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PROPRIETARY ESTOPPEL AND THE *LAND TITLES ACT*

TEO KEANG SOOD*

This article seeks to demonstrate that under the *LTA* there are no impediments to the satisfaction of an equity based on a claim in proprietary estoppel and its enforceability against third parties. That there are problems in these two respects is misconceived in light of case law and the relevant statutory provisions in the *LTA*. As for the satisfaction of the equity, it is argued that a principled approach must be adopted notwithstanding the wide discretion conferred on the courts on the matter.

I. INTRODUCTION

It is trite that the three main elements required for a claim based on proprietary estoppel are (i) a representation or assurance made to the claimant; (ii) reliance on it by the claimant; and (iii) detriment to the claimant in consequence of his or her reliance.[1] Lord Walker in the case of *Cobbe v Yeoman's Row Management Ltd*[2] had, nevertheless, cautioned that "If the... elements [of representation, assurance and detriment] appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again."[3] As Sundaresh Menon JC (as he then was) helpfully explained in *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd*,[4] the principle that underlies the doctrine of proprietary estoppel is unconscionability.[5] In considering this, it is relevant to examine all the circumstances of the case, although these are considered by reference to the three elements of representation, reliance and detriment.[6]

The application of the remedy of proprietary estoppel in the context of the Torrens system of title registration operative in Singapore, and its relationship with the latter, will be examined. The Torrens system, provided for in the *Land Titles Act*[7], is designed to provide for simplicity in land dealings as well as to give certainty and

* Professor, Faculty of Law, National University of Singapore.

1 Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (New York: Oxford University Press, 2009) at para 9.2.8; Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade*: *The Law of Real Property*, 8th ed (London: Sweet & Maxwell, 2012) at para 16-001.

2 [2008] 1 WLR 1752 (HL) [*Cobbe*].

3 *Ibid* at para 92.

4 [2007] 1 SLR(R) 292 (HC) [*Hong Leong*].

5 *Ibid* at para 171.

6 *Ibid* at para 173.

7 (Cap 157, 2004 Rev Ed) [*LTA*].

security of title.[8] Equitable interests are recognised[9] and given protection under the system of caveats.[10]

It has been suggested that the application of the doctrine of proprietary estoppel in the Singapore Torrens system poses various difficulties as follows:

> Registered land presents problems in relation to both satisfaction of the equity and enforceability against third parties. The *Pascoe v Turner* option of ordering a transfer of the freehold in favour of the claimant seems incompatible with the indefeasible title of the registered proprietor, particularly in the light of the statements of the Court of Appeal in *United Overseas Bank v Bebe bte Mohammad* regarding personal equities.[11]

The "problems", as identified above, pertain to (i) the satisfaction of the equity; and (ii) the enforceability of the equity against third parties. It will be demonstrated below that the doctrine of proprietary estoppel does not pose difficulties in these two respects when applied in the Singapore Torrens system.

II. Torrens System Does Not Abrogate Application of Principles of Equity

It is trite that the Torrens system does not oust the court's jurisdiction to do equity in appropriate cases. This is clear from the observations of the Privy Council in the following two cases. In *Frazer v Walker*,[12] a New Zealand case on appeal to the Privy Council, Lord Wilberforce, in delivering the judgment of the Board, had observed that the "... principle [of indefeasibility of title] in no way denies the right of a plaintiff to bring against a registered proprietor [by reason of the latter's own conduct] a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant."[13] Closer to home, in the later Malaysian case of *Oh Hiam v Tham Kong*,[14] which went on appeal to the Privy Council, Lord Russell took the opportunity to reiterate that the principle of indefeasibility "... under the Torrens system of conveyancing, while operating effectively and indeed necessarily for its effectiveness as between independent rival claimants to a property, in no way interfered with the ability of the court, exercising its jurisdiction *in personam* to insist upon proper conduct in accordance with the conscience which all men should obey." Lord Russell had further observed that the Torrens system is designed to "provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience."[15]

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8 See *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at paras 91, 92 (CA) [*Bebe*].

9 See definition of "interest" in *LTA*, *supra* note 7, s 4(1).

10 *LTA*, *supra* note 7, s 115(1).

11 WJM Ricquier, *Land Law*, 5th ed (Singapore: LexisNexis, 2017) at para 6.7.18.

12 [1967] 1 AC 569 (PC) [*Frazer*].

13 *Ibid* at 585. In this regard, see also the Australian High Court case of *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 637 (HC).

14 [1980] 2 MLJ 159 at 165 (PC) [*Oh Hiam*].

15 *Ibid* at 164.

The above statements by the Privy Council testify to the fact that principles and doctrines of equity are very much applicable in the Torrens system in appropriate cases, the Singapore Torrens system being no exception. Notwithstanding that the Singapore Court of Appeal in *Bebe*[16] had cautioned that the statements in *Frazer* and *Oh Hiam* do not necessarily apply to the *LTA*, the Court of Appeal in the same case did not disapprove absolutely of the application of principles of equity or personal equities in the Singapore Torrens system. Instead, it advised that Singapore courts "should be *slow* to engraft onto the *LTA*"[17] principles or doctrines of equity not specifically provided for in the statutory exceptions to indefeasibility in sections 46(1) and (2) of the *LTA* so as to reduce uncertainty and to give finality in land dealings. In fact, the Court of Appeal conceded as much that the statutory exceptions to indefeasibility in the *LTA* are not exhaustive of all claims.[18] There is, accordingly, no absolute bar or prohibition to the application of equity in the Singapore Torrens system in appropriate cases.

III. Protection at Contract Stage or On Registration of Title

Section 47 of the *LTA* is concerned with the position of a prospective purchaser who is dealing with the registered proprietor at the contract stage of the transaction. Subsection (3) of section 47 provides that: "The protection afforded by this section [*ie* section 47] shall commence at the date of the contract or other instrument evidencing such dealing." The protection mentioned is to be found in section 47(1) where a prospective purchaser, who is not guilty of fraud,[19] when dealing with the registered proprietor, is not "required or in any manner concerned:

(a) to inquire or ascertain the circumstances in or the consideration for which the current proprietor or any previous proprietor is or was registered;
(b) to see to the application of the purchase money or any part thereof; or
(c) to be affected by notice (actual or constructive) of any trust or other unregistered interest, any rule of law or equity to the contrary notwithstanding."

