

Land law – proprietary estoppel



**ASSIGN
BUSTER**

Proprietary estoppel protects a person who has a non contractual agreement over land but they have suffered a detriment due to them acting upon a reliance based on an assurance made by the claimant. There has been much discussion in recent case law and academic commentaries as to the elements which make up the nature of proprietary estoppel.

Unconscionability is a major point for discussion in deciding whether it should be treated as a separate element or if it is linked into the three main elements.

This essay will consider and discuss the nature of proprietary estoppel and the two views on unconscionability; whether there will always be unconscionability if there has been a non-performance of an assurance causing the claimant to suffer a detriment based on the assurance which they relied on or if unconscionability should be proven as a separate element in each case.

The starting point of proprietary estoppel was in the case of *Willmott v Barber* (1880) where five criteria were laid down, which had to be satisfied by a person claiming proprietary estoppel and the courts applied these criteria to a wide range of proprietary estoppel claims.

However these criteria were criticised for being too strict leading to the broader approach established in *Taylor Fashions Ltd v Liverpool Trustees Co Ltd* (1982) where Oliver J stated: ‘ whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment’. Although the approach became broader

there still remained essential elements which must be satisfied for a successful claim.

The more modern approach towards proprietary estoppel is based on three main elements, firstly an assurance of land or property being made to the claimant, the claimant relying on the assurance which has been made and finally the claimant suffering a detriment as a consequence of relying on the assurance made. The main point for discussion and questioning in proprietary estoppel is the role of unconscionability and whether it should be treated as a fourth element which too must be satisfied in order for a claim to be successful or if unconscionability is interlinked with the other elements of proprietary estoppel.

Proprietary estoppel acts as ‘ a sword and a shield’ and can be used in one of two ways. ‘ Put positively, the reason why it is possible to use proprietary estoppel to generate a property interest in a favour of a claimant despite the absence of the normal formality rules is because of the need to prevent unconscionable conduct. This is why unconscionability is the foundation of estoppel. It is the antidote to the otherwise fatal absence of formality. ‘ This is one of the views on unconscionability which suggest that unconscionability is at the heart of proprietary estoppel rather than a separate element of it.

The first element of proprietary estoppel is encouragement where the claimant’s belief that they would have some rights over land or property has been encouraged by the promisor and this could have been done actively or passively. Active encouragement is seen in common expectation cases

where the claimant has been actively persuaded through an express representation as in *Inwards v Baker* (1965) where a son was actively encouraged to build on his father's land in the expectation that it would be his in the future.

Common expectation cases are dealt with more generously by judges, compared to passive cases, as the promisor has led the claimant to have a reasonable belief that they would acquire the land therefore leading them to rely upon that assurance causing them to suffer a detriment. It would be seen as unconscionable in a common expectation case for the claimant to have been encouraged to suffer a detriment for the promisor to then go back on their assurance, meaning that unconscionability is instantly a running theme in the elements as it can be seen at the first instance and should therefore not be treated as a separate element.

The encouragement could also be passive, for example a land owner standing by watching someone build on their land knowing that somebody is acting under a mistaken belief. The nature of a passive expectation made to the claimant can be distinguished in commercial and domestic cases as was seen in *Cobbe v Yeoman's Row Management Ltd* (2008) where the House of Lords established that the expectation of an interest in land should not be vague in a commercial situation.

The expectation should be for 'a certain interest in land' for proprietary estoppel purposes which was not the expectation held by Cobbe therefore the expectation was held to be too vague. Lord Scott stated 'Unconscionability in my opinion plays a very important part in the doctrine

of equitable estoppel, in unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again. This statement shows how case law endorses the unconscionability approach as being interlinked with the other elements of proprietary estoppel however if all of the elements are not satisfied there can not be a claim for proprietary estoppel as is the case here. In domestic (family) cases, the nature of the expectation doesn't have to be so specific as long as there is an interest or right in land that would amount to a significant expectation. The assurance made must be clear enough so that claimant is found to have relied upon.

