

# **PROPRIETARY ESTOPPEL: GREAT EXPECTATIONS AND DETRIMENTAL RELIANCE**

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**Keynote Lecture**

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1. It is a great pleasure to be invited to give this keynote lecture to the Modern Studies in Property Law Conference. I have always greatly valued the input that academia provides to our legal system, and so it is very pleasing to see so much activity and lively debate taking place in Oxford. As well as this property law conference, this weekend promises a fascinating weekend of talks on the contemporary place of Equity as we approach the 150<sup>th</sup> anniversary of the Judicature Act 1873. I particularly look forward to Professor Ben McFarlane's inaugural lecture on Thursday this week. My own thinking on proprietary estoppel and much beyond has been shaped through conversations with Professor McFarlane and reading his work, and his lecture promises to be fascinating.
2. I do, however, find myself in the somewhat unenviable position of delivering a lecture on proprietary estoppel just two days before a lecture by the person who quite literally wrote the book on the subject. I am also conscious that the world awaits a judgment from my colleagues in the Supreme Court in another important proprietary estoppel case, *Guest v Guest*. I was not on the panel which heard that case and would not presume to try to forecast the result. Instead, for this address I have tried to pan out a little from a close focus on doctrine to try to discuss some of the wider legal and policy issues to which the topic of proprietary estoppel gives rise. Unfortunately, the fact remains that anything I say today might be outflanked and its flaws revealed either by what Professor McFarlane says in his lecture or what my colleagues will say in *Guest v Guest*. I therefore ask for your sympathy and forbearance.
3. More happily, by coincidence, my subject today chimes with the focus on Equity later this week. Proprietary estoppel in the guise authoritatively recognised by the House of Lords in *Thorner v Major*<sup>1</sup> is a core example of the courts' basic equitable jurisdiction to intervene in cases where the application of strict legal rules would produce a result sufficiently at odds with a party's reasonable expectations so as to 'shock the conscience of the court'. As Robert Walker LJ recognised in the important case of *Gillet v Holt*, "the

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\* Lord Sales, Justice of the Supreme Court of the United Kingdom. I am grateful to Jake Thorold, my Judicial Assistant, for his excellent assistance in preparing this lecture and to Ben McFarlane for comments on an earlier version. The usual caveat applies.

<sup>1</sup> [2009] UKHL 18.

fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the [proprietary estoppel] doctrine”.<sup>2</sup>

4. As so often with Equitable doctrines, the law finds itself in a state of tension between trying to be flexible to respond to the particular circumstances of the case before it, in all its moral and factual complexity, and trying to lay down clear rules for the future, which are predictable in their effect. Veer too far in the first direction, and law seems to turn on the length of the Chancellor’s foot. Or, more accurately, on the instincts of the first instance judge who tries the case. If the outcome of the case turns on a very broad discretion in the judge, three things follow.
5. First, it becomes difficult to mount an appeal. The usual approach for an appellate court where a highly discretionary standard is being applied is not to interfere with the conclusion of the first instance judge who has directed himself or herself correctly as to the discretionary test to be applied and has not reached a perverse or irrational conclusion overall. If those conditions are satisfied, an appellate court stands back and leaves the assessment of the trial judge in place. As Hoffmann LJ said in *Re Grayan Building Services Ltd*:<sup>3</sup> “generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standard [... has] been met, the more reluctant an appellate court will be to interfere with the trial judge’s decision”. Related to this, it becomes more difficult for the superior courts to develop doctrine and general rules known and applicable throughout the legal system.
6. Secondly, in consequence, space opens up for a degree of capriciousness to enter the system. The same or similar cases can be decided in completely different ways by different judges, without there being any error of law. What is supposed to be the rule of law looks increasingly like the rule of men (or women).
7. Thirdly, it becomes more difficult for the parties to predict how the law will react to what they do. This affects them at two points in time. First, when they interact with each other. If I behave in a particular way, will I have incurred obligations to the other person or will I have acquired rights against them? Second, when the day of reckoning arrives and I have to decide whether I go to law to assert a claim, with all the cost and stress that may involve, or whether I resist a claim made against me. Lack of clarity in the law and the possibility of victory or defeat turning on the roll of the dice of which judge you get can deter the risk adverse from vindicating their rights and encourage speculative litigation by the desperate or those with a disposition to gamble in the hope of victory.
8. These features of a strongly discretionary approach relying on a vague standard of “unconscionability” with unspecified content pose particular problems when dealing with the allocation of property rights and the rules governing the acquisition and disposal of such rights. Property law is supposed to be a paradigm area for the application of fixed and clear rules, so that everyone can know where they stand and what they own – not

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<sup>2</sup> *Gillett v Holt* [2001] Ch. 210, per Robert Walker LJ at 225.

<sup>3</sup> *Re Grayan Building Services Ltd (in liquidation)* [1995] Ch 241, 254

just the parties who have been dealing with each other, but also those looking to acquire property from them.

