The Role of Expectation in the Determination of Proprietary Estoppel Remedies

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I. INTRODUCTION

The decision of the Court of Appeal in *Jennings v Rice*\(^1\) signalled an important shift in the approach of the English courts to the role of expectation in the determination of proprietary estoppel remedies. The implications of this case have yet to be fully worked through and the position has been further clouded by the speech of Lord Scott in *Yeoman’s Row Management Ltd v Cobbe*,\(^2\) where his Lordship made certain assumptions about the remedial question without referring to *Jennings v Rice* or other relevant Court of Appeal decisions.\(^3\) In light of the fact that the law is arguably in a state of transition (or, perhaps, in a state of confusion), the primary focus of this chapter will be on analysing the various possible roles for expectation\(^4\) and attempting to identify the most satisfactory approach.

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\(^1\) *Jennings v Rice* [2002] EWCA Civ 159.

\(^2\) *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55.

\(^3\) Note also the more recent decision of the House of Lords in *Thorner v Major* [2009] UKHL 18. For further discussion of the impact of these cases, see text to nn 30–42 below.

\(^4\) The concept of ‘expectation’ is understood in this chapter in an objective sense, to mean the expectation which the claimant has reasonably formed on the basis of the inducement or encouragement of the defendant. The term is not intended to encompass a subjective expectation of the claimant which has no reasonable relationship to any inducement or encouragement of the defendant (compare nn 22 below). An alternative terminological option would be to refer to a remedy which requires the defendant to make good his representation rather than to one which fulfils the claimant’s expectation. However, this terminology is not always apt, since it does not cover cases where the defendant has merely encouraged, or acquiesced in, an assumption made independently by the claimant.
as a matter of principle. The central argument of the chapter will be that the only role for expectation should be to provide a cap or upper limit on a remedy which must be determined by reference to other factors which do not include the question of expectation.

The foundation of a proprietary estoppel claim is that the claimant (C) was induced to incur detriment on the basis of an expectation created or encouraged by the defendant (D). At first sight, it seems logical to suggest that D should be able to satisfy the claim by erasing the detriment or, if this is more favourable to D, by satisfying the expectation. In either case, the foundation for C’s appeal to justice is removed and D cannot be said to have acted unconscionably.5 If the detriment exceeds the expectation, C has no grounds for complaint because D cannot be said to have acted unfairly if the expectation he has created is satisfied. Thus, on this model, the expectation would act as a cap or upper limit on the extent of a remedy based on detrimental reliance.6

While the ‘reliance-based’ remedial approach enjoys not inconsiderable academic support,7 it has not yet found acceptance in the English case law. Judges have preferred the view that the court must determine the appropriate remedy by exercising ‘a wide judgmental discretion’.8 In Jennings v Rice, Robert Walker LJ explained that a range of relevant factors could be considered by the court, including misconduct on the part of C, particularly oppressive conduct by D, the need in some circumstances to ensure a clean break between the parties, changes in the benefactor’s circumstances over the years, the likely effect of taxation, (to a limited extent) the other legal and moral claims on the benefactor or his estate, and ‘many other factors which it may be right for the court to take into account in particular factual situations’.9 On this discretionary approach also, it is logical that the expectation should operate as an upper limit on the remedy (because its fulfilment eliminates C’s cause of complaint) and this emerges with reasonable clarity from the English case law.10

5 Although this complex question will not be pursued in this chapter, it should be noted that there could be a case for a remedy which would be measured by D’s gain, where this exceeds the level of C’s detriment but does not exceed the level of the expectation.


9 ibid, [52].

10 See eg Dodsworth v Dodsworth (1973) 228 EG 1115 (CA) 1115 (Russell LJ); Watson v Goldsbrough [1986] 1 EGLR 265, 267 (Browne-Wilkinson V-C); Baker v Baker [1993] 2 FLR 247 (CA) 251 (Dillon LJ); 253 I (Beldam LJ); 256G–H (Roch LJ); Parker v Parker [2003] EWHC 1846 (Ch), [210] (Lewison J). It is sometimes assumed, eg by Aldous LJ in Jennings v Rice [2002] EWCA Civ 159, [22], that the court in Crabb v Arun UDC [1976] Ch 179
The primary purpose of this chapter is not to champion the reliance-based remedial paradigm. Instead, the chapter seeks to advance the debate through a close examination of the role of expectation in the remedial inquiry. It accepts the relatively uncontroversial proposition that the expectation must serve as the upper limit on C’s remedy. However, it also advances the more significant claim that the expectation should have no further role in the remedial inquiry. Proponents of both the discretionary approach and the reliance-based approach to remedies have argued that the expectation has an important role to play in the determination of the remedy, whether as the starting point in the remedial inquiry, or as a factor to be considered in the exercise of the court’s discretion, or as providing a ‘proxy’ for the detriment incurred by C. Furthermore, there is also a third possible view on the remedial question—which is arguably bolstered by Lord Scott’s unconventional approach in *Yeoman’s Row v Cobbe*¹¹—which would suggest that the fulfilment of the expectation should be the invariable remedial response. This chapter interrogates these various positions on the proper role of expectation, seeking to demonstrate that none is defensible in principle.¹² Prior to undertaking this analysis, it will be necessary to prepare the ground by considering the evolution of the law to date.

II. THE DEVELOPMENT OF THE LAW ON PROPRIETARY ESTOPPEL REMEDIES

A. The Position before *Jennings v Rice*

As has already been mentioned, the courts have traditionally emphasised the extent of their discretion in determining the appropriate remedy for proprietary estoppel. For example, in *Crabb v Arun District Council*,¹³ Lord Denning MR explained that it was up to the court to determine how to satisfy the equity which arises in favour of a successful claimant, (CA) gave a remedy which went beyond the expectation. However, this overlooks the fact that a potentially important element of the claimant’s expectation is the time when it is to be fulfilled. In *Crabb*, C’s expectation was to obtain a vital easement within a short time frame for a relatively modest sum, so that the remedy of granting C the easement without payment a number of years later was, on the facts of the case, a remedy valued at much less than the expectation, properly understood.

¹¹ *Cobbe* [2008] UKHL 55. For discussion, see text following n 30 below.

¹² This area has been illuminated by the contributions of a number of leading scholars, whose works are referred to throughout the chapter. It should be stressed that the emphasis of this chapter is, for the most part, on what the law should be. Equally legitimately, other commentators on the subject are often concerned (though rarely exclusively) with establishing the current state of the law. To the extent that the arguments of others represent an attempt to rationalise the authorities, criticisms in this chapter of those arguments should be understood as aimed at the cases rather than the commentator wrestling with them.

¹³ *Crabb v Arun District Council* [1976] Ch 179 (CA).
It might be argued that, because the relevant issues are complex and the courts were not in a position to state a convincing set of principles to govern the determination of remedies, they fell back on a wide discretion which would allow them to avoid counter-intuitive results without having to explain their reasoning too closely. However, it seems difficult to justify, as a matter of principle, a broad discretion which does not even provide the court with a clear objective in framing a remedy.

At an earlier point in the development of the case law, it was plausible to argue that, notwithstanding the tendency of the courts to give lip-service to the existence of a wide remedial discretion, the court’s invariable response was to fulfil the expectation. In 1997, Cooke noted that, in a survey of all the decided cases, she was only able to find, at most, four decisions which departed from the expectation remedy model. However, writing at around the same time, Smith detected the early beginnings of a move away from the previously prevailing position. A key turning point has been Jennings v Rice, where the Court of Appeal accepted that it would not be appropriate to give a remedy based on the expectation where this would be disproportionate in comparison with the extent of the detriment incurred by C.

