

# The Supreme Court in *Guest v Guest*: Remedial Mysteries in Proprietary Estoppel

RAIFF KAI ANDREWS\*

## ABSTRACT

In the light of the Supreme Court's recent decision in *Guest v Guest* [2022] UKSC 27, this article critically examines the equitable doctrine of proprietary estoppel with a focus on the question of how the court should approach the quantification of the form and extent of the remedy that is awarded. Firstly, this article examines the majority and minority judgments of the Supreme Court in *Guest* and explores the respective advantages and disadvantages of the expectation-based and detriment-based approaches. Secondly, this article evaluates the role of proportionality in determining the appropriate remedy in the light of the Supreme Court's judgment in *Guest*. Thirdly, this article explores the intrinsic value to both the judiciary and the layperson in ensuring that a clear framework of principles is developed. Finally, this article argues that the Supreme Court in *Guest* is correct to champion the expectation-based approach when deciding the form and extent of the remedy, as it provides a more determinative framework on which the court can ground its judicial discretion.

*Keywords:* *proprietary estoppel, equity, unconscionability, remedies, expectation*

## I. INTRODUCTION

Proprietary estoppel is a doctrine that marks the intersection between the comparatively rigid laws governing the transfer of land and more malleable principles of equity. It allows equity to act as a counterweight to the unconscionability that arises where B has relied, to their detriment, on A's promise to utilise a legal power. It is A's subsequent refusal to exercise this legal power, whether intentionally or not, that is usually the unconscionable conduct. The assurance, reliance, detriment, and unconscionability to which the circumstances

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give rise can come in varying degrees and forms.<sup>1</sup> The appropriate remedy in any particular case varies in turn. For example, property rights (such as the freehold title to a property) or private rights (such as damages or a licence) may be the most appropriate method of satisfying the equity that has arisen in the circumstances.<sup>2</sup>

Two broad competing approaches have emerged in relation to the remedial issue of how the court should exercise its discretion when quantifying the remedy in cases of proprietary estoppel.<sup>3</sup> On the first approach, the court starts with an assumption that B's expectations will be protected unless it is disproportionate to do so.<sup>4</sup> On the second approach, the court will look to do no more than remedy the detriment that B has suffered as a result of A reneging on their promise.<sup>5</sup> This is, as Lewison LJ remarked, a 'lively controversy about the essential aim of the exercise of this broad judgmental discretion'.<sup>6</sup>

When faced with the difficult task of formulating the remedy in instances of proprietary estoppel, the court must exercise, to a greater or lesser degree, judicial discretion. In the development of the case law, there has been a lack of clarity as to what the remedial objective of the doctrine of proprietary estoppel is, and this has resulted in a lack of certainty as to how judges might quantify the form and extent of a remedy.<sup>7</sup> The recent uptake of cases of proprietary estoppel concerning family farms has served to accentuate the need for a clear framework in order to bring about a concrete foundation on which the court can base its judicial discretion. These cases typically involve a family dispute over their agricultural businesses whereby B will have worked on the farm with the expectation that they will one day inherit it, but instead they are denied their expected inheritance. This is usually as a result of the breakdown of the family relationship.<sup>8</sup> At the heart of this debate have been Court of Appeal cases such as *Davies v Davies*<sup>9</sup> and *Guest v Guest*.<sup>10</sup> Until the recent Supreme Court judgment in *Guest v Guest* [2022] UKSC 27, the question of whether the doctrine of proprietary estoppel is concerned with rectifying unconscionability as a result of denied expectations or as a result of detrimental reliance had been left open.<sup>11</sup> It is this fundamental question of how the form and extent of the remedy should be

<sup>1</sup> *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [29].

<sup>2</sup> In *Jennings v Rice* [2002] EWCA 159, [2003] 1 P & CR 8, the Court of Appeal made a monetary award. By contrast, in *Voyce v Voyce* (1991) 62 P & CR 290 (CA), a freehold title was awarded.

<sup>3</sup> Ben McFarlane, 'Estoppel' in John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020) para 12-049.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

<sup>6</sup> *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P & CR 10 [39].

<sup>7</sup> Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel — Again' (2006) 122 *Law Quarterly Review* 492, 499.

<sup>8</sup> *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911 [236]; *Habberfield v Habberfield* [2019] EWCA Civ 890, [2019] 2 P & CR DG13 [82].

<sup>9</sup> *Davies* (n 6).

<sup>10</sup> [2020] EWCA Civ 387, [2020] 1 WLR 3480.