Lord Walker stated in the case of *Thorner v Major* (2009) “ There is no definition of proprietary estoppel that is both comprehensive and uncontroversial...the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance” One view on unconscionability stated that ‘ Once there has been detrimental reliance on an assurance, it is unconscionable to withdraw it’ therefore if it cannot be proven that an assurance existed then it wont be unconscionable for it to be withdrawn showing that unconscionability is a running theme within proprietary estoppel rather than a separate element. One difficulty in deciding these kinds of cases is that although an assurance has been made to the claimant in the way of a will, the claimant is also aware that the will could be revoked at any time therefore the question to be

asked is whether their reliance based on the assurance was adequate. The second element of proprietary estoppel is reliance where the claimant must have been encouraged to rely on the promisor's assurance which has caused them to suffer a detrimental loss by changing their position and there must be a sufficient causal link between this in that the encouragement must have caused the detriment suffered.

Reliance can not be treated as an element alone it has to have caused a change in the position of the claimant, if no detriment has been suffered then there can be no claim for proprietary estoppel. There are several ways in which the courts can show how the claimant was influenced to rely on the encouragement; firstly is by clearly showing that there has been a change in position by the claimants positive act, for example the claimant spending money on the land or making property improvements based on the assurance that it will become theirs, causing them to suffer a detriment. Where the claimant has acted in a way different to what he would had the assurance not been made and relied on this can also show how the encouragement has influenced the reliance causing a detriment as in *Jones (AE) v Jones (FW) (1977)* where a son acted on the assurance of property becoming his left his job and house to live with his father, however had the assurance not had been made he would not have done this leading to the detriment that he suffered. There can be a presumption made that the claimant relied on the assurances given to them based on their conduct and in these cases the burden is put onto the other party to prove that the claimant did not rely on the promises made and this is hard to prove as it is a subjective matter based on the claimants state of mind. This was the case

in *Greasley v Cooke* (1980) where the defendant did not have to prove that she relied on assurances as it was presumed from her conduct.

The final element of proprietary estoppel is that the person must have suffered a detriment due to the reliance on the assurance which has caused a change in their position. The detriment suffered can be in many forms not just that of financial detriment although it must be substantial in making it unconscionable for the land owner to withdraw their promise of land to the claimant. *Walton v Walton* (1994) shows where financial detriment wasn't the main detriment suffered, the claimant had suffered a personal detriment as he had spent years of his life relying on the assurance made to him that the farm would one day be his, and he couldn't get those years of his life back. Public policy in formalities of contracts plays a major part in the deciding claims for proprietary estoppel.

Section 2 Law of Property (Miscellaneous Provisions) Act 1989 states that (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 which the parties have expressly agreed in one document, or where contracts are exchanged, in each. This act stops informalities in land transfers where a claimant would be expected to sign up a contract but hasn't done so, as in *Cobbe*, and this is where they would turn to proprietary estoppel to try and show that the detriment which they have suffered is due to the unconscionability of the removal of the assurance which they had originally relied on. Proprietary estoppel acts as a way around formalities and a form of protection for those who have not followed contractual formalities in the transfer of land.

Why should people be able to use proprietary estoppel to make a claim for land where they have followed formalities and drawn up a contract as in Cobbe, it can be seen that it is not unconscionable for the promisor to withdraw as there is no contractual agreement. However in domestic cases where there wouldn't always be an expectation of a legal contract to be drawn up proprietary estoppel can stop unfair decisions being made due to the lack of formalities where it would be unconscionable for the defendant to suffer a detriment due to an assurance on which they have relied. There are clearly two competing arguments against proprietary estoppel, the first being that 'once there has been detrimental reliance on an assurance, it is unconscionable to withdraw it. Indicating that unconscionability is a function of the three elements. If unconscionability was seen as a separate element then it would be pointless in having formalities as it wouldn't matter whether it was unconscionable or not as long as the other elements had been satisfied. The second view on unconscionability is that of it being a separate fourth element and in some circumstance this can be seen as being successful for example in commercial cases where the first three elements of proprietary estoppel have been established but it would be unconscionable for the claimant to benefit due to the lack of formalities and contractual agreement.

Therefore although in some cases unconscionability being treated as a separate element is beneficial in some circumstances, it should be treated as function of assurance, reliance and detriment as a withdrawal of the assumption in most cases is unconscionable. Bibliography Roger Sexton and Barbara Bