plaintiff's detriment. The discussion then turns to the more limited case law from this jurisdiction, before seeking to identify the best way for our law to develop. It is concluded that, from a practical point of view, the most attractive approach would be one that identifies the underlying aim of the remedy as the elimination of the plaintiff's detriment but acknowledges that ensuring that this is achieved will frequently involve fulfilling the plaintiff's expectation.

Keywords: Proprietary Estoppel; Remedies; Law of Equity; Testamentary Promises; Judicial Discretion.

This article will consider, in light of developments in other jurisdictions, how the Irish courts should approach the question of determining the remedy in a proprietary estoppel claim based on a promise by the defendant (D) that the plaintiff (P) will obtain an interest in D's land or other property. Many of the recent cases in Ireland and in England and Wales have concerned testamentary promises to children in respect of the family farm[1] but the doctrine is also applicable in the business context, even if no family relationship is involved.[2] As was recently noted

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[1] See *Naylor v Maher* [2018] IECA 32; *K v K* [2018] IEHC 615.

[2] See *Ace Autobody Ltd v Motorpark Ltd* [2024] IECA 6. (Note that an appeal in this case has been heard by the Supreme Court but, at the time of writing, judgment is still awaited.) Of course, farming is also a business and some of the proprietary estoppel cases that have arisen in this context have involved either no family dimension (see *Finnegan v Hand* [2016] IEHC 255) or a fairly

by the UK Supreme Court in the leading case of *Guest v Guest*,[3] there has been a 'lively controversy' as to what the court should be trying to achieve in granting a remedy in such cases.[4]

Proprietary estoppel is not subject to the principle that it can operate as 'a shield but not a sword', a limitation associated with the neighbouring doctrine of promissory estoppel.[5] Therefore, it can be used as a cause of action and can generate positive remedies. Possible remedies include requiring D to transfer ownership of the land to P,[6] or to grant P an indefinite license to occupy the land (or not to revoke an existing licence)[7] or to grant a lease at a nominal rent,[8] or to pay P a monetary sum,[9] or to grant an easement to P.[10] Equity has traditionally described the process in terms of an 'equity' arising in favour of P, with the court having a discretion as to how best to satisfy that equity. In the leading Irish case, *Naylor v Maher*,[11] Peart J (speaking for the Court of Appeal) regarded the aim as

distant degree of kinship (see *Coyle v Finnegan* [2013] IEHC 463: claim by a second cousin once removed).

[3] [2022] UKSC 27.

[4] ibid [50], [52], [60] (Lord Briggs); [136], [137], [156], [158], [168] (Lord Leggatt); the phrase was originally used in *Davies v Davies* [2016] EWCA Civ 463 [39] (Lewison LJ).

[5] There has been an unfortunate lack of precision in the Irish cases in relation to terminology. For example, in *Naylor* (n 1), Peart J, with whom Ryan P and J agreed, described (at [4], [5], and [8]) the doctrine at issue as "promissory estoppel". However, it is clear that the Court of Appeal was considering the doctrine of proprietary estoppel. There was a lesser degree of confusion in the first instance judgment: see [2012] IEHC 408 [349]. Note also Costello J's reliance on promissory estoppel in *Re JR (A Ward of Court)* [1993] ILRM 657, discussed in John Mee, 'Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?' (1998) 33 Irish Jurist 187, 217-219. For a discussion of the differences between the two doctrines, see ibid 197-202.

[6] See *Smyth v Halpin* [1997] 2 ILRM 38 (involving the fee simple remainder). Sometimes a remedy of this nature is expressed by reference to the existence of a constructive trust: see *An Cumann Peile Boitheimeach Teorenta v Albion Properties Ltd* [2008] IEHC 447. Note also the suggestion in *Finnegan* (n 2) that a constructive remedial trust should be imposed in certain cases. This was based on the approach of Lord Scott in *Thorner v Major* [2009] UKHL 18, which was not supported by any of the other judges in that case. For criticism of Lord Scott's unorthodox approach, see John Mee 'The Limits of Proprietary Estoppel: *Thorner v Major*' (2009) 21 Child and Family Law Quarterly 367, 378-381.

[7] See *Cullen v Cullen* [1962] IR 268; *McMahon v Kerry County Council* (1976) [1981] ILRM 419.

[8] *Griffiths v Williams* (1977) 248 EG 947.

[9] See *Coyle* (n 2).

[10] See eg *Board of Management of All Saints Church of Ireland National School v Courts Service* [2011] IEHC 274.

[11] [2018] IECA 32.

being 'to achieve a just result for the plaintiff in accordance with equitable principles' and explained that 'the facts and circumstances of each case will determine how that ultimate objective is achieved.'[12] This states the court's task in the most abstract terms possible and so is not informative. Of course, it makes sense that the court would approach its task in a flexible manner, taking into account the peculiarities of the individual case. Nonetheless, it is necessary to know what the court is trying (in a pragmatic way) to achieve.

In thinking about this issue, two factors are of potential relevance: the detriment incurred by P and the expectation reasonably created in P by D's promise. Most of the difficult questions that arise in this area relate to these two concepts and their interaction. Does the extent of the detriment incurred by P have a role in the determination of the appropriate remedy? Does it matter if the value of the expectation-based remedy sought by P is greater, or much greater, than the value of P's detriment? How are the courts to deal with the fact that P's detriment may be difficult to quantify in monetary terms, as, for example, where a farmer has promised to leave his or her child the family farm, and that child has given up opportunities elsewhere to work for low pay for decades on the farm in reliance on this promise? Finally, what if P's detriment is linked to his or her expectation through an informal agreement, whereby one was the *quid pro quo* of the other? Should the courts seek to enforce such bargains, despite the fact that statutory formalities have not been complied with?[13]

This article will begin with a brief discussion of the relevant strand of proprietary estoppel. This will be followed by a review of the development of the case law in England and Wales, where the relevant issues have been given much more attention than in Ireland. This will include a detailed consideration of the positions established by the majority and the minority of the UK Supreme Court in the leading case of *Guest v Guest* in 2022.[14] Next, the relatively limited Irish case law will be discussed. Finally, the various possible theoretical approaches to the determination of proprietary estoppel remedies will be identified and evaluated.

[12] ibid [13].
[13] See section 51 of the Land and Conveyancing Law Reform Act 2009 (requirement of signed evidence in writing of a contract for sale of land).
[14] *Guest* (n 3).

It will be suggested that it is difficult to defend the approach of the majority in *Guest*, which insists that the remedy will normally reflect P's expectation but offers no convincing explanation as to why this is the case, nor any intelligible guidance as to the basis for choosing an alternative remedy when an expectation remedy is considered to be inappropriate. It will be submitted that, in theoretical terms, the most attractive approach is to base the remedy on the detriment incurred by P. However, this approach has proven unattractive to courts in practice, given the difficulty in quantifying non-monetary detriment incurred over a long period. Therefore, the conclusion offered by this article is that, in practical terms, the most realistic proposal may be an approach which identifies the aim of the remedial process as the elimination of P's detriment but which, at the same time, is willing to use the expectation as a proxy for the detriment in cases where the detriment is difficult to quantify, in order to ensure that P receives an adequate remedy.

The Doctrine of Proprietary Estoppel

It is often said that two 'limbs' of proprietary estoppel emerged from the decision of the House of Lords in *Ramsden v Dyson*[15] – the expectation (or promise) limb and the mistake (or acquiescence) limb.[16] The mistake limb requires P to have mistakenly believed himself or herself to be the owner of D's land and D to have allowed him or her to act to his or her detriment on the basis of this mistaken belief.[17] The Irish courts have considered the principle in a number of cases but the case law has been relatively sparse.[18] In practical terms, the expectation limb is the most important aspect of the doctrine of proprietary estoppel. It owes its origins to the speech of Lord Kingsdown in *Ramsden v Dyson,*[19] and was revived

[15] (1866) LR 1 HL 129.
[16] In the leading textbook on the doctrine, (Ben McFarlane, *The Law of Proprietary Estoppel* (2nd edn, Oxford University Press, 2020)), McFarlane – following John Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in Susan Bright (ed), *Modern Studies in Property Law: Vol VI* (Bloomsbury Publishing, 2011) 175, 181-183 – analyses proprietary estoppel under three separate headings: acquiescence, promise, and representation. The third of these strands involves cases where D has represented that P currently holds an interest in D's land or other specific property. It is not necessary in the present context to address this third strand in detail. For an Irish example, see *McDonagh v Denton* [2005] IEHC 127.
[17] See the statement of this principle by Lord Cranworth in *Ramsden* (n 15), 140-141.
[18] Perhaps the leading case is the generous decision of Finlay P in *McMahon v Kerry County Council* [1981] ILRM 419, discussed in John Mee 'Lost in the Big House' (n 5) 208-211.
[19] *Ramsden* (n 15) 170.