<sup>11</sup> *Guest* (n 8).

quantified that the Supreme Court in *Guest* was asked to address.<sup>12</sup> The Supreme Court focused their analysis on instances of a promise of a future interest in property, rather than on circumstances in which there is a mistaken belief that such an interest has already been acquired.<sup>13</sup>

## II. THE BACKGROUND TO THE SUPREME COURT CASE OF *GUEST* *V GUEST*

There has been a great deal of contemporary debate regarding the question of whether proprietary estoppel seeks to remedy the detriment suffered by B, or whether it seeks to uphold B's expectations. As hinted above, at the forefront of this debate have been *Davies*<sup>14</sup> and *Guest*.<sup>15</sup>

*Davies* and *Guest* have broadly similar fact patterns, with both involving B's expected inheritance of the family farm and the subsequent breakdown of family relations. In *Davies*, B (A's daughter) worked on the farm for many years and received low pay.<sup>16</sup> B had expected to receive a share in the farm business based on various assurances made by A.<sup>17</sup> However, owing to various disagreements, A reneged on their assurances that B would inherit his promised share.<sup>18</sup>

*Guest* concerned Tump Farm, which had mostly been a dairy farm consisting of 197 acres with a farmhouse and a semi-detached cottage on its grounds.<sup>19</sup> It had been farmed by the Guest family since 1938.<sup>20</sup> B (A's son) had worked on Tump Farm full-time for 32 years with the expectation that he would one day inherit the farm.<sup>21</sup> A breakdown in the family relationship occurred and B was written out of A's will. As a result, B brought a claim in proprietary estoppel.<sup>22</sup>

It is clear that both *Davies* and *Guest* considered the prevention of an unconscionable result to be the doctrinal purpose of proprietary estoppel.<sup>23</sup> Until the judgment of the Supreme Court in *Guest*, however, recent cases were indecisive in relation to the approach that should be employed when deciding the form and extent of a remedy in proprietary estoppel.<sup>24</sup>

In *Davies*, the High Court awarded B a total of £1.3 million, as the trial judge concluded that this fairly reflected both B's expectations as well as the

<sup>12</sup> *ibid* [7].

<sup>13</sup> *ibid* [4].

<sup>14</sup> *Davies* (n 6).

<sup>15</sup> *Guest* (n 8).

<sup>16</sup> *Davies* (n 6) [4]–[6].

<sup>17</sup> *ibid* [21].

<sup>18</sup> *ibid*.

<sup>19</sup> *Guest* (n 8) [113].

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid* [116].

<sup>22</sup> *ibid* [123].

<sup>23</sup> *Davies* (n 6) [38]; *Guest* (n 8) [160].

<sup>24</sup> *Guest* (n 8) [7].

detriment that B had suffered.<sup>25</sup> However, the Court of Appeal drew a different conclusion and reduced the remedy to £500,000.<sup>26</sup> Lewison LJ recognised that the need for proportionality between the remedy and the detriment meant that B's expectations should be fulfilled 'in a more limited way' in circumstances where the expectation was disproportionate to the detriment.<sup>27</sup> He also approved of the suggestion that there might be 'a sliding scale' that considered the expectation, the detriment, and the length of time that the expectation was reasonably held.<sup>28</sup> Lewison LJ's approach marks an erosion of the significance of the role of B's expectations, in that B's expectations are unlikely to be fulfilled under this approach (although they would not be ignored).

In contrast to the Court of Appeal in *Davies*, the High Court in *Guest* fashioned the remedy around B's expectations.<sup>29</sup> B was granted a lump sum payment reflecting (among other things) 50 per cent after tax of the market value of the farming business along with 40 per cent after tax of the value of the farm itself.<sup>30</sup> A appealed against this remedy. A argued (among other things) that rather than seeking to enforce B's expectations, the court should instead make a detriment-based assessment of B's loss of opportunity to pursue other work or look to compensate B for any increase in the value of the farm as a result of B's contributions.<sup>31</sup>

The Court of Appeal rejected the argument that the court should seek to compensate for B's loss of opportunity to work elsewhere, highlighting that in 'a case where the claimant has largely performed his side of the bargain, it is fair to take what the claimant was promised as a rough proxy for what he has lost'.<sup>32</sup> The argument that the remedy should be based on the increase in the value of the property was also rejected, as it was an approach that did not properly reflect the assurances given.<sup>33</sup>

Both *Davies* and *Guest* reaffirm unconscionability as the doctrinal purpose of proprietary estoppel.<sup>34</sup> They differ, however, in their respective approaches: *Davies* gives greater weight to B's detriment, and vice versa.<sup>35</sup> In contrast with *Davies*, the majority judgment of the Supreme Court in *Guest* firmly establishes that the court should formulate the form and extent of the remedy through the lens of B's expectations.<sup>36</sup>

<sup>25</sup> *Davies v Davies* [2015] EWHC 015 (Ch) [56] (Judge Milwyn Jarman QC).

