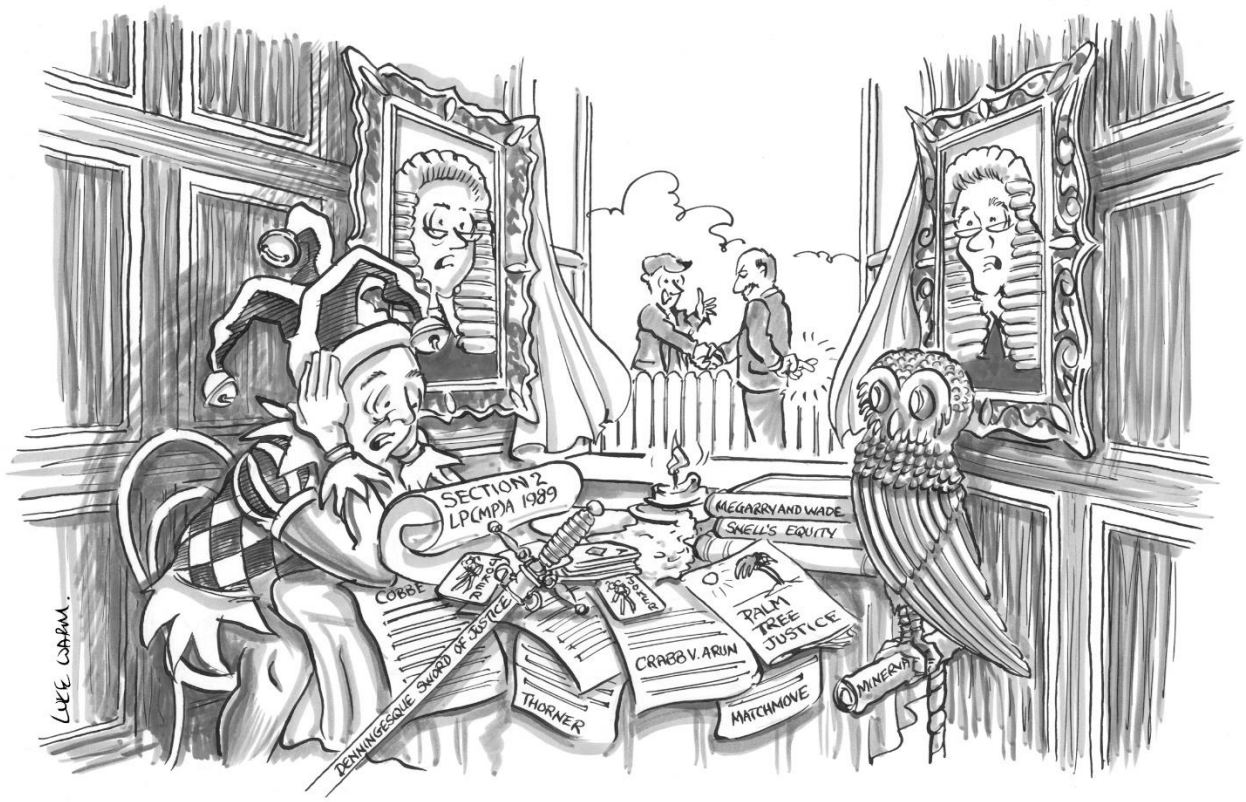
Proprietary estoppel: Moving beyond the long shadow cast by *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55

Case review: ***Howe & Anor v Gossop & Anor* [2021] EWHC 637 (Ch)**

Date of decision: 19 March 2021

Court: High Court, Business & Property Courts in Leeds

Link: https://www.bailii.org/ew/cases/EWHC/Ch/2021/637.html



Summary

1. This case is a paradigm example of a proprietary estoppel claim being deployed to prevent a landowner, described by the Judge as "*arrogant, argumentative, petulant, contrary and evasive*", from engaging in unconscionable conduct by resiling from an oral agreement to transfer land to his neighbour.

2. The most interesting aspect of this impressive decision is the author's observation that Lord Scott's dicta in ***Cobbe v Yeoman's Row Management Ltd*** **[2008] UKHL 55** ("***Cobbe***")[1] continues to create uncertainty for protagonists in these types of disputes.[2] As this case demonstrates, the courts have subsequently strained to construe both ***Cobbe*** and ***Thorner v Major*** **[2009] UKHL 18** ("***Thorner***") in imaginative ways so to quietly re-assert the centrality of unconscionability as the organising concept for such claims.[3]

Facts

3. Unlike recent proprietary estoppel decisions emanating from the courts, this dispute did not concern a family farm.[4] The claimants, Mr. & Mrs. Howe, claimed possession over a piece of land that they owned but which their neighbours, Mr. & Mrs. Gossop, had fenced, cleared, and seeded.

