

“A lively controversy”

The role of detriment in the doctrine of proprietary estoppel

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1. In this paper I consider some of the issues relating to detriment as that concept features in the doctrine of proprietary estoppel. It is a doctrine which exists to provide legitimate remedies which are unavailable under the usual well defined routes (contract, express trust, etc), and in essence, and to over simplify, has been developed over the decades to meet hard cases. This feature of its genesis explains both the case by case nature of its development, and also most significantly the flexibility with which it provides a remedy to a claimant who has established liability.
2. It is well established that in order to establish liability in a claim for proprietary estoppel, three conditions must be met. An equity arises where:
 - a. an owner of land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the owner’s property;
 - b. in reliance on this belief, the claimant acts to his detriment to the knowledge of the owner; and
 - c. the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive.
3. The issue in any given case is whether it will be unconscionable for the owner to deny that which he has allowed or encouraged the claimant to assume to his detriment. Equally well known is that the court has a wide discretion as to the manner in which it will satisfy an equity which has been established in accordance with these principles in order to avoid an unconscionable result, having regard to all the circumstances of the case, including, but not limited to, the expectations and conduct of the parties.

4. Hence the two ways in which detriment features in estoppel claims: the first is on the question of liability; the second is its role in determining the question of how the equity should be satisfied.

(1) Unconscionability

5. The first question is whether detriment is in fact a necessary ingredient in order to establish the existence of unconscionability. Megarry and Wade (8th edition) suggest that “*in the absence of detriment it would seldom (if ever) be unconscionable for the owner to insist upon his strict legal right*”. To track down the source of that equivocation we need to go back in time to Watts v Storey (1984) 134 NLJ 631 which was quoted with approval in Gillett v Holt [2001] Ch 210, in which Robert Walker LJ noted “*the overwhelming weight of authority shows that detriment is required*”. That there is a doubt at all derives from the judgement of Lord Denning MR in Greasley v Cook [1980] 1 WLR 1306, in which he states “*there is no need for the claimant to prove that she acted to her detriment or to have been prejudiced*”. One possible explanation for this is that the statement is directed towards the requirement that that such detriment be proved by the claimant; in other words it is an evidential point. Perhaps, the argument would go, there is a presumption of detriment in a case where the claimant can show that he changed his position in reliance on the representation by the owner, so there is no need to “prove” that that was to the claimant’s detriment. Thus for example in Steria v Hutchinson [2005] EWHC 2993 (Ch), Peter Smith J allowed the claimant to take advantage of a presumption of detriment when attempting to establish an estoppel by representation. He relied in that case on the statement of Lord Denning in Greasley v Cook.
6. However the notion that there is any such presumption has been laid to rest. Robert Walker LJ stated in terms in Gillett v Holt that “*the detriment alleged must be pleaded and proved.*” And in Jones and Watkins, Slade LJ emphasised that “*the elements of detriment relied on should ... be specifically alleged and proved. The court should not readily infer detriment which has not been proved*”. And indeed the Court of Appeal rejected the analysis of Peter Smith J when overruling Steria, and Neuberger L.J, as he then was, stated that the observations of Lord Denning in Greasley v Cook “*can*

only fairly be read as applying to reliance, and does not justify the view that there is presumption of detriment’.

7. Thus has the arguably loose observation of Lord Denning has been refined to mean something rather different from that which it appears to mean on its face. The statement in the latest edition of Megarry and Wade stands however, although it is difficult to imagine the case where unconscionability could be established in the absence of detriment. Another important gloss needs to be noted. The detriment in my view needs to have been established by the time the claim is brought. It is not the case that one can simply look to the withdrawal of the promised interest and identify that as the detriment which will have been suffered should it be permitted. It has been suggested that a proprietary estoppel claim will fail if the claimant cannot show that, were the owner free to act as the owner wishes, the claimant would suffer a detriment. Put in this way, which is suggestive of the detriment lying in the future if the promise is resiled from, the requirement will be satisfied merely by asserting that if the owner, for example, fails to leave the property to the promisee in the owner’s will, the claimant will suffer detriment by reason of the owner acting contrary to earlier promises with the result that the claimant will not now be receiving the property. In fact it is necessary to look retrospectively at detriment suffered in reliance on the promises, and not in the form of a promisor withdrawing the promise.

