Promises, promises: mutual wills and estoppel

Mark Pawlowski asks whether proprietary estoppel can be used to underpin the enforcement of mutual wills

Mutual wills arise where two parties (usually husband and wife) make wills, pursuant to a binding agreement, in similar form in each other's favour on terms that the survivor will not revoke his (or her) will after the death of the other. The doctrine operates on the basis that each testator provides consideration for the other's promise by making his (or her) will in the agreed terms and not altering it to the date of death. In other words, the traditional view is that there must be a binding legal contract between the two testators for the doctrine to apply: see, for example, *Re Goodchild* [1997] 1 WLR 1216, at 1229. But is this necessarily so? The recent decision in *McLean v McLean* [2023] EWHC 1863 (Ch) suggests that the doctrine of proprietary estoppel may be sufficient for the purposes of establishing mutual wills.

Does an estoppel suffice?

The decision in *Healey v Brown* [2002] 4 WLUK 529 has confirmed that s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 applies to a contract made between testators making mutual wills. However, s.2(5) of the 1989 Act expressly provides that s.2 does not affect the creation or operation of resulting, implied or constructive trusts. In *Healey*, Mr David Donaldson QC (sitting as a deputy High Court judge) alluded also to the possibility of applying proprietary estoppel doctrine so as to avoid the consequences of applying s.2 to mutual wills. In his view, equity enforces the agreement made between the parties not because it constitutes a legally binding contract but because it would be unconscionable for the survivor to disregard the claimant's expectations arising from the agreement and upon which the claimant has acted to his (or her) detriment. Applying this reasoning to the facts before him, the deputy judge concluded, at [26]:

> "On the faith of [the agreement] . . . (deprived of legal contractual character only by section 2 of the 1989 Act) that the flat would be left to her niece, Mrs Brown on her death passed to her husband the entirety of her estate, including her undivided share in the flat. In doing so she performed wholly her side of the bargain as the first to die. . . It would In my opinion be entirely inequitable now to frustrate Mrs Brown's expectation and it was unconscionable for Mr Brown to seek to do so by his actions after her death in seeking to pass the flat to [the defendant]."

The application of proprietary estoppel has also found support in subsequent case law. In *Legg v Burton* [2017] 4 WLR 186, at [24], Judge Paul Matthews (sitting as a High Court judge) felt

able to effectively side-step the requirement of a legally binding agreement as enunciated in *Re Goodchild*, above, in the following terms:

> "I cannot help thinking that, when Leggatt LJ . . . referred to the necessity of an agreement, in order to justify a constructive trust being imposed, not on the property passing from testator 1 to testator 2, but on testator 2's existing beneficially owned property, he cannot have had in mind the possibility that testator 2 might make a promise, intended to be relied upon, to deal in future with her own beneficial property in a certain way, on which testator 1 *relied to his detriment* by making his will as (informally) agreed, and then dying, so putting it out of his power to alter his will in future. In other words, that judge was not excluding the possibility that the necessary equitable obligation to bind the conscience of testator 2, and so call into existence the constructive trust of mutual wills, might arise from *a proprietary estoppel* rather than from a contract."

In the deputy judge's view, the absence of any reference to proprietary estoppel in *Re Goodchild* was "not surprising" given that the case itself did not give rise to any such possibility: at [26]. His conclusion, albeit obiter, was that "for practical purposes, if you need a contract to achieve an object, a proprietary estoppel should equally serve your purpose": [27]: see further, S. Atkins, "Proprietary Estoppel Might Found a Basis for Mutual Wills", *Trusts & Trustees* (2018) Vol. 24(4), pp. 377-380. If this approach is correct, then the availability of an estoppel would provide an effective solution posed by a situation in which the subject matter of mutual wills was real property, the agreement said to give rise to mutual wills was oral and the effect of s.2 of the 1989 Act was to provide that there could be no contract because the agreement was not in writing. Interestingly, such a conclusion has also found favour most recently in *McLean v McLean*, referred to earlier, where Sir Anthony Mann, at [42], opined:

> "There are strong remarks in *Re Goodchild* which would, if taken at face value, strongly point to the requirement of an agreement in mutual wills in terms which would preclude the operation of an estoppel falling short of an agreement . . . However, I share the view of Judge Matthews [in *Legg v Burton*] that, at least as a matter of principle, it is not easy to see why an estoppel should not operate in the realms of mutual wills if the evidence were clear enough (though in practice there may not be many cases where it would be likely to operate). Mutual wills operates in the realms of equity in order to prevent injustice, and that is what estoppels do as well."

