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Promises in Equity and at Law: Proprietary Estoppel after *Guest* v *Guest*

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Under the doctrine of proprietary estoppel, a promise made to another that they will acquire a right in the promisor's land can give rise to a legal remedy, if the promisee has detrimentally relied on that promise. In *Guest* v *Guest*, the Supreme Court was asked to settle a long-running debate about how judges should go about fashioning that remedy. The Court held that the claimant's award should be whatever is required to alleviate the unconscionability constituted by the promisor's repudiation of their promise. How that is to be determined will vary from case to case, but *Guest* v *Guest* makes clear that the starting assumption is that the promise will be enforced. This note sets out the approaches of the majority and the minority, and then discusses a number of issues raised by this decision.

INTRODUCTION

In *Guest* v *Guest* (*Guest*),[1] the Supreme Court set out the method for determining what remedy to award in response to a successful claim in proprietary estoppel. Andrew Guest's parents had promised Andrew that he would inherit a sufficient portion of the family farm so that he could operate his own farming business. When Andrew and his parents later fell out, his parents made new wills which did not leave Andrew any rights to the farm. The ingredients of a proprietary estoppel claim were made out: Andrew had relied on his parents' promise to his detriment by continuing to work on their farm for many years at low pay, rather than seeking employment elsewhere. The important question was to what Andrew should be entitled. In the High Court, Andrew had been awarded a lump sum payment, calculated to represent (after tax) 50 per cent of the market value of his parents' business, plus 40 per cent of the market value of the title to the farmland.[2] That award was designed to give effect to Andrew's expectation that he would inherit some of the farm, but meant that the parties (and the rest of the family) could have a 'clean break' without being forced to live or farm alongside each other.[3] The Court of Appeal then refused to interfere with the High Court's award.[4]

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1 [2022] UKSC 27.
2 [2019] EWHC 869 (Ch).
3 *ibid* at [286].
4 [2020] EWCA Civ 387.

This note is in three parts. It first explains the Supreme Court's majority judgment, given by Lord Briggs, with whom Lady Arden and Lady Rose agreed. It then sets out the dissent of Lord Leggatt, with whom Lord Stephens agreed. Its final section discusses a number of issues which arise in virtue of the decision. Plausible arguments can be made that *Guest* undermines statute, will lead to unnecessary litigation, and fails to do justice. Taken seriously, the Supreme Court's reasoning also threatens some long-established rules in other areas of private law.

THE MAJORITY JUDGMENT

The Court held that Andrew Guest should be awarded a remedy giving effect to his expectation, but permitted his parents to choose how that should be done. They could either choose that Andrew acquire a 'reversionary interest under a trust of the farm, with the parents having a life interest in the meantime',[5] so that Andrew would get an unencumbered legal title to 40 per cent of the farm on their deaths, or they could instead pay Andrew a lump sum. Importantly however, that lump sum would not be equivalent to the market value of 40 per cent of the farm, because that would give Andrew something which he had not been promised. He had only ever been promised the farm after his parents' deaths, and so an 'appropriate discount' would be needed to take account of the 'early receipt' of the market value of the farmland.[6]

To reach this conclusion, Lord Briggs' judgment moved through four stages. In the first stage, Lord Briggs looked at the issue of the remedy 'from the perspective of first principles, free from authority'.[7] For some time before *Guest* there had been a 'lively controversy' about its purpose.[8] Should it aim to give effect to the claimant's expectation, at least as a starting assumption? Or should it rather ensure that the claimant not suffer detriment as a result of the defendant repudiating their promise? Lord Briggs rejected the view that there is some binary choice between these approaches; instead, he said, the 'true purpose' of the remedy is 'dealing with the unconscionability constituted by the promisor repudiating his promise'.[9] Thus, according to Lord Briggs, it is a mistake to say that proprietary estoppel is about preventing or compensating for detriment. However, detrimental reliance remains important in two ways. First, without it there is no proprietary estoppel claim, because it is not unconscionable to repudiate a promise which has not been detrimentally relied upon.[10] Second, where the expectation is 'completely disproportionate' to the detriment, it would go 'much further than necessary to put right the unconscionability inherent in the repudiation of the promise' to award that expectation in full.[11]

5 *Guest* n 1 above at [101].
6 *ibid* at [98].
7 *ibid* at [8].
8 The phrase comes from Lewison LJ's judgment in *Davies* v *Davies* [2016] EWCA Civ 463 (*Davies*) at [39].
9 *Guest* n 1 above at [13].
10 *ibid* at [10].
11 *ibid*.