The effect of section 47(3) is that a prospective purchaser who finds the land register free from caveats, can safely enter into his contract which will then overreach the earlier unregistered interest.[20] This is in line with the principle that "the register is everything"[21] and that the Torrens system rewards the diligent and not the indolent.[22]

Unfortunately, the effect of section 47(3) as interpreted by the Court of Appeal in *Bebe* in relation to the question of indefeasibility has given rise to difficulties. As the

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16 *Bebe*, *supra* note 8 at para 78.
17 *Ibid* at para 91 [emphasis added].
18 *Ibid*.
19 *LTA*, *supra* note 7, s 47(2) provides that for "the purpose of subsection (1) [of section 47], the knowledge that any unregistered interest is in existence shall not of itself be imputed as fraud."
20 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance, 1956 of the State of Singapore* (Singapore: Govt Printer, 1961) at 93, 94.
21 See *Waimiha Sawmilling Company, Limited (in liquidation) v Waione Timber Company, Limited* [1926] 1 AC 101 at 106 (PC); *Fels v Knowles* [1906] 26 NZLR 604 at 620 (CA); *Tai Lee Finance Co Sdn Bhd v Official Assignee* [1983] 1 MLJ 81 at 84 (CA).
22 *United Overseas Finance Ltd v Mutu Jeras* [1989] 1 SLR(R) 446 at para 12 (HC).

Court of Appeal in *Bebe* said:

> Section 47(3) goes further in providing that the protection afforded by s 46(1) *commences at the date of the contract* or other instrument evidencing such dealing, subject only to the proprietor's title being defeasible by overriding interests in s 46(1) itself and the exceptions in ss 46(2)(*a*)–46(2)(*e*). By implication, and logic, any such event, act or omission prescribed by ss 46(1) and 46(2) as capable of defeating the title of the registered proprietor *must exist before or at the time the instrument is registered*, as once registered the proprietor's title becomes indefeasible.[23]
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> . . .
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> This being the statutory framework provided by ss 46 and 47 of the *LTA*, we are of the view that any fraud, or personal claim, or defeasible condition, or event or overriding interest that can defeat the title of the registered proprietor must *exist before and at the time* the contract is entered into or at the time of registration of the instrument. Any personal equity claim that arises *after* the registered proprietor has obtained his protection under s 47(3) or s 46(1) of the *LTA* cannot affect his right to an indefeasible title as giving effect to it would be inconsistent with ss 46(1) and 47(3) itself.[24]

In essence, the Court of Appeal in *Bebe* was of the view that a claim in equity, among others, if it is to be effective in defeating the interest of a prospective purchaser or title of a registered proprietor, must have existed *before and at the time* the contract is entered into or *at the time of registration* of the title or interest respectively. To construe otherwise *after* the relevant parties have obtained the protection under section 47(3) or section 46(1) of the *LTA* is to go against, and be inconsistent with, the legislative intent laid down in these provisions.

The one obvious observation that can be made is that the protection referred to in section 47(3) is that provided in section 47(1) itself given the words "this section" employed in section 47(3) and not section 46(1) as the Court of Appeal in *Bebe* had mistakenly thought.[25] In addition, both section 47 and section 46(1) are concerned with different scenarios *ie* section 47 deals with a situation at the contract stage (where registration of the title or interest has yet to take place) while section 46(1) deals with a situation where registration has already taken place. In the latter situation involving section 46(1), the protection by way of the quality of indefeasibility is *prima facie* conferred[26] on the title or interest that is registered.

The interpretation of the Court of Appeal in *Bebe* would also give "permanent" protection to a prospective purchaser irrespective of his or her conduct *after* the

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23 *Bebe*, *supra* note 8 at para 93 [emphasis in original].

24 *Ibid* at para 94 [emphasis in original].

25 The Court of Appeal in *Bebe*, *supra* note 8 at para 93, had stated thus: "Section 47(3) goes further in providing that the protection afforded by s 46(1)...". *Cf* the language in s 47(3): "The protection afforded by *this section* [*ie* section 47] shall commence at the date of the contract or other instrument evidencing such dealing." [emphasis added].

26 In *Tay Jui Chuan v Koh Joo Ann* [2010] 4 SLR 1069 at para 24 (CA) and *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286 at para 14 (CA), the Singapore Court of Appeal held that a registered proprietor is entitled to rely on the presumption of indefeasibility of title to the property which is good against the whole world until it is proved otherwise.

conclusion of the contract or *after* registration of his or her title or interest. The prospective purchaser or registered proprietor might have acted unconscionably thereafter. It is important to note that a "purchaser" is the strongest person under the *LTA*.[27] It is telling that the word "purchaser" is not used in both section 47 and sections 46(1) and (2). This would mean that the position of the prospective purchaser after the conclusion of the contract or the title subsequently obtained by the registered proprietor (unless they qualify as a "purchaser") is still open to attack in appropriate cases, such as where proprietary estoppel has arisen in favour of a claimant in relation to the property. For example, at the time of the contract, the prospective purchaser may have given an assurance to the claimant that he or she will allow the claimant to remain on the property pursuant to the then existing arrangement with the owner of the land. However, after the conclusion of the contract or registration of the title, the prospective purchaser or registered proprietor, as the case may be, acted unconscionably and reneged on the assurance to the detriment of the claimant who had relied on it. Where the requisite elements are present and satisfied, a claim based on proprietary estoppel could be successfully invoked by the claimant in the circumstances. To deny the claim would be an affront to fairness and justice and to allow the proprietor to hide behind the registered title which is not a true reflection of the state of affairs concerning the land, a point further canvassed below.

IV. Proprietary Estoppel and the System of Caveats

The nature of a claim based on proprietary estoppel is succinctly explained by Lord Walker in *Stack v Dowden*[28] as follows:

> Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a 'mere equity'.[29]

Given the nature of such a claim, the issue which arises is how then does a claimant protect an inchoate proprietary estoppel claim in equity under the *LTA* against the registered proprietor or a third-party purchaser?