by Lord Denning's Court of Appeal in *Inwards v Baker*,[20] before it was approved at House of Lords level in *Cobbe v Yeoman's Row Management Ltd*[21] and *Thorner v Major*.[22] It was some time before the expectation limb was accepted in Ireland, with the key case being *Smyth v Halpin*.[23] It has since featured relatively frequently in the Irish case law.[24] According to White J in *Finnegan v Hand*,[25] the doctrine 'is based on three main elements: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.'[26] In terms of the requirement of a representation, mentioned by White J, the better view is that, to trigger the doctrine, the representation must amount to a promise rather than a statement of present intention.[27]

Despite the fact that they can both be traced to the case of *Ramsden v Dyson*, it would probably be better to regard the mistake limb and the expectation limb as separate principles, rather than as two aspects of the same doctrine. The mistake limb turns on D's failure to act to prevent P's mistake,[28] whereas the expectation limb is founded on D's having led P to act to his or her detriment on the basis of a promise that P will obtain an interest in D's land. In what follows, the focus will be on the expectation limb.

The Development of the English Case Law

Prior to *Guest v Guest*

Equity has traditionally thought in terms of an 'equity' arising in favour of P when the requirements of the doctrine are satisfied, with the court having a broad

[20] [1965] 2 QB 29.
[21] [2008] UKHL 55.
[22] [2009] UKHL 18.
[23] [1997] 2 ILRM 38. See the discussion in John Mee 'Lost in the Big House' (n 5) 194-197.
[24] For textbook discussions of the doctrine, see Hilary Biehler and Philip Gavin, *Equity and the Law of Trusts in Ireland* (8th edn, Round Hall 2025) ch 18 and Ronan Keane, *Equity and the Law of Trusts in Ireland* (3rd edn, Bloomsbury 2017) [27.29]-[27.74].
[25] [2016] IEHC 255.
[26] ibid [37], referring to the formulation by Lord Walker in *Thorner* (n 22) [29].
[27] See McFarlane (n 16) [2.80]-[2.113]. It is arguable that it could also be sufficient if D is aware that P mistakenly believes that D has made a promise.
[28] This is an unusual example in private law of liability flowing from an omission. See generally, Kelvin Fatt Kin Low 'Non-feasance in Equity' (2012) 128 LQR 63.

discretion as to how best to satisfy that equity. One constraint was that the court must do justice to D as well as to P, so that the remedy is 'the minimum equity to do justice', as suggested by Scarman LJ in *Crabb v Arun District Council*.[29] Although this was not explicitly identified as the aim of the process, the almost invariable result of the exercise of the court's discretion was that the remedy took the form of giving effect to P's expectation (as reasonably created by D's promise). As Elizabeth Cooke suggested in 1997, 'the courts have consistently, with very few exceptions, protected the claimant's expectation interest when responding to estoppel'.[30] While the judicial assumption at this stage was 'that expectation is the main driver of the remedy',[31] a different outcome could be reached 'where practical considerations made [the fulfilment of P's expectation] impossible, impracticable or manifestly unjust.'[32]

In theoretical terms, a possible objection to this approach is that it fails to take adequate account of the role of detrimental reliance. Consider a hypothetical case 'in which the party claiming the benefit of an estoppel precluding a denial of his ownership of a million dollar block of land owned by the allegedly estopped party would sustain no detriment beyond the loss of one hundred dollars spent on the erection of a shed if a departure from the assumed state of affairs were allowed'.[33] In such circumstances, it would seem unjust to fulfil P's expectation and award him or her the very valuable land on the basis of limited detriment. Given that the foundation of P's claim is that he or she was induced to incur detriment on the basis of an expectation created by D, it seems logical to suggest that D should be able to satisfy the claim by erasing the detriment or, if this is more favourable to D, by satisfying the expectation. In either case, the foundation for P's appeal to justice is removed and D cannot be said to have acted unconscionably. On this approach, the expectation would serve as an upper limit on the remedy. This is because, even if the detriment exceeds the expectation, P has no grounds for

[29] [1976] Ch 179, 198.
[30] Elizabeth Cooke, 'Estoppel and the Protection of Expectations' (1997) 17 Legal Studies 258, 258. As pointed out by Lord Briggs in *Guest* (n 3) [63], where there is a difficulty with fulfilling P's expectation *in specie*, the remedy may take the form of a monetary sum valued by reference to P's expectation.
[31] *Guest* (n 3) [22] (Lord Briggs).
[32] ibid [38].
[33] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 441 (Deane J).

complaint because D cannot be said to have acted unfairly if the expectation he or she has created is satisfied.[34]

The English courts responded to this concern, not by switching to a detriment-based approach, but by introducing a somewhat unsatisfactory compromise, represented by the concept of proportionality. This concept made its first appearance in English law in the case of *Sledmore v Dalby*.[35] In a concurring judgment,[36] Hobhouse LJ referred to the Australian case of *Commonwealth of Australia v Verwayen*,[37] where Mason CJ had stated that:

> A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption.[38]

The next step was the emphasis placed on the concept of proportionality by the Court of Appeal in *Jennings v Rice*.[39] In discussing the appropriate approach to satisfying the equity that arises in favour of P, Aldous LJ described the question of proportionality as '[t]he most essential requirement'.[40] Also in *Jennings*, Robert Walker LJ agreed that 'the principle of proportionality (between remedy and detriment), emphasised by Mason CJ in *Verwayen*, is relevant in England also.'[41] He went on to state that '[t]he essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way of going about that.'[42] In the later case of *Ottey v Grundy*,[43] Arden LJ referred to 'the general proposition that the relationship between the promise and the remedy must be proportionate, and that the

[34] This paragraph draws on the explanation in John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in Martin Dixon (ed), *Modern Studies in Property Law, Vol V* (Hart Publishing 2009) 390.
[35] (1996) 72 P & CR 196.
[36] Both Hobhouse and Butler-Sloss LJJ agreed with the reasons of Roch LJ.
[37] *Verwayen* (n 33).
[38] ibid 413 (Mason CJ).
[39] [2002] EWCA Civ 159.
[40] ibid [36].
[41] ibid [56].
[42] ibid.
[43] [2003] EWCA Civ 1176.

promise, even if of a specific property, is only a starting point'.[44] The high-water mark in terms of enthusiasm for proportionality came in the Privy Council decision of *Henry v Henry*[45] where Sir Jonathan Parker stated that '[p]roportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application.'[46]

The proportionality approach meant that the extent of P's detriment was recognised as a factor having relevance, at least in some situations, in the determination of the remedy. However, Robert Walker LJ commented in *Jennings v Rice* that a conclusion that an expectation remedy would be disproportionate 'does not mean that the court should … abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief.'[47] Instead, he felt, 'the court has to exercise a wide judgmental discretion'.[48] He went on to identify various factors which the court could take into account, such as

> misconduct of the claimant … or particularly oppressive conduct on the part of the defendant, … the court's recognition that it cannot compel people who have fallen out to live peaceably together, so that there may be a need for a clean break; alterations in the benefactor's assets and circumstances, especially where the benefactor's assurances have been given, and the claimant's detriment has been suffered, over a long period of years; the likely effect of taxation; and (to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate.[49]

As Professor Simon Gardner has suggested, while it might be arguable that these factors could have an impact, in an appropriate case, on the mode of relief, it is more difficult to find a principled justification for the proposition that they should affect the quantum of relief.[50] For example, it is hard to see why the need for a

[44] ibid [58].
[45] [2010] UKPC 3.
[46] ibid [65].
[47] *Jennings* (n 39) [51].
[48] ibid.
[49] ibid [52].
[50] Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 496, 500-504.

clean break between the parties should result in P being awarded a less valuable remedy than he or she would otherwise have obtained, even if it might sometimes make it appropriate to award P the monetary equivalent of his or her expectation rather than the land at issue. Furthermore, the factors listed by Robert Walker LJ – none of which might be in play in a particular case – are unhelpful in that they do not identify the aim that the court has in exercising its 'wide judgmental discretion'.[51]

In fact, there is a logical problem with an approach that generally determines the remedy on one basis but, when that would be disproportionate to the level of P's detriment, switches to another method. The use of different methods of determining the remedy will inevitably lead to indefensibly inconsistent results. The problem cannot be seen when looking at any one hypothetical case. Rather, as this author has argued in detail elsewhere, it only emerges when one compares the results that are generated in different hypothetical circumstances.[52] It is arguable that a potentially fatal defect in the expectation approach, i.e., that it unfairly benefits P at D's expense by affording a remedy that exceeds P's detriment, is being inadequately addressed by a decision to abandon that approach in only the most egregious instances of this unfairness.