B. Jennings v Rice

The claimant in Jennings had begun to work as a part-time gardener for Mrs Royle in 1970. Over the years, he took on a greater role in assisting her, running errands for her, taking her shopping and helping to maintain

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14 ibid, 189.
16 E Cooke, ‘Estoppel and the Protection of Expectations’ (1997) 17 Legal Studies 258, 271–3. See also E Cooke, The Modern Law of Estoppel (Oxford, Oxford University Press, 2000) 150ff. In each case, Cooke’s views were expressed in the context of a study which considered other forms of estoppel as well as proprietary estoppel. This chapter makes no attempt to pursue the question of whether expectation plays, or should play, a different role in relation to remedies outside the context of proprietary estoppel.
the house. By the late 1980s she had ceased to pay him. After a burglary in the house in 1993, the claimant was persuaded to stay in the house to provide security for Mrs Royle and he slept on a sofa in the sitting room almost every night from some time in 1994 until her death in 1997. She had at various times given him to understand that she would leave him some or all of her property on her death. In fact, she died intestate. At first instance, the claimant was awarded £200,000. He appealed on the basis that the remedy in proprietary estoppel should fulfil the claimant’s expectation, which in this case was either that he would inherit the entire estate of Mrs Royle valued at £1,285,000 or the house and furniture valued at around £435,000. This appeal was rejected by the Court of Appeal. Two judgments were given, by Aldous LJ and Robert Walker LJ (who agreed with each other’s judgments), with Mantell LJ agreeing with both judgments.

In terms of establishing general principles in relation to the remedial inquiry, the judgment of Robert Walker LJ is of the greater interest, although it is not always easy to interpret. Robert Walker LJ summed up his approach in the following terms:

To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor’s house, either outright or for life. In such a case the court’s natural response is to fulfil the claimant’s expectations. But if the claimant’s expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant’s equity should be satisfied in another (and generally more limited) way.19

Read literally, this passage (and Robert Walker LJ’s earlier reasoning)20 appears to divide up the possible scenarios into two categories. The first category involves cases where the parties have reached a mutual understanding in reasonably clear terms (what have been called ‘bargain’ cases)21—here the court’s natural approach is to fulfil C’s expectation. The second category includes cases where C’s expectations are uncertain or extravagant22 or out of all proportion to the detriment which C has suffered—in such cases, the court will normally give C a lesser remedy than the fulfilment of his expectation. It is obvious, however, that Robert Walker LJ’s dichotomy is a strange one, since his second category is not

19 ibid, [50].
20 See ibid, [45]–[49] (with a curious transition between paras [45] and [46]).
21 See eg Bright and McFarlane, above n 6, at 458.
22 In referring to ‘extravagant’ expectations, Robert Walker LJ had in mind ([2002] EWCA Civ 159, [47]) cases where the court ‘is not satisfied that the high level of the claimant’s expectations is fairly derived from his deceased patron’s assurances’. Thus, he was using the term ‘expectation’ in a looser sense than the one in which it is used in this chapter: see above n 4.
the converse of his first. It is somewhat as if he had divided up the class of all animals into (i) cats and (ii) those animals which are not mammals. To understand Robert Walker LJ’s meaning, it is necessary to fill in some gaps.

Robert Walker LJ’s assertion that the court will not generally fulfil C’s expectation in cases where this expectation is ‘uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered’ seems to suggest that the court will generally fulfil C’s expectation in the converse case where that expectation is not uncertain, extravagant or disproportionate to the detriment. Stronger support for this conclusion derives from Robert Walker LJ’s explanation of why it would be natural for the court to fulfill C’s expectation in a ‘bargain’ case. His Lordship explained that, in such a case, ‘the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate’. This reasoning points to a view that the expectation should be fulfilled where it is not disproportionate to the detriment incurred by C. As a final indicator in this direction, it should be noted that Robert Walker LJ explicitly accepted ‘the principle of proportionality (between remedy and detriment)’. This principle was also accepted by Aldous LJ.

Thus, it appears to emerge from Jennings that, in general, the court should fulfil the expectation of C unless this would be disproportionate to the detriment suffered by C. If an expectation remedy would be disproportionate, then it would be necessary for the court ‘to exercise a wide judgmental discretion’. The approach in Jennings v Rice has since been approved on a number of occasions in the Court of Appeal, and in two of the more significant authorities, Ottley v Grundy and Powell v Benney, the proportionality principle was invoked to justify giving C a remedy which fell short of the expectation.

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23 ibid, [45]. See text to and following n 54 below for discussion of an alternative understanding of Jennings v Rice and of the proportionality principle.
24 ibid, [56]. See below n 55 for discussion of how Aldous LJ phrased his support for the principle.
25 Note that Robert Walker LJ’s judgment might, in places, be interpreted to suggest that an expectation remedy should be denied only if it would be very disproportionate. See ibid, [45], [50]. However, at the conclusion of his judgment (ibid, [56]) he emphasised that it cannot be right to give ‘a disproportionate remedy’ and this seems to represent a more defensible position.
26 ibid, [51]. See text to n 9 above for Robert Walker LJ’s list of some of the factors relevant to the exercise of this discretion.
C. Yeoman’s Row Management Ltd v Cobbe and Thorner v Major

In the recent case of Yeoman’s Row Management Ltd v Cobbe, the House of Lords overturned the generous decision of the Court of Appeal in favour of an experienced property developer who had relied on an incomplete ‘agreement in principle’, which he knew to be binding only ‘in honour’. Two leading speeches were delivered in the case, by Lord Scott (with whom Lords Hoffman, Mance and Brown agreed) and by Lord Walker (with whom Lord Brown also agreed). While the final result was a reasonable one, the speeches in the case appear to reflect a flawed understanding of the doctrine of proprietary estoppel as it had previously been applied by the courts.

In his speech, Lord Scott argued that:

[a]n ‘estoppel’ bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a ‘proprietary’ estoppel—a sub-species of a ‘promissory’ estoppel—if the right claimed is a proprietary right.

This passage takes too literally the label ‘proprietary estoppel’. As is explained in Megarry and Wade, ‘[i]t is perhaps unfortunate that proprietary estoppel should be so called. Although the equitable doctrine shares some characteristics with estoppel at common law, it differs fundamentally from it’.

Lord Scott’s unorthodox view of proprietary estoppel appears to have led him to assume that the remedy for proprietary estoppel will inevitably be the fulfillment of the expectation of C; if proprietary estoppel is regarded as preventing D from asserting certain facts which would otherwise defeat C’s proprietary claim, the implication is that that claim will then simply succeed, leaving C with a proprietary remedy reflecting his expectation. Lord Scott did not address the remedial question directly nor did he make any reference to the line of Court of Appeal authority, including Jennings v Rice, which is clearly inconsistent with the assumption that the remedy

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31 Cobbe [2006] 1 WLR 2964 (CA).
32 Cobbe [2008] UKHL 55, [14].
34 Cobbe [2008] UKHL 55, [4], [14], [16], [38].
will automatically reflect C’s expectation. It seems that Lord Scott’s rejection of the proprietary estoppel claim in *Cobbe* can be satisfactorily explained on more limited grounds,36 so that his apparently misconceived views as to the nature of proprietary estoppel, with their implications for the remedial question, could be seen as falling outside the ratio of the case.

Interestingly, Lord Walker’s speech, whilst also taking an unexpectedly restrictive view of the scope of proprietary estoppel,37 did recognise the existence of a discretion in the court in relation to the appropriate remedy in proprietary estoppel cases.38 It is noteworthy that Lord Brown agreed with both Lord Walker and Lord Scott, despite the differences in their two speeches in relation to the remedial question. This suggests that the House of Lords was not really focused on that question and that too much should not be read into the case in this regard.

The more recent decision of the House of Lords in *Thorner v Major*39 appears to represent a retreat from some of the more controversial aspects of *Cobbe*. In *Thorner*, the House of Lords unanimously upheld the claim of a Somerset farmer to inherit the farm of his father’s first cousin, the claimant having worked unpaid on the farm for many years on the strength of oblique assurances that he would inherit. Once again, the issue of remedies was not central to the case. Significantly though, when one compares *Thorner* with *Cobbe*, it is clear that the balance of support in the House of Lords has switched away from the views of Lord Scott to those of Lord Walker.40 Given that, in *Thorner*, Lord Walker adhered to the traditional position that the court has a discretion in relation to the remedy for proprietary estoppel,41 it appears probable that this position now represents the law.42

36 Lord Scott emphasised that the proprietary interest expected by C was too uncertain to form the basis for a claim in proprietary estoppel, in that it was dependent on the successful conclusion of future negotiations on certain essential contractual terms: *Yeoman’s Row* [2008] UKHL 55, [18]–[20], [23]; see also *ibid*, [87]–[89] (Lord Walker).
37 See *ibid*, [63]–[68] (asserting that C must believe that D is legally bound by his assurance).
38 *ibid*, [55], [82].
40 Five speeches were given in *Thorner*. Lord Neuberger agreed with Lord Walker, although he made a substantial speech of his own. Lord Rodger also agreed with Lord Walker, making a short separate speech. Lord Scott made a comparatively short speech, having stated that he was ‘in broad agreement’ with the reasons of Lords Walker and Neuberger. Lord Hoffman also made a short speech.
41 [2009] UKHL 18, [66].
42 In *Thorner*, Lord Scott did not resile from the views he had expressed in *Cobbe* on the nature of proprietary estoppel. However, he suggested that, by utilising the ‘remedial constructive trust’ recognised in *Gissing v Gissing* [1971] AC 886, the court could exercise a remedial discretion in certain cases that would conventionally be regarded as falling under proprietary estoppel. With great respect, it appears that Lord Scott’s views are not consistent with the orthodox understanding of either proprietary estoppel or the *Gissing v Gissing* constructive trust. For discussion, see Mee ‘The Limits of Proprietary Estoppel’ n 39 above.
III. THE ROLE OF EXPECTATION

Having considered the current state of the law, it is now possible to move on to examine the various possible roles which expectation could play in the determination of the remedy for proprietary estoppel.