With these foundations laid, Lord Briggs moved on in the second stage of the judgment, analysing a long list of previous authorities. Many of those cases awarded the claimant exactly what they had been promised. In *Crabb* v *Arun District Council* (*Crabb*),[12] for example, Mr Crabb was awarded the right of way which he had been promised by the defendant. Similarly, in *Thorner* v *Major* (*Thorner*),[13] the House of Lords did not challenge the lower courts' decision to allow Mr Thorner to inherit all of the property promised to him. The roots of these expectation-based awards, according to Lord Briggs, went back to at least the mid-19th century.[14] Existing case law revealed an 'almost single-minded' pursuit of the enforcement of the expectation.[15]

That pursuit, Lord Briggs argued, was only recently tempered by the addition of a concern that the expectation be proportionate to the detriment in the Court of Appeal's judgment in *Jennings* v *Rice* (*Jennings*).[16] In that case, Mr Jennings had worked as an unpaid carer for Mrs Royle in the expectation that he would inherit title to some or all of her land and furniture, worth approximately £435,000 in total. However, he was only awarded a sum of £200,000, which was the amount that Mrs Royle would have had to pay for full-time care during the period for which Mr Jennings laboured unpaid. Although this may have appeared to be an award of his detriment, this was not how the award was in fact explained by the Court of Appeal. Robert Walker LJ made clear that he did not 'abandon expectations completely', nor did he consider the award to be defined by Mr Jennings' detriment.[17] Similarly, Aldous LJ stated that any Australian authorities which 'lean towards' limiting the award to compensation for detriment 'do not reflect the law of this country'.[18] So, *Jennings* meant that neither the expectation nor its monetary equivalent had always been awarded, but it did not stand as authority in favour of the view that English law only makes up for a claimant's detriment in cases of proprietary estoppel.

In the judgment's third stage, Lord Briggs brought these threads together. Courts are to move through three steps to determine an appropriate remedy, guided throughout by a concern to do whatever the case before them demands so that the unconscionability constituted by the repudiation of the promise can be relieved. First, they should identify what was promised, working on the 'assumption (but not presumption) that the simplest way to remedy the unconscionability' at play is to 'hold the promisor to the promise'.[19] Second, the court should 'listen' to the reasons why the defendant might consider specific enforcement of that promise to be inappropriate.[20] If convinced by those reasons – for example, if giving effect to the promise would require warring family

12 [1976] Ch 179.
13 [2009] UKHL 18.
14 The earliest case cited by Lord Briggs in support of his analysis was *Hammersley* v *De Biel* (1845) 12 Cl & F 45, 8 ER 1312.
15 *Guest* n 1 above at [26].
16 [2002] EWCA Civ 159. The seeds of the proportionality test were in fact sown earlier than this, in particular in *Sledmore* v *Dalby* [1996] 72 P&CR 196 (CA) and in *Campbell* v *Griffin* [2001] EWCA Civ 990.
17 *Jennings ibid* at [51].
18 *ibid* at [30].
19 *Guest* n 1 above at [75].
20 *ibid*.

members to live or work together – then a proxy for what was promised, such as its market value, may be appropriate. Third, the court must consider whether these awards would be out of all proportion to the detriment suffered. Where this is so, it becomes the task of the court to 'put right' the disproportionality, such that justice between the parties is done.[21] The idea here is not that the claimant should only recover their detriment, but rather that the initial award should be reduced until the court is satisfied that it would no longer be out of all proportion to the detriment. A nice illustration is provided by *Ottey* v *Grundy*.[22] In that case, the defendant had promised Ms Ottey, his partner, that she would inherit property worth £250,000. She relied on that promise to her detriment by caring for the defendant for two years, but their relationship then broke down and Ms Ottey stopped caring for him. The defendant died one year later. In *Guest*, Lord Briggs explained that the short period of Ms Ottey's detrimental reliance, relative to the intentions of the parties at the time of the promise, meant that it would have been disproportionate to enforce that promise or to award its monetary equivalent.[23] Ms Ottey was instead awarded some of the promised property (valued at £50,000), and a further lump sum of £50,000.

Lord Briggs concluded by applying this three step analysis to the facts of *Guest*. Given the ongoing dispute within the family, it would be appropriate to allow the parents to choose whether to perform their promise or to give Andrew its monetary equivalent.[24] For two reasons, Lord Briggs did not consider either award to fall foul of the proportionality test. First, Andrew had laboured under the shadow of his parents' promise for many years; the detriment suffered if the promise was not fulfilled would be impossible to value in precise terms because he had shaped his life around that promise.[25] Second, there was an arrangement akin to a bargain between the parties, and Andrew had performed the bulk of his side of that bargain by working on the farm until he fell out with his parents.[26] It followed that there was no reason to depart from the starting assumption that either specific enforcement of the promise, or payment of its monetary equivalent, should be Andrew's remedy.

THE MINORITY JUDGMENT

Lord Leggatt, delivering a powerful dissenting judgment, argued that Andrew should only be entitled to recover compensation for the detriment that he would suffer if his parents went back on their promise. To do so, the law should put him in the position in which he would have been in if he had never relied on his parents' promise that he would inherit a portion of their farm.

21 *ibid* at [76].
22 [2003] EWCA Civ 1176. Similarly, *Davies* n 8 above, was plausibly rightly decided on the basis that the claimant in that case had not made 'life-changing choices' in reliance on the defendant's promise of an inheritance: *Guest ibid* at [51].
23 *Guest ibid* at [47].
24 *ibid* at [103]-[104].
25 *ibid* at [95].
26 *ibid* at [100].

Before making his argument in support of that conclusion, Lord Leggatt offered a quite different interpretation of existing precedent from that of the majority. In particular, he rejected Lord Briggs' view that the doctrine of proprietary estoppel as we now have it – or, as Lord Leggatt would prefer to call it, the doctrine of 'property expectation claims'[27] – has roots which stretch back to a time before *Crabb*. According to Lord Leggatt, no earlier case had done more than recognise a contract existed on its facts,[28] or prevent the defendant (and the defendant's successors in title) from exercising some right that they had against the claimant, such as a right to exclude the claimant from entering land.[29]

Lord Leggatt then set out his preferred approach to the remedy. He began by dismissing as unhelpful the reliance placed by some judges on unconscionability. According to Lord Leggatt, the concept tells us nothing specific about what is an unconscionable result,[30] and it risks inconsistent decisions which turn on the views of individual judges.[31] Instead, one needs to ask what the doctrine of proprietary estoppel is aiming to achieve, and then work out a set of determined rules by reference to that aim.[32] As we have seen, Lord Briggs considered the law to be concerned with the harm inflicted on the claimant by the non-fulfilment of the defendant's promise. Lord Leggatt rejected that position, on the grounds that another area of private law – the law of contract – exists to serve precisely that aim, and has a number of well-established rules which proprietary estoppel ignores: the need for consideration;[33] the need for an intention to create legal relations; and the need for the promise or agreement in question to be sufficiently certain.[34] Commentators sometimes point to these differences as evidence that contract law and proprietary estoppel are different beasts.[35] However, for Lord Leggatt, such objections miss the point; it is the aim of the doctrine which is crucial, and so simply to point to differences between the rules of contract law and the rules of proprietary estoppel does nothing to prove that the two doctrines are altogether different. One could equally well read those differences as inconsistencies to be ironed out. The fear of inconsistency would be heightened by an award giving effect to the claimant's expectation in response to a proprietary estoppel claim,[36] because that is the usual measure of damages for breach of contract.[37]

27 *ibid* at [155].
28 As in, for example, *Dillwyn* v *Llewelyn* (1862) 4 De G F & J 517, discussed by Lord Leggatt in *Guest ibid* at [139]. *Dillwyn* was invoked by Lord Briggs at [20].
29 This is the explanation of *Ramsden* v *Dyson* (1866) LR 1 HL 129 offered by Lord Leggatt in *Guest ibid* at [140]-[146]. *Ramsden* was relied upon by Lord Briggs in support of his preferred approach at [20].
30 *Guest ibid* at [160].
31 *ibid* at [164].
32 *ibid* at [109].
33 Lord Leggatt did, however, express some reservations about whether one could not regard detrimental reliance as a form of or substitute for consideration: *ibid* at [175].
34 *ibid*.
35 See for example Peter Millett, '*Crabb* v *Arun District Council* – A Riposte' (1976) 92 LQR 342, 346.
36 *Guest* n 1 above at [174].
37 See for example *Robinson* v *Harman* (1848) 1 Exch 850, 855 per Parke B.

The solution to this problem, Lord Leggatt went on to argue, is to recognise that proprietary estoppel has a role to play which is different to the law of contract – to see that people do not suffer detriment as a result of their reasonable reliance on others' promises.[38] Of course, one way in which that aim could be achieved would be to award compensation for that detriment; however, a court could also prevent detriment by holding the defendant to their promise (or to the value of that promise).[39] Agreeing with Andrew Robertson's argument,[40] Lord Leggatt claimed that, when faced with a choice between those two alternatives, a court should, in principle, do whichever imposes the least burden on the defendant.[41] Usually – and on the facts of *Guest* itself – this will mean that the court should hold the defendant liable to compensate the claimant for their detriment, and should not give effect to the claimant's expectation. That latter measure of award would only be justified where two facts are made out: first, when the claimant's detriment is sufficiently difficult to quantify;[42] and second, where it is clear that giving effect to the expectation would not award the claimant more than the value of their detriment.[43] These wrinkles in the analysis explained the outcome – but not the reasoning – of, among other cases, *Jennings*. Mr Jennings' detriment could be adequately prevented by the award of a sum considerably smaller than what he had expected to inherit, and the £200,000 award should now be understood as the court's 'best estimate' of his detriment,[44] taking account of the fact that there 'was no ready way to put a monetary value on what Mr Jennings had lost'.[45]

Turning to the facts at hand, Lord Leggatt accepted that Andrew's award needed to be re-analysed, and calculated to put him into the position he would have been in had he never relied on his parents' promise. In that counterfactual world, Andrew would not have continued to work on his parents' farm at low pay, and the award should, at a minimum, make up for his lost earnings (plus interest), as well as the 'feelings of dislocation and distress' caused by the repudiation of his parents' promise.[46]

DISCUSSION

The minimum equity to do justice

In *Crabb*, Scarman LJ described Mr Crabb's award as the 'minimum equity to do justice' to him.[47] Ever since, courts and commentators have struggled to understand what to make of that phrase. Could it be prayed in aid of a

38 *Guest* n 1 above at [188]-[191].
39 *ibid* at [192].
40 Andrew Robertson, 'The Reliance Basis of Proprietary Estoppel' [2008] Conv 295. See similarly Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford: OUP, 2nd ed, 2020).
41 *Guest* n 1 above at [197].
42 *ibid* at [202].
43 *ibid* at [204].
44 *ibid* at [258].
45 *ibid* at [225].
46 *ibid* at [36]-[40] of the Appendix.
47 *Crabb* n 12 above, 198.

detriment-focussed approach to the remedy? After all, the detriment is often of lesser financial value than the expectation. Lord Briggs considered that suggestion to be a misunderstanding of Scarman LJ:

> [T]he supposed logic of the detriment-based approach … is wrong in its result because it would if correct entirely replace what is meant to be a flexible conscience-based discretion aimed at producing justice with the mechanical task of monetarising the detriment and the expectation and then awarding whichever produces the lower figure, on the misconceived basis that this is the "minimum equity needed to do justice".[48]

Scarman LJ's description of Mr Crabb's award was 'not minimum equity, but minimum equity *to do justice*'.[49] According to Lord Briggs, justice requires remedying the unconscionability constituted by the repudiation of the promise, and may, in turn, require its enforcement: the 'traditional English approach' is that 'the purpose of the estoppel is, prima facie, to hold the promisor to his promise'.[50] There is, his Lordship argued, 'nothing in principle unjust in a full enforcement of the promise being worth more than the value of the detriment'.[51]

With respect, this is not an accurate statement of the detriment-focussed interpretation of Scarman LJ's dictum. No one would seriously argue that a detriment-focussed approach should be adopted even if it produces injustice. The claim is rather that compelling the defendant to make up for the claimant's detriment would be the just outcome and, therefore, that compelling the defendant to pay more than this would inflict an injustice on the defendant. The reason to think this, so the argument goes, is that the remedy should be determined by the reasons which explain why the claimant should have a claim at all.[52] If detrimental reliance is a necessary element to justify a proprietary estoppel claim, then there should be no claim when it is not present. This is reflected in some of the law's positive rules, which demand that a claimant must prove that they would suffer detriment if the defendant went back on their promise in order to acquire any claim under proprietary estoppel.[53] Two implications of that rule are that a claimant cannot successfully invoke proprietary estoppel if the defendant offers (accurate) compensation for the claimant's detriment when they seek to go back on their promise,[54] or if a claimant receives countervailing benefits in reliance on the promise which outweigh or match their

48 *Guest* n 1 above at [53].
49 *ibid* at [13] (emphasis added).
50 *ibid* at [53].
51 *ibid* at [76].
52 McFarlane, n 40 above, para 7.38.
53 See text at n 10 above.
54 This is one understanding of the result in *Uglow* v *Uglow* [2004] EWCA Civ 987, discussed by Lord Leggatt in *Guest* n 1 above at [249]-[253]. The same point is established in the doctrine of promissory estoppel. So, a promisor is permitted to repudiate their promise not to enforce a contractual obligation if the promisee is given a reasonable period to 'undo' their reliance on that promise: *Ajayi* v *RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326.

detriment.[55] If those rules are justified, then it is difficult to understand why the same principles should not govern when the parties are in court.

Given that *Guest* was the first time that arguments on the issue were made before the UK's highest court, the argument in favour of the detriment-focussed approach merited more careful consideration than it was given by the majority. Three objections to it might be discerned from Lord Briggs' reasoning, but none of those objections is compelling.

The first objection is that the argument misunderstands the 'wrong' and/or the 'harm' with which the law should be concerned, which are, respectively, the 'repudiation of the promise' and the attendant 'loss of expectation'.[56] However, this objection amounts to no more than a reformulation of the conclusion for which the majority is arguing. The question in issue is what the law ought to regard as the wrong or the harm to which it is responding; this objection does nothing to form a satisfying answer to that question. In contrast, the alternative view presented above – at least if one takes seriously the claim that detrimental reliance is a part of proprietary estoppel's 'moral justification'[57] – has some rational weight behind it.

A second objection is that the detriment-focussed approach seems to lead to unwelcome characterisations of the parties' activities before the repudiation of the defendant's promise. In *Guest*, the promise was made in 'complete good faith', and the detriment was 'freely and willingly' incurred by Andrew.[58] The worry here is that the detriment-focussed approach would lead to the law characterising the making of the promise as wrongful and the incurring of the detriment as harm caused by that wrong.[59] These labels appear inapposite, because the promise and the detrimental reliance were, at the time of their occurrence, natural and typical things for people in close familial relationships to do.

However, this objection's force derives from a misunderstanding of the detriment-focussed approach. If the law adopted that approach, it would not adopt these characterisations of the promise or of the detriment. What the law would regard as 'wrongful' would not be the making of the promise itself, but rather Andrew's parents leaving Andrew to bear the burden of the detriment once they repudiated their promise.

A third objection to the argument for a detriment-focussed approach is that the detriment cannot always be reduced to money.[60] Andrew decided to become a farmer on the basis of his parents' promise. Had no such promise ever been made, he might have pursued another career; no amount of money could undo the life-long effects of that decision.