The rejection of the detriment-based approach in *Guest v Guest*

In an article published in 1983,[53] Andrew Burrows (now a member of the UK Supreme Court) suggested that the question of whether estoppel remedies protect expectation or detriment was one 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.'[54] Almost forty years later, this question was finally considered by the UK Supreme Court in *Guest v Guest*.[55] The Court was split 3-2, with Lord Briggs (with whom Lady Rose and

[51] ibid 499.
[52] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in Martin Dixon (ed), *Modern Studies in Property Law: Vol V* (Hart Publishing, 2009) 402-404. This argument was discussed by Lord Leggatt in *Guest* (n 3) [224].
[53] Andrew Burrows, 'Contract, Tort and Restitution – A Satisfactory Division or Not?"' (1983) 99 LQR 217.
[54] ibid, 243, quoted in Cooke (n 30) 258.
[55] *Guest* (n 3). Lord Burrows was not, in fact, part of the panel.

Lady Arden agreed) in the majority and Lord Leggatt (with whom Lord Stephens agreed) in the minority.

The facts of the case were not remarkable, although they had the distinguishing feature that the dispute arose before D's death.[56] Like many of the leading cases in the area, *Guest* involved a plaintiff who had worked on a family farm for low pay, foregoing other opportunities, on the basis of a promise of inheritance. The promise in *Guest* was that the plaintiff, Andrew Guest, would be left 'a sufficient (but undefined) part of [the family farm] to enable him to operate a viable farming business on it after the death of his parents.'[57] After he had worked on the farm for more than thirty years, more than twenty of which came after he had been led to expect an inheritance, the parties fell out and the parents changed their wills. The plaintiff was successful at first instance in his proprietary estoppel claim and was awarded, in addition to the 50% of the farming business to which he was already entitled under a partnership with his parents, a monetary sum representing 40% of the value of the farm land and buildings. The defendants were given permission to appeal on the question of the appropriate remedy but the Court of Appeal upheld the trial judge's decision. On a further appeal to the UK Supreme Court, the majority agreed that the remedy should be valued by reference to the plaintiff's expectation but held that the trial judge had erred by granting the plaintiff more than his expectation because he had failed to introduce a discount to reflect the element of acceleration which arose because the plaintiff was to receive the land immediately, rather than upon his parents' death as had been promised. Lord Briggs concluded that the defendants should be given a choice as to whether to give the plaintiff 40% of the farm upon their deaths, or a lesser monetary sum now (reduced to reflect the element of acceleration). While the remedy favoured by the majority reflected the plaintiff's expectation (albeit in monetary form), the minority favoured a remedy which would reflect the detriment he had incurred. Lord Leggatt's judgment included an appendix which worked through the necessary calculations, which would have

[56] Note also the facts of *Gillett v Holt* [2001] Ch 210; *Carter v Ross* (HC, 8 December 2000).
[57] *Guest* (n 3) [2].

led to an order requiring the defendants to pay the sum of £610,000 to the plaintiff.[58]

D's argument in *Guest* was that the remedy should have been limited to the extent of P's detriment. It was suggested that Scarman LJ's famous dictum concerning the 'minimum equity to do justice' represented 'the golden thread which explains the nature and purpose of the remedy'.[59] The suggestion, as Lord Briggs explained it, was that the meaning of this dictum was that 'the court separately values the expectation and the detriment and then chooses whichever is the cheaper for the promisor'[60] (which is another way of describing the approach whereby the remedy is based on the detriment subject to an upper limit represented by P's expectation). Lord Briggs regarded this as a distortion of the meaning of the relevant dictum,[61] and insisted that 'this court should firmly reject the theory that the aim of the remedy for proprietary estoppel is detriment-based forms any part of the law of England.'[62]

Lord Briggs' judgment, it is suggested, was somewhat disappointing in terms of the reasons he gave for this conclusion. One of his strongest points, in practical terms, was the suggestion that 'the detriment [is not] fairly capable of being monetarised, when it consists of decisions about education, training and career which (as here) have life-long consequences.'[63] It is certainly true that farming cases such as *Guest*, where P has often incurred decades of hard-to-quantify detriment, represent a challenging context for the detriment-based approach. However, as a matter of principle, it is difficult to see how the existence of a

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[58] The award at first instance was worth around £1.3 million: ibid [131] (Lord Leggatt). The precise value of the reduced award favoured by the majority was not determined. Lord Briggs held that, if the defendants chose to pay a discounted monetary sum immediately and the parties could not agree on the figures, the matter would have to be remitted to the Chancery Division[105]. In passing, it may be noted that, from a tactical point of view, it may not have been advisable for Lord Leggatt to have included a detailed forty paragraph appendix which sought to implement his detriment-based approach. His judgment might have been more persuasive to his judicial colleagues if he had been more willing to paint with a broad brush, in the style with which judges applying equitable principles are more familiar.
[59] *Guest* (n 3) [7] (Lord Briggs).
[60] ibid [13].
[61] ibid [13], [25]-[26].
[62] ibid [71].
[63] ibid [12].

practical difficulty in respect of quantification justifies granting P the highest possible remedy, so as to avoid the challenge of calculating the extent of the lower remedy that justice seems to require. In practical terms, it must also be remembered that the expectation represents an upper limit on the remedy.[64] Therefore, cases involving very substantial detriment will often result in an expectation remedy, even on the detriment-based approach. On that approach, the problem of quantifying the detriment will arise only in cases where the level of expectation is so high that it might be seen to exceed the value of the detriment, if the detriment could be quantified. This article will return, at a later point, to the difficulty in quantifying detriment, where it will examine the argument that it could be appropriate to hold D responsible for the factual uncertainty created by their failure to keep their promise.[65]

Lord Briggs went on to emphasise the fact that authority to date had not favoured the detriment-based approach, suggesting that it was not appropriate to reverse 'over 150 years' careful development of the remedy upon a different foundation.'[66] The reference to 150 years ignores the period of over 80 years when the doctrine was moribund, between 1884 (*Plimmer v Wellington Corporation*)[67] and the revival of the doctrine in 1965 following *Inwards v Baker*.[68] It would perhaps be more accurate to suggest that it was not regarded as appropriate to take the level of detriment incurred by the plaintiff into account from 1965 up to the decision in *Jennings v Rice*[69] in 2002, a period four times shorter than that specified by Lord Briggs. Having given some role to detriment in *Jennings*, the courts were increasingly aware of the strong argument of principle in favour of the idea that the detriment should actually determine the extent of the remedy. It was, for example, suggested by Lewison LJ in *Davies v Davies*[70] that '[l]ogically, there is much to be said for' the detriment approach.[71] Admittedly, the authority in favour of that approach was slim prior to *Guest*, but

[64] See (n 34).
[65] See text following (n 117), below.
[66] [2022] UKSC 27 [71].
[67] (1884) 9 App Cas 699.
[68] [1965] 2 QB 29.
[69] *Jennings* (n 39)
[70] [2016] EWCA Civ 463.
[71] ibid [39].

one might have expected that the apex court would be free to consider the arguments of principle and not be constrained to follow the past decisions of the lower courts.