A. Expectation as Determinant of the Remedy

(i) Expectation as Remedy

While the case law (up until Cobbe at any rate) has turned away from this approach, it is relatively coherent from a logical point of view to suggest that the fulfilment of C’s expectation should be the aim of the court in devising a proprietary estoppel remedy. The idea would be that C’s detriment would be the key which would ‘unlock the impulse to compel men to make good their promises’. One advantage of this approach is that it would be as certain and easy to apply as one could reasonably hope.

A difficulty with this approach lies in reconciling it with the fact that, in the absence of any detriment, the court will give no remedy on the basis of an unfulfilled promise. If the claimant has incurred detriment to the extent of X, the court requires the promise to be satisfied, leading to a remedy valued at (say) X + Y. The claimant who has incurred some detriment seems to get a bonus to the value of Y, which is denied to the claimant who has incurred no detriment. One possible answer to this point would be to argue that the existence of detriment takes the case into a different category, from ‘unenforceable promise’ to ‘promise enforceable due to detriment incurred by promisee’. It remains unclear, however, why the injection into the equation of C’s detrimental reliance leads to the enforcement of the promise, rather than simply entitling C to a remedy valued by reference to the detriment.

43 For practical reasons, it would not be possible to achieve this in every case and, in some instances, it would be necessary to substitute a monetary award which would, to the extent practicable, be valued at the level of the expectation. See Gardner (1999) above n 15, at 446–52.
44 L Fuller and W Perdue, ‘The Reliance Interest in Contract Damages: I’ (1936–37) 46 Yale Law Journal 52, 69. This approach would require the application of a threshold principle, whereby detrimental reliance which was regarded as too insignificant would be disregarded and would fail to trigger any remedy.
45 E Cooke (‘Estoppel, discretion and the nature of the estoppel equity’ in M Bryan (ed), Private Law in Theory and Practice (London, Routledge, 2006) 189) argues that the courts are given a strong incentive to favour expectation relief in estoppel cases by the fact that such relief is normal under the common intention constructive trust analysis. However, it would be most unsatisfactory if the principled development of the law on estoppel remedies were to be impeded by a requirement to ensure uniformity with the theoretically incoherent common intention analysis (criticised in J Mee, The Property Rights of Cohabitees (Oxford, Hart Publishing, 1999) ch 5).
(the reliance-based remedial approach) or to the remedy which seems appropriate to the court in light of all the circumstances of the case (the discretionary approach to remedies).46

(ii) The Problem of Countervailing Benefits

A different objection to the ‘expectation as remedy’ approach relates to the question of countervailing benefits which may have been received by C. Unlike consideration in the context of a contract, detrimental reliance by C in the estoppel context does not constitute the agreed price of D’s promise. Since such detrimental reliance is deemed sufficient to trigger an estoppel remedy, it would seem inconsistent not to take account of countervailing benefits received by C from D, notwithstanding the fact that the provision of such benefits has not been formally agreed upon by the parties as compensation for C’s detrimental reliance. Although the question has not been sufficiently analysed, it seems to be generally accepted that it is necessary to take such benefits into account.47 The issue is often presented in terms of the need for C to show ‘net’ detriment, so that C will receive no remedy if the detriment on which he is relying is offset by the benefits he has received. Applying this in the context of the approach discussed above, the receipt of countervailing benefits would be fatal to a claim if C has suffered no significant net detriment; however, if the net detriment remains significant, it appears that the countervailing benefits would have no effect and C would still receive his expectation remedy.

This approach, however, leads to results which are very difficult to defend. Consider a case where C has incurred detriment to the value of three units, in reliance on an expectation of receiving 10 units. Assume that this level of detriment exceeds the minimum threshold for an estoppel claim and that, in the absence of any other relevant factor, C would stand to have his expectation fulfilled. Imagine, however, that C has received three units worth of countervailing benefits. This brings his net detriment to zero and he is no longer entitled to any remedy. The question is why receiving

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46 Nonetheless, the ‘expectation as remedy’ approach has proven attractive to a number of scholars. See eg S Moriarty, ‘Licences and Land Law: Legal Principles and Public Policies’ (1984) 100 Law Quarterly Review 376; J Edelman, ‘Remedial Certainty or Remedial Discretion in Estoppel after Giumelli?’ (1999) 15 Journal of Contract Law 179. Cooke, above n 41, favours a variation whereby expectation remedies are the norm but the existence of an underlying discretion permits ‘a sensitivity to moral and economic factors which the courts use, however sparingly and carefully’ (ibid, 190), though she does also acknowledge (ibid, 183) the ‘renewed stress on the need for proportionality between detriment and remedy’ after Jennings. See also Gardner (1999) above n 15.

three units is sufficient to destroy his claim to the ten units which he would otherwise have received. It is possible to modify the example so that the receipt of the countervailing benefits occurs after the detriment of 3 units has been incurred. Thus, at one point in the chronology, C would stand to receive 10 units; then he receives three units and his entitlement goes down to zero. This appears illogical.

It is possible, also, to set up the example so that the countervailing benefits, in fact, represent the beginning of the enjoyment of the expected benefit. Consider the following scenario, based loosely on the facts of *Sledmore v Dalby*.48 D promises that C can live rent-free in a house belonging to D for the rest of C’s life. C takes up occupation of the house and incurs significant detriment in reliance on D’s promise by making improvements to the premises (or, say, by giving up secure accommodation elsewhere). If D were to resile from the expectation at this point, C would be able to establish a claim in proprietary estoppel and, applying the remedial approach under discussion, would stand to benefit from the fulfilment of the expectation. Imagine, however, that no dispute arises for a number of years, during which time C is permitted to enjoy the occupation of the house rent-free. At this point, the value of these countervailing benefits (let it be said) cancels out the detriment, and C no longer has any basis for an estoppel claim. D would then be permitted to resile from the expectation and recover possession of the house. However, this seems an entirely indefensible result. How can it be that enjoyment of part of the expected benefit will eliminate a claim, which would otherwise have been available, to the remainder of that benefit?

When one considers the matter further, it appears that (in the context under discussion) the principled approach might be to deduct the countervailing benefits from the expectation remedy, rather than comparing them to the detriment. Countervailing benefits do not generally undo detrimental reliance but rather constitute something which C has received in return. Thus, it seems that they fall into the same category, and should (as it were) be entered in the same column for accounting purposes, as the possible fulfilment of C’s expectation. This approach would work well where the countervailing benefits took the form of enjoyment of the expected benefit; the ‘reduced’ expectation remedy would simply be to enjoy the property for the remainder of the period envisaged, with the period of enjoyment which has already occurred being notionally deducted from the total time period originally envisaged. This would avoid the counter-intuitive result discussed in the previous paragraph.

However, where the countervailing benefits are unrelated to the satisfaction of the expectation, one would be left with a remedial approach which

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is much harder to justify. When framing a remedy, one would in principle have to deduct the value of the countervailing benefits from the expectation. This would require the quantification of both the expectation and the countervailing benefits, reducing the advantage of simplicity which is normally associated with the ‘expectation as remedy’ approach. The result would also be that a remedy could be available to C even where the countervailing benefits exceeded C’s detriment. For example, if the expectation was valued at 10 units and the detriment at 4 units and the countervailing benefits at 5 units, C would still be entitled to a remedy of 5 units despite already having received benefits which are more valuable than the detriment incurred.