4. The defendants had come to be in possession by virtue of a concluded oral agreement whereby they agreed to waive a debt owed to them by Mr. & Mrs Howe in return for sale of the land. At first instance, the court found that the parties had sealed

[1] Lord Scott's expressly obiter view was that section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 may be construed as imposing a prima facie bar on promised-based proprietary estoppel claims.
[2] '*[I]t is difficult to see how confusion will not be caused in the lower courts by the speeches in Cobbe*." Mee, J. (2011). 'Proprietary Estoppel, Promises and Mistaken Belief', in Bright, S. (ed.) *Modern Studies in Property Law - Vol 6*. London: Hart Publishing, pp. 198.
[3] "*Organising concept*" being a borrowed term - see Halliwell, M. 'Unconscionability as a Cause of Action' (1994) 14 Legal Studies 15.
[4] In ***Habberfield v Habberfield*** **[2019] EWCA Civ 890** it was a diary-farm; in ***Guest v Guest*** **[2019] EWHC 869 (Ch)** it was share in a third generation family farm where a son had worked for 30 years; the case of ***Moore v Moore & Anor*** **[2018] EWCA Civ 2669** was concerned with the Moore family farm. In ***Shaw v Shaw*** **[2018] EWHC 3196** a son claimed a share of the family farm having been disinherited by his parents who left the estate to their two daughters.

the agreement with a handshake in the presence of the claimants' son who, incidentally, gave his evidence in answer to a witness summons.

5. Predictably, a short time thereafter, the parties fell out over an unrelated matter. This was the catalyst for Mr. Howe demanding possession of the cultivated land, claiming that the oral agreement had not been legally binding due to the failure to comply with section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (the "**Act**").[5]

6. The court agreed with the defendants that the three basic elements of proprietary estoppel had been made out, namely an assurance, reliance, and detriment, and gave relief in the form of an irrevocable licence in respect of the land.

7. The claimants ran a number of overlapping arguments on appeal, the thrust of which was to place reliance upon dicta falling from the House of Lords in ***Cobbe*** and ***Thorner*** as well as Arden LJ in ***Herbert v Doyle*** **[2010] EWCA Civ**. It was asserted on the claimants' behalf that as the parties were dealing with the transaction at arm's length, the circumstances were not so exceptional so as to avoid the agreement being declared void for non-compliance with s. 2. Moreover, it was argued that there were a number of separate 'bars' to relief, such as the uncertainty over the extent of the land; the parties' awareness that the oral agreement was not legally binding; and the parties' intention to reduce the agreement to writing at a later date.

Putting the appeal within its proper context

8. Thankfully, Parliament has acknowledged that under s. 2(1) there is a risk that persons such as Mr. & Mrs. Howe will seek to take advantage of the sanction when it is unconscionable for them to do so. To that extent, s. 2(5) of the Act provides a relief valve for the 'innocent party' as nothing in s. 2 affects the creation or operation of resulting, implied, or constructive trusts.

[5] *"(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms the parties have expressly agreed in one document or, where contracts are exchanged, in each."*

9. Whilst s. 2(5) makes no mention of proprietary estoppel, in practical terms this has not caused claimants, defendants or the courts too much difficulty in the recent past. A claim for proprietary estoppel is often paired with a cause of action founded on a common intention constructive trust.[6] In such as case, there has often been a type of silent contract[7] between the parties and the court to sidestep the controversies and difficulties associated with a proprietary estoppel claim.[8] Nevertheless, it may strike the uninitiated as being peculiar that there should be any residual uncertainty following seemingly clear pronouncements from the House of Lords in recent times, first in ***Cobbe*** and then in ***Thorner***.

10. Whist much ink has been spilt on mapping the common law twists and controversies which have cloaked the doctrine, the synthesised modern doctrine of proprietary estoppel arguably started with the excellent Judgment of Oliver J (*as he then was*) in ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*** **[1982] QB 133** who, after a review of the older authorities, emphasised the centrality of unconscionability at [147]: *"[It] seem[s] to me to support a much wider equitable jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable."*[9]

11. From there, private client practitioners will be aware that the doctrine continued to seep into claims concerning testamentary expectations, with unconscionability remaining the touchstone to do justice between the parties and provide a remedy where necessary to prevent unconscionable conduct.[10] In ***Gillett v Holt*** **[2001] Ch 210**,

[6] Both doctrines contain similar features, although it would be wrong to conclude that each doctrine is indistinguishable from the other. Proprietary estoppel is a flexible concept which typically consists of asserting an equitable claim against the conscience of the true owner. The remedies can range from a monetary award to a personal licence, to an interest in land. A common intention constructive trust, by contrast, is concerned with identifying the true beneficial owner and the size of their beneficial interests.

[7] As a boxing fan, I have always thought that Mike Tyson's outspoken boxing trainer Teddy Atlas put the term 'a silent contract' to illuminating effect when he described it as a situation when two fighters come to some kind of subconscious agreement that they won't afflict any real damage on each other.

[8] In other occasions, such as in ***Matchmove Ltd v Dowding*** **[2016] Civ 1233**, there are express agreements between the parties and the court. *"[26] Although the judge based his decision upon both proprietary estoppel and constructive trust, counsel for Mr Dowding and Ms Church was content to rely solely upon constructive trust, or more specifically a common intention constructive trust. This has the advantage of avoiding the issue of whether section 2(5) of the 1989 Act can apply to claims based on proprietary estoppel as distinct from constructive trust."*

[9] Co-incidentally Lord Scott (*as he became*) appeared for Taylors Fashions and would give the leading judgment in ***Cobbe***.

[10] A helpful summary of the position of the legal landscape as it appeared prior to ***Cobbe*** can be seen here: Pawlowski. M, (2001) 'Unconscionability as a unifying concept in equity', *The Denning Law Journal,* Vol. 16 No. 1, 79-96

Walker LJ said at [225]: *"[T]he fundamental principle that equity is concerned to prevent unconscionable conduct permeates all elements of the doctrine. In the end the court must look at the matter in the round."* In ***Jennings v Rice*** **[2003] 1 P & CR 8**, the same Judge said at [56]: *"The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result."*

12. In an article entitled 'Is there a future for proprietary estoppel as we know it (2009)',[11] it was suggested that what may have prompted the House of Lords to take such a strong stand against the concept of unconscionability in its decision in ***Cobbe*** was the growing perception that the three essential elements were being overlooked. As Lord Walker said at [1775]: *"[E]quitable estoppel is a flexible doctrine … But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side."*

13. Whatever the reasoning, there is little doubt that ***Cobbe*** represented a restrictive turn in the development of the law of proprietary estoppel. In that case, Mr Cobbe, a property developer, had reached an oral agreement to purchase and develop a property. As part of the arrangement, Mr Cobbe was to go to the expense of obtaining planning permission. Only when he did so, would the property be sold to him for £12m. Eventually, planning permission was secured at considerable expense to Mr Cobbe. Unfortunately, Mrs Lisle-Mainwearing refused to adhere to the terms of the original agreement which had provided for the parties to enter into a formal contract. In rejecting Mr Cobbe's claim, Lord Walker focused on his lack of belief that he had a legally enforceable right against the defendant. He opined at [66] that, in successful claims, *"the claimant believed that the assurance on which he or she relied was binding and irrevocable."* Lord Scott highlighted a broader problem caused by s.2 at [29]: *"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."*

[11] Delany, H. (2009). 'Is there a future for proprietary estoppel as we know it', *Dublin University Law Journal*, Vol 31, pp 440-457

14. ***Cobbe*** was swiftly followed by ***Thorner***. In that case, a farmer "*of few words*" had encouraged another, David, to work on his farm for almost 30 years labouring under the expectation that he would one day inherit the farm. Following a failing out with another beneficiary, the farmer revoked his will. On the strict belief-based requirement as laid down in ***Cobbe***, an observer may be forgiven for thinking that David's claim would fail. As a testamentary promisee, it was unlikely that David believed that the promisor was legally obliged to transfer the property to him under a revokable will.

15. However, in spite of the reasoning in ***Cobbe***, the House of Lords unanimously re-instated the decision of the trial judge in David's favour. It was left to Lord Neuberger to reconcile the two decisions by emphasising a context-based dichotomy. In other words, what was considered permissible under the doctrine in the domestic consumer context was unlikely to be so in the commercial environment.[12] In his extra-judicial comments,[13] Lord Neuberger did nothing to dispel this approach, suggesting that it was not for the courts to "*go in galumphing in, wielding some Denningesque sword of justice to rescue a miscalculating improvident or optimistic property developer from the commercially unattractive, or even ruthless actions of a property owner, which are lawful at the common law*" before going on to add for good measure: "*the notion that a claimant takes his chance, where he knows that he has no legally enforceable right, is easier to accept in the context of a commercial and arm's length relationship than a domestic or familiar context.*"

The Judge's decision on appeal

16. In light of the above, it is not surprising that Mr. & Mrs. Howe prosecuted the appeal by emphasising the commercial nature of the transaction as between Mr. Howe and Mr. Gossop, together with the fact that all parties appreciated that they would be required to sign a further agreement in the future. The latter indicating that the transaction fell afoul of the belief-test as stressed in ***Cobbe***. In that regard, Mr. & Mrs.