<sup>26</sup> *Davies* (n 6) [69].

<sup>27</sup> *ibid* [38].

<sup>28</sup> *ibid* [41].

<sup>29</sup> *Guest v Guest* [2019] EWHC 869 (Ch).

<sup>30</sup> *ibid* [288] (Judge Jonathan Russen QC).

<sup>31</sup> *Guest* (n 10) [65].

<sup>32</sup> *ibid* [82] (Floyd LJ).

<sup>33</sup> *ibid* [85].

<sup>34</sup> *Davies* (n 6) [38]; *Guest* (n 8) [47].

<sup>35</sup> *Davies* (n 6) [38].

<sup>36</sup> *Guest* (n 8) [75].

### III. THE CONTRASTING APPROACHES OF THE MAJORITY AND MINORITY IN THE SUPREME COURT

The majority ruling of the Supreme Court in *Guest* was given by Lord Briggs (with whom Lady Arden and Lady Rose agreed), with Lord Leggatt and Lord Stephens dissenting.<sup>37</sup>

Both Lord Briggs and Lord Leggatt agreed that the concept of unconscionability remains at the foundation of proprietary estoppel both when assessing whether or not the circumstances give rise to an equity, as well as when assessing the form and extent of the remedy.<sup>38</sup> There is, however, a clear dividing line between the prevailing judgment of Lord Briggs and the dissenting judgment of Lord Leggatt. Lord Briggs affirmed that the essential aim of proprietary estoppel is to rectify the unconscionability that results from A repudiating their promise to B and that the starting assumption is to enforce B's expectations.<sup>39</sup> As stated by Lord Briggs, 'it is the repudiation of the promised expectation' that constitutes the unconscionable conduct.<sup>40</sup> In contrast, Lord Leggatt argued that the essential aim of the doctrine of proprietary estoppel is to remedy the detriment that B has suffered as a result of their reliance on a promise by A that A has subsequently reneged on.<sup>41</sup> He viewed the nature of the harm that is being remedied as being A's failure to take responsibility for not upholding their assurances, rather than A's failure to uphold their assurances.<sup>42</sup> Consequently, despite Lord Briggs's and Lord Leggatt's agreement that unconscionability remains at the foundation of proprietary estoppel, they differed as to how this unconscionability should be remedied.

Lord Briggs agreed with Scarman LJ in *Crabb v Arun District Council* that the court must achieve the 'minimum equity to do justice'<sup>43</sup> and placed an emphasis on the 'to do justice' element of this judicial endeavour.<sup>44</sup> Lord Briggs highlighted that the requirement 'to do justice' entailed that the essential aim is to remedy the unconscionability that has arisen.<sup>45</sup> He stated that the court should apply a two-stage analysis in this regard.<sup>46</sup>

At the first stage, the court must assess whether or not A's conduct in repudiating their promise to B was unconscionable.<sup>47</sup> At the second stage, the court should start with an assumption that it is B's expectations that should be

<sup>37</sup> *ibid.*

<sup>38</sup> *Guest* (n 8) [13] (Lord Briggs), [160] (Lord Leggatt).

<sup>39</sup> *ibid* [53], [75].

<sup>40</sup> *ibid* [53].

<sup>41</sup> *ibid* [195]–[196].

<sup>42</sup> Lorren Eldridge, 'Looking a Guest Horse in the Mouth: Proprietary Estoppel in English Law' [2023] *Conveyancer and Property Lawyer* 101, 106.

<sup>43</sup> [1976] Ch 179 (CA) 198.

<sup>44</sup> *Guest* (n 8) [13].

<sup>45</sup> *ibid* [13].

<sup>46</sup> *ibid* [74]–[75].

<sup>47</sup> *ibid.*

enforced.<sup>48</sup> In this regard, the court will typically ‘start with the assumption (not presumption) that the simplest way to remedy the unconscionability constituted by the repudiation is to hold the promisor to the promise’.<sup>49</sup> But if it is shown that the specific enforcement of the promise is ‘out of all proportion to the cost of the detriment’ suffered by B, then the court has discretion to limit the remedy so as to do justice between the parties.<sup>50</sup> On this point, Lord Briggs stated that the ‘court may have to listen to many other reasons from the promisor... why something less than full performance will negate the unconscionability and therefore satisfy the equity’.<sup>51</sup>

In contrast to Lord Briggs, Lord Leggatt argued that the ‘basal purpose’ of proprietary estoppel is to remedy the detriment suffered by B and that the expectation-based approach and the detriment-based approach are both methods of achieving this purpose.<sup>52</sup> Therefore, Lord Leggatt highlighted a key distinction between two scenarios: firstly, where performance of the promise remains contingent on a future event (for example, the death of A); and secondly, where a promise has fallen due for performance.<sup>53</sup>