Overall, in the context of the remedial approach under discussion, it does not seem possible to find a way of dealing with the issue of countervailing benefits which is both consistent and satisfactory.49

(iii) Conclusion on ‘Expectation as Remedy’ Approach

It has just been argued that, while it has certain attractions, the approach under discussion runs into difficulties in relation to the question of countervailing benefits. In addition, the approach has another obvious problem: the fact that it requires the court to grant an expectation remedy even where the detriment, though sufficiently large to entitle C to a remedy, is much less valuable than the expectation. Ultimately, the courts were not prepared to tolerate this type of outcome. As Robert Walker LJ put the point in Jennings, ‘[t]he essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way of going about that’.50

Recognition of the need to ensure proportionality has led the courts to a different approach to the role of expectation in the remedial inquiry, relegating it from the more or less automatic choice to the status of a starting point, subject to testing on the basis of a comparison with the detriment incurred by C. Significantly, the introduction of detriment into the equation reduces

49 Under a detriment-based remedial approach, these difficulties would not arise, since one would simply seek to determine the net detriment incurred by C and would base the remedy on this. Note, however, that the net detriment issue appears to create difficulties for the argument, in Bright and McFarlane, above n 6 (building on B McFarlane, ‘Proprietary Estoppel and Third Parties after the Land Registration Act 2002’ (2003) 62 Cambridge Law Journal 661), that property rights arising under proprietary estoppel take effect immediately without any need for a court order. On this analysis, a property right will come into existence as soon as C has incurred sufficient detriment for the grant of that property right to be proportionate (assuming other conditions for the creation of a property right are satisfied). But what happens if C subsequently enjoys countervailing benefits which reduce his net detriment such that it would no longer be proportionate to grant the property interest in question? Does that property right flicker out of existence again?

50 Jennings [2002] EWCA Civ 159, [56].
the dimensions of the countervailing benefits problem, since the court would not grant an expectation remedy if this would be disproportionate to the (net) detriment of C. The discussion now turns to a consideration of the merits of this different view of the role of expectation.

B. Expectation as a Starting Point in Framing the Remedy

As has already been mentioned, this is the role for expectation which emerges from the leading case of Jennings v Rice. This is similar, in broad outline at any rate, to the position currently prevailing in Australia in light of the decision of the High Court in Giumelli v Giumelli (notwithstanding the assertion in Jennings that the Australian courts favour a remedial approach which focuses exclusively on detriment).

It is important to note that the essence of the approach under discussion, which gives a role to expectation as a starting point in the inquiry, is that there is a two-stage approach to determining the remedy for estoppel, with somewhat different criteria being applied at each stage. The first question is whether the expectation remedy would be ‘disproportionate’ to C’s detriment. If it would not be disproportionate, then the expectation remedy will be granted. Robert Walker LJ’s judgment is silent on the question of whether, in judging whether the expectation is proportionate to the detriment, the court should take into account the full range of discretionary factors that come into play if the court is obliged to reject the expectation remedy and devise an appropriate lower remedy. It is quite possible that the court would not disregard (say) serious misconduct on the part of C but it seems improbable that, in considering the focused question of proportionality between expectation and detriment, the court is intended to exercise the same wide discretion as when devising a non-expectation remedy. In any event, if the expectation remedy is deemed to be disproportionate, then the court goes on to exercise its ‘wide judgmental discretion’ by reference to all the relevant factors. The key point is that this involves applying a somewhat different set of criteria in ‘proportional’ cases, as against ‘non-proportional’ cases. This is because in the latter cases there can be no element of effectively rounding up the remedy to the level of the expectation on the grounds that this would not be ‘disproportionate’ and, also, because it is probable

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51 Compare n 49 above.
54 See text to n 9 above for Robert Walker LJ’s list of some of these factors.
that a lesser range of discretionary factors is relevant to the proportionality inquiry as compared to the determination of an alternative remedy if the expectation remedy is adjudged to be disproportionate.

It would, of course, be possible to envisage an approach whereby the same criteria would be applied in all cases. However, such an approach would not actually accord the type of role to expectation which is currently under discussion. Consider an approach whereby one determined the appropriate remedy by applying a specified set of factors in every case. It would be superfluous to add the qualification that, if the universally applicable test pointed in favour of an expectation remedy, then an expectation remedy would be granted. The applicable test could fully be described without reference to expectation and an expectation remedy could not sensibly be described as the starting point in the inquiry. Similarly, if the expectation is merely operating as a cap on a remedy which is determined by reference to other factors, it would not be accurate to describe the expectation as a starting point. For example, a test whereby the remedy is based on the detriment unless it exceeds the expectation could, at the cost of some artificiality, be phrased as a test whereby the remedy is based on the expectation unless this exceeds the detriment, in which case the remedy will be based on the detriment. However, if this were the applicable test, it would be unhelpful for analytical purposes to present the expectation remedy as the starting point.

The previous paragraph laboured the point that, in order to have independent significance, the ‘expectation as starting point’ approach must involve applying a different remedial approach where an expectation remedy is proportional, compared to that applicable if proportionality is found to be lacking. This point is being emphasised because it represents the key problem, from a principled point of view, in the ‘expectation as starting point’ approach.

(i) The Flaw in the ‘Expectation as Starting Point’ Approach

Consider a hypothetical case where D has promised to leave C a certain house and where, in reliance on this, C has incurred detriment which is substantial but is difficult to quantify. On the approach under discussion, the court should grant an expectation remedy unless this would be disproportionate to the detriment incurred by C. A crucial variable in the hypothetical scenario is, therefore, the value of the house. The argument will proceed by examining the consequences of adjusting the example by increasing the value of the hypothetical house, while holding constant the level of C’s detriment and the other features of the case.\footnote{It is not easy to make a reasoned criticism of a particular approach to estoppel remedies, since apparent inconsistencies in the treatment of different factual situations can be dismissed on the basis that the choice of remedy responds to unique features in a specific scenario. The}
that the house is worth (say) £100,000 and that, on the facts, it would not be disproportionate for the court to fulfill C’s expectation when it is set at this level. In these circumstances, the court would grant the house to C by way of remedy.

Consider next a case where the value of the house is adjusted upwards to the highest level whereby it would still not be disproportionate to fulfill C’s expectation. Let it be said that this value of the house is £400,000. In the version of the example where the house has this value, the court will once more fulfill C’s expectation and grant him the house worth £400,000 (although the case is at the outer limit of proportionality and, if the level of the expectation had been meaningfully higher, the court would have found it disproportionate to give an expectation remedy). Consider finally a variation on the example where all the facts are the same except that the house is now worth £1,000,000. In this situation, it would be disproportionate to order that C should receive the house, given the disparity in value between the expectation and C’s detriment. Therefore, the court must devise a remedy in the exercise of its ‘wide judgmental discretion’. Depending on the way in which the relevant factors operate in the particular circumstances of the case, the court might award a monetary remedy valued at (say) £200,000 or £300,000 or £400,000. It cannot be argued that the remedy will inevitably be greater than or equal to £400,000, the expectation remedy which was given to C in the previous example. In fact, as was mentioned in the discussion of that example, that figure effectively represents the maximum possible remedy in light of the level of C’s detriment, given that any higher remedy would be disproportionate to that detriment. Imagine that, in the circumstances of the case, the court exercises its discretion to choose a remedy of £300,000.

Thus, with an expectation valued at £400,000, C received a remedy valued at £400,000 (the fulfilment of the expectation); however, when the expectation was greater, being valued at £1,000,000, the award was only £300,000. That cannot be right. It is not possible to defend a position where, with all the other facts in the scenario being held constant, a higher expectation on the part of C can lead to a lower remedy. It is necessary methodology in the text seeks to surmount this difficulty by considering variations on the same hypothetical situation, making it possible to isolate and analyse the impact of just one factor, the expectation of C.

56 The court could not be regarded as having a discretion if it was obliged in every case to grant the highest possible remedy which would not be disproportionate to the detriment. If the court were so obliged, one would be dealing with a very different remedial approach, i.e. a variation on the model whereby the remedy is determined by reference to the level of the detriment.

