

Estoppel, equitable relief & the formality of writing



© Getty images/istockphoto

Mark Pawlowski examines a recent case on the inter-relationship between proprietary estoppel and statute

IN BRIEF

► The recent High Court decision in *Thandi v Saggi* has highlighted again the complex inter-relationship between proprietary estoppel and the requirements of writing contained in s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 in the context of informal land transactions.

Conflicting views

In *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, Lord Scott intimated (obiter) that a complete agreement (ie certain as to its terms) for the acquisition of an interest in land, which did not comply with the prescribed formalities contained in s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989), could not be saved via the application of proprietary estoppel.

Although s 2(5) expressly makes exception for 'resulting, implied or constructive trusts', it significantly makes no reference at all to proprietary estoppel. In the words of Lord Scott, at [29]: 'My present view . . . is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute.'

In the Court of Appeal in *Cobbe*, however, there were clear indications that proprietary estoppel provides the claimant with a separate and distinct cause of action which may operate independently of the statutory exemption contained in LP(MP)A 1989, s 2(5). This was also the view taken by Etherton J at first instance who concluded that, in appropriate circumstances, a claimant could obtain the benefit of an

agreement which, under LP(MP)A 1989, s 2(1), was rendered invalid, solely by the operation of an estoppel. The rationale for this approach was that estoppel did not rest merely on the existence of the agreement but was founded on an inducement and reliance on that inducement which rendered it unconscionable for a party to rely on his strict legal rights. As such, neither the existence of the estoppel nor the appropriate relief (which is moulded to the individual circumstances of the case so as to do justice to the parties) amounted to a direct (or indirect) enforcement of the agreement contrary to the policy underlying the 1989 Act. In effect, the estoppel provides an alternative (non-statutory) exception to s 2(1) regardless whether the facts also warrant the imposition of a constructive trust. A similar view has been expressed in later cases: see, for example, *Muhammad v Ary Properties Ltd* [2016] EWHC 1698 (Ch), at [49] and *Farrar v Miller* [2018] EWCA Civ 172, at [58]. Most recently, in *Thandi v Saggi* [2023] EWHC 2631 (Ch), Mr Hugh Sims KC (sitting as a deputy judge of the High Court) put the matter this way, at [133]: 'The argument is that] proprietary estoppel is not affected by s 2(1) at all because s 2(1) regulates the requirements of a contract for the sale or other disposition of an interest in land and a proprietary estoppel claim, even if promise based, is distinct from a contractual claim. This seems to be the view favoured by the authors of *Snell's Equity* and *Megarry & Wade* and which Snowden J appears to have been attracted by, though did not need to decide, in *Howe v Gossop*.'

The weight of authority, however, appears to be against a purely estoppel-based exception to legal formality in the context of an oral agreement which falls foul of LP(MP)A 1989, s 2(1). In *Kinane v Alimamy Mackie-Conteh* [2005] EWCA Civ 45, Arden LJ, despite commenting that the

cause of action in estoppel is not founded on the unenforceable agreement but upon the defendant's unconscionable conduct, went on to identify the primary issue as being 'whether the circumstances justify a finding of proprietary estoppel overlapping with constructive trust': at [30]. The thrust of his judgment, therefore, was that the policy underlining s 2(1) will not be violated only if the unconscionability underlying the estoppel claim also gives rise to a constructive trust within s 2(5). Neuberger LJ in *Kinane* is even more clear on this point. According to him, 'the only real question in the present case is whether, in the light of the facts found by the judge, it can be said that a "constructive trust", within the meaning of s 2(5) of the 1989 Act, was created': at [39]. His Lordship, therefore, was 'content to assume' that it would not have been open to the claimant to avoid the consequences of s 2(1) if he could establish a proprietary estoppel and not a constructive trust: see also, *Dudley Muslim Association v Dudley Metropolitan Borough Council* [2016] P & CR. 10, at [33].

Similarly, in *Herbert v Doyle* [2008] EWHC 1950 (Ch), decided just after the House of Lords' ruling in *Cobbe*, Mr Mark Herbert KC (sitting as a deputy judge of the High Court) had occasion to reflect on Lord Scott's observations on the issue of s 2(1) and concluded that a court could still give effect to a proprietary estoppel in the context of an oral agreement of land by recognising or imposing a constructive trust that enabled s 2(5) to apply. In the Court of Appeal, however, (see, [2010] EWCA Civ 1095), Arden LJ made clear that if, following the oral agreement, the parties still intended to make a formal contract setting out the terms of their bargain (or if further terms remained to be agreed so that the claimant's interest in property was not clearly identified), neither party could rely on a constructive trust as a means of avoiding s 2(1): [57]. On the facts in *Herbert*, the parties' agreement was not subject to contract and there was no doubt as

to the identification of the claimant's interest in the property—accordingly, there was a constructive trust which did not require compliance with s 2(1).