Where the first scenario arises (namely where performance is conditional on a future event but A has resiled from their promise), Lord Leggatt stated that consideration should be given to whether A has offered to compensate B for their reliance loss. Following this, where there is no offer of compensation, the court will have to decide between ‘(1) awarding a remedy assessed by reference to the prospect of a future gift and (2) awarding compensation for B’s reliance loss’.<sup>54</sup>

Where the second scenario occurs (namely where the promise has fallen due), Lord Leggatt argued that, even where B’s reliance loss is difficult to quantify but the value of the interest in the property is disproportionate to B’s detriment, then the court should aim to quantify the loss in monetary terms, rather than start with the assumption that the promise should be enforced.<sup>55</sup> It may be appropriate, however, to design a remedy that gives effect to the promise where the reliance loss is difficult to quantify in monetary terms and the value of the interest in property is not clearly disproportionate to B’s reliance loss so as to fulfil the equity in the circumstances.<sup>56</sup> Lord Leggatt further argued that the purpose of the court’s discretion to fashion an appropriate remedy to achieve justice in the circumstances is to prevent B from suffering a detriment, highlighting that:

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid* [75].

<sup>50</sup> *ibid* [76].

<sup>51</sup> *ibid* [75].

<sup>52</sup> *ibid* [196], drawing upon the dictum of Dixon J in the High Court of Australia in *Grundt v Great Boulder Pty Gold Mines Ltd* (1938) 59 CLR 641, 674–675.

<sup>53</sup> *Guest* (n 8) [257]–[259].

<sup>54</sup> *ibid* [260].

<sup>55</sup> *ibid* [258].

<sup>56</sup> *ibid.*

...in exercising this discretion, the aim is to award a remedy which does all that is necessary, but no more than is necessary, to prevent B from suffering detriment as a result of having relied on a promise of a gift of property which A no longer intends to make.<sup>57</sup>

At the heart of Lord Briggs's majority judgment is the championing of proprietary estoppel as an equitable remedy. Both the majority and the minority judgments agreed that the appropriate remedy can take the form of either specific performance or damages.<sup>58</sup> Although Lord Leggatt recognised that the court 'has a flexible discretion to fashion a remedy which does justice in the circumstances', Lord Leggatt's focus on remedying the detriment with a view to quantifying the loss into a monetary sum greatly limits the scope of the court's discretion when compared to Lord Briggs's expectation approach.<sup>59</sup>

Lord Leggatt did find support for this detriment-focused approach. For example, *Jennings v Rice* stands in contrast to the expectation-based trend that had emerged in previous case law throughout the twentieth century.<sup>60</sup> On appeal, the argument that the court should employ an expectation-based remedy was rejected in favour of the argument that there needed to be proportionality between the remedy and the detriment. However, Walker LJ also rejected the argument that the correct approach was to remedy the detriment that B had suffered.<sup>61</sup> He reasoned that the court should not solely look to remedy the detriment because in some circumstances such a quantification cannot be done with reasonable accuracy.<sup>62</sup> Further, Walker LJ highlighted that the application of proportionality takes into account any other benefits that B may have received (like free accommodation) which might not be considered if the court were solely to apply either the expectation-based approach or the detriment-based approach.<sup>63</sup>

Another point in support of the detriment-focused approach can be found in Australian case law. In *Grundt v Great Boulder Pty Gold Mines Ltd*, Dixon J (of the High Court of Australia) noted that 'it is often said simply that the party asserting the estoppel must have been induced to act to his detriment'.<sup>64</sup> Therefore, the unconscionable conduct would not be A's failure to keep their promise but rather A's failure to prevent B from suffering a detriment as a result of their reasonable reliance on the promise.<sup>65</sup>

It could also be argued that one of the primary advantages of Lord Leggatt's approach is that if it is possible to quantify accurately the detriment suffered by B, then the remedy will accurately reflect B's detriment-based loss.

<sup>57</sup> *ibid* [261].

<sup>58</sup> *ibid* [53] (Lord Briggs), [192] (Lord Leggatt).

<sup>59</sup> *ibid* [261].

<sup>60</sup> *Jennings* (n 2).

<sup>61</sup> *ibid* [51].

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid*.

<sup>64</sup> *Grundt* (n 52).

<sup>65</sup> *Guest* (n 8) [191] (Lord Leggatt).