At the level of principle, Lord Briggs' judgment had little to offer. His one point of principle was focused on the concept of 'harm'. He assumed that, when one was trying to explain the nature of the doctrine, the task was to identify a wrong on the part of D and the harm that this caused to P. He took the view that the 'true purpose' of proprietary estoppel remedies 'is dealing with the unconscionability constituted by the promisor repudiating his promise.'[72] His view was that '[t]he wrong is the repudiation [of the promise] and the harm is the non-fulfilment of the promise thereafter'.[73] He stated:

> [T]he harm caused by the repudiation of the promise is not the same as the detriment. That lies entirely in the past. It cannot be undone and is in no sense caused by the repudiation, or by any wrong at all…. [74]

Thus, Lord Briggs' reasoning was that the detriment incurred by P cannot amount to the relevant harm because it comes at the wrong time in the chronological progression. It has happened before the triggering event, the unconscionable repudiation by D of his or her promise.[75]

In trying to identify the 'harm' to P, Lord Briggs focused only on the last event in the normatively relevant chain of events, the repudiation by D of his or her promise. However, this event can only be seen as causing harm in a relevant sense if it can be said that it was unconscionable of D to have acted in the relevant way. To determine whether it was unconscionable, we must look also at the earlier events in the chain: D's making of the promise and P's detrimental reliance on it. Lord Briggs' line of reasoning assumes that these earlier events make it unconscionable for D not to (later) keep his or her promise, meaning that the relevant harm is the non-fulfilment of the promise. However, it is equally possible to conclude that these earlier events make it unconscionable for D not to (later)

[72] *Guest* (n 3) [13].
[73] ibid [70].
[74] ibid [11].
[75] See also Lord Briggs' restatement of the point, ibid [70].

keep his or her promise without erasing P's detriment, meaning the relevant harm is to be valued by reference to P's detriment. On either view, previous events give shape to the constraint that equity's conception of unconscionability places on D's later conduct. Lord Briggs' reasoning, in fact, gains its plausibility by exploiting an ambiguity in the term 'detriment', which can be understood to refer either to P's conduct in reliance on D's representation or to the negative consequences of those actions (i.e., his or her reliance loss). Of course, as Lord Briggs emphasises, P's past conduct cannot represent the 'harm' caused by D's later unconscionable conduct. However, in the sense that is relevant here, the 'detriment' suffered by P is the extent to which he or she would be worse off, as a result of his or her prior conduct in reliance on the promise, if P were now to resile from his or her promise.[76] On the detriment approach, this is the harm that must be addressed by a proprietary estoppel remedy. Thus, once the relevant ambiguity is clarified, Lord Briggs' point based on chronology is disarmed.

Expectation and Proportionality in Lord Briggs' Judgment in *Guest*

When interpreting Lord Briggs' judgment, it is important to recognise the existence of a gap between the rhetoric he employed and the substance of his position. He referred to 'a fundamental divergence of view about which, as between satisfying the expectation and compensating for the detriment, is or rather should be the true underlying aim of the remedy'.[77] He described this as a 'supposed conundrum'[78] and suggested that 'neither expectation fulfilment nor detriment compensation is the aim of the remedy'.[79] Instead, he insisted, '[t]he aim remains what it has always been, namely the prevention or undoing of unconscionable conduct.'[80] Unfortunately, this statement is, with respect, essentially meaningless – or, in the words of Lord Leggatt in *Guest*, 'unexceptionable but … of little help.'[81] It provides 'no principled basis for

[76] Note the classic explanation of detriment by Dixon J in *Grundt v The Great Boulder Proprietary Mines Ltd* (1937) 59 CLR 641, 674: 'the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.'
[77] *Guest* (n 3) [7].
[78] ibid [8]
[79] ibid [94].
[80] ibid.
[81] ibid [160] (Lord Leggatt), referring to similar statements in other cases.

identifying the "equity" that arises when a claim is established or what the law regards as an unconscionable result.'[82] The question at issue relates to the demands of conscience and, therefore, a formulation involving that idea is not an answer but simply a reframing of the question. Whatever test equity settles upon will come to represent what equity deems to be necessary to prevent or undo unconscionable conduct. Thus, in defending the detriment-based approach in his judgment, Lord Leggatt made the point that

> what the law regards as unconscionable is not A's failure to keep a non-binding promise [but rather] is A's failure to accept responsibility for the consequences of B's reasonable reliance on the promise and for ensuring that B does not suffer detriment as a result of such reliance.[83]

If one more member of the panel had been persuaded of this position, this would have come to represent what, in English law, equity regards as necessary for 'the prevention or undoing of unconscionable conduct'. This demonstrates that it is not possible to read off any particular conclusion from the term 'unconscionability'. In equity, it represents a way of asking the essential question, or of describing the answer after it has been decided upon; it does not, in itself, constitute the answer.

In truth, despite his rhetoric, Lord Briggs came down strongly in favour of an approach centred around the fulfilment of P's expectation, albeit not in every conceivable case. There are repeated indications in his judgment that 'the specific enforcement of the promise or assurance is the primary remedy for the unconscionability threatened or occasioned by its breach.'[84] Thus, he stated that the court aims to remedy unconscionability 'mainly by satisfying expectation'[85] and 'with the effect, but not the aim, that it tend[s] to satisfy the expectations of the promisee'.[86] In the course of his review of the authorities, Lord Briggs commented approvingly on the assumption by the courts that 'expectation is the

[82] ibid.
[83] ibid [191].
[84] ibid [5].
[85] ibid [68].
[86] ibid [61].

main driver of the remedy'.[87] Thus, he referred: to the courts' 'almost single-minded ... pursuit of the enforcement of expectation';[88] to a 'discretionary approach to a remedy designed primarily to satisfy expectation',[89] and; to 'fine-tuning the fulfilment of the expectation of the promisee'.[90] It is only if one underestimates the subtlety of the so-called 'lively controversy' as to the nature of estoppel remedies that one could regard Lord Briggs' approach as taking a middle course between the two alternatives envisaged in that controversy. The choice was never between, on one side, a rigid or mechanical focus on the elimination of detriment, with no awareness of 'the practical problems' that arise in particular cases, and, on the other side, an invariable willingness to enforce the expectation, again ignoring the practical obstacles that can arise. The practicalities of the situation must, of course, be taken into account under either approach. In the end, Lord Briggs not only chose the 'expectation' side of the pre-existing debate, he favoured a more radical version of that approach than was regarded as orthodox prior to *Guest*.

In order to understand the extent to which Lord Briggs shifted the focus towards an expectation-based approach, it is instructive to consider his treatment of the role of proportionality – a concept which, after *Jennings v Rice*, appeared to reduce the centrality of expectation by affording a role to detriment in the determination of the remedy. Looking at the various remarks on the subject in his judgment in *Guest*, it is clear that Lord Briggs was determined to downplay its significance. His scepticism was foreshadowed by his remark, in the course of reviewing the English case law, that 'the introduction [in *Sledmore v Dalby*] of a supposed general requirement for proportionality between the remedy and the detriment was entirely new in English law'.[91] He felt that '[l]ike most tools or rules for the examination whether something produces justice, [the proportionality

[87] ibid [22].
[88] ibid [26].
[89] ibid [30].
[90] ibid [25].
[91] ibid [37]

test] is a good servant but a bad master'.[92] For Lord Briggs, it was 'no more nor less than a useful cross-check for potential injustice.'[93]

Lord Briggs' desire to restrict the role of proportionality is evidenced by multiple aspects of his judgment. For example, he interpreted the requirement to mean that the remedy had to be not merely 'disproportionate' but rather 'out of all proportion' to the detriment.[94] Different formulations had been used in earlier cases, so that it had been uncertain whether a high degree of disproportionality was required or not.[95] In fact, the two examples of disproportionality given by Lord Briggs were extreme. The first was a hypothetical case where

> a disabled 50 year old person … secures a commitment by her carer to look after her at very low wages for the rest of her life, on the assurance that she will inherit her large mansion [but] dies only three months later, without making a will to give effect to her promise.[96]

Lord Briggs mentioned that the hypothetical disabled person had 'no expectation of an early death'.[97] If one conservatively postulates that she was expected to live to the age of 75, then, in Lord Briggs' example, she has died one hundred times sooner than expected (i.e., after three months rather than after 25 years).

The second example was

> the full enforcement of a promise by an elderly lady to leave her carer a particular piece of jewellery if she stayed on at very low wages, which turned out on valuation by her executors to be a Faberge worth millions.[98]

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[92] ibid [72].
[93] ibid.
[94] ibid [68], [72], [73], [76], [79], [94].
[95] Contrast, for example, *Suggitt v Suggitt* [2012] EWCA Civ 1140 [44] (Arden LJ) ('out of all proportion') with *Jennings v Rice* (n 39) [36] (Aldous LJ) ('there must be proportionality between the expectation and the detriment.')
[96] *Guest* (n 3) [10]. Note that Lord Briggs repeats a version of this example when he returns to the question of disproportionality later in his judgment: ibid [76].
[97] ibid.
[98] *Guest* (n 3) [76].

The statement that the value of the jewellery 'turned out on valuation by her executors' to be extremely high introduces the possibility that D had been mistaken in her estimation of the value of the jewellery, thus suggesting a further possible reason to deny an expectation remedy. This seems to imply that even the apparently very high level of disparity between expectation and detriment in the example might not be enough on its own to justify the denial of an expectation remedy. The extreme nature of the examples selected by Lord Briggs[99] seems to suggest that he did not envisage that disproportionality would often play a role.