8. To return to the main question as to whether or not the doctrine applies in the absence of detriment, most commentators agree that it would never be possible to establish liability in a claim based on proprietary estoppel without detriment having been established. In this way the doctrine is to be distinguished from example from the doctrine of promissory estoppel, in which the principal concern is not to prevent a situation where the claimant having suffered the detriment remains without the promised reward, but rather seems to depend on the need for finality; and the doctrine of promissory estoppel can apply even in a case where the claimant cannot show that it would suffer a detriment should be promisor be allowed to resile from his promises. Of course promissory estoppel does not give the claimant a cause of action against the owner; its effect is limited to extinguishing or suspending a right held by the owner.

This is in contrast of course to the doctrine of proprietary estoppel which can and often does found a claim. Nonetheless, the doctrine of promissory estoppel may in certain circumstances be established without either initial detriment having been suffered or there being any prospect of the claimant suffering a detriment.

9. There is no such leeway in the doctrine of proprietary estoppel. I have scratched my head and failed to imagine any set of circumstances in which in the absence of detriment would not be fatal to the claim. Of course, the absence of detriment may not deprive a particular claimant of all chance of a remedy, since on any given set of facts it might be possible for the claimant to establish an independent cause of action that doesn't depend on detriment. I won't go into those now but they include the *Pallant v Morgan* equity, and on one view a common intention constructive trust, in cases involving the joint acquisition in the names of both the claimant and the defendant of legal title to the disputed property, where the court's focus is on the quantification of the parties' beneficial interests, removing the need to consider the question which underlies all proprietary estoppel claims, and many constructive trust claims, namely, the question whether the claimant can establish an interest in the first place.
10. So the smart money is on the view that notwithstanding the apparent unwillingness of some courts and legal textbooks to say as much, detriment is an essential ingredient if liability is to be established; remembering that what must be shown in such a claim is that in reliance on the representation, promise or acquiescence on the part of the owner, the claimant adopted a particular course of conduct. It is often said that whether or not such conduct can be regarded as detriment requires a comparison of two positions, both assuming that the owner was now free to act as he wishes, that is to say, otherwise in accordance with the promises that were made. The first position is the position that the claimant is now in having adopted the actual course of conduct in reliance on those promises. The second position is the position that the claimant would now be in if he had not adopted the actual course of conduct in reliance on the promises of the owner. If the first position is less advantageous to the claimant than the second position, then detriment is established.

11. This is a neat enough formulation and perhaps easy enough to apply in commercial contexts where the course of action which the representee takes might (though not necessarily so) be easily analysed in terms of income or profits or capital growth. However in the increasingly familiar territory of the family or personal dispute, where the claimant has often structured his life around the promises, that life often spanning decades, a straightforward comparison between the two positions is at best less than straightforward, and, in my view, at worst almost wholly unrealistic. This is for two reasons.
12. Firstly, the exercise may descend into laborious, painful, technically bedevilled detail. In a typical case the claimant in a domestic or agricultural family based context will over the years have received a large number of benefits, some financial, some in kind, all of which the defending owner will wish to claim should be taken into account when considering the question of detriment. Indeed there is no doubt on the authorities but that countervailing benefits must be taken into account. In the past, and certainly in my early years of practice, this exercise would result in the defendant producing vast amounts of detail on the financial value of electricity, gas, water, meals, teas, coffees, often accommodation, amounts which had been spent on improving the accommodation or its curtilage, fuel, use of car, magazine subscriptions (I kid you not), and anything else the defendant could possibly dream up in order to keep the total of the “countervailing benefits” as high as possible with a view to establishing that they exceeded or outweighed any detriment proved. In order to defend the allegation that the claimant had in fact received more than he had lost by adopting the particular course of conduct, the claimant would then be required to show, by way of very common example, what a farm manager or farmworker in the claimant’s position could have expected to receive over the same period. Such an exercise will often involve digging out old Ministry of Agriculture wages orders, and I have even been involved in cases in which the relative seniority of the comparators was closely investigated by reference to the number of hours worked, the duties undertaken, and so on and so forth.