9. But veer too far in the opposite direction, to lay down firm and inflexible fixed rules in advance, and a different type of problem emerges. It is a well-known feature of legislating now for the future that the legislator cannot predict in advance every situation for which they might wish – had they foreseen it - to make provision by the rules they lay down. Two particular consequences flow from rigidity in the rules to be applied.
10. First, a gap opens up between the rationale for having a rule and the rule itself, the more the rule is treated as governing in an inflexible way types of cases which are within the ambit of its formulation but outside the contemplation of the rule-maker. If the gap gets too wide, the moral authority of the law and public confidence in it is eroded. A different type of capriciousness emerges: the capriciousness arising from lack of foresight about how the rule will in fact operate, and the results it will in fact produce, in future, unanticipated cases. One might say there is a pathology associated with too much rule by law and too little rule by men (or women).
11. Equity as a set of rules or principles grew out of the jurisdiction of the Lord Chancellor to modify the stringent application of the common law in order to do justice in the circumstances of the individual case. This is a reflection of Aristotelian thinking, using his concept of *epieikeia* (usually translated as equity) to supplement and work partial modification of legal rules at their point of application in order to ensure justice is done and that the application of a rule in the particular case is tied closely to the underlying justice-based rationale for having the rule in the first place.<sup>4</sup> In the early equity jurisprudence, this derivation was made clear, for instance in the *Earl of Oxford's* case.<sup>5</sup>
12. Secondly, fixed rules may fail in their guidance function if the practical reality is that the people who are subject to the rules do not in fact look to them when dealing with each other, but instead rely more on general moral standards which they think will govern how others will behave in relation to them and which, in a vague way, they may expect the law broadly to reflect. The less the parties to a transaction which they regard as binding have been concerned to fashion their relationship by reference to the legal rules, the greater the justification for allowing a more flexible equitable standard to govern their case.
13. These points are, of course, very familiar across a wide range of legal contexts. There is an extensive literature on the choice between rules and standards as forms of legal ordering.<sup>6</sup> The choice reflects the tension between the guidance function of law and the function of law to produce just outcomes in particular cases. Proprietary estoppel is a case study in how these functions are balanced in a particular area and how the tension is

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<sup>4</sup> *Nicomachean Ethics*, V. 10. 1137b, 12-29; Richard A Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (1961), Ch. 10.

<sup>5</sup> (1615) 1 Ch Rep. 1, 6.

<sup>6</sup> See eg F. Schauer, *Playing by the Rules* (1999); L. Alexander and E. Sherwin, *The Rule of Rules: Morality, Rules & the Dilemmas of Law* (2001).

resolved in a practical and concrete way in doctrine. That is one reason why the subject is so interesting.

14. Another is because, since land is such an important and valuable asset, it is an area in which ordinary, unsophisticated people, who have ordered their affairs without knowledge of the applicable legal rules, are drawn into litigation despite the huge expense. The courts therefore find themselves having to deal with cases where the pressure to do justice in the particular case is strong and where law's guidance function has broken down to a significant degree. But do hard cases make bad law in this area? On the other hand, to what extent should justice in the individual case be compromised in the interests of providing guidance for other cases?
15. 150 years on from the first Judicature Act, the resurgence of a doctrine like proprietary estoppel poses many questions for the modern relationship between Equity and the common law. Reports of the demise of Equity as a result of the supposed fusion brought about by the great procedural reforms in the 1850s and 1870s are exaggerated. One of the themes of my lecture will be how Equity overlays common law rules to mitigate the harshness that would result from those rules being applied rigidly in cases for which they are not well-adapted.
16. I have a particular focus on detrimental reliance, an idea with a long history in our law of obligations. It is this idea which has come to inform the balance which the courts have sought to strike between the competing imperatives of achieving justice on the one hand and, on the other, recognising the importance of adherence to prescribed formalities to promote legal certainty.
17. One can also ask, is detrimental reliance now the essence of the doctrine, its be all and end all? Is the reliance interest the only interest of a claimant which is being protected? And what is the relationship between the grounds for Equity's intervention and the remedy which should be given? Does the tension between rules and standards inform that question, or is there scope for a high degree of prescription as to the relief which might be ordered?
18. I will address the particular form of proprietary estoppel as authoritatively recognised in *Thorner v Major*. That is, the cause of action arising where a person has acted to their detriment in reliance on a promise made by another in relation to land. Three elements are required. First, there must be a promise made by A to B that B has been or will be given an interest in property. Second, reasonable reliance on that promise. And third, there must be an identifiable detriment to B if A resiles from the promise they have made. When these three features are present, an "equity" will arise for the court to satisfy.
19. What is unique about this particular strand of proprietary estoppel, which Professor McFarlane and I have termed the 'promise-detriment' strand<sup>7</sup>, is that it creates a cause of

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<sup>7</sup> B. McFarlane and P. Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610. This strand of proprietary estoppel is distinct from two other strands. Firstly, the acquiescence-based strand whereby a person, A, is estopped from asserting a right against another person, B, in circumstances where B has

action through which property rights can be created notwithstanding the absence of formalities. In this sense I think there is reason to question whether this strand of the doctrine should be considered a species of estoppel at all.

20. A particularly important aspect of this promise-detriment strand which can be overlooked is its backward-looking nature. Unlike a purely executory contract, proprietary estoppel does not impose duties or liabilities from the moment that the relevant promise is made. Rather, as Hoffmann LJ (as he then was) explained in *Walton v Walton*<sup>8</sup> in 1994, the principle

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

21. It would therefore be a mistake to understand proprietary estoppel as simply a variant of contract law, with detrimental reliance standing in place of consideration as the factor which obligates a person to keep a promise. Instead, the promise-detriment strand of proprietary estoppel constitutes a standalone doctrine targeted at the specific form of unconscionability that arises if a person, A, were wholly free to leave another person, B, to suffer a detriment as a result of B’s reasonable reliance on A’s promise. Although this doctrine has a complicated relationship with the strict requirements of contract law and in particular the ordinary formalities required for contracts relating to land, it must be analysed in its own right.
22. The lively debate in *Guest v Guest* – whether proprietary estoppel remedies are expectation or reliance based – is of considerable importance. Today, however, I want to concentrate on the more abstract question of the tension between the goals of providing legal certainty through strict formalities and achieving justice, and the way that concepts such as detrimental reliance can be relevant to arriving at some accommodation between the two.
23. With that in mind, I want to consider first the role that formalities play in our law. The great virtue of formalities is that they reduce the scope for legal dispute by providing a degree of certainty lacking from purely informal arrangements.
24. This is particularly apt in the context of land, of course, where Parliament has long held that most transactions must be executed in a formal, predictable and certain way.<sup>9</sup> There are very good reasons for this. Proprietary rights are capable of affecting land through generations and the state and members of society generally must have certainty as to their existence and effect. This includes the people who live and work on the land. People should have a high degree of notice so that they know when they are conveying

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adopted a particular course of conduct in reliance on a mistaken belief as to her current rights and A knows that this belief is mistaken yet fails to correct B as to the true position. Secondly, the representation-based strand whereby A is prevented from denying the truth of a representation made as to a matter of fact, or mixed fact and law, where B has acted on the basis of the truth of that representation.