Lord Briggs placed the burden on D to establish disproportionality,[100] thus making it even less likely that it would be established in practice. He did not offer a justification in principle for changing the normal location of the burden of proof. He also required that the lack of any proportionality must be something that 'can easily be identified without recourse to minute mathematical calculation'.[101] A further restriction on the possible role of disproportionality is that Lord Briggs was of the view that the existence of an informal bargain between the parties could strengthen the case for giving effect to P's expectation.[102] He mentioned a hypothetical case where a daughter 'spends the whole of her working life on the family farm, working at low wages, in the promised expectation that she will inherit it.'[103] He went on to state that, even if the capital value of the farm was very high, an expectation remedy would 'be proportionate (or at least not out of all proportion) because the daughter has fulfilled her part of the family understanding, and it is only fair and proportionate that the parents should now perform theirs.'[104] Here, Lord Briggs has expanded the meaning of the word proportionality, so that it no longer simply refers to the relationship between the value of the detriment and the value of the expectation. It has come to mean

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[99] Compare Kirsty Potts, 'An unwelcome Guest? Exploring the spare room of proprietary estoppel' (2023) Conv 78, 84 ("outlandish" examples).

[100] *Guest* (n 3) [76].

[101] ibid [94].

[102] ibid [77]. Note also Lord Briggs' mention of the idea of a 'spectrum' between bargain and non-bargain cases. For discussion, see Hilary Biehler, '*Guest v Guest*: a reconsideration of the role of the concepts of proportionality and unconscionability in formulating remedies in cases of proprietary estoppel' (2024) 71 Irish Jurist 133, 144-146.

[103] *Guest* (n 3) [73].

[104] ibid.

something more like 'appropriate in all the circumstances', notwithstanding the fact that (in the sense of the word he had previously favoured) the expectation remedy would be disproportionate to the detriment P has incurred.[105]

Thus, an examination of Lord Briggs' judgment suggests that he felt obliged to include the concept of proportionality in his scheme but that he sought to curtail its role to the greatest extent possible, thus giving increased prominence to the enforcement of expectations. However, as has been mentioned before, he simultaneously tried to insist that the enforcement of expectations was not the 'aim' of the remedy. This meant that, aside from unhelpful generalities about unconscionability, he failed to identify any underlying purpose that the court is trying to achieve when devising a remedy. This in turn resulted in his being unable to provide coherent guidance as to what the court should do in the (rare) case where the fulfilment of the expectation would be disproportionate. Lord Briggs did not refer to the factors that had been listed by Robert Walker LJ in *Jennings v Rice*. However, he shared Robert Walker LJ's unwillingness to revert to determining the remedy by reference to the detriment. Lord Briggs stated:

> I can see no principled justification for treating a perceived need to abandon full enforcement as a reason for moving straight (or at all) to compensation on the basis of an attempt to value the detriment. … I recognise that, in a case where there is perceived to be a large gap between the respective values of the promise and of the detriment this may leave the judge with a wide range of options with little in the way of rules as a guide. … [W]here the only objection to full enforcement is that it will be out of all proportion to the detriment then the court will … just have to do the best it can.[106]

This injunction to judges to 'do their best' is, with respect, far from convincing. In the absence of any identified remedial philosophy, in the words of Lord Leggatt, 'the law provides no yardstick for deciding when it is appropriate to award

[105] Compare *Naylor v Maher* (n 1) [16], where Peart J stated that the court 'must be guided by correct equitable principles, which necessarily includes a consideration of proportionality and fairness between the parties'. It seems clear that, here, 'proportionality' does not refer narrowly to proportionality between the remedy and P's detriment. Note also *K v K* (n 1) [124].
[106] *Guest* (n 3) [79].

something other than what was promised (or its value) or for deciding what that something else should be.'[107]

The Minority Position in *Guest*

The minority judgment in *Guest* was given by Lord Leggatt, with whom Lord Stephens agreed. Lord Leggatt took the view that the underlying purpose of the remedy is to erase P's detriment. However, he also accepted that it is necessary to ensure that P's remedy is adequate in this respect and that granting an expectation remedy is often necessary to achieve this. Therefore, despite important differences in emphasis between his judgment and that of Lord Briggs, the gap between their positions in terms of practical outcomes should not be overstated. Lord Leggatt's minority position, although notable for its attempt to ground the determination of proprietary estoppel remedies in a theoretical framework focusing on the elimination of detriment, would not have been particularly radical in its effect. Arguably, in practical terms, it could even be seen as representing less of a departure from the pre-existing English position, established in cases such as *Jennings v Rice*,[108] than Lord Briggs' majority approach (which sought to restrict the scope of the proportionality principle that had previously been recognised).

Summing up his position, Lord Leggatt stated in *Guest* that:

> a remedy designed to give effect to the promise is likely to be appropriate if (as eg in *Thorner v Major*): (1) … [P]'s reliance loss is of a kind which is very difficult to quantify in money terms; and (2) the value of the interest in property promised by … [D] is not clearly disproportionate to … [P]'s reliance loss.[109]

[107] ibid [181].
[108] *Jennings* (n 39).
[109] *Guest* (n 3) [258] (addressing the situation where the testator making the promise has died; Lord Leggatt suggested that somewhat different principles would apply where the dispute arose during the life of the promisor. See ibid [259]-[260]). Note that, in the quoted passage, Lord Leggatt refers to it being 'very difficult' to quantify the detriment, suggesting that he would be willing to quantify the detriment in cases where it would merely be difficult to do so. The frequency with which Lord Leggatt would have been willing to take on the quantification of non-monetary detriment is clearly crucial to assessing how significantly the results under his approach would differ in practice from those generated by Lord Briggs' majority approach. It may be significant,

Lord Leggatt had previously explained that:

> the principle that courts will not allow difficulty in quantifying loss to deprive the claimant of a remedy sits alongside, and sometimes in tension with, another principle. This is the principle that, where there is a choice between two possible remedies one of which is an award of money that would be difficult to quantify, such difficulty of quantification may be a good reason to prefer the other remedy.[110]

As an example, Lord Leggatt referred to the courts' willingness to grant an injunction or specific performance in a case where damages would not provide an adequate remedy, because *inter alia* damages 'would be hard to quantify … either because the loss is non-financial in nature or because the loss, although financial, would be uncertain in amount and difficult to estimate or prove'.[111] He felt that a similar approach was justified in proprietary estoppel cases where P's detriment is hard to quantify because

> [g]ranting the [promised] property right ensures that the claimant receives a remedy which is adequate and not one which is inadequate to prevent the claimant from suffering harm as a result of reasonably relying on the defendant's promise.[112]

It seems that the Australian courts also apply a version of this approach. They appear to accept that the object of the remedy is to erase P's detriment[113] but nonetheless see the expectation measure as the *prima facie* remedy.[114]

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in this regard, that Lord Leggatt saw *Thorner v Major* as a case where it was appropriate to grant an expectation remedy without attempting to quantify the detriment, despite the fact that the farm and associated assets awarded to P were worth over £2 million (as noted at the Court of Appeal stage in the case: [2008] EWCA Civ 732 [27]).

[110] ibid [200].

[111] ibid [201].

[112] ibid [202].

[113] See *Sidhu v Van Dyke* [2014] HCA 19 [82] (French CJ; Kiefel, Bell and Keane JJ) and Ying Khai Liew, 'The 'Prima Facie Expectation Relief' Approach in the Australian Law of Proprietary Estoppel' (2019) 39 OJLS 183, 184-193.

