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WHICH SIDE "OUGHT TO WIN"?—DISCRETION AND CERTAINTY IN PROPERTY LAW

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The title of this lecture echoes a well-known (I might even say notorious) passage in the judgment of Deane J. in the High Court of Australia in *Muschinski v. Dodds*[1]:

> Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity. Thus it is that there is no place in the law of this country for the notion of 'a constructive trust of a new model' which 'by whatever name it is described ... is ... imposed by law whenever justice and good conscience requires it.' Under the law of this country—as, I venture to think, under the present law of England—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.' Long before Lord Seldon's anachronism identifying the Chancellor's foot and the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law.

This passage might be called notorious because either Deane J. or his law clerk had got his history seriously wrong. The preface to the latest edition of *Meagher, Gummow and Lehane*[2] quotes the last sentence as "Lord *(sic)* Seldon's *(sic)* anachronism *(sic)*". John Selden was not in the House of Lords, but a courageous member of the House of Commons under Charles I; his name is not spelled like Lord Eldon's; and his famous Table Talk antedated the consolidation of equitable principle under

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* Lord Walker of Gestingthorpe was a barrister in Lincoln's Inn from 1960 and was made a Queen's Counsel in 1982. He was a High Court Judge in the Chancery Division from 1994 to 1997, and held the post of Lord Justice of Appeal from 1997 to 2002. He was appointed Lord of Appeal in Ordinary on 1 October 2002 and received, additionally, a life peerage with the title Baron Walker of Gestingthorpe in the County of Essex.

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1 (1985) 160 C.L.R. 583, at 615-616 (H.C.A.) (references and one parenthesis omitted).

2 Roderick Pitt Meagher, John Dyson Heydon & Mark James Leeming, eds., *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed. (Australia: LexisNexis Butterworths Australia, 2002) at xi [*Meagher, Gummow and Lehane*].

Lord Nottingham, who became Lord Chancellor 20 years after Selden's death. Perhaps the Justice or his law clerk blundered in confusing Selden and Eldon. More substantially, the split decision of the High Court and the widely differing reasoning in the case made it a surprising context for a reassertion of strict equitable orthodoxy, especially by Deane J. himself. Two pages earlier he had been asserting an underlying identity between institutional and remedial constructive trusts, and a page later he was flirting with unjust enrichment.

Nevertheless the passage from Deane J.'s judgment is a striking statement of the need for the court—in England as in Australia—to decide property disputes by the application of legal principle, and not by the exercise of untrammelled discretion, in relation to the facts as found. The two most obvious areas of difficulty, well known to you all, are beneficial ownership of the matrimonial (or cohabitational) home and proprietary estoppel. I shall spend most of my time on proprietary estoppel, although the overlap of that doctrine with the "common purpose" constructive trust[3] means that I shall be referring to several cases about beneficial ownership of the family home.

Proprietary estoppel is a particularly appropriate context in which to examine the struggle between principle and discretion. There are frequent complaints that it is difficult to predict the outcome of claims of this sort, and that the court sometimes seems to be administering a sort of palm-tree justice, without any properly reasoned explanation of why relief is being granted or refused—or of the nature and quantum of the remedy when relief is granted.

It must be acknowledged that there is some force in such criticisms. However my general thesis is that proprietary estoppel should be and can be a principled doctrine which, properly handled, corrects injustice arising from the vagaries of human conduct. But it is still developing and some of its principles are not particularly easy to grasp, partly because they tend to be expressed in shorthand phrases—such as "common expectation", "detrimental reliance", "expectation interest" and "reliance interest"[4]—which can be fully understood only by reading the cases.

I shall suggest that the proper adjudication of a proprietary estoppel claim involves up to four separate elements. First, the judge must understand the relevant legal principles. Their full development has some way to go, both on the issue of liability and (if the judge gets that far) on the issue of remedy. I shall identify some of the main issues that are still open to debate, but let me say at once that there are two important and debatable topics that I am going to avoid. For reasons of time I am going to say nothing about whether the doctrine can give rise to an equity of a proprietary character capable of affecting third parties either before or after the making of an order granting a remedy. For reasons of prudence I am going to say nothing about whether the doctrine can apply in the context of commercial negotiations conducted "subject to contract". The House of Lords is going to consider that topic in *Cobbe v. Yeoman's*

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[3] The overlap should not however be treated as congruence: see Patricia Ferguson, "Constructive Trusts—A Note of Caution" (1993) 109 L.Q.R. 114; also Ben McFarlane, "Proprietary Estoppel, Constructive Trusts and Formality Rules" (a paper given to the Property Bar Association on 3 April 2007), online: Property Bar Association < http://www.propertybar.org.uk/Text/McFarlane.pdf >.

[4] For these last two expressions see Simon Gardner, "The Remedial Discretion in Proprietary Estoppel" (1999) 115 L.Q.R. 438, an important article to which I gratefully acknowledge my indebtedness.

Row Management Ltd.,[5] having given leave last March, and it would be unwise for me to say more about it today.

The judge's second task is to make clear findings of primary fact. That may be a difficult task. There may be acute conflicts of evidence between the principal witnesses, often people who were once lovers or friends but have now fallen out and give quite different accounts of conversations years before. The evidence may be one-sided, because one of the principals is dead. In any case the judge is largely in the hands of the advocates as to how usefully the time devoted to cross examination is employed. *Greasley v. Cooke*,[6] *Jennings v. Rice*[7] and *Stack v. Dowden*[8] (the last a constructive trust case) are well-known cases which illustrate these points.

The judge's third task is to evaluate the facts as found in order to answer the crucial question (framed in terms of what is unconscionable, a clumsy mouthful of a word which it is impossible to avoid) in order to determine whether any relief should be granted. This is not the exercise of a discretion, although it certainly calls for judgment. It is a judgmental evaluation of the facts in order to answer a question to which (however difficult some borderline cases may be) there is in theory only one right answer, just as there is only one right answer to the question whether a company director is a person "unfit to be concerned in the management of a company" within the meaning of the *Company Directors Disqualification Act 1986*.[9]

The judge's final task, if he or she gets that far, is to decide on the appropriate remedy. This certainly involves the exercise of a discretion. The well-known statement of Lord Denning M.R. in *Crabb v. Arun District Council,*[10] "[h]ere equity is displayed at its most flexible", has been often—perhaps too often—repeated. The court has a flexible discretion but it must be exercised in a principled way, and the court must be prepared to explain its reasoning. The principles governing the exercise of the remedial discretion are still far from clear. Simon Gardner, a fellow of Lincoln College Oxford, is one of several academic lawyers who are doing valuable work in this area.[11]

May I now come back to the principles governing liability? Here we immediately encounter a preliminary question: is proprietary estoppel a single doctrine, or an aggregation of rules with no more than a family resemblance? Building a house on land which belongs to someone else[12] is a very different factual situation from a lodger undertaking the increasingly onerous task of caring for his elderly landlords in the expectation that he will have a home for life.[13]

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5 [2006] 1 W.L.R. 2964 (C.A.).

6 [1980] 1 W.L.R. 1306 (C.A.) [*Greasley*].

7 [2003] 1 F.C.R. 501 (C.A.) [*Jennings*].

8 [2007] 2 W.L.R. 831 (H.L.) [*Stack*].

9 *Company Directors Disqualification Act 1986* (U.K.), c. 46. See the observations of Hoffmann L.J .in *In re Grayan Building Services Ltd.* [1995] Ch. 241 at 254-255 (C.A.).

10 [1976] Ch 179 at 189 [*Crabb*].

11 See *supra* note 4 and Simon Gardner, "The Remedial Discretion in Proprietary Estoppel—Again" (2006) 122 L.Q.R. 492; also Elizabeth Cooke, "Estoppel and the Protection of Expectations" (1997) 17 L.S. 258; Mark Thompson, "The Flexibility of Estoppel" [2003] Conv. 225; Susan Bright & Ben McFarlane, "Proprietary Estoppel and Property Rights" (2005) 64 Cambridge L.J. 449.

12 *Dillwyn v. Llewelyn* (1862) 4 De. G. F. & J. 517, 45 ER 1284 (C.A.) [*Dillwyn*]; *Inwards v. Baker* [1965] 2 Q.B. 29 (C.A.).

13 *Campbell v. Griffin* [2001] W.T.L.R. 981 (C.A.) [*Campbell*].

One possible answer is that it is a single doctrine, but only if it is stated in terms of such wide generality as to give little idea of what it is really about—of what Lord Hoffmann (in discussing estoppel and legitimate expectation in public law)[14] called "the moral values which underlie the private law concept of estoppel". Those moral values are reflected in that ugly but unavoidable word, "unconscionable".

One very short statement of the general doctrine is in *Elements of Land Law*,[15] to which I acknowledge my debt in preparing this lecture:

> A successful claim of proprietary estoppel thus depends, in some form or other, on the demonstration of three elements:
> - representation (or an 'assurance' of rights);
> - reliance (or a 'change of position'); and
> - unconscionable disadvantage (or 'detriment').

Of course the authors go on to explain each element in detail, and it becomes apparent that the representation may sometimes amount to little more than passive (but conscious) acquiescence in a neighbour's unilateral mistake. As long ago as 1802, Lord Eldon said:[16]

> This Court will not permit a man knowingly though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement.

Many of the 19th century cases are concerned with acquiescence in construction works carried out on other people's land, because of the great boom, during the industrial revolution, first in canal building, and then in railway building.[17]

So the concept of representation (or assurance) is a very broad one. We must also closely examine detrimental reliance (the formula used in Professor Harpum's edition of *Megarry & Wade*,[18] where there is a similar three-part analysis: encouragement or acquiescence; detrimental reliance; and unconscionability). But the first issue of principle that I want to address is whether the representation or assurance must relate to identified land in the ownership of the representor.

The short answer is, I think, that there will almost always be identified land—it is, after all, *proprietary* estoppel that we are talking about. But it has been held that the representation can exceptionally refer to a house to be acquired in the near future,[19] or to an identified cottage and rest of the representor's modest property,[20] or to the business enterprise of a prosperous farmer who, during a period of over 25 years of repeated assurances, was the freehold or leasehold owner, either directly or through

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14 *R v. East Sussex County Council ex parte Reprotech (Pebsham) Ltd.* [2003] 1 W.L.R. 348, at para. 34 (H.L.).

15 Kevin Gray & Susan Francis Gray, *Elements of Land Law,* 4th ed. (New York: Oxford University Press, 2005) at para. 10.174 [*Elements of Land Law*].

16 *Dann v. Spurrier* (1802) 7 Ves. 232, 235-236.

17 See for example Sir John Romilly M.R. in *Duke of Beaufort v. Patrick* (1853) 17 Beav. 60.

18 Charles Harpum, ed., *Megarry & Wade: The Law of Real Property,* 6th ed., (London: Sweet & Maxwell, 2000) at paras. 13-007 [*Megarry & Wade*].

19 *Riches v. Hogben* [1986] 1 Qd. R. 315 S.C. (Queensland) [*Riches*].

20 *Re Basham* [1986] 1 W.L.R. 1490 (C.A.) [*Basham*].

corporate vehicles, of a varying pattern of agricultural land.[21] But it cannot apply to a wholly unspecific promise of "financial security".[22]

The next issue is the present status of Fry J.'s five *probanda* in *Willmott v. Barber*.[23] The short answer is that the *probanda* were only ever intended to apply to one variety of proprietary estoppel, and even in relation to that variety their rigidity has been attenuated. *Elements of Land Law* expresses the view[24] (to my mind convincingly) that cases of proprietary estoppel can be classified either as imperfect gifts (the textbook example being *Dillwyn*[25]) cases of common expectation (the textbook example being *Plimmer v. Mayor of Wellington*[26]) and cases of unilateral mistake (once the commonest but now the rarest category, and the only one to which *Willmott*[27] was ever relevant). Insistence on the *probanda* in other cases may lead either to an unfair result[28] or to their being distorted in order to produce a fair result.[29]

In the recent jurisprudence, cases of common expectation occur most frequently, and that brings us back to the important topic of detrimental reliance. It conceals several difficult points. At what time is detriment to be judged? How much does detriment add to mere change of position? Is an estoppel excluded if the claimant would or might have acted in the same way even in the absence of an assurance?

Take first cases (whether of imperfect gifts or common expectation) in which the claimant has made substantial physical improvements to another's property. In *Dillwyn*[30] the son, in reliance on a written memorandum of gift which had no effect in law, spent £14,000 (at 1853 prices) on building a house and laying out its grounds. He lived there, ostensibly as owner, for two years until his father's death raised the question of title. The son had certainly incurred substantial expenditure, but it was detrimental to him only if he was to be deprived of the property. Until then the character of the expenditure is equivocal. I tried to explore this in my judgment in *Gillett*[31] in a passage which I venture to repeat:

> If in a situation like that in *Inwards v. Baker*,[32] a man is encouraged to build a bungalow on his father's land and does so, the question of detriment is, so long as no dispute arises, equivocal. Viewed from one angle (which ignores the assurance implicit in the encouragement) the son suffers the detriment of spending his own money in improving land which he does not own. But viewed from another angle (which takes account of the assurance) he is getting the benefit of a free building plot. If and when the father (or his personal representative) decides to go back on the assurance and assert an adverse claim then, as Dixon J. put it in ...

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21 *Gillett v. Holt* [2001] Ch. 210 (C.A.) [*Gillett*].
22 See *Lissimore v. Downing* [2003] 2 F.L.R. 308 [*Lissimore*], *infra* text accompanying footnote 43.
23 (1880) 15 Ch. D. 96 [*Willmott*].
24 *Supra* note 15 at para. 10.189.
25 *Supra* note 12.
26 (1884) 9 App. Cas. 699 (P.C.) [*Plimmer*].
27 *Supra* note 23.
28 See *Coombes v. Smith* [1986] 1 W.L.R. 808 [*Coombes*], though arguably the result would have been the same in any case.
29 *Elements of Land Law, supra* note 15 at para. 10.204, instancing *Crabb*, *supra* note 10.
30 *Supra* note 12.
31 *Supra* note 21 at 233. See also *Elements of Land Law, supra* note 15 at para. 10.257, headed "Ambiguity of 'detriment"'.
32 *Supra* note 12.

Grundt v. Great Boulder Goldmines Ltd.,[33] 'if [the assertion] is allowed, his own original change of position will operate as a detriment.'

In the modern authorities the claimant's case is usually founded, not on physical improvement of the property in question, but on the claimant's personal assistance to the defendant (I shall use those labels for the parties even though the estoppel is sometimes relied on by the defendant in a possession action). Such assistance may continue for decades and may take the form of domestic services, help in a business, personal care, and sexual or non-sexual companionship. *Greasley*,[34] *Coombes*,[35] *Grant v. Edwards*,[36] *Maharaj v. Chand*,[37] *Basham*,[38] *Jones v. Watkins*,[39] *Wayling v. Jones*,[40] *Gillett*,[41] *Campbell*,[42] *Lissimore*,[43] *Ottey v. Grundy*,[44] *Powell v. Benney*[45] and *Thorner v. Curtis*[46] are all examples of what I will call "assistance" claims (and I will use "assistance" in this very wide sense). *Grant*[47] is, of course, a "common intention" constructive trust case, but Sir Nicolas Browne-Wilkinson V.C.[48] drew a parallel, which has often been remarked on since, between that type of constructive trust and the "common expectation" type of proprietary estoppel.

It seems to be generally assumed that in assistance claims the claimant, in throwing in his or her lot with the defendant, must incur an immediate and unequivocal detriment. It may consist of some or all of the following elements: giving up the security and contentment of an existing home, job or relationship; giving up other opportunities for one's career or personal life; undertaking domestic or personal services, or working in the defendant's business, for no pay or inadequate pay; and becoming subservient to the defendant's will.

The view expressed by Lord Denning M.R. in *Greasley*[49] (based on two earlier decisions of his own) that detriment need not be proved, has not prevailed. *Gillett*,[50] following observations of Slade L.J. in *Jones*,[51] shows that it is to be interpreted broadly, and need not involve demonstrable financial loss. But the bare fact of a woman leaving her husband to become the mistress of a richer man, even if he promises her a lifetime of happy cohabitation, is hardly detrimental reliance, even if it all ends in tears within a few years. That is the message of *Coombes*[52] and

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33 (1938) 59 C.L.R. 641 at 674-675 (H.C.A.) [*Grundt*].
34 *Supra* note 6.
35 *Supra* note 28.
36 [1986] Ch. 638 (C.A.) [*Grant*].
37 [1986] A.C. 898 (P.C.) [*Maharaj*].
38 *Supra* note 20.
39 26 November 1987, C.A. Transcript 1987/1200 [*Jones*].
40 [1995] 2 F.L.R. 308 [*Wayling*].
41 *Supra* note 21.
42 *Campbell*, *supra* note 13.
43 *Supra* note 22.
44 [2003] W.T.L.R. 1253 (C.A.) [*Ottey*].
45 [2007] EWCA Civ. 1283.
46 [2007] EWCA Civ. 2422.
47 *Supra* note 36.
48 *Ibid.* at 648.
49 *Supra* note 6.
50 *Supra* note 21.
51 *Supra* note 39.
52 *Supra* note 28.

Lissimore,[53] in which the outcome depended in large part on the fact that though there certainly was a change of position there was no detriment. In both cases the claimants seem to have been in unhappy marriages which they were glad to get out of.[54] As the defendant's counsel said in *Coombes*:[55]

> Whenever a woman moves into a house provided by a man, she must have come from somewhere else. ... if the mere fact of that inevitable change were sufficient detriment, there would be a detriment in every case.

Similarly Nourse L.J. said in *Grant*:[56]

> The law is not so cynical as to infer that a woman will only go to live with a man to whom she is not married unless she understands that she is to have an interest in their home.

He suggested that the test was whether the court found "conduct on which the woman could not reasonably be expected to embark unless she was to have an interest in the house."

He went on to instance the wife in *Eves v. Eves*[57] who wielded a 14lb sledgehammer in the front garden, a feat which seems to have found its way into the pleadings in many later cohabitation cases. However in *James v. Thomas*[58] the claimant's claim failed, although she had driven a tipper truck, dug trenches and laid concrete and tarmac. Chadwick L.J. said,[59]

> The true position, as it seems to me, is that she worked in the business, and contributed her labour to the improvements to the property, because she and Mr Thomas were making their life together as man and wife. The cottage was their home: the business was their livelihood. It is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest.

How does this square with the notion that detriment is to be judged at the time the defendant's assurance is repudiated? *Elements of Land Law* points out[60] that in *Commonwealth v. Verwayen*[61] Mason C.J., developing the reasoning of Dixon J. in *Grundt*,[62] identified two distinct types of detriment and said, "the detriment against which the law protects is that which flows from reliance upon the deserted assumption."

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53 *Supra* note 22.

54 Compare *Thwaites v Ryan* [1984] VR 65, 89 in which the Supreme Court of Victoria found no detriment in the claimant "leaving his moribund marriage and moribund tenancy and going to live rent free in the present home of his old friend". *Maharaj*, *supra* note 37 (a Privy Council appeal from Fiji) is perhaps distinguishable because of the importance which the trial judge attached to social housing conditions in Fiji (the claimant had given up security of tenure and if she had been "put out on the street" it would have been with three dependent children).

55 *Supra* note 28 at 816.

56 *Supra* note 36 at 648.

57 [1975] 1 W.L.R. 1338 (C.A.).

58 [2007] EWCA Civ. 1212.

59 *Ibid.,* at para. 36.

60 *Supra* note 15 at para. 10.258.

61 (1990) 170 C.L.R. 374 at 415 (H.C.A.) [*Verwayen*].

62 *Supra* note 33.

In this compressed statement the emphasis is on "deserted". The position is to be assessed when the claimant's reliance on the defendant's assurance is falsified. The disappointment of expectations, however bitter when it occurs, cannot establish an estoppel unless there has been a change of position on reliance on an assurance, and it would be unconscionable for the defendant to get away with disregarding his assurance. Moreover *Sledmore v. Dalby*[63] shows that such reliance may give rise to a potential equity which is however fully satisfied before the claimant's enjoyment is disturbed.

In other assistance cases the concept of detrimental reliance has raised a question of causation (which may sometimes be little more than a different way of putting the last point): must the claim fail if the claimant would (because of ties of blood or affection) have continued to provide assistance even in the absence of any assurance as to future benefit? That was an issue in *Greasley*,[64] *Wayling*[65] and *Campbell*[66] (and, to a limited extent, *Lissimore*[67]). The principle appears to be that proof of an assurance by the defendant followed by compliant assistance by the claimant shifts the burden of proof (of non-reliance) on to the defendant, and that the assurance need not be the only operative cause of the assistance. It can co-exist with feelings of love, affection, duty, or simply common humanity (Mr. Campbell, the lodger who became an unpaid part-time carer, said in cross-examination in *Campbell*[68] that he would not have been prepared to walk by his elderly landlords and leave them lying on the floor.)

I would like to say a bit more about *Lissimore*.[69] It has not, I think, received a great deal of academic comment and it deserves to be better known, because of the exceptional quality (if I may say so) of the judgment of His Honour Judge Norris Q.C. (as he then was) and the human interest of the story which it tells. I cannot do justice to either in a brief summary but I can perhaps arouse your curiosity by saying that the story begins when the claimant, then a 25 year old married pharmacist's assistant, went with a woman friend to a "we hate men" evening at a country pub. There she met the defendant, then a 41 year-old retired heavy-metal star whom she took for a farmer. This pleased him as he had acquired a mansion house and 380-acre estate in Shropshire, he saw himself as the Lord of the Manor, and he hoped to avoid what he called "the occupational hazard of the money-grows-on-trees rock star". The story ends with Miss Lissimore claiming joint ownership of the whole of the estate (valued at £2.5m) and backing her claim by registering a caution against it. Her claim (later reduced to a lump sum in excess of £150,000) was dismissed.

The judgment of Judge Norris is to my mind exemplary. It sets out the legal principles, it makes clear and detailed findings of fact, and it evaluates them (as regards assurances, detrimental reliance and possible unconscionability) realistically and proportionately. It is full of dry humour but never pokes fun at either litigant.

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63 (1996) 72 P. & C.R. 196 (C.A.) [*Sledmore*].
64 *Supra* note 6.
65 *Supra* note 13.
66 *Supra* note 13.
67 *Supra* note 22.
68 *Supra* note 13.
69 *Supra* note 22.

The judge cited the observation of Millett J. in *Windeler v. Whitehall*[70] (another case of considerable human interest):

> Any wife or mistress would do the same. Only a lawyer versed in the authorities but lacking all sense of proportion would consider that such conduct gave her any kind of proprietary interest in the house.

By the time the reader gets to the end of the judgment the dismissal of the claim appears not as an exercise of palm-tree justice, but as a principled, reasoned, and inevitable conclusion.

The last topic I want to address (and possibly the most important and difficult topic of all) is the exercise of the remedial discretion. Its exercise should also be principled and reasoned, but I think we still have some way to go in establishing the principles. I tried to address this question in my judgment in *Jennings*[71], but I have to say that my research was rather sketchy, and my judgment has received less severe comment than it probably deserved.[72]

The main focus of the debate is on whether the remedy granted to a successful claimant should based on his "expectation interest"—what the claimant believed he or she was going to get as a result of the defendant's assurance –or the "reliance interest"—what it cost the claimant, in terms of detriment, to change position in reliance on the assurance. This question has been considered in some important Australian cases, including a well-known trio of cases in the High Court: *Waltons Stores*[73] in 1987, *Verwayen*[74] in 1990, and *Giumelli*[75] in 1999. The general tendency of these authorities (although they do not speak with a single voice) is to limit the claimant to his reliance interest unless the more generous remedy of the expectation interest is the only way to do justice. The rationale is, as McHugh J. said in *Verwayen*, in a judgment dissenting on the facts[76]:

> Often the only way to prevent the promisee suffering detriment will be to enforce the promise. But the enforcement of promises is not the object of the doctrine of equitable estoppel. The enforcement of promises is the province of contract. Equitable estoppel is aimed at preventing unconscionable conduct and seeks to prevent detriment to the promisee.

In the same case Deane J. gave an example by way of *reductio ad absurdum*:[77]

> An obvious example would be provided by a case in which the party claiming the benefit of an estoppel precluding the denial of his ownership of a million dollar block of land owned by the allegedly estopped party would sustain no detriment beyond the loss of one hundred dollars spent on the erection of a shed.

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70 [1990] 2 F.L.R. 505 at 511.
71 *Supra* note 7.
72 In particular, the two most recent articles, *supra* note 11.
73 *Waltons Stores (Interstate) Ltd. v. Maher* (1987) 164 C.L.R. 387 (H.C.A.).
74 *Supra* note 61.
75 *Giumelli v. Giumelli* (1999) 196 C.L.R. 101 (H.C.A.) [*Giumelli*].
76 *Supra* note 61 at 501.
77 *Ibid*., at 441.

But in *Giumelli*[78] the High Court unanimously held that the expectation interest could sometimes be appropriate. Indeed recent authority in Australia suggests that *Giumelli*[79] is now being liberally interpreted, and the gap between the English and Australian approaches may be narrowing; citations can be found suggesting that each jurisdiction considers itself to be more liberal than the other.[80]

In short, the Australian approach seems to favour a remedy that is proportionate to the detriment suffered. The strongest support for that approach, in recent English cases, is the judgment of Hobhouse L.J. in *Sledmore*.[81] But the same approach can be found in some of the old cases such as *Crabb*[82] ("the minimum equity to do justice to the plaintiff") and indeed *Plimmer*[83] ("[t]he court must look at the circumstances in each case to decide in what way the equity can be satisfied").

Against that, there is a considerable body of English authority which appears to treat the vindication of the claimant's expectation interest as the natural and normal remedy. It includes three comparatively modern decisions of the Court of Appeal, *Griffiths v. Williams*,[84] *Burrows v. Sharp*[85] and *Baker v. Baker*[86] (although in none of those cases was precise vindication possible, in the first case because of the operation of the *Settled Land Act 1925*[87] and in the other two because it had become impossible for the parties to live together in the same house). Moreover McHugh J.'s denial that the equitable doctrine is aimed at the enforcement of promises may be open to debate. Under the comparable equitable doctrine of part performance the defendant was "really charged upon the equities resulting from the acts done," in the words of Lord Selborne in *Maddison v. Alderson*;[88] nevertheless the Court of Chancery vindicated the claimant's equity, where it was made good, by granting specific performance of the oral contract.

In *Jennings*[89] I made a broad distinction between what could be loosely called "bargain" and "non-bargain" cases, describing the former as follows:[90]

> Sometimes the assurances and the claimant's reliance on them, have a consensual character falling not far short of an enforceable contract ... in a case of that sort both the claimant's expectations and the element of detriment to the claimant will have been defined with reasonable clarity ... in a case like that the consensual

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78 *Supra* note 75 at paras. 33 and 63.

79 *Ibid.*

80 *Henderson v. Miles (No.2)* [2005] N.S.W.S.C. 867; *Sullivan v. Sullivan* [2006] N.S.W.C.A. 312; *Donis v. Donis* [2007] V.S.C.A. 89. I am grateful to Professor Kevin Gray for directing me to these and other recent Australian cases.

81 *Supra* note 63 at 208-209 ("it would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption").

82 *Supra* note 10 at 198, *per* Scarman L.J.

83 *Supra* note 26 at 714, *per* Sir Arthur Hobhouse.

84 (1977) 248 E.G. 947 at 949-950 (C.A.).

85 (1989) 23 H.L.R. 82 at 92 (C.A.).

86 [1993] 2 F.L.R. 247 (C.A.).

87 *Settled Land Act, 1925* (U.K.), 15 & 16 Geo. V., c. 18. [*Settled Land Act 1925*].

88 (1883) 4 App. Cas. 467 at 475; note that in *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129 at 171, Lord Kingsdown referred by analogy to *Gregory v. Mighell* (1811) 18 Ves. 328, an early part performance case.

89 *Supra* note 7.

90 *Ibid.*, at para. 45.

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

This suggested classification, if valid, would have the effect of subdividing the "common expectation" category, and does not fit easily with the categories of imperfect gift[91] and unilateral mistake. Gardner has rightly observed that few cases fall very distinctly on one or other side of the line.

I am not here today either to defend or to abandon what I said in *Jennings,*[92] and nothing I say can affect such authority as it has as a precedent. But I am sure I would have done better to refer to a spectrum rather than a dividing line. Very few of the "assistance" cases involve anything like a clear bargain at the outset of the relationship. That is not how human nature works. The claimant (the assister) and the defendant (the assisted) need to find out by experience how they get on. But over the years an understanding develops, sometimes fairly precise and sometimes imprecise, as to what is expected of the assister, and as to the quid pro quo which the assister can expect to receive sooner or later. What is expected often becomes more onerous over the years, as the assisted person becomes increasingly frail (as in *Campbell*[93] and *Jennings*[94]) or alcoholic (as in *Ottey*[95]) or unable or unwilling to work in his business (as in *Wayling*[96] or to some extent *Gillett*[97]). The *quid pro quo* may be defined precisely (possibly even in writing, as in *Ottey*[98]). It may change over the years as the defendant's business changes its location (as in *Wayling*[99] and *Gillett*[100]). On the other hand it may be highly ambiguous (as in *Jennings*[101]).

The more ambiguous the *quid pro quo*, and the more disproportionate it is in relation to the claimant's detriment, the more likely the court will be to grant a remedy less generous than the expectation interest. Instead the court will probably aim at making good the claimant's detriment. In assistance cases the detriment may be extremely difficult to quantify in money terms. In cases of this sort it is, I think, very unusual for there to be expert (or any) evidence as to the remuneration and terms of service of full-time or part-time carers.[102]

So I conclude, I am afraid, in a very inconclusive way. Gardner rightly stresses that, in order to be compatible with the rule of law, the court's discretion must have an aim fixed by law; it must be necessary; and it must be susceptible to audit. There is still a lot of ground to be covered in fully achieving these objectives in connection

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91 But consider McPherson J. in *Riches, supra* note 19: "There is of course a sense in which all agreements made or promises given without consideration are imperfect gifts of the benefits they purport to confer".

92 *Supra* note 7.

93 *Supra* note 13.

94 *Supra* note 7.

95 *Supra* note 44.

96 *Supra* note 40.

97 *Supra* note 21.

98 *Supra* note 44.

99 *Supra* note 40.

100 *Supra* note 21.

101 *Supra* note 7.

102 But see the Australian case of *Public Trustee v. Wadley* (1997) 7 Tas. L.R. 35; and in *Thorner v. Curtis* [2007] EWHC 2422 there was detailed evidence about levels of agricultural wages.

with proprietary estoppel. But recognising that there are important questions of principle to be answered is a step towards establishing that the 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. Nevertheless the individual judge's skill and care in finding the facts clearly, and evaluating them realistically and proportionately, will always be essential to the proper application of the doctrine.