Michaelmas Term
[2022] UKSC 27
On appeal from: 2020 EWCA Civ 387

JUDGMENT

Guest and another (Appellants) *v* Guest (Respondent)

before

Lord Briggs
Lady Arden
Lord Leggatt
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
19 October 2022

Heard on 2 December 2021

Appellants (David George Guest and Josephine Guest)
Thomas Dumont KC
William Moffett
(Instructed by Thrings LLP (Bristol))

Respondent (Andrew Charles Guest)
Penelope Reed KC
Philip Jenkins
(Instructed by Clarke Wilmott LLP (Taunton))

LORD BRIGGS (with whom Lady Arden and Lady Rose agree)

1. “One day my son, all this will be yours”. Spoken by a farmer to his son when in his teens, and repeated for many years thereafter. Relying on that promise of inheritance from his father, the son spends the best part of his working life on the farm, working at very low wages, accommodated in a farm cottage, in the expectation that he will succeed his father as owner of the farm, to be able to continue farming there, and in due course to pass on the farm to his own children.

2. Many years later, father and son fall out. It does not matter who is to blame for the falling out, but they can no longer work together or even live in close proximity. The son has no alternative but to leave, to find alternative work and rented accommodation for himself and his family elsewhere. Meanwhile the father cuts him out of his will. The facts of this case differ from the above common example only because the father David Guest has two sons, Andrew and Ross as well as a daughter Jan. Andrew was not promised the whole of the farm (“Tump Farm”) as an inheritance, but only a sufficient (but undefined) part of it to enable him to operate a viable farming business on it after the death of his parents.

3. What if anything can the law do for Andrew? There is no contract between them which Andrew can enforce. The farm was not put into trust for the parents for life with remainder to be shared between Andrew, Ross and Jan. The Inheritance (Provision for Family and Dependants) Act 1975 is unlikely to assist Andrew because he can still earn a living. Anyway his parents may have many years to live. And the farmhouse is their home. Most people would think that Andrew has been very unfairly treated by his father, but many would also think it strange if the court were to require David to give Andrew a viable share of the farm now, when he had promised to do so only upon his and his wife’s death. Why should Andrew receive a share of the farm earlier than he had been promised it, because of a family dispute for which he may have been no less to blame (if blame is the right word at all) than his father?

4. Providing a remedy for Andrew is a task for which the courts have recourse to equitable principles. One of the principal functions of equity is to put right injustice to which the law is otherwise blind, by restraining the rigid application of legal rules where their implementation would be unconscionable. Two legal rules are engaged here. The first is that a promise is not enforceable unless it is made part of a contract. The second is that a person is free to change his will until he dies (or loses mental capacity to do so). David was, in accordance with those rules both free to renege upon his promise to Andrew, and to do so both by evicting him and then changing his will. But equity may in such circumstances provide the promisee (here Andrew) with a remedy if a promise has been made to confer property upon him in the future, (or an informal assurance that the property is already his) in reliance

upon which he has acted to his detriment. The remedy is called proprietary estoppel. The word “proprietary” reflects the fact that the remedy is all about promises to confer interests in property, usually land. The perhaps quaint word “estoppel” encapsulates the notion that the equitable wrong which has been threatened or done is the repudiation of the promise where it would be unconscionable for the promisor to do. So the equitable remedy is to restrain, or stop or “estop” the promisor from reneging on the promise. The court may require the promise to be performed by the promisor or, if he has died in the meantime, by or at the cost of his estate. It may in limited circumstances affect successors in title of the promisor to the relevant property.

5. Equitable remedies are generally more flexible than those afforded by the common law and they are always discretionary. The very notion of the specific enforcement (or performance) even of a contractual promise is equitable in origin. It exists to fill the lacuna in the common law remedy of damages, where the nature of the underlying property is such that damages would be an inadequate remedy. But there is no cause of action for damages for breach of a non-contractual promise. Equity is not in this context merely providing an ancillary remedy in support of a common law cause of action, for which damages is the primary remedy. Under the doctrine of proprietary estoppel the specific enforcement of the promise or assurance is the primary remedy for the unconscionability threatened or occasioned by its breach.

6. Nonetheless there have been many cases where the court has recognised that full specific enforcement is not the appropriate remedy. The promise may be incapable of specific enforcement, for example where the underlying property is no longer in the hands of the promisor or his estate. The promised date for performance may lie so far in the future, or the date may be so unpredictable, that an order for performance on the promised date would be too insubstantial as a remedy. Or the early enforcement in full of a promise which, although repudiated, is years away from the due date for performance may give the promisee too much, or something radically different from that which was promised. The promisor may have other powerful equitable or moral claims on his bounty, so that the appropriation of the whole of the promised property to meet the claim of the promisee may be unjust to those other claimants, and be more the cause of unconscionable conduct than a remedy for it. Finally the magnitude of specific enforcement in full may be so disproportionate to the detriment undertaken by the promisee that something much less than full specific enforcement is needed to clear the conscience of the promisor.

7. These real-life difficulties (and those outlined above are only a few examples) have come to mean that in the field of proprietary estoppel equity is regarded as being at its most flexible in terms of remedy. Furthermore the lack of any necessary or even likely equivalence between the value of the expectation generated by the promise and the burden of the detriment undertaken in reliance on it has led, during

the last 25 years, 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. The divergence is best understood, at the academic level, by reading Elizabeth Cooke's *The Modern Law of Estoppel (2000)* and Ben McFarlane's The Law of Proprietary Estoppel, 2nd ed (2020). It is mentioned by Robert Walker LJ in *Jennings v Rice* [2003] 1 P & CR 8, by Dyson LJ in *Cobbe v Yeoman's Row Management Ltd* [2006] 1 WLR 2964, by Lewison LJ in *Davies v Davies* [2016] 2 P & CR 10 and by Floyd LJ in the Court of Appeal in the present case [2020] 1 WLR 3480. It even continued on the internet during the hearing of this appeal. It has been complicated by the well-known but often misunderstood dictum of Scarman LJ in *Crabb v Arun District Council* [1976] Ch 179, 198 that the court's remedy in that case was "the minimum equity to do justice". Mr Tom Dumont KC for the Appellants placed this dictum in the forefront of his submissions, describing it as the golden thread which explains the nature and purpose of the remedy.

8. I shall in due course examine some of the many authorities to ascertain whether they answer this supposed conundrum. Relief on the ground of proprietary estoppel is a purely judge-made remedy, so that the assistance from authority is, if available, likely to be compelling. That said, the dicta mentioned above do not suggest that the search is likely to be a short or simple one. But it is worthwhile first to look at the problem from the perspective of first principles, free from authority. As I have already said, the remedy afforded under the label of proprietary estoppel is there to eliminate, or at least mitigate, the affront to conscience constituted by a decision by the maker of a non-contractual promise or assurance about property upon which the recipient has relied to their detriment to go back on it. Although part of the same doctrine, I can leave aside the cases about the informal assurance of a supposed existing right, because this case is about a promise of a future interest, no more and no less.

9. The equitable "wrong" (if that is the right word) is not the making of the promise in the first place. In almost all the cases, and certainly this one, the promise was genuinely made, in complete good faith, typical of the relations between a farmer and his eldest son, and it was adhered to over more than 25 years. Nor is the detrimental reliance to be classified as harm in any conventional sense. It is usually (and was in this case) something freely and willingly undertaken in the expectation of the fulfilment of the promise, not being daily counted as a cost, still less resented at the time when it was being incurred. Nor is it something which can necessarily or even usually be valued. In the present case, as in many where the promisee is a young person who gives up other career opportunities to work for their parents on the family farm, a measure of the supposed wages differential to date, coupled with interest, will not begin to recognise the improvement in life which further education, an independent career and the opportunities to develop their own farming or other business might have generated. A modest home, bought on an 80% LTV mortgage

twenty-five years ago could itself now be worth hundreds of thousands of pounds, because of the meteoric rise in property prices.

10. Nonetheless the detriment is relevant to both the arising of the equity and to the remedy. Without reliant detriment there is simply no equity at all. This reflects the notion that it is the reliant detriment which makes it unconscionable for the promisor to go back on his promise. Detriment is relevant to remedy because a slavish enforcement of the promise may be so completely disproportionate to the detriment that it goes much further than necessary to put right the unconscionability inherent in the repudiation of the promise. A simple example will suffice. Suppose that a disabled 50 year old person with no expectation of an early death 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 she dies only three months later, without making a will to give effect to her promise. Plainly some compensation less than the mansion would be sufficient to remedy any unconscionability.

11. But the 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 (unless the original promise was dishonest, in which there would be a cause of action in deceit). In a case like the present the harm consists of the soul-destroying, gut-wrenching realisation of being deprived, and then actually being deprived over the rest of a lifetime, of an expected inheritance of land upon which the promisee has spent the whole of his life and work to date and which, in due course, he expected to be able to pass on to one or more of his own children, making the same promise to them as his father made to him. Again that cannot necessarily be valued with any reliability, not least if (as here) the expectation of inheritance still lies mainly in the future at the time when the promise is repudiated. Discount for the accelerated receipt of a future benefit is an imperfect tool, as has been vividly demonstrated in the field of personal injuries litigation.

12. It is true that the common law courts have developed a formidable armoury for valuing or monetising harm (and for present purposes even detriment) in comparable circumstances, and even for treating some kinds of what a lay person would easily recognise as harm as being too remote on policy grounds. So if the only difficulty in identifying compensation for detriment or fulfilment of expectation as the true purpose of proprietary estoppel was difficulty in quantification in monetary terms, that might perhaps not be insuperable, at least from the perspective of the common law. Quantifying the detriment might generally be harder than valuing the expectation, but that would not of itself be a sufficient ground for preferring one over the other, certainly as a general rule, not least because those difficulties are likely to be widely different in particular cases. Even in an individual case a perception that one was much easier to quantify than the other would not of itself be a sound basis for concluding that it was therefore the more just. Furthermore the

expectations typically generated by this kind of estoppel are, in part because they are always about property and usually land, not generally susceptible to being fairly reduced to monetary terms unless that is truly unavoidable. That is why equity grants specific performance of contracts concerning land rather than damages for breach, even if the value of the land can be reliably ascertained. In that respect neither is the detriment fairly capable of being monetarised, when it consists of decisions about education, training and career which (as here) have life-long consequences. The expectation of being a farmer for life may or may not be more valuable in money terms than being a plumber, but neither is a fair substitute for an expectation of the other, and nor is their monetary equivalent.

13. In my view the notion that the problems about framing an appropriate remedy in proprietary estoppel cases can all be solved by identifying either compensation for detriment or fulfilment of expectation (or in default compensating for its loss by a monetary award) as the true purpose of the remedy, is misconceived. The true purpose, as recognised by the Court of Appeal in the present case, is dealing with the unconscionability constituted by the promisor repudiating his promise. It is wrong to treat the unconscionability question as limited to the issue whether or not an equity arises, and then to leave it out of account when framing the remedy. Concern about disproportionality between expectation and detriment is not the only one of the many real-life problems that have made the framing of an appropriate remedy so difficult in many cases. Nor is the beguiling application of "minimum equity" necessarily a just solution. The suggestion is that the court separately values the expectation and the detriment and then chooses whichever is the cheaper for the promisor: see Robertson: *The reliance basis of proprietary estoppel remedies* [2008] Conv 295. Scarman LJ had nothing like that in mind in *Crabb*. His dictum was not minimum equity, but minimum equity to do justice. In this context justice means remedying the unconscionability identified in the promisor's repudiation of his promise.

The Authorities

14. The principles applicable to proprietary estoppel have never been before the Supreme Court, and only twice in recent times before the House of Lords, in *Cobbe v Yeoman's Row* [2008] 1 WLR 1752 and *Thorner v Major* [2009] 1 WLR 776. Neither yields rich pickings for a reasoned understanding of the principles governing the identification of appropriate relief to satisfy the equity once established. *Cobbe v Yeoman's Row* was primarily about whether proprietary estoppel had any role to play in an arms-length commercial subject to contract relationship where one party incurred expense on a speculation that a binding contract would eventually be entered into, but from which the other resiled. The claim failed *in limine* in the House of Lords, so that the question of appropriate remedy never arose. Besides containing the well-known dicta of Lord Walker of Gestingthorpe about the need for certainty in property transactions and the need for principle rather than uncontrolled judicial

opinion as to the morality of the parties' conduct, a bare recognition of the debate between detriment and expectation as the basis for relief, it offers nothing more by way of a solution.

15. The main significance of *Thorner v Major* was to rescue proprietary estoppel from what some commentators thought had been a fatal blow delivered to it by *Cobbe.* It displays strong similarity of type with the present case, since it was about the disappointed expectation that a farmer ("Peter") would leave his farm on his death to the son of his cousin ("David"), on which David had worked full-time but for no payment for many years. The House of Lords restored the judge's order that David should receive the whole of the farm, animal stock and equipment on the farmer's death. There was no valuation of, or compensation for, David's detriment, although the judge concluded that, without needing a precise valuation of the detriment, his expectation of inheriting the whole farm was not disproportionate to it. The decision may have rescued proprietary estoppel from an unintended early demise, but the House saw no need to reinvent it or recast the underlying principles as they had been developed by the courts of equity over more than a century.

16. If nothing else *Thorner v Major* demonstrates how factual differences within the same type of case may make all the difference to a perception about the justice of the outcome, and therefore the difficulty of laying down rules or principles applicable even to cases of a particular type, let alone across the wide field covered by proprietary estoppel. In particular there was no falling out between Peter and David. Peter had provided fully for David's expectation in his will, but then destroyed it only because it also contained a legacy to someone else, of which he had repented. He was warned of the consequences of intestacy but died before making a new will, and David got nothing. The critical difference with the present case was that the time for fulfilment of the promise did not lie in the future at the time when David discovered that it had been repudiated. There were therefore no problems arising from early receipt and potential injustice to the promisor and his other dependants from the imposition of a clean break lifetime remedy which complicate the present case. Nonetheless both the expectation and the detriment were of very similar kinds to those in the present case. Yet the judge plainly started from a disposition to satisfy David's expectation rather than calculate and then compensate for the detriment, and this was not criticised as an error of principle by the House of Lords. A "minimum equity" point was raised as a ground of appeal but not, as far as can be seen from the judgments, seriously argued.

17. There being no decisive treatment of the present issue by the highest court, the student is thrown upon the confused waters of a large body of non-binding but persuasive authority in the Court of Appeal and below, with the (in the event) less than compelling assistance of the parallel learning of other common law jurisdictions. The repeated judicial statements that they contain no conclusive resolution of the question which, of satisfying expectation or compensating for detriment, is the

purposive bedrock of the equitable jurisdiction to grant appropriate relief does not mean that they can therefore just be passed by. As Floyd LJ said in the Court of Appeal, this may be because neither is.

18. It is instructive to look first at some of the antecedents to what is now called proprietary estoppel, since the jurisdiction did not suddenly spring up, fully fledged, in the 20th century. There are much earlier cases which, although sometimes classified under different legal headings, are based upon remarkably similar fact types. The first is illustrated by the attempted application in *Loffus v Maw* (1862) 3 Giff 592; 66 ER 544 of the principle laid down by the House of Lords in *Hammersley v De Biel* (1845) 12 Cl & F 45; 8 ER 1312 that where a person induces another to act upon the faith of a representation, then he will be compelled to make it good. The plaintiff was a young widow who was induced to care for the needs and home of an elderly and very unwell uncle for nothing more than pocket money by the promise that he would leave her specified interests in real property in his will, verified three years before his death, and on her threatening to leave, by her being showed a codicil to that effect. Sixteen days before he died he made a further codicil giving the same property to his son, cutting the plaintiff out altogether. The plaintiff claimed, in the alternative, the specific enforcement of the promise (i.e satisfaction of her expectation) or compensation by way of proper remuneration for all her work (i.e compensation for her detrimental reliance). Sir John Stuart VC gave her the former.

19. This early precursor of proprietary estoppel proved to be stillborn, because *Loffus v Maw* was overruled by the House of Lords in *Maddison v Alderson* (1883) 8 App Cas 467, on the ground that, in order to found a cause of action based on detrimental reliance, the representation in question had to be about an existing fact, not a promise of future conduct. The unsuccessful plaintiff had worked for many years without wages as housekeeper for Alderson, on the faith of a promise that he would leave her his house in his will, fortified by his showing her his signed but unfortunately not properly executed will to that effect. He therefore died intestate. The House of Lords considered whether the facts satisfied the doctrine of part performance, but held that her conduct was not sufficiently referable to a contract by Alderson to transfer his house to her. The case is best remembered as the classic exegesis of the (now abolished) equitable doctrine of part performance, under which the claimant's right to the promised property lies not in the contract itself, which is void under the Statute of Frauds, but "upon the equities resulting from the acts done in execution of the contract" (per Lord Selborne at p 475). Those acts are generally a form of detrimental reliance, but the relief normally consists of fulfilment of the plaintiff's expectation rather than compensation for her detriment.

20. The same single-minded determination to satisfy an equitable claim by reference to expectation rather than detriment is found in *Dillwyn v Llewelyn* (1862) 4 De G F & J 517, a case now widely regarded as an early precursor of proprietary estoppel, but treated by Lord Westbury LC as analogous to part-performance of an

ineffective contract. A father invited his younger son to take a farm of his and build a house on it, producing a document of purported transfer which was ineffective for the purpose because it was neither a contract nor a deed. The son built a house on the farm for £14,000, following which his father died without ever perfecting his intended gift. His will did not provide for the plaintiff to inherit the farm. But the House of Lords satisfied the son's equity, derived from his detrimental reliance, by an award of the fee simple, whereas the Court of Appeal had granted him only a life interest. The cost of the detriment was known to the last penny, but compensation for it did not form the basis of the remedy. Nor did it in the classic case about the doctrine of estoppel by acquiescence, in Lord Kingsdown's famous dictum (while dissenting, but not on this point) in *Ramsden v Dyson* (1866) LR 1 HL 129, 170:

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

An alternative remedy consisting of refunding the money laid out did not even come a poor second.

21. Expectation was preferred to detriment again when *Ramsden v Dyson,* and Lord Kingsdown's dictum, was applied by the Privy Council in *Plimmer v Wellington Corpn* (1884) 9 App Cas 699, but there was express recognition of the flexibility of the remedy, and of the alternative possibility of compensating for the detriment incurred in making expenditure on another's land: see per Sir Arthur Hobhouse at pp. 713-714. He cited *Unity Joint Stock Mutual Banking Corpn v King* (1858) 25 Beav 72 as an example, where the landowner had not intended or suggested that the expenditure on the land by his sons should lead to the conferring of a proprietary interest upon them. They were declared to have a lien on the land for the recoupment of their expenditure upon it. This appears to be a case where there was no reasonable expectation greater than that to satisfy.

22. The early cases which deal with proprietary estoppel under its now customary name demonstrate a similar assumption that expectation is the main driver of the remedy. That is probably why it was thought fit to call the remedy a form of estoppel, even though a cause of action rather than merely a defence. The earliest of the well-known modern cases is *Inwards v Baker* [1965] 2 QB 29. A son was encouraged to build a bungalow on his father's land, with the expectation that it

should be his home for as long as he wished. After the father's death his executors claimed to be able to terminate the son's licence. The case was therefore a direct descendant of *Dillwyn v Llewelyn, Ramsden v Dyson* and *Plimmer v Wellington*, all of which were relied upon by both Lord Denning MR and Danckwerts LJ. It was the latter who called the remedy a form of equitable estoppel (at p 38). In his view the purpose of the remedy was to protect the promisee from injustice. But Denning MR was characteristically more specific. At p 37 he said:

> "All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do."

The son's expectation was specifically enforced. He had been living rent free in the bungalow for 34 years by the time of the appeal and his father had paid half the £300 cost of its construction. There was nonetheless no attempt to evaluate and then compensate for the net continuing detriment (if any, because even at those days' prices rent free occupation for over 30 years seems quite a good *quid pro quo* for the payment of £150), nor any suggestion that this was the purpose of the remedy. The recognition by the Court of Appeal that equity enjoyed a flexibility as to remedy was treated as enabling the best means to be provided for the fulfilment of the expectation.

23. Lord Denning MR and Danckwerts LJ gave the leading judgments in the next case: *E R Ives Investments Ltd v High* [1967] 2 QB 379. This was factually distinct from those already discussed, since the detrimental reliance consisted of the defendant building a garage on his own land on the faith of an understanding, encouraged by his neighbour's predecessor in title, that he enjoyed a right of way to it across his neighbour's land. Unfortunately the supposed right of way was, in law, ineffective against the successor in title because of *inter alia* non-registration, although the successor had been informed about it at the time of purchase. It was a case of a genuinely defensive use of an estoppel or, as Lord Denning MR called it, at p 394, "equity arising out of acquiescence". The remedy had by then been labelled proprietary estoppel by the editors of Snell's Equity, 26th ed (1966), pp 629-633 and Danckwerts LJ was content to give that name the court's first official blessing, at p 399. For present purposes all that needs to be noted (apart from Snell's observation, at p 633, that "the doctrine thus displays equity at its most flexible") is that again the promisee received specific enforcement of his expectation, and that there was no mention made of compensation for detriment.

24. *Crabb v Arun District Council* [1976] Ch 179 falls into much the same fact-set as *Ives v High.* The plaintiff, in the expectation encouraged by the defendant council

that he would be given a right of access to his land over the defendant's neighbouring land, sold off part of his land so as (to the defendant's knowledge) to leave the retained part with no means of access other than by means of the expected easement. The defendant then blocked up the route of the expected easement leaving the plaintiff's retained property landlocked. The plaintiff lost at first instance but duly received the expected easement by way of proprietary estoppel from the Court of Appeal, in which Lord Denning MR was joined by Lawton and Scarman LJJ. The case is memorable for Lord Denning's robust but perhaps less than fully reasoned affirmation that proprietary estoppel can be used as a cause of action. At p 187 he said:

> "When Mr Millett (*later Lord Millett)*, for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppel and estoppel. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action."

Academic writers have been puzzling over that explanation ever since but it has stood the test of time. It is not in dispute, nor material to this appeal.

25. Much more important for present purposes is Scarman LJ's famous observation about "minimum equity to do justice", which now calls for serious examination. Fortunately the case is very fully reported. In opening the appeal Mr Millett QC made it clear that his client's expectation was not that the easement would be provided for nothing in return. Rather he submitted that the loss sustained by having his land sterilised by being landlocked for a time (in fact for five or six years) should be set off to the extinction of any requirement for payment for the easement: see pp181-182. Lord Denning accepted that submission in terms, at p.189-190. Scarman LJ did so as well, but in more detail, at pp. 198-199. The basis of the analysis, both in Mr Millett's submission and in the judgments of Lord Denning and Scarman LJ, was how best and most fairly to fulfil, but not to exceed, the plaintiff's expectation. It had nothing at all to do with compensating for the detriment as an alternative to fulfilling the expectation, still less choosing in any particular case the cheaper (or more minimalist) alternative, as between the two. The true "detriment" in that case was the sale-off by the plaintiff of part of his land in a way which left the remainder landlocked without the promised easement. The true harm caused by the defendant's repudiation was not a few years' obstruction of an easement to which in equity the plaintiff was already entitled (which was the subject of the set-off) but the permanent sterilisation of part of the plaintiff's land by the denial of the easement in perpetuity. That was not itself valued, and the remedy awarded was specific enforcement of the expectation, not compensation for the

detriment or harm. Lord Scarman's "minimum equity" dictum appears in the following passage, at pp. 198-199:

> "I turn now to the other two questions-the extent of the equity and the relief needed to satisfy it. There being no grant, no enforceable contract, no licence, I would analyse the minimum equity to do justice to the plaintiff as a right either to an easement or to a licence upon terms to be agreed. I do not think it is necessary to go further than that. Of course, going that far would support the equitable remedy of injunction which is sought in this action. If there is no agreement as to terms, if agreement fails to be obtained, the court can, in my judgment, and must, determine in these proceedings upon what terms the plaintiff should be put to enable him to have the benefit of the equitable right which he is held to have."

This analysis is all about fine-tuning the fulfilment of the expectation of the promisee, and nothing to do with valuing and then compensating for the detriment, while denying him the expectation.

26. This expectation-based approach is hardly surprising. The authorities to which the Court of Appeal had regard included *Ramsden v Dyson, Plimmer v Wellington, Inwards v Baker* and *Ives v High.* As I have sought to demonstrate, they are almost single-minded in their pursuit of the enforcement of expectation. None of them would have given Scarman LJ any inkling that compensating for the detriment, as an alternative to satisfying or enforcing the expectation, had anything to do with the remedy of proprietary estoppel. Nor, for completeness, would *Duke of Beaufort v Patrick* (1853) 17 Beav 60, to which Scarman LJ referred during argument at p 182. Attempts since then to use "minimum equity" as a sort of mantra for that purpose are in my view misconceived, and would have left that distinguished judge very surprised at such misuse.

27. The earliest case of compensation for detriment as a remedy by way of proprietary estoppel which I have found appears to be *Dodsworth v Dodsworth* (1973) 228 EG 1115. The plaintiff persuaded her brother and his wife (who had just returned from Australia and were looking for somewhere to live) to come and live with her in her bungalow on the basis that they could use it as their home for as long as they wanted. They spent about £700 on improvements. The cohabitation lasted only a few months, after which the parties fell out and the plaintiff sued them for possession. The County Court judge held that an equity had been established but, because the specific enforcement of the defendants' expectation would force then to live with the plaintiff under the same roof while they were at loggerheads, a more

just solution would be to order the plaintiff to refund their expenditure, so that they could use it on another property. The defendants appealed and the plaintiff then died. The Court of Appeal also considered them entitled to an equity, and recognised that the obstacle which had prevented the judge from fulfilling their expectations had disappeared on the plaintiff's death. But the court held that the conferral on the defendants of a life interest would make them tenants for life under the Settled Land Act 1925 which would give them statutory powers (including a power of sale) which far exceeded their expectations. So they were given a right to possession until repaid their outlay. This was not because compensation for detriment was regarded as the purpose of the remedy, but only because the court thought that an expectation-based remedy could not be awarded in a way which would not have been in excess of their real expectation.

28. The same problem arose in *Griffiths v Williams* (1977) 248 EG 947, but with an outcome that fully vindicated the promisee's expectation. Mrs Williams had lived for many years in a house belonging to her mother, in the expectation encouraged by her mother that she would inherit a life interest in it. Her mother had so provided in a will, and Mrs Williams has spent about £2,000 on the house, partly in running repairs and partly in improvements. Her mother then changed her will, cutting out Mrs Williams altogether. After her mother's death Mrs Williams was sued for possession. Reginald Goff LJ asked, at p 948:

> "What is the equity? That must be an equity to have made good, so far as may fairly be done between the parties, the representation that Mrs Williams should be entitled to live in the house rent-free for the rest of her life"

He then (with the parties' consent) neatly avoided the Settled Land Act problem by providing for her to have a long lease at a nominal rent determinable on her death. But he made this comment, at p949, about the *Dodsworth* case:

> "But it seems to me that *Dodsworth v Dodsworth* proceeded upon the basis which I have spelt out of *Crabb's* case – that the third problem (*i.e. remedy*) is one of discretion: the court ought to see, having regard to all the circumstances, what is the best and fairest way to secure protection for the person who has been misled by the representations made to him and subsequently repudiated"

For my part I would readily accept that the remedy is discretionary, but "the best and fairest way to secure protection" for the promisee begs the question: protection

from what? *Crabb's* case is clear authority for an expectation-based form of protection, at least as a starting point.

29. A dispassionate observer of those two cases might think that the real distinction between them (once the plaintiff in *Dodsworth* had died) lay not so much in the ability of the Court of Appeal in *Griffiths* to navigate a safer route around the Settled Land Act, but in the very large difference in the period during which the promisees relied on the promises made. It goes far beyond the idiosyncrasies of particular judges to regard reliance during the best part of the promisee's working life as creating a much stronger case for the fulfilment of expectation than a few months spent as a lodger on return from abroad. If there is some kind of spectrum between expectation and detriment as the basis for relief based upon the length of the period of detrimental reliance, then the length of that period in the present case must surely lie at the expectation end of the spectrum.

30. *Pascoe v Turner* [1979] 1 WLR 431 is the first of the cases cited in this appeal in which Scarman LJ's "minimum equity to do justice" dictum appears to have been elevated into a guiding principle. It is a direct descendent of *Dillwyn v Llewelyn*, and the outcome was the same. The plaintiff and the defendant lived together as man and wife in a house bought by the plaintiff. When their relationship was breaking down due to the plaintiff's infidelity he assured the defendant that the house was hers and everything in it. She then spent sums on improvements which were objectively modest but substantial for her. He had by then left but, later, sued her for possession. The Court of Appeal awarded her the house outright, together with the contents, by way of remedy for proprietary estoppel. It was a full specific enforcement of her expectation and rejected her alternative lesser claim for a life interest. After reviewing the authorities from *Dillwyn v Llewelyn* to *Crabb v Arun* Cumming-Bruce LJ said this, at pp 437- 438:

> "So the principle to be applied is that the court should consider all the circumstances, and the counterclaimant having at law no perfected gift or licence other than a licence revocable at will, the court must decide what is the minimum equity to do justice to her having regard to the way in which she changed her position for the worse by reason of the acquiescence and encouragement of the legal owner."

It is clear from the court's review of her detrimental reliance that the award in her favour was worth more by many orders of magnitude than any value which could have been placed upon her detriment. Indeed the court regarded a life interest or outright ownership as the only real alternatives and gave heavily fact-dependent reasons for preferring the latter, even though it was of course worth much more

than the former. It is certainly a good example of the discretionary approach to a remedy designed primarily to satisfy expectation, and a clear demonstration that, even using the "minimum equity to do justice" dictum as a principle, (which in my view it was not intended to be) "minimum" plainly does not mean cheapest.

31. It is therefore not at all surprising to find, three years later, one of the greatest equity judges, Oliver J (later Lord Oliver of Aylmerton) treating as uncontroversial the following summary by counsel of the remedy of proprietary estoppel in the following terms, in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Limited* [1982] QB 133, at 144:

> "if under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, [A] acts to his detriment in connection with such land, a Court of Equity *will compel B to give effect to such expectation*." (my italics).

This found its way into the 31st Edition (2005) of Snell's Equity, at para 10-16, as "the most important and authoritative modern statement of the doctrine" subject to a health warning about the need for the remedy to be proportionate to the detriment, and satisfaction of the expectation not being an invariable requirement. That summary was duly adopted as his guidance by the deputy judge Mr John Randall QC at first instance in *Thorner v Major* [2008] WTLR 155, para 5*,* and his judgment was eventually upheld by the House of Lords.

32. Another case in which there was a need to avoid forcing warring parties into cohabitation was *Burrows v Sharp* (1991) 23 HLR 82. The appellant, a long-term council tenant, had managed to exercise her right to buy the freehold of her house by securing the financial assistance of her grand-daughter and her husband (the respondents) on the basis that they would pay the necessary mortgage and look after the appellant's handicapped daughter after the appellant's death, and inherit the house. They also planned to extend the house and moved in with their children to live with the appellant and her daughter. The extension had not been built by the time the relationship broke down within a year of the move, not least because of the serious overcrowding involved. The County Court judge made what the Court of Appeal described as a complicated but wholly unworkable order which sought to provide for their continued cohabitation. In the end, after a detailed analysis of the insuperable obstacles in the way of satisfying the respondents' expectations, and a review of *Crabb, Dodsworth and Griffiths*, Dillon LJ made an order for refunding the respondents' expenditure. They had fortunately not parted with their own council flat, to which they were able to return. So they were not left homeless. He summarised the very difficult remedial task in this way, at p 92:

> "It is often appropriate to satisfy the equity by granting the claimant the interest he or she was intended to have. If that is not practicable however, the court has to do the best it can. In general it would, if possible, want to avoid giving the claimant more than he was ever intended to have."

That case illustrates a number of the problems which have led the court to depart from specific enforcement of the promised expectation. They included the need to avoid enforced cohabitation, in the present case called the need for a clean break, the fact that the promise had been repudiated well before the benefit was to be conferred (on the appellant's death) and the very short period during which the reliant conduct had occurred. It was also relevant that the reliant respondents had not burned their boats, and could return to their own flat. But the problems do not have appeared to have included a concern that the expectation was disproportionate to the detriment. It almost certainly was, but that was not treated as an obstacle to an expectation-based remedy. Still less was compensating for the detriment treated as the aim of the equitable remedy.

33. The order of the Court of Appeal in *Baker v Baker* (1993) 25 HLR 408 is sometimes regarded as an example of a detriment-based remedy. In fact it was the opposite. The plaintiff was a 75 year old man who contributed £33,950 to the purchase of a house for his son and daughter-in-law, on the basis that he would be given a room there in which to live for the rest of his life. The relationship failed within a year, and the plaintiff moved into council accommodation. The trial judge rejected his claim to a resulting trust interest but ordered repayment of his outlay as a remedy for proprietary estoppel. The defendants appealed on the basis that this was much more than his expectation interest was worth. Agreeing, the Court of Appeal ordered his expectation interest to be valued and paid, by a majority ruling that there should be no discount for the fact that the plaintiff had found somewhere else to live at public expense. No one suggested that the parties could be expected to continue to live together. It was therefore a case in which the promisee received a monetary proxy for his expectation interest. There is a useful analysis by Beldam LJ at p 415 of the "minimum equity to do justice" dictum in *Crabb*, in which he concludes:

> "I would not interpret Lord Scarman's remarks as suggesting that in a case in which a plaintiff's equity could only be satisfied by a monetary award, that the court necessarily had to place the minimum value on the disappointed interest."

Thus the reduction in the plaintiff's monetary remedy was not because expectation was, in that case, cheaper than compensation for detriment, but because the expectation was the true and maximum measure of the equity.

34. The penultimate 20th Century English authority to which I need to refer is *Walton v Walton* (unreported) 14 April 1994. It is a farming case with considerable similarities with the present, at a high level of generality. The promise by mother to son was that the son would inherit her farm. It was first made when he was a teenager, and he devoted many years labour to the farm at very low wages before the mother retired. The main differences, which made the question as to remedy much easier than here, are that although the mother and son had fallen out during her lifetime she had died by the time of the trial, and there was no other family member with relevant expectations in relation to the farm which had been promised to the son. There were, in short, none of the obstacles in the way of the full expectation-based remedy ordered by the Court of Appeal of the type which make the present case so difficult. The case is of value because of the brief statement of principle about the purpose of the remedy by Hoffmann LJ. At para 11 he said:

> "The plaintiff's claim is based upon equitable estoppel. That sounds very technical but the principle is really quite simple. Ordinarily the law does not enforce promises unless they have been made formally under seal or as part of a contract. Mrs Walton's promise was not, of course, made under seal and for reasons which I shall explain in a moment, I do not think that it was part of a contract. So if there was nothing more than the promise, she would have been free to change her mind. It would have been a matter for her conscience and not the law. But the position is different if the person who has been promised some interest in property has, in reliance upon it, incurred expense or made sacrifices which he would not otherwise have made. In such a case the law will provide a remedy. It can take various forms. It may order the maker of the promise to pay compensation for the expense which has been incurred. It may make payment of compensation a charge on the property. Or it may require the promise to be kept. The choice of remedy is flexible. The principle on
>
> which the remedy is given is equitable estoppel. As Oliver J put it in *Taylor Fashions Ltd. v Liverpool Trustee Co. Ltd* [1982] 1 QB 133, 151, [1981] 1 All ER 897, the question is -
>
> 'whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment.'"

In the event the court ordered the mother's executors to keep her promise in full. There was no attempt to value either the expectation or the detriment, still less to choose the cheaper as the "minimum equity".

35. In *Sledmore v Dalby* (1996) 72 P & CR 196 Mr and Mrs Sledmore allowed their daughter Jacqueline and her husband Mr Dalby use of an unoccupied house which they owned, initially at a modest rent but, after Mr Dalby lost his job and Jacqueline contracted cancer, rent-free, and on the basis that it would one day be theirs by inheritance. The Dalbys then spent a significant amount on improvements. Mr Sledmore did make a will leaving the property to Jacqueline if she survived her mother, but she did not. After Mr Sledmore died, his widow sought possession of the house for her own use, her existing home being precarious due to disrepair and a large mortgage. By that time Mr Dalby had little use for the property, spending two nights there a week and living mainly with a new partner at her home, while again employed. But he successfully resisted the possession claim at first instance, on the basis of proprietary estoppel.

36. The Court of Appeal ordered him to leave. The court was palpably offended at the injustice of his conduct in insisting upon his supposed equity at a time when he hardly needed the property while his mother-in-law, in straightened circumstances, plainly did. Roche LJ (with whom Butler Sloss LJ agreed) held that Mr Dalby had to be content with something less than his full expectations, that his equity had expired and that in the changed circumstances there was nothing unconscionable in Mrs Sledmore seeking possession. While agreeing, Hobhouse LJ also made reference to recent dicta from Australia (to which I will return) in support of an additional conclusion about the need for proportionality between the remedy and the detriment. He said at p 209 that:

> "This is to say little more than that the end result must be a just one having regard to the assumption made by the party asserting the estoppel and the detriment which he has experienced."

37. This decision seems to me, on its facts, to have been a very proper application of the fundamental principle of unconscionability, and at the correct time, namely when the promisor seeks to repudiate the promise. The facts of the case show vividly that it will not always by then be unconscionable to do so. But the introduction of a supposed general requirement for proportionality between the remedy and the detriment was entirely new in English law. Although not part of the ratio of *Sledmore v Dalby,* it soon proved to be a fast-growing seed. The irony is that, as will appear, it did not flourish in its country of origin.

38. From the beginning of the current century the cases come thick and fast, as do the academic writings. I intend to consider seven of the cases, as appearing to be the most relevant to the present task. But it is first worth pausing to see what a distinguished academic, Professor Elizabeth Cooke, thought was the animating principle or aim behind the choice of remedy, in England at least, in her book The Modern law of Estoppel (2000). Her view was that despite the dicta in Australia relied upon by Hobhouse LJ in *Sledmore v Dalby* (to which I shall return) the long-standing tendency of the English courts had been to frame relief on an expectation rather than detriment basis, save where practical considerations made that impossible, impracticable or manifestly unjust. An expectation-based remedy would typically be specific enforcement of the promise, but it might take the form of a monetary equivalent, for example where the promised property had already been sold, as in *Wayling v Jones* (1995) 69 P & CR 170. My own examination of the pre 2000 authorities leads me to the same conclusion.

39. *Gillett v Holt* [2001] Ch 210 marks the arrival on the scene of England's most significant living judicial contributor to this debate, Lord Walker of Gestingthorpe, then Robert Walker LJ. It was a farming case in which a wealthy landowner Mr Holt took the plaintiff (who was not a family member) under his wing in his mid-teens, trained him to be the resident manager of his farm and later encouraged him to expect that he would inherit it. They fell out after the plaintiff had lived and worked there for over 25 years, and Mr Holt sought to dismiss and remove him, also cutting him out of his will. As in the present case the litigation was fought while Mr Holt remained alive, and while therefore the plaintiff's proprietary expectation of inheritance remained in the future. But there was no problem of cohabitation at the farm, since Mr Holt had long since ceased to live or work there. The plaintiff failed at trial on promise and detriment but succeeded in the Court of Appeal. In relation to detriment his success was significantly based on what Robert Walker LJ said was the judge having taken a "too narrowly financial a view of the requirement for detriment" (p 235). In the event the plaintiff received an expectation-based award, consisting of a mixture of the freehold farmhouse, freehold farmland and monetary compensation for his expectation interest in the remainder of the farming business, in that aspect to achieve a clean break with Mr Holt and his new protegee. There does not appear to have been any attempt to monetarise the detriment, to consider whether it was proportional to the expectation, or to frame a detriment-based remedy.

40. The treatment of the remedy issues is too fact (and tax) specific to yield much express dicta about the underlying principles, but Robert Walker LJ did refer to the need to consider all the circumstances, and to the "minimum equity to do justice" dictum in *Crabb.* He also introduced his analysis of proprietary estoppel with this summary, at p 225:

> "…the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round."

All in all *Gillett v Holt* represents no departure from the tendency of the English courts to prioritise an expectation-based approach to remedy, as firmly established by the turn of the century, over the previous century and a half.

41. The same cannot be said of *Jennings v Rice* [2003] 1 P&CR 8. This was a classic "one day all this will be yours" case, in which the claimant looked after an elderly widow Mrs Royle on what became an unpaid basis, as a live-in carer tending for her every need, all in the expectation which she encouraged that he would inherit all or part of her large house valued on her death at £420,000 and its furniture, worth £15,000. The judge awarded him £200,000, on the basis that he needed only £150,000 to buy himself a suitable house, and that the sum awarded was a fair estimate of the cost of full-time nursing care for the relevant period.

42. The claimant appealed, unsuccessfully, on the ground that the basic rule was that a proprietary estoppel equity could only be satisfied by making good the expectation. After a review of the authorities, including *Sledmore v Dalby*, Aldous LJ said, at para 36:

> "There is a clear line of authority from at least *Crabb* to the present day which establishes that once the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment."

On the way to that conclusion he nonetheless rejected, as forming any part of English law, the notion that compensating for the detriment was the aim or purpose of the award: see para 30. I must confess to some surprise that proportionality between remedy and detriment should have been regarded by Aldous LJ as "the most essential requirement" in the framing of the remedy. It had never previously been so described, during the more than 150 years during which, on broadly comparable facts, the courts of equity had been applying and developing this essentially flexible jurisdiction. And the only prior English recognition of it was in the concurring judgment of Hobhouse LJ in *Sledmore v Darby* which did not form part of the ratio of the case, borrowed from Australian obiter dicta which advocated a different point

(namely that the aim of the remedy is to protect against detriment) and which have not stood the test of time, even in Australia.

43. Robert Walker LJ agreed but added his own analysis. At para 44 he said:

> "The need to search for the right principles cannot be avoided. But it is unlikely to be a short or simple search, because (as appears from both the English and the Australian authorities) proprietary estoppel can apply in a wide variety of factual situations, and any summary formula is likely to prove to be an over-simplification. The cases show a wide range of variation in both of the main elements, that is the quality of the assurances which give rise to the claimant's expectations and the extent of the claimant's detrimental reliance on the assurances. The doctrine applies only if these elements, in combination, make it unconscionable for the person giving the assurances (whom I will call the benefactor, although that may not always be an appropriate label) to go back on them."

Turning to the remedy he continued (from para 45) with an analysis of the distinction between, on the one hand, an understanding little short of contract in which the expectation and the detriment have been clearly defined, where a full expectation-based remedy would usually be appropriate and, on the other hand, a case where the expectation is genuine but not clear, where the fulfilment of the highest expression of it may only be a starting point. In a later lecture he said that he would have preferred to use the concept of a spectrum between those extremes. Speaking of the "minimum equity to do justice" dictum in *Crabb,* he said, at para 48:

> "Scarman LJ's reference to the minimum does not require the court to be constitutionally parsimonious, but it does implicitly recognise that the court must also do justice to the defendant."

He concluded at paras 50-51:

> " To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming

> into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or *out of all proportion to the detriment which the claimant has suffered*, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.
>
> But that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations." (my italics).

44. Robert Walker LJ deprecated any detailed computational approach to valuing the detriment. After illustrating an Australian example, he continued, at para 54:

> "That illustrates the Australian preference for compensating the reliance loss only. Under English law that approach may sometimes be appropriate (see paragraph 51 above) but only where, on the facts, a higher measure would amount to overcompensation. In my view it would rarely if ever be appropriate to go into detailed inquiries as to hours and hourly rates where the claim was based on proprietary estoppel (rather than a restitutionary claim for services which were not gratuitous). But the going rate for live-in carers can provide a useful cross-check in the exercise of the court's discretion."

Finally at para 56 he said this about proportionality:

> "The 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."

No one would disagree with the notion that a remedy must be proportionate to the harm. But in the present context that begs the question whether the harm is the detriment or rather (as I think) the loss flowing from the repudiation of the

expectation. Nonetheless by that means the seed of proportionality has become firmly embedded in the English law of proprietary estoppel.

45. *Ottey v Grundy* [2003] EWCA Civ 1176; [2003] WTLR 1253 is an example of a case in which the proportionality principle (by then binding as part of the ratio in *Jennings v Rice)* was applied in the framing of a remedy. The claimant had cared for a Mr Andreae during a loving relationship of three years' duration, but promises that she would inherit his apartment in Jamaica and house-boat on the Thames were made only two years before they broke up. Mr Andreae died about a year later. The trial judge awarded the claimant the Jamaica flat (with £50,000 in lieu) plus another £50,000 out of an expectation which he valued at £250,000. He found, without valuing the detriment but noting its short duration, that the expectation and the detriment were out of proportion. The main issue in the appeal was whether the claimant should have received anything, but she cross-appealed for a larger share of her expectations. Both the appeal and the cross-appeal failed.

46. Giving the leading judgment Arden LJ said at para 58 that Robert Walker LJ's judgment in *Jennings v Rice* did not detract "from the general proposition that the relationship between the promise and the remedy must be proportionate, and that the promise, even if of a specific property, is only a starting point". At para 61 she said that:

> "…the purpose of proprietary estoppel is not to enforce an obligation which does not amount to a contract nor yet to reverse the detriment which the claimant has suffered but to grant an appropriate remedy in respect of the unconscionable conduct."

47. In my view the outstanding feature of *Ottey v Grundy* was the shortness of the period of detrimental reliance, not in absolute terms, but by comparison with what must have been the expectations of both parties at the time when the promise was made. Any promise to provide by inheritance suggests an assumption that, in the meantime, the relationship will continue at least for the life of the promisor. In that case the judge found that the relationship was a close, devoted and loving one on both sides, so that its early failure was outwith their contemplation when the promise was made, at a time when Mr Andreae was only in his early 50s. It is easy to see why, in such a case, there may be nothing unconscionable in the promisee receiving less than her full expectation.

48. *Uglow v Uglow* [2004] EWCA Civ 987; [2004] WTLR 1183 is another farming case. Nothing turns on the facts, and the estoppel claim failed both at first instance and on appeal. But it is noteworthy for the characteristically useful and compressed

six point summary of the relevant principles provided by Mummery LJ at para 9. They are well-known and need not be set out in full. In points (1),(2),(4) and (5) he emphasises how the prevention of unconscionable conduct lies at the heart of the doctrine. Point (5) is directed at remedy:

> "It is necessary to stand back and look at the claim in the round in order to decide whether the conduct of the testator had given rise to an estoppel and, if so, what is the minimum equity necessary to do justice to the claimant and to avoid an unconscionable or disproportionate result."

It is to be noted that, while endorsing proportionality of result as a relevant consideration, he does not tie the remedy to the detriment as the subject of a proportionality test, still less suggest that the aim of the remedy is to protect against detriment.

49. *Henry v Henry* [2010] 1 All ER 988, an appeal from St Lucia, is famous for the dictum at para 65 that:

> "Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application."

Geraldine Pierre had promised Calixtus Henry that he would inherit her one-half share of a property in St Lucia if he cared for her until her death and cultivated the plot. But Theresa Henry purchased Geraldine's share before she died. The Court of Appeal held that since Calixtus had been in occupation at the time of the sale his estoppel equity was an overriding interest, and therefore bound Theresa. He therefore received his half share. On Theresa's appeal the Privy Council cut his entitlement by half. He had suffered a detriment in providing food and care for Geraldine, and had, by remaining on the plot, admittedly rent free and partly for his own benefit, deprived himself of the opportunity of a better life elsewhere. The Court of Appeal had held that it had no power to consider whether the promise (and the resulting benefit) was disproportionate to the detriment. This is what led to the dictum to the contrary quoted above. The outcome is a slightly strange one, in the sense that the Board made no apparent attempt to value either the expectation or the detriment, and simply made an unexplained 50% reduction in an otherwise expectation-based specific enforcement of the promise. It no doubt satisfied the Board's perception as to what needed to be done to rectify the unconscionability of Calixtus being otherwise left with nothing. It is difficult to dispel the suspicion that sympathy for Theresa, who had paid for Geraldine's share of the property in good faith, may have led to a conclusion that, as between her and Calixtus, the pain should fairly be equally shared.

50. The next relevant case is *Davies v Davies* [2016] EWCA Civ 463; [2016] 2 P & CR 10, again arising from an expectation of inheriting a farm. Although heavily caveated, it comes nearer to elevating compensation for detriment into a governing principle in the framing of a remedy than any other. At para 39, shorn of references to authority and academic scholarship, Lewison LJ said this:

> "There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so. The other takes the view that essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different. Much scholarly opinion favours the second approach. Others argue that the outcome will reflect both the expectation and the reliance interest and that it will normally be somewhere between the two. Logically, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim. Fortunately, I do not think that we are required to resolve this controversy on this appeal."

51. On the facts, the claimant had not made life-changing choices in reliance upon any promise of inheritance. Lewison LJ acknowledged that, in such a case, the imponderable and speculative nature of the detriment might properly lead the court to decide that specific enforcement of the expectation in specie should be given: see para 66. The outcome of a complicated set of facts was a largely unexplained very round sum, between the defendants' detriment-based offer and the judge's detriment coupled with expectation-based financial proxy, which provides no real insight into the Court of Appeal's precise analysis.

52. The well-known passage about the 'lively controversy' quoted above calls for some cautious examination. First, while there clearly was, by 2016, a long line of authority stretching back over 150 years which had generally followed the expectation-based approach, there is not a single English authority favouring the approach that the essential aim of the remedy was to protect the claimant's reliance interest and therefore to compensate for the detriment. As I have sought to show,

the nearest that the English authorities had come was to say that there had to be some proportionality between remedy and detriment, but always a rejection of the notion that compensation for the detriment was the aim. There was some short-lived Australian authority apparently to the contrary, to which I will shortly turn.

53. Secondly, the supposed logic of the detriment-based approach is in my view both faulty in origin and wrong in its inevitable result. It is faulty in origin because it fails to recognise that while reliant detriment is necessary to engage the equitable relief, and forms a large part of its moral justification, it is the repudiation of the promised expectation which constitutes the unconscionable wrong. It ignores the view of equity that land is unique, which is the foundation for the remedy of specific performance, and for much of the remedial work of equity in supplementing the defective notion of the common law that every wrong can and must be remedied by monetary compensation. It mistakenly treats the detriment rather than the loss of expectation as the relevant harm. It is wrong in its result because it would if correct entirely 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 and then awarding whichever produces the lower figure, on the misconceived basis that this is the "minimum equity needed to do justice". It would banish the expectation-based remedy to the diminishing shadowy margins where the court could not satisfy itself as to one or other of those two figures. This would set the traditional English approach, that the purpose of the estoppel is, prima facie, to hold the promisor to his promise, completely upon its head. It is in that context not surprising that its proponents question whether proprietary estoppel is the right name for the remedy at all. It would directly contradict the warning from Robert Walker LJ in *Jennings v Rice* that it would hardly, if ever, be appropriate to undertake a precise mathematical task of calculating the monetary value of the detriment. And it would make a nonsense of proportionality. If the aim of the remedy is to compensate for the detriment, why should it not do so precisely?

54. I must mention the recent decision of the Court of Appeal in *Habberfield v Habberfield* [2019] EWCA Civ 890. The facts were similar to those of the present appeal. The claimant was assured that she would inherit a sufficient part of her parents' farmland on which to run a viable dairy unit, and in reliance she spent nearly 30 years working there at low wages with minimal holidays. At the time when the promise was repudiated her mother was still alive and living in the farmhouse. The judge (Birss J) made a monetary award based on a valuation of most of her expectation, of about £1.17 million, on a basis which maximised the prospects of the mother being able to continue to live at the farmhouse which, although within the claimant's expectation by way of inheritance, was excluded from the valuation. The award was also scaled down from her full expectation by reference to the claimant's earlier rejection of an offer from her parents which would have preserved a working dairy unit on the farm, with a replacement value of £400,000. The detriment consisting of wage differential was about £220,000.

55. The Court of Appeal upheld the judge's approach. In particular Lewison LJ agreed with the judge's view that the "whole life" consequences of the promises to the claimant made it impossible fairly to value her detriment as a whole, so that it could not be shown that his proposed award was out of all proportion to her detriment. He affirmed the relevance of Robert Walker LJ's spectrum, and treated the case as lying towards its quasi-contractual end. The claimant had done what her parents had asked of her, and they should now perform their promise. At para 33 he said:

> "Underpinning the whole doctrine of proprietary estoppel is the idea that promises should be kept. "

Later at para 68 he said:

> "Both Mr Wilson and Mr Blohm agreed (rightly in my judgment) that there was no clear point of division between different categories of proprietary estoppel claims. There was a broad spectrum of such claims. Looking back from the moment when assurances are repudiated, the nearer the overall outcome comes to the expected reciprocal performance of requested acts in return for the assurance, the stronger will be the case for an award based on or approximating to the expectation interest created by the assurance. That does no more than to recognise party autonomy to decide for themselves what a proportionate reward would be for the contemplated detriment. As Mr Blohm put it: if you get what you asked for, you should give what you offered."

The Australian jurisprudence

56. The *fons et origo* of the Australian jurisprudence to the effect that the aim of all estoppels is to prevent harm arising from detrimental reliance are the minority opinions of members of the High Court, dissenting, in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394. The case arose from the dreadful collision in 1964 between two Australian Navy warships, in which the aircraft carrier HMAS Melbourne cut in two and sank the destroyer HMAS Voyager, with heavy loss of life. The plaintiff had been a member of Voyager's crew, injured in the collision. He alleged negligence and, at that time in accordance with policy, the defendant did not deny either a duty of care or plead limitation, following which the plaintiff continued with the action and incurred cost. Later, upon a change in litigation policy, the defendant sought to plead both defences by amendment. It succeeded in obtaining

leave to amend to run both defences at first instance, was held to have been estopped from doing so in the Court of Appeal, and lost its appeal to the High Court by a bare 4-3 majority. Two of the majority upheld estoppel while the other two based their conclusion on waiver. The result was that the plaintiff's expectation of not having to face either of those defences was protected. His only detriment was probably costs.

57. There are influential dicta from the minority (Mason CJ, Brennan and McHugh JJ) that protection from detriment is the main aim of the court's remedy for estoppel, and that the "minimum equity" may not require specific enforcement of the promise or representation. But the estoppel in question was not proprietary estoppel, nor had it been in the earlier case of *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, from which, in part, the minority developed their thesis.

58. *Giumelli v Giumelli* [1999] HCA 10; 196 CLR 101 was a case about proprietary estoppel, in line with the stream of English authority which the High Court traced back to *Dillwyn v Llewelyn* and *Plimmer v Wellington.* Various promises had been made to the respondent by his parents that he would be given an interest in development land belonging to them, in reliance upon which he worked without wages and built a house on part of the land. The parents appealed to the High Court on the basis that, contrary to the dicta in *Commonwealth v Verwayen*, the relief awarded by the courts below (which was partly in specie and partly a financial proxy for the son's expectation interest) exceeded the cost or value of his detrimental reliance. The High Court decided , unanimously, that the *Verwayen* case did not require relief for proprietary estoppel to be founded upon compensation for detriment. While by a majority they restored the order of the first instance judge by reference to reasons about other aspects of the equities of the matter than detriment, the result was that an essentially expectation-based monetary award was upheld.

59. To much the same effect was the decision of the High Court in *Sidhu v Van Dyke* [2014] HCA 19; 251 CLR 505. The claimant sought the transfer to her of a cottage which had been promised to her by the defendant on the faith of which she had relied to her detriment by (*inter alia*) not seeking a property transfer from her former husband on divorce. She had obtained an order for payment for the value of her promised interest, being denied a specific order for transfer because of the inequity which that would have caused to the defendant's former wife, who was a co-owner of the land on which it stood. One of the grounds of appeal to the High Court was that the order should have been limited to the cost or value of her reliant detriment, again based upon the dicta in *Commonwealth v Verwayen*. The High Court's response is encapsulated in the following passage from the joint judgment of the majority (French CJ, Kiefel, Bell and Keane JJ) at paras 84-85:

> "If the respondent had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of the appellant's assurances, then it might not be unconscionable for the appellant to resile from his promises to the respondent on condition that he reimburse her for her outlay. But this case is one to which the observations of Nettle JA in *Donis v Donis* [(2007) 19 VR 577, 588-589, para 34] are apposite:
>
> ' [H]ere, the detriment suffered is of a kind and extent that involves life-changing
>
> decisions with irreversible consequences of a profoundly personal nature…beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based.'
>
> 85. The appellant's argument, rightly, sought no support from the discussion in cases decided before *Giumelli v Giumelli* of the need to mould the remedy to reflect the 'minimum relief necessary to "do justice" between the parties' [*Verwayen* 170 CLR 394, 416].
>
> There may be cases where '[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption' [*Verwayen*, at p 413]; but in the circumstances of the present case, as in *Giumelli v Giumelli*, justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises. While it is true to say that 'the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct' [*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 419], where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise."

60. Thus did the seed of a detriment-based aim of the remedy in proprietary estoppel, sown in *Verwayen,* fall on hard Australian ground and wither away. After a

momentary wobble their jurisprudence on the issue appears now to have fallen squarely back within that which originated in England in *Dillwyn v Llewelyn, Ramsden v Dyson* and, with assistance from New Zealand, in *Plimmer v Wellington.* But the lively controversy to which its transplantation to England has given rise remains to be resolved.

The applicable principles

61. Drawing together this lengthy review of the authorities and looking at the matter historically, I suggest that what has happened may be summarised in this way. For over a century, starting in the 1860s, the courts of equity developed an equitable estoppel-based remedy, the aim of which was to prevent the unconscionable repudiation of promises or assurances about property (usually land) upon which the promisee had relied to his detriment. The normal and natural remedy was to hold the promisor to his promise, because that was the simplest way to prevent the unconscionability inherent in repudiating it, but it was always discretionary, and liable to be tempered by circumstances which might make strict enforcement of the promise unjust, either between the parties or because of its effect on third parties. While reliant detriment was a necessary condition for the equity to arise, the court's focus on holding the promisor to his promise was not aimed at "protecting" the promisee from the detriment, still less compensating for it. It was aimed at preventing or remedying the unconscionability of the actual or threatened conduct of the promisor, with the effect, but not the aim, that it tended to satisfy the expectations of the promisee.

62. The experience of having to frame an appropriate remedy to do justice in the infinitely variable exigencies of real life threw up numerous practical problems to answer which the courts devised practical (rather than doctrinaire) solutions. Thus the court could substitute payment of the value of the expectation constituted by the promise rather than enforcement in specie where the promisor had sold the promised property, or where specific enforcement would cause injustice to a third party with an interest in it, or with a dependency upon its continued use. Occasionally the court concluded that the repudiation of the promise would not, in changed circumstances from those in which it was made, be unconscionable at all. More often in such cases the court might require some smaller monetary payment to be made than one which represented the full value of the promised expectation.

63. A particular problem in some of the cases (the "clean break cases") arose where full enforcement of the promise would leave warring parties in cohabitation with each other. For the same reason that equity does not enforce a contract for personal services this usually required the court to remedy the unconscionability either by a mixed in specie and monetary award, or by a pure monetary award, but even then generally by reference to the value of the promised expectation.

64. A potentially acute problem arose, but not often in the reported cases, where (as here) the repudiation of the promise occurred long before it was due to be performed. This might often accompany the clean break problem, but it created a justice issue between the parties and sometimes family dependents which was conceptually distinct from the need to avoid enforced cohabitation.

65. The inherent flexibility and pragmatism of equitable relief enabled the courts to address all these problems as they arose without having to frame a rule book for the purpose, but while pursuing the invariable aim of preventing or putting right unconscionable conduct. Sometimes the solutions were simple and obvious. Sometimes an experienced court devised a complex solution which had previously eluded the court in earlier cases. But in none of them until the last 25 years did there appear to be a perception that the aim of the whole exercise was to protect from or compensate for detriment, or that there needed always to be a relationship of proportionality between the detriment and the remedy. In some cases a very marked disparity between the length of the period of detrimental reliance and the enduring nature of the promised property right did operate as a ground for something less than strict enforcement of the promise, on the common-sense basis that to ignore it would be to fail to do justice between the parties.

66. Nor did there appear to be a concern that the breadth and flexibility of the equitable remedy made it too much of an approximation to the length of the Chancellor's foot.

67. A perception on doctrinaire grounds that all might not be well with the underlying principles of proprietary estoppel arose from minority dicta about a different estoppel in Australia in *Commonwealth v Verwayen*, to the effect that the true aim of the remedy was to prevent or compensate for the detriment. Put in harness with Lord Scarman's often misunderstood "minimum equity to do justice" dictum in *Crabb* (which may have been influential in *Verwayen* itself) it sprouted in England in the form of two new themes. The first, developed judicially, was that the remedy ought not to be disproportionate to the detriment. The second, more radical, suggestion developed by some academic commentators in the present century was that maybe the true aim of the remedy ought now to be recognised as detriment-based, and that this might reduce harmful uncertainty as to likely remedy among litigants and their advisors.

68. I have already noted that the two themes are not easily reconciled. If the true aim of the remedy is to compensate for detriment then it should be done as precisely as possible, using all the common law court's formidable techniques for monetarising almost everything, and treating the rest as too remote. But if the aim lies as I think elsewhere (to remedy unconscionability mainly by satisfying expectation) then a

cross-check by reference to whether a proposed remedy is out of all proportion to the detriment is a useful guard against potential injustice.

69. My reading of the authorities tells me that the notion that the aim of the remedy is detriment-based has not taken root in England. It was expressly rejected in *Jennings v Rice,* and no more than toyed with in *Davies v Davies.* In *Moore v Moore* [2018] EWCA Civ 2669; [2019] 1 FLR 1277 at paras 25-26 Henderson LJ (with whom Leggatt and Floyd LJJ agreed) said that he would be wary of giving primacy to the detriment-based approach in a field where cases are so fact-sensitive and proportionality has such a prominent role to play.

70. Meanwhile it has been comprehensively rejected as the aim of a proprietary estoppel remedy in Australia. I have already explained why I regard it as wrong both in principle and in its likely effect. If the detriment consists of something done for or given to the promisor the remedy has the superficial appearance of being a kind of restitution, but that is not the same as equity. Otherwise it seems supportable only on the highly artificial tortious basis that the original promise or assurance, however well meant, is by its later repudiation somehow turned retrospectively into a wrong, causing the harm constituted by the detriment. I have explained why, with respect, I regard that as a reversal of the reality. The wrong is the repudiation and the harm is the non-fulfilment of the promise thereafter. The reliant conduct has occurred in full before the wrong is even committed. To treat it as harm caused by the wrong is incoherent. Some maintain that the reliant conduct is somehow converted into harm by the repudiation of the promise. But that is only because the promisee is being deprived of the expected benefit of the promise.

71. In my view therefore 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. I acknowledge that the common law (and perhaps even equity) could have based itself on such a theory, and I accept that the concept that the remedy compensates for detriment is one which will appeal to some minds. But the cases show that equity did not take that course, and there is no good reason for doing so now, by a reversal of over 150 years' careful development of the remedy upon a different foundation.

72. By contrast the concept of a proportionality test does appear to have taken root in England, as part of the assessment of whether a proposed remedy to deal with the proven unconscionability based on satisfying the claimant's expectation works substantial justice between the parties. It has become a well-used part of the relevant equitable toolkit in the Chancery Division: see e.g. my own decision in *Hopper v Hopper* [2008] EWHC 228 Ch; [2008] 1 FCR 557, paras 102-104, where its use was a matter of agreement between counsel. Like most tools or rules for the examination whether something produces justice, it is a good servant but a bad

master. It is no more nor less than a useful cross-check for potential injustice. As Robert Walker warned in *Jennings v Rice*, it is not to be applied by reference to any detailed mathematical examination of wage rates or interest rates. The question is, as he put it, whether the proposed remedy is "out of all proportion to the detriment". The true "value" of the detriment may be impossible to assess with anything approaching confidence. The counterfactual of an education and working life of a very different kind may be too speculative to quantify. But that does not mean that the non-financial element of the detriment should be ignored, as if it were too remote. Prima facie, wherever the reliant detriment has (as here) had lifelong consequences, a detriment valuation analysis will fall upon stony ground. As noted in the relevant cases, it is where the detriment is specific and short-lived, and in particular shorter than the parties are likely to have contemplated, that it is likely to serve a useful purpose. And that purpose is not generally to serve as even an approximate yardstick for a monetary award. In my view the best summary of the proportionality test is that the remedy should not, without some good reason, be out of all proportion to the detriment, if that can readily be identified. If it cannot, then the proportionality test is unlikely to be of much use.

73. Finally, the question of proportionality is not to be carried out on the basis of a purely financial comparison. Take the example where the 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. The question whether giving her the farm is disproportionate is not to be answered in such a case simply by comparing the monetary value of the farm with the net present value of the wages differential. Modern capital values of farmland are typically so high that the farm would always be worth much more than any valuation of the detriment. But that does not make a full in specie enforcement of the expected inheritance disproportionate. It will 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.

74. I consider that, in principle, the court's normal approach should be as follows. The first stage (which is not in issue in this case) is to determine whether the promisor's repudiation of his promise is, in the light of the promisee's detrimental reliance upon it, unconscionable at all. It usually will be, but there may be circumstances (such as the promisor falling on hard times and needing to sell the property to pay his creditors, or to pay for expensive medical treatment or social care for himself or his wife) when it may not be. Or the promisor may have announced or carried out only a partial repudiation of the promise, which may or may not have been unconscionable, depending on the circumstances.

75. The second (remedy) stage will normally 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. The promisee cannot (and

probably would not) complain, for example, that his detrimental reliance had cost him more than the value of the promise, were it to be fully performed. But the court may have to listen to many other reasons from the promisor (or his executors) why something less than full performance will negate the unconscionability and therefore satisfy the equity. They may be based on one or more of the real-life problems already outlined. The court may be invited by the promisor to consider one or more proxies for performance of the promise, such as the transfer of less property than promised or the provision of a monetary equivalent in place of it, or a combination of the two.

76. If the promisor asserts and proves, the burden being on him for this purpose, that specific enforcement of the full promise, or monetary equivalent, would be out of all proportion to the cost of the detriment to the promisee, then the court may be constrained to limit the extent of the remedy. This does not mean that the court will be seeking precisely to compensate for the detriment as its primary task, but simply to put right a disproportionality which is so large as to stand in the way of a full specific enforcement doing justice between the parties. It will be a very rare case where the detriment is equivalent in value to the expectation, and there is nothing in principle unjust in a full enforcement of the promise being worth more than the cost of the detriment, any more than there is in giving specific performance of a contract for the sale of land merely because it is worth more than the price paid for it. An example of a remedy out of all proportion to the detriment would be 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. Another would be a promise to leave a generous inheritance if the promisee cared for the promisor for the rest of her life, but where she unexpectedly died two months later.

77. There is in my view real merit in Lord Walker's spectrum (as he would now prefer to call it) between on the one hand a case where both the promise and the detriment are reasonably precisely defined by the time when the promise is repudiated, where the one is in a sense the *quid pro quo* of the other although falling short of contract, and on the other hand where either or both are left much less certain. The "almost contractual" end of the spectrum is likely to generate the strongest equitable reason for the full specific enforcement of the promise if the reliant detriment has been undertaken in full, regardless of a disparity in value between the two. At the other end there may be much greater scope for a departure from full enforcement, even if there are no other problems making it just to do so.

78. Cases where at the time of a repudiation during the lifetime of the promisor the date of performance lies in the future, e.g. upon the death of the promisor, are likely to be the most difficult in terms of finding an appropriate remedy. They may provoke objections to a strict enforcement by both sides. The promisor will complain that he never promised to part with the property, or its value, in his lifetime, and

that to do so earlier would cause him and his dependents unjust hardship. If the promisor proposes that the promisee be given a reversionary interest in the promised property, then (as in the present case) the promisee may say that the repudiation has so fouled the parties' relations that only a clean break will do. This may be a fair claim where the promise to transfer property at a future date carried with it (as here) the implication that the promisee would be able to live and work there until then. A clean break does not necessarily require an acceleration of the promised benefit, or at least not of the whole of it. But if it does, with an early proxy for performance, it is likely to require an appropriate discount for accelerated receipt.

79. 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. That would suggest something approaching a binary choice which would be alien to the flexible and pragmatic nature of the discretion. 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. In some cases the nature of the problem in the way of full enforcement may point the way to the solution, as in *Griffiths v Williams*. In an early receipt case the solution, as already noted, may be a discount for acceleration of the expectation. The remedy may have to accommodate the risk that the promisor (of an inheritance) may need to realise part of the promised property to pay for expensive nursing care. There would not normally be anything unconscionable about that. In a case where there is a need to avoid enforced cohabitation the solution may be a financial proxy for the promise rather than enforcement in specie. But where the only objection to full enforcement is that it will be out of all proportion to the detriment then the court will, in the words of Dillon LJ in B*urrows v Sharp*, just have to do the best it can.

80. In the end the court will have to consider its provisional remedy in the round, against all the relevant circumstances, and ask itself whether it would do justice between the parties, and whether it would cause injustice to third parties. The yardstick for that justice assessment will always be whether, if the promisor was to confer that proposed remedy upon the promisee, he would be acting unconscionably. "Minimum equity to do justice" means, in that context, a remedy which will be sufficient to enable that unconscionability question to be answered in the negative.

81. In *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2019] UKSC 46, at para 2, I said, about the equitable remedy of relief from forfeiture:

> "Relief from forfeiture is one of those equitable remedies which plays a valuable role in preventing the unconscionable abuse of strict legal rights for purposes other than those for which they were conferred. But it needs to be constrained with principled boundaries, so that the admirable certainty of English law in the fields of business and property is not undermined by an uncontrolled intervention of equity in any situation regarded by a judge as unconscionable."

I adhere to that view, and it is as applicable to proprietary estoppel as to any other equitable remedy, even though the typical context may be family property rather than business and commerce. In the present case the criticism has not been that there are no sufficient principles to govern the circumstances when a judge may intervene. Rather the complaint is that there is insufficient principle to guide the judge as to an appropriate remedy, once the equity has arisen, so that practitioners find it hard to advise their clients as to likely outcome, with the result that cases go to court at great expense and family bitterness whereas otherwise they would settle.

82. I am not persuaded by this. The repudiation of promises of this kind made between family members is likely to be causative of, or at least accompanied by, such bitterness that settlement is always going to be difficult. Since the relevant promises are likely to have been made orally, or even by conduct, the propensity for fundamental disputes of primary fact are themselves likely to be the greatest enemy of any predictability of outcome. Nor is unpredictability as to remedy necessarily a bar to settlement, because the increased risks of a trial for both sides can be a spur to settlement before the litigation becomes a battle purely about costs. But even if it is, that is no reason for the court to invent artificial rules about remedy where there is in truth no underlying supportive principle beyond those which I have described.

Application to the Facts

83. The facts of this difficult case threw in the judge's way a number of the problems which have in the past inhibited a full enforcement of the promise relied upon. There was, first, some uncertainty in the identification of the precise interest in Tump Farm promised, due to the accepted need to provide also for Andrew's brother Ross and his sister Jan. But the judge found that it was to be enough of Tump Farm to constitute a viable farming unit, and no effective complaint has been made to this court about that as being too uncertain. Secondly, the fact that the repudiation of the promise, when David was over 70 and Andrew almost 50, occurred at an indefinite time before the promised inheritance was due gave rise to problems both of futurity (or acceleration) and cohabitation (or clean break). Andrew's father and mother were both still living at the farmhouse, and David's

disinclination to retire had been a main bone of contention between him and Andrew. His mother's dependency upon the farm was another factor standing in the way of early enforcement in specie. His sister Jan also has an expectation to inherit which the judge took into account.

84. There was by contrast little uncertainty about the nature and extent of Andrew's detrimental reliance. He had worked full time at Tump Farm from 1982 until 2015 (33 years) and from 1993 onwards in the expectation of inheritance encouraged by David. His was plainly a form of reliance with whole-life consequences, starting when he left school at 16 and lasting until he was almost 50. So, however precisely it might be described, its lifetime consequences were extremely difficult to value.

85. After a lengthy review of the authorities the judge concluded his analysis of the principles relevant to the choice of an appropriate remedy in the following way, at para 165:

> "In my judgment, therefore, the court should approach the question of remedy by looking first at the claimant's expectation based upon the nature of the assurance made to him. Before contemplating the grant of a remedy which would satisfy that expectation it should first check that doing so would not produce one out of proper proportion to the value of the detriment suffered by the claimant. That is the eighth proposition in *Davies*. But identifying the true measure of 'the equity' to be satisfied may not stop there. The ninth proposition refers to the principled exercise of 'the broad judgmental discretion' and it is clear from what Robert Walker LJ said in *Jennings v Rice*, at para 49, that satisfying the equity may well not involve satisfying the claimant's expectation for other reasons that might support the conclusion that, in the circumstances, it is too extravagant. Together with the fifth one, that last proposition encompasses the notion that the court must also do justice to the defendant. That may involve taking account of the defendant's continuing interest in the property (particularly when the claimant's expectation was to inherit only after his death) and the interests of others, aside from the claimant, whose occupation may derive from that interest or who may have their own claims or expectations in relation to it."

As a general statement of legal principle tailored for the facts before the judge I consider that to be unobjectionable.

86. When applying that summary to the facts he began by noting (correctly in my view) that this was not a quasi-contractual type of case in which Andrew's expectation was precisely defined. His siblings' expectations of inheritance made his own too uncertain. He next acknowledged that, since Andrew's expectation was for an inheritance after the death of both his parents, the grant of relief now would involve an acceleration. This further reduced the coherence of his expectation since his parents might reduce or enlarge the farm in the meantime, or encumber part of it with a long lease. Nonetheless, with reasons given, he proceeded on the basis of Tump Farm as it then stood.

87. The judge naturally recognised that any remedy would have to involve a clean break, in the light of the inability of the parties either to live or work together. This led him directly to the conclusion that the farm would have to be sold, and that this would frustrate the succession tax planning on which his parents had been embarked. He considered that Andrew should bear his share of the consequential tax burden.

88. The order that he made, without further explanation or reasoning, was that Andrew should receive, net of tax, 50% of the farming business and 40% of the proceeds of sale (or valuation) of the farm after tax, reduced by crediting to his parents a life interest in the farmhouse. It is apparent that the judge modelled this division on the terms of an earlier will made by David (since revoked) at a time when he intended to make good the promise of inheritance made to Andrew. The 50% of the business sensibly satisfied Andrew's existing entitlement to an equal share in the existing business partnership, and the 40% of the farm accommodated 40% for Ross and 20% for Jan.

89. The judge did not state at this stage what he regarded as the value of Andrew's detrimental reliance, but he had earlier said, at para 273, that:

> "Andrew invested what for many is a lifetime's worth of work for very modest reward which involved him sacrificing the likely prospect of bettering himself elsewhere."

He noted Andrew's evidence that, by contrast, his siblings had both saved for and acquired properties of their own. Bearing in mind that he had directed himself as to the need to consider whether the proposed remedy would be disproportionate to the detriment, it is I think to be assumed that the judge did not think so. If that is right it must have been because he did not regard Andrew's detriment as having

been susceptible to reliable valuation, because he expressed no view of his own as to what it might actually have been worth.

90. The judge did not expressly consider why the need for a clean break necessitated the conferring of an immediate rather than reversionary interest in Tump Farm or why, if Andrew's proprietary expectation lay mainly in the future (on his parents' death), it should be necessary for the farm to be sold then and there, while they were still living. There had already been a clean break of sorts by the time of the trial, because Andrew had ceased working on the farm, vacated the cottage with his family and taken up work elsewhere. Nor was the substantial acceleration of Andrew's interest accompanied by any equivalent discount for early receipt. It was not sufficient in that respect only for the value of the farm to be discounted (as the judge did) by the notional value of his parents' life interest in the farmhouse. That represented only a modest part of the value of the whole of Tump Farm. Although Andrew's expectation was that he would continue to be able to work there in the meantime, and live in the cottage, he had no proprietary expectation in the land pending his parents' death.

91. These potential shortcomings in the judge's analysis were pursued on the parents' behalf in the Court of Appeal, but Floyd LJ (giving the lead judgment) said that they fell within the wide ambit of the judge's discretion. This was a case in which the parents advanced no specific case at all at trial about remedy, beyond a purely general reference to authority about the need for proportionality. The judge is therefore entitled to some sympathy for not dealing in detail with points which were never made to him. But sympathy should not obscure error if that is what happened.

92. The main attack on the judge's analysis mounted by the parents was that it had been wrong for the judge to adopt an expectation-based approach. He should, they said, have limited any compensation to the value of the contribution made by Andrew to the value of the farm over and above the requirements of his employment, with some additional amount to reflect his loss of opportunity to save for the purchase of a house. Floyd LJ held that the judge had been entitled to use an expectation-based approach because, although there was not initially the certainty of mutual expectation of the quasi-contractual type, when later viewed as at the time of the repudiation in 2015 Andrew had substantially performed his side of the quasi-bargain, so that the expectation of inheritance represented the parties' own common understanding of an appropriate (rather than unconscionable) reward. At para 82 he said:

> "Similarly, I would reject an approach to compensation based on Andrew's loss of opportunity to work elsewhere. The loss or detriment suffered by a claimant who is persuaded to take a poorly remunerated position on the

> strength of a promise of some interest in land is not limited to the quantifiable difference in wages. There is a large but unquantifiable element attributable to loss of opportunity which will, in many cases, make it just to award sums far greater than any sum based on the wage differential. 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. The judge was certainly entitled to take the view that this was such a case."

93. In this court the parents have again focussed their attack upon acceleration and, more fundamentally, upon a failure to adopt a detriment-based remedy. I will take those main points in reverse order. I have noted how Mr Dumont KC for the parents put "minimum equity" in the forefront of his argument, directed at asking this court now to resolve the "lively debate" between expectation and detriment as the aim of the remedy in favour of the latter. It is for that reason that I have conducted the review of the authorities which leads me to a different conclusion.

94. For the reasons given, neither expectation fulfilment nor detriment compensation is the aim of the remedy. The aim remains what it has always been, namely the prevention or undoing of unconscionable conduct. In many cases, once the equity is established, then the fulfilment of the promise is likely to be the starting point, although considerations of practicality, justice between the parties and fairness to third parties may call for a reduced or different award. And justice between the parties may be affected if the proposed remedy is out of all proportion to the reliant detriment, if that can easily be identified without recourse to minute mathematical calculation, and proper regard is had to non-monetary harm.

95. In the present case I would, like the Court of Appeal, reject this ground. This was a case where, by 2015, Andrew had spent over 25 years working for his father on minimal wages, with incalculable whole-life consequences in terms of the sacrifice of opportunities for an independent career and the ownership of his own home. It is simply impossible to identify some monetarised value of his detriment in a way which would render a fulfilment of his expectations disproportionate. An offer now just to pay the wage differential, after more than half a working lifetime working towards the inheritance of a viable farm would in my view clearly remain unconscionable. More to the point, to the very limited extent that this approach to remedy was advocated at all at trial, the judge made no error of law in rejecting it.

96. I am much more concerned with the acceleration point. Mr Dumont's submission was that Andrew did not merely get a full monetary proxy for his promised expectation. He got more than that because he got it early. It was, in short,

expectation plus. And it was an unnecessary injustice to his parents, because it forced them to sell the farm during their lifetime to pay Andrew off, which they had never promised to do, in circumstances where the parties had already achieved the substance of a clean break. I recognise that the judge was hampered by having no submissions about this from the parents, and the apparent lack of reasoning given by him for this least satisfactory part of his analysis may well be attributable to having had no formulated dispute about it to resolve.

97. The question however is whether the order which he made was outwith the ambit of his discretion. While a large gap between simple enforcement of the promise and something more proportionate to a measurable detriment may give a judge a broad discretion, that is not this case. Andrew's detriment was not measurable in any reliable monetary sense so as to give a lower "floor" as the basis for a proportionality assessment. Indeed his order was not, in my view, disproportionate to Andrew's detriment save for the fact that Andrew had not continued to work on the farm until the death of his parents. But a perception that he had stopped work a little early is no different in substance from a perception that the judge's order had the effect of paying him too early.

98. While there may have been a debate about whether the aim of the remedy is detriment or expectation-based, there has never been any doubt that there is no equity to give a claimant more than his promised expectation, either in terms of simple amount or accelerated receipt. There may be discretion to accelerate, if necessary for example to achieve a clean break, but only if there is built in an appropriate discount to reflect early receipt. This is true even if the value of the detriment exceeds the value of the promised benefit, because it is simply not unconscionable for the promisor to give all he promised, but no more.

99. There may have been a reason why the judge did not provide for a general discount for early receipt. It may have had something to do with the fact that Andrew and his family had already been forced off the farm and had lost the impliedly promised benefit of being able to go on working and living there until his parents died. But it is speculation whether any such, or different, reasoning motivated the judge. For my part I can see no good reason why it would have been unconscionable for Andrew's parents to have discounted an offered payment substantially by reference to his early receipt, and as the quid pro quo for them having to give up the farm by having to sell it during their lifetime to pay him off, which they had never promised to do.

100. It follows that in this respect the judge did exceed the ambit of his discretion, and that this court should exercise it afresh. I would have gone about the process in this way. By the time of the parents' repudiation of their promise to Andrew he had performed the bulk of his "working on the farm" commitment to his parents. He had

a reasonably well-settled expectation that he would inherit both half the farm business and a viable part of the farm on which to continue farming and to live. This was therefore a case in which satisfaction of his expectation was a prima facie appropriate remedy, on the "spectrum" analysis propounded by Robert Walker LJ in *Jennings v Rice* and endorsed by Lewison LJ in *Davies v Davies.*

101. Andrew was already entitled to 50% of the business under his partnership with his parents. 40% of the farm was a perfectly appropriate division for the purpose of making good the parents' promise, subject to tax as the judge explained, if that was unavoidable. But it was only appropriate at that level once his parents died, and could have been achieved by an award on appropriate terms to Andrew of a reversionary interest under a trust of the farm, with the parents having a life interest in the meantime. That would not of itself have had the effect of forcing Andrew and his parents back into a cohabitation which had ceased by the time of trial. That might leave a lacuna in the management of the business during any period between the parents' retirement and their death, but that could have been addressed by providing for Andrew to take over sole management (if he still wished) at that stage, if it arose. Leaving aside the litigation costs that does not seem to me to have required the parents to sell the farm or give up occupation and use of it in the meantime, which they had never promised to do.

102. I would not as part of that remedy have given Andrew additional compensation for his being off the farm pending his parents' death. True it is that this was an implied part of the parents' promise, but its impossibility of performance was the result of the breakdown in the relationship. Andrew had obtained alternative employment with accommodation provided at as good a rate financially as he was likely to get if he had continued to work on the farm, and his parents remained dependent upon the farm's business for their own sustenance, if it was not to be sold. It would simply not be unconscionable for him to have received no additional compensation for that part of his disappointed expectation.

103. I note however that there may have been a wish on all sides for a more complete break than a settlement of that kind would provide. Andrew may find the postponement of receipt of part of the farm until the date of his father's death less attractive than a discounted monetary equivalent now. His parents may themselves prefer to sell the farm now, to provide capital to support their care needs as they grow older. The judge's order provides an appropriate framework for such a break, at the cost of a tax-inefficient early sale of the farm, but only if a sufficient discount for early receipt by Andrew is built in. That would reflect a continuing notional life interest of the parents not only in the farmhouse (as the judge ordered), but also in the whole of the farm.

104. I consider that the parents should be entitled to choose between those two alternative forms of relief. They would thereby be spared, if they so choose, the injustice of having to sell up and leave early, but alternatively given the opportunity of a completely clean break at a considerably lower price than that ordered by the judge. Either remedy if afforded to Andrew would draw the sting of unconscionability from the outright repudiation of their promises to him. Since the aim of the remedy is to prevent or remove unconscionability, then where there are two different ways of doing so the persons against whom the equity is asserted should in principle be the ones to make that choice.

105. If the parents do choose the alternative financial remedy (and indeed to enable them to make that choice) it is necessary to identify the amount of the early receipt discount. Normally that would be a matter of expert evidence about the value of a notional life interest of the parents in the whole farm, which is not available to this court. But in sensible dread of further costs and delay the parties have asked the court to do its best on the material available, rather than adjourn the matter further or remit it. I note that the judge solved the problem of quantifying his preferred (but inadequate) discount by having the notional life interest in the farmhouse carried out as part of the valuation of the farm as a whole. I see no reason why that same approach should not be sufficient for the more general acceleration discount which I am proposing, and conducted before the parents are put to the choice between the financial and non- financial remedy. If the relevant figures can be agreed there need be no further proceedings. If not, that question would have to be remitted to the Chancery Division. Further, if the parties cannot agree the appropriate structure, or content of any instrument or order, by which the first of the two options referred to in paragraph 104 above may reasonably and efficiently be implemented, that too will need to be remitted to the Chancery Division.

106. I would therefore allow the appeal to that extent.

LORD LEGGATT (with whom Lord Stephens agrees):

A. INTRODUCTION

107. Intrinsic to any system of private property is the owner's right to choose what to do with his or her property. To ensure that dispositions of property are made in accordance with, and only with, the owner's authority, rules are required to determine when legally valid consent to a disposition of property has been given. In English law consent to dispose of an interest in property in the future is valid only if the authorisation is given in a contract or, if the intended future disposition is a gift, in a deed or will. To be valid, a deed or will must comply with specific formal requirements. The reason for requiring such formality is to make sure that the

consent was genuine and intended to create a legal obligation. In relation to land, given its importance as a form of property formality is also required to make a valid contract. Thus, under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, a contract for the sale or other disposition of an interest in land must be made in writing in a document that incorporates all the terms expressly agreed and is signed by each party.

108. In recent years, however, a potent legal doctrine has developed under which a court may order interests in land and other property to be transferred, including on death, even though the requirements for a valid disposition of property have not been satisfied. The doctrine has been called "proprietary estoppel" (although, as I will explain later, the label is inapt). In *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776, the House of Lords confirmed that a claim based on "proprietary estoppel" has three main elements: an assurance by A to B that B has been or will be given an interest in property; reasonable reliance by B on the assurance; and consequent detriment to B if A resiles from it. Where these three elements are present, an "equity" may arise which the court may satisfy by compelling A to grant an interest in property to B or to pay monetary compensation.

109. A fundamental question which was not, however, raised on the appeal in *Thorner v Major* and which has still not been clearly resolved is: what is the nature of this "equity"? Why, when the elements of a "proprietary estoppel" claim are proved, does or may the law afford the claimant a remedy of any kind? Without an answer to that question, it is impossible for a court to decide in a way that is rational and not merely arbitrary what remedy should be awarded in any particular case. If the court is to award a remedy which is capable of being justified, it is necessary to know what the remedy is <u>for</u>.

110. Another, more specific question is what the approach to remedy should be where an assurance consisting of an informal promise is revoked before it is capable of being fulfilled. In *Thorner v Major* the event upon which the claimant had been promised that he would be given property (the death of his cousin) had happened. Should the approach be the same where a person who has promised to make a will leaving property to the claimant later revokes the promise after the claimant has detrimentally relied on it? To grant an immediate remedy in such a case gives the claimant something that was never promised. What was promised was a gift upon the promisor's death. When and how, if at all, is it justifiable to grant a remedy in such a case when the promisor is still alive?

111. The present case is a case of this kind. For many years the claimant worked long hours for low pay on the family farm relying on promises from his father that he would inherit the farm (or a substantial share of it) on the death of his parents. After his relationship with his parents broke down and the son was disinherited, he

brought this claim against them based on “proprietary estoppel”. At trial the claim succeeded. The remedy awarded by the judge was to order the parents to make an immediate lump sum payment to their son, calculated as a proportion of the current value of the farm and farming business. The judge’s order was upheld by the Court of Appeal. The further appeal to this court requires us to consider what principles should guide the grant of a remedy for a claim of this kind.

112. Before considering those principles, I will give a fuller summary of the facts.

B. THE FACTS

113. Tump Farm is located near the confluence of the River Wye and the River Severn, not far from Chepstow. It consists of around 197 acres of land: mainly pasture, with some woodland. There is a farmhouse with a semi-detached cottage (called Granary Cottage) and other buildings. Tump Farm has primarily been a dairy farm, though 32 acres are now leased to a commercial operator as a solar energy park. It has been farmed by members of the Guest family since 1938. David Guest’s parents originally farmed the land as tenants. In 1964, when he was only 19, David’s father died, and David and his mother bought Tump Farm with a mortgage. They were partners in the farm business until 1992, when David’s mother died. David then carried on the farm business in partnership with his wife, Josephine.

114. David and Josephine Guest are the defendants to this claim. The claimant is their son, Andrew Guest. He is the oldest of their three children. Andrew was born in 1966; his sister, Jan, in 1968; and a younger brother, Ross, in 1977.

115. In 1981 David and Josephine Guest made wills providing for Andrew and Ross to inherit Tump Farm and its business in equal shares upon the second death of their parents, subject to a pecuniary legacy to Jan equal to one fifth of the value of the estate. Andrew was never told about the terms of these wills but was aware of his father’s intention to leave the farm to the next generation.

116. From when he left school in 1982, Andrew worked full time at Tump Farm. He did so for 32 years before he and his parents fell out. Until 1989, Andrew lived in the farmhouse with his parents and paid his mother for board and lodging. In 1989 Andrew married his wife, Tracey, and an old granary attached to the farmhouse was converted into a cottage (Granary Cottage) for them to live in. They have two children.

117. Over time Andrew took on various responsibilities on the farm and played an increasing role in the farm business. After 1982 he quickly took over sole

responsibility for calf rearing; after 1984 he took responsibility for artificial insemination of cattle; and after 1985 (having undertaken two part-time courses in farm management) he took on more responsibility for paperwork, progressing to financial management and administration. In 2006, Andrew obtained a postgraduate diploma in Agricultural Business Management. Outside his work on the farm, Andrew has taken on various roles in bodies representing dairy farmers and the interests of farmers generally, in particular the Northern Milk Partnership and the National Farmers' Union.

118. Ross, who is 11 years younger than Andrew, has also become a farmer. From 1997 until 2005, Andrew and Ross operated an outdoor activity centre at Tump Farm as a partnership (offering quad biking, then also paintballing). But it did not work out. Since 2002 Ross has been working full-time on the farm.

119. For most of the time that he worked on the farm, Andrew was paid only a basic wage. Until 1996, Andrew's wages (excluding overtime) were in line with the minimum rate set by the Agricultural Wages Board; but after that they fell behind. In 2008 Andrew raised a complaint with the Board about the level of his wages. In response his father wrote a letter to Andrew saying that he was "somewhat saddened that you wish to be regarded as an ordinary employee rather than a valued member of the family." The parents maintained that, in assessing what he was paid, the value of various benefits (such as his rent-free occupation of Granary Cottage) should be taken into account. There was disagreement about the value of such benefits, but in June 2009 a compromise was reached under which Andrew's wages were increased, though by less than he had requested.

120. In 2007 the parents' farming partnership took a farm business tenancy of a neighbouring farm, Dayhouse Farm, and farming operations there were integrated with those on Tump Farm. In 2012, the tenancy of Dayhouse Farm came up for renewal, with the opportunity to rent the farmhouse and not just the land. This enabled Ross with his wife and young children, who had previously been living with the parents at Tump Farmhouse, to move to Dayhouse Farm. By that stage it was clear that, for various reasons, Andrew and Ross could not continue to farm together. Two new family partnerships were formed: one between the parents and Andrew to run Tump Farm; and the other between the parents and Ross to run Dayhouse Farm. Each son was to be the principal farmer of "his" farm. In each partnership the son was to have a 50% share of profits, with the other 50% being split equally between the parents. The judge found that an express promise of equal inheritance by Andrew and Ross was made at that time, with the land at Tump Farm to be split between them.

121. These arrangements did not continue as planned because relations between Andrew and his father soon broke down. The reasons for their falling out do not

matter but, on the judge's findings, they stemmed largely from disagreement about the direction of the farming business and the extent to which Andrew should now have control over it. Another point of contention was Andrew's belief that "his" branch of the farming business was being treated unfairly in comparison with the part allocated to Ross.

122. In May 2014 the parents made new wills, which cut out Andrew from inheritance except for a right to occupy Granary Cottage. By this time David was threatening to dissolve the parents' farm partnership with Andrew. Negotiations took place in late 2014 and early 2015 over the possibility of Andrew taking a farm business tenancy of Tump Farm, but he regarded the terms offered to him as not commercially viable. In April 2015 David and Josephine Guest dissolved their farm partnership with Andrew and gave him notice to quit Granary Cottage. Andrew and his wife and children accordingly left the farm. (David and Josephine subsequently made further new wills excluding him entirely.)

123. Andrew instructed solicitors, who in June 2016 sent a letter of claim relying on the doctrine of proprietary estoppel. In August 2017 these proceedings were begun. The trial took place over six days in November and December 2018 before HHJ Russen QC sitting as a judge of the High Court.

124. At the time of the trial, Andrew Guest was aged 52 and his father, David, was aged 77. Andrew had by then got a job on another farm, near Tewkesbury, as a senior herdsman.

125. Since the trial, and as matters stand: the dairy herd at Tump Farm has been sold; but Tump Farm is still farmed by the parents and they wish to continue to make use of it, whether for themselves or ultimately for the use of the Dayhouse Farm Partnership.

C. THE JUDGE'S FINDINGS

126. In his judgment at [2019] EWHC 869 (Ch) the judge made careful and detailed findings of fact leading to the conclusion that, until they fell out in 2014, Andrew was consistently led to believe by his father, with the tacit support of his mother, that he would succeed to the farming business and inherit a substantial share of Tump Farm. Until the late 1990s, Andrew was assumed within the family to be the sole successor to the farming business; but from 1997, when Andrew and Ross launched their outdoor activity business, the family's expectation, which Andrew accepted, was that he and Ross would farm side-by-side. The extent of Andrew's promised inheritance was not specified, but the judge found that "David's statements were clear enough

to amount to an assurance that Andrew would inherit a sufficient stake in Tump Farm as to enable him to carry on farming after his parents' deaths" (para 242).

127. The judge was satisfied that Andrew had reasonably relied on this assurance. This could be seen from the fact that Andrew worked hard on the farm for many years for little financial reward, even taking into account the provision of accommodation at Granary Cottage and the payment of certain living expenses. He would not have done so if his father had not encouraged the idea of an inheritance. While the judge could not say exactly what would have happened if Andrew had gone to work elsewhere, he described Andrew as "a hard-working, accomplished and forward-thinking farmer" and considered that his current position as a herdsman, starting afresh in his 50s, provided "no real indication of his true worth in his 20's, 30's and 40's" (paras 270-271).

128. When he came to consider remedy, the judge described his task as being to exercise a "broad judgmental discretion in an endeavour to do what is necessary to avoid an unconscionable result or, alternatively, to identify the minimum equity to do justice" (para 282).

129. The judge rejected a suggestion that the equity in this case was based on an assurance of a "quasi-contractual" nature because the promised extent of Andrew's inheritance was too uncertain for that (para 283). He reminded himself that the assurance concerned an inheritance after the deaths of both parents who "may expect to live for many more years yet, in their home at Tump Farmhouse" (para 284). Even though Andrew had expected to take on the farming business (and thought that he had effectively done so in 2012), he did not expect to acquire any proprietary interest in the land and buildings before his parents died. But the judge considered that the extent to which Andrew had fallen out with the other members of the family made it appropriate to grant a remedy which would achieve a clean break between them (para 286). As a result, the parents would almost inevitably have to sell Tump Farm, resulting in loss of the tax advantages that would occur if the farm was passed on through inheritance. Although Andrew was not to blame for the failure of the succession arrangements, the judge considered it fair that he should bear his share of the taxes (actual or notional) which were the price of satisfying the equity (para 287).

130. The judge decided that the appropriate remedy was to order David and Josephine Guest to make an immediate lump sum payment to Andrew, comprising:

> (i) 50% after tax of either the market value of the dairy farming business (as valued in an expert's report) or the value realised by a sale of the business in consequence of the judgment; plus

(ii) 40% after tax of either the market value of the freehold land and buildings at Tump Farm (again as valued in an expert's report) or of the proceeds of sale in consequence of the judgment. In either case the farmhouse was to be treated as subject to a life interest in favour of the parents (on terms that they are responsible for its upkeep for so long as either of them lives there);

(iii) The amount payable to Andrew was to be net of any taxes payable (or which would have been payable) by the parents on the sale of the dairy business and/or Tump Farm.

131. Joint experts' reports in evidence at the trial valued the dairy farming business at that time at £496,704 and Tump Farm (including the farmhouse and Granary Cottage) at around £2,855,000. The farmhouse was valued on a freehold basis at £286,520 but there was no evidence of the amount by which a life interest in favour of the parents would reduce this figure. On these valuations, before taking account of the life interest and the impact of taxation, the amount payable to Andrew would be around £1.3m.

132. The judge's order has been stayed while it is under appeal.

D. THE PARENTS' APPEALS

(1) The decision of the Court of Appeal

133. Permission to appeal to the Court of Appeal was granted only on the question of remedy. The parents argued that the judge was wrong to fashion a remedy based on Andrew's expectation of inheritance and should instead have awarded compensation based either on the extent to which the value of the farm had increased as a result of Andrew's contribution or on Andrew's loss of opportunity to work elsewhere. For reasons given by Floyd LJ, with whom Newey and Arnold LJJ agreed, the Court of Appeal rejected this contention and dismissed the appeal: [2020] EWCA Civ 387; [2020] 1 WLR 3480.

134. The Court of Appeal held that the judge was entitled to take Andrew's expectation as "a strong factor in deciding how to satisfy the equity" (para 86). A remedy based on any increase in the value of the land would not reflect the nature of the assurances given - which were not that Andrew's efforts would be rewarded by reference to any increase in value if they bore fruit but that he would inherit a sufficient interest in the farm to enable him to farm himself. Such a remedy would also be "completely out of kilter with the nature of the cause of action" and "more

appropriate to an action in unjust enrichment, which this is not" (para 81). The court similarly rejected an approach based on valuing Andrew's loss of opportunity to work elsewhere (para 82). They did so on the basis that:

> "The loss or detriment suffered by a claimant who is persuaded to take a poorly remunerated position on the strength of a promise of some interest in land is not limited to the quantifiable difference in wages. There is a large but unquantifiable element attributable to loss of opportunity which will, in many cases, make it just to award sums far greater than any sum based on the wage differential. 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."

In the view of the Court of Appeal, the judge was entitled to decide that this was such a case.

135. The Court of Appeal also rejected a submission that the judge wrongly accelerated Andrew's expectation, which as regards the land and buildings was only ever that he would inherit a substantial proprietary interest when his parents died. The court held that, in circumstances where there was no prospect of the parties continuing to work and live in close proximity, the judge did not err in principle nor exceed "the wide bounds of his discretion" in devising a clean break solution. The judge was entitled to conclude that the consequent near inevitability of a sale of the farm "was a sad consequence of the breakdown in relations, and was part of what was, in all the circumstances, necessary to avoid an unconscionable result" (paras 88-89).

(2) This appeal

136. The issue of general importance raised on this further appeal is what are the correct principles to apply in awarding a remedy in cases of proprietary estoppel. Both parties agree that it is necessary for this court to consider, in particular, the proper approach to remedy in cases where the expectation is of a future inheritance rather than an immediate benefit. In addition, counsel for the parents have asked the court to address "the solution to the 'lively controversy' between a reliance-based approach and an expectation-based approach to the question of relief in proprietary estoppel cases in general."

137. Before I come to this "lively controversy", I will briefly describe how the doctrine of "proprietary estoppel" has developed.

E. HOW THE LAW HAS DEVELOPED

(1) The name "proprietary estoppel"

138. Although the origins of the doctrine can be traced back to cases in the nineteenth century and before, the name "proprietary estoppel" appears to have been first used in *Snell's Equity*, 26th ed (1966), pp 629-633, which was cited by Danckwerts LJ in *E R Ives Investment Ltd v High* [1967] 2 QB 379, 399. It is an irony that, soon after the name "proprietary estoppel" was invented, the doctrine developed in a way which made this name inapt. Estoppel is a negative and essentially defensive legal principle. The very words "estoppel" and "estop" are simply an archaic form of the word "stop". To say that a party is estopped or subject to an estoppel means that the party is stopped by law from asserting or denying something. Detrimental reliance is a requirement of many forms of estoppel. For example, an estoppel by representation may arise where A makes a representation on which B relies in a way which would cause detriment and hence injustice to B if A were permitted to resile from the representation. In such a case, A may be estopped from denying the truth of the representation.

(2) Estoppel by acquiescence

139. In most of the early cases which can be seen as cases of proprietary estoppel, the "estoppel" was based, not on a promise, but on A's acquiescence in, or encouragement of, a mistaken belief by B that A had given B a property right. In *Dillwyn v Llewelyn* (1862) 4 De G F & J 517 a father signed a memorandum "presenting" his son with a plot of land on which to build a house, which the son then did at his own expense. After the father died, the son claimed that he was entitled to have the legal estate conveyed to him. Lord Westbury LC upheld the claim, saying, at pp 522-523, that:

> "it was the plain intention of the testator to vest in the son the absolute ownership of the estate. The only inquiry therefore is, whether the son's expenditure on the faith of the memorandum supplied a valuable consideration and created a binding obligation. On this I have no doubt; and it therefore follows that the intention to give the fee-simple must be performed …"

Lord Westbury appears to have analysed the memorandum as creating an offer of a unilateral contract, which the son accepted by building on the land. An alternative explanation is that the son's expenditure, incurred with the father's knowledge and encouragement, enabled equity to perfect an imperfect gift: see *Pascoe v Turner*

[1979] 1 WLR 431; *Voyce v Voyce* (1991) 62 P & CR 290; *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752, para 49. Neither the language nor the reasoning of estoppel was used.

140. A case which can straightforwardly be viewed through the spectacles of subsequent jurisprudence as one of estoppel (see *Thorner v Major*, para 20, per Lord Scott) is the decision of the House of Lords in *Ramsden v Dyson* (1866) LR 1 HL 129. Lord Cranworth LC (with whom Lord Wensleydale and Lord Westbury agreed) laid down the principle, at pp 140-141, that:

> "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own."

141. The result of the case turned on whether a tenant, when he built on the demised land, believed, to the knowledge of the freehold owner, that he had a right at any time to convert his annual tenancy into a long lease which could be perpetually renewed; or whether the tenant believed only that he would in practice be granted such a right if he asked for it. The tenant lost, as the majority of the House of Lords (Lord Kingsdown dissenting) held that he had failed to establish either (1) that he believed, when the building took place, that he had any existing right greater than a tenancy from year to year, or (2) that the freeholder knew or believed that the tenant was spending his money in the mistaken belief that he had such a right.

142. Another classic statement of the requirements which must be met to give rise to an estoppel of this kind is that of Fry J in *Willmott v Barber* (1880) 15 Ch D 96, 105-106:

> "In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. … Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. … Lastly, the defendant, the possessor of the legal right, must

> have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

143. These "five probanda", as they became known, like Lord Cranworth LC's statement of the law in *Ramsden v Dyson*, confine the principle to a mistaken belief in an existing right. In his dissenting judgment in *Ramsden v Dyson*, Lord Kingsdown suggested that the principle might also apply where A had encouraged B to believe that B *would be* granted an interest in land and A then stood by knowing that B was acting in reliance on this belief. The decision of the Privy Council in *Plimmer v Wellington Corpn* (1884) 9 App Cas 699 was such a case (although it has also been explained as based on a contract: see *Canadian Pacific Railway Co v The King* [1931] AC 414 at p 428). So was the more modern case of *Inwards v Baker* [1965] 2 QB 29. There a father encouraged his son to build a bungalow on the father's land. The son did so in the expectation that he would be allowed to live there for as long as he wished. The father left the land in his will to others, who later sought to evict the son. The Court of Appeal held that they were not entitled to do so. Lord Denning MR, at p 37, said that the son had acquired:

> "an equity well recognised in law … [that] arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there."

Danckwerts LJ, agreeing, used the language of estoppel. He said, at p 38:

> "It is not necessary, I think, to imply a promise. It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

144. The same principle was applied in *E R Ives Investment Ltd v High* in which the label of "proprietary estoppel" was first judicially used. Neighbouring landowners had in that case acted for many years on the basis of an informal agreement whereby Mr High was promised a right of way across his neighbours' yard in return for

withdrawing his objection to a small encroachment on his land when they built the foundations of their block of flats. Mr High relied on this right of way when building a garage on his land. The neighbours later sold their land expressly subject to the right of way, but it was never registered as a land charge. Their successor in title brought an action for damages for trespass and an injunction to restrain Mr High from trespassing on their yard. The judge dismissed the claim, and that decision was upheld by the Court of Appeal.

145. All three members of the Court of Appeal reasoned that the neighbours' inaction in standing by when Mr High built his garage with access only over the yard, knowing that he was relying on the existence of a right of way across the yard, gave rise to what Lord Denning MR described, at p 394, as an "equity arising out of acquiescence". Danckwerts and Winn LJJ analysed this equity in terms of estoppel. Winn LJ, at p 405, explained the nature of the estoppel in this way:

> "Estoppels arising from representations made by owners of land that rights exist affecting their land will, unless in form they are limited to the duration of the interest of the representor, bind successors to his title. It is no anomaly that a person should have a legally valid answer to a claim and yet be estopped from asserting that answer against the claimant … Where estoppel applies, the person entitled to wield it as a shield has, ex hypothesi, suffered a past detriment or other change of position; he is not asserting any positive right but is invoking law or equity to afford him procedural protection to avert injustice."

Thus, Mr High had no right of way across his neighbours' yard, but his original neighbours and their successors in title were estopped from denying that he had such a right and from asserting their right to exclude him from their property.

146. In these cases the equitable doctrine operated as an estoppel properly so called. The doctrine was not treated as an independent basis for acquiring legal rights, let alone one which might justify compelling A to transfer an interest in land to B. It operated negatively and defensively to prevent A (or A's successors in title) from exercising a pre-existing property right against B. Where the relevant conditions were satisfied, A was estopped from asserting this right against B.

(3) Crabb v Arun District Council

147. This understanding of the doctrine in negative and defensive terms, however, subsequently evolved into a conception of "proprietary estoppel" as a positive cause

of action. The critical step was taken by the Court of Appeal in *Crabb v Arun District Council* [1976] Ch 179. Mr Crabb owned land next to a road owned by the council. His land had the benefit of a formal right of way along the road to one access point (A). Mr Crabb reached an agreement in principle with the council to have a further right of access at a second point (B). The council built a fence along the road but left gaps in the fence and installed gates at the two access points. Mr Crabb then sold part of the land with the right of access to point A, relying on his ability to get access at point B to the land which he retained. When the council blocked off Mr Crabb's access at point B and demanded more money than he was willing to pay for a formal right of access, he sued, relying on the doctrine of proprietary estoppel. Mr Crabb failed at first instance but succeeded on appeal. The relief granted by the Court of Appeal went beyond holding that the council was estopped from asserting its right to prevent Mr Crabb having access to his property across its land. The court granted Mr Crabb a right of way binding not only on the council (and any successor in title) but in the form of an easement binding on other people generally.

148. Lord Denning MR admitted that, when counsel for Mr Crabb said that he put his case on an estoppel, "it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action" (p 187). But Lord Denning recovered his composure by accepting that "there are estoppel and estoppel", that some do give rise to a cause of action, and that:

> "In the species of estoppel called proprietary estoppel, it does give rise to a cause of action."

Lord Denning recalled that the early cases did not speak of the basis for the court's intervention as an "estoppel" but of the dealings between the parties as "raising an equity" in favour of the claimant (p 187). He said that "it is for a court of equity to say in what way the equity may be satisfied" (p 188). Scarman LJ (at pp 192-193) identified the court's task as being to answer three questions:

> "First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?"

Scarman LJ also used a phrase, at p 198, which has often been repeated since when he described the grant of an easement as "the minimum equity to do justice" to the claimant in that case.

149. The understanding of proprietary estoppel as a genuine estoppel, negative and defensive in its operation, did not disappear all at once. It can be seen in a number of later cases. An example is *Taylors Fashions Ltd v Liverpool Victoria*

Trustees Co Ltd (Note) [1982] QB 133, in which Oliver J reviewed many of the earlier authorities. Two tenants of the defendant landlord had served notices to exercise options contained in their leases to renew the lease for a further term. In each case the option was held to be void because it had not been registered as a land charge. The issue then arose whether the defendant had encouraged the tenants to incur expenditure or otherwise alter their position in the belief that the option was valid, with the result that the landlord was estopped from denying that the tenant had a right to renew the lease. Oliver J held that in one case such an estoppel arose and in the other case it did not.

150. It was common ground in argument (see p 144) that:

> "if under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, [A] acts to his detriment in connection with such land, a court of equity will compel B to give effect to such expectation."

This proposition was derived from Lord Kingsdown's speech in *Ramsden v Dyson* at p 170. It was not suggested, however, that the claimant's expectation when acted on to his detriment could itself create a right to acquire an interest in property. The argument advanced was a conventional one that an expectation encouraged by the landlord, on which the claimant had detrimentally relied, gave rise to an estoppel which barred the landlord from asserting that the option to renew the lease was invalid.

151. The traditional conception of proprietary estoppel resurfaced strongly in dicta of Lord Scott of Foscote in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752. He said, at para 14:

> "An 'estoppel' bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a 'proprietary' estoppel … if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action."

The revival of the traditional view, however, was short-lived. When "proprietary estoppel" involving a promise to grant an interest in property was considered again

by the House of Lords in the following year in *Thorner v Major*, its status as an independent cause of action and basis for acquiring new property rights was established beyond question.

(4) Thorner v Major

152. David Thorner was aged 26 when he began to work on the farm of his father's cousin, Peter. He continued to do so, for no pay, until Peter's death 29 years later. David lived with his parents and received pocket money from them but, as time went by, became more and more involved in helping Peter on his farm. By various indirect statements and actions, Peter led David to believe that he would inherit the farm on Peter's death. A key incident occurred when Peter handed David a bonus notice relating to two life insurance policies and said: "that's for my death duties". The judge found that, by this gesture, Peter meant to, and did, convey to David that David would inherit the farm on Peter's death. When Peter died without leaving a will, David claimed the farm relying on proprietary estoppel. His claim succeeded at first instance and, although the judge's decision was reversed by the Court of Appeal, it was ultimately upheld by the House of Lords.

153. The relief claimed and granted in *Thorner v Major* did not just bar Peter's personal representatives from asserting property rights: it comprised a declaration that they held the farm and assets of the farming business on trust for David. David had no contractual or other independent basis for claiming ownership of this property which Peter's personal representatives were estopped from denying. The only basis for his claim was "proprietary estoppel". The decision of the House of Lords that the claim had been established therefore demonstrated conclusively that this form of "proprietary estoppel" is not merely negative and defensive in its operation but provides an independent basis for acquiring new property rights which are valid against other persons generally.

154. Once "proprietary estoppel" came to be seen, not simply as an estoppel, but as capable of giving rise to an independent cause of action, the need arose to identify the constituent elements of the cause of action and the basis on which they "raise an equity" in favour of the claimant. In *Thorner v Major* it was held that there are three essential elements, which are, in short, an assurance, reliance and detriment: see paras 15 (Lord Scott), 29 (Lord Walker) and 72 (Lord Neuberger). The assurance may be either a representation as to an existing interest or (as in *Thorner v Major* itself) a promise of a future interest in property. Lord Walker observed, at para 55, that *Thorner v Major* was not a case of acquiescence but said that:

> "if all proprietary estoppel cases (including cases of acquiescence or standing-by) are to be analysed in terms of

> assurance, reliance and detriment, then the landowner's conduct in standing by in silence serves as the element of assurance."

155. It is an open question whether these three strands of the doctrine - in which the "assurance" consists, respectively, of a representation, a promise or acquiescence - are best understood as resting on a single underlying principle or on different legal principles. It is unnecessary to address that question on this appeal as, like most recent cases in which the doctrine has been invoked, the present case involves only its promissory form. It should, however, be noted that it is only the promissory strand which has taken on a life of its own and emerged as an independent basis for acquiring property rights. To avoid confusion, it seems to me that, where the doctrine operates in this way, it would be better to shed the label "estoppel" and adopt a name which reflects, at least broadly, the nature of the claim. Without pre-judging the controversy to which I am about to turn, I would suggest the description "property expectation claim".

(5) The "lively controversy"

156. In *Jennings v Rice* [2002] EWCA 159; [2003] 1 P & CR 8, para 42, Robert Walker LJ posed the question "whether the fundamental aim of this form of estoppel is to fulfil the claimant's expectations, or to compensate him for his detrimental reliance on the defendant's non-contractual assurances, or is some intermediate objective." He observed that "the range of English authorities provides some support for both theories and for a variety of intermediate positions." The judgment of Robert Walker LJ in that case remains the most important judicial discussion of this question to date, and I will come back to it. But in a lecture given in 2008 to the Chancery Bar Association Lord Walker (as he was by then) acknowledged that "the principles governing the exercise of the remedial discretion are still far from clear" and repeatedly emphasised that the development of the relevant legal principles has "some way to go" and that "there is still a lot of ground to be covered" and "important questions of principle to be answered" to establish that proprietary estoppel "is indeed a principled doctrine and not a matter of palm-tree justice, or the individual judge's intuition as to which side ought to win": see "Which side 'ought to win'?: Discretion and certainty in property law" (2008) Sing J Legal Studies 229 at pp 230, 231, 239-240.

157. In *Cobbe v Yeoman's Row Management Ltd* [2006] EWCA Civ 1139; [2006] 1 WLR 2964, para 121, in the Court of Appeal, Dyson LJ referred to the two "alternative theoretical bases of relief", based on vindicating the claimant's expectation or compensating the claimant's detrimental reliance on an assurance, and commented:

> "The difficulty with this area of the law is that the two approaches are fundamentally different. The cases are replete with examples, but short on analysis of the reason why one approach is adopted rather than another."

158. Ten years later when the point was raised again in *Davies v Davies* [2016] EWCA Civ 463; [2016] 2 P & CR 10, para 39, no progress had been made in resolving this fundamental question. Before saying that in a case based on proprietary estoppel the court has to exercise a "broad judgmental discretion", Lewison LJ referred to what he called the "lively controversy" about the essential aim of this discretion. As he described it:

> "One line of authority takes the view that [the] essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so. The other takes the view that the essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different …"

Lewison LJ observed that much scholarly opinion favours the second approach and that "logically, there is much to be said for [it]", but that it was unnecessary to resolve the controversy on that appeal.

159. In the Court of Appeal in the present case, at para 48, Floyd LJ referred once more to the controversy about whether the aim of the court in deciding on a remedy should be to give effect to the claimant's expectations or to protect the claimant's reliance interest and said:

> "That controversy is much ventilated in academic writings of great scholarship, but the courts have shown a marked reluctance to answer a question posed in such stark terms. The courts have preferred to identify its aim or task as the fashioning of a remedy that is appropriate in all the circumstances of the case to satisfy the equity that has arisen, and so to avoid an unconscionable result."

(6) The exercise of discretion

160. In my view, English law needs to do better than this. It is true that many statements can be found in the cases that the aim of the court is to avoid an unconscionable result and, in words often quoted from *Plimmer v Wellington Corpn* (1884) 9 App Cas 699, 714, to "look at the circumstances in each case to decide in what way the equity can be satisfied". Such statements are unexceptionable but by themselves are of little help. They provide no principled basis for identifying the "equity" that arises when a claim is established or what the law regards as an unconscionable result.

161. Although equity jurisdiction was originally administered according to the conscience of the Chancellor, that long ago ceased to be the case and modern equity is governed by principle just as much as the law in general. As Harman LJ said in *Campbell Discount Co Ltd v Bridge* [1961] 1 QB 445, 459:

> "Since the time of Lord Eldon the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles."

Likewise, on appeal in the same case, Lord Radcliffe observed that:

> "'Unconscionable' must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other, and equity lawyers are, I notice, sometimes both surprised and discomfited by the plenitude of jurisdiction, and the imprecision of rules that are attributed to 'equity' by their more enthusiastic colleagues."

See *Bridge v Campbell Discount Co Ltd* [1962] AC 600, 626.

162. Courts have frequently emphasised the importance of ensuring that the doctrine of "proprietary estoppel" is governed by principle, and not just the conscience or sense of fairness of the individual judge. As Deane J said in *Muschinski v Dodds* (1985) 160 CLR 583, 615-616 (a decision of the High Court of Australia), in a passage quoted by both Lord Scott and Lord Walker in *Cobbe* [2008] 1 WLR 1752, paras 17 and 46:

> "proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' and 'the formless void' of individual moral opinion …" (citations omitted)

Lord Walker made the same point in *Cobbe* in his own words when he said, at para 46, that:

> "[proprietary estoppel] is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions."

163. To similar effect Lord Neuberger in a lecture on proprietary estoppel emphasised that "equity is not a sort of moral US fifth cavalry riding to the rescue every time a claimant is left worse off than he anticipated as a result of the defendants behaving badly, and the common law affords him no remedy": see Lord Neuberger of Abbotsbury, "The stuffing of Minerva's owl? Taxonomy and taxidermy in equity" (2009) 68 CLJ 537, 540. But perhaps the point was best put by HH Judge Weeks QC when he said in *Taylor v Dickens* [1998] 1 FLR 806, 820, that:

> "there is no equitable jurisdiction to hold a person to a promise simply because the court thinks it unfair, unconscionable or morally objectionable for him to go back on it. If there were such a jurisdiction, one might as well forget the law of contract and issue every civil judge with a portable palm tree. The days of justice varying with the size of the Lord Chancellor's foot would have returned."

164. In a valuable article Professor Simon Gardner formulated three conditions, endorsed by Lord Walker in his 2008 lecture, which need to be satisfied if the exercise of a judicial discretion is not to "resemble ancient priests interpreting birds' entrails" but is to be consistent with the rule of law: see S Gardner, "The Remedial Discretion in Proprietary Estoppel - Again" (2006) 122 LQR 492, 505; Lord Walker, "Which side 'ought to win'?: Discretion and certainty in property law" (2008) Sing J Legal Studies 229, 239. The first and foremost condition is that the aim which the court is seeking to achieve in exercising the discretion must be fixed by the law itself, not left to the choice of the judge in the individual case. This condition is of fundamental importance. To give judges no clearer mandate than to do what they think just or necessary to avoid unconscionability is a recipe for inconsistent and arbitrary decision-making. That is itself a source of injustice.

165. The second condition is that giving judges a discretion must be necessary. It seems clear that, in view of the wide variety of factual situations capable of giving rise to a property expectation claim, deciding on the appropriate remedy cannot be a

matter of applying a rigid or automatic rule. An exercise of judgment is inevitably required. But that is often the case with remedies. For example, an injunction is a discretionary remedy which the court has power to grant whenever "it appears to the court to be just and convenient": see section 37(1) of the Senior Courts Act 1981. But this does not mean that the court's discretion is unstructured. On the contrary, there are well-established principles, albeit principles which require judgment in their application, that govern when an injunction should or should not be granted.

166. The third condition is that the judge's decision must be susceptible to audit. This requires judges to give reasons explaining why they consider the remedy granted to be the best way of achieving the aim of the doctrine. Such reasons serve at least three purposes. First, the discipline of formulating them helps the judge to approach the task in a principled way, focusing on the law's aim. Second, giving reasons enables the parties (and others) to understand how the outcome has been reached and to see that the decision is the judge's best attempt to fulfil the law's aim. Third, giving reasons allows an appeal court to check that the outcome reached is a genuine and reasonable attempt to achieve the law's aim, taking account of relevant factors and not based on irrelevant ones.

(7) Terminology

167. Before proceeding further, I should say a word about terminology. I have already noted that the term "proprietary estoppel" is a misnomer and liable to mislead. Although I will continue to use it, the term "expectation" is also potentially misleading. The term could be taken to refer to what the claimant subjectively expects. It clearly could not be right, however, to grant a remedy aimed at fulfilling a subjective expectation that was not justified by the content of the promise made to the claimant. When I refer to the claimant's "expectation", I therefore mean an expectation which is not only subjectively held but also objectively justified by the statements or actions of the promisor. Finally, whether action or inaction in reliance on a promise constitutes a "detriment" depends on what the claimant would otherwise have done. I will use the term "reliance loss" as a shorthand to describe the extent, measured in money, to which the claimant is worse off as a result of relying on a promise (ignoring for this purpose any benefit that the claimant would gain from its performance).

(8) The parties' cases

168. Counsel for the parents requested this court to provide a clear and "much needed" statement of principle and to do so by resolving the "lively controversy" between a reliance-based and an expectation-based approach to the grant of relief in favour of a reliance-based approach. They submitted that the proper place to start is

by assessing the claimant's reliance loss. The detriment which the claimant has suffered by relying on the defendant's promise(s) may be so great that the court might decide in its discretion to order the defendant to transfer the property promised to the claimant; but in general the just approach is to remove the detriment by awarding financial compensation for it. They further submitted that the judge was wrong not to adopt that approach in the present case.

169. On Andrew's behalf, the opposite contention was advanced that the doctrine of proprietary estoppel is "animated" by expectation, not detriment, and that, although satisfying expectations is not the end of the matter, it should be the starting point. Counsel submitted that the authorities establish that, where the ingredients of a claim are present, the claimant's expectations should be fulfilled unless they are out of all proportion to the detriment suffered. They further submitted that the judge in this case gave appropriate primacy to Andrew's expectations based upon the nature of the promises made to him and that, given the substantial and largely unquantifiable detriment that Andrew incurred over so many years, granting a remedy aimed at satisfying his expectations cannot be said to be out of all proportion to the detriment suffered.

(9) Academic commentary

170. In addition to the written and oral submissions of counsel, we have also been much assisted by their citation of academic writing. Work that I have found particularly helpful includes: A Robertson, "The reliance basis of proprietary estoppel remedies" [2008] Conv 295; J Mee, "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in M Dixon (ed), *Modern Studies in Property Law: Volume V* (2009), chapter 16; I Samet, "Some Strings Attached: The Morality of Proprietary Estoppel" in J Penner and H Smith (eds), *Philosophical Foundations of Property Law* (2013), chapter 6; B McFarlane and P Sales, "Promises, detriment, and liability: lessons from proprietary estoppel" (2015) 131 LQR 610; A Robertson, "The Form and Substance of Equitable Estoppel" in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (2019), chapter 11; and Professor Ben McFarlane's impressive book on *The Law of Proprietary Estoppel*, 2nd ed (2020).

171. A criticism levelled by some commentators is that the law of proprietary estoppel, in its promissory form, has become unprincipled and consequently unpredictable. The point is made that such unpredictability makes it harder for parties to reach a sensible compromise and generates additional litigation: see eg Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel*, 3rd ed (2012), para 11.02; J Mee, "Proprietary estoppel and inheritance: enough is enough?" [2013] Conv 280, 296-297 ("it is not in the public interest for the legal system to tolerate an indulgent and confused proprietary estoppel jurisdiction"); *Snell's Equity*, 34th ed (2020), para 12-047.

172. Given the controversy and lack of clarity that continues to surround the essential aim of the doctrine, this criticism seems to me to be justified. At the same time the volume of litigation has been snowballing. In an article published since the hearing of this appeal, Professor Martin Dixon has identified 21 property expectation claims which have gone to trial in the last four years, of which 17 (including the present case) have involved family farms. Looking at this gallery of cases, Professor Dixon sees neither the fine classical lines of a painting by Titian nor the broad brushstrokes of Howard Hodgson. Instead, he sees a Jackson Pollock:

> "A splattering of unpredictable colour on a canvas, where a sense of objective form and predictability has been lost."

See M Dixon, "Painting proprietary estoppel: Howard Hodgkin, Titian or Jackson Pollock?" [2022] Conv 30. Some degree of unpredictability is the inevitable price of a flexible remedial discretion. But there is an urgent need to continue the search for principle which some 20 years' ago Lord Walker (in *Jennings v Rice*, para 44) accurately forecast was "unlikely to be a short or simple search".

F. THE SEARCH FOR PRINCIPLE

(1) Detrimental reliance does not justify enforcing non-contractual promises

173. It is now well established that the elements of the cause of action that I am calling a property expectation claim are a (non-legally binding) promise to transfer an interest in property, reasonable reliance on the promise and detriment to the claimant (see para 154 above). But what is the principle that justifies awarding a remedy when these elements are proved? And what role does each of the three elements play in giving rise to a claim for relief?

174. One theoretically possible approach would be to view detrimental reliance as, in the words of a famous article by Lon Fuller and William Perdue, a factor which serves "to unlock the impulse to compel men to make good their promises": see L Fuller and W Perdue, "The Reliance Interest in Contract Damages: I" (1936) 46 Yale Law Journal 52, 69. If this view were correct, a property expectation claim would be based on the same foundational principle as the law of contract that promises should be kept. For a promise to give rise to a legally binding contract, it must be "supported by consideration" - that is to say, the promisee must do or agree to do something in exchange for it. An approach which has sometimes been suggested is to regard detrimental reliance as an alternative to this requirement and hence a factor which can transform a promise that is not legally binding into one that binds the promisor. On this view what the law regards as unconscionable conduct is failing to keep a

promise to make a gratuitous transfer of property on which the promisee has detrimentally relied.

175. Such a rationale for a property expectation claim, however, is not consistent either with legal principle or with precedent. Even if detrimental reliance could be seen as a substitute for consideration, consideration is not the only requirement which must be met for a promise to create a legal obligation. Two further requirements of the law of contract are that the promise must be: (1) intended to be legally binding; and (2) sufficiently certain to be enforceable. The principle that promises should be kept cannot justify enforcing a promise which was not intended (objectively) to create a legally binding obligation. Nor on settled legal principle is it legitimate for the court to enforce a promise if its content is so vague or uncertain that it would, in effect, be the court and not the promisor which is creating the legal obligation. As mentioned at the beginning of this judgment, in order for a promise to dispose of an interest in land or to dispose of any property on death by will to be legally valid and enforceable, English law also requires compliance with specified formalities.

176. None of these requirements is satisfied when a remedy is awarded for a property expectation claim. The promise which gives rise to such a claim may be oral and entirely informal. Its content may be vague. Even more fundamentally, there is no requirement that the promise must be an utterance which would reasonably be understood as intended to create a legal obligation. Typically, it is obvious from the domestic context in which the statement was made that it was not objectively intended to do so. In *Thorner v Major*, for example, there was no suggestion that, when Peter handed David the policy bonus notice saying "that's for my death duties", David understood or would reasonably have understood Peter to be making a legally enforceable promise to leave him the farm. Yet this did not prevent Peter's words, in context, from amounting to a promise capable of supporting a successful claim.

177. The present case is another example. The judge found that David Guest led his son Andrew to believe during conversations over a number of years that Andrew would inherit a substantial, but unspecified, share of Tump Farm. The statements made were vague and indirect, to the effect that, one day, Andrew would take over the farm. Such promises of succession (as the judge found them to be) would be too uncertain to give rise to any legal obligation - quite apart from the fact that, by reason of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, no such obligation could arise because nothing was put in writing. Nor could Andrew reasonably have thought when the promises were made that they were intended to be legally enforceable. That precludes enforcement of the promises in equity no less than at common law: see eg *Ramsden v Dyson* (1866) LR 1 HL 129, 145-146 (Lord Cranworth LC); *Cobbe*, para 53 (Lord Walker). Yet it has not been suggested that this means that Andrew's claim could not succeed. Any such argument would be doomed

to fail in the light of *Thorner v Major* and the many other cases in which informal promises of this kind have given rise to successful claims.

178. There is no justification for bypassing the requirements for the creation of a legal obligation just because the promisee has acted to his or her detriment in reasonable reliance on the promise. Still less is there any justification for doing so where the subject matter of the promise is the disposition of an interest in land - a realm in which legal certainty is particularly important and the law insists on formality. Detrimental reliance might perhaps be regarded as an alternative to the need for consideration. But if a promise is too uncertain to create a legal obligation, no amount of reliance on it can alter that fact. Even more fundamentally, if the understanding of a reasonable addressee would be that the promise was not intended to create a legal obligation, it would be contrary to principle if the promisee could make it enforceable by relying on it. In any case, the statutory provisions which require a valid disposition of an interest in land or authority to transfer property on death to be in writing and comply with other formal conditions of validity contain no exception for informal promises on which detrimental reliance has been placed. Describing failure to keep such a promise as "unconscionable" cannot justify disregarding law laid down by Parliament.

179. A theory of proprietary estoppel which views detrimental reliance as capable of making an informal promise legally enforceable is also inconsistent with how the doctrine has been applied in what is now a large body of case law. A property expectation claim does not operate in a binary way. The approach of the courts is not that, provided there has been substantial reliance, the promise will be enforced. There are many cases in which the remedy granted to a successful claimant has not been to order the transfer of the promised interest in property or to award its financial value, but has instead been to award the claimant a sum of money which does not reflect, and was not intended to reflect, the value of what was promised. To mention just a few of these cases, they include (at appellate level): *Campbell v Griffin* [2001] EWCA Civ 990; *Jennings v Rice* [2002] EWCA 159; [2003] 1 P & CR 8; *Ottey v Grundy* [2003] EWCA Civ 1176; [2003] WTLR 1253; *Powell v Benney* [2007] EWCA Civ 1283; *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988; *Southwell v Blackburn* [2014] EWCA Civ 1347; [2014] HLR 47 and *Davies v Davies* [2016] EWCA Civ 463; [2016] 2 P & CR 10.

180. As an example, take *Henry v Henry*. The claimant in that case (B) lived for more than 30 years on a plot of agricultural land in St Lucia which was owned by two individuals in equal shares. One of the owners (A) had promised B that she would leave her share in the plot to him on her death if he cared for her until her death and cultivated the plot. B did so. Shortly before she died, A sold her share of the plot. B brought a claim based on proprietary estoppel against the purchaser maintaining that he was entitled to A's half share. The ultimate decision of the Privy Council was

that, although the claim had been established, the appropriate remedy was not to award B the promised share of the plot but only one-half of A's share.

181. This and the other cases mentioned cannot be explained on the basis that it is considered unconscionable not to keep an informal promise to make a gift of property to someone if they have made sacrifices or otherwise acted to their detriment in reliance on the promise and that such "unconscionability" somehow authorises enforcement of the promise even though this is inconsistent with statutory and other rules of law. In each of the cases mentioned at para 179 above the court neither sought to enforce the promise nor awarded compensation measured as the value of what was promised. Nor can a rationale based on upholding promises be salvaged by saying that it is subject to an exception that the court will not enforce the promise or award its financial value if or in so far as resiling from the promise is not considered unconscionable in the circumstances. That simply raises the question of what makes it unconscionable to resile from a non-binding promise on which detrimental reliance has been placed in some circumstances but not in others. A principle that promises should be kept or that promises should be kept if they have been detrimentally relied on cannot provide an answer to that question. Nor can such a principle explain when or why disproportion (or disproportion of some particularly high degree) between the value of the promise and the claimant's detriment makes some other remedy appropriate. If the remedial aim is to prevent or put right the "unconscionability" of breaking a non-binding but detrimentally relied on promise, then the law provides no yardstick for deciding when it is appropriate to award something other than what was promised (or its value) or for deciding what that something else should be. The decision whether to enforce the promise and, if not, what alternative remedy to grant is arbitrary. Legal principle has been replaced by the portable palm tree.

182. There is a yet further reason why a rationale of holding people to their promises cannot explain or justify the doctrine of "proprietary estoppel" as it has been applied by the courts. As I will discuss later, the award of a remedy does not depend on showing that in failing or refusing to fulfil the promise the promisor was at fault. The relationship between the parties may have broken down through no fault on either side or through what might, if it were necessary to decide the question, have been mainly the fault of the claimant. To speak of a "wrongful repudiation" of the promise in such cases is not an apt description. Furthermore, it is often a fair inference that, when A made informal promises to leave property to B in her will, she did so on the unspoken assumption that they would remain on good terms until she died. If a rift later occurs between them for which she is not to blame, it is hard to see why it should be regarded as wrong let alone unconscionable for A to decide to leave her property to somebody else. Yet save in exceptional cases, the courts do not treat responsibility or lack of responsibility for a breakdown in relations as affecting the claimant's equity.

183. It does not follow that what was promised has no role to play in determining the appropriate remedy for a property expectation claim. On the contrary, as I will discuss shortly, it is clear that it does. But the notion that it is from a legal point of view unconscionable (or sometimes unconscionable) for A to break an informal promise to make a future gift of property to B if B has detrimentally relied on the promise is not a coherent explanation of the doctrine of "proprietary estoppel". 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.

(2) Reliance on a non-binding promise

184. It might be argued that, if a promise is not legally enforceable, a person who chooses to rely on it necessarily does so entirely at their own legal risk. Such an argument, if accepted in this stark form, would leave no room at all for property expectation claims. Either such a claim would be unnecessary because the promise satisfies the conditions for the creation of a legal right or, if the promise does not satisfy those conditions, any reliance placed on it by the promisee could not give rise to any legal liability on the part of the promisor.

185. Reasoning of this kind gained support from the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752. In that case a property developer relied on an oral agreement with a landowner that, if the developer managed to obtain planning permission, the owner would sell the land to him at an agreed price. The developer succeeded in obtaining planning permission, but the owner then withdrew from the arrangement. A claim based on proprietary estoppel failed in the House of Lords. The developer did not believe and could not reasonably have believed that the agreement was legally binding. It was held that, in the circumstances, in choosing to rely on a promise binding in honour only the developer was acting at his own risk.

186. Some commentators feared that the effect of the decision in *Cobbe* would be to abolish the doctrine of "proprietary estoppel" as a positive source of rights: see B McFarlane and A Robertson, "The Death of Proprietary Estoppel" (2008) 4 LMCLQ 449; T Etherton, "Constructive trusts and proprietary estoppel: the search for clarity and principle" [2009] Conv 104. As already indicated, however, reports of the doctrine's demise proved to have been greatly exaggerated when *Thorner v Major* was decided the following year. Lord Scott and Lord Walker who sat on both appeals did not directly address in *Thorner v Major* the distinction between the two cases. But Lord Neuberger did. He emphasised, at paras 96-97, that in *Cobbe* the relationship between the parties was such that they could well have been expected to enter into a contract; however, although they discussed contractual terms, they had consciously chosen not to do so and intentionally left their legal relationship to

be negotiated on the understanding that neither of them was legally bound. By contrast, in *Thorner v Major* the relationship between Peter and David was familial and personal and, in the context of their relationship, no contract as to the ownership of the farm after Peter's death could have been reasonably expected even to be discussed between them.

187. The main issue on the appeal to the House of Lords in *Thorner v Major* was how clear and certain a promise needs to be to found a cause of action. It was held that the promise need not be express. It may consist of any words or conduct which are reasonably understood as intended to be taken as a commitment which can be relied upon. The leading speeches emphasised the importance of assessing the relevant words or actions in their context: see paras 56-59 (Lord Walker) and para 84 (Lord Neuberger). In a commercial setting, parties typically (though not invariably) deal with each other on the understanding that, if a party chooses to rely on a promise that is not legally binding, it does so at its own legal risk. But in some contexts such an approach does not match social reality. Promises are made, particularly in domestic situations, that are reasonably understood as commitments in which trust is invited and can reasonably be placed, even though the promise is not legally enforceable. To ask for the commitment to be embodied in a legally enforceable written contract would be regarded as at best superfluous and at worst offensive (because implying rejection of the trust which has been invited). In such cases, even though reliance on the promise cannot make it legally enforceable, the reliance may still be reasonable and give rise to an "equity" which a court should protect.

(3) Avoidance of detriment

188. What then is the nature of this equity? As I see it, the key to understanding this lies in understanding the basis of the doctrine of estoppel out of which the cause of action that I am calling a property expectation claim evolved. The object of reliance-based forms of estoppel is to protect a person (B) who has been induced by another person (A) to act in reliance on a particular assumption from detriment that B would suffer if A were afterwards permitted to assert rights against B inconsistent with the assumption. The classic explanation of the principle and of the concept of detriment which is central to it was given by Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd* (1938) 59 CLR 641, 674-675 (a decision of the High Court of Australia). Dixon J noted that "it is often said simply that the party asserting the estoppel must have been induced to act to his detriment". He continued:

> "Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel

> by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that 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. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice."

189. This passage has repeatedly been adopted as representing the law of England and Wales: see *Spencer Bower: Reliance-Based Estoppel*, 5th ed (2017), para 1.6; and the numerous cases cited in KR Handley, "Unconscionability in estoppel by conduct: triable issue or underlying principle?" [2008] Conv 382, 383, fn 5. In *Gillett v Holt* [2001] Ch 210, 233, the passage was specifically approved by Robert Walker LJ as applicable to proprietary estoppel as well as to other forms of estoppel. Robert Walker LJ observed that "the point made in the passage may be thought obvious, but sometimes it is useful to spell out even basic points." The key point made in the passage is that "the basal purpose of the doctrine" is to protect B against a detriment which will flow from B's change of position in reliance on an assumption induced by A if A does not adhere to the assumption. Where the assumption is based on a promise that A will give a property right to B, the purpose is therefore to avoid detriment to B which will result from B's reasonable reliance on the promise if B is not given this right.

190. This remains the basal purpose of proprietary estoppel when transposed, as it has been, from a defensive doctrine to an affirmative cause of action. As discussed above, the equity that arises from B's reasonable reliance on a non-binding promise by A to give B an interest in property is not a right or claim that the promise should be kept. Ex hypothesi B has no legal right to performance of the promise because the conditions required to create a legal obligation have not been satisfied. The equity is to be protected from detriment that B will suffer if the promise is not kept. By making a promise on which, although it is not legally enforceable, B has reasonably relied, A comes under a responsibility to ensure that B's change of position does not operate as a detriment to B.

191. Expressed in terms of unconscionability, what the law regards as unconscionable is not A's failure to keep a non-binding promise. It 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.

(4) Alternative methods of preventing detriment

192. The most obvious way of preventing such detriment is for the court to compel performance of the promise. A variant of this approach, if specific performance of the promise is impossible or undesirable, is to award monetary compensation aimed at putting B into as good a position as if A's promise had been performed. Where either of these remedies is granted, it may appear as though the promise is being treated as legally binding. That is not, however, the basis for equitable intervention. As it was put in the majority judgment of the High Court of Australia in *Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505, para 58:

> "It is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise."

193. In principle, and sometimes in practice, there is another way of achieving the law's aim. This is to prevent the detriment that would otherwise flow from the failure to perform the promise by awarding compensation which puts B into as good a position, as best money can do it, as if B had not relied on A's promise: in other words, to grant a remedy which compensates B's reliance loss.

194. To illustrate this approach, consider, for example, *Southwell v Blackburn* [2014] EWCA Civ 1347; [2014] HLR 47. Ms Blackburn gave up a secure tenancy of a house which she had spent money on improving to live with Mr Southwell, with whom she was in a relationship, on the strength of his promises that she would have a home for life. Ten years later the couple split up. The judge found that a proprietary estoppel claim was established and made a monetary award which was designed to enable Ms Blackburn to set herself up in much the same way as she was before she gave up her own house to move in with Mr Southwell. The Court of Appeal upheld the decision and approved the judge's remedial approach. That approach was calculated to prevent Ms Blackburn from suffering detriment as a result of her reliance on the promises made to her, not by enforcing those promises, but by seeking to put her into as good a position as if she had not relied on them.

195. It is important to recognise that both remedial approaches are ways of preventing B from suffering detriment from reasonably relying on A's promise. Such

detriment is avoided either if A performs the promise (or pays B the value of the promised performance) or if A pays an amount of money which makes B as well off as if B had not acted in reliance on the promise. As Professor Robertson put it in an article mentioned earlier, 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: see A Robertson, "The reliance basis of proprietary estoppel remedies" [2008] Conv 295, 303.

196. It follows that the existence of two lines of authority - one comprising cases where the relief granted has been designed to fulfil the claimant's expectation and the other comprising cases where it has been designed to compensate the claimant's reliance loss - is not itself a sign of any incoherence in the law. Each remedial approach is a means of achieving the "basal purpose" of the equitable doctrine of avoiding detriment to the promisee. But the question which then arises is: how is the court to decide in any particular case which of the two alternative approaches should be preferred?

(5) The minimum equity

197. At a theoretical level the answer to this question is straightforward. Where there is more than one means of avoiding detriment to the claimant, the court should in principle adopt whichever remedial approach imposes the least burden on the defendant. To paraphrase Mason CJ in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 412, equity permits a court to do what is required, but no more than is required, to prevent detriment to the party who has relied on the promise. When in *Crabb v Arun District Council*, at p 198, Scarman LJ referred to "the minimum equity to do justice" to the claimant, he was addressing the facts of that case and it seems unlikely that he was intending to lay down any general principle. But the phrase "minimum equity" has been used in many subsequent cases and the approach which it denotes is one of general application: see eg *Clarke v Swaby* [2007] UKPC 1; [2007] 2 P & CR 2, para 18; *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432, para 37 (Lord Walker). In *Jennings v Rice*, para 48, Robert Walker LJ observed that:

> "Scarman LJ's reference to the minimum does not require the court to be constitutionally parsimonious, but it does implicitly recognise that the court must also do justice to the defendant."

Doing justice to the defendant requires that the court should not award a remedy which is more generous to the claimant and more burdensome for the defendant than is necessary to achieve the underlying purpose for which the remedy is granted.

(6) Difficulty in quantifying reliance loss

198. 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. The cases contain many examples of reliance involving what have been described as "life-changing decisions with irreversible consequences of a profoundly personal nature": *Donis v Donis* [2007] VSCA 89: 19 VR 577, para 34 (Nettle JA). Those consequences may include 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.

199. It is important not to overstate the difficulty. As Lord Stephens pointed out in oral argument, courts routinely place a monetary value on lost earning opportunities and on non-pecuniary harm. In personal injury cases, for example, it may be necessary where the claimant has been permanently disabled to estimate what she would have earned over the rest of her lifetime if she had not been deprived of the opportunity to work. Damages in personal injury cases are also awarded for pain, suffering and loss of amenity. To take another example, damages are awarded in breach of privacy and defamation cases for non-pecuniary harm caused by wrongful invasion of a person's privacy or damage to their reputation. Damages in these and many other types of case are not capable of arithmetical computation. No sum of money is comparable to physical or psychiatric injury. Nevertheless, given the ubiquity of money as a measure of value in modern society, awarding a sum of money is the best that a court can do by way of compensation. The aim is to award a sum which will be perceived as fairly reflecting the gravity of the injury suffered by the claimant.

200. At the same time, 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.

201. A familiar situation in which this principle is applied is where a court is faced with a choice whether to order specific performance or grant an injunction compelling a party to perform a contract of which that party is (or is about to be) in breach; or whether instead to award damages for loss caused by the breach. For policy reasons courts do not generally specifically enforce contractual obligations and will usually only award financial compensation. But there is an exception where damages "would not be an adequate remedy". It is well established that the reasons

why damages may not be adequate include the fact that they would be hard to quantify. That might be 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: see eg *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, 371-372, 378; *Chitty on Contracts*, 34th ed (2021), vol I, para 30-021.

202. It seems to me that a similar approach is justified where a property expectation claim has been made out and the court is faced with a choice between preventing detriment by compelling the defendant to perform his promise or by awarding financial compensation to the claimant for her reliance loss. Difficulty of 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. Granting the 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.

203. *Thorner v Major* provides an illustration. As found by the trial judge, David was at Peter's beck and call for most of his adult life, without any material countervailing benefits, and in consequence lived without a social life and in modest financial circumstances throughout the period of 29 years that he worked on Peter's farm. The judge considered that on those facts attempting to place a monetary value on David's contribution, and on what he sacrificed in order to make it in terms of lost opportunities in life, would be "to take on a virtually impossible task": see [2007] EWHC 2422 (Ch) [2008] WTLR 155, paras 139 and 142. There was, on the other hand, no corresponding difficulty in preventing detriment to David by the alternative remedy of giving effect to the promises made and requiring Peter's personal representatives to transfer ownership of the farm to David.

204. There is, however, a limit to the circumstances in which the difficulty of quantifying reliance loss can justify giving effect to the defendant's promise. The limit derives from the minimum equity principle. In accordance with that principle, it is not just and equitable to require the defendant to fulfil his promise (or to pay its monetary value to the claimant) if the court thinks it clear that detriment to the claimant could be prevented at less cost. The fact that the claimant has made sacrifices or lost opportunities to which it is hard to assign a monetary value is not a good reason to award a remedy which the court considers would be out of proportion to the detriment suffered.

205. The trial judge applied this principle of proportionality in *Thorner v Major*: see para 143. He limited the property awarded to David to the farm and the assets of the farm business at the time of Peter's death and did not include other property owned by Peter. The judge did so on the ground that, even if David's expectation was to

inherit the whole of Peter's estate, it would be disproportionate for David also to receive Peter's non-agricultural assets.

(7) Monetary compensation

206. After the promissory form of "proprietary estoppel" evolved into a cause of action, it took some time before both the possibility of awarding monetary compensation as a remedy and the principle of proportionality came to be recognised. This was a natural consequence of continuing to view the doctrine as an estoppel. In cases of genuine estoppel, awarding monetary compensation, whether calculated on an expectation basis or on a reliance basis, is not an available option. That is because, as discussed earlier, estoppel is a negative and defensive legal doctrine which operates in a binary way. Either A is estopped from asserting a legal right against B or he is not. There is no intermediate possibility. Nor is there any cause of action for which monetary compensation or any other remedy can be awarded. Hence although the "basal purpose" of the doctrine is to prevent a detriment to the party who raises the estoppel, it is settled law that the detriment is not the measure of the relief and need not be commensurate with the loss that the claimant would suffer if the defendant were to resile from the assumption on which the claimant has acted. It is enough that the detriment is substantial and such as to make it unjust for the defendant to resile: see *Avon County Council v Howlett* [1983] 1 WLR 605, 620-625; *Kelly v Fraser* [2012] UKPC 25; [2013] 1 AC 450, para 17. If this approach is carried over to "proprietary estoppel" as a cause of action, it leads to compelling the defendant to grant a property right which will give effect to the claimant's expectation.

207. Such an approach ceases to be justifiable, however, when estoppel is no longer operating as a defence. Then the question is not the binary, all-or-nothing one of whether a party is or is not estopped from asserting a legal right. It is: what remedy should be awarded where a cause of action is established? Once "proprietary estoppel" came to be conceived as a basis for acquiring new property rights, the possibility arose that granting a right which gave effect to the claimant's expectation might go further than was necessary to avoid detriment. At the same time the flexibility of equitable relief gave the court the ability to fashion a remedy which would fulfil the aim of protecting the claimant from detriment in a targeted way, including by making a monetary award.

208. The recognition that monetary compensation could be awarded as an alternative to granting a property right and that granting the claimant a property right matching what was promised might go further than was necessary to do justice emerged gradually in the decades after *Crabb v Arun District Council* was decided. Lord Briggs has traced this development in his judgment. The first case in which monetary compensation for reliance loss was awarded as a remedy appears to be

Dodsworth v Dodsworth (1973) 228 EG 1115. Another such case was *Burrows v Sharp* (1991) 23 HLR 82.

209. In *Baker v Baker* (1993) 25 HLR 408 such an award was overturned by the Court of Appeal in favour of an expectation-based remedy. The claimant in that case was a 75 year old man who contributed a large capital sum towards the purchase of a house for his son and daughter-in-law on the strength of their promise that he could live in a room rent-free for the rest of his life. After only a few months the relationship between the parties broke down and the father moved out. The judge found that a proprietary estoppel claim was established and ordered the son and his wife to repay the money which the father had contributed towards the purchase. The order was therefore aimed at compensating the father's reliance loss. The Court of Appeal allowed an appeal on the ground that the award was much greater than the value of what was promised, which was rent-free occupation of a room for the rest of the claimant's life. As the claimant had been re-housed by the council and was receiving housing benefit, his expectation loss appeared to be modest and the claim was remitted to the judge to assess the relevant amount. This was a case, therefore, in which the value of the claimant's expectation was less than his reliance loss and so the remedy was properly limited to the value of the expectation.

(8) Proportionality

210. The critical development of identifying the need for the remedy to be proportionate to the detriment occurred at the beginning of this century through a trilogy of decisions of the Court of Appeal. In each case the lead judgment was given by Robert Walker LJ.

211. The first of these cases was *Gillett v Holt* [2001] Ch 210, which I discuss in more detail below. For now it is enough to note that, although the concept of proportionality was not used, Robert Walker LJ, at p 237, identified the court's aim as being "to form a view as to what is the minimum required to satisfy the [equity]". The remedy awarded was to order Mr Holt to transfer only a portion of the land and farming business that he had promised to give Mr Gillett, along with a sum of monetary compensation said to take account of numerous matters.

212. This case was followed shortly afterwards by *Campbell v Griffin* [2001] EWCA Civ 990. The claimant, Mr Campbell, had moved in with a couple, initially as a lodger but afterwards without paying rent, and cared for them as they became increasingly infirm in their old age, relying on assurances that he would "have a home for life". After they had both died intestate, he stayed on in the house and claimed a right to occupy it based on proprietary estoppel. The claim failed at first instance, but the Court of Appeal reversed the judge's decision on the facts. Robert Walker LJ (with

whom the other members of the court agreed) rejected the proposal that Mr Campbell should be granted a life interest in the house on the ground that "such an order would be disproportionate" (para 34). Instead, the Court of Appeal required Mr Campbell to give up possession of the property and awarded him a sum of money which "will assist him with rehousing himself" (para 36).

213. In the following year the seminal case of *Jennings v Rice* [2002] EWCA 159; [2003] 1 P & CR 8 was decided, in which the principle of proportionality was fully articulated.

(9) Jennings v Rice

214. Mr Jennings spent a considerable amount of his time over many years looking after Mrs Royle before she died, despite the fact that for around the last ten years of her life she paid him nothing. He did so partly from compassion and partly because she led him to believe that he would receive all or part of her property on her death. When Mrs Royle died without leaving any will, Mr Jennings brought an action against her estate. The trial judge found that the promises made by Mrs Royle were too vague to be contractual but held that Mr Jennings had established a cause of action based on proprietary estoppel. The judge awarded him compensation of £200,000, which represented an estimate of what full-time nursing care would have cost over the last eight years of Mrs Royle's life.

215. Mr Jennings appealed, contending that he should have been awarded, if not Mrs Royle's entire estate, then at any rate the value of her house and furniture, which was assessed at £435,000. The Court of Appeal dismissed the appeal, holding that the judge was entitled to grant the remedy that he did. The essential reason was that to award the value of what was promised would be disproportionate to the detriment suffered by Mr Jennings. Aldous and Robert Walker LJJ gave substantive judgments and Mantell LJ agreed with both.

216. Aldous LJ, after reviewing cases from *Crabb v Arun District Council* onwards, concluded that it is an essential requirement that "there must be proportionality between the expectation and the detriment" (para 36). This statement cannot be read literally since whether the expectation and the detriment are proportionate to one another clearly depends upon the facts of the case and is not within the control of the court. But I think it plain from the context that what Aldous LJ meant was that it is not appropriate to grant a remedy which reflects the claimant's expectation where such a remedy would not be proportionate to the detriment suffered (see *Habberfield v Habberfield* [2019] EWCA Civ 890, para 55).

217. Robert Walker LJ likewise, at para 56, endorsed "the need for proportionality" and "the principle of proportionality (between remedy and detriment)", agreeing with the previous affirmation of this principle by Hobhouse LJ in *Sledmore v Dalby* (1996) 72 P & CR 196, 208-209. Hobhouse LJ had in turn cited with approval a passage "of particular value" from the judgment of Mason CJ in *Commonwealth of Australia v Verwayen* in the High Court of Australia, who said in relation to equitable estoppel at p 413:

> "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."

(Aldous LJ had also referred to this statement of the law with approval at para 30.)

218. Earlier in his judgment Robert Walker LJ had stressed the importance of taking a principled approach to the exercise of the court's remedial discretion and outlined some relevant principles. He summarised these, at para 50, as follows:

> "To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way."

This passage and the earlier discussion which it summarises have rightly been regarded as authoritative, but they require some unpacking.

219. Robert Walker LJ's first category of case is one where the claimant and the person whom he referred to as "the benefactor" have reached a reasonably clear understanding, but not one amounting to a contract, that if the claimant resides with and cares for the benefactor, the claimant will receive a property right in return. Robert Walker LJ considered that, in such a "quasi-bargain" type of case, "the court's natural response is to fulfil the claimant's expectations".

220. It is important, however, to appreciate why Robert Walker LJ considered this to be the court's "natural response". The reason was not that the benefactor has made a promise which, even though not legally binding, nevertheless ought to be kept. As explained at para 45, the reason was that, in this category of case:

> "the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate."

In other words, it is fair to treat the value of what was promised as broadly equivalent to the value of what the claimant has sacrificed by relying on the promise where it can be inferred that the parties themselves regarded the two as broadly equivalent.

221. I would accept that there can be cases where the relations between the parties have a transactional character which may support such an inference. There may have been such an element to the parties' relationship in *Thorner v Major*. The decision of the Supreme Court of Canada in *Cowper-Smith v Morgan* [2017] SCC 61; [2017] 2 SCR 754 is another example. But it would seem dubious to draw an inference of this kind in most cases involving close family members. As counsel for the parents in this case observed, parents and children do not generally strike quasi-contractual bargains. In cases where a child works for many years on a family farm which the parents have promised to pass on to their child, it is unlikely that either party will weigh the opportunity cost of working for low pay for a given number of years against the value of the land. Rather, the parents wish their children to inherit out of natural love and affection and may also want the farm to stay in the family, if possible, when they retire or die. Children who commit themselves to such a life are also likely to regard the farm as a source of livelihood to be preserved and passed on to the next generation rather than as a realisable asset whose market value has any financial relationship with what they would or might have earned if they had chosen a different career.

222. A second point to note about the passage quoted at para 218 above is that the contrast drawn by Robert Walker LJ is not one between opposites. The converse of the "quasi-bargain" category of case comprises cases where the parties have <u>not</u> reached a mutual understanding of the relevant kind. Such cases may or may not be cases where the claimant's expectations are "uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered." It is easy to see why in cases of the latter kind "the court can and should recognise that the claimant's equity" should not be satisfied by fulfilling the claimant's expectations but "in another (and generally more limited) way". But the judgment does not directly

address whether, or when, the court should aim to fulfil the claimant's expectations if (a) they are not uncertain or extravagant etc but also (b) the case does not fall in the "quasi-bargain" category.

223. I have no doubt that this omission was deliberate and that Robert Walker LJ did not intend to suggest a general rule in such cases. But he made the point, in para 51, that in many cases the detriment suffered by the claimant may be very difficult to quantify in money terms. He gave the example of "the detriment of an ever-increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes". That described the facts of *Jennings v Rice* itself: see paras 6-7 of the judgment. He also pointed out the need to take into account any countervailing benefits that the claimant may have received (such as free bed and board). Nevertheless, the remedy awarded by the judge and approved by the Court of Appeal was a sum of money aimed at compensating Mr Jennings for his reliance loss. I do not think it right to interpret the decision as based on any finding that Mr Jennings' expectation was "extravagant" or that the value of the house and furniture promised was "out of all proportion" to the detriment. It was sufficient that the judge was satisfied that, notwithstanding the difficulty of quantification, detriment could fairly be prevented by awarding a lower sum.

224. Some commentators have criticised the notion that, in a case of this kind, it is appropriate to take account of the difficulty of quantifying the claimant's reliance loss: see J Mee, "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in M Dixon (ed), *Modern Studies in Property Law: Volume V* (2009) 389, 403-404; B McFarlane, *The Law of Proprietary Estoppel*, 2nd ed (2020), para 7.50. Thus, Professor McFarlane poses the question of what the position would have been in *Jennings v Rice* if Mrs Royle's house and furniture had been worth only £250,000 (instead of £435,000). He makes the point that, on such facts, it might not have been possible to conclude that enforcing the promise would be disproportionate to the detriment (for which Mr Jennings was awarded compensation of £200,000). On that basis Mr Jennings would have received £250,000 or property with that value. Yet, ex hypothesi, this sum exceeds the extent of his reliance loss by £50,000. Professor McFarlane argues that it is illogical that a higher expectation (property worth £435,000 rather than £250,000) should lead to a lower remedy (compensation of £200,000 rather than £250,000).

225. This logic would be compelling if it were possible to value precisely the loss that Mr Jennings had suffered through relying on the promises of inheritance made to him. Had that been the position - had, for example, his loss consisted solely in wasted expenditure or lost earnings which could be quantified with reasonable precision - there would be no justification for awarding a higher sum. On the facts of *Jennings v Rice*, however, that was not the case. There was no ready way to put a monetary value on what Mr Jennings had lost. The trial judge awarded a sum of £200,000 arrived at by estimating what Mrs Royle would have had to pay for full-

time care. That was necessarily a crude measure, not least because it seems unlikely that Mr Jennings would have been paid that sum if he had not relied on Mrs Royle's promises. Had the value of her house and furniture been only £250,000, the judge might well have concluded that Mr Jennings' reliance loss could not confidently be quantified as less than this and that the fair way of preventing detriment in those circumstances was to enforce the promise. There is nothing illogical about such an approach. It takes account of the practical difficulties and limitations of putting a monetary value on what the claimant has sacrificed in a case of this kind and the principle that the remedy awarded must be adequate to achieve the law's aim of protecting the claimant from harm.

(10) Other cases of disproportionate expectations

226. The principle of proportionality endorsed in *Jennings v Rice* has been applied in many other subsequent cases, including those mentioned at para 179 above.

227. For example, in *Ottey v Grundy* [2003] EWCA Civ 1176; [2003] WTLR 1253 the claimant lived with the deceased as his girlfriend and interrupted her acting career to care for him in reliance on a written promise to leave her property worth around £250,000. Their relationship ended after around two and a half years and a few months later he died. The judge found that a proprietary estoppel claim was established but that to fulfil the claimant's expectations would be out of proportion to the detriment which she had suffered. He made an award with a total value of £100,000. This was upheld by the Court of Appeal.

228. In *Powell v Benney* [2007] EWCA Civ 1283 a couple looked after a friend and incurred some expenditure on two properties that he owned in reliance on his promise that he was going to leave those properties to them when he died. When he died leaving only a statement of his wish that they should have the properties and no will, the couple advanced a claim to the properties (which were valued at £280,000) on the basis of proprietary estoppel. The Court of Appeal affirmed the decision of the trial judge that the couple's expectations of receiving the properties were out of all proportion to the detriment which they suffered and that their equity should be satisfied by a monetary award of £20,000.

229. In *Henry v Henry*, discussed at para 180 above, the Privy Council held that to award B the share of the plot promised to him by A on her death would be disproportionate to the detriment suffered and that the appropriate relief in order to achieve the minimum equity required to do justice to B was to award him one-half of A's share of the plot. Sir Jonathan Parker, who delivered the judgment of the Board, expressed the view, at para 65, that "proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application".

230. In *Cowper-Smith v Morgan*, para 47, the Supreme Court of Canada has also endorsed the principle that:

> "Since the equity aims to address the unfair or unjust detriment the claimant would suffer if the owner were permitted to resile from her inducement, encouragement, or acquiescence, 'there must be a proportionality between the remedy and the detriment which is its purpose to avoid'."

231. As I have indicated, this principle has its origins in the seminal Australian cases of *Grundt* and *Verwayen*. Since the decision of the High Court in *Giumelli v Giumelli* (1999) 196 CLR 101, courts in Australia appear to have moved towards treating the claimant's expectation as the prima facie basis for relief. However, according to a recent review of the Australian case law, no Australian court has expressly said that the importance of detriment has diminished or resiled from the view that proportionality lies at the heart of the doctrine: see YK Liew, "The 'Prima Facie Expectation Relief' Approach in the Australian Law of Proprietary Estoppel" (2019) 39 OJLS 183. Indeed, in the most recent case in which the High Court of Australia has considered a claim based on proprietary estoppel, *Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505, the fundamental aim of the doctrine as identified in the earlier authorities was affirmed.

232. Thus, in *Sidhu v Van Dyke* the lead judgment (given by French CJ, Kiefel, Bell and Keane JJ, with Gagler J agreeing separately) begins by citing Mason CJ's description in *Verwayen* (1990) 170 CLR 394, 409, of the "fundamental purpose" of proprietary estoppel as being to give "protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted" (see para 1). Later, the judgment also cites with approval the passage from Dixon J's judgment in *Grundt* quoted at para 188 above stating that "the basal purpose of the doctrine … is to avoid or prevent a detriment" (see para 80). The lead judgment goes on to note, at para 82, that the majority in *Giumelli* accepted that "the fundamental purpose of equitable estoppel is to protect the plaintiff from ... detriment".

233. On the facts of *Sidhu* the appellant had promised to transfer to the respondent, which whom he was having an affair, a cottage on his land in which she was living as gift once the land had been subdivided. In reliance on those promises, the respondent gave up the opportunity to seek a property settlement from her husband on their divorce and continued to live in the cottage with her child for over eight years, paying some rent and also carrying out unpaid work to maintain and renovate the cottage as well other properties owned by the appellant and his wife. During this period the respondent also lost the opportunity to earn wages from full-

time employment. The Court of Appeal, reversing the decision of the trial judge, had awarded compensation to the respondent to be assessed by reference to the value of the cottage. (Transfer of the property was not ordered, as the parties' relationship had broken down and she had moved away.) This decision was upheld by the High Court. The lead judgment stated, at para 85, that, while "there may be cases where '[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption' [a quotation from *Verwayen*]; but in the circumstances of the present case, as in *Giumelli v Giumelli*, justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises".

234. Given the nature and extent of the detriment suffered by the respondent in *Sidhu* and the absence of evidence quantifying the disadvantages she had suffered, which were clearly substantial, I have no doubt that an English court would have reached a similar conclusion applying the principles I have discussed above. There was no reason to suppose that the value of the cottage was disproportionate to the detriment or that awarding any lower sum of money would have been adequate compensation for the respondent's reliance loss.

(11) Other factors

235. In *Jennings v Rice*, at para 52, Robert Walker LJ listed a number of additional factors which may be relevant to the exercise of the court's discretion. He said that they include, but are not limited to, misconduct of the claimant or particularly oppressive conduct by the defendant - to which "can safely be added":

> "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."

236. As regards the first of these factors, 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. As Simon Gardner says in the article mentioned earlier commenting on *Jennings v Rice*, analysing relationship breakdowns in terms of fault is at best a tasteless, and generally an inept, undertaking: see S Gardner, "The Remedial Discretion in Proprietary Estoppel -

Again" (2006) 122 LQR 492, 496; cited in *Davies v Davies*, para 62. It seems to me that it would only be in an extreme case that misconduct by the claimant could justify exempting a defendant from the responsibility to prevent the claimant from suffering detriment as a result of reasonably relying on the defendant's promise. Further, since the remedial aim is to prevent detriment to the claimant and not to punish the defendant, the only relevance of particularly oppressive conduct by the defendant, so far as I can see, would be in so far as such conduct is found to have increased the detriment which the claimant suffered.

237. The judgment of the trial judge in the present case records that a significant part of the cross-examination of Andrew was devoted to showing that he was at fault in his dealings with his father and brother - a line of argument which the judge described as "he had his chance and he blew it": see paras 276-277 of the judgment. The judge found very little merit in the points raised, and certainly none that had any adverse impact on Andrew's equitable claim: see paras 278-280. In my view, the judge's reluctance to apportion blame was well founded. A court will seldom be assisted in deciding a property expectation claim by attempts to debate the rights and wrongs of family disputes.

(12) Cases where the promise is conditional on a future event

238. Most of the cases that I have so far discussed (in particular, the leading cases of *Jennings v Rice* and *Thorner v Major*) were cases where the promise was conditional on an event (the benefactor's death) which had already occurred when the claim was made. In each case the result of relying on the promise was to make the claimant worse off, unless the promise was fulfilled, to an extent that was hard to quantify. The primary factor which determined what form of remedy to grant was whether the benefit conferred by giving effect to the promise would be disproportionate to the detriment. Different considerations arise, however, where the benefactor resiles from a promise conditional on a future event which has not yet occurred. The typical case of this kind is one where the promise relied on is that the claimant will inherit property on the benefactor's death and the promise is later revoked during the benefactor's lifetime.

239. *Gillett v Holt* [2001] Ch 210 was a case of this kind. The facts were in many ways similar to those of *Thorner v Major*. Mr Gillett had from a young age worked for Mr Holt on his farm, giving up educational opportunities to do so. Mr Holt made repeated promises over many years that Mr Gillett would inherit his farming business. Some of the promises also extended to Mr Holt's non-farming assets. After almost 40 years Mr Holt resiled from his promises and Mr Gillett brought a claim based on proprietary estoppel. Carnwath J dismissed the claim, but Mr Gillett successfully appealed. The Court of Appeal awarded Mr Gillett the freehold of the farm on which Mr Gillett and his wife and children had lived for many years together

with a sum of £100,000 to compensate him for his exclusion from the rest of the farming business (which comprised two other, larger farms).

240. The notable difference from the facts of *Thorner v Major* was that Mr Holt, although elderly, was not dead. The result of the judgment was therefore that Mr Gillett was granted a property right during Mr Holt's lifetime, which was not something that Mr Holt had ever promised him. Such a remedy could not therefore have been granted if, instead of making informal promises, Mr Holt had entered into a legally binding contract with Mr Gillett to leave the farm on which he was living (or other property) to Mr Gillett in his will. If the purpose of the equitable doctrine were to hold the promisor to his promise, this would be a fatal objection to the remedy granted. It could not be justifiable, in the name of enforcing a promise by A to transfer property to B upon A's death, to order A to transfer the property to B during A's lifetime. The objection is not fatal, however, since, as discussed, the object of relief in a property expectation claim is not to require the promisor to do what he promised to do but to prevent detriment to the promisee if the promise is not performed. There may sometimes be no other effective way of preventing such detriment than by compelling the defendant to transfer property to the claimant sooner than was promised.

241. Nevertheless, there is clearly a need for great caution before adopting such an approach. An order of this kind is a substantial interference with the freedom of an owner of property to dispose of it in the way they choose. In *Gillett v Holt*, at p 237-238, Robert Walker LJ (with whom Waller and Beldam LJJ agreed) emphasised that the approach adopted in that case represented the court's view as to what was "the minimum required to satisfy [Mr Gillett's equity]" and took account of (amongst other things) "the element of acceleration" involved. It is clear that the value of the award made by the court was far less than the value of the entire farming business which Mr Holt had repeatedly promised that Mr Gillett would inherit.

(13) Minerva's owl

242. A further difficulty which arises in cases of this kind is that promises of a future inheritance are often, as Hoffman LJ put it in *Walton v Walton* (unreported) 14 April 1994, para 19, "subject to unspoken and ill-defined qualifications". In *Thorner v Major*, para 19, Lord Scott posed the question whether if, before Peter's death, he had required full-time nursing care which needed to be funded by selling the farm or some part of it, to do so would have been inconsistent with the promises made to David. Lord Scott doubted that it would. In a commentary on the case Professor John Mee raised other hypothetical scenarios, such as whether David would reasonably have expected Peter's promise to leave his property to David to be performed (or to be performed in full) if David had married, or if Peter had married again (Peter had been married twice but had no children), or if Peter had decided that he wanted to

give up farming, or in the event that David were to assault Peter in the course of a row or to humiliate him in front of members of the local farming community: J Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] CFLQ 367, 375. Another, more obvious implied condition must have been that David would not die before Peter.

243. Such hypothetical possibilities caused no difficulty on the actual facts of *Thorner v Major* because none of them had in fact come to pass. When Peter died, nothing had happened which arguably qualified the promise that David would inherit Peter's farm. Accordingly, as Lord Walker said at para 65, it was "unprofitable, in view of the retrospective nature of the assessment which the doctrine of proprietary estoppel requires, to speculate on what might have been." The retrospective nature of the assessment was clearly explained in a passage which Lord Walker quoted, at para 57, from the judgment of Hoffman LJ in *Walton v Walton*. Hoffman LJ there observed, at para 21, that, in contrast to the law of contract, proprietary estoppel:

> "does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

In his judgment in *Thorner v Major*, at para 8, Lord Hoffmann expressed the backwards-looking nature of the assessment more poetically with a metaphor drawn from the preface to Hegel's *Elements of the Philosophy of Right* (1820):

> "The owl of Minerva spreads its wings only with the falling of the dusk."

244. Where the promise is revoked before it falls due to be performed, however, the owl of Minerva has not yet flown. In this situation the court is not looking backwards from that moment and asking whether it would be unconscionable for the promise not to be kept or whether detriment can be avoided by a monetary award. In fashioning a remedy, the choice is between seeking to compensate the claimant's reliance loss and giving effect or partial effect to a promise which has not yet fallen due to be performed. Evaluating the second of these alternatives necessarily requires the court to look forward into the future and guess what might happen. Any such assessment must in principle seek to take account of such "unspoken and ill-defined qualifications" as were implicit in the promise made and how they bear on what might happen in the future (or on what might have happened in the future in a counterfactual world in which the promise had not been revoked when it was). That

may be a difficult and speculative exercise to attempt to undertake, potentially more so than quantifying the claimant's reliance loss.

(14) Moore v Moore

245. A recent case in which such difficulties arose is *Moore v Moore* [2018] EWCA Civ 2669; [2019] 1 FLR 1277, which bears some similarities to the present case. The claimant, Stephen Moore, had worked all his life for long hours and low pay on the family farm. He had repeatedly been promised by his father that it "would be his one day". Stephen reasonably understood these promises to mean that he would inherit his father's share of the farm and the farming business upon the death of the survivor of his parents. When his father retired, Stephen took over the running of the farm, although his father, Roger, continued to own a half share of the farm and the farming business. Relations between Stephen and his parents subsequently broke down and Roger purported to dissolve their partnership. Roger was by this time suffering from Alzheimer's Disease and, by the time of the trial, was living in a care home needing permanent care.

246. The trial judge found that all the elements of a property expectation claim had been established. He approached the question of remedy on the basis that he should aim to mirror as closely as possible the arrangements which would have obtained had the dispute not arisen. The order made involved an immediate transfer of Roger's share of the farm and the farming business to Stephen, subject to a licence granted to the parents to live in the farmhouse for so long as they wished or could. Stephen was required to pay the outgoings for the farmhouse, the reasonable costs of care for his parents and £200 a week for the rest of their lives.

247. The Court of Appeal (of which I was a member), in a judgment given by Henderson LJ, held that the judge's approach was incorrect for two main reasons. First, it was an error to seek to replicate what would have happened on the wholly unrealistic assumption that no dispute had arisen and, in particular, to adopt a solution which forced the parties to remain financially dependent on each other when relations within the family had completely broken down (see paras 95, 98). Second, although it was in principle open to the judge to direct an immediate transfer to Stephen of all his father's interest in the partnership land and business, it was necessary to reflect the very significant acceleration which this entailed and the fact that Stephen's expectation was always subject to such expenditure as his parents might reasonably need or choose to make during the remainder of their lives (see paras 95, 103). The case was remitted to the judge with directions to make a remedial award which would, among other things, provide "full and generous protection" for the parents. Henderson LJ indicated that the appropriate figure for this purpose would probably be somewhere between £1m and £2m (out of assets probably worth in the region of £5m): see paras 95-96 and 104.

248. Three points may be made about this decision. First, it was not argued by the parents that the appropriate remedy was to compensate Stephen for his reliance loss and no attempt was made to quantify this - although the judge had expressed himself satisfied that the remedy which he granted was proportionate to the detriment (see para 34). Second, ordering the transfer of property before the condition for the promised transfer had been met was considered the appropriate remedy only because of the (unusual) circumstances: in particular, the fact that Stephen was still living on the farm and running the farming operations as he had in practice already been doing for a number of years; the fact that his father was incapable of taking any further part in the business; the fact that Stephen already owned the other half of the farm and farming business; and the imperative need to achieve a clean break between Stephen and his parents. Third, the Court of Appeal emphasised the importance of making full and generous allowance for the acceleration involved and the contingencies to which the promise was subject.

(15) Remedial offers

249. Where A, for whatever reason, decides to revoke a promise on which B has relied that A will transfer property to B on A's death (or some other event) before the event has occurred, A may satisfy such equity as has arisen by making a gift or offer of compensation to B sufficient to prevent B's change of position from operating as a detriment.

250. This was what happened in *Uglow v Uglow* [2004] EWCA Civ 987. The owner of a farm had encouraged his nephew to go into partnership with him to farm the land on the understanding that he would leave the farm to the nephew in his will. The nephew took up the offer, thereby abandoning an existing farming partnership with his own father, mother and brothers. After eight years relations between the uncle and nephew broke down and the uncle then granted the nephew a transmissible tenancy of about three-quarters of the farmland. When he died, the uncle left the farmhouse and land that he had retained to another relative. The nephew claimed that he should be entitled to this property, as it was part of what he had been promised and he had suffered substantial detriment in relying on the promise and giving up the opportunity to stay in his own family partnership.

251. The judge dismissed the claim, and his decision was affirmed by the Court of Appeal. Mummery LJ (with whom Jonathan Parker and Waller LJJ agreed) held that the judge had been entitled to infer that the promise of inheritance was made on the unexpressed assumption that the two men would remain in partnership for the rest of the uncle's lifetime. When that assumption proved not to be correct, it was not unconscionable for the uncle to revoke the promise and replace it by a different arrangement, provided this satisfied the equity that had arisen in favour of the claimant before the change of circumstances. The arrangement made by the uncle

had satisfied the nephew's equity at that time, and the uncle therefore did not act unconscionably when he made a will leaving the farm to another member of the family.

252. When a prospective benefactor changes his or her mind, as the uncle did in the *Uglow* case, there is a clear interest, which the courts should encourage, in the benefactor voluntarily providing or offering an arrangement which will prevent previous reliance on the original promise from causing detriment to the promisee. A fair offer made at this stage may avert litigation which all too often ends up being ruinously expensive for all involved; or, if the offer fails to achieve that result, it should at least give the defendant some protection against an adverse order for costs. To that end, it seems to me that, provided the prospective benefactor has endeavoured to treat the promisee fairly and has made a genuine and reasonable alternative arrangement or offer of amends, a court should be slow to find fault with it and to order more extensive relief.

253. In the present case, however, the only offer made by the parents when their relationship with Andrew broke down was an offer of an agricultural tenancy of Tump Farm (excluding the farmhouse and the land leased as a solar energy park) at a rent which was significantly higher than the rent paid for Dayhouse Farm. Andrew took the view that he could not make the farm profitable at that rent. The judge found that the offer made to Andrew had no negative significance for his claim (see para 280 of the judgment). That conclusion was clearly right: it could not be said that the offer represented fair compensation for the opportunities that Andrew had lost by relying on the promises made to him.

G. SUMMARY OF PRINCIPLES

254. Before considering whether the remedy granted by the judge in this case was justified, I will seek to distil the points discussed above into a summary of the key principles and their practical application. In doing so I would emphasise that these are principles and not rules. We are concerned with a situation where: (1) A makes an informal promise to give B an interest in land or other property (typically, as here, on A's death); (2) the promise is not (and would not reasonably be understood to be) legally binding; (3) B nevertheless reasonably relies on the promise and, in doing so, acts in a way which will operate as a substantial detriment to B if the promise is not kept; and (4) A later resiles from or fails to keep the promise for reasons which are assumed to be neither party's fault (or no more the fault of one party than the other).

255. In such cases the core principle underpinning the grant of relief is that equity will not allow A to go back on the promise made without ensuring that B does not

suffer detriment as a result of B's reliance on it. The aim of the remedy is thus to prevent detriment to B in the circumstances which have arisen.

256. In principle, there are two methods of achieving this aim. One is to compel A to perform the promise (or to award a sum of money calculated to put B into as good a position, as best money can do it, as if A's promise had been performed). The other is to award a sum of money calculated to put B into as good a position, as best money can do it, as if B had not relied on A's promise: in other words, to compensate B's reliance loss. Since both methods will in principle achieve the aim of preventing detriment to B, if on the facts both are practicable the court should adopt whichever method results in the minimum award necessary to achieve that aim.

257. In deciding what remedy to grant, there is a distinction between cases where the promise has already fallen due for performance and cases where performance was conditional on an event (typically, the promisor's death) which has not yet occurred.

258. In the former type of case where the promise has fallen due for performance, a remedy designed to give effect to the promise is likely to be appropriate if (as eg in *Thorner v Major*): (1) B'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 A is not clearly disproportionate to B's reliance loss. But where, even though B's reliance loss is difficult to quantify, the value of the interest in property appears clearly disproportionate to it (eg *Jennings v Rice*), the court should generally make the best estimate that it can of B's reliance loss, approximate as it will inevitably be, to avoid granting a remedy which is unjust to A because it goes beyond what is necessary to avoid detriment to B.

259. In the second type of case where the promise has not yet fallen due to be performed but A has resiled from it, the court should see whether A has made an offer of compensation to B. Where A has made an offer which represents a genuine and reasonable attempt to prevent B from suffering detriment as a result of the changed circumstances (as eg in *Uglow v Uglow*), the court should be slow to order relief which goes beyond the offer made.

260. Where no such offer has been made, 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. Where A's promise is to give B property on A's death and B's reliance on that expectation consists in working on A's farm or caring for A, it will often be an unspoken condition of the promise that the work or care will continue until A dies. If the parties fall out during A's lifetime, that condition may well become impossible to fulfil because the parties can no longer be expected

to live or work together. In such cases any expectation-based remedy would need to take account of the fact that an immediate remedy gives B property or money sooner than was promised and without fulfilling all the conditions of the promise. If such a remedy is contemplated, the award will therefore need to be discounted to allow for the contingencies to which performance of the promise was subject (including A's freedom to use her property for her own purposes during her lifetime) and the acceleration involved. Although there may be exceptions (eg *Moore v Moore*), in many cases - especially where A is in reasonable health and may live for many years yet - awarding compensation for B's reliance loss, even if difficult to quantify, is likely to be less uncertain and to produce a fairer result.

261. The court has a flexible discretion to fashion a remedy which does justice in the circumstances of the particular case. But, 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.

H. THE REMEDY IN THIS CASE

262. I turn to the remedy awarded by the judge in this case, summarised at para 130 above. Although the judge did not say so in terms, his order was clearly aimed at seeking to compensate Andrew for the loss of his expectation of acquiring a substantial proprietary interest in the land and buildings at Tump Farm and in the farming business. The judge recognised that Andrew had not expected to acquire such an interest in the land and buildings until his parents died. Nevertheless, because of the level of falling out and mistrust between Andrew and the other members of his family, the judge thought it necessary to achieve a clean break between them. The way in which the judge sought to achieve this was by ordering the parents to make an immediate payment to Andrew of a lump sum calculated as a proportion of the values of the farming business and the freehold land and buildings.

(1) Lack of reasons

263. I have sympathy for the judge who, quite understandably, found this to be the most difficult aspect of the case (see para 282 of his judgment) and appears to have received hardly any assistance on the question of remedy from the parents' (then) counsel, who focused almost exclusively on issues of liability (see para 161 of the judgment). The fact of the matter is, however, that the judge did not give adequate reasons for the remedy that he awarded. He made impeccable findings of fact justifying his conclusion that the necessary elements of a property expectation claim had been established. In his discussion of the question of remedy, he identified a number of factors (summarised at para 129 above) which he took into account. But

he did not say why he had chosen to award the percentages (50% and 40%, respectively) of the value of the farming business and of the land and buildings that he did. Nor (although this was perhaps more obvious) did he give any reason for deducting from the sum awarded the value of a life interest in the farmhouse in favour of the parents. More fundamentally, the judge in his discussion of the law had identified the need to check, before granting a remedy aimed at satisfying the claimant's expectation, that the remedy granted would not be out of proportion to the value of the detriment suffered by the claimant (see para 165). But when he came to discuss the appropriate remedy, the judge said nothing about why he was satisfied that the sum of money awarded was not disproportionate to the detriment suffered by Andrew.

264. It is possible to infer what the judge's reasons for the conclusions that he reached on these matters probably were. But this should not have been left to inference. The reasons should have been stated, even if only briefly. As discussed earlier, the exercise of the remedial discretion in a case of this kind needs to be as transparent as possible. There are inevitable limits to this where judges are required to put monetary values on matters which cannot be quantified mathematically or by reference to any clear benchmark. In such cases judges have to bring to bear their sense of what amount of money would be and be perceived to be fair compensation. But, so far as they can, judges should show their workings so that the parties, the public and any court reviewing the decision on appeal can understand how the judge has arrived at the result reached.

265. In this case no explanation of the figures chosen was given. This, in itself, is a ground on which an appeal court is entitled to interfere with the judge's order. A failure to give any reasons for an exercise of discretionary judgment deprives it of the leeway for reasonable disagreement which it would otherwise deserve.

266. In the absence of express reasons, the assumption that I would make is that the percentage figures of 50% of the value of the farming business and 40% of the value of the land and buildings were based upon the wills made by the parents in 1981 (see para 115 above). At para 17 of his judgment, the judge recorded that these percentages were proposed by Andrew's counsel in his closing submissions and commented that this submission "was no doubt made with the provisions of the earlier 1981 will well in mind". Although he found that Andrew did not know the terms of his parents' 1981 wills, the judge evidently considered that Andrew's expectations were consistent with those wills and that the terms of the parents' wills are likely to have informed what David led Andrew to expect (see paras 245, 249 and 262 of the judgment). The deduction of the value of a life interest in Tump Farmhouse in favour of the parents from the lump sum award was presumably intended to give effect to the judge's finding that Andrew expected the farmhouse to remain his parents' home for as long as they, or the survivor of them, wished (see para 284).

(2) No allowance for acceleration

267. On these assumptions there is, however, a serious problem with the approach adopted in valuing Andrew's expectation. The judge recognised that the order he was making involved an acceleration in the receipt of an interest in property which Andrew had expected to inherit upon the deaths of both his parents. But the only allowance made for this fact appears to have been the deduction of the value of a life interest in their home.

268. The fact that, as the judge observed, "David and Josephine may expect to live for many more years yet," carried with it the possibility that they might need or choose to use some of their wealth for their own purposes - for example, if one of them became ill or incapacitated. Andrew could not reasonably have expected that, if for example, one of his parents needed care services (as happened in *Moore v Moore*), the promises of an inheritance made to him would preclude them from using some of their assets to pay for this, perhaps by selling part of their property or borrowing against it. Even if no such contingency arose, David and Josephine would need to be supported in their old age beyond having somewhere to live. There is no evidence that they had any private pension. It is reasonable to expect that they would have continued to receive some financial support for the rest of their lives from the profits of the farming business. The order made by the judge in effect relieves Andrew's expected share of the family assets from that future burden and places it entirely on the share of the farming business (and of the land and buildings) retained by his parents.

(3) Failure to analyse detriment

269. However, the flaws in the approach adopted in my view go much deeper than this. Key questions which needed to be addressed were: whether or to what extent it was in fact possible to fulfil Andrew's expectation; what detriment he would suffer in so far as his expectation was not fulfilled; and what was the minimum equitable remedy necessary to protect Andrew from such detriment.

270. The judge treated what Andrew had been promised as, in effect, that he would succeed to an equal share of the farming business and of the land and buildings at Tump Farm with his brother, Ross, subject to making provision from the parents' estate for their sister, Jan, in an amount quantified at 20% of the value of the land and buildings. Whether it would actually have been viable for Andrew to continue farming at Tump Farm after his parents died on this basis is unclear to me, given the relatively small size of the farm, the equal proprietary expectation of Ross and the fact that Andrew and Ross had proved unable to work together. But whether

it would or not, in the events which happened it is plain that Andrew's expectation could not possibly be fulfilled.

271. The judge rejected as unrealistic any notion that Andrew, having been evicted by his parents in 2015, might return to farming at Tump Farm. That conclusion seems inevitable and has not been challenged. It meant that there was no question of granting a remedy which sought to implement - albeit prematurely - what Andrew had been informally promised. In these circumstances attention ought to have turned to considering what harm Andrew had suffered by relying on promises of succession that were not now on any view going to be fulfilled. No attempt, however, was made to do this.

272. The rationale put forward by Andrew's counsel for basing the award on the financial value of what was promised was that "a payment of that order would enable Andrew to set himself up again as a farmer elsewhere" (see para 17 of the judgment). The thinking may have been that, even though Andrew would not now be able to carry on farming at Tump Farm after his parents' deaths, he could at least have his expectation satisfied that he would be farming on his own account rather than as an employee of someone else. No consideration seems to have been given, however, to whether Andrew would in fact be likely at this stage of his career to try to set himself up elsewhere, nor to what sum of money would be needed to do this - let alone to how that sum compared with Andrew's reliance loss. I note that in their written case for this appeal Andrew's counsel have accepted that it is unclear that the value of the judge's award would allow him to set himself up in farming again and that, in his mid-50s, he may have to be "satisfied with being an employee in someone else's business". This suggests that the remedy awarded by the judge was in fact incapable of achieving its own object.

273. The Court of Appeal thought that the judge was entitled to take the view that, in circumstances 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" (see para 134 above). The judge, however, had specifically rejected the notion that this is a quasi-bargain type of case where it can fairly be inferred that the parties themselves regarded the expected benefit and the accepted detriment as broadly equivalent (see para 283 of his judgment). For the reasons given at para 221 above, he was right to do so. There is no reason to assume that the value of the land which Andrew was promised bore any correspondence, even a rough one, to the amount of his reliance loss. Indeed, the reverse is true. As Lord Briggs has pointed out, modern capital values of farmland are typically so high that the land will almost inevitably be worth far more than any valuation of the detriment in a case of this kind.

274. In these circumstances the order made by the judge cannot stand and it is necessary to consider afresh how the equity raised in this case should be satisfied.

(4) Re-exercising the remedial discretion

275. Approaching the matter afresh, I start from the point discussed above that it is impossible in this case to procure the fulfilment - or anything approximating to the fulfilment - of the informal promises made to Andrew that he would succeed to part of the family farming business and inherit a sufficient stake in Tump Farm to enable him to carry on farming there after his parents die. Andrew and his parents (and brother) have irreversibly parted ways. There is no going back to Tump Farm and Andrew's hopes of carrying on the farming business (or part of it) there, or indeed of having his own farm at all, have been permanently disappointed. The only practicable remedy is an award of money, which will almost certainly have to be funded by selling the farm, either now or following the parents' deaths (assuming of course that Andrew does not pre-decease them). The only question is how the sum awarded should be calculated and when it should be payable.

276. As discussed earlier, the aim of the remedy is to prevent Andrew from suffering detriment as a result of his reliance on the promises made to him by his father. As enforcing those promises is not an option, the only practicable way of seeking to achieve that aim is to make an award of compensation calculated to put Andrew, so far as money can do it, in as good a position as if he had not built his career on those promises. As already mentioned, this is not a case in which it is reasonable to treat the market value or proceeds of sale of Andrew's promised share of the farm and farmland as a rough equivalent or proxy for what he would otherwise have earned. The appropriate course is therefore to estimate his reliance loss.

277. Basing the award on Andrew's reliance loss also conclusively answers the argument made by counsel for the parents that no immediate order for payment is appropriate in this case. As opposed to Andrew's expectation which lay in the future, the loss suffered by working at Tump Farm for low pay until 2015 rather than in a better paid job elsewhere had already been incurred by the time of the trial. Basing a remedy on an expectation which was conditional on an event which has not yet happened is open to the objection already mentioned that it gives the claimant a transfer of property (or its monetary value) which he was never (even informally) promised. That objection does not apply where the approach adopted is to award compensation aimed at putting the claimant into as good a position as if he had not acted in reliance on the promise. The latter approach is entirely backward-looking. Furthermore, the remedy is appropriate as soon as it becomes clear that the promise will not be performed. At that point the claimant's past change of position becomes a detriment: see *Gillett v Holt* [2001] Ch 210, 232-233. An immediate payment of compensation is therefore justified.

(5) Estimating Andrew's reliance loss

278. The judge was satisfied that, if David had not encouraged him to believe that he would one day benefit substantially from Tump Farm, Andrew could and would have found better financial reward elsewhere. Although the judge said that he could only speculate on what Andrew might have done instead of working on Tump Farm, it seems fair to assume that he would have pursued an alternative career in the dairy farming business. Andrew was born into a farming family and grew up on a dairy farm. He clearly took to dairy farming from a young age. He said in his witness statement that, when he left school at 16, he was not keen to continue in full-time education and that he "wanted to work on the farm as farm work was the type of work I could do and it seemed like the natural progression." The various agricultural courses that he attended, as well as the area representative roles that he took on through what the judge referred to as "his wider interest in the dairy business" (para 270), are consistent with the vocational element in his choice of career.

279. The judge made no findings about how much Andrew would be likely to have earned if he had left Tump Farm at a younger age. That is understandable given the way the case was argued. The result would ordinarily be that the case would now have to be sent back to the High Court to carry out the necessary assessment. It is not part of this court's normal role - nor for that matter that of the Court of Appeal - to undertake an assessment of this nature. Nor do we have all the information that would be desirable for this purpose.

280. Despite this, both parties have asked this court, if we conclude that compensation should be assessed on a reliance basis, to fix the amount of the award ourselves. Both parties plainly recognise that any such assessment, which can only be based on the limited material before us, will inevitably be more approximate than the assessment which would be undertaken by the High Court at a further hearing. But another hearing in the High Court would add yet more cost and delay to proceedings which have been going on for several years already and must have taken a heavy toll, both financially and psychologically, on all involved. Moreover, it is one of the tragedies of this type of litigation that, one way or another, the legal costs incurred by both sides will diminish the assets about which they are arguing, and the more so the longer the litigation goes on.

281. In view of the overwhelming interest in finality, we agreed to the parties' joint request that, if compensation is to be assessed on a reliance basis, this court should decide on the amount of the award. In the event, this remedial approach has not found favour with the majority of the court. But I have explained in the Appendix to this judgment how I have calculated what I consider would be a just award of compensation in this case.

I. CONCLUSION

282. I would allow the appeal and substitute for the remedial order made by the judge an order requiring David and Josephine Guest to pay a sum of £610,000 to Andrew as equitable compensation.

APPENDIX ON QUANTIFICATION OF LOSS

1. To quantify Andrew's reliance loss, four matters need to be addressed:

    (i) The appropriate starting date for the calculation;

    (ii) The appropriate figures for loss of earnings;

    (iii) What interest, if any, should be added; and

    (iv) What the overall amount of compensation should be.

I will consider these in turn.

(1) The starting date

2. The judge did not make an express finding about when Andrew began to act to his potential detriment in reliance on his father's assurances that he would in due course inherit Tump Farm (or a substantial share of it). His counsel submitted that it is implicit in the judge's findings that the reliance spanned Andrew's entire working life on Tump Farm and that the appropriate starting date to take in estimating Andrew's reliance loss is 1982 when Andrew left school. Counsel for the parents, in contrast, submitted that the appropriate starting date is 1997, when Ross announced that he wanted to work on the family farm. Andrew gave evidence at the trial, which the judge accepted, that this had pleased their father who "said that Ross and I would have to learn to work together as he intended to leave the farm to us jointly to run after his death" (judgment para 238).

3. On the judge's findings, however, that occasion was not the first time when promises of succession were made. It was Andrew's evidence, also accepted by the judge, that on a number of occasions in the period before 1997 his father had shut down discussions where they disagreed over a farming decision by saying that one day the farm would be Andrew's but for the moment it was his. Andrew gave two particular examples - one an occasion in 1993 and the other in 1995 or 1996. What changed in 1997 was that Andrew adjusted his expectation downwards by accepting that he would not inherit the whole farm but would share it with his brother. The thrust of the judge's findings is that, even though his expectations were scaled down by his parents in 1997, his father had consistently led Andrew to believe that he

would succeed to the farming business and inherit a sufficient interest in the land to enable him to carry on the business after his parents died (see paras 171-175, 241). Later assurances merely confirmed "what had always been assumed, and sufficiently communicated, within the family" (para 244).

4. Nevertheless, even on the footing that promises of eventual succession were made to Andrew from when he first started working full-time on the farm in 1982, I do not think it right to infer that he has suffered detriment from that time. Andrew was only 16 when he left school. In his first few years of working on the farm, he attended part-time courses and was rapidly given significant responsibilities, while continuing to live at home (see para 117 of the main judgment). It seems unlikely that he would have got a more favourable apprenticeship in farming elsewhere. There is no clear point at which it can be said that it would have been to Andrew's advantage to have left Tump Farm - or that he would probably have done so - had he not been led to believe that one day it would be his. But I consider that a reasonable date to take is a date shortly after he got married and then moved into Granary Cottage in late 1989.

5. Work had been done, funded mainly by his parents' farming partnership, to convert the old granary into a home for Andrew and his wife Tracey to live in. Andrew gave evidence in his witness statement, which I see no reason to doubt, that, to afford a house, he would otherwise have had to leave Tump Farm to get a higher paid job. He also said that it "made sense for Tracey and me to live on the farm as this is where we all expected our lives to be." Tracey gave evidence at the trial, which the judge accepted, that, if she had known what was to come, then she would have put pressure on Andrew to get a better paid job, which would probably have involved him working less hours, away from Tump Farm (judgment, para 187).

6. On this basis it seems to me fair to treat the start of 1990 as the date when Andrew began to rely to his detriment on the promises made to him.

(2) Lost earnings

7. There are several good indications of what remuneration Andrew could reasonably have expected to earn in alternative employment. One is the fact that, since leaving Tump Farm, Andrew has secured a job as a senior herdsman earning an annual salary of £33,000 plus payment of the rent on a house near his workplace. This is significantly more than he was paid at Tump Farm. I see no sufficient reason to infer that, if he had left Tump Farm at a younger age, Andrew's current earnings would be higher than they in fact are. In the absence of evidence of a career ladder that he might have climbed, I think it reasonable to proceed on the assumption that the skills and experience that Andrew acquired working at Tump Farm were as

valuable in the job market as if he had pursued a career in farming elsewhere and that, in his present job, he is not suffering any continuing prejudice.

8. This is supported by Andrew's own view of the detriment he has suffered, as expressed in a conversation with his parents in April 2014 which they secretly recorded. At the time of this conversation David had begun to threaten to dissolve their farming partnership although it was not until a year later that he did so. As quoted in the judgment at para 266, Andrew was recorded as saying:

> "What I'm saying is that I gave you the best 30 years of my life … If I'd gone to work for somebody else, I'd have £30,000 a year, plus a house to live in, council tax paid, plus a car."

A few years earlier, in a letter dated 27 March 2009 to his father's solicitor during the negotiations which followed Andrew's complaint about his wages to the Agricultural Wages Board ("AWB"), he had written:

> "The going rate for a herd manager, which best describes the job that I do, is £30-35,000 per year plus a house rent-free with council tax paid. Source: LKL recruitment services."

9. More detailed figures are contained in a schedule annexed to Andrew's particulars of claim. This schedule sets out his actual wages and other benefits received each year from 1982 (when he began working on the farm) until 2012 (when he went into what proved to be the short-lived farming partnership with his parents). The schedule compares those figures with the wages which, on Andrew's case, he would have received during the same period if he had been paid at the minimum rates set by the AWB. The total difference claimed is £360,467.

10. So far as appears, no issue was taken at the trial with the figures given in this schedule for Andrew's actual wages nor with the additional sums included for council tax, car insurance, health insurance and heating for Granary Cottage - all of which were paid for by the farming partnership. The point was made, however, that the figures shown for Andrew's actual wages are net of tax and national insurance, whereas those calculated using the AWB rates are gross. In this respect the comparison is therefore not like for like.

11. Issue was also taken in two respects with the figures given in the schedule for the wages that Andrew would or should have been paid applying the AWB rates.

First, David disputed the number of hours a week on average that Andrew worked. Second, David said that the rates used in preparing the schedule were those for Grade 6, the highest grade of agricultural worker, and that this was higher than Andrew's true level of responsibility. The parents produced a counter-schedule, to which David referred in his witness statement, containing various alternative calculations. These all use Grade 3 agricultural worker rates until 1998, Grade 5 rates for the period 1998 to 2007 and Grade 3 rates for 2008 onwards.

12. The judge did not resolve the conflict about how many hours Andrew worked and this court is not in a position to do so. Nor can we judge ourselves which agricultural worker grade applied at any given time. However, while these issues were relevant in the context of Andrew's complaint in 2008 about how much he was paid at Tump Farm, they are not directly relevant in estimating how much he would have earned in another job. The AWB rates are, after all, the minimum legal rates of pay for agricultural workers and Andrew might well have earned more than the minimum legal rate. More specifically, it seems inherently unlikely that his pay would in reality have fallen in 2008 as implied by the figures used in the counter-schedule.

13. The basis for using Grade 5 rates for the decade to 2007 but then lower Grade 3 rates from 2008 onwards in the counter-schedule is correspondence with the Agricultural Wages Team at DEFRA in early 2009 when Andrew made his wage complaint. Based on the information he had provided, they classified Andrew for the period 2005-2007 as a Grade 5 worker but indicated that he would only be classified as a Grade 3 worker for 2008 because the AWB had changed its definition of Grade 5 to include responsibility for disciplining staff as a requirement, which was not one of Andrew's responsibilities at Tump Farm. I see no reason to think that this change in the AWB definition would have affected the amount that Andrew was paid if he had followed an alternative career path.

14. The best way to test which figures are the most realistic to use seems to me to be to cross-check them against the evidence indicating what Andrew could have been earning at another farm, at least by around 2009.

15. In Andrew's schedule his estimated annual pay at AWB rates climbs steadily year by year to reach £30,000 for the first time in 2004. For 2007 the figure is £34,020 and for 2009 it is £36,288. For the first quarter of 2012 (the last period included in the schedule) the figure is £10,264, equivalent to £41,056 on an annualised basis. The fact that the figures shown in the schedule for the later years are higher than the salary which, based on the evidence referred to at paras 7-8 above, Andrew believed that he could have been earning elsewhere, and was in fact earning at the time of the trial in 2018, suggests that they are somewhat overstated. The same may therefore also be true for the earlier years - particularly as the AWB rates for the same grade (Grade 6) are used for every year included in the schedule,

when it seems reasonable to assume that there would in fact have been some progression in pay grade early on in alternative employment as Andrew gained more experience.

16. Tested against the available evidence of what Andrew could have been earning as a senior herdsman from 2009 onwards, the comparable figures given in the parents' counter-schedule at what are described as "corrected rates" for the years up to and including 2007 (for which the estimated amount is £31,500) seem to me reasonable. But the reduction to Grade 3 rates for the period 2008 to 2011 does not. In the absence of information about the Grade 5 rates for those years, I would propose to use the figures given in the counter-schedule for the years up to and including 2007, and then to increase the 2007 figure of £31,500 by £500 a year until 2012. This results in a projected salary of £33,500 for 2011 and £8,500 for the first quarter of 2012.

17. I also think it appropriate to make two adjustments to the (undisputed) amounts of actual wages and benefits received. The first is to exclude council tax from these figures, as the evidence indicates that an employer would be expected to pay council tax in addition to providing a house rent-free. The second is to gross up the actual remuneration for tax and national insurance. By reference to published tax tables, an uplift of 15% seems appropriate.

18. After making these adjustments, I calculate that Andrew's actual gross earnings (excluding the benefit of accommodation) during the period from 1990 to the end of March 2012 amounted in total to £299,426. This compares with a total estimated amount that he would have earned during this period if employed on another farm of £546,938. The difference between these figures is £247,513.

19. The end of March 2012 was when Andrew went into partnership with his parents. According to the draft partnership accounts which were in evidence at the trial, his drawings were: £16,737 in the year ended 31 March 2013; £23,996 in the following year; and £28,032 in the year ended 31 March 2015. The partnership was then dissolved. Although there were no doubt some expenses charged to the partnership from which Andrew benefited, it seems unlikely that, at least in 2013 and 2014, these would have bridged the gap between his drawings and the salary that he would have been earning in another job at that stage of his career. In the circumstances I would propose to "top up" Andrew's earnings during the period that he was in partnership with his parents by including in the calculation amounts which would bring his earnings up to an annual salary of £30,000 during the period. This leads to the inclusion of lost earnings of around £13,000 for 2012, £7,800 for 2013, £3,000 for 2014 and £500 for the first quarter of 2015.

20. There is no information about how much money Andrew managed to earn during the period of some three and a half years from April 2015 until October 2018, when (according to the agreed chronology) he began work in the job near Tewkesbury in which he was employed at the time of the trial (and I assume is still employed). In so far as his earnings during this period may have been less than he could have expected to earn in full-time employment, the point can be made that he might have encountered one or more periods of unemployment between jobs if he had worked away from Tump Farm from 1990. I will assume no further lost earnings during this period.

21. The result is that on my calculation the total principal amount of Andrew's lost earnings over the entire period from 1990 onwards is £267,748.

(3) Interest

22. Next it is necessary to add compensation for the delay in receiving this sum. If Andrew had left Tump Farm at the beginning of 1990, the relevant earnings would have been received between seven and 32 years ago. Counsel for the parents made the unreasonable submission that no allowance at all should be made for the delay in receipt. They sought to justify this on the ground, first, that this is not a case in which the parents have profited from Andrew's low wages. They make the point that, as the judge found (at para 60), over the period from 2000 to 2012 David drew out from the farming business even less than he was paying Andrew. Secondly, they submit that it is necessary to balance competing factors of justice to the other persons who also worked on the farm at a low wage, namely, David and Ross.

23. Contrary to the submission made, it is clear that David and Josephine have indeed profited from Andrew's low wages, as their partnership has had the benefit of his labour without paying a commercial rate for it. Further, by paying the members of the family who have worked on the farm below market wages, the parents have been able to preserve and enhance the value of their capital investment (including by servicing the mortgage loans taken out to buy Tump Farm and build Granary Cottage). This has enriched them (and Ross, assuming he inherits a share of the farm and farming assets). Andrew, by contrast, will never receive his promised share. I cannot see any competing factors of justice there. But in any event, the relevant question in fixing the amount of compensation is not what others have gained or lost but what financial harm Andrew has suffered as a result of staying at Tump Farm instead of leaving to get a job elsewhere. To award Andrew only the lost pay which, on the relevant hypothesis, he would have received many years ago without compensating him for the delay in receipt would be grossly unfair.

24. It is not possible to know what Andrew would have done with the additional sums that he would have earned over the period from 1990 to 2015. No doubt he might have spent some of the money. In the light of Tracey's evidence that another job would probably have involved him working fewer hours, he might also have enjoyed more leisure time. In circumstances where Andrew has been denied those opportunities, however, I can see no better way of measuring the value of such loss than to estimate what his additional earnings, if not spent but invested, would be worth now.

25. The two questions which then arise are: (1) what rate of return on such investment (expressed as a rate of interest) should the court apply; and (2) should the returns be compounded (and, if so, with what rests)? Counsel for Andrew proposed that the court should apply the Bank of England base rate of interest, compounded annually; they also provided an alternative calculation based on simple interest at 1.5% above the base rate. The parents' case is that only simple interest should be awarded, at no more than the base rate.

26. Taking the question of compounding first, counsel for the parents argued that only simple interest is appropriate as this case does not fall within one of the limited categories in which compound interest may be awarded in equity and, otherwise, the court only has power under section 35A of the Supreme Court 1981 to award simple interest on damages. (The term "damages" in section 35A includes equitable compensation: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, 373.) I agree that this is not a case in which the court has power to award compound interest on damages awarded to the claimant. But the parents' argument, as I see it, fails to distinguish between interest <u>on</u> damages and interest <u>as</u> damages. It has been clear at least since the decision of the House of Lords in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs* [2007] UKHL 34; [2008] AC 561, that there is no legal impediment to the recovery of compensation for loss which is properly measured by interest calculated on a compound basis. That is the nature of the loss suffered here.

27. In any long-term investment which generates a return on capital, unless profits are withdrawn, they are added to the capital sum which will accumulate on a compound basis. Simple interest therefore does not reflect the real value of money. The annual compounding proposed by Andrew's legal representatives is a conservative measure to adopt, as in many forms of investment (including many interest bearing accounts) returns are reinvested more frequently.

28. As for the appropriate rate of return, the parents' counsel submitted that this should be no more than the Bank of England base rate, on the footing that this is roughly equivalent to the return that Andrew could have achieved if he had placed the money on deposit. I do not think it reasonable, however, to suppose that, if

Andrew had saved the additional sums earned, he would have done so by keeping the money in a bank deposit account (particularly at the negligible rates of interest payable in the period since the financial crisis in 2008, when the base rate has mostly been at 0.5%). It is more realistic to assume that Andrew would have invested the money in a financial product which was relatively low risk but aimed to achieve some capital growth - for example, a with profits endowment life assurance policy. There is no evidence of the return that such an investment would have generated. But it would undoubtedly have been well above the 1% or 1.5% over the Bank of England base rate posited in the calculations provided by Andrew's legal representatives. Those rates are also significantly less than standard variable mortgage rates for most of the relevant period which would have applied to money borrowed to fund a house purchase.

29. In the circumstances I would propose to adopt a rate of 2% above base rate, which is still a very conservative rate of return to assume.

30. Using the spreadsheet which Andrew's legal representatives have helpfully provided, I calculate that, at this rate of return, the additional loss attributable to Andrew being kept out the money that he would have earned in another job is £342,162 at the date of handing down this judgment. Adding this to the principal sum of £267,748 and rounding the result to avoid a spurious impression of precision, yields an estimated total financial loss of £610,000.

(4) Overall assessment

31. The final question is whether it is appropriate to add to (or reduce) this figure in arriving at the overall award.

32. I have already considered, and rejected, the submission made on behalf of the parents that their own low drawings from the farming partnership or the low wages paid to their other son, Ross, give rise to any countervailing equity. For their part, counsel for Andrew submitted that, in addition to financial loss, Andrew suffered substantial non-pecuniary harm by relying on his parents' assurances that he would succeed to Tump Farm which should be reflected in the compensation awarded. They cited a statement of Lewison LJ in *Habberfield v Habberfield* [2019] EWCA Civ 890, para 60, that: "one must not lose sight of the fact that, as the judge found, the three decades of her life that [the claimant] spent on the farm are not susceptible of quantification." They submitted that the same is true for Andrew in the present case.

33. Although in one sense undoubtedly true, statements that detriment has been incurred which is not susceptible of quantification do not seem to me helpful in a case such as this where the remedy being granted is a purely monetary one. In such a

case, if it really is the position that a form of detriment cannot be assigned any monetary value, then the consequence must be that no money can be awarded for it. More in point, in my opinion, is the observation of Lewison LJ in *Davies v Davies*, para 67, that:

> "… since it is now common ground that the ultimate award will be a purely monetary one, we must do the best that we can. In different situations the court is often called upon to award compensation for non-pecuniary losses, and the difficulty of assessment is no bar to an award."

34. In this case there seem to me to be two main forms of non-pecuniary loss suffered by Andrew. One, which I have already mentioned, is that in another job he would not only have had more money to spend but probably also more leisure time. In so far as that is true, however, it is taken into account in the calculation made, which rewards what might be called delayed gratification through a compound return on the principal sums awarded. The second form of non-pecuniary detriment is emotional harm from having built his life on an expectation of inheriting Tump Farm which has been disappointed.

35. The object of the present assessment is to work out what compensation is required to put Andrew, so far as money can do it, into as good a position as if he had made a career away from Tump Farm from a much younger age. In that event, he would not have had to undergo a fundamental change of situation at this stage of his life. I accept the submission made on Andrew's behalf that his sense of who he is and where he belongs must have been profoundly shaped by living and working at Tump Farm for 25 years between 1990 and 2015 in the expectation that it would become his farm and would always be his home. Having to rebuild his life when he was nearly fifty years old is likely to have caused corresponding feelings of dislocation and distress.

36. This is a detriment which in principle a court can take into account in assessing compensation. I would not, however, increase on this basis the amount of money awarded in this case. This is for four reasons.

37. First, it is inherently difficult to separate feelings of dislocation and distress at having to rebuild his life from other harm for which no compensation can be recovered - for example, the anger and sense of betrayal that must have accompanied the disappointment of Andrew's expectations and breakdown in relations with his parents and brother and the stress and anxiety involved in this litigation: both of these are adversities for which the law offers no remedy.

38. Second, unlike the trial judge who was immersed in the facts of the case and heard the witnesses give evidence, an appeal court is poorly placed to evaluate the extent to which Andrew has suffered feelings of dislocation and distress at having to rebuild his life. People differ widely in their response to major life changes of this kind. In any such evaluation it would also be relevant to consider whether Andrew may have enjoyed some non-financial benefits from living and working at Tump Farm over the relevant period which would not have been replicated in another job and which would need to be weighed on the other side of the scales. Again, this court is not in a position to assess this.

39. My third reason for not attempting such an assessment is that the feelings of dislocation and distress which Andrew must have suffered should be seen in the context that he has managed to rebuild his life away from Tump Farm.

40. Fourth, awarding £610,000 in financial compensation can be expected to go a long way towards alleviating feelings of dislocation and distress at having to rebuild his life. It should give Andrew and Tracey enough money to buy their own home and enjoy reasonable financial security when they retire. Counsel for the parents emphasised evidence given by Andrew in his witness statement that:

> "I worked incredibly long hours at Tump Farm for 32 years … I have nothing to show for that. If I had left the farm at 16 by now Tracey and I would probably own our house outright and we would probably have savings. As things stand, we have no house or savings."

An award of £610,000 should be enough to repair that loss. Doing so should bring with it the satisfaction for Andrew of knowing that at least he has not laboured in vain.