Here again, his Lordship alluded to the fact, also made in *Legg v Burton*, that the Court of Appeal in *Re Goodchild* did not have estoppel in mind when stating that a binding contractual agreement is required to support the doctrine of mutual wills and that the focus was on the firmness of the agreement which was required rather than on laying a clear boundary in principle: at [42]. It was unnecessary, however, for his Lordship to reach a concluded view on this point since, on the facts of the case before him, there was an absence of representation and detrimental reliance capable of supporting an estoppel. In his Lordship's words, at [40]:

> "If the estoppel claim is to work, it must be established that there was an appropriate representation by Maureen, intended to be binding and received as such, that she would not revoke her will. The facts which are fatal to establishing mutual wills by agreement are equally fatal to the estoppel argument. There was no agreement because it was not established that the parties intended to bind themselves beyond the realms of trust. If that is right then anything said by Maureen was neither said nor received on the footing that it was intended to be binding. There was, therefore, neither the necessary representation intended to be relied on, nor reliance on any such representation."

Does estoppel overcome the requirement of writing?

Assuming the necessary equitable obligation to bind the conscience of the surviving testator can arise not from a binding legal contract but proprietary estoppel, does this also avoid the consequences of s.2 of the 1989 Act?

On one view, since the estoppel imposes an equitable obligation (akin to an equitable obligation arising under contract) on the surviving testator capable of taking effect by way of a constructive trust, the formality of writing simply does not come into play because constructive trusts, as we have seen, are expressly excepted from the requirements of writing in relation to contracts for the disposal of an interest in land under s.2(5) of the 1989 Act. The point here is that the need for a binding contract in writing is replicated in its effect in equity by the doctrine of proprietary estoppel - a constructive trust arises by virtue of an equitable obligation regardless whether this originates under contract or estoppel. In this connection, it is perhaps also useful to recall the words of Mummery LJ in *Olins v Walters* [2009] Ch 212, at [37]:

> "The obligation on the surviving testator is equitable. It is in the nature of a trust of the property affected, so the constructive trust label is attached to it. The equitable obligation is imposed for the benefit of third parties, who were intended by the parties to benefit from it. It arises by operation of law on the death of the first testator to die so as to bind the conscience of the surviving testator in relation to the property affected."

An alternative argument, which is undoubtedly more controversial, is that proprietary estoppel provides the claimant with a separate and distinct cause of action which operates *independently* of the statutory exemption contained in s.2(5) of the 1989 Act. This is because the cause of action in proprietary estoppel is not based on an unenforceable contract but on the defendant's unconscionable conduct. On this reasoning, s.2(1) is simply not an issue and entirely irrelevant. Significantly, the point was made recently by Snowden J in *Howe v Gossop* [2021] EWHC 637 (Ch), at [48], concerning a contract for the sale of land, who opined that "there is considerable doubt that s.2 is intended to affect the operation of proprietary estoppel at all": see further, M. Pawlowski, "Informal Agreements and Estoppel: Formality No Bar to Estoppel", Property Law Journal, (2021), No. 387, pp. 1-9. The question, however, as to whether an estoppel on its own (independently of any finding of a constructive trust) can operate so as to support the doctrine

of mutual wills, notwithstanding non-compliance with s.2(1), remains debatable given the ongoing controversy surrounding the application of proprietary estoppel in the context of oral agreements of land which do not comply with the 1989 Act: see, for example, *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752; *Kinane v Alimamy Mackie-Conteh* [2005] EWCA Civ 45; *Herbert v Doyle* [2008] EWHC 1950 (Ch). From a practical standpoint, therefore, the better view is to rely simply on the equitable obligation to bind the conscience of the surviving testator (either by way of contract or estoppel) and so call into existence (in either case) the constructive trust of mutual wills so as to avoid the consequences of the 1989 Act: see further, M. Pawlowski, "Mutual Wills - Some Constructive Thoughts", Family Law [2023], Vol. 53, pp. 598-601.

Conclusion

It remains to be seen whether proprietary estoppel will be judicially acknowledged at appellate level as a mechanism of enforcing mutual wills. In the writer's view, if the evidence is clear enough to establish the necessary assurance and detrimental reliance in order to raise an equitable obligation (in the form of an constructive trust) on the surviving testator, there is no reason why proprietary estoppel should not be applied (in appropriate cases) to resolve the problems associated with oral agreements intended to give rise to mutual wills which do not comply with s.2(1) of the 1989 Act.

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