<sup>8</sup> Unreported, 14 April 1994.

<sup>9</sup> Now, for contracts to convey land see s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

land or creating property interests in relation to it. The formalities associated with land transactions provide certainty as to what the relevant property rights are after the event of a transaction. Moreover, they enable lawyers confidently to advise clients as to their rights, on the basis of which people can plan their affairs.

25. Although not generally required to be in writing, similar concerns for legal certainty lie behind the strict common law requirements for contract formation. Contract has over the last two centuries become the central legal category for reciprocal promise-based relationships between private individuals. Contracts are now so commonplace in our lives that we can overlook that entering into a contract entails a significant commitment which can have sizeable financial repercussions. The expectation-based approach to contractual damages, for example, means that a party can be liable for non-performance even where the other party has suffered no loss. Potentially severe repercussions such as these make it important that the rules of contract formation are sufficiently precise such that individuals can reasonably know when they have entered into a contract and what they are required to do to abide by it.
26. On the whole, therefore, strict formalities promote justice for society as a whole, and at a general level, by promoting legal certainty and reducing the scope for costly disputes. They provide people with workable frameworks through which to manage their affairs, with the knowledge that – provided they have done what is required of them – the law will provide protection to them. In an important sense, therefore, formalities rules are facilitative tools which promote individual freedom and autonomy. If I comply with the rules I will produce particular intended effects; I can do so with assurance that the law will give effect to my intentions; and if I do not use the tools, then I will keep my property and not be affected by obligations which I did not intend to assume.
27. Life is not always so simple, however. To state the obvious, people are usually not lawyers and their ideas of what is just are not based, or at any rate not closely based, on whether legal criteria are complied with. The strictness of legal rules comes under strain where they meet real life situations in which their application conflicts with common understandings of justice. It might be difficult to explain to many, for example, why the law will uphold an agreement supported by even the tiniest amount of consideration but will provide no recourse for gratuitous promises no matter how ardently expressed.
28. One response to this is simply to say that such instances are the unfortunate yet necessary byproduct of the imperative of legal certainty. Yet law cannot be wholly divorced from common conceptions of what is just, for if it is it will lose its legitimacy. Certainly the approach of Equity is that common conceptions of what is just and in accordance with “conscience” should feed into the law, rather than be sacrificed always at the altar of maintaining the purity of the rule-based regime. It is a fact of life that people form reciprocal relationships which they understand to carry mutual obligations outside of the confines of contract and outwith the prescribed formalities for land transactions. For the law to wash its hands where the breakdown of those relationships and application of the strict legal rules would produce results offensive to widespread conceptions of what is right would be an abdication of the court’s ultimate responsibility to achieve justice. Law (by which I mean Equity here) has to meet real life half-way, by

trying to find a just path which accommodates a basic social conception of justice as appropriate in the individual case with the more formal legal conception of justice, which is rule-based and directed to providing guidance across the full range of cases which might arise in future.

29. I suggest that Equity's contemporary role remains to provide an essential channel by which broad social understanding of justice, as applicable to the individual historic case, can affect the application of laws directed to the general set of future cases. This is Equity's historic and established role. It grew from the fourteenth century because of the reification and rigidity of the common law, which had split apart from social understandings of justice and acceptable conduct. The common law tended to favour strict, bright-line rules of property and obligation, whereas Equity in its early period afforded the Lord Chancellors' considerable freedom to do as they thought right. But it should be emphasised that their freedom was constrained, in the deeply Christian social context of that period, by quite a high degree of customary specificity about what might be required by "conscience". Although one can say that Equity has tightened up its approach since the nineteenth century, eroding reliance on vague standards combined with a socially constrained idea of "conscience" and moving towards an increased reliance on rules or discretions framed by rules, it retains its function to keep the underlying values and rationales of law in line with the actual application of the law, by providing relief against opportunistic misuse of the strict rules of the common law.<sup>10</sup>
30. Equity therefore overlays the common law, mitigating the harshness that would ensue were strict legal rules to be applied without any exception. It operates to bridge the tension between the bright line rules favoured by the common law and a need for a sense of moral legitimacy in the application of the law.<sup>11</sup>
31. One might draw an analogy with aspects of the law of tort, which can fulfil a similar function. For example, in identifying an exception to the rule against recovery for pure economic loss in *Hedley Byrne v Heller*<sup>12</sup> Lord Devlin observed that a duty of care would arise in

"relationships which ... are 'equivalent to contract', that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract."<sup>13</sup>

Although through the machinery of tort rather than Equity, one can perceive the House of Lords straining to find a way around the unforgiving requirements of contract in order to do what it perceived as justice. Certain types of contract terms implied at law in a way similar to that by which a duty of care is identified fulfil an equivalent role. For example, in an employment relationship, the implied duty to maintain trust and confidence<sup>14</sup>

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<sup>10</sup> See P. Sales, "Common Law: Context and Method" (2019) 135 LQR 47, 53. I. Samet, *Equity: Conscience goes to Market* (2018), ch 2.

<sup>11</sup> See P. Sales, "The Interface between Contract and Equity", Lehan Memorial Lecture, Sydney, 28 August 2019. Available on the Supreme Court website.

<sup>12</sup> [1964] A.C. 465.

<sup>13</sup> *Ibid*, at 529.

<sup>14</sup> *BCCI v Malik* [1998] AC 20.

operates as a local form of equity, preventing an employer from operating the express terms of the contract in an opportunistic and unfair way.

