# Proprietary Estoppel: Widening the Net

*Mark Pawlowski and James Brown consider whether a proprietary estoppel claim can extend to property other than land*

Most of the case law on the entitlement to family assets is concerned with disputes concerning beneficial ownership of the matrimonial (or quasi-matrimonial) home. This, of course, is not surprising given that the family home is likely to be the most substantial asset acquired by the parties during the period of their marriage or cohabitation. Disputes about property ownership, however, may not always be confined to the home and may include entitlement to other assets such as chattels owned by one of the parties. In this context, the doctrine of proprietary estoppel (which readily applies to land) have been far less developed by the courts although, in principle, there seems little reason why they should not form the basis of entitlement in appropriate cases.

## Comparison with promissory estoppel

Under English law, proprietary (like promissory) estoppel is a species of equitable estoppel. Whilst the requirements of inducement and detrimental reliance are broadly the same for both, one important distinction is that promissory estoppel cannot generate an independent cause of action since it is concerned primarily with preventing a contracting party from resiling from his representations or promises if the other party has acted in reliance on them: *Coombe v Coombe* [1951] 2 KB 215, at 224; *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 and *White v Riverside Housing Association Ltd* [2005] EWCA Civ 1385. By contrast, proprietary estoppel may be used not only as a "shield" in defence of an action by the legal owner but also as a "sword" capable of grounding a distinct and separate cause of action in equity. In this sense, the estoppel is capable of creating rights in property on behalf of the claimant who has successfully asserted an equity based on assurance and detrimental reliance.

## Judicial pronouncements

There is no direct English authority on the question whether the doctrine of proprietary estoppel is applicable exclusively to chattels as well as realty. Until recently, all the cases have concerned the application of the doctrine to rights and interests in and over land. There are, however, several dicta which suggest that the estoppel may not be limited to land. In *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, Lord Denning MR drew no distinction between goods or land when discussing the application of the doctrine. He stated, at p. 242:

> "There are many cases where the true owner of goods or of land has led another to believe that he is not the owner, or, at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing. In such

> cases it has been held repeatedly that the owner is not allowed to go back on what he has led the other to believe. So much so that his own title to the property, *be it land or goods*, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct – what he has led the other to believe – even though he never intended it." (Emphasis added).

This view was cited with apparent approval in *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204, at 218, where Megaw LJ, delivering the judgment of the Court of Appeal, opined that the principle of proprietary estoppel "may extend to other forms of property." In the *Baird Textile* case, referred to above, Mance LJ defined the scope of proprietary estoppel as "probably" extending to other property: at [97]. Similarly, Sir Andrew Morritt V-C, referring to the *Western* case, characterised the estoppel as creating "a cause of action . . . limited to cases involving property rights, whether or not confined to land": at [34]. The third member of the Court of Appel, Judge LJ, stated that "the principles relating to proprietary estoppel are limited to 'rights and interests created in and over land' and, possibly 'to other forms of property'": at [54]. Similarly, in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, Lord Scott, stated, at [14]:

> "The estoppel becomes a "proprietary" estoppel - a sub-species of promissory estoppel – if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action."

Again, in *Thorner v Major* [2009] 1 WLR 776, at [61], Lord Walker referred to proprietary estoppel as having to "relate to identified property (usually land) owned (or, perhaps, about to be owned) by the defendant."