13. Luckily there has been a strong move away from such a soul destroying and I would venture to suggest ultimately meaningless process, and the courts tell us now in no uncertain terms that establishing detriment “*is not a narrow or technical concept ... the detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad enquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances*”.¹ Gillet v Holt, Robert Walker LJ.
14. There is a move against a narrow spreadsheet approach to establishing the difference between the first and second positions in the comparison I referred to above. However moving away from that approach, necessary though it is, leads us into another difficulty, which is the second reason for querying how easy it is to apply the apparently straightforward comparative model where one compares one outcome (actual) with another outcome (counterfactual). If one is not taking a highly technical financial approach, then establishing what the outcome for the claimant would have been if the claimant had not taken the course of action which he did take is (a) difficult as a matter of evidence; and (b) difficult as a matter of comparison. Who is to say what the nephew in Thorner v Major would otherwise have done had he not devoted himself to working on the uncle’s farm all those years?. It might on any given set of facts be a reasonable assumption that had somebody not worked on farm he or she might have sought farm work elsewhere. This indeed is often the presumption that is applied when a defendant owner seeks to debunk the claimant’s claim to have established detriment. The argument is advanced that the claimant, only ever having been a farmer, could only have been a farmer in this alternative parallel universe which is being contemplated. However such a presumption is lazy, not to say naive, and anyone who has ever taken a moment to travel along the theory of parallel universes knows that feeling of stupefaction as one contemplates the infinite number of different alternatives that might unravel at every decision point arising throughout a person’s life. In other words, in my view, any presumption that somebody who was a farmer for thirty years on his father’s farm would, or would even most likely, have been a farmer on somebody else’s farm over that period of 30 years had his father not

¹ Gillet v Holt at page 232

made him a promise that he would inherit the farm is inherently suspect when subjected to any degree of analysis.

15. That then is the evidential difficulty involved in the process of comparison. It is not unconnected with the second difficulty which is in making the comparison at all. It may well be that the reason parties will so readily assume that a claimant who was a farmer on his father's farm for 30 years is likely had that not been the case to have been a farmer on another farm for 30 years is that the resulting comparison is relatively – I emphasise relatively – straightforward, albeit still involving a large dose of assumption as to how matters would have progressed. But once it is realised that actually there might be any number of other outcomes – which might involve travel, other trades, marrying into money, becoming homeless – how can any sensible comparison be made, even if it were possible to establish what the most likely outcome would have been had the claimant not devoted himself or herself to the defendant for the last two decades? How can a court compare the relative advantages and disadvantages of working in the motor racing business as against working on a farm for 30 years?

16. Indeed the problems caused by these difficulties have been recognised, more or less explicitly, by the courts in the more recent cases. It is no longer necessary to demonstrate conclusively that had a different course been taken by the claimant he would have done better;² it is the fact that that the claimant has deprived himself of the opportunity to do any better which counts.³ There may be sufficient detriment if the claimant has:

*“positioned his whole life on the basis of the assurances given to him and reasonably believed by him”.*⁴

17. Whilst this approach has the more than superficial attractiveness of a good dose of common sense, it might be said that it is hard to see how it is consistent with the comparison approach I referred to above. What seems to be being said, rather, is that

² Davies v Davies [2014] EWCA Civ 586

³ Gillett v Holt at page 235 A-B

⁴ Suggitt v Suggitt [2012] EWCA Civ 1140 at [59]

far from the claimant having to be able to show that the position in having adopted a certain course of conduct in reliance on the owner's promises is manifestly worse than the position that he would have been in had he not adopted that course of conduct (because the representations had not been made), the detriment subsists in the mere fact that he adopted a course of conduct that he did, regardless of whether or not that can be shown to be disadvantageous or advantageous compared with any number of potential other courses of conduct, and that in doing so he had deprived himself of the opportunity to do anything elsewhere, whether better or not.

18. As I say, although the earlier comparison based approach appears to have the merit of being logical, allowing an ostensibly principled approach to be taken by performing the comparison exercise, for the reasons given its utility is in my view overstated. It simply cannot achieve that which it purports to achieve, at least not without deploying a theory of how life would have unfolded which is going to be very difficult in many cases to establish to any court's satisfaction. Of course on any given set of facts the alternatives which had been turned down by a claimant may be real and concrete. But in most of the cases which have come before the courts, the alternatives are purely theoretical. There is no way the court can determine, even on the balance of probabilities, what might have happened had the claimant not in fact thrown his lot in with the landowner in the way that he had. But the alternative formulation, which is to accept that somebody can establish detriment merely by showing that he has positioned his whole life around an enterprise in reliance on a promise that it would be given to him or he would otherwise share in it in the future, seems necessarily to move away from the comparison approach and arguably to move away from the classic understanding of detriment; or, perhaps to put it more accurately, to formulate albeit implicitly a sort of evidential proposition or presumption that devoting one's whole life to an enterprise on the basis of a promise is detriment for that reason alone.