[12] This approach was favoured by the House of Lords in the context of a common intention constructive trust in ***Stack* v *Dowden* [2007] UKHL 17**. Interestingly, Lord Neuberger provided the dissenting view in that decision preferring the traditional resulting trust approach, focusing on financial contributions on purchase price.
[13] Lord Neuberger, 'The stuffing of Minerva's owl? Taxonomy and Taxidermy in equity' (2009) 68 CLJ 537

Howe sought to rely upon dicta falling from the Court of Appeal in ***Herbert v Doyle*** **[2010] EWCA Civ** at [44] – [57] which appeared to summarise and endorse the general approach taken in ***Cobbe*** and ***Thorner*****:**

> *"57. In my judgment, there is a common thread running through the speeches of Lord Scott and Lord Walker. Applying what Lord Walker said in relation to proprietary estoppel also to constructive trust, that common thread is that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act."*

17. However, after plotting a path through the common law, Mr Justice Snowden rejected these arguments by picking up where the Court of Appeal had left off in ***Dowding and another v Matchmove Ltd*** **[2016] EWCA Civ 1233**. In that case, whilst the court focused on the common intention constructive trust part of the claim (*leaving the more difficult deliberations on proprietary estoppel for another day*), it helpfully identified Arden LJ's comments in ***Herbert v Doyle*** as mere descriptions of the facts of ***Cobbe***, not to be treated as independent bars on giving equitable relief. In the present case, the court adopted that very approach. It therefore followed that simply because Mr. & Mrs Howe could point to evidence that the defendants did not believe the agreement was legally binding and/or intended to enter into a further agreement (*incorporating all the terms)* at a later date, this was not fatal to their claim.

18. As some commentators pointed out after ***Matchmove***,[14] this was a surprising reading of both ***Herbert v Doyle*** and, indeed, ***Cobbe***. However, such an approach has subsequently given the courts a renewed flexibility to reassess Lord Scott's dictum in a more imaginative way by re-invigorating unconscionability and moving beyond the

[14] Boncey. T & Ng. F. 'Common intention constructive trusts arising from informal agreements to dispose of land Matchmove Ltd v Dowding' [2016] EWCA 1233. (2017) Conv. Vol 2, 146-157.

straight-jacket of the context based dichotomy which had forced protagonists to identify their dispute as either commercial or domestic.

19. On a closer examination of Lord Scott's comments at [29], Mr Justice Snowden said that what Lord Scott had actually meant was that section 2 operated as a bar to enforce the terms of an agreement which would otherwise be invalid by statute. However, where a person seeks to invoke the court's jurisdiction to grant equitable relief in some other way (*for example Mr. & Mrs Gossop's pleaded case was for a licence as opposed to a transfer as per the oral agreement*), there was no reason why s. 2 should operate as a bar. In that sense, what the court does is give relief as a remedy to the unconscionable conduct, not give effect to the contractual relationship. What this ought to mean is that the court's enquiry is focused on the nature and extent of the unconscionable conduct, which needs to be more than the mere refusal to honour a contractual agreement.

Conclusion

20. In a recent paper,[15] Martin Dixon, remarked that the spike in proprietary estoppel claims involving farms may have something to do with the flexibility of the court's equitable jurisdiction to award a range of remedies. He also observed that proprietary estoppel, like the constructive trust doctrine for co-habitants, is increasingly viewed as coming to the aid of disappointed family members in circumstances where nothing is written down and wealth is increasingly concentrated in land.

21. The author's view is that proprietary estoppel claims have been relegated to the domestic context, with parties struggling to see beyond the dichotomy between the domestic and the consumer context as imposed by ***Thorner***. However, as chancery practitioners are fully aware, there are any number of disputes which fall somewhere in the middle. Many property transactions, particularly involving independent businesses, loose associations of distant relatives, and partnerships, are often not

[15] Dixon, M. 'Proprietary Estoppel: The Law of Farms and Families' [2019] Conv 89

reduced to writing. In those types of cases, this case is to be welcomed as providing additional clarity on the broader scope of the doctrine.

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