As against the registered proprietor, the following difficulties are encountered. As noted in *Stack v Dowden* above, a claim in proprietary estoppel is only a mere equity.[30] Since the circumstances giving rise to a proprietary estoppel claim only raise a mere inchoate equity *ie* a right in favour of the claimant pending its "crystallisation" or pronouncement by the court by the grant of a remedy[31] which may not necessarily

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[27] A "purchaser" is defined in *LTA*, *supra* note 7, s 4(1) to mean "a person who, in good faith and for valuable consideration, acquires an estate or interest in land, and includes a mortgagee, chargee and lessee. . . ". See also *LTA*, *ibid*, s 157(1) which reads: "*Notwithstanding anything in this Act*, no purchaser who has become a proprietor shall be subject to action for the recovery of land or of money on the plea that his vendor, or any predecessor in title, may have acted in bad faith." [emphasis added].

[28] [2007] 2 AC 432 (HL).

[29] *Ibid* at 37. As for the main differences between proprietary estoppel and constructive trusts, see *Low Heng Leon Andy v Low Kian Beng Lawrence* [2013] 3 SLR 710 at para 28 (HC) [*Andy Low (HC)*].

[30] Albeit proprietary in character (see Gray & Gray, *supra* note 1 at para 9.2.88. "Even if the court holds the equity to be satisfied not by the recognition of any proprietary interest in the land but by a mere order for money compensation. . . , this too demonstrates the infinitely gradable nature of the concept of property.", *ibid* at n 6).

[31] See *Andy Low (HC)*, *supra* note 29 at para 44.

involve the recognition of any proprietary interest in the land, the claimant would, in the meantime, have no interest in the land to protect his or her right. Further, being a mere inchoate equity, a claim in proprietary estoppel does not amount to an "interest" in land which can support the entry of a caveat under section 115(1) of the *LTA*. "Interest", in relation to land, is further defined in the *LTA*, section 4(1) to mean "any interest in land recognised as such by law, and includes an estate in land."

One way out of this conundrum is to consider coming within the extended meaning of a caveatable interest provided in the *LTA*, section 115(3)(b) which reads as follows:

> For the purposes of this Part, and without limiting its generality, a reference to a person claiming an interest in land shall include a reference to any of the following persons:
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> . . .
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> (b) a person who has obtained an injunction in respect of an estate or interest in land.

The claimant would first have to get an injunction from the court to protect the claim and then lodge a caveat under section 115(1).

Another approach is for the claimant to lodge a caveat, as a practical matter, under section 115(1) to stall any attempt by the registered proprietor to transfer the property to defeat the former's claim. The Registrar is not concerned to enquire whether or not the caveator's claim is justified.[32] The rationale for this is because of the role which the system of caveat is designed to play in the Torrens system, namely, for the speedy interim protection of claims to interests in land that are alleged by the caveator but not yet proved lest they be defeated by subsequently created registered interests.[33]

In employing this approach, there is the fear that the caveator (claimant) may be held liable to pay compensation to the registered proprietor in the event that the caveat is ultimately ordered removed by the court. However, the Singapore Court of Appeal in *Ho Soo Fong v Standard Chartered Bank*[34] has observed that ". . . the issue is whether the caveator lodged the caveat without an honest belief based on reasonable grounds that a caveatable interest exists."[35] In light of *Ho Soo Fong*, a caveator will not be held liable to pay compensation under the *LTA*, section 128(1) if he has an honest belief based on reasonable grounds that he has an interest in the property to support the entry of a caveat.

As against a third-party purchaser, the *LTA*, section 95(2) provides that ". . . in any case where a licence relating to the use or enjoyment of land is by law binding on assigns of the licensor, the licensee thereunder shall be deemed to have an interest in the land for the purposes of section 115." An assign may be bound in law by way of a claim based on proprietary estoppel. Thus, where a third-party purchaser is bound by a proprietary estoppel claim on grounds of unconscionable conduct, *LTA*

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32 *LTA*, *supra* note 7, s 117(5).

33 Note, however, that *LTA*, *supra* note 7, s 120(1) strikes a proper balance between protecting the interests of the caveator (claimant) and that of the caveatee (registered proprietor) in the matter.

34 [2007] 2 SLR(R) 181 (CA) [*Ho Soo Fong*].

35 *Ibid* at para 35. Compare the more restrictive approach taken in the earlier cases of *Tan Soo Leng v Wee Saktu & Kumar Pte Ltd* [1993] 2 SLR(R) 741 (HC) and *Eng Bee Properties Pte Ltd v Lee Foong Tatt* [1993] 2 SLR(R) 778 (HC).

section 95(2) can be invoked by the claimant to lodge a caveat against the former. Where the third-party purchaser has already obtained registration of the property, the caveat lodged will prevent him or her from further transferring the property to another purchaser who may have bought the property in good faith which will defeat the claimant's interest. The caveat will remain until the latter's claim is resolved in court.

A final matter worth noting is that in *Re Sharpe (A Bankrupt)*,[36] the court made it clear that a claimant's equity in the property based on proprietary estoppel does not arise for the first time when the court declares it to exist. The equity would have arisen at the time of the relevant transaction in order for the claimant to have any right the breach of which can be remedied.[37] The court's order merely operates to backdate the claimant's equity to the time when the proprietary estoppel first arose.[38]

V. Ascertaining the Appropriate Remedies in Proprietary Estoppel and the Position in the *Land Titles Act*

Where the circumstances giving rise to a proprietary estoppel claim occur, the court has an extremely wide discretion to formulate a remedy which is appropriate in the circumstances to satisfy the inchoate equity raised so as to do justice to the claimant. A proprietary estoppel claim need not necessarily result in a proprietary remedy; a personal remedy can also be awarded[39] as the equity which has arisen may be satisfied by various means. Given the wide discretion conferred on the courts and depending on the circumstances of the case, the remedies to be granted can range from specific enforcement of the original promise of rights to mere monetary compensation. As Sundaresh Menon JC (as he then was) had observed in *Hong Leong*:[40]

> [The remedy] may involve giving effect to the common expectation... or limiting the relief so as to preserve a degree of proportionality between the detriment and the relief... or to award monetary relief... It may even be found that the equity had been satisfied by enjoyment and was therefore exhausted...[41]

The approach of the courts in deciding on the appropriate relief to be granted is premised on the following principles, namely, to award the minimum right or interest necessary to do justice between the parties[42] and that there should be proportionality between the expectation, the detriment and the remedy to be granted.[43]

As will be seen in the cases discussed below, the principle of minimum equity to do justice between the parties does not mean granting the least valuable relief or

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36 [1980] 1 WLR 219.