19. I draw attention to a potential difficulty inherent in the proposition that merely basing one's life around a particular enterprise in reliance on promises is sufficient detriment. At the very least that formulation departs from the logical comparison based approach which, as I sought to demonstrate above, is to be rejected for very good reasons. But

quite what the elusive nature of detriment is, if all one has to do is show that one believed the promises and took a course of action in reliance on them as a result, remains to be articulated. The danger is that it starts to look not dissimilar to a presumption of determined based on change of position, a position which as discussed earlier has been rejected by the Courts.

20. Before moving on to that question, I pause to consider where the forgoing analysis leave a claimant in terms of trial preparation. Is it ever going to be safe to rely simply on establishing a commitment to a course of conduct in reliance on the promises, without descending to details about what that has entailed? This is where principle is subordinated to the fact that the outcome of estoppel cases is, for all the struggle to elucidate and apply the doctrine in a principled way, highly fact sensitive and often dependent on matters of impression. Take the case of Moore v Moore [2016] EWHC 2202 (Ch). Stephen Moore was a farmer's son and was the fourth generation of sons to farm the family farm originally created by his great grandfather. His father made, as the Judge found, all the usual noises along the lines of "this will all be yours one day"; and to digress slightly the judge was particularly struck by the evidence of the son under cross examination that his father gave as his reason for refusing requests to leave work early to go to a farmer's dance the fact that the son was required to stay and invest in what was in effect his future. Although that went to the likelihood of the representations having been made, it also serves as an example of a claimant conducting his whole life in reliance on the promise, and is a prime example of the way in which small matters of detail will contribute to an impression on which the judge's findings as to liability will eventually be based.

21. Stephen did not excel at school, and had no other obvious talents, although he was very interested in motor racing. Whilst working on the farm although he took what appeared to be relatively low wages over the years, he was always provided with accommodation (albeit none of it was in his name), he had the use of a number of cars, and almost all of the outgoings which normal mortals have to fund out of their income were met by the farm: utilities; fuel; magazine subscriptions; and so on. Moreover, Stephen was made a salaried partner within a few years of starting to work

full-time on the farm, and an equity partner a very few years after that, following which profits were allocated to his current account on an annual basis along with the other two partners, his father and his uncle. On one view Stephen was, by the stage that the proceedings were brought, worth quite a lot by virtue of his share of the partnership.

22. The father (through his wife acting on his behalf) sought to exploit this to demonstrate that Stephen, far from suffering detriment as a result of the course of conduct he had chosen to adopt, was to the contrary massively advantaged by adopting that course of action, and could not therefore be said to have suffered detriment. There were a number of reasons why this argument did not prevail. First of all, evidentially, those acting on behalf the father sought to introduce the relevant comparison by reference to a schedule which they had produced. The schedule purported to show the amounts by which Stephen had benefited in a number of various categories: benefits in kind; profit allocation; contributions to pension; and so on. The schedule was attached to the skeleton argument; and the schedule was referred to in closing submissions. However the schedule was never deployed in evidence. Nor did any witness speak to it in order to explain the source of the figures contained in it or any of the assumptions on which it was based. The schedule was not put either to Stephen, or to the partnership accountant who gave extensive evidence on how the partnership had managed and approached its financial affairs. He was the one with the intimate knowledge of the accounts and insofar as the schedule was based on items contained in the accounts he could have been asked to comment on them and indeed to explain many of them which were opaque.
23. However none of these things happened and the judge ruled that it was not sufficient for a party to produce what was alleged to be a summary of financial evidence, without making explicit the assumptions on the basis on which the analysis had been performed, and, most crucially, without introducing the schedule into evidence either by means of having a witness speak to it or by putting its elements to the party against whom it was being used. It was meaningless and without evidential value.

24. Secondly, even were it to be taken at face value, it did not address the central proposition on detriment which was that Stephen had chosen to position his whole life in relation to the farm. This is partly because the figures which it relied on had all arisen and were related to time periods in the last few years before the case was brought; they did not address the early detriment in the form of long working hours and low wages asserted by Stephen which remained unchallenged. It was also - and this again demonstrated the degree to which these findings are fact sensitive - because those advantages which did accrue were not properly characterised as countervailing benefits; rather, on the facts of this case they could be seen as the beginning of the fulfilment of the promises which the father had made. The father had never been specific about the mechanism by which those promises would be fulfilled; it was not inconceivable for example (albeit admittedly unlikely on the facts) that the father would choose, as his own father and indeed his brother had chosen, to retire from the business at which point it could be expected that in fulfilment of the promises the assets including the land of the partnership would be made over to Stephen either in whole or on a gradual basis. As it was that didn't happen, because the father (until his ill health prevented him) continued reasonably actively in the business albeit with a declining role; but bringing Stephen into the partnership and exposing him to those benefits (and, an important point overlooked on those acting on behalf of the father, the liabilities that go with that) in fact demonstrated to the court exactly what the father's intentions for Stephen were. Far from demonstrating that Stephen was in receipt of countervailing benefits which diminished or negated any detriment he might have suffered, the bestowing of the partnership and the benefits that went with it showed that this was indeed part of the father's overarching plan that Stephen would have his share of the farm in the fullness of time.