57 If anything, one might expect the opposite—that sometimes a higher expectation might justify an increased remedy for C, even where the remedy does not take the form of fulfilling the expectation completely. However, it will be argued in the next section that such an approach is not appropriate.
to treat like cases alike and this principle is violated where C can be treated less favourably where the only difference in the scenario is one which in no way weakens his claim to a remedy. Yet this anomaly is the inevitable consequence of an approach which seeks to privilege the expectation remedy as ‘the starting point’ in the remedial inquiry, ie as the prima facie remedy which will be granted unless it is disproportionate to C’s detriment. Either one applies the same approach to determining the remedy in all cases—in which case the expectation remedy loses its status as the prima facie remedy—or else one faces the absurdity that C may be in a stronger position if he can show that the expectation induced in him by D was sufficiently low to count as ‘not disproportionate’ to his detriment.

C. Expectation as a Factor in the Determination of the Remedy

This section considers a different and wider understanding of the proportionality principle, which would allow expectation to be taken into account as a factor in the determination of a remedy, even if that remedy is lower in value than the expectation. The issue of proportionality, as it was described in the previous section, was a question of the relationship between detriment and remedy. In Jennings, Robert Walker clearly had in mind ‘the principle of proportionality (between remedy and detriment)’.\textsuperscript{58} Gardner, however, seems to argue for a different understanding of proportionality. He suggests that, while the statements in Jennings about proportionality are not always cleanly put, ‘[t]he idea, however, is probably that there must be proportionality between the expectation, the detriment and the outcome’.\textsuperscript{59}

Since both the expectation and the detriment are fixed features of a particular case, the outcome (ie the remedy) is the only one of the three things mentioned by Gardner which can vary. Therefore, on Gardner’s view, the court must ensure proportionality by taking the expectation, as well as the detriment, into account in determining the outcome. Where one

\textsuperscript{58} Jennings [2002] EWCA Civ 159, [56]. This is confirmed by Ottey v Grundy [2003] EWCA Civ 1176, [57] where Arden LJ explained Jennings v Rice as having decided that: ‘[t]he remedy must be proportionate to the detriment suffered’. See also ibid, [62], in similar terms. This is also the understanding of proportionality which emerges from the judgment of Mason CJ in Commonwealth of Australia v Verwayen (1990) 170 CLR 394, 413, which Robert Walker LJ accepted in Jennings [2002] EWCA Civ 159, [56] as applicable in English law.

\textsuperscript{59} S Gardner, ‘The Remedial Discretion in Proprietary Estoppel—Again’ (2006) 122 Law Quarterly Review 492, 498. Gardner ibid derives support for his interpretation of proportionality from a dictum of Aldous LJ in Jennings [2002] EWCA Civ 159, [36] that ‘the task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment’. Since the expectation and the detriment in a given case are matters of fact which cannot be made proportionate to each other by any action of the court, it is submitted that Aldous LJ meant that such proportionality must exist if an expectation remedy is to be granted. Note that Aldous LJ made his remarks in a case where the central issue was the claimant’s argument that an expectation remedy must invariably be granted.
is considering a possible expectation remedy, there would be no difference between the two versions of proportionality because the expectation and the remedy under consideration are the same, so that the third variable introduced by Gardner’s formulation disappears. The difference appears in cases where an expectation remedy is ruled out because it would be disproportionate to the detriment. On Gardner’s version of proportionality, the court would take the expectation into account (alongside the detriment) as a factor in framing a remedy which is lower than the expectation.

Some aspects of Robert Walker LJ’s judgment might indeed seem to envisage a role for expectation short of actually determining the remedy. For example, when he discussed cases where it is not appropriate to grant an expectation remedy, he commented that ‘that does not mean that the court should in such a case abandon expectations completely’. He also agreed with Hobhouse LJ in *Sledmore v Dalby* that to recognise the need for proportionality ‘... is to say little more than that the end result must be a just one having regard to the assumption made by the party asserting the estoppel and the detriment which he has experienced’. While not clear-cut, such dicta could be interpreted to mean that the level of the expectation can play a role in determining the remedy even in cases where the remedy is less than the expectation. It would involve a further step to conclude that the judges had in mind the version of proportionality favoured by Gardner, rather than envisaging a simpler approach under which expectation, along with all other matters, would be taken into account when the court is exercising its very broad discretion.

Assuming that Gardner’s approach finds some support in the case law, how would it work in practice? Consider the facts of *Jennings*, where the claimant acted to his detriment in the expectation of inheriting a house worth £435,000 and was awarded a remedy of £200,000. If the expectation had been to inherit a house worth £1,000,000, would this have justified an increase in the value of the remedy? In other words, in *Jennings* the defendant ‘promised Mr Jennings the moon and left him nothing’; would Jennings have deserved a greater remedy if he had been promised the moon and the stars? If the expectation is relevant to the process of choosing a remedy, alongside other factors, it must be possible to envisage circumstances where adjusting the extent of the expectation, while not varying the status of other relevant factors, would lead to a change in the extent of the remedy to be granted. Yet it is difficult to see why, as a matter of principle,

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60 *Jennings* [2002] EWCA Civ 159, [51].
62 *Jennings* [2002] EWCA Civ 159, [56].
63 This latter possibility is considered later in this section: see text to and following nn 70–72 below.
64 *Jennings* [2002] EWCA Civ 159, [14].
the claimant in a case like *Jennings* should receive an ever greater remedy, on the basis of the same detriment, as one increases the extent of the hypothetical expectation. Such an approach would seem to offend unacceptably against the more straightforward proportionality principle discussed previously, which stipulates that the remedy should not be disproportionate to the detriment (a principle not recognised on Gardner’s analysis, since it is replaced by a complex understanding of proportionality which brings expectation into the question as well as detriment).

A central problem with an approach which gives a role to expectation as a factor in the determination of the remedy is that, unless it is to be an entirely arbitrary process, there must be some principled way of determining the extent to which the expectation impacts upon the remedy. However, no such principled mechanism is available. One must ask how, as a matter of logic, the remedy can be made proportional to two different values, the expectation and the detriment? The only answer appears to be that one would have to resort to some defined rule which would relate the two values to each other, so as to generate one new value to which the remedy could be made proportionate. A simple example of this would be a rule which stipulated that the court should pitch the remedy at a point half-way between the detriment and the expectation.65 Unless one imposes some arbitrary formula like this (which is surely not a viable option as a matter of principle), the inevitable result would be that different courts would give different relative weightings to the expectation and the detriment. The result would be indefensibly inconsistent.

In terms of explaining how the expectation is to be taken into account in framing the remedy, Gardner argues that the remedy will normally be pitched somewhere between the value of the expectation and the value of the detriment.66 He suggests that the aim of the court is ‘to rectify unconscionability, of a particular kind’ and that ‘[t]he claimant’s expectation and reliance are relevant because they are the essential elements of the unconscionability’.67 In Gardner’s view, in order ‘[t]o redress the unconscionability, the outcome must therefore reflect both the claimant’s expectation and reliance, and the degree to which these can be ascribed to the defendant, given his encouragement or acquiescence’.68 Unfortunately, Gardner does not fully explain this argument concerning the ascription to D of responsibility for C’s expectation and reliance.69 His argument appears to involve the proposition that, as well as being a threshold issue for any liability in

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65 Perhaps adjusting this up or down depending on the play of other discretionary factors of the sort identified by Robert Walker LJ in *Jennings*.
67 *ibid*, 499.
68 *ibid*, 500.
69 Coming closest perhaps, *ibid*, 508.
proprietary estoppel, D’s responsibility for C’s expectation and detriment is also a question of degree which affects the remedial inquiry. Even if one accepts this proposition, however, it is unclear how Gardner’s emphasis on ascription of responsibility can provide a non-arbitrary solution to the question of the relative weight to be given to detriment and expectation in the determination of the remedy.