This objection suffers from at least two serious difficulties. First, it gives us no reason to reject the detriment-focussed approach in those cases where the

55 See for example *Jennings* n 16 above at [51] per Robert Walker LJ and *Henry* v *Henry* [2010] UKPC 3.
56 *Guest* n 1 above at [53].
57 *ibid*.
58 *ibid* at [9].
59 *ibid* at [70].
60 For expressions of this concern, see *ibid* at [9], [72] and [95]. However, Lord Briggs is clear that he considers this objection alone to be insufficient to dismiss the detriment-focussed approach: *ibid* at [12].

claimant's detriment can be quantified. Second, the argument is entirely negative. Although it may show that a detriment-focussed approach is imperfect, it cannot alone explain why courts should therefore jump to the enforcement of the promise or the grant of its monetary equivalent. Perhaps the law would do better to require courts to assess detriment as accurately as they can. Indeed, in other areas of law, courts have developed the means to put monetary value on loss which is difficult, or even impossible, to accurately quantify. The compensation of tort claimants who have suffered life-altering injuries is one example. Lord Briggs gives us no reason to suppose that courts would be unable to undertake a similar process in the proprietary estoppel context.

Proprietary estoppel and formalities

Guest has also arguably undermined both the policy and the letter of statutory formality rules. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides that contracts for the sale or disposition of an interest in land can only be made in signed writing. The Act was intended 'to simplify the law and to avoid disputes' by limiting the evidence which parties could rely on in court.[61] Land often makes up a large portion of a person's wealth, and there is good sense in having rules which protect people against claims that are based on falsely alleged facts.[62] Although the worry behind the Act may be overblown – perhaps it takes too cynical a view of the ability of courts to make determinations of fact in an age where conversations often take place via email or messaging apps – it is odd that Lord Briggs did not even mention it (or the Act itself) in his judgment, let alone consider its possible relationship to the claim at hand.

The reason for this omission was probably an unarticulated belief that proprietary estoppel claims are different to traditional contractual claims and so are not caught by the letter of the Act, which refers only to contracts. As Kitchin LJ said of the Act in *Farrar* v *Miller*:

> these words, on their face, refer only to the circumstances in which arrangements between the parties over the sale or disposition of land will give rise to a valid contract. They say nothing to prevent those arrangements giving rise to another cause of action.[63]

However, to simply assert this is to beg the question in issue, which is whether the two causes of action are sufficiently similar, such that they should be seen as two species of 'contract', at least for the purposes of the Act. What reasons are there to think that the two are dissimilar? One obvious thought latches onto the undeniable fact that claimants must prove different things in order that

61 *First Post Homes Ltd* v *Johnson* [1995] 1 WLR 1567, 1571 per Peter Gibson LJ.
62 This seems to be the policy which lay behind the enactment of the Law of Property Act 1925, s 53: Willam Swadling, 'The Nature of the Trust in *Rochefoucauld* v *Boustead*' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010).
63 [2018] EWCA Civ 172 at [58]. See too *Thorner* n 13 above at [99] per Lord Neuberger.

their claim is successful. However, to point to those differences tells us little, in the same way that the fact that claimants must prove different things to bring claims in battery and in deceit does not alone prove that the two are not both torts. A second thought is to look to the reasons which explain or justify the claim. If two claims exist for similar reasons, then perhaps those claims should be classified together, as part of a larger set. On this approach, Lord Briggs' analysis leads us into difficulty. What might plausibly justify those claims which all would accept to be contractual, if not the unconscionability constituted by parties not fulfilling, or threatening not to fulfil, their promises and/or their agreements? Yet that is the rationale of proprietary estoppel which is endorsed by the majority in *Guest*.

The proportionality test

Guest tells courts that an expectation-based remedy should be granted unless such a remedy would fall foul of the proportionality test. Lord Briggs was careful in his formulation of the test: the expectation must be 'out of all proportion',[64] or 'completely disproportionate',[65] to the detriment. Prior to *Guest*, the most influential statement of the test was that of Lewison LJ in *Davies* v *Davies*, who said rather that there should be 'a proportionality between the remedy and the detriment'.[66] Thus, it seems plausible to think that *Guest* is intended to raise the bar here. Certainly, the tenor of Lord Briggs' judgment was one that was sceptical of the future utility of the proportionality test as a means of displacing the starting assumption that the expectation should be enforced, either specifically or in its monetary equivalent.[67] In particular, wherever the detriment cannot 'readily be identified' in precise terms, Lord Briggs made clear that the proportionality test 'is unlikely to be of much use'.[68]