[114] See the leading case of *Giumelli v Giumelli* (1999) 196 CLR 101 [40]-[48] (Gleeson CJ; McHugh, Gummow and Callinan JJ) and *Sidhu v Van Dyke* [2019] HCA 19 [85] (French CJ; Kiefel, Bell and Keane JJ). Note that the relatively nuanced Australian approach is often misunderstood. It is not

One advantage of this approach is that it deals more comfortably than Lord Briggs' approach with cases where the detriment is easily quantifiable (such as where money has been spent on improvements to a house). In such cases, it seems natural to grant a monetary remedy reflecting the extent of P's expenditure. The idea that the underlying aim of the remedy is to erase detriment makes it obvious why such a remedy is appropriate.[115] The English courts have, in the past, taken this approach in the case of monetary expenditure on D's property,[116] but it is not clear how this apparently sensible result can be justified on the logic of the majority in *Guest*. That approach would seem to suggest that an expectation remedy should be granted in cases where the detriment – although easily quantifiable – is significant in comparison to the value of the land, so that the expectation remedy would not be 'out of all proportion' to the detriment. Furthermore, in cases where the expectation remedy would indeed be 'out of all proportion' to the detriment, Lord Briggs' opposition to the proposition that the court should ever be concerned with erasing P's detriment leads him to the unhelpful proposition that, in such cases, the court must simply 'do the best it can.'[117]

Although Lord Leggatt's approach has practical attractions, it remains to be demonstrated why it is appropriate to grant P the highest possible remedy (fulfilling his or her expectation) in cases where it is (very) difficult to quantify the detriment. Why is it assumed that the difficulty in quantification is D's problem? The normal position is that the burden of proof lies on P to prove all the elements of his or her case and it might seem natural to think that only loss which P can prove that he or she suffered should be compensated. A possible rationalisation, in terms of principle, for the approach under consideration is provided by Professor Andrew Robertson, who suggests that D – who has created the difficulty

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accurate to regard the Australian courts either as straightforwardly supporting the detriment-based approach (as suggested by Robert Walker LJ in *Jennings* (n 39) [54]; see also *Naylor v Maher* (n 1) [11], [13]) or as having 'comprehensively rejected' the elimination of detriment as 'the aim of a proprietary estoppel remedy' (*Guest* (n 3) [70] (Lord Briggs)).

[115] Compare Peart J's statement in the Irish case of *Naylor v Maher* (n 1)[16] that 'there will be other cases where the circumstances presented may indicate that it is just that the particular equity found to exist would be justly satisfied by a pecuniary award.' *Naylor v Maher* is discussed in detail later.

[116] See *Powell v Benney* [2007] EWCA Civ 1283. Note also *Sidhu v Van Dyke* (n 113) [84].

[117] *Guest* (n 3) [79].

by his or her inequitable conduct in making a promise and resiling from it – should be held 'responsible for the factual uncertainty brought about by his or her inconsistent conduct'.[118] He suggests that, in such cases, the expectation remedy may be chosen as a proxy for the detriment, as a means of ensuring that justice is done to P. As Robertson puts it 'expectation relief … provides complete protection of the unquantifiable reliance interest'.[119] Thus, there is 'a reliance-based rationale for protecting the expectation interest.'[120]

The plausibility of this rationalisation is open to debate.[121] It is arguable that, in a case like *Guest*, neither side could be said to be to blame for the breakdown in the parties' relationship which prevented the implementation of their intended arrangement. In principle, it may only be justifiable to apply the 'expectation as proxy for the detriment' approach in cases where D's unconscionable change of mind is actually the cause of the factual uncertainty in terms of the value of the detriment. This would, however, leave the courts with the difficult task of deciding whether D is to blame for the uncertainty in any given case.[122] As Lord Leggatt pointed out in *Guest*, 'courts have rightly been wary of investigating the parties' conduct and, in cases where their relationship has broken down, of making judgments about who was to blame.'[123] Furthermore, even if it were possible reliably to identify those cases where D was and was not at fault, in the latter category of case it would still be necessary to apply a pure detriment-based approach in cases where D is not at fault (with all the perceived practical difficulties that would entail). Finally, it should be pointed out that, as a matter of logic, a willingness to hold D responsible for the factual uncertainty created by his or her conduct does not inevitably lead to the expectation being used as a proxy for the value of the detriment. In an appropriate case it would, instead, justify pitching the remedy at a sufficiently high level, short of a full expectation remedy, that the court can feel confident that it is sufficient to erase P's detriment.

[118] Andrew Robertson 'The Reliance Basis of Proprietary Estoppel Remedies' [2008] Conv 295, 317.
[119] ibid 296.
[120] ibid.
[121] For a critique of Robertson's position, see Mee (n 34) 408-411.
[122] Or, possibly, the appropriate question would instead be whether D was more to blame than P. Compare this with the approach of Clarke J, in a different context, in *Bracken v Byrne* [2006] 1 ILRM 91, 98.
[123] Guest (n 3) [236]. See also [182].

Thus, in a case with a similar fact pattern to *Suggitt v Suggitt*,[124] a court might decide that – even though the non-monetary detriment incurred by P is difficult to value in monetary terms – granting P some specified fraction of the promised farm, rather than the entire farm, would be sufficient to ensure that his or her detriment had been erased.

On the whole, it seems that Lord Leggatt's approach, which has similarities to that of the Australian courts, is relatively plausible even if questions remain over whether its willingness to avoid (severe) quantification difficulties by granting an expectation remedy can be fully justified in theoretical terms.

The Irish Case Law

Having reviewed the English case law, it is now necessary to turn to consider the more limited body of case law from this jurisdiction.

Preference for the Expectation Approach

While there has been very little explicit analysis, the Irish case law, like that of England and Wales up to *Jennings v Rice*, shows a straightforward preference for expectation remedies. Consider, for example, *Re JR, A Ward of Court*.[125] In this case, Costello J stated that P had established 'an equity which entitles her to stay in the house rent free for as long as she wishes to which the court must give effect'.[126] Thus, the equity which the court would have discretion to satisfy was treated as already having been shaped by P's expectation (since, on the facts of the case, P had been promised that she could remain rent-free in the house for as long as she wanted). The second step of giving effect to the equity involved discretion only in terms of deciding how best to give effect to P's expectation. On the facts, a difficulty arose with the obvious approach of preventing P's eviction (and refusing the request that had been made on behalf of D, a ward of court, that the house be sold). The house needed expensive repairs and was too large for P's needs. The solution implemented by Costello J was to allow it to be sold

[124] [2012] EWCA Civ 1140. For criticism of the remedy in that case, where P was awarded a very valuable farm despite an apparently modest level of detriment, see John Mee, 'Proprietary Estoppel and Inheritance: Enough is Enough?' [2013] Conv 280, 281-286.
[125] [1993] ILRM 657.
[126] ibid 663.

on condition that a new, smaller house be purchased that would be suitable for P's needs, in which P would be allowed to live for as long as she wanted. While this remedy did not exactly reflect the expectation reasonably created in P by D's promise, it represented the closest practical equivalent (along the lines of ordering a monetary remedy quantified on the basis of the value of P's expectation in a case where the disputed property had already been sold by D and so it would not be possible to provide a simple expectation remedy).[127]

The case of *Smyth v Halpin*[128] provides another example of the Irish courts assuming that the aim of the remedy is to fulfil P's expectation. Geoghegan J stated:

> In this case the clear expectation on the part of Mr. Smyth was that he would have a fee simple in the entire house. The protection of the equity arising from the expenditure *therefore* requires in this case that an order be made by this Court directing a conveyance of that interest to him.[129]

Geoghegan J's use of the word 'therefore' suggests an assumption that the automatic remedy is the fulfilment of the expectation.

In *Carter v Ross*,[130] Murphy J stated the three standard requirements of the doctrine in terms of representation, reliance and detriment but went on to suggest that:

> I think it can be stated more quickly and effectively by saying that the courts *will hold a promisor to his promise* even if made without

[127] Note that, oddly, Costello J described the doctrine he was applying as promissory rather than proprietary estoppel: see (n 5). For other cases where, in the context of granting an expectation remedy, the court has made adjustments necessary to achieve justice, see *McDonagh v Denton* [2005] IEHC 127 (D, who was estopped from asserting his prior title, had spent money on the disputed land in the belief that he was the owner; he was held to be entitled to recoup this); *Naylor v Maher* [2012] IEHC 408; [2018] IECA 32 (P was entitled to the farm he had been promised but, on appeal to the Court of Appeal, was required to execute a disclaimer of a monetary bequest which he had been given 'in substitution for the lands which he was no longer to receive': [18] (Peart J)).
[128] *Smyth* (n 23).
[129] ibid 44 (emphasis supplied).
[130] (HC, 8 December 2000).