Overall, Gardner’s analysis does not appear to be convincing as a matter of principle. However, it does not represent the only way in which expectation could be taken into account as a factor in determining the extent of a non-expectation remedy. Rather than suggesting that the ultimate remedy must be proportional to the expectation as well as the detriment, it could simply be argued that the court is entitled to take the expectation into account alongside all the other factors relevant to the exercise of the court’s discretion. In relation to the idea of taking expectation into account in determining a non-expectation remedy, one must consider why, as a matter of justice, it might be thought that a higher expectation should indicate a higher remedy. It seems that the argument would have to be that the larger the expectation, the more significant the ‘disappointment’ suffered by C when the expectation is not fulfilled. In Powell v Benney,70 this point was considered in passing by Sir Peter Gibson, who noted that the trial judge ‘chose to increase the sum of £8,830, which he found [the first claimant] had expended, by what appears to be an arbitrary amount “looking at the size of the estate and the disappointment [the claimants] had suffered”’.71 Since there was no cross-appeal by the defendants against the modest award of £20,000 to the claimants, Sir Peter Gibson did not comment further on the judge’s rounding up of the remedy to that sum to allow for the claimants’ ‘disappointment’ but his use of the term ‘arbitrary’ might indicate disapproval of this approach.

Two comments can be made on the question of factoring ‘disappointment’ into the determination of the remedy. First, as Sir Peter Gibson implied, it is difficult to see how one would avoid arbitrariness when deciding how much allowance to make for the level of C’s expectation. Secondly, along the lines of an argument put forward by Brennan J in Commonwealth v Verwayen,72 it cannot be said that disappointment is something which C suffers in reliance on the expectation created by D. It is a consequence of the non-fulfilment of the expectation but does not appear to fall within the category of detrimental reliance on the expectation. The disappointed claimant who has incurred no detriment will not obtain any remedy when the promise is not fulfilled. Why should disappointment be compensatable when associated with detrimental reliance but not when it occurs on its own?

70 Powell v Benney [2007] EWCA Civ 1283.
71 ibid, [18].
On the whole, it does not seem to be defensible in principle to treat the expectation as a factor to be taken into account in devising a non-expectation remedy, whether through the adoption of Gardner’s version of proportionality or otherwise.

D. Expectation as a Proxy for Detriment

Another role for expectation is suggested by Robertson in his latest contribution to the debate. Robertson’s general view is that the purpose of estoppel relief is to protect C against reliance-based harm. Seeking to explain the approach of recent English and Australian cases, he argues that C’s detriment in estoppel cases is often difficult to quantify and that, in such cases, the expectation provides a reliable proxy for the reliance interest of C. He suggests:

If the primary goal of proprietary estoppel is to protect the claimant against harm resulting from reliance on the representor’s conduct, then the most complete way to provide that protection is to fulfil the claimant’s expectations *in specie*. The claimant suffers no detriment as a result of his or her reliance on a particular assumption if that assumption is made good. The notion that a Court of Equity should grant specific relief where it can by that means provide better protection for a plaintiff than would be provided by a monetary award is consistent with the principle that a court will grant specific performance for breach of contract, ‘when it can by that means do more perfect and complete justice’.74

The trouble, however, with this idea of doing ‘more perfect and complete justice’ to C is that this occurs at the expense of D.

Robertson concedes that the courts could attempt to quantify reliance loss but feels that they should not do so. This is because

[where the reliance loss cannot accurately be quantified, the court is faced with a choice between running a risk of under-compensating the claimant by seeking to quantify the reliance loss, and running a risk of over-compensating the claimant by awarding relief in the expectation measure.75

It is submitted that these risks are not equally balanced. If the court tries conscientiously to quantify the reliance loss, there should be an equal risk that it will over-compensate or under-compensate C; thus it is favouring neither C nor D. If, on the other hand, it insists on taking the expectation as the determinant of the remedy, it is picking the highest possible measure (given that the expectation must operate as an upper limit on relief),

74 *ibid*, 315–16, quoting from *Wilson v Northampton and Banbury Junction Railway Co* (1874) 9 Ch App 279, 284.
75 *ibid*, 317.
eschewing all risk of under-compensation but running a very clear risk of over-compensation since no attempt has been made to ensure that the detriment actually equals or exceeds the value of the expectation.

Robertson justifies this favouring of C on the basis that ‘the court is, in effect, holding the representor responsible for the factual uncertainty brought about by his or her inconsistent conduct [ie in resiling from his promise]’. However, it is important to note the manner in which it is proposed to hold D responsible for the factual uncertainty. Instead of declining to give D the benefit of the doubt in the process of quantifying the remedy on the basis of detriment, it is proposed that the court should discard detriment as the basis for quantification and settle instead on the expectation as the remedy (at least where this would not be ‘disproportionate’ to the detriment).

Furthermore, Robertson’s argument seems to presuppose that, in all estoppel cases, D’s behaviour can be regarded as sufficiently blameworthy to justify skewing the quantification of the remedy against him. One might be reluctant to give D the benefit of any doubt if he had never had any intention of fulfilling the expectation he had created and had deliberately engineered a benefit for himself by inducing C to act to his detriment. However, there are many cases where D is not acting in bad faith and where his failure to fulfil C’s expectation may be due to an unforeseen change in circumstances or to a falling out between the parties for which D is no more to blame than C. In such circumstances, even if it may be appropriate to allow C a remedy in estoppel, it is not clear that all assumptions should be made against D in terms of quantification.

Robertson envisages as a protection for D the fact that the court will not fulfil the expectation where to do so would be disproportionate to the detriment suffered. In ‘rare cases’ where C’s loss is ‘is purely financial or is otherwise accurately quantifiable’, the court can award financial compensation. However, ‘[i]n other cases, the focus is necessarily on fashioning an award that is proportionate to the claimant’s reliance loss, rather than one that precisely corresponds to it’. This argument makes it necessary to look more closely at what is meant by the somewhat slippery notion of ‘proportionality’.

Proportionality is a concept which, at a superficial level, is difficult to quarrel with—we are accustomed to thinking of a proportional response as being, by definition, reasonable. Yet the attractiveness, in the abstract, of the concept masks certain difficulties. If you owe me £200 and you offer to repay me £150, suggesting that this amount is proportionate (or ‘not

76 ibid.
77 ibid, 319. Note that, although at this point Robertson refers to a remedy which is proportionate to the detriment, what he seems to envisage is subtly different: a remedy which is merely ‘not disproportionate’ to the detriment.
disproportionate’ to the amount of the debt, I would not be satisfied with this rough correspondence in terms of scale. Both the debt and the tendered payment are measured in the same currency and I would insist on full repayment. Even if we had agreed that you would repay me with natural produce from your garden, we would be thinking of a payment in kind which, as closely as possible, mirrored the amount of the debt. I would not be satisfied with a payment, even in kind, which was merely ‘not disproportionate’ to the debt. These analogies lead to the following question: Given that, on Robertson’s view, the court’s task is to erase the detriment of C, why should the court not simply fashion a remedy which represents its best endeavour to do that? In other words, why should the court be willing to give an expectation remedy where that remedy is greater than that indicated by the court’s best attempt to quantify the detriment?

Significantly, as with the ‘expectation as starting point’ approach which was considered earlier in this chapter, further difficulties emerge with the approach under discussion if one considers what happens in a hypothetical scenario where the level of the expectation is increased. Consider a case where C’s expectation is not regarded as being disproportionate to the detriment he has incurred. Therefore, rather than attempt the difficult task of quantifying the detriment, the court will opt for an expectation remedy—even if that would be greater than a detriment-based remedy. However, what if one changed the facts so that C’s expectation was far higher, such that it would be disproportionate to give effect to it? The court would then have to resort to quantifying the detriment, possibly leading to a lesser remedy for C. Once more, one sees that C will potentially be in a less favourable position if he had a higher level of expectation. Note also that, where the expectation is disproportionate to the detriment, the court is forced to do its best to quantify the detriment and to determine the remedy on this basis. If this can be done in some cases, why should it not be done in all cases? It is true that it can be difficult to quantify certain forms of detriment and that it is possible to underestimate the significance of activities such as caring for an elderly defendant, investing emotionally in a home, sacrificing other financial opportunities or making ‘life changing decisions of a personal nature’. However, this merely highlights the importance of not quantifying the detriment-based remedy on a crude or unsympathetic basis. It does not justify favouring the expectation measure over the court’s best estimate of the remedy appropriate to erase the detriment.

To sum up, if one accepts (as Robertson does) that the purpose of the remedy is to erase C’s detriment subject to a cap based on expectation, then one must be willing to quantify the detriment. Clearly, the court will

78 See Robertson’s discussion of these issues, ibid, 305–15.
79 Unless, of course, the court’s valuation of the detriment is such that the expectation comes into play as the upper limit on C’s remedy.
sometimes be faced with difficult issues of quantification but these issues are identical to those which arise in cases where the expectation happens to be disproportionate to the detriment. These difficulties are a necessary consequence of an equitable jurisdiction, which is regarded, under Robertson’s approach, as having the function of protecting detrimental reliance. It is submitted, therefore, that it is not appropriate to regard C’s expectation as a proxy for the detriment which C has incurred.

