# Property Litigation column: Can section 2 of the LP(MP)A 1989 be outflanked by proprietary estoppel?

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Bruce Walker, a barrister at Enterprise Chambers, discusses whether section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 can be circumvented by proprietary estoppel in relation to an oral contract for the sale of an interest in land.

In the recent High Court decision of *Wills v Sowray [2020] EWHC 939 (Ch)*, HHJ Raeside QC found that a farmer (Tony Sowray) had promised to leave land on death to two brothers, Matthew and James Wills: a plot to James on which James had pitched his mobile home (the Plot), and all the remaining farmland to Matthew. But Tony made no will, and his estate passed to his only daughter on intestacy. Matthew and James brought claims based on the promises. Judgment was handed down on 15 April 2020. The judge upheld both claims.

On 6 May 2020, the appeal was filed with the Court of Appeal on six grounds. Ground one is a point of law which is ripe for consideration in the light of conflicting decisions: whether an oral contract for the sale of an interest in land, void by section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989), can be circumvented by proprietary estoppel.

Section 2(1) declares void any agreement for the acquisition of an interest in land, which does not comply with the formalities prescribed by that section, namely signed writing, incorporating all the agreed terms in a single document (or where contracts are exchanged, in each document). There is a saving provision in section 2(5), for resulting, implied and constructive trusts. But there is no saving provision for proprietary estoppel, despite that doctrine being well known at the date of the LP(MP)A 1989.

So how is section 2(1) relevant to *Wills v Sowray*, which appears to be a proprietary estoppel case?

James' primary case was an oral agreement for the sale of land: James agreed in 2012 to give his Jeep to Tony, and in return Tony agreed to leave the Plot on death to James. The Jeep was worth £2,000, the Plot was worth £25,000. That was a contract to leave by will, which must comply with section 2(1) (see *Thorner v Major [2008] EWCA Civ 732, at paragraph 53*; the Court of Appeal decision was reversed in the House of Lords, but not on this point).

James' alternative case was proprietary estoppel: the oral agreement amounted to a representation, relied on to James' detriment in giving the Jeep (and various other forms of detriment in the years after 2012).

So the stage was set: James pleaded an oral contract for the sale of an interest in land, alternatively a proprietary estoppel arising from that same agreement.

In the House of Lords decision of *Cobbe v Yeoman's Row [2008] 1 WLR 1752,* Lord Scott gave an obiter view that a contract void by section 2(1) could not be revived by proprietary estoppel:

 

> "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." (*Paragraph 29.*)

In *Cobbe*, the court was faced with an oral "agreement in principle" for the sale of an interest in land, which was incomplete since some terms remained for negotiation (*paragraph 15*). Mr Cobbe had devoted time, effort and expertise to obtaining planning permission, in the expectation that a binding contract would be entered into, but he knew that a contract had yet to be agreed. Yeoman's Row changed its mind and would not enter the contract. Mr Cobbe's proprietary estoppel claim failed (though he was entitled to a *quantum meruit* payment). Since there was no complete contract, which section 2 could render void, Lord Scott's comment was *obiter*.

In *Wills v Sowray*, HHJ Raeside QC took the view that the contest between section 2(1) and proprietary estoppel was a textbook argument, and that he did not need to look at the underlying case law (*paragraph 259*). He preferred two books over two other books, and held that proprietary estoppel could circumvent section 2(1).

That was an unusual approach. Particularly in the face of contrary House of Lords obiter.

At paragraph 260, the judge relied on a "disagreement" between Lord Scott and Lord Neuberger to find the matter was not "open and closed law". For that "disagreement" he referred to a textbook (*Lewin on Trusts, 19th ed, paragraph 7-037; now 20th ed, paragraph 8-037*). But that book mentions no "disagreement" between Lords Scott and Neuberger. Rather, it recites Lord Scott's view in *Cobbe*, then Lord Neuberger's "response" in *Thorner v Major [2009] 1 WLR 776* at paragraph 99, the latter drawing a distinction between, on the one hand, those cases where a claim in proprietary estoppel seeks to enforce an agreement, and, on the other, those cases where there is no contractual connection. The judgment of Lord Neuberger reads:

> "However, at least as at present advised, I do not consider that section 2 has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection." (*Paragraph 99.*)

If that is the relevant distinction in law, it could not help James Wills, since his primary claim was an oral contract for the sale of land for his Jeep (void by section 2(1)), and his alternative claim was founded on that same void contract. Since the latter claim was founded on the void contract, it could not be saved by falling into Lord Neuberger's "straightforward estoppel claim without any contractual connection".

So it appears Lords Scott and Neuberger would have reached the same conclusion on James Wills' claim: an agreement void by section 2, which estoppel could not assist.