> consideration where it would be unconscionable to permit him to resile from the promise which he had made.[131]

This restatement of the doctrine indicates an assumption that it operates so as to hold D to his or her promise. Other Irish cases also show an assumption that the remedy will be to fulfil the expectation.[132]

Implementing the Expectation Approach on More Complex Facts

The determination of the remedy has not been simple in all the relevant Irish cases. Although at first sight some of the cases might seem to involve a choice by the court to give P a remedy falling short of the expectation, upon closer inspection it becomes clear that the complexities have related to the question of determining the precise nature of P's reasonable expectation, which it is assumed must be fulfilled. For example, in *Coyle v Finnegan*,[133] the deceased had told P that he needed help in working his farm and that he would leave P 'the place'.[134] After this, P helped with the farm for some nine years, at which point his contribution 'slowed down' to nothing.[135] His evidence was that the deceased 'did not mind'.[136] Later the deceased began to get assistance from the defendants (two brothers) and ultimately he changed his will to leave the land to them. P failed in his claim to the farm but was awarded €74,000 on a *quantum meruit* basis. Laffoy J concluded that the deceased had not made a simple promise to leave the farm to P. Rather, the commitment he had made was that he would leave him the farm or, if he changed his mind about doing so, would instead compensate him for his work. Thus, the remedy chosen by the Court ensured the fulfilment of the deceased's promise to P.

A second example is *Finnegan v Hand*,[137] where P worked for 38 years on the farm of D, his neighbour, from 1972 up to 2009 (the year that D died). P had been 'substantially underpaid and was seriously exploited by the deceased in that

[131] ibid (emphasis supplied).
[132] See, for example, *Owens v Duggan* (HC, 2 April 2004); *Prunty v Crowley* [2016] IEHC 293.
[133] *Coyle* (n 2).
[134] ibid [4].
[135] ibid [14].
[136] ibid.
[137] *Finnegan* (n 25).

regard'.[138] Perhaps being generous to P,[139] White J held that P should 'be awarded half that portion of the estate which includes the farmlands comprised in all the Folios, half the value of the stock and machinery and miscellaneous items sold', with D being given credit for the value of a site that he had provided to P.[140] What was the basis for the remedy granted in this case? It is significant that White J did not accept P's argument that D had promised him the farm. White J was willing to accept only that D had 'led the plaintiff to believe that he would, at least, name the plaintiff as a beneficiary in his will',[141] and emphasised the 'uncertain nature of the promises'.[142] On one interpretation of the facts, given that D had merely promised to mention P in his will, he would have fulfilled his promise if he had left P a non-trivial sum – say €10,000 – in his will. If this were the appropriate objective interpretation of D's words, then the remedy in the case could not exceed this amount (since, on any view, the expectation represents an upper limit on the extent of the remedy). It seems that the only way to justify the decision of White J on the remedial question is to assume instead that, on the facts, it would have been reasonable for P to understand a promise to be mentioned in the will as a promise that he would be given an amount commensurate with the extent of the work he had done on the deceased's farm. This would mean that the remedy given in the case would have to be categorised as an expectation remedy. Inevitably, the assessment of the remedy would involve a strong element of judgment in respect of assessing the amount that could be said to reflect P's work on the farm. However, the process would not involve a discretionary departure from the expectation measure, but rather the court doing its best to calculate the expectation remedy.[143]

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[138] ibid [60].

[139] P was said by White J to have 'some credibility problems', due to evidence that he had, on two separate occasions, made claims based on alleged promises of testamentary provision by people other than the defendant. See ibid [55]-[57].

[140] ibid [72].

[141] ibid [64].

[142] ibid [70].

[143] See also *Board of Management of All Saints Church of Ireland National School v Courts Service* [2011] IEHC 274, where the remedy took the form of a right of way shaped by the nature of the defendant's representations.

Proportionality and the Detriment-Based Approach in the Irish Case Law: *Naylor v Maher*

There has been little consideration in the Irish case law of the possibility of taking detriment into consideration in shaping the remedy for proprietary estoppel. However, it was discussed in the leading case of *Naylor v Maher*.[144] In reliance on promises of inheritance, P had worked for many years for low pay on a farm belonging to a man whom he believed to be his stepfather but who, it emerged in the course of the litigation, was in fact his natural father. At first instance, O'Keeffe J upheld P's proprietary estoppel claim and awarded him the farm.[145] On appeal, it was argued by D that this award was 'excessive and disproportionate to the detriment suffered'.[146] This argument was rejected.

Peart J stated that the defendant's submissions 'referred to two diverging strands of jurisprudence as to the appropriate method of satisfying an equity in circumstances such as here', suggesting that 'the topic has not thus far been the subject of authoritative determination in this jurisdiction.'[147] The divergence had been described by counsel by reference to a passage in *Snell's Equity*, where it was stated that '[o]n the first approach the starting point is that … [P]'s expectation will be protected, and a departure from this is permitted only if it is clear that such an order would impose a disproportionate burden on … [D].'[148] The textbook went on to explain that

> [o]n the second approach, there is no presumption in favour of making … [P]'s expectation good, and the extent of relief will be determined principally by the need for such relief to do no more than ensuring that … [P] suffers no detriment as a result of … [P]'s reasonable reliance on … [D].[149]

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[144] [2012] IEHC 408; [2018] IECA 32. A submission based on proportionality was mentioned by O'Hanlon J at first instance in *O'Rourke v O'Rourke* [2018] IEHC 791 [99]-[100], but the point was not subsequently addressed, given the failure of P's case. The Court of Appeal rejected P's appeal ([2022] IECA 59) and again the question of remedies was not discussed.
[145] [2012] IEHC 408. See also (n 127).
[146] *Naylor* (n 1) [11].
[147] ibid.
[148] John McGhee (ed), *Snell's Equity* (33rd edn, Sweet and Maxwell 2015) [12.48], as quoted in *Naylor* (n 1) [12] (Peart J).
[149] *Naylor* (n 1) [12].

Thus, the first approach represented the English position at the time, prior to *Guest*, and the second approach represented the detriment-based approach. Peart J stated that this 'binary choice' was not one which he considered 'necessary to make in order to achieve a just result for the plaintiff in accordance with equitable principles.'[150] According to Peart J:

> The facts and circumstances of each case will determine how that ultimate objective is achieved: it is not necessary, so to speak, to shoehorn the Court's overall disposition of the case into one or other approach.[151]

Thus, the Court of Appeal avoided making a choice between expectation and detriment on the basis of the argument, criticised many years ago by Andrew Burrows, that the 'answer will depend on the facts of each particular case'.[152]

Two main reasons were given by Peart J for rejecting D's argument, on the facts of the case, for a detriment-based remedy. The first was that P's detriment 'is not confined to a reduction of income or other purely monetary loss.'[153] Thus, the detriment also involved lost opportunities. Peart J pointed out that

> [t]he trial judge was impressed by the plaintiff and was satisfied that, despite his limited education, he was the sort of man who would in all probability have made a success of his life in Dublin or elsewhere, and away from farming.[154]

Peart J emphasised the fact that P had 'altered the course of his life'[155] and was of the view '[t]hat the altered life that he has led ever since ought not in good conscience be taken from him and replaced by mere money.'[156] In these remarks, Peart J anticipated the emphasis placed by Lord Briggs in *Guest* on the difficulty in fairly quantifying non-monetary detriment.[157] It should be remembered, though, that under a detriment-based approach it is appropriate to grant an

[150] ibid [13].
[151] ibid.
[152] See Burrows (n 53).
[153] *Naylor* (n 1) [16].
[154] ibid [14].
[155] ibid. Note the similar emphasis on the life-long nature of the detriment in *K v K* (n 1) [124].
[156] *Naylor* (n 1) [14].
[157] See text to n 58 above.

expectation remedy when the value of the detriment equals or exceeds the value of the expectation. Therefore, it is quite possible that the outcome in *Naylor* would have been the same under such an approach.

The second point made by Peart J was that 'the representations made to the plaintiff by the deceased that he would get these lands, and the reliance which the plaintiff placed upon them, in truth amount to a contract which ought to be fulfilled. The deceased should be kept to his contract – "*pacta sunt servanda*".'[158] The obvious difficulty with this line of reasoning is that D's representations did not 'in truth' amount to a contract. If they had, it would have been possible for D to obtain a remedy in the law of contract and so he would not have had to resort to the law of proprietary estoppel. As Lord Leggatt explained in *Guest v Guest*, there are a number of reasons why a promise that is capable of triggering a proprietary estoppel remedy may not be enforceable in the law of contract: (i) there may be an absence of consideration; (ii) the promise may lack the certainty required for contractual enforcement; (iii) there may be an absence of an intention to create contractual relations, and; (iv) the necessary evidence in writing in relation to contracts for the sale of land[159] may not have been complied with.[160] The maxim *pacta sunt servanda* does not ordinarily apply to non-contractual promises. Therefore, it seems that Peart J's point here must be understood to be that where there is an informal bargain between the parties, it is more reasonable to grant an expectation remedy. This view was taken by Lord Briggs in *Guest* as part of his expectation-focused approach,[161] but it could also be rationalised as part of a detriment-based approach on the basis that the existence of a bargain shows that the parties had regarded the detriment as equivalent in value to the expectation.[162]

[158] [2018] IECA 32 [15] (emphasis in original).
[159] See s 51 of the Land and Conveyancing Law Reform Act 2009. Note also the more stringent rule created in England under s 2 of the Property (Miscellaneous Provisions) Act 1989.
[160] See *Guest* (n 3) [173]-[183].
[161] See above.
[162] See *Guest* (n 3) [220] (Lord Leggatt).