Lord Leggatt was not suggesting that the damages must be capable of 'arithmetical computation' for the court to grant them.<sup>66</sup> Rather, as with cases of personal injury, damages represent the most appropriate remedy to reflect the degree of harm done to the claimant.<sup>67</sup>

Another argument in favour of the detriment-based approach is that it safeguards the traditional requirements for the formation of a legally binding obligation.<sup>68</sup> On an expectation-based claim, detrimental reliance can be viewed as an alternative to the requirement of consideration, which would serve to make the assurances made by A legally binding.<sup>69</sup> Through this framework, a claim for the enforcement of A's promise would arise merely from A's failure to make a gratuitous transfer after B has relied on A's promise to their detriment.<sup>70</sup> However, even if detrimental reliance is an appropriate substitute for consideration, it cannot supersede the other requirements necessary to create a legal obligation, such as the intention to create a legally binding obligation and the need for certain terms under the agreement.<sup>71</sup>

Indeed, as Lord Leggatt highlights, under the expectation approach, 'there is no requirement that the promise must be an utterance which would reasonably be understood as intended to create a legal obligation'.<sup>72</sup> This is reflected in *Thorner v Major*, where the House of Lords held that a promise need not be express to give rise to a claim in proprietary estoppel.<sup>73</sup> In *Thorner*, B had been working on the family farm for almost 30 years and, because of various assurances from A (although none of these assurances were express), was expecting to inherit upon A's death in 2005.<sup>74</sup> A had made a will to this effect, but it was subsequently destroyed with the result that A disinherited B.<sup>75</sup> B brought a claim in proprietary estoppel which ultimately succeeded. However, as Lord Leggatt summarised in *Guest*, the doctrine 'does not and could not sensibly have as its aim the enforcement of promises which do not satisfy the requirements for the creation of legal obligations. A property expectation claim is not a form of contract lite.'<sup>76</sup> From this perspective, the detriment-based approach prevents proprietary estoppel from threatening the erosion of the conventional principles governing the formation of a contract by preventing detrimental reliance from substituting in for the role of consideration.

Nevertheless, there are various advantages to the adoption of Lord Briggs's expectation-based remedial approach for the development of future case law

<sup>66</sup> *ibid* [199].

<sup>67</sup> *ibid*.

<sup>68</sup> Eldridge (n 42) 104.

<sup>69</sup> *Guest* (n 8) [174].

<sup>70</sup> *ibid*.

<sup>71</sup> *ibid* [175].

<sup>72</sup> *ibid* [176].

<sup>73</sup> *Thorner* (n 1) [55]–[56] (Lord Walker).

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid* [44].

<sup>76</sup> *Guest* (n 8) [183].



compared to Lord Leggatt's detriment-based approach.<sup>77</sup>

Firstly, to start with an assumption that the expectation, rather than the detriment, should be met to remedy the unconscionability in the circumstances is a more determinative approach. This is because it provides a clear starting point for the court when considering the form and extent of the remedy and, in so doing, it promotes a greater degree of doctrinal certainty. In particular, it circumvents the difficulties involved in calculating the detriment. In *Guest*, Lord Leggatt highlighted the difficulties of quantifying B's detrimental reliance, stating that:

In some cases there is no difficulty in quantifying the claimant's reliance loss, where for example it consists in spending money on improving property. Often, however, the detriment to the claimant does not consist in, or is not limited to, the expenditure of money or other financial damage.<sup>78</sup>

Lord Leggatt further noted a wide array of non-pecuniary examples of detrimental reliance, including 'loss of educational or career opportunities and other non-pecuniary detriment of a kind which it is intrinsically difficult, and in one sense impossible, to value in terms of money'.<sup>79</sup> Although Lord Briggs concedes that the court's inability to place a value on the detriment is not in itself a sound reason to prefer an expectation-based remedy,<sup>80</sup> in acknowledging this difficulty, Lord Leggatt rightly admitted 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'.<sup>81</sup> He further commented that the difficulties involved in 'quantifying the reliance loss may be a good reason to prefer the remedy of compelling the defendant to grant the property right which the claimant was promised'.<sup>82</sup>

*Thorner v Major* supports this argument. The trial judge in that case commented that to place a monetary value on B's lifelong contribution to the farm was a 'virtually impossible task'.<sup>83</sup> By contrast, the expectation-based approach did not pose such a difficulty in *Thorner*.<sup>84</sup> Walker LJ in *Jennings* also recognised this difficulty, stating that 'in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations'.<sup>85</sup> Therefore, starting with an assumption that the expectation should be met is an approach that avoids the risk of uncertainty and undercompensating B.

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid* [198].

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid* [12].

<sup>81</sup> *ibid* [200].

<sup>82</sup> *ibid* [202].