**The deceased's net estate**

More significantly, in several cases, the doctrine has been invoked so as to include the deceased's residuary personalty as well as land. Thus, in *Re Basham, (deceased)* [1986] 1 WLR 1498, the deceased's net estate comprised a cottage, furniture and other chattels and some cash in a current and deposit account. The deceased had assured the claimant that she would inherit all his property on his death. The court drew no distinction between the various items of the deceased's property, referring simply to the claimant's equity as extending to the whole of the net estate. Similarly, in *Jennings v Rice* [2002] EWCA Civ 159, the deceased's estate comprised not only a house (valued at £420,000) but also furniture (worth about £15,000) and £583,615 on deposit. Here again, neither Weeks J (at first instance) nor the Court of Appeal made any distinction in respect of these assets when considering the applicability of the doctrine. In both courts, it was tacitly assumed that the estoppel would extend to the whole of the deceased's property: see also, *Ottey v Grundy* [2002] EWHC 2858 (Ch) and [2003] EWCA Civ 1176, where the successful estoppel claim related to an apartment in Jamaica (valued at £36,000) and a life interest in a houseboat moored in Chelsea, London, (estimated at £280,000); and *Murphy v Rayner* [2011] EWHC 1 (Ch), (land and investments) and *Pascoe v Turner* [1979] 1 WLR 431, (house and contents).

**Other property**

The doctrine was applied to an insurance policy in *Re Foster, Hudson v Foster (No. 2)* [1938] 3 All ER 610 and *Strover v Strover* [2005] EWHC 860 (Ch). More recently, proprietary estoppel was invoked in the context of a licence in respect of intellectual property involving copyrights. In *Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch), Birss J, stated, at [60]-[61]:

> "The licence would be permission to publish the Middle East edition of Hello magazine. The reason it is a licence is because the defendant (or the Hello/Hola group) holds intellectual property rights which I can take it would otherwise be infringed if Motivate published a version of Hello magazine without permission. In English law those intellectual property rights consist of goodwill, know-how, copyright and perhaps design rights. I can think of no reason in principle why a proprietary estoppel should not be available to the claimants in this case to prevent the defendant from denying the existence of a licence of this kind. It would be a right enforceable by the claimants against the defendant. The fact that the licence is a licence of intellectual property rights rather than an interest in land makes no difference. No case has been drawn to my attention in which a proprietary estoppel has been refused on that ground."

As one commentator has put it, the decision "is necessarily an incremental step, in recognising a more inclusive promise principle beyond promises relating to land; however that step is a welcome one": see, A Shaw-Mellors, "Proprietary Estoppel and the Enforcement of Promises", (2015) Conv. 529. Proprietary estoppel has also been applied to an entitlement to a share of profits. In *Sutcliffe v Lloyd* [2008] EWHC 1329 (Ch) and [2007] EWCA Civ 153, the claimant had entered into an arrangement with the defendants to provide the management, design and construction of a residential building development in return for 50 per cent of the share capital and an equal split of the profits. In this case, therefore, the interest to which the equitable obligation attached was the profit earned on the development and not a share in the enhanced value of the land itself. On the evidence, the court held that minimum equity to do justice was that the claimant should receive the sum of £25,000.

The doctrine, however, has been held not to apply to a promise simply to pay a sum of money for work done by the claimant. In *Sami v Hamit* [2018] EWHC 1400 (Ch), Morgan J held that proprietary estoppel had to relate to property of some kind and a claim to payment for work done was more properly the subject of a claim based in contract or unjust enrichment. Similarly, in *Newport City Council v Charles* [2009] 1 WLR 1884, the Court of Appeal held that a local authority's right to possession against a person succeeding to a secure tenancy on the death of a family member, on the ground that the accommodation was more than he reasonably required, was not an interest in land capable of giving rise to a proprietary estoppel. Laws LJ, stated, at [27]:

> "The housing authority is not claiming an interest in land. Its interest as landlord and as freeholder is not in question. That interest is not facilitated by

> any estoppel. What the housing authority seeks to do is no more nor less than to raise a strictly statutory claim to possession in a strictly statutory context. That ambition as it seems to me cannot be fulfilled as the fruit of a proprietary estoppel. The defendant has not created any expectation that the defendant will enjoy any kind of interest in land."