37 *Ibid* at para 225H.

38 See Gray & Gray, *supra* note 1 at para 9.2.89.

39 See *Andy Low (HC)*, *supra* note 29 at para 34.

40 *Hong Leong*, *supra* note 4.

41 *Ibid* at para 249. For cases where the equity was held to have been exhausted, see *Sledmore v Dalby* (1996) 72 P & CR 196 (CA) and *Chiam Heng Luan v Chiam Heng Hsien* [2007] 4 SLR(R) 305 (HC).

42 See, for example, *Gillett v Holt* [2000] 3 WLR 815 at 840 (CA); *Pascoe v Turner* [1979] 1 WLR 431 at 438 (CA) [*Pascoe*].

43 See, for example, *Jennings v Rice* [2003] 1 P & CR 100 at paras 36-38 (CA) [*Jennings*]; *Hong Leong*, *supra* note 4 at para 252.

remedy to the claimant. What it means is that the courts will do the minimum required to satisfy the maximum extent of the equity and do justice between the parties. Thus, if a transfer of the property is the minimum that must be granted to the claimant in the circumstances so as to satisfy the equity, then that remedy will be ordered by the court. But the court does not necessarily have to award an interest in the land to the claimant. Instead, the remedy of monetary compensation for the detriment suffered by the claimant might be sufficient in the circumstances. As the primary task of the court is to do justice by rectifying the unconscionability which has arisen, the remedy awarded must also be proportionate[44] after taking into account all relevant factors to ensure there is proportionality between the expectation and the detriment suffered. For the court to order a disproportionate remedy to rectify the unconscionability which has arisen would be inequitable and unjust in the circumstances.

There is a debate as to the basis of the remedy awarded in cases involving proprietary estoppel, namely, whether the remedy should be based on the expectation or reliance measure.[45] This is also recognised by the Court of Appeal in *Low Heng Leon Andy v Low Kian Beng Lawrence*.[46] The main focus of the debate is whether the remedy granted to a successful claimant should be based on his or her (i) expectation interest *ie* what the claimant believed he or she was going to get as a result of the defendant's assurance; or (ii) reliance interest *ie* what it cost the claimant, in terms of detriment, to change position in reliance on the assurance. The High Court in *Lim Chin San Contractors Pte Ltd v Shiok Kim Seng*[47] had this to say of the expectation or reliance-based approach:

> When awarding monetary compensation as a remedy for a proprietary estoppel claim, the court could adopt either an expectation-based approach or a reliance-based approach in quantifying the compensation, depending on the facts of each case. The difference is that the expectation-based approach looks to the plaintiff's position had the representations been carried through, whereas the reliance-based approach looks to the plaintiff's position had the defendant not made the representations.[48]

In this connection, in the beginning of this paper by way of "Introduction", it was noted that the three main prerequisites necessary for a claim in proprietary estoppel are (i) a representation made or assurance given by the defendant to the claimant; (ii) reliance by the claimant on the representation or assurance; and (iii) some detriment

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44 *Andy Low (HC)*, *supra* note 29 at para 26.

45 Lord Walker, "Which Side 'Ought to Win'?: Discretion and Certainty in Property Law" (2008) 6:3 Trust Q Rev 5; Simon Gardner, "The Remedial Discretion in Proprietary Estoppel – Again" (2006) 122 Law Q Rev 492. See also John Mee, "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in Martin Dixon, ed, *Modern Studies in Property Law*, vol 5 (Oxford: Hart Publishing, 2009) at 415.

46 [2018] SGCA 48 at para 21 [*Andy Low (CA)*].

47 [2012] 3 SLR 595 (HC) [*Lim Chin San (HC)*].

48 *Ibid* at para 8. It would appear that the High Court may not be correct in its explanation of the reliance-based approach if in stating that "had the defendant not made the representations" it meant that there was no representation, assurance or acquiescence on the facts. This is because a proprietary estoppel claim must first be successfully established (which would require there to be a representation, assurance or acquiescence) before the question of the appropriate remedy to satisfy the equity, whether by way of the expectation or reliance measure, can arise.

incurred by the claimant as a consequence of that reliance, which together make it unconscionable in the circumstances for the defendant to insist on his or her strict legal rights. Lord Scott in *Thorner v Major*[49] further clarified that "... the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity."[50]

The starting point to found a claim in proprietary estoppel, as can be seen above, is that there has to be a representation or assurance, either by words or conduct, on the part of the defendant. A claim in proprietary estoppel will not succeed if there is no representation or assurance established in the first place. This can be seen in the case of *AG of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd*[51] where the Hong Kong government negotiated with the Hong Kong Land ("HKL") group to acquire some flats in a building owned by the latter in exchange for the government granting some Crown land in return. The exchange of the properties was agreed in principle but subject to contract. It was common ground that the negotiations did not result in a contract. The government took possession of the flats and spent money upon them. The government allowed the HKL group to enter the Crown land and to demolish buildings upon it. Subsequently, the HKL group decided to withdraw from the negotiations. It was contended that every action of the government and every action of the HKL group after the date of the agreement in principle served to create or encourage a belief in the government that the agreement in principle would be carried into effect. The actions taken by the government in that belief were seriously detrimental in a way which could not be remedied. Accordingly, it was unconscionable for the HKL group to withdraw from the agreement in principle and they were estopped from so doing.