32. In this regard, the law of unjust enrichment provides another important analogy with proprietary estoppel. Both assumed increased prominence over a similar period and can be equally analysed as forms of equity or “epieikeia” to ameliorate the potential harshness of the strict rules of property law or contract. Those rules mean, for example, that in most cases the making of a mistake by a party to a property transaction will not prevent the transfer of a right even where the other party is aware of the mistake. Unjust enrichment cannot undo the transaction, as this would undermine legal certainty in circumstances where the property may have been passed on to third parties. But it can offer a means of redress which can mitigate the harshness of that conclusion by providing a mechanism to meet the justice of the case between the immediate parties, adjusting the remedy to reflect the extent to which the enrichment was unjust.
33. There are a good many other examples of Equity acting in such a way. The law of constructive trusts is a large topic in itself which I cannot hope to explore in detail this evening. But I would argue that they can be understood as having a similar function to soften and adjust the rigours of a strict application of bright line formalities and common law rules. The doctrine in *Rochefoucauld v Boustead*<sup>15</sup>, for example, holds that a constructive trust will arise to enforce an informal agreement in relation to a trust of land despite the absence of compliance with statutory formality requirements. Where B informally agrees to hold land on trust for A, and A transfers or allows their land to be transferred to B in reliance on B’s promise, *Rochefoucauld* holds that a constructive trust arises to ensure that B takes only a qualified interest once they acquire A’s land. As with proprietary estoppel, therefore, Equity steps in to avoid an unconscionable outcome arising from a strict application of formality rules. As with proprietary estoppel, the doctrine has promises and reliance at its heart.<sup>16</sup>
34. The interactions of Equity and equity substitutes with the common law are therefore multifarious. In certain areas, the common law has incorporated an Equity-type approach into itself. In others, Equity overlays the common law to provide relief in circumstances where the application of strict formality rules would produce unconscionable results. Predictability and stability in the law is achieved by application of the common law’s bright-line rules in the vast majority of cases. Nonetheless, when faced with the exceptional case where the application of a bright-line rule produces a result antithetical to justice, there is the possibility of avoiding this.
35. I think there is also much to be said for Irit Samet’s argument in her book, *Equity: Conscience goes to Market*<sup>17</sup>, that Equity as a distinct body of doctrine laid over the common law serves to narrow the gap between law and morality and thus to legitimise the law and secure loyalty to it.<sup>18</sup> On this reading equitable doctrines such as proprietary estoppel do not undermine formality rules, but actually serve to legitimise them and their application in the ordinary run of cases. As described by Henry Smith, Equity has the ability to offer

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<sup>15</sup> [1897] 1 Ch 196.

<sup>16</sup> See further Y.K. Liew, *Rationalising Constructive Trusts* (2017), chapter 4.

<sup>17</sup> I. Samet, *Equity: Conscience goes to Market* (2018)

<sup>18</sup> See also P. Sales, “Common Law: Context and Method” (2019) 135 LQR 47, 53.

a limited “safety valve” that, by preventing opportunistic use of strict formality rules, can in fact strengthen the force of those formal rules by softening their harshness in marginal cases, thus rendering them more palatable as the governing framework in ordinary circumstances.<sup>19</sup> Equity takes the pressure off the courts to try to modify or bend the underlying strict rules in an effort to do justice in the individual case.<sup>20</sup>

36. There is no avoiding, however, that any qualification to the requirement for formal rules also creates challenges for the law. The interaction of the formal *rules* and the justice *standard* has to be managed effectively so that the predictability associated with legal rules is not compromised too readily, thereby undermining the facilitation of individuals’ autonomy which they tend to promote. Legal rules which can be circumvented too easily are hardly rules at all, and as I have stressed there are good reasons why the strict rules should be difficult to displace. The challenge for the law therefore is to give definition to the circumstances in which it is permissible to depart from the bright line rules in order to achieve interpersonal justice, but to limit those circumstances sufficiently so as still to give primacy to the bright line rules and their guidance function for wider society. Flexibility is undoubtedly one of Equity’s great virtues, enabling the law to reflect broad standards of fairness in very different factual scenarios. Nonetheless, to ward off the old charge that Equity is measured by the length of the Chancellor’s foot<sup>21</sup> it is also critical for the law to define sufficiently the circumstances in which Equity will intervene to qualify formality rules.
37. This is particularly necessary in the context of proprietary estoppel, where the stakes can be very high for those involved. Although the law has since progressed, this extrajudicial observation of Lord Walker in 2008 remains relevant:

“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 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 judge’s intuition as to which side ought to win.”<sup>22</sup>

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<sup>19</sup> See H. Smith, “Property, Equity, and the Rule of Law” in L. Austin and D. Klimchuk (eds), *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014). For an extended treatment of this subject, see H. Smith, “Equity as Meta-Law” (2021) 130 Yale LJ 1050.

<sup>20</sup> Cf Karl Llewellyn, *The Theory of Rules: edited with an introduction by Frederick Schauer* (2011), Introduction, 23-27, scepticism about rules is a strong theme in US legal thought, where a focus on purposive interpretation tends to redefine the real rule to be applied as a combination of the text and background principles which taken together generate a just result: “a long tradition, with Llewellyn as one of the pioneers, seeks to redefine prescriptive rules so that they incorporate what are in reality anti-rule perspectives”.

<sup>21</sup> On this tension, see L. Alexander and E. Sherwin, *The Rule of Rules: Morality, Rules and the Dilemmas of Law* (Durham: Duke University Press, 2001), especially Chs 3 and 4.

<sup>22</sup> Lord Walker, “Which side ‘ought to win’? Discretion and certainty in property law”, Chancery Bar Association Conference 2008. Lord Walker made a similar point in *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752 at para 46: “[proprietary estoppel] is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions.” See also S. Gardner, “The Remedial Discretion in Proprietary Estoppel – Again” (2006) 122 LQR 492.

38. It is fortunate that Lord Walker had the opportunity to contribute to this effort by way of his judgment in *Thorner v Major* just one year later. With this judgment a principled basis for the intervention of Equity began to be delineated in a more concrete way, although the doctrine still retains its critics on grounds of unpredictability.<sup>23</sup>
39. As Lord Walker made clear, at the heart of the proprietary estoppel doctrine, and a crucial basis for the intervention of Equity, is detrimental reliance. That is, the detriment that would arise from B's reasonable reliance on A's promise were A able to renege on that promise. What has led the law to identify this as the principled basis on which Equity can intervene, such that the formalities relating to contracts and land transactions can be qualified?
40. It should be emphasised at this stage that the presence of detrimental reliance in a given situation will not necessarily result in the court giving relief which has the effect that the claimant's expectations arising from a promise made to them are realised. Once a claimant has demonstrated the requirements of promise, reliance and detriment, then as recognised by Scarman LJ in *Crabb v Arun District Council* the court's task becomes to identify "the minimum equity to do justice" and give relief accordingly. Where awarding a remedy which meets the claimant's expectation would be disproportionate – perhaps because the degree of detriment suffered by the claimant was, in the event, fairly low – then it is open to the court to fashion a different remedy. In *Ottey v Grundy*,<sup>24</sup> for example, the extent of the detriment was limited because the period in which the claimant had acted in reliance on the promise made was limited and had not led to the giving up of any alternative opportunities. As a result, the court awarded the claimant significantly less than what had been promised to him. However, it does not necessarily follow that the relief granted should always be limited only to the amount of detrimental reliance which has been suffered. Whether that should be so is a matter for exploration as the case-law stemming from *Thorner v Major* develops.
41. The notion of detrimental reliance as a basis for recovery has a long history and is woven into many aspects of the law of private obligations. Perhaps the clearest precursor to modern proprietary estoppel was the equitable doctrine of 'making representations good', which had detrimental reliance at its heart. As set out by the House of Lords in *Hammersley v De Biel* in 1845, the doctrine permitted the court to intervene where a representation is made by one party "for the purpose of influencing the conduct of another and acted upon by him".<sup>25</sup>
42. An example of application of the doctrine which seems very close to the field now occupied by proprietary estoppel is the 1862 case of *Loffus v Maw*.<sup>26</sup> A young widower went to look after her unwell uncle. She found the work for her uncle grueling. After she threatened to leave, her uncle promised that he would provide to her the rents and profits of two houses owned by him in Hull for life. Upon his death, however, the niece

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<sup>23</sup> See for example J. Mee, "Proprietary estoppel and inheritance: enough is enough?" [2013] Conv 280 and M. Dixon, "Painting proprietary estoppel: Howard Hodgkin, Titian or Jackson Pollock?" [2022] Conv 30.

<sup>24</sup> [2003] EWCA Civ 1176.

<sup>25</sup> [1845] 8 E.R. 1312, 1320.

<sup>26</sup> [1862] 66 E.R. 544.

discovered that her uncle had produced a new will in which the uncle had left the promised rents and profits to his son rather than to her. By a codicil to his will executed just 16 days before his death, the uncle made void all gifts contained in his will in favor of his niece and directed that his will should be read as if her name were expunged. In finding for the niece to enforce the promise made to her, the Vice-Chancellor stated:<sup>27</sup>

“... the present Plaintiff is entitled not to have relief out of the general assets, but out of that specific property which the testator represented to her that she was to enjoy after his death, she having acted upon the faith of that representation and performed those services which he, by the representation, induced her to render.”

43. Although “making representations good” did not have exactly the same backwards-looking character possessed by modern proprietary estoppel, the essential normative principle that it is unconscionable to allow someone to suffer a detriment as a result of their reliance upon a promise which is reneged upon sits at the centre of both doctrines. One can only assess the existence and extent of detriment arising from reliance on a promise by looking back from the point when the promisor reneges on that promise. Another interesting forerunner of proprietary estoppel in which detrimental reliance features is the limited equitable jurisdiction to perfect a failed gift, discussed in the 1862 case of *Dilhyn v Llewelyn*.<sup>28</sup> The relevant estoppel, sometimes known as estoppel by encouragement,<sup>29</sup> affects the donor of property who makes an imperfect gift – ie without compliance with proper formalities - and then induces the donee to act on the assumption that the gift is effective or will be perfected.
44. Another equitable doctrine which merits close attention as a precursor of proprietary estoppel is the doctrine of part performance as the basis for an award of specific performance of a contract (typically for the sale of land) where relevant formalities were not complied with.<sup>30</sup> It is thought that this doctrine was abolished for England in 1989,<sup>31</sup> but this does not mean we should ignore lessons which can be drawn from it. The basis for the doctrine is substantive law, not an aspect of the law of evidence. It is that acts of detrimental reliance in performance of the contract give rise to an equity, if the other party relies upon lack of formality to deny the contract, and the court will give relief to satisfy that equity.
45. The leading case on this doctrine is *Maddison v Alderson* in 1889.<sup>32</sup> It fits the classic fact pattern in the modern proprietary estoppel cases. The defendant was induced to work for years as housekeeper to Alderson on the promise he would leave her a life estate in

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<sup>27</sup> *Ibid.*, 549.

<sup>28</sup> *Dilhyn v Llewelyn* (1862) 4 De G, F & J 517. This has been described as “one of the leading cases on proprietary estoppel”: G. Owen & M. Parker Jones, “*Dilhyn v Llewelyn* – a fresh perspective on a misconceived approach” [2022] Conv 1.

<sup>29</sup> J. Heydon, M. Leeming and P. Turner, *Meagher, Gummow & Leane’s Equity: Doctrines and Remedies* (5<sup>th</sup> ed, 2015), 519.

<sup>30</sup> See *Maddison v Alderson* (1883) 8 App Cas 467; *Steadman v Steadman* [1976] AC 536; and discussion in J. Heydon, M. Leeming and P. Turner, *Meagher, Gummow & Leane’s Equity: Doctrines and Remedies* (5<sup>th</sup> ed, 2015), 678-687.

<sup>31</sup> Section 2(8) of the Law of Property (Miscellaneous Provisions) Act 1989; see J. Heydon, M. Leeming and P. Turner, *Meagher, Gummow & Leane’s Equity: Doctrines and Remedies* (5<sup>th</sup> ed, 2015), 678 and references.

<sup>32</sup> (1883) 8 App Cas 467.

certain land. This agreement was void for want of writing. Alderson died without having made an effective will to leave the life estate, and his heir sued to recover the title deeds held by the housekeeper. Her defence was the agreement she had made and performed, which she sought to enforce in equity. Lord Selborne said, “In a suit founded on such performance, the defendant is really ‘charged’ upon the equities resulting from the acts in execution of the contract, and not . . . upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow.”<sup>33</sup>

46. One does not need to look too far below the surface to see notions of detrimental reliance in other precursors to the modern law of obligations. Among the family of the so-called *assumpsit* causes of action, for example, was the action for misperformance of an undertaking. In seminal cases such as *Coggs v Barnard*,<sup>34</sup> the courts found that a defendant could be liable where a claimant had relied upon a gratuitous undertaking to carry goods which the defendant had subsequently misperformed. Notwithstanding the absence of any consideration, the claimant could recover on the basis that they had relied on the undertaking to their detriment.
47. These old forms of action infused by ideas of detrimental reliance fell into abeyance, however, as the law became increasingly systematized around the law of contract and tort as the nineteenth century went on. In particular, the rise of Will Theory led the law of obligations to coalesce around a doctrine of contract based on the parties’ expectations, with liability for breach of contract fixed irrespective of whether there had been any detrimental reliance.<sup>35</sup> Moreover, in light of the prestige of the natural sciences and Benthamite philosophy, the law increasingly became seen as a science, with an emphasis on law as consisting of definite formulae with intellectual coherence a priority. No longer could an appeal to the old forms of action be regarded as a satisfactory way of ordering the law. They left too many questions unanswered and applied in what had come to seem a fairly random way. More intellectual coherence was required to provide predictability. So the common law increasingly focused on bright line rules, epitomised by its strict requirements in relation to the formation of contracts.
48. But as I have sought to show, the interaction of these bright line rules with the unpredictability of real life inevitably created tensions. Crudely put, mid-twentieth century judges began to look for ways to ameliorate the harshness that ensued from people largely having to fit their disputes within the tightly defined doctrines of contract and tort. In doing so they drew creatively on caselaw preceding the arrival of Will Theory and the scientific understanding of law to fashion doctrines able to meet the tensions they perceived. This provides the context for the emergence of promissory estoppel, the constructive trust, unjust enrichment and the *Hedley Byrne* run of cases to name just a few.

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<sup>33</sup> (1883) 8 App Cas 467, 475. See also J. Heydon, M. Leeming and P. Turner, *Meagher, Gummow & Leane’s Equity: Doctrines and Remedies* (5<sup>th</sup> ed, 2015), 685-686 (“The principle of part performance is undoubtedly . . . a rule of substantive law, not evidence”).

<sup>34</sup> [1703] 92 E.R. 999.

<sup>35</sup> See D. Ibbotson, *A Historical Introduction to the Law of Obligations* (1999), chapter 12.

49. Although often awkwardly categorised as an unjust enrichment case, *Brewer Street Investments v Barclays Woollen*<sup>36</sup> is another case in which detrimental reliance was central. It can be seen as a case which revives an older view of the equities rising where services are provided without a contract being in place, but where it is expected one will be entered into thereafter. The ruling that the services were provided on a conditional basis, that they would not be paid for separately if the contract was entered into (because the contract price would cover the cost), so that a quantum meruit was payable when that condition failed, seems to hark back to the approach in the old case of *Planché v Colburn*.<sup>37</sup> In that case the parties had agreed a price to be paid on the completion of a book work. The plaintiff duly performed a large amount of work in writing the book, only for the defendant to cancel the contract before completion. The Court of King’s Bench held that the defendant could not withhold payment on a quantum meruit basis: “the plaintiff ought not to lose the fruit of his labour.”<sup>38</sup> The relief in both cases responded to the fact of detrimental reliance upon an assurance given, albeit the remedy was not limited to the detriment as such, but was fashioned by reference to the reasonable market price of the services provided.
50. The reassertion of ideas of detrimental reliance in modern proprietary estoppel – and indeed in the *Hedley Byrne* cases concerning assumption of responsibility – falls squarely within this story. Re-emerging first in proprietary estoppel’s acquiescence and representation-based strands<sup>39</sup>, the force of detrimental reliance when coupled with a promise has since evolved to become a powerful cause of action capable of allowing for the enforcement of agreements notwithstanding the absence of formalities.
51. But why should detrimental reliance be so important in this particular context? After all, the law could adopt any number of alternative bases for when it will recognise rights and obligations despite the absence of formalities. Lord Denning in *Greasley v Cooke*<sup>40</sup>, for example, suggested that mere reliance on a promise could be sufficient to “activate the Equity” without any detriment. Or it might be argued that proprietary estoppel should be confined to being a species of constructive trust or alternatively a remedy for unjust enrichment without detrimental reliance being necessary.
52. Much of this disquiet arises from a concern that detrimental reliance is somehow poised to displace consideration and by doing so undermine the law of contract. This concern is misplaced, in my opinion, as it overlooks critical differences between the promise-detriment strand of proprietary estoppel and contract law. Most obviously, the promise-

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<sup>36</sup> *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428.

<sup>37</sup> (1831) 8 Bing. 14; 131 E.R. 305.

<sup>38</sup> *Ibid.*, 306, per Tindal CJ. see C. Mitchell and P. Mitchell, ‘*Planché v Colburn*’, in C. Mitchell and P. Mitchell, *Landmark Cases in the Law of Restitution* (2006). The authors consider that the case was determined on a restitutionary basis; they argue, however, that the case is awkwardly categorised as such because the defendant received no discernible benefit. This aligns with the view that the case is better thought about in terms of detrimental reliance: See McFarlane and Sales, ‘Promises, detriment, and liability: lessons from proprietary estoppel’ (2015) 131 LQR 610, 627.

<sup>39</sup> See, for example, the first judicial use of the term in *E R Ives Investment v High*, [1967] 2 QB 379, 405, per Winn LJ: “where estoppel applies, the person entitled to wield it as a shield has, ex hypothesi, suffered a past detriment or other change of position; he is not asserting any positive right but is invoking law or equity to afford him procedural protection to avert injustice.”

<sup>40</sup> [1980] 1 WLR 1306 at 1311.

detriment remedy is backward-looking in nature and does not impose obligations at the time of the relevant promise, whereas contract looks forward by imposing obligations as soon as the bargain is struck.

53. Concepts such as ‘detrimental reliance’ and ‘unjust enrichment’ are really the proxies we use for an underlying moral question. That is, they are used in an attempt to delineate the threshold at which the law can justifiably intervene in private – typically reciprocal - relationships, to enforce them or to give relief arising out of them. This is of course a question not limited to the proprietary estoppel context and sits at the heart of the entire law of obligations. As put by Fuller and Perdue in their famous 1936 article “The Reliance Interest in Contract Damages”, concepts like detrimental reliance are ultimately the basis for moral claims about when it is appropriate “to unlock the impulse to compel men to make good their promises”.<sup>41</sup>
54. Fuller and Perdue were of course grappling with this question in the context of contractual damages, but it has wider application. Put simply, what circumstances are sufficiently unpalatable to legitimise the law in intervening in private reciprocal arrangements and compelling one party to pay money or convey property to another? Fuller and Perdue’s tripartite analysis of the expectation, reliance and restitution interests has proved to be remarkably influential. It offers a useful schema for considering why detrimental reliance is an appropriate focus for the doctrine of proprietary estoppel.
55. As Fuller and Perdue point out, the classic model for contract remedies is based on expectation, with the object being to put the innocent party in as good a position as they would have been in had the defendant performed their promise. This remedy flows from the moral basis that it is unjust for a party not to receive what they had been promised. There are good reasons why this should not be taken to provide the basis for proprietary estoppel. To make available a claim in proprietary estoppel for frustrated expectations would seriously undermine the operation of contract law and the strict requirements which have been developed to police the formation of contractual bonds which have such far-reaching legal effects regarding the enforcement of promises. There are good reasons to restrict contractual rights on the expectation-basis to the cases where contractual formalities have complied with, and this regime would be undermined if proprietary estoppel led simply to the enforcement of gratuitous promises.
56. Fuller and Perdue’s version of the restitution interest is based on a different moral premise, ie of preventing unfair gain by a defaulting promisor at the expense of a promisee. There are proprietary estoppel cases which adopt an approach approximating to this. In *Jennings v Rice*<sup>42</sup>, for example, the Court of Appeal simply calculated the market cost of the labour received by the promisor as a result of the promisee’s reliance without considering any wider detriment.
57. The problem with a restitutionary approach for proprietary estoppel is that it does not seem accurately to capture the unconscionability inherent in proprietary estoppel cases. The benefit received by a promisor may be disproportionate to the extent of the

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<sup>41</sup> L. Fuller and W. Perdue, “The Reliance Interest in Contract Damages: I” (1936–37) 46 Yale Law Journal 52, 69.

<sup>42</sup> [2002] EWCA 159.

detriment suffered by the promisee. Consider the situation in *Crabb v Arun DC*.<sup>43</sup> There the promise related to a grant of a right of access on which Mr Crabb relied by selling the land on which his only other access point was located. The defendant council did not benefit in any obvious way from Mr Crabb's reliance on the assurance it gave. The restitutionary approach therefore fails to reflect what made the council's conduct unconscionable, which was the combination of the breaking of a promise or assurance with the detriment which ensued for Mr Crabb as a result of this. Again, however, it is worth pointing out that it is not obvious that there was an exact correspondence between the relief given (the grant of the right of access) and the extent or value of the detriment suffered by him.

58. Therefore, from Fuller and Perdue's tripartite analysis, we are left with the reliance interest. That corresponds with the unconscionability of permitting someone to suffer a detriment by virtue of their reliance on a promise if that promise is reneged upon. This is a claim with a strong moral basis, indeed I would argue stronger than either the expectation interest or even the restitution interest (at least where the enrichment of the defendant is greater than the extent of the claimant's detrimental reliance). As Fuller and Perdue observe:<sup>44</sup>

“the promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him.”

59. Patrick Atiyah made a similar point in his *Essays on Contract*:

“Consider next the possibility of detrimental reliance by the promisee. Is it not manifest that a person who has actually worsened his position by reliance on a promise has a more powerful case for redress than one who has not acted in reliance on the promise at all? A person who has not relied on a promise (nor paid for it) may suffer a disappointment of his expectations, but he does not actually suffer a pecuniary loss... no definitional jugglery can actually equate the position of the party who suffers a diminution of his assets in reliance on a promise, and a person who suffers no such diminution.”<sup>45</sup>

60. It is in my view this heightened claim on conscience which detrimental reliance carries which makes it the appropriate starting point for an analysis of the basis for application of the doctrine of proprietary estoppel. It is only where unconscionability is made out to this high standard that there is sufficient justification to allow qualification of strict adherence to the formalities associated with property and contract rights. Through detrimental reliance the law is able to provide redress for the most pressing instances of unconscionability, while leaving intact the primacy of the ordinary formality rules.
61. Where third parties receive property which may be affected by equitable claims based on proprietary estoppel, their interests will be protected by the usual rules governing when

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<sup>43</sup> [1976] Ch 179.

<sup>44</sup> L. Fuller and W. Perdue, “The Reliance Interest in Contract Damages: I” (1936–37) 46 Yale Law Journal 52, 56.

<sup>45</sup> P.S. Atiyah, *Essays on Contract* (1986), 20.

equities bind them. In particular, the bona fide purchaser of a legal interest for value and without notice – Equity’s darling – will be fully protected. In this way, Equity protects against the limited disruption of the apparent property rights of the claimant and the defendant in a proprietary estoppel case, which is appropriate between the two of them, rippling out and creating an undue impact on the rights of third parties.

62. However, there is an additional element that informs the unconscionability analysis in many of the proprietary estoppel cases beyond simple detrimental reliance. The moral claim for adjustment of the strict legal rules may be all the stronger where the detrimental reliance occurs in the context of reciprocal relationships based on trust and what the parties objectively appear to regard as an acceptance of mutual obligations Fuller and Perdue’s tripartite schema does not adjust for this significant feature, which is present in some but not all cases of detrimental reliance.

63. Detrimental reliance can of course occur in circumstances where there is no reciprocity between the parties. A person may simply rely to their detriment on a promise without having given any undertaking to provide anything in return for that promise: see *Hedley Byrne*. What is materially different about most of the proprietary estoppel cases however, is that, despite not meeting the requirements for having a binding contract, they involve reciprocal relationships where the parties exchange promises and perform what they take to be obligations to one another.<sup>46</sup> For example, in *Gillet v Holt*, Robert Walker LJ recorded that the promisee and his wife had

“devoted the best years of their lives to working for Mr Holt and his company, showing loyalty and devotion to his business interests, his social life and his personal wishes, on the strength of clear and repeated assurances of testamentary benefits.”<sup>47</sup>

64. It is not clear that the account of unconscionability here is limited to the feature of detrimental reliance. Should the reciprocity of the relationship, as understood by both parties, be factored in as well? Certainly it seems that the moral argument in favour of qualification of any right to rely on the absence of the usual formalities is all the stronger in a case of detrimental reliance in the context of the working out of a reciprocal relationship. The existence of a reciprocal arrangement between individuals is important in other contexts where equity intervenes to impose a constructive trust to give effect to the arrangement despite non-compliance with formalities: one thinks of *Rochefoucauld v Boustead*, the *Pallant v Morgan* trust<sup>48</sup> and the doctrine of mutual wills,<sup>49</sup> for example. So there may be an argument for confining proprietary estoppel to this sort of case. But would it be right to take the imperfect gift cases outside the scope of the doctrine?

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<sup>46</sup> This was also, of course, a feature of *Maddison v Alderson* (1883) 8 App Cas 467: one might say that the modern doctrine of proprietary estoppel has developed and expanded to take over the work once done, in part, by the doctrine of part performance. This gives rise to the question whether the modern doctrine ought to prevail in the face of the abolition of the doctrine of part performance by section 2(8) of the Law of Property (Miscellaneous Provisions) Act 1989: it is submitted that this provision does not indicate an intention to eliminate doing justice in a proprietary estoppel situation. See also n. 30 above.

<sup>47</sup> [2001] Ch 210, 235.

<sup>48</sup> [1953] Ch 43. See Liew, *Rationalising Constructive Trusts* (2017), ch 6.

<sup>49</sup> Liew, *Rationalising Constructive Trusts* (2017), ch 12.

65. Related to this point is the question whether the addition of this reciprocity element should affect the remedy to be granted. Should the relief be confined purely to making good any element of detrimental reliance, perhaps including adjustment to require the defendant to pay the market rate for any services rendered, as in *Brewer Street*? Or should there be scope for enforcement of the promise in some cases, where, looking back in the way proposed by Hoffmann LJ in *Walton v Walton*, it can be seen that the promisor has in fact got the substance of what they took themselves to be seeking in the reciprocal relationship in which they made the promise? This might be a basis on which one could seek to explain the cases in which the promise has been enforced on the hybrid model which Professor McFarlane and I proposed in our article in 2015.<sup>50</sup> Going down this route might also allow one to recognise the imperfect gift type of case as falling within the doctrine, while at the same time acknowledging that it might be appropriate to limit the relief to be granted in such a non-reciprocal context to a remedy which purely reflects the extent of the detrimental reliance alone.
66. I make these points to draw out two aspects of the law in this area. First, the modern law of proprietary estoppel needs to stand on its own feet as a distinct basis for the creation of obligations affecting property rights. To call it an estoppel, which suggests that a party is estopped from refusing to fulfil their promise, conceals a good deal more than it reveals about the basis of this species of obligation. I would suggest that academia and the courts need to examine with great care the factors which do, and conversely those which do not, provide a justification for departure from the usual rules of formalities and contract formation. There are potentially important distinctions to be drawn between different cases, depending on precisely which factors may be present.
67. Detrimental reliance in the context of the working out of a reciprocal arrangement seems to me to be the strongest justification for Equity's intervention to qualify formality rules in the proprietary estoppel cases. The case for intervention becomes weaker when one moves away from that model. The law of proprietary estoppel is attempting to do two things. First, the caselaw is developing in an effort to ensure that the principles by which the ordinary formalities regarding property and contract-formation are departed from are given reasonably determinate form, in the interest of promoting consistency and fairness. The law here cannot be a terrain of palm-tree justice with no principles, laid down authoritatively by the superior courts, to guide judicial discretion. Secondly, the law is attempting to strike a balance between addressing the unconscionability caused by opportunistic reliance on strict formality rules while at the same time specifying a sufficiently high threshold for Equity's intervention so as not to undermine those rules fatally. It is this need for a high bar that has pushed the law towards a focus on detrimental reliance.
68. The second point of emphasis for this evening is that we need to think more carefully about the relationship between the justification for Equity's intervention under the doctrine of proprietary estoppel and the relief which is granted when such an estoppel is found to exist. The law should marry up the relief granted with the grounds for applying the doctrine in the first place. This is another important way in which the law and its

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<sup>50</sup> McFarlane and Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610.

rationale can be kept in line with each other, in true Aristotelian fashion, while also striving for a reasonable degree of certainty and predictability.