25. I have gone into that element of that case in some detail as a way of demonstrating that how detriment actually plays out in any case is highly fact sensitive, and to emphasise that the preparation for trial must be rigorous on that evidential issue; whilst not necessarily over technical in terms of quantifying detriment and countervailing benefits, it does need to be evidentially technical in the sense of setting out to demonstrate the detailed facts that support the case on detriment.

(2) Satisfying the equity

26. The question is equally sensitive when it comes to consideration of how the extent of the detriment affects the way in which any equity which has been established is to be satisfied. There are a number of factors which require as a matter of principle to be taken into account when looking at how to satisfy the equity, the extent of the detriment which has been suffered being a factor of obvious significance. These factors have been summarised by Lewison LJ in the recent case of Davies v Davies [2016] 2 P. & C.R. 10, another farming case, in which the court overruled the decision of HHJ Jarman sitting as a deputy of the High Court, in which the equity which had been established was satisfied by granting the entire value of the parents' estate to the farming daughter, the Court of Appeal substituting a much lower proportion of the value of the estate.
27. The parents owned and ran a farm. They wished the farm to remain in the family after they died but the daughter was the only one of their children interested in running it. She lived on the farm for many years and worked on it for low pay. The judge held that the parents had caused her to have various expectations over the years, including that she would have a share in the farm business, and that she would be left the farm and its business in the parents' wills. The parents changed their wills on several occasions over the relevant time period. There were a number of disagreements over the years, and the daughter stopped living and working at the farm at various points, finally leaving and stopping work there in 2012. The judge accepted that an estoppel had been established. He identified two strands in the detriment the daughter had suffered: working for long hours without full payment, and losing the opportunity to work shorter hours in an environment of her choosing without the difficult working relationship with her parents. He rejected the daughter's claim to be awarded the land and business *in specie*. He also rejected the parents' offer to pay £350,000 in respect of the claim. In conclusion, he awarded the daughter £1.3 million. On appeal, it was common ground that the eventual award would be purely monetary and the farm and business would not be transferred.

28. The appeal was allowed. The Court in Jennings v Rice [2002] EWCA Civ 159 had held that in cases where the claimant's expectations were uncertain, or where the court was not satisfied that the high level of the claimant's expectations was fairly derived from the assurances relied upon, the court could still take the claimant's expectations as a starting point. However, it was not entirely clear from Jennings what the court was to do with the expectation. It was a useful working hypothesis to take a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation.
29. The judge at first instance had applied far too broad a brush and failed to analyse the facts he had found with sufficient rigour. Nor had he explained why he reached his conclusion. Although he had said that he took expectation as an appropriate starting point, he had not explained which expectation, out of the many he had found, he regarded as the starting point. There had been a series of different and sometimes mutually incompatible expectations, some of which had been repudiated by the daughter herself, others of which had been superseded by later expectations. The judge had recognised that the expectations were changing and uncertain but said that the uncertainty related to the parents' proposals as to how to formalise the daughter's position at particular times and that the essence of the expectation was that the daughter was the only one who could fulfil their wishes of keeping the business in the family. That conclusion did not take into account the judge's findings about the changing nature of the parents' wills.
30. The judge had not properly analysed the parents' offer and failed to appreciate that it contained much that went towards satisfying the daughter's expectations. It reflected the value of her expectations regarding succeeding to the business. The judge had also noted that the offer did not take into account the parents' "*significant role in bringing that expectation to an end*". But it was inherent in almost every proprietary estoppel claim that the promisor had resiled from the promise; it was always the promisor who had a significant role in bringing the expectation to an end. There was no warrant and no authority for increasing a monetary award on that account. The only explanation

from the judge's own reasoning for the gap between the offer and his award was that he had attributed a value of almost £1 million to the non-financial aspects of detrimental reliance, and/or that he had ascribed a very large value to the disappointment of the daughter's expectation of inheriting the land. On the evidence, the expectation of inheritance could not fairly be derived from what she had been told; it could not carry much weight in an overall assessment. As to non-financial detrimental reliance, the judge had made no finding that any of what the daughter had given up was irretrievable. Any award under that head would be relatively modest. The factors were incapable of precise valuation, but the difficulty of assessment was no bar to an award. The parents' offer would be increased by £150,000, making a total award of £500,000.