E. Linking Expectation with Detriment by Reference to a Bargain

In *Jennings v Rice*, Robert Walker LJ felt that one justification for an expectation remedy would be that there has been something approaching a bargain between the parties. He referred to the possibility of a case where ‘the assurances, and the claimant’s reliance on them, have a consensual character falling not far short of an enforceable contract’. He went on to explain:

In a case of that sort both the claimant’s expectations and the element of detriment to the claimant will have been defined with reasonable clarity. A typical case would be an elderly benefactor who reaches a clear understanding with the claimant (who may be a relative, a friend, or a remunerated companion or carer) that if the claimant resides with and cares for the benefactor, the claimant will inherit the benefactor’s house (or will have a home for life). In a case like that the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate.

In considering these remarks, it is first necessary to identify the possible significance of this attempt to link expectation with detriment in cases where there is ‘a mutual understanding which is in reasonably clear terms but does not amount to a contract’.

In the context of Robert Walker LJ’s judgment, the ‘bargain’ analysis does not really represent an independent conception of the role of expectation in the remedial inquiry. It simply indicates a set of circumstances where, according to Robert Walker LJ, it will be reasonable to conclude that there is no lack of proportionality between expectation and detriment (presumably applying in cases where the detriment or the expectation, or both, are difficult to quantify in financial terms). Under Robert Walker LJ’s analysis, this would justify the award of an expectation remedy on the basis of the principle that such a remedy should be awarded unless it is disproportionate

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80 *Jennings* [2002] EWCA Civ 159, [45].
81 ibid.
82 ibid, [50].
to the detriment.\textsuperscript{83} Thus, the bargain analysis can be seen as merely an aspect of the wider ‘expectation as starting point’ approach, which has already been discussed.\textsuperscript{84} Similarly, the bargain idea could be integrated into an approach which, unless the expectation were disproportionate to the detriment, regarded the expectation as a suitable proxy for the detriment.\textsuperscript{85} Again, the existence of a bargain could be regarded as showing that there was no lack of proportionality, thus permitting the award of an expectation remedy. In both cases, the possible role for the concept of ‘bargain’ is dependent on the concept of ‘proportionality’ and it has already been argued in detail that this concept does not stand up to close scrutiny in the case of either approach.

Furthermore, there are serious difficulties with the idea of taking a bargain into account in the manner envisaged by Robert Walker LJ.\textsuperscript{86} An important preliminary point is that there may well be an element of gift in an apparent bargain.\textsuperscript{87} It is quite possible that D wished to make a gift to C while gaining some benefit from C in partial return. Therefore, it does not necessarily follow from the existence of a consensual arrangement between the parties, involving an apparent quid pro quo, that either party regards the promised benefit as equivalent, or not disproportionate, in value to the detriment which it is envisaged will be incurred by C.

This means that the possible relevance of a bargain is confined to a subset of consensual arrangements where there is no element of gift in the exchange between the parties. It should be emphasised, of course, that in the type of case which is under discussion there is no binding contract between the parties (or it would not be necessary for C to rely on proprietary estoppel). It seems clear that the parties’ agreement as to the equivalence of the detriment and the expectation is part of the unenforceable bargain and, therefore, is unenforceable just like the bargain as a whole. Apparently accepting this, Robert Walker LJ does not suggest that the parties are bound, as such, by their consensual arrangement. Rather, he sees the fact that the parties were willing to exchange the detriment for the expectation simply as evidence of the fact that each regards the expectation as being roughly equivalent in value to the detriment or, at least, not disproportionately higher in

\textsuperscript{83} Contrast the comments of Gardner (2006), above n 55, 494–7 on Robert Walker’s ‘bargain’ analysis, which are conditioned by Gardner’s different understanding of the concept of proportionality as it emerges from Jennings (see text to nn 58–69 above).
\textsuperscript{84} See text to nn 52–57 above.
\textsuperscript{85} See the discussion of this approach in the text to nn 73–79 above.
\textsuperscript{86} Lord Walker’s extra-judicial commentary suggests that he now has reservations concerning his ‘bargain’ analysis, at least in its original form: see R Walker ‘Which Side “Ought to Win”?—Discretion and Certainty in Property Law’ [2008] Singapore Journal of Legal Studies 229, 238–239. (His Lordship’s article is also to be found at (2008) 6 Trust Quarterly Review 5).
\textsuperscript{87} Consider, for example, the facts of Baker v Baker [1993] 2 FLR 247 (CA).
value. Thus, the existence of the bargain is regarded as assisting the court in comparing the value of the detriment to that of the expectation.

The plausibility of this approach depends on one’s view as to the appropriate basis on which to value detriment for the purpose of determining estoppel remedies. In fact, untested questions arise in relation to this issue.\textsuperscript{88} It is unclear whether one should be looking at the value of the detriment from the point of view of C, or of D, or from some ‘objective’ viewpoint (or on some other more complex basis). The resolution of this issue seems to impact on the possible relevance of a bargain in terms of valuing the detriment. If the valuation is to be, in some sense, ‘objective’, then it is not obviously decisive that the parties themselves regarded the detriment as being equivalent in value to the expectation. If, on the other hand, the appropriate test requires the court to consider the value of the detriment from C’s or D’s viewpoint (or, say, to take the higher of these two valuations where there is a difference), the existence of an unenforceable bargain might seem more relevant—not because either party is bound by it but because it might be thought to indicate the value which each party places on the detriment. However, even this proposition must be examined further.

Consider a case where X, an artist, agrees to sell one of his paintings to Y for £50,000. This does not actually show that each values the painting at £50,000. X might have been willing to sell for anything above (say) £30,000, while Y might have been willing to pay up to (say) £100,000. Thus, the bargain which they actually strike simply shows that £50,000 was greater than or equal to the value which X placed on the painting and less than or equal to the value Y placed on the painting. At what point the agreed price fell in the range of £30,000 to £100,000 would have depended on, amongst other things, the respective negotiating abilities of the parties. Thus, an informal agreement between the parties gives us no guidance as to how to value the detriment from C’s viewpoint, which is one leading option in terms of how the court should be trying to value the detriment. Since C was willing to exchange the detriment for the expectation, we know that he does not value the detriment more highly than the expectation but that adds no information in terms of choosing a remedy because, in any case, there is a general principle that the remedy can never exceed the expectation. However, if the aim of the exercise is to value the detriment by reference to its value to D,\textsuperscript{89} then the existence of a bargain might indeed seem to justify valuing the detriment at the level of the expectation. This is because D’s agreement to exchange the expectation for the detriment shows that he values

\textsuperscript{88} These issues have not been given much consideration to date since the valuation of detriment is not necessary within the expectation remedy paradigm nor does it feature prominently in the context of a strongly discretionary approach to remedies.

\textsuperscript{89} Or if the idea is to value it by reference to whichever is the greater, its value from D’s perspective or from C’s perspective.
the detriment at the level of the expectation or higher, and the existence of
the cap at the expectation level rules out the possibility of imposing a rem-
edy greater than the expectation. However, one should also mention the dif-
iculty that circumstances may have changed significantly between the time
of the bargain and the time when the court must determine the remedy, so
that the prior ‘bargain’ may not give an accurate indication of D’s current
view as to the relative value of the detriment and the expectation.

The preceding discussion has suggested that it does not follow simply
from the existence of a consensual arrangement between the parties that
it is appropriate to regard the detriment and the expectation as roughly
equivalent or to assume that the expectation is not disproportionate to the
detriment. It depends, first, on whether the apparent bargain between the
parties involves an element of gift; secondly, on the viewpoint from which
it is regarded as appropriate to value the detriment; and, thirdly, on the
assumption that the circumstances have not changed significantly since the
time of the bargain.

Further complications arise in a scenario where the ‘bargain’ between the
parties is such that it is unclear what amount of detriment C will have to
incur in return for the fulfilment of the expectation. Consider, for example,
the type of scenario envisaged by Robert Walker LJ where D, who is (say)
70 years old, ‘promises that if the claimant resides with and cares for
[D], the claimant will inherit [D’s] house’.90 A key feature here is that it
is unclear how long the obligation to care for D will last (given that it is
uncertain when D will die), so that it is not possible to know in advance
what C will have to do in order to obtain the house. What if D dies after
two years, so that C incurs a relatively modest, but not trivial, amount of
detriment? Robert Walker LJ’s ‘bargain’ idea would suggest that the remedy
should reflect the expectation. However, in these circumstances, the exist-
ence of the bargain actually gives no indication that either C or D valued
the detriment which was subsequently incurred, ie two years of caring for
D, as equivalent or not disproportionate to the expectation. All the exist-
ence of the bargain could show is an equivalence or lack of disproportion
between a gift of the house and ‘caring for D for as long as D may live, be
it one year or 20 years’. That is irrelevant to the question of what value the
parties place on the actual detriment, ie ‘caring for D for two years’. Thus,
the existence of the bargain is of no evidential significance in terms of assist-
ing the court in comparing the value of the detriment incurred by C to the
value of the expectation.

It might be thought that there is some unfairness to C in this refusal to
take account of the bargain when comparing the detriment actually incurred
with the expectation. The basis for this view would be that C might have had

90 Jennings [2002] EWCA Civ 159, [45].
to care for D for 20 years (instead of for two years), incurring detriment at a much higher level than the value of the expectation, but would in those circumstances have had to be content with a remedy capped at the level of the expectation. Would it not be appropriate for the court to ‘take account of the parties’ perception of “the balance of risks and rewards” to [C] of performing his side of the bargain’?91 This would involve fulfilling the expectation once C has done ‘exactly what [D] agreed or suggested was necessary in order to acquire the promised right’.92 However, this appears to involve an impermissible shift from the notion of using the existence of the bargain as evidence of the value placed by the parties on the detriment over to an approach which seeks to enforce the unenforceable bargain (once C has fulfilled his side of it). When one is applying the proportionality principle envisaged by Robert Walker LJ, what matters is the detriment which was actually incurred by D, not the amount of detriment he might have incurred if things had turned out differently. The bargain principle cannot justify awarding an expectation remedy where this would be disproportionate to the detriment.93

IV. CONCLUSION

This chapter has analysed the various roles which expectation could play in relation to the determination of proprietary estoppel remedies. It has been argued, by a process of eliminating the various alternatives, that the only appropriate role for expectation is as a cap on a remedy determined on the basis of other factors. This involves a rejection of the notion, supported by Jennings v Rice, that the fulfilment of the expectation should be the prima facie remedy, to be granted unless such a remedy would be disproportionate to the detriment suffered by C. This chapter has argued that such an approach does not stand up to close scrutiny and leads to demonstrably illogical results. It is interesting, however, to reflect on why this approach has become fashionable.

The answer seems to be that, understandably, courts and commentators feel uneasy with the idea of a completely discretionary approach to remedies. In a sea of discretion, the only two concepts to which one can cling are expectation and detriment. The approach of automatically fulfilling C’s

91 Bright and McFarlane, above n 6, 458, quoting Etherton J at first instance in Cobbe v Yeoman’s Row Management Ltd [2005] EWHC 266 (Ch), [136].
92 ibid.
93 Interestingly, Bright and McFarlane, ibid, 459 concede that in a bargain case ‘it may be that proportionality does have a minor role if B’s expectation greatly exceeds his reliance’, referring to the possibility of D dying ‘very shortly’ after the arrangement is made. However, once this concession is made, it is difficult to see why proportionality should have a role only if the expectation is ‘out of all proportion to the reliance’ (ibid, 460). Why does the normal proportionality principle not apply?
expectation, perhaps given a boost by the recent decision of the House of Lords in *Cobbe*, affords no role whatsoever to the concept of detriment at the remedial stage. No convincing argument has been advanced as to why this should be so and, as well as allowing for the possibility of an award for C which is disproportionate to his detriment, this approach also runs into difficulties in dealing with the problem of countervailing benefits received by C (as pointed out in this chapter). The ‘estoppel as starting point’ approach of *Jennings* seems to represent an improvement, in that it gives a prominent role to expectation, while making a concession to the fact that C’s detriment is central to the establishment of his cause of action and so, in principle, should not be ignored completely at the remedial stage. The difficulty is that upon analysis it turns out that, once it has been admitted to the remedial inquiry, it is not possible to keep the concept of detriment locked up in a box marked ‘proportionality’. The attempt to do so leads to inconsistent results, as has been pointed out in this chapter by reference to hypothetical examples showing C being awarded a lower remedy based on a higher expectation.

If one rejects the attempt to give a role to detriment through the ‘expectation as starting point’ approach, what is the alternative? One obvious candidate is a detriment-based remedial approach. This can be seen as allocating an appropriate role to both of the two main elements in an estoppel claim, expectation and detriment. C’s claim to justice is based on the combination of the expectation and the detriment and so it is logical that D can satisfy the claim either by erasing the detriment or by fulfilling the expectation. This suggests a remedial approach whereby the remedy is designed to erase the detriment, subject to an upper limit at the level of the expectation. It is true, of course, that the English courts have been hostile to this approach. This is presumably based, in part at least, on the complexity of trying to quantify C’s detriment, which may not be financial in nature. Since it tends to be easier to fulfill C’s expectation, the courts prefer to avoid the problem of quantifying detriment.

If this is the case, it highlights a potential difficulty with the whole proprietary estoppel jurisdiction. It would not seem acceptable to contend that, while justice to D requires the courts to limit the remedy by reference to C’s detriment, the courts must lean towards the maximum possible remedy (one based on expectation) because of the practical difficulty in calculating a remedy based on detriment. Equity has arrogated to itself a very broad jurisdiction which, given the principles of justice which underlie it, sometimes requires the court to put a value on C’s detriment. If this requirement were to make the doctrine too difficult to operate in practice, then the justification for its existence would be called into question. At the least,

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94 *Cobbe* [2008] UKHL 55.
one might doubt the wisdom of the rapid expansion in the scope of the doctrine in recent years.96

It is probably too soon, however, to concede that it is impossible for the courts to take a principled approach to proprietary estoppel remedies. The law is still absorbing the lessons of cases such as *Jennings v Rice*, which represent the beginning of a move to take account of detriment at the remedial stage. As the case law develops, one can hope for greater sophistication from the courts in terms of their understanding of the concepts of expectation and detriment, and of the relationship between them. In truth, there may not be all that much distance between the reliance-based remedial model and the traditional discretionary approach. While Robert Walker LJ did not include a reference to detriment in his non-exhaustive list of factors relevant to the exercise of the court’s discretion,97 it cannot sensibly be denied that the detriment incurred by C is an important factor relevant to the exercise of the court’s discretion. After all, it is not difficult to imagine a case where none of the other (relatively peripheral) factors explicitly mentioned by Robert Walker LJ will be relevant. Thus, it might not be much of a stretch to recast the court’s traditional discretionary approach in terms of the court being required to grant a remedy which is appropriate in light of C’s detriment, viewed in conjunction with any other relevant factors of the sort identified by Robert Walker LJ, and which is subject to an upper limit based on the level of the expectation. While not all that radical on the face of it (and not yet representing a complete move to a reliance-based model), such a rethinking of the basis for estoppel remedies would seem to represent a step forward in terms of coherence and certainty.

Some observations have been offered at this concluding stage as to the possible future development of the courts’ approach to proprietary estoppel remedies, betraying sympathy on the part of the author with the reliance-based remedial model. However, the primary intention has been to analyse the place of expectation in the remedial inquiry, trying to cast light on the possible roles of this concept, whether as the invariable measure of the remedy, or as a starting point in the remedial inquiry, or as a proxy for detriment, or as an element in an informal bargain between the parties. It is hoped that this analysis may be of value irrespective of the reader’s doctrinal allegiances.

96 Consider, for example, developments in relation to testamentary promises, including those which do not necessarily concern land. The speeches in *Cobbe* [2008] UKHL 55 suggested anxiety on the part of the House of Lords, not specifically related to the remedial question, as to the recent expansion in the reach of proprietary estoppel. However, in the subsequent decision in *Thorner v Major* [2009] UKHL 18, the House of Lords upheld a claim in the testamentary context which appeared to fall at the outer limits of the existing proprietary estoppel jurisdiction.

97 See text to n 9 above.