**An extension of the doctrine?**

Assuming that the doctrine of proprietary estoppel is of general application to property other than, strictly speaking, interests in land, there is no reason why a spouse or (cohabitee) should not be able to mount a successful claim in equity to a family chattel provided he (or she) can establish the requisite elements of an assurance and detrimental reliance. The point is vividly illustrated by Elizabeth Cooke, in her book, *The Modern Law of Estoppel*, (2000, OUP), at p. 53:

> "If I whisper to you 'the house is yours, darling', I may have to make that good if you rely on what I say; if I murmur 'the shares (or the aeroplane or piano) are yours, darling', I am safe as if I said: 'I will give you £10,000 next Monday."

In *Rowe v Prance* [1999] 2 FLR 787, the claimant was a widow who, for a period of 14 years had an intimate relationship with the defendant, a married man of considerable private means. During their relationship, he purchased a yacht for £172,000 which was registered in his sole name, giving the excuse that a joint registration was not possible because the claimant did not possess an ocean master's certificate. The claimant gave up her rented house and put her furniture in storage to base herself on the yacht, although she was there predominantly at weekends only, spending the remainder of her time in bed and breakfast accommodation. In a letter to the claimant, the defendant promised her that his absences would shortly cease and that the yacht would be theirs to share so that they could live together. Significantly, in numerous conversations, both before and after the purchase of the yacht, the defendant referred to it as "ours" or "our boat". Mr Nicholas Warren QC (sitting as a deputy judge of the Chancery Division), applying the earlier case in *Paul v Constance* [1977] 1 WLR 527, held that the defendant's repeated use of the word "our" when referring to the yacht and his assurances that the claimant's "security" was her interest in it (coupled with his explanation as to why he alone could be registered as owner) evidenced a clear understanding that she had a beneficial interest in the property. On the facts, therefore, the defendant had constituted himself a trustee of the yacht for himself and the claimant in equal shares.

Let us suppose, however, that in *Rowe*, the claimant had relied on the defendant's promises by spending her own money on restoring or repairing the yacht. The expenditure of money on improvements to the property in reliance on the legal owner's assurance is, of course, a "classic way" in which a detriment can be established. In these circumstances, it is submitted, a claim based on proprietary estoppel would have also succeeded, giving the claimant an estoppel equity which the court would have satisfied by means of an appropriate award which did justice to the parties. In *Rowe*, this would have meant giving the claimant an equal beneficial share

in the proceeds of sale of the yacht – an outcome which would not differ from the actual decision based on a self-declared or constructive trust.

One can also envisage an alternative scenario where the claimant incurs expenditure (and labour) in restoring the yacht believing it to be hers. The defendant knows of her mistaken belief and encourages her in the expenditure of her money by abstaining from asserting his own legal rights in relation to the property. Here again, the claimant would, it is submitted, be able to bring her claim under proprietary estoppel and seek an appropriate form of relief in order to satisfy her equity: see, *Ramsden v Dyson* (1866) LR 1 HL 129 and *Willmott v Barber* (1880) 15 Ch D 96. Significantly, in this scenario, a proprietary estoppel claim may be the only form of legal redress open to the claimant given that the defendant has not constituted himself as trustee of the yacht (unlike the owner of the yacht in *Rowe*), nor do the facts give rise to any contractual relationship between the parties or common intention establishing a constructive trust.

**Impact on third parties**

An interesting feature of being able to successfully invoke the doctrine of proprietary estoppel in the above scenarios is that the estoppel claim would generate an inchoate equity, itself being an equitable chose in action and, accordingly, a species of property right albeit not a full proprietary interest. In the event, therefore, that the defendant sold the yacht to a third party prior to the claim being heard by the court, the latter would, it is submitted, be bound by the inchoate equity unless he could show that he was a bona fide purchaser for value of the yacht without notice of the estoppel claim.