One problem this analysis leaves is how *Guest* might be reconciled with *Jennings*. In *Guest*, there was no indication that *Jennings* was incorrectly decided, although Lord Briggs hinted at mild displeasure with it, expressing 'some surprise' that proportionality was given such a central role by the Court of Appeal.[69] It is difficult to understand, on Lord Briggs' approach, why Mr Jennings should not have been entitled to the full enforcement of Mrs Royle's promise, which Lord Briggs accepted to be that Mr Jennings would inherit her house and furniture.[70] Mr Jennings had spent a considerable amount of time and energy caring for Mrs Royle over many years, and it is more than plausible to think that his sense of self-worth was wrapped up in his decision to do so. Reading

64 For this formulation of the proportionality test, see *Guest* n 1 above at [68], [72], [76] and [94].
65 *ibid* at [10].
66 *Davies* n 8 above at [38].
67 See, for example, the dismissive characterisation of Lewison LJ's formulation of the proportionality test, which Lord Briggs described as 'shorn of references to authority and academic scholarship': *Guest* n 1 above at [50].
68 *ibid* at [72].
69 *ibid* at [42].
70 *ibid* at [41]. See further *Jennings* n 16 above at [9]. Courts may latch onto the fact that Mrs Royle's promise was particularly vague, but Lord Briggs made nothing of that fact in *Guest*.

Guest, one cannot help but suspect that Lord Briggs considered the outcome of *Jennings* to be a misstep. If that is correct, it is regrettable that the opportunity was not taken to make this explicit; if that is incorrect, then it is regrettable that the opportunity was not taken to explain precisely what it was about *Jennings* that made an expectation-based award out of all proportion to Mr Jennings' detriment. The tension between these two cases may form the basis of the next proprietary estoppel dispute which makes its way through the courts.

Proprietary estoppel's limits

In various places throughout the judgment, Lord Briggs endorsed the view that promises to grant rights in relation to property other than land can be made enforceable via the doctrine of proprietary estoppel.[71] Given that earlier obiter dicta in both the House of Lords and the Court of Appeal have endorsed the view that proprietary estoppel would probably bite in relation to property other than land,[72] and that proprietary estoppel has been used to enforce promises to transfer chattels along with land,[73] it is surely only a matter of time before the doctrine is regularly used to enforce promises made in relation to all forms of property. Given the current state of the law, this development would be welcome as a matter of consistency. There is no obvious reason to think that only promises made in relation to land can be sufficiently important such that they are worthy of enforcement if the promisee detrimentally relies on them.

The more pressing question is whether the principles recognised by the law of proprietary estoppel should apply to promises made by a person which cannot be said to relate to the grant of a right in relation to property. As explained above, Lord Briggs located the justification for the doctrine in the unconscionability constituted by a person repudiating a promise which they have made. If that is correct, then there is no reason to think that this principle should be limited to promises made in relation to property. To expand the scope of the doctrine in this way would, of course, exacerbate the already serious tension between the proprietary estoppel jurisdiction and the traditional rules of contract formation – in particular, the need for consideration – which are traditionally understood to be the rules which English law adopts to pick out those promises or agreements which deserve legal enforcement. This tension may be no bad thing, but it is, again, regrettable that the implications of the reasoning in *Guest*

71 Lord Briggs claimed that the doctrine need only 'usually' respond to promises made in relation to land three times: *ibid* at [4], [12] and [61]. When discussing the proportionality test, he also used the example of a promise to leave a carer a 'piece of jewellery' if they worked at very low wages (at [76]), and clearly implied that the doctrine could, in theory, work to render such a promise legally enforceable.

72 In the House of Lords, see *Cobbe* v *Yeoman's Row Management Ltd* [2008] UKHL 55 at [14] per Lord Scott. In the Court of Appeal, see *Baird Textile Holdings Ltd* v *Marks & Spencer Plc* [2001] EWCA Civ 274 at [54] per Judge LJ, citing *Western Fish Products Ltd* v *Penwith District Council* [1981] 2 All ER 204 (CA).

73 For example in *Thorner* n 13 above the relevant promise was to transfer land together with the chattels on that land, including livestock and equipment.

were not explicitly considered.[74] For now, we must sit and wait for a suitable case to be brought before the Supreme Court which challenges the belief that non-proprietary estoppels cannot be invoked as 'swords',[75] as causes of action which generate new positive rights.

However, it should be noted that a similar concern can be raised against Lord Leggatt's preferred approach. There would also be no reason to think that only promises made in relation to property should cause the promisor to come under a liability to make up for the detriment which the promisee reasonably suffers in reliance on that promise.[76] Again, I do not have the space in this note to consider whether this would be a desirable thing for the law to do, but it should be noted that it would create a tension with established rules of tort law. Consider Lord Leggatt's explanation of the detriment-focussed approach:

> [W]hat the law regards as unconscionable is … A's failure to accept responsibility for the consequences of B's reasonable reliance on the promise and for ensuring that B does not suffer detriment as a result of such reliance.[77]

The idea here has an intuitively attractive moral appeal. It is unfair for A to allow B to suffer loss by virtue of B's reasonable reliance on A's promise; given that B has suffered that loss, it is, other things being equal, preferable for A to bear that loss than it is for B to bear it. On its own terms, that argument is unobjectionable. However, English law does not usually hand out claims to worthy parties simply because they have suffered loss at another's hands, even where that other has carelessly caused such loss and it would, for that reason, appear to be intuitively fair for them, and not the claimant, to bear it. So, if a defendant negligently damages electricity cables which they know carry power to the claimant's factory, they will not be liable to compensate the claimant for the lost earnings which they would have made had the power not been cut.[78] This is so even though it is, in one sense at least, unconscionable for the defendant to fail to accept responsibility for the foreseeable consequences of their actions.

What is missing from Lord Leggatt's account is some explanation of what is special about *promises* such that losses suffered in reliance on them should be recoverable. I do not mean to say that such an explanation cannot be found, but

74 At various points in the judgment, Lord Briggs does appear to limit proprietary estoppel to promises made in relation to property, although no explanation of that limitation is offered. See, for example, *Guest* n 1 above at [4]: 'The word "proprietary" reflects the fact that the remedy is all about promises to confer interests in property, usually land'. See similarly *Guest* n 1 above at [8], [12] and [61].

75 See *Combe* v *Combe* [1951] 2 KB 215.

76 Academic commentators who endorse a position similar to that of Lord Leggatt have long highlighted (and often welcomed) this implication of their position. See, for example, Nicholas J. McBride, 'A Fifth Common Law Obligation' (1994) 14 LS 35; Donal Nolan, 'Following in their Footsteps: Equitable Estoppel in Australia and the United States' (2000) 11 KCLJ 202; Jason W. Neyers and Jonathan M. Moncrieff, '(Mis)Understanding Estoppel' [2003] LMCLQ 429; Ben McFarlane and Philip Sales, 'Promises, Detriment, and Liability: Lessons from Proprietary Estoppel' (2015) 131 LQR 610, 621-625; McFarlane, n 40 above, para 10.65.

77 *Guest* n 1 above at [191].

78 *Spartan Steel and Alloys Ltd* v *Martin & Co (Contractors) Ltd* [1973] QB 27.

its omission is important because, if the minority approach were preferred, then English law would be taking a stand on the relative merits of claimants who have suffered loss due to their reliance on another's promise, and those who have suffered loss due to another's careless actions. It is important that decisions of this sort are made transparently and are open to scrutiny. As with the majority judgment, it is a shame that the implications of the minority's reasoning were not fully explored.

CONCLUSION

Guest has brought the oddities of proprietary estoppel into sharp focus. If one believes that relatively strict formalities should govern dealings with land, that the doctrine of consideration has good reason to exist, or that property rights should only be created through an application of predictable rules, then it may be that one should also believe that the rules of proprietary estoppel ought to be reformed, or perhaps abolished altogether. Of course, it may be that one should not believe any of those things; I leave determination of those issues to another day. The point for now is a simpler one: courts will soon be asked whether they have produced a coherent body of rules. If the answer to that question is that they have not, they will then be asked what, if anything, they should do about it. We may find that *Guest* has paved the way for some dramatic changes elsewhere in English law.