Possible Models

Having discussed the development of the law in England and Wales, as well considering the existing Irish authorities, it will now be useful to identify a number of possible theoretical models that could be adopted by the Irish courts at the remedial stage. Naturally, different variants of each approach may exist, but the aim here will simply be to indicate the broad range of possibilities. The question of which model the Irish courts should adopt will be considered in the conclusion.

The Non-Committal Approach

Under this model, the aim of the court in choosing a remedy is to give effect to 'correct equitable principles' (in the words of Peart J in *Naylor v Maher*).[163] Unfortunately, while it is understandable that the courts would resist being 'shoe-horned' into an inflexible position, invoking general principles of equity and good conscience provides no practical guidance for the court. In the end, the development of a satisfactory theoretical framework requires the court to take *some* position on the role of expectation and detriment in the process of determining the remedy.

The Pure Expectation Approach

Under this model, the purpose of the remedy is to fulfil P's expectation. As with all equitable doctrines, a pragmatic approach is taken in the individual circumstances of different cases, within the general framework of giving effect to expectations. It might seem to be a disadvantage of this approach that it does not give any role to the concept of proportionality. However, it is important to understand that the word 'proportionality' can have different meanings. The plausible proposition that all equitable remedies must avoid disproportionality involves a general sense of the word 'proportionate', conveying the idea of appropriateness in light of the circumstances and the logic of the equitable doctrine that is being applied. The concept of proportionality, as it has developed in the proprietary estoppel context, has a special meaning involving the relationship between the remedy and the detriment incurred by P. Assertions involving proportionality in that specialised sense have no inevitability to them.

[163] *Naylor* (n 1) [16].

Under the approach currently being discussed, a claim would either fail completely due to the fact that the detriment incurred was trivial and so could be dismissed as *de minimis*[164] (as could equally happen under any of the other theoretical models identified in this section),[165] or it would generally lead to the fulfilment of P's expectation. Thus, the approach under discussion would require the courts to give an expectation remedy even where there was a large disproportion between the detriment and that remedy, provided that the amount of the detriment was non-trivial. This may appear unpalatable but, in the end, this would be an intellectually honest approach – if one is unwilling to accept the detriment-based approach, one must face up to the logical consequence that limited detriment is sufficient to trigger a large expectation remedy.

The Expectation Approach Tempered by Proportionality

Under this model, the remedy would normally take the form of the fulfilment of P's expectation, subject to pragmatic considerations that might arise in individual cases. However, a lesser remedy would be chosen (on the somewhat unsatisfactory basis of the court 'doing its best' in the circumstances) if an expectation remedy would be disproportionate to P's detriment or – if one were to follow Lord Briggs in *Guest* – if it would be 'out of all proportion' to P's detriment. The existence of an informal bargain between the parties, which has been fulfilled by P, could also demonstrate the absence of disproportionality.

The Pure Detriment Approach

Under a detriment-based approach the purpose of the remedy is to erase P's detriment. This is subject to an upper limit of the expectation, so that an expectation remedy would be granted where this would be less onerous for D than a remedy based on the detriment. This approach has an obvious logic to it and has appealed strongly to academic commentators.[166] As Lord Leggatt put the

[164] As recently explained by Lord Briggs in *Brown v Ridley* [2025] UKSC 7 [30], the maxim *de minimis non curat lex* excludes 'matters which are trifling, insubstantial, inconsequential, immaterial, irrelevant or negligible'.

[165] Note *Phoenix Rock Enterprises (Trading as Frank Pratt & Sons) v Hughes* [2025] IEHC 126 [121] (Kennedy J): P's engagement of a planning consultant for a few days 'involved de minimis … inconvenience or expense which must be deemed inconsequential'. See also *Bracken v Byrne* [2006] 1 ILRM 91.

[166] For one notable example, see McFarlane (n 16) [7.35]-[7.69].

central argument in *Guest*, 'both expectation loss and reliance loss are essential elements of the equity, and, once either the expectation is fulfilled or reliance loss is prevented, there is no further reason for the court to intervene'.[167]

It seems that courts in various jurisdictions have been discouraged from adopting this theoretically pure approach by the practical difficulty in quantifying non-monetary detriment.[168] Many leading cases have occurred in the farming context, and have tended to involve life-changing choices and non-monetary detriment which is incurred over a period of decades. Thus, the difficulties in quantifying detriment have been very much at the forefront of judicial minds. Although it has been suggested that '[t]he fact that a disadvantage may not be susceptible to quantification does not make it a trump card',[169] in practical terms it is not easy for a judge to depart from an expectation approach when P's detriment has a life-long quality, even if (because of inflation in farm values) the expectation remedy runs to millions of euros.

A Detriment-Based Approach Tempered by Proportionality and/or a Willingness to Use the Expectation as a Proxy for the Detriment

The minority approach of Lord Leggatt in *Guest*, and that of the Australian courts, can be placed under this broad heading. This type of approach identifies the elimination of P's detriment as the aim, in theoretical terms, of estoppel remedies. At the same time, it makes the concession that, where there are difficulties in quantifying the detriment, the award of an expectation remedy may be necessary to ensure that P receives an adequate remedy. This can be rationalised as using the expectation as a proxy for the detriment on the basis that D is to blame for the factual uncertainty created by his or her unconscionable conduct in making, and then resiling from, a promise upon which P has relied to his or her detriment.

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[167] *Guest* (n 3) [195], citing Robertson (n 118) 303.
[168] It is arguable that these difficulties have been somewhat exaggerated: see Ben McFarlane and John Mee "Estoppel Remedies: Switching to Expectation When It Is Difficult to Quantify Detriment" <https://blogs.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2022/03/estoppel-remedies-switching-expectation-when> accessed 8 January 2026. See also *Guest* (n 3) [199] (Lord Leggatt).
[169] *Winter v Winter* [2024] EWCA Civ 699 [30] (Newey LJ).

Conclusion

What approach should the Irish courts adopt? Notwithstanding the fact that it was recently favoured by a majority of the UK Supreme Court, the 'expectation tempered by proportionality' approach (number (iii) above) is difficult to defend in principle. It fails to identify the underlying purpose that the doctrine of proprietary estoppel aims to achieve. We are told that the remedy will normally aim to fulfil P's expectation but if that is deemed inappropriate (on what principled basis?) then the court must do its best (to achieve what?). The pure expectation approach (number (ii) above), whereby the fulfilment of the expectation would be recognised as the aim of the remedy, is more coherent but has the disadvantage that the courts would sometimes have to grant a large expectation remedy on the basis of very limited detriment.

As a matter of principle, the detriment-based approach (number (v) above) is, it is submitted, the most attractive. The difficulty is that the enthusiasm of academic commentators for this approach has not been shared by the courts. Although it is this author's preferred approach, it may not advance matters much in practical terms to commend it to the Irish courts, given its recent rejection by the majority of the UK Supreme Court in *Guest*, and the absence of examples of its adoption in other cognate jurisdictions. It may be that, in pragmatic terms, the best hope is that the Irish courts will see the merits of approach number (iv) above, which is reflected in Lord Leggatt's minority approach in *Guest* and, in a somewhat different form, in the approach applied in Australia. These approaches acknowledge that the underlying aim of the remedy is to eliminate P's detriment, while at the same time emphasising that it will often be necessary in practice to grant an expectation remedy. Although this type of compromise may be open to question in theoretical terms, it is undeniable that the underlying questions are difficult and that no approach is without its drawbacks. To introduce a degree of predictability to this aspect of the law, it is important that the Irish courts settle on a specific understanding of the aim of estoppel remedies, rather than taking refuge in the unhelpful proposition that 'it all depends on the facts of the case'. In practical terms, the minority approach in *Guest*, or the broadly comparable approach favoured in Australian law, may represent the most plausible way forward for Irish law.