In finding for the HKL group, Lord Templeman, in delivering the judgment of the Privy Council, accepted that the government acted to their detriment and to the knowledge of the HKL group in the hope that the latter would not withdraw from the agreement in principle. But in order to found an estoppel, the government must go further to show that (i) the HKL group created or encouraged a belief or expectation on the part of the government that the HKL group would not withdraw from the agreement in principle and (ii) that the government relied on that belief or expectation. The Privy Council held that the government failed on both counts. While there was no doubt that the government acted in the not unreasonable hope that the agreement in principle would eventually be followed by the achievement of legal relationships in the form of grants and transfers of property, at no time did the HKL group indicate expressly or by implication that they had surrendered their right to change their mind and to withdraw from the agreement.[52] That right, expressly reserved and conferred by the government, was to withdraw at any time before "document or documents necessary to give legal effect to this transaction are executed and registered." In light of the right of the HKL group to resile from the agreement which was known to the government and based on the evidence, it could

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49 [2009] 1 WLR 776 (HL).

50 *Ibid* at para 15.

51 [1987] 1 AC 114 (PC).

52 *Ibid* at 124.

not be said (i) that the HKL group had encouraged or allowed a belief or expectation on the part of the government that the HKL group would not withdraw from the agreement, or (ii) that the government had relied on such expectation.[53] In the result, no estoppel operated to prevent the HKL group from exercising its legal right to refuse to execute the documents and to withdraw from the transaction.

Where a representation or assurance, together with the other elements, can be established, the court will then "crystallise" the inchoate equity which has arisen by crafting the appropriate remedy to satisfy the equity, bearing in mind the guiding principles of applying minimum equity and ensuring proportionality discussed above. Thus, if the expectation interest that the claimant believed he or she was going to get as a result of the defendant's assurance is made out in the circumstances, be it, for example, the transfer of the property or just a grant of monetary compensation, then the remedy to be awarded should be based on the expectation measure if that is the minimum equity to do justice between the parties and is proportional in this regard. That this is the correct approach to take can be seen in the following cases.

In *Pascoe*,[54] the plaintiff, a businessman, became acquainted with the defendant, a widow with an invalidity pension and a modest amount of capital. Their friendship further developed and the defendant moved into the plaintiff's house as his housekeeper. They began to live together as man and wife. Later, the plaintiff bought another house which they then moved in and continued to live there as man and wife. He gave her a housekeeping allowance but she used her own money to buy her clothes. Subsequently, the plaintiff began an affair with another woman. The plaintiff assured the defendant that the house was hers and everything in it. The defendant continued to stay on in the house and in reliance upon the plaintiff's declaration that he had given her the house and its contents, the defendant spent money on redecorations, improvements and repairs of the house. The plaintiff knew that the defendant was improving what she thought to be her property. There was no conveyance and nothing in writing regarding the transfer of the house into the defendant's name. Some years later, the plaintiff gave the defendant notice to determine her licence to occupy the house. The defendant refused to leave and the plaintiff commenced proceedings for recovery of possession of the house. The trial judge dismissed the action holding that the plaintiff had made a gift to the defendant of the contents of the house and that the beneficial interest in the house had passed to the defendant under a constructive trust to be inferred from the words and conduct of the parties.

In dismissing the appeal, Cumming-Bruce LJ, who delivered the judgment of the Court of Appeal, found that there was nothing in the facts from which an inference of a constructive trust could be drawn.[55] This was because there were no documents supporting the plaintiff's statement that he had given the house to the defendant. Accordingly, the gift had not been perfected and the defendant occupied the house under a licence revocable at will. However, the circumstances gave rise to an equity in favour of the defendant. Having been told that the house was hers, the defendant set about improving it. The improvements, repairs and redecorations were substantial. All the while the plaintiff not only stood by and watched but encouraged and

[53] *Ibid* at 125, 126.

[54] *Pascoe*, *supra* note 42.

[55] *Ibid* at 435.

acquiesced, without a word to suggest that the defendant was putting her money and her personal labour into his house.[56] As for the relief that the defendant was entitled to, the principle to be applied is that the court should consider all the circumstances and must decide what is the minimum equity to do justice to the defendant having regard to the way in which she changed her position for the worse by reason of the acquiescence and encouragement of the plaintiff. The defendant had spent a substantial amount on the house and was left only with her pension. The Court of Appeal was of the view that:

> . . . the equity cannot here be satisfied without granting a remedy which assures to the defendant security of tenure, quiet enjoyment, and freedom of action in respect of repairs and improvements without interference from the plaintiff. The history of the conduct of the plaintiff. . . in relation to these proceedings leads to an irresistible inference that he is determined to pursue his purpose of evicting her from the house by any legal means at his disposal with a ruthless disregard of the obligations binding upon conscience. The court must grant a remedy effective to protect her against the future manifestations of his ruthlessness. . . [57]

To have the equity satisfied by the grant of a licence to the defendant to occupy the house for her lifetime was unsatisfactory and ineffective as she might find herself ousted by a purchaser for value without notice. In the result, the Court of Appeal held that the equity to which the facts in this case gave rise could only be satisfied by compelling the plaintiff to give effect to his promise and her expectations, namely, a transfer of the house to the defendant.[58]

Another case which resulted in the grant of a property interest remedy in favour of the claimant is the local case of *Hong Leong*.[59] Confining and simplifying the facts to the claim based on proprietary estoppel, the developer of Springleaf Tower, a commercial development, ran into financial difficulties. The developer's banker was United Overseas Bank ("UOB"). Yongnam Engineering & Construction Pte Ltd ("YEC") was one of the contractors for Springleaf Tower. Despite the financial problems encountered, the building was eventually completed. YEC, which had substantial sums owed to it at that time, claimed it went ahead with its work and effectively financed a part of the cost to completion because it was led by UOB to believe it would get the 23rd floor of the completed Springleaf Tower as consideration for completing the work. UOB, however, foreclosed on its mortgage and denied YEC's claim. There was no concluded contract between them. Earlier, when YEC proceeded with the works after it became apparent that the developer was in no position to pay, YEC needed financing and it eventually obtained this from Hong Leong Singapore Finance Ltd ("Hong Leong") which took a security interest in the 23rd floor that YEC thought it would acquire for carrying on and completing the works. The question, *inter alia*, was whether YEC was entitled to an equitable remedy by way of the doctrine of proprietary estoppel against UOB.

