

## **Question 18**

'The case for using formalities for land transactions, such as deeds and contracts, is unanswerable. Equally indisputable is the need for flexibility in the creation of property rights. What matters is that this flexibility should be achieved by the operation of clearly demarcated and predictable principles.'

To what extent do you agree with these propositions? Does proprietary estoppel (PE) achieve flexibility in the way described? 2022A

### **Introduction**

This essay involves two fundamental issues. First the absence of contract formality which needs LP(MP)A 1989 s 2 formality. Second PE as an alternative to s 2 formality thus (a) representation – or expectation induced by D; (b) detrimental reliance which seems clear. Lastly this paper will examine if there is flexibility in the concept.

### **Contractual Formality**

In the majority of land purchases/sales, the parties will enter into a contract to buy/sell the land. This following is the process of conveyancing. Once exchange of contracts occurs, the parties become contractually committed to buy/sell the land:

- Exchange of Contracts;
- Completion of the Deed; and
- Registration.

All three of the following requirements must be satisfied to have a valid land contract. This is as per the (LP(MP)A), s 2: This is in addition to the normal contract law requirements and relates to all contracts where the subject matter of the contract is land

- The contract must be in writing.
- It must contain all the expressly agreed terms.
- It must be signed by both parties.

There have been occasions, however, where one or more of the agreed terms were excluded from the final contract, which was then relied upon by an aggrieved party. The courts are faced with the question of whether or not they can uphold the incomplete contract or must declare it void for non-compliance with the LP(MP)A 1989 s 2. This can be seen in the case of *North Eastern Properties Ltd v Coleman and another* [2010] 2 EGLR 161.

The effect of a binding land contract is to pass an equitable interest in the land to the buyer. A land contract was given proprietary status in the case of *Walsh v Lonsdale* (1882) 21 Ch D 9 and is authority for the equitable maxim that "equity regards as done that which ought to be done." Put simply, a land contract is an agreement to create or transfer a proprietary right in the land, such as an agreement to grant a lease. *Walsh v Lonsdale* (1882) made clear that although such an agreement will not create a proprietary right at law, it will be good in

equity. In this case, although the formalities for a legal lease had not been met, there was an agreement to grant a lease. The tenant under the contract was therefore regarded as having an equitable interest (and equitable lease) in the land, known as an estate contract. The same would apply in PE. Even though a PE transfer does not occur by some document or contractual formality PE being an equitable principle means the court will have regard to the, behaviour of both parties in determining whether to make an order of PE. If the buyer delays in requesting the remedy or itself have not behaved honourably (with clean hands) then the court may well refuse to make an order of specific performance or transfer ownership under the doctrine of PE or some other type of constructive trust.

### **What is PE?**

Proprietary estoppel is an equitable doctrine which enables a person to informally acquire property (or personal) rights. Its objective is to prevent unconscionable conduct. It enables a court to do justice by modifying the parties' strict legal rights. It is a very flexible doctrine. A successful proprietary estoppel claim gives rise to an 'equity.' The court determines how to 'satisfy' the equity, ie the court determines what remedy is appropriate. The court enjoys a broad discretion in selecting the remedy. It can satisfy the equity by awarding the claimant a personal right or a property right (including a right under a trust). In Thorner v Major [2009] UKHL 18, the House of Lords identified the three main elements of a proprietary estoppel claim:

1. An assurance made to the claimant.
2. Reliance by the claimant on the assurance.
3. Detriment to the claimant in consequence of their reliance.

Moreover, as proprietary estoppel is based on 'the fundamental principle that is equity is concerned to prevent unconscionable conduct,' (Gillett v Holt [2001] Ch 210) the claimant must also demonstrate that it would be unconscionable for the defendant to renege from the assurance: Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55. This notion of 'unconscionability' unifies and confirms the other

### **Setting the Context**

Proprietary estoppel claims are commonly encountered in two distinct factual situations (although they are not limited to these situations). In the first situation, A mistakenly believes that they have a right in land which is owned by B and, in reliance on that belief, act to their detriment in circumstances where B is aware of their mistake but does not attempt to correct it or prevent them acting to their detriment. This situation is commonly described as an 'acquiescence' case.