The case of *Gray v Smith* [2013] EWHC 4136 (Comm) serves to provide a useful analogy, which involved a car dealer purchasing a MacLaren Formula One racing car. Mr Gray had instructed a fraudulent dealer to purchase the car for him in the United States and to ship it back to England. The fraudster purchased the car, using the £1 million Mr Gray had already paid, and shipped the same to England. However, the fraudster then failed to deliver the car to Mr Gray, but rather transferred title to it to another (reputable) dealer so as to settle a debt. This dealer then sold the car to Mr Smith. It was held that, when the fraudulent dealer purchased the car, he acquired legal title as Mr Gray's agent, acquired legal title, but held the car on trust for Mr Gray, who had the equitable title. However, as the reputable dealer had bought the car without actual or constructive notice of Mr Gray's equitable interest, he had acquired the car free from it. The court was persuaded by trade practice which showed that such car sales were typically made orally, often over the phone, or with a handshake, without any prior need to demand and investigate a documentary chain of title. The significance of the decision, for present purposes, is that it provides an analogy with the case law on the doctrine of notice which governs the liability of third parties in respect of estoppel claims in the context of unregistered land: see, for example, *Duke of Beaufort v Patrick* (1853) 17 Beav 60 and *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72. In the case of registered land, s.116 of the Land Registration Act 2002 provides that an equity by estoppel is capable of binding successors in title subject to the effect of registered dispositions on priority.

Apart from impacting on purchasers, the estoppel equity has the potential to bind the legal owner's trustee in bankruptcy: see, *Re Sharpe (A Bankrupt*) [1980] 1 WLR 219, (estoppel in the form of an equitable licence). The inchoate equity has also been held to bind the legal owner's personal representatives: see, for example, *Inwards v Baker* [1965] 2 QB 29 and *Jones (AE) v Jones (FW)* [1977] 1WLR 438. Similarly, a volunteer successor in title from the legal who has notice of the circumstances from which the equity has arisen will be in no better position than that of the owner: *Voyce v Voyce* (1991) 62 P & CR 290.

If, on the other hand, the claimant is successful at the hearing in establishing his or her estoppel equity, it would be a matter for the court to determine how best to satisfy the equity so as to avoid an unconscionable result and to do justice between the parties. If the court grants the claimant a proprietary entitlement to the property (for example, an equitable interest under a constructive trust as might have been the case in *Rowe*), the interest so created by the application of the estoppel doctrine would, according to its nature, be binding on a purchaser who has actual (or constructive notice) of the circumstances giving rise to the equity.

**Conclusion**

Although several of the English cases have tacitly assumed that the doctrine of proprietary estoppel does apply to chattels where the claim also relates to land, it remains to be seen how far the courts will be prepared to go in acknowledging the estoppel equity where the subject-matter of the claim is exclusively personalty. In the writers' view, there seems little justification for drawing artificial boundaries between different species of property in the estoppel context. As one writer has put it, "it would be remarkable if an equitable principle intended to frustrate unconscionable conduct was limited to a particular type of property": see, KR Handley, *Estoppel by Conduct and Convention*, (2006, Sweet & Maxwell), at p. 189.
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**Points for the practitioner**

1. There is no direct English authority on the question whether the doctrine of proprietary estoppel is applicable exclusively to chattels as well as realty.

2. There are, however, numerous dicta in the English case law which suggest that the estoppel may not be limited to land. In several cases, it has been invoked so as to include the deceased's residuary personalty as well as land.

3. It has also been held to apply to insurance policies and a licence in respect of intellectual property rights such as copyrights, but not to an entitlement to a share of profits or to a claim to payment for work done.

4. Assuming that the doctrine of proprietary estoppel is of general application to property other than, strictly speaking, interests in land, there is no reason why a spouse or (cohabitee) should not be able to mount a successful claim in equity to a family chattel provided he (or she) can establish the requisite elements of an assurance and detrimental reliance.

5. A significant feature of being able to successfully invoke the doctrine of proprietary estoppel is that the estoppel claim would generate an inchoate equity capable of binding third parties. If the court grants the claimant a proprietary entitlement to the property in satisfaction of the equity, the interest so created by the application of the estoppel doctrine may also bind third parties who have actual or constructive notice of the circumstances giving rise to the equity.

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