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[56] *Ibid* at 436.
[57] *Ibid* at 438, 439.
[58] *Ibid* at 439.
[59] *Hong Leong*, *supra* note 4.

In allowing YEC's claim, the Singapore High Court was satisfied[60] that there was a representation on the part of the bank in its endorsement and encouragement of the settlement between YEC and the developer on the basis that YEC was expecting to acquire the unit free of the mortgage. YEC relied upon the representation as it was a significant factor that influenced its decision to resume work and complete its scope of work. YEC did suffer detriment in resuming work on the project in reliance upon the representation of the bank. In the circumstances, it was unconscionable to allow UOB to resile from a position that it had encouraged YEC to believe and on which YEC had relied to its detriment.[61]

On the remedy to be granted, the High Court reiterated that upon the equity arising, its value and how it should be satisfied was a matter for the court's discretion in the light of all the circumstances, including the claimant's expectation and the detriment he or she had suffered. The court's task was to do justice in all the circumstances and to ensure that there was an element of proportionality between the expectation, the detriment and the remedy.[62] The key is flexibility so as to ensure that the remedy is appropriate to the equity in each case.

Taking all the facts into account, the equity of YEC would be satisfied by, *inter alia*, an order requiring UOB to take all necessary steps to transfer the unit to YEC free of all other interests subject only to the interest of Hong Leong as the equitable mortgagee of YEC's interest. In its concluding remarks, the High Court observed that an order to this effect would be in line with the legitimate expectations of all the parties at the material time and there is due proportionality between the detriment suffered by YEC and the benefit to the bank on the one hand, and on the other hand, the expectation that would be fulfilled by this.[63]

It may be appropriate, at this juncture, to consider whether, in light of the "problems" articulated[64] in the Introduction of this paper, the application of the proprietary estoppel remedy involving a transfer of the property or an interest therein to the claimant as in *Pascoe* and *Hong Leong* is indeed incompatible with the Singapore Torrens system as embodied in the *LTA*. It is submitted that there does not appear to be any real impediment in applying the doctrine of proprietary estoppel to registered land. In fact, the case of *Hong Leong*, which deals with registered land, illustrates this, both in respect of the satisfaction of the equity and its enforceability against third parties (such as against the bank, UOB, in the case). In any event, the Court of Appeal in *Bebe*, as noted earlier, does not prohibit the application of principles of equity in appropriate cases, just that courts must be slow in doing so to ensure finality in land dealings.

Where the expectation interest is not in relation to property or an interest therein or where it is inappropriate to grant such a remedy, monetary relief would be awarded. In *Khew Ah Bah v Hong Ah Mye*,[65] the defendant owned an attap house which stood on land which the plaintiff had purchased. The defendant paid ground rent to the

[60] *Ibid* at paras 212, 214, 220.

[61] *Ibid* at para 221.

[62] Referring to *Jennings*, *supra* note 43 at paras 36-38.

[63] *Hong Leong*, *supra* note 4 at para 252.

[64] See WJM Ricquier, *supra* note 11.

[65] [1971] 2 MLJ 86 (HC).

plaintiff. Later, the defendant carried out major repairs to the house, enlarged it and changed its character from an attap house to a semi-permanent house with zinc roofing. The plaintiff subsequently gave notice to quit to the defendant and brought proceedings for possession of the house. The High Court found that the major repairs and improvements made to the house were carried out with knowledge of the plaintiff. In the circumstances, as the defendant had acquired a monthly tenancy coupled with an equity, the plaintiff had to satisfy the defendant's equity before he could recover possession of the premises. In allowing the plaintiff's claim, the High Court was of the view that it was appropriate that the equity be satisfied by the payment of $15,000 as reasonable compensation to the defendant.

Another local case where the remedy of monetary relief was awarded as the expectation interest is *Goh Swee Fang v Tiah Juah Kim*.[66] The first appellant and respondent (mother and son respectively) were tenants in common of a terrace house in equal shares. Following an argument between them in 1973, the respondent transferred his half share in the property to the first appellant for $20,000. The respondent made several demands on the first appellant for payment who told him that she would give him his half share when the property was sold. In 1989, the first appellant transferred the property to the second and third appellants for a purported consideration of $315,000 when the actual sum paid was $150,000. The higher consideration of $315,000 shown in the transfer was to enable the second and third appellants to obtain loans totalling $150,000 from the CPF Board and a bank secured by mortgages on the property. No sum from the proceeds of sale was paid to the respondent by the first appellant. The respondent commenced proceedings against the first appellant for, *inter alia*, misrepresentation and alleged that the second and third respondents were not purchasers in good faith without notice of his interest. The transfer of the respondent's half share to the first appellant as well as the transfer of the property to the second and third appellants were set aside by the trial judge who, *inter alia*, granted a declaration that the first appellant held one undivided half share in the property on trust for the respondent.

The appellants' appeal was dismissed. The Court of Appeal found that no trust arose in favour of the respondent in respect of his half share in the property. The respondent's intention at the time of the transfer was that the first appellant take the property absolutely for a stated consideration of $20,000 and there was no intention on his part to retain his half share.[67] Nevertheless, the respondent had relied and acted on the representation of the first appellant that when she sold the property, he would receive his half share of the proceeds of sale. In fact, the first appellant had no intention of doing so. The respondent had relied on her representation to his detriment for over 16 years by refraining from exercising his legal right to claim the sum of $20,000. The respondent clearly had the expectation, created and encouraged by the first appellant, to receive a half share of the proceeds of sale if and when the latter sold the property.[68] In the circumstances, by application of the doctrine of proprietary estoppel, an equity arose in favour of the respondent in regard to his entitlement to a half share of the proceeds of sale.

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[66] [1994] 3 SLR(R) 556 (CA) [*Goh Swee Fang*].

[67] *Ibid* at para 19.

[68] *Ibid* at para 23.