Extra-judicially, Lord Neuberger took a much broader view in *The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity [2009] CLJ 537*, saying:

> "I suggest that section 2 has nothing to do with the matter. In cases such as *Crabb v Arun District Council* and *Thorner v Major*, the estoppel rests on the finding that it would be inequitable for

 

> [A] to insist on his strict legal rights. So the fact that, if there was a contract, it would be void is irrelevant: indeed the very reason for mounting the proprietary estoppel claim is that there is no enforceable contract." (*Page 546*.)

If that is right, section 2(1) becomes worthless, where one party to the void contract has acted to their detriment by performing their part (or a portion of their part) of the agreement. In short, it brings back the doctrine of "part performance" which section 2(1) was intended to abolish.

Lord Neuberger drew an alternative distinction in *Thorner v Major* between the "commercial context" and the "domestic or family context" (*paragraph 100*). Lord Walker drew the same distinction in *Cobbe*, saying:

> "In the domestic or family context ... The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic claimant does not stop to reflect ... whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title." (*Paragraph 68*.)

That is a difficult distinction to draw: why should a contract, void by section 2(1), be validated by remedy in a domestic context, but remain void and without remedy in a commercial context? It also begs the question where the line is to be drawn between commercial and domestic, very real in *Wills v Sowray* which was not "domestic" or "family" but (probably) not commercial. Even that distinction would not appear to help James Wills, since he did "stop to reflect ... whether some further legal transaction (such as a grant by deed, or the making of a will ...)" was necessary.

Other cases have given varying answers, though the tide appears to be against proprietary estoppel in a void contract case.

In *Herbert v Doyle [2010] EWCA Civ 1095*, Arden LJ expressed a clear view that the policy of section 2(1) was to protect the public by preventing parties from being bound by a contract for disposition of an interest in land unless fully documented in writing (*paragraph 10*). She considered that rule needed "to be repeated loud and clear", and was "admitting of few exceptions under section 2", so the exceptions were only those listed in section 2(5). Not proprietary estoppel.

Yet the very next year, in *Whittaker v Kinnear [2011] EWHC 1479 (QB)*, Bean J chose not to follow *Cobbe*, or *Herbert*, holding that:

> "... proprietary estoppel in a case involving the sale of land has survived the enactment of s.2 of the 1989 Act."

Bean J relied specifically on *Yaxley v Gotts [2000] Ch 162* and on Beldam LJ (in the Court of Appeal in *Yaxley*) having been on the Law Commission which produced the working paper on which the LP(MP)A 1989 was founded. But he then omitted to observe that the working paper may have mentioned proprietary estoppel, but the saving section 2(5) did not. Had section 2(5) been intended to save proprietary estoppels, it could have said so. Most significantly, *Yaxley* was decided in the Court of Appeal as a constructive trust case, so had the benefit of the saving provision of section 2(5), and Beldam LJ was careful to ensure he founded the decision on a constructive trust (or a proprietary

 

estoppel if (and apparently only if) both a constructive trust and proprietary estoppel could arise from the same facts), so the section 2(5) saving would apply.

In 2014, Nugee J held in *MP Kemp Ltd v Bullen Developments Ltd [2014] EWHC 2009 (Ch)* that an estoppel would subvert the policy behind section 2 (*paragraph 123*).

In 2015, in *Dudley Muslim Association v Dudley MBC [2016] 1 P&CR 10*, Lewison LJ doubted whether the decision in *Yaxley* could stand, given Lord Scott's observations in *Cobbe* (whose speech, he noted, was agreed by Lords Hoffmann, Brown and Mance) (*paragraphs 33-34*). He agreed with Nugee J's decision in *MP Kemp* that a promissory estoppel could not overcome section 2(1). That effectively disapproved *Whittaker*. As Lewison LJ said:

> "Unless a case falls within section 2(5), to admit a defence based on promissory estoppel would be effectively to repeal the section by judicial legislation."

In *Dowding v Matchmove [2016] EWCA Civ 1233,* the contest between section 2 and proprietary estoppel was avoided in the Court of Appeal, by the respondents relying solely on a constructive trust (*paragraph 28*).

Most recently, in *Sahota v Prior [2019] EWHC 1418 (Ch)*, Falk J acknowledged that proprietary estoppel cannot be used to make an agreement enforceable which section 2 has declared void, pointing out that the respondents:

> "... are not trying to enforce a contract for the sale of land. They are not seeking to bind [the Appellant] to transfer a property interest to them pursuant to a contract ...
>
> What Lord Scott was getting at in paragraph 29 of *Cobbe* was the point that proprietary estoppel cannot be used to get around [a void agreement for the sale of land], but it does not mean that no other legal consequences can attach ... where recognition of those consequences does not amount to an effective enforcement of an agreement that would be void under section 2, namely, an agreement for the sale ... " (*Paragraphs 26 and 28.*)

HHJ Raeside QC's order falls foul of precisely that problem: he ordered transfer of the Plot to James, giving "effective enforcement of an agreement that would be void under section 2".

The recent cases certainly point against proprietary estoppel outflanking section 2. But a definitive answer is sorely needed from an appellate court. Perhaps *Sowray v Wills* will provide it.

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