<sup>83</sup> *Thorner v Major* [2007] EWHC 2422 (Ch), [2008] WTLR 155 [139]–[142]; *Guest* (n 8) [203] (Lord Leggatt).

<sup>84</sup> *Thorner* (n 83).

<sup>85</sup> *Jennings* (n 2) [51].

Further, under Lord Briggs's approach, the fact that the court starts with the assumption that the expectation should be enforced does not mean that 'real-life difficulties'<sup>86</sup> will be unaccounted for, such as the need for a clean break or to account for disproportionality between the remedy and the detriment.<sup>87</sup> Harry Sanderson highlights that such remedial flexibility is 'familiar to equity'.<sup>88</sup> The emphasis on the flexibility of the court's discretion is shown in *Guest* by the focus that Lord Briggs placed on remedying unconscionability, rather than on seeking to enforce a *prima facie* entitlement to B's expectations.<sup>89</sup> This highlights that Lord Briggs's approach is sensitive to the varying fact patterns in proprietary estoppel cases.<sup>90</sup>

Secondly, starting with an assumption that B's expectations are to be enforced saves parties both time and costs. B's expectations are often clearer than B's detriment. As demonstrated in *Guest*, accurately quantifying the detriment can be a difficult, if not impossible, task for the court. One judge's opinion on how to quantify the detriment arising from a particular set of facts may also be different from another's. Where the detriment suffered is non-pecuniary (as it so often is in cases concerning proprietary estoppel), this expectation-based starting assumption circumvents unnecessary attempts at quantifying and distilling the detriment suffered into a specific monetary sum.

Thirdly, the benefit of the courts cementing the expectation-based approach extends into instances where the doctrine of proprietary estoppel interacts with a potential contract. It could be argued that championing an expectation-based remedy will only serve to promote uncertainty in commercial transactions as expectations may contravene the terms of the potential contract. This is a scenario that Lord Walker in *Cobbe v Yeoman's Row Management Ltd* was keen to avert.<sup>91</sup> From this perspective, Lord Leggatt's approach would largely circumvent this issue. These concerns, however, are overstated. As Martin Dixon highlights, the distinction between commercial and non-commercial contexts in instances of proprietary estoppel is an artificial one.<sup>92</sup> He further points out that the doctrine of proprietary estoppel cannot successfully operate in contract-type scenarios as the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 have not been met.<sup>93</sup> Nor can proprietary estoppel be invoked by parties to a contract to override it. In *Gordon v Havener*, it was noted that 'proprietary estoppel cannot, as a matter of principle, be invoked by a contract-

<sup>86</sup> *Guest* (n 8) [7].

<sup>87</sup> *ibid* [13], [16].

<sup>88</sup> Harry Sanderson, 'Proprietary Estoppel in *Guest v Guest*: Equity at Its Most Flexible?' (2023) 139 *Law Quarterly Review* 187, 191.

<sup>89</sup> *ibid* 190.

<sup>90</sup> *Guest* (n 8) [65].

<sup>91</sup> [2008] UKHL 55, [2008] 1 WLR 1752 [81].

<sup>92</sup> Martin Dixon, 'Painting Proprietary Estoppel: Howard Hodgkin, Titian or Jackson Pollock?' [2022] *Conveyancer and Property Lawyer* 30, 37–38.

<sup>93</sup> *ibid* 36.

breaker where the relevant promise is contained in the contract...'.<sup>94</sup> Conversely, Dixon comments that this also makes clear that proprietary estoppel cannot operate as a remedy for breach of contract as 'the estoppel is not seeking to enforce the contract, it is remedying the unconscionability of the defendant'.<sup>95</sup>

Simply put, the 'heart of the doctrine' remains that of rectifying the unconscionability suffered by B rather than attempting to enforce a contract.<sup>96</sup> The presence of a potential contract does not change the fact that proprietary estoppel is a mechanism of equity and is therefore separate from a contractual claim.<sup>97</sup> Accordingly, the courts should be under no compulsion to depart from the expectation-based assumption as affirmed in *Guest* in instances where the doctrine of proprietary estoppel interacts with a potential contract.<sup>98</sup> It is true that commercial formalities and conventions will often mean that the full enforcement of B's expectations will not be necessary to prevent B from suffering an unconscionable result. Equally, the presence of a potential contract does not disbar the application of equity. In these circumstances, the court must exercise judicial discretion in its application of proportionality.