31. In his judgement, Lord Justice Lewison focused on what he said was a “lively controversy” about the essential aim of the exercise of this broad judgemental discretion. *“One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant’s expectation unless it would be disproportionate to do so. The other takes the view that essential aim of the discretion is to ensure that the claimant’s reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different.”*

32. The Judge pointed out that much scholarly opinion favours the second approach, while others argue that the outcome will reflect both the expectation and the reliance interest and that it will normally be somewhere between the two. Logically, he said, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim.

33. In Jennings v Rice Robert Walker LJ referred to a class of case in which the assurances and reliance had a consensual character not far short of a contract. In such

a case “*both the claimant’s expectations and the element of detriment will have been defined with reasonable clarity.*” In that kind of case the court is likely to vindicate the claimant’s expectations. Although Robert Walker LJ does not say so in terms, it is implicit that in such a case the claimant will have performed his part of the quasi-bargain. He then referred to another class of case in which:

“... the claimant’s expectations are uncertain (as will be the case with many honest claimants) then their specific vindication cannot be the appropriate test. A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant’s expectations is fairly derived from his deceased patron’s assurances, which may have justified only a lower level of expectation. In such cases the court may still take the claimant’s expectations (or the upper end of any range of expectations) as a starting point, but unless constrained by authority I would regard it as no more than a starting point.”

34. This is what led Lewison LJ to adopt the submission of Counsel to the effect that where the case does not fall into the quasi contractual category, so that the court adopts the expectations only as a starting point, then in determining how to satisfy the equity it is helpful to think of a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation.
35. So the satisfaction of the equity in the Moore case and (on appeal) in the Davies case looks quite different but can be analysed as the difference between on the one hand a quasi contract case (Moore), in which the claimant had fulfilled his side of the bargain over many years, and the expectation was very clear; and on the other hand a case (Davies) where the high level of the claimant’s expectations (to inherit the whole farm) was not fairly derived from the promisors’ assurances given the background of the daughter coming and going, the changing wills, and the rows over the years, and the detriment was not so substantial where she could still realise some of the opportunities of which she had been deprived by working on the farm. Although

superficially similar, one can see that in fact Stephen Moore was given promises, and based his whole life on them. That was the detriment, the whole life detriment referred to earlier in this paper. The daughter in Davies had not done that, although she had incurred detriment to a degree.

36. We can see clearly that the existence of detriment is an essential part of satisfying the equity in the second type of case, a slide rule case, often guiding the court's consideration as to the specific amount to be awarded. At first sight, in the other type of case, where the arrangement is quasi contractual, it is not so obviously relevant. However, in my view it does appear in the guise of the performance of the claimant's side of the bargain, which properly analysed is the relevant detriment. Here we may come full circle, back to the establishment of unconscionability, and find the answer to the questions I posed in the earlier part of this paper, concerning proof of detriment, the technical problems in establishing detriment as a matter of evidence, and the apparent unsatisfactoriness of whole life course of conduct being regarded as detriment in and of itself. These "whole life cases", where the claimant has based his whole life on the defendant's project or enterprise, are cases of quasi contract where the expectation is clearly established and the detriment consists in the claimant having performed his side of the bargain.

37. This, then provides the analytical underpinning for accepting the whole life course of conduct as detriment in itself: in such cases the claimant behaved as if he were bound, and fulfilled his side of the bargain, whilst the person who induced the conduct with promises of satisfaction at a later stage is seeking at the end of it to get away in effect without paying that which he had promised in return for the performance of the (quasi) obligations. The detriment consists not in the failure of the defendant to fulfill the promises – we saw earlier that that is an erroneous approach – but in the claimant having kept to his side of the bargain often over many years by performing the obligations. The detriment was in behaving as if he was bound, in accordance with the agreement as he understood it, regardless of whether he thought, or had ever given any thought, to whether such an agreement was binding.

38. In this way the role of detriment in establishing liability, and its role in guiding the court's discretion in satisfying the equity, are consistent with each other, and support a coherent view of the part detriment plays in the doctrine of proprietary estoppel.