In the second situation, B assures A that they have or will acquire a right in relation to B's property and, in reliance on that assurance, B acts to their detriment. This situation is commonly described as an 'assurance' case. In rare circumstances, judges have used the doctrine of 'proprietary estoppel' to order the transfer of a freehold. This may happen when, for example, B has looked after A for many years, in reliance on a promise by A that B

will get the house from A, so that it would be inequitable for A to go back on their promise (Pascoe v Turner [1979] 1 WLR 431 and Re Basham [1987] 1 ALL ER).

### **PE used to make up for the absence of s 2 formalities?**

Under s2(5) LP(MP)A 1989, certain contracts are exempt from the formality requirements of s2:

1. a contract to grant a lease for a term which does not exceed three years, which takes effect 'in possession' (ie immediately) and which is at the best rent reasonably obtainable;
2. contracts made at public auctions;
3. certain contracts regulated by the Financial Services & Markets Act 2000 which include an interest of some kind in land;
4. the creation of resulting, implied or constructive trusts.

In Yaxley v Gotts [1999] 3 WLR 1217, the Court of Appeal held that an oral agreement for an interest in land was still enforceable on the basis of a constructive trust or proprietary estoppel. In that case, the claimant was held to be entitled to an interest in land on the basis of estoppel or a constructive trust because he acted to his detriment in reliance on an oral promise that he would be given an interest in the land.

### **Constructive trust or PE**

In the 1990s, there was a concerted effort by some commentators and judges to assimilate proprietary estoppel and common intention constructive trusts. Robert Walker LJ was the leading judicial advocate of this project (Yaxley v Gotts [2000] Ch 162). However, on his elevation to the House of Lords, Lord Walker recanted and in Stack v Dowden [2007] UKHL 17 he identified the principal conceptual distinction between proprietary estoppel and common intention constructive trusts:

“Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the “true” owner. The claim is a “mere equity.” It is to be satisfied by the minimum award necessary to do justice [...] which may sometimes lead to no more than a monetary award. A “common intention” constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests”

### **Does PE achieve flexibility?**

Does PE achieve flexibility where there is a need for flexibility in the creation of property rights or are the limits of this doctrine hard to define? In the case of Thorne v Major it was recognised that within the domestic context contractual relations could not reasonably be expected due to nature of the relationship and the lack of commercial experience of the parties but that in a commercial context contractual relations could be expected due to the nature of the relationship as well as the usual commercial experience of the parties. This decision supported the case of Cobbe v Yeoman's Row Management Ltd where very similar utterances were made. In the case of Cobbe it was fatal to the Claimants action for estoppel

that he had not entered into a contract as it was held that “conscious reliance on honour alone will not give rise to an estoppel” within the commercial context.

As a result of the distinction made between commercial and domestic cases the courts have been less willing to do away with the need to satisfy formality requirements (such as s2 of the Law of Property (Miscellaneous Provisions Act 1989) in the former case than they have in the latter. In the case of *Thorne v Major* Lord Neuberger held that the formality requirements under Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 which require a contract for the sale or other disposition of an interest in land to be made in writing could effectively be avoided in a “straightforward estoppel claim without any contractual connection”. This can be directly contrasted with the case of *Cobbe v Yeoman’s Row* where Lord Scott held that “proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void” where a contractual connection was supposed not to exist but where the parties were operating in a commercial setting.

### **Conclusion**

Proprietary estoppel is an equitable doctrine. It provides a means for people to claim an interest in land, even though this has not been formally created. An estoppel arises when one person, X, makes a promise or representation to another, Y. X allows Y to act to his detriment in reliance on that promise or representation, knowing that Y is mistaken as to his position. X will be estopped from denying the promise or representation if it is unconscionable for him to do so.

In such a case, an equity arising by estoppel will be recognised. The court has a wide discretion in awarding a remedy, and this could include the grant of a lease or a licence. So although the correct formalities for the creation of an interest in land may not have been followed, X will be estopped from denying that the interest exists.