#### IV. PROPORTIONALITY

Lord Briggs addressed the role of proportionality in claims of proprietary estoppel, arguing that it should not be viewed as the essential aim of the doctrine or be used as a basis for the remedy.<sup>99</sup> This is in contrast to recent case law, in which proportionality has been said to be 'at the heart' of the doctrine of proprietary estoppel.<sup>100</sup> In *Crabb*, Scarman LJ highlighted that it is an essential requirement that there must be proportionality between the expectation and the detriment, and that the court should seek 'the minimum equity to do justice to' the claimant.<sup>101</sup> In *Guest* itself, Lord Leggatt argued that the correct interpretation of Scarman LJ's dictum is that the court should not grant a remedy that reflects B's expectations when this would be disproportionate to the detriment that B has suffered.<sup>102</sup>

However, Lord Briggs is correct to conclude that, as the detriment suffered by B usually cannot be easily quantified, an accurate assessment of proportionality cannot be undertaken in most cases.<sup>103</sup> Placing the proportionality test as the aim of the doctrine therefore does not provide adequate guidance as to the form and extent of the relief. *Davies* is an example of an instance where the court had

<sup>94</sup> [2021] UKPC 26 [15].

<sup>95</sup> Dixon (n 92) 36.

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

<sup>98</sup> *Guest* (n 8).

<sup>99</sup> *ibid* [72].

<sup>100</sup> *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988 [65].

<sup>101</sup> *Crabb* (n 43) 198.

<sup>102</sup> *Guest* (n 8) [197].

<sup>103</sup> *ibid* [72].

difficulty in quantifying the extent of the detriment compared to the remedy.<sup>104</sup> The trial judge commented that the ‘proportionate remedy is to award... a lump sum in the amount of £1.3 million’, this being about a third of the net value of the family farm.<sup>105</sup> On appeal, Lewison LJ commented that the trial judge provided ‘no further explanation of how he reached his ultimate conclusion’, and the £1.3 million awarded at trial was reduced to £500,000, as noted above.<sup>106</sup> In this instance, the court quantified the remedy but was unable to elucidate on the specifics of the approach involved in arriving at a remedy that it deemed to be proportionate. This is far from the first time that the court has faced difficulty in quantifying the detriment and assessing proportionality.<sup>107</sup>

*Habberfield v Habberfield* also illustrates how proportionality is not a suitable framework for the court to ground its judicial discretion when deciding on the form and extent of the remedy.<sup>108</sup> In the Court of Appeal, Lewison LJ upheld the expectation-based approach of Birss J, who had awarded a monetary sum as a proxy for the promised inheritance of part of the contested farmland. Lewison LJ agreed that decades of B’s life in contributing to the farm were not ‘susceptible of quantification’.<sup>109</sup> As it was not possible to value the detriment accurately, it would not be possible to show that B’s expectation was out of proportion to the detriment suffered.<sup>110</sup> From this perspective, the issue of proportionality between the remedy and the detriment occupies a more limited role as a result of *Guest* and its championing of the expectation-based approach.<sup>111</sup> As is often the case, the detriment is very difficult or impossible to quantify accurately and the application of proportionality is accordingly made redundant.<sup>112</sup>

Nevertheless, proportionality still has a role to play. The application of proportionality goes beyond the examination of the relationship between the expectation and the detriment. The enforcement of the expectation, or a monetary equivalent, may be proportionate as a consequence of B upholding their side of the bargain: where B does so, it is proportionate to require A to fulfil their part of the agreement.<sup>113</sup> That said, in a situation where A can show that the enforcement of B’s expectation (whether by *in specie* enforcement or a monetary equivalent) would be disproportionate to the remedy given, the court has the power to exercise discretion and amend the form and extent of the remedy so that it remedies the equity in the circumstances. An example is *Guest* itself, in which the acceleration of the promised benefit (in this case, caused by the acceleration of intestacy) and the need for a clean break made a discount for accelerated receipt

<sup>104</sup> *Davies* (n 6).

<sup>105</sup> *Davies* (n 25) [56].

<sup>106</sup> *Davies* (n 6) [37], [69].

<sup>107</sup> *Jennings* (n 2) [43].

<sup>108</sup> *Habberfield* (n 8).

<sup>109</sup> *ibid* [60].

<sup>110</sup> *Guest* (n 8) [55].

<sup>111</sup> *ibid*.

<sup>112</sup> *ibid* [72].

<sup>113</sup> *ibid* [73].

appropriate.<sup>114</sup> This is because the accelerated receipt of inheritance was an additional benefit that also had the effect of depriving the current proprietors of a proportion of their assets for the remainder of their lifetime.

As a consequence of *Guest*, it is clear that proportionality serves as a barometer for the court to apply in the circumstances to assess whether or not the enforcement of B's expectations is necessary to prevent an unconscionable result, rather than being the essential aim of proprietary estoppel.<sup>115</sup> The principle allows the court to assess whether a lower remedy is required to prevent B from being awarded more than what is necessary to satisfy the equity in the circumstances.<sup>116</sup> The application of proportionality in this manner will assist the court in averting the possibility of overcompensating B that might result from the initial assumption that the court should enforce B's expectations.