Overlap between estoppel & constructive trust

Several cases have shown the court's willingness to apply constructive trust doctrine in order to avoid the consequences of s 2(1). In *Yaxley v Gotts* [2000] Ch 162, the Court of Appeal held that the oral agreement made between the claimant and the defendant's father was sufficient to confer on the former a beneficial interest under a constructive trust. That being so, the claimant could rely on the saving contained in LP(MP)A 1989, s 2(5) without relying on proprietary estoppel to uphold the agreement. Unlike *Cobbe*, the agreement was largely complete and there was a clear expectation of acquiring an interest in property without reference to any subsequent enforceable contract. Similarly, in *DS v SS* [2006] EWHC 2892 (Fam), Sumner J held that, because the proprietary estoppel in favour of the claimant was based on an agreement, it gave rise to a constructive trust which, under s 2(5), ousted the usual requirement of writing under s 2(1). The same reasoning has been held to apply in the context of a joint enterprise to purchase commercial property: see, *Parris v Williams* [2008] EWCA Civ 1147; *Brightlingsea Haven Ltd v Morris* [2008] EWHC 1928 (QB); *Matchmove Ltd v Dowding* [2016] EWCA Civ 1233. In *Thandi*, the deputy judge referred also to the use of the constructive trust in granting relief—'if such a constructive trust is found then because s 2(5) expressly carves this out it cannot be said to give rise to any undermining of the intention of the legislature': at [133]. The difficulty, however, in *Thandi*, was that the constructive trust argument was not available on the facts.

Nature of equitable relief

In *Howe v Gossop* [2021] EWHC 637 (Ch), Snowden J concluded that s 2(1) was aimed at problems in the formation of contracts for sale of land, whereas an estoppel remedied unconscionability in the assertion of strict legal rights. Accordingly, it was doubtful whether s 2(1) was intended to affect the operation of proprietary estoppel. Even if it did, s 2(1) could only bar the grant of equitable relief if such relief gave effect to a contract for the sale or other disposition of an interest in land that the statute rendered invalid. Significantly, in *Thandi*, the deputy judge adopted a similar view, at [137]: 'I see no reason why simply because the parties intended a contract, which then failed

through non compliance under s 2(1), this should preclude a party from inviting the court to grant equitable relief to prevent any unconscionability. I conclude this is so even if the assurance or promise is contained in an agreement rendered "non-contractual" by s 2(1). In that scenario the party relying on an estoppel is not circumventing s 2(1). They are simply being put back into a non-contractual position. Like any other claimant they have to prove the requisite elements of a proprietary estoppel. They are no better off. But equally I see no reason why they should be worse off.'

According to the deputy judge, therefore, there should be no problem using proprietary estoppel, even when dealing with a contract that is void by virtue of s 2(1), provided that the estoppel is aimed at doing the 'minimum equity' necessary to prevent an injustice. Thus, while it might be 'impermissible to allow the proprietary estoppel to fulfil expectations', there may be no objection 'to estoppel operating to reverse any detriment as a result of the invalid contract': at [137].

In *Thandi*, the claimant owned a home and a small commercial property. The defendant's company had carried out works on her home and a dispute arose over the amount owing. The claimant told the defendant that she wished to sell the commercial property and he expressed his interest in purchasing it. The defendant provided three letters, which the claimant signed, stating that he would purchase the commercial property; he also transferred some money to her as a deposit. The claimant maintained that the letters were not a binding contract and brought a claim against the defendant, who counterclaimed on the basis that he had an interest in the property under, inter alia, the doctrine of proprietary estoppel. The counterclaim did not seek a transfer of the property but instead: (1) a sum of £15,000 based on a waiver of fees owing by the claimant; (2) £5,000 paid to the claimant by way of deposit; (3) £2300 for reimbursement of legal costs on the aborted sale; and (4) £75,000 being the difference between the sale price and the market value of the property.

The deputy judge concluded that the sum based on waiver of fees was not recoverable on the facts. The difference between the sale price and market value of the property was also rejected on the basis that this was 'expectation based' relief and there were 'reasons here why something less than full performance will negate any unconscionability caused': at [144]. The upshot was that the defendant was granted equitable relief limited to the recovery of the deposit and reimbursement of half of

the legal costs incurred: at [144]-[145].

Conclusion

Section 2(1) of the 1989 Act is aimed at problems in the formation of contracts for sale of land, whereas the purpose of an estoppel is to remedy unconscionability in the assertion of strict legal rights. It remains unclear, however, whether proprietary estoppel provides the claimant with a separate and distinct cause of action which may operate independently of the statutory exemption contained in LP(MP)A 1989, s 2(5).

Several cases, however, have shown the court's preference to use the constructive trust as a means of avoiding s 2(1). The focus here is whether the parties have reached sufficient consensus (and contractual certainty) as to the terms of their bargain so as to characterise their agreement as a constructive trust within the recognised exception of LP(MP)A 1989, s 2(5).

Significantly, however, the decision in *Thandi*, following *Howe*, goes further by holding that s 2(1) will only operate as a bar to the grant of equitable relief if and to the extent that such relief has the effect of enforcing, or otherwise giving effect to, the terms of a contract for the sale or other disposition of an interest in land. In the words of the deputy judge, at [138]: 'If the requisite elements of a proprietary estoppel are satisfied then the court should be able to grant relief to remedy any unconscionability. Section 2(1) should not, in my judgment, make the court squeamish in doing so. It does not bring back the doctrine of 'part performance' but instead recognises the equity in reversing unconscionable conduct when it is present. Nor does it undermine the policy behind s 2(1)—the parties are not contractually bound by any contract . . . In particular where any detriment which has been suffered can be reversed there is no substantial undermining of the 1989 Act in my judgment.'

As things stand at the moment, therefore, it is unlikely that proprietary estoppel will assist a claimant in a case where the relief sought is the same as enforcing a contract which is rendered invalid by s 2(1). As the deputy judge in *Thandi* pointed out, at [139]: 'There is difficulty in concluding an 'expectation' performance remedy should be granted where a constructive trust cannot be found.' Some lesser form of relief, on the other hand, such as relief from detriment, may be granted where proprietary estoppel is found on the facts, if this does not contradict the statute.

NLJ