The Court of Appeal found that the second and third appellants knew that the respondent would not be paid anything when the property was transferred to them. They knowingly assisted the first appellant in her scheme to deprive the respondent of his entitlement to a half share of the proceeds of sale of the property. Accordingly, they, together with the first appellant, were liable to account for the respondent's equity.

On the question of how the equity of the respondent was to be satisfied, the Court of Appeal took the view that the transfer pertaining to the respondent's half share was perfectly valid and ought to stand as there was no intention on his part to retain his half share in consideration of the $20,000 to be paid to him.[69] Thus, in 1989 when the property was transferred to the second and third appellants, the respondent had no expectation interest in the property as such but only to a half share of the proceeds of sale. Moreover, third parties had acquired indefeasible interests in the property by way of mortgages. Accordingly, the transfer to the second and third appellants was also valid and ought to stand unaffected by the equity in favour of the respondent.[70] In this regard, the order of the trial judge was set aside. In the result, the figure of $315,000 was adopted as the market price of the property at the time of the transfer to the second and third appellants. The respondent's equity was, therefore, half of that amount which was $157,500.

It has been suggested[71] that the case illustrates the difficulties of satisfying the equity which has arisen in the context of registered land. On the facts and evidence in *Goh Swee Fang*, it was clear that the expectation interest of the respondent was not in relation to having any interest in the property. The expectation interest was purely monetary in nature, namely, a half share of the proceeds of sale of the property. That being the case, it has nothing to do with acquiring any interest in the property and consequently, does not involve registered land as such. Hence, there was no difficulty in satisfying the respondent's equity in monetary terms against the appellants in the manner the Court of Appeal had done. Justice Warren Khoo, who dissented on the remedy to be given, was of the view that the respondent should be given a half undivided share of the property since property prices had vastly increased from the time of the transfer to the second and third appellants.[72] But this would be going against the facts and evidence in the case as found by the Court of Appeal which his Honour did not disagree with. On the CPF Board and the bank having acquired indefeasible interests in the property as third parties, the Court of Appeal was correct to hold that their interests cannot be defeated by the respondent's equity. This is in line with their status as a "purchaser", being the strongest person under the *LTA*.[73] It is submitted that the position would be the same even if the transfer to the second and third appellants was set aside and the property reinstated in the name of the first appellant who would now have to take subject to the indefeasible interests.

The expectation measure approach would be inappropriate where it is more appropriate, in the circumstances, to look instead to the detriment incurred by the claimant which will invoke the operation of the reliance-based approach. This can be seen in

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[69] *Ibid* at para 39.
[70] *Ibid*.
[71] See WJM Ricquier, *supra* note 11 at paras 6.7.19, 6.7.20.
[72] *Goh Swee Fang*, *supra* note 66 at para 46.
[73] See *supra* note 27 and the accompanying text.

LS Investment Pte Ltd v Majlis Ugama Islam Singapura.[74] The appellant had purchased a property from its trustees without knowing that it was *wakaf*[75] property. The respondent knew of the sale only much later. After having purchased the property, the appellant proceeded with redevelopment works. Under the *Administration of Muslim Law Act*,[76] legal title to *wakaf* properties vested in the respondent. Before the sale was effected, the respondent had tried repeatedly, but without success, to determine from the trustees if the property was a *wakaf* property. The respondent subsequently lodged a caveat on the property on the basis that it was the lawful owner pursuant to the *Administration of Muslim Law Act*. When the appellant sought to re-sell the property, it learned of the caveat lodged by the respondent. The appellant applied for the caveat to be removed but failed. The appellant's claim against the respondent was based on, *inter alia*, proprietary estoppel. The High Court refused to grant any relief to the appellant.

In allowing the appeal in part, the Court of Appeal held that, based on the evidence, the respondent did not know of the proposed sale of the property by the trustees to the appellant, nor of the application to court for sanction which was made *ex parte*, until after the completion thereof. While the respondent had pursued the trustees to determine the status of the property without success, it had no dealings with the appellant. In the absence of knowledge, the respondent could not be said to have encouraged or acquiesced to the sale of the property.[77] The appellant's claim based on proprietary estoppel thus failed.

However, in regard to the redevelopment works, the respondent, upon being aware that the appellant had bought the property from the trustees, should have given immediate notice of its interest in the property to the appellant. The respondent would have known that the appellant, having bought the property which was an old shophouse, would undertake renovation or other works to modernise it, either for its own use or for resale. Yet the respondent stood idly by and let the appellant carry on with the works to its detriment. In the circumstances, an equity arose in favour of the appellant. The equity would only be satisfied by the respondent by reimbursing the appellant in full for all expenditures actually incurred by them on account of the redevelopment works.[78]

Another instance where the reliance-based approach was applied is the High Court case of *Lim Chin San*.[79] Before entering into a two-year tenancy agreement, the plaintiff landlord had represented, *inter alia*, to the defendant tenant that the latter could construct a mezzanine floor in the premises. The defendant relied on this representation, among others, and entered into the tenancy with the plaintiff and paid and constructed a mezzanine floor in the premises. As the mezzanine floor was against planning guidelines, regulatory approval was refused and the mezzanine floor had to be subsequently removed pursuant to a court order. The defendant's claim based on proprietary estoppel succeeded against the plaintiff.

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74 [1998] 3 SLR(R) 369 (CA) [*LS Investment*].

75 See definition of "*wakaf*" in s 2 of the *Administration of Muslim Law Act* (Cap 3, 2009 Rev Ed).

76 *Ibid.*

77 *LS Investment*, *supra* note 74 at para 40.

78 *Ibid* at para 53.

79 *Lim Chin San (HC)*, *supra* note 47.

The High Court opined that the appropriate remedy would always turn on the particular facts of each case, bearing in mind the principles of doing minimum equity and ensuring some kind of proportionality between the detriment which had been incurred by the claimant and the remedy eventually awarded.[80] In regard to the representation that a mezzanine floor could be constructed, the defendant's expectation could not be fulfilled as it was illegal. To take the defendant's expectation as a starting point would mean that he would recover nothing which was clearly not an appropriate measure. The more appropriate, and in fact, only, measure is the reliance-based approach, namely, for compensation to be assessed on the basis of the detriment incurred.[81] In the result, the plaintiff was required to pay the defendant for the renovation costs of installing the mezzanine floor.

The Court of Appeal, which did not appear to disagree with the reliance-based approach adopted by the High Court, was, nevertheless, of the view that the equity founded on the representation that a mezzanine floor could be built was weak to begin with. At the time when the mezzanine floor was eventually demolished, the defendant had by then enjoyed it for more than four years. Any equity in this regard had, therefore, been significantly spent.[82] Accordingly, the sum awarded was grossly disproportionate to the strength of the defendant's equity, the extent of his reliance and the benefits already enjoyed by him.[83] Thus, the equity would be satisfied by an award in the defendant's favour that amounted to 10% of the original amount assessed.

In *Lim Chin San (HC)*, the High Court had made the following comments which may give rise to doubts as to the analytical framework for quantifying the compensation to be awarded based on the expectation or reliance-based approach:

> . . . It is clear that while the court may take into account any of the above bases of quantifying the compensation, no single approach is determinative.[84]
>
> . . .
>
> The approach in *Jennings*. . . which adopts the fulfilment of the claimant's expectation as a starting point, has been repeatedly endorsed in subsequent cases. However, [it is to be noted] that the approach has not received universal support.. . .[85]
>
> Therefore, to summarise, the authorities suggest that [the court is] not bound by any specific measure in quantifying the amount of compensation to be awarded.. . . The court has discretion to adopt whichever measure. . . that it considers to be the most appropriate sum given the facts of the case.[86]

The High Court may be taken to suggest that there is no principled approach in applying the expectation or reliance-based measure and that the courts have a free rein in deciding in their discretion which measure to apply. It is submitted that this should not be the position and that the above suggestion of the High Court, if it has

[80] *Ibid* at para 6.
[81] *Ibid* at para 17, 19.
[82] *Lim Chin San Contractors Pte Ltd v Shiok Kim Seng* [2013] 2 SLR 279 at para 55(g) (CA).
[83] *Ibid* at para 56.
[84] *Lim Chin San (HC)*, *supra* note 47 at para 8.
[85] *Ibid* at para 10.
[86] *Ibid* at para 11.

this effect, should be rejected. In *Andy Low (CA)*,[87] the Court of Appeal appeared to suggest that the expectation-based approach should not be taken to be the starting point[88] but did not definitively rule on the matter.[89]

With due respect, it is argued below that the expectation-based measure should be the starting point. It is trite that the question of satisfying the equity, whether based on the expectation or reliance measure, does not arise if a claim based on proprietary estoppel cannot even be established in the first place. For such a claim to be successfully established, the first element that must be satisfied is the existence of a representation or assurance which would need to be sufficiently clear and unequivocal.[90] Failure to prove this element at the outset would mean that there is no room for the other requisite elements of reliance, detriment and unconscionability to come into play at all. Given that this is so, it is only logical that one begins by looking at the fulfilment of the equity by way of the expectation interest which should be the *prima facie* remedy to be granted as is supported by *Jennings*[91] unless such a remedy would be disproportionate to the detriment suffered by the claimant. Accordingly, the analytical framework, which provides for a principled and disciplined approach, is the fulfilment of the expectation interest as a starting point. Thus, where the transfer of the property or an interest therein is the appropriate remedy to satisfy the equity in the circumstances bearing in mind the principles of proportionality and doing minimum equity, as was the case in *Pascoe*[92] and *Hong Leong*[93] respectively, it would be inappropriate to apply instead the reliance measure approach. In fact, the court should be slow in abandoning the expectation measure approach as was observed in *Jennings*:

> 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... way.[94]
>
> 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. Detriment can be quantified with reasonable precision if it consists solely of expenditure on improvements to another person's house...[95]

While flexibility is the key to ensure that the remedy is appropriate to the equity in each case,[96] it makes for a principled approach which provides certainty in this

87 *Andy Low (CA)*, *supra* note 46.
88 *Ibid* at para 20.
89 The Court of Appeal noted that the Assistant Registrar and the Judge below had proceeded throughout on the basis of the expectation-based approach as this was at all times the appellant's case. As such, it was too late for the Court of Appeal to take into account the reliance-based approach as it was bound to consider only the evidence on record (*ibid* at paras 27, 31).
90 See judgment of Lord Scott in *Thorner v Major*, *supra* note 49.
91 *Jennings*, *supra* note 43 at para 47.
92 *Pascoe*, *supra* note 42.
93 *Hong Leong*, *supra* note 4.
94 *Jennings*, *supra* note 43 at para 50.
95 *Ibid* at para 51.
96 *Hong Leong*, *supra* note 4 at para 249.

area of the law if the above analytical framework is adhered to. To do otherwise is to create confusion in applying the expectation or reliance bases of quantifying the compensation to be awarded or in determining the appropriate remedy to be granted. As Lord Walker aptly cautioned in *Cobbe*:

> [E]quitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it 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. . .[97]

VI. Conclusion

As demonstrated in this paper, there is no difficulty in satisfying the equity arising from a claim based on proprietary estoppel under the *LTA*. Similarly, there is no impediment to enforcing the equity against third parties thereunder. Local case law has consistently shown that this is the position. In addition, this is supported by the statements of the Privy Council in *Frazer* and *Oh Hiam* on the role of equity in the Torrens system. The Court of Appeal in *Bebe* likewise does not rule out the application of equity in appropriate cases. Thus, application of the doctrine of proprietary estoppel is in no way inconsistent with the policy objectives of ensuring certainty and finality in land dealings in the Singapore Torrens system. On the contrary, it reflects the certainty of the true state of affairs of the land in question and, at the same time, provides for fairness and justice by preventing the proprietor from hiding his or her unconscionable conduct behind the registered title in the face of the claimant's equity. In other words, it is a case of killing two birds (*ie* achieving certainty and fairness at the same time) with one stone, so to speak. On the satisfaction of the equity, a disciplined and principled approach must be adhered to when applying the expectation or reliance measure in determining the appropriate remedy to be granted. This will give certainty and instil confidence in the analytical framework that is adopted.

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[97] *Cobbe*, *supra* note 2 at para 46.