## V. THE INTRINSIC VALUE OF THE EXPECTATION-BASED FRAMEWORK

As Lord Briggs points out, the 'traditional English approach' is, on the face of it, to 'hold the promisor to his promise'.<sup>117</sup> In referencing *Dillwyn v Llewelyn*<sup>118</sup> as 'an early precursor of proprietary estoppel,' Lord Briggs argued that throughout the development of the doctrine there has been a 'single-minded' aim of remedying the expectation.<sup>119</sup> The majority judgment went on to state that remedying the expectation is the 'simplest way to prevent the unconscionability inherent in repudiating it', albeit that this has always been tempered by discretion.<sup>120</sup> Although detrimental reliance forms a large part of the 'moral justification' for equitable relief,<sup>121</sup> and is a required condition to give rise to it, judges had not been focused on protecting B from the detriment they had suffered until *Jennings* introduced the principle of proportionality.<sup>122</sup> Indeed, to focus on the detriment would 'replace what is meant to be a flexible conscience-based discretion aimed at producing justice with the mechanical task of monetarising the detriment and the expectation'.<sup>123</sup> In considering the nature of equity more broadly, Lord Sales (writing extrajudicially) highlights that equity 'overlays the common law, mitigating the harshness that would ensue were strict legal rules to be applied without any exception'.<sup>124</sup> Therefore, an approach in which the court starts with

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid* [65].

<sup>116</sup> *ibid* [104]–[105].

<sup>117</sup> *ibid* [53].

<sup>118</sup> (1862) 4 De GF & J 517, 45 ER 1285.

<sup>119</sup> *Guest* (n 8) [20].

<sup>120</sup> *ibid* [61].

<sup>121</sup> *ibid* [53].

<sup>122</sup> *Jennings* (n 2).

<sup>123</sup> *Guest* (n 8) [53].

<sup>124</sup> Lord Sales JSC, 'Proprietary Estoppel: Great Expectations and Detrimental Reliance' in Natalie Mroczkova, Aruna Nair, and Luke Rostill (eds), *Modern Studies in Property Law*, vol 12 (Hart Publishing 2023)

the assumption that the expectation interest is to be satisfied, but remains capable of modifying the remedy, represents an accurate reflection of the development of proprietary estoppel and its inherent flexibility as an equitable doctrine.

Furthermore, the doctrine of proprietary estoppel should always aspire to be capable of providing normative guidance, as this will promote certainty in the lives of citizens.<sup>125</sup> However, to prevent unfettered indeterminacy in the exercise of judicial discretion, the expectation-based framework must be developed and implemented in future case law. The Supreme Court's decision in *Guest* will assist judges in future cases in fixing their discretion within the law itself and therefore facilitate their role as agents of the law,<sup>126</sup> as it reaffirms B's expectations as the court's starting point when quantifying the form and extent of the remedy.<sup>127</sup> Lord Briggs's expectation-based framework, in counteracting legal indeterminacy, will also help those who are affected by a claim in proprietary estoppel, whether they be a legal practitioner or a layperson, to plan for the future more reliably.<sup>128</sup> Therefore, his approach directly promotes the rule of law.<sup>129</sup>

## VI. CONCLUSION

It is clear that the Supreme Court in *Guest* held aspirations of promoting doctrinal certainty when reaffirming the expectation-based approach to remedying claims in proprietary estoppel.<sup>130</sup> Lord Briggs sets out a clear two-stage test which provides a framework that the court can use to assess the merits of future claims. This is an intuitive approach that is capable of accommodating the broad spectrum of scenarios that can arise in cases of proprietary estoppel. In clarifying the focus of the doctrine, the Supreme Court has provided a focal point for judicial discretion, which will prevent those tasked with fashioning the appropriate remedy under a claim for proprietary estoppel from straying into the shade of the 'portable palm tree' once again.<sup>131</sup>

Nevertheless, some questions remain unanswered. Although the role of proportionality in the assessment of the appropriate remedy has been substantially clarified by the majority judgment in *Guest*, its continued application will inevitably lead to future debate regarding the relationship between B's expectations and the detriment that they have suffered.

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<sup>125</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 228.

<sup>126</sup> Gardner (n 7) 505.

<sup>127</sup> *Guest* (n 8) [75].

<sup>128</sup> *ibid.*

<sup>129</sup> See Raz (n 125).

<sup>130</sup> *ibid.* 222.

<sup>131</sup> *Taylor v Dickens* [1998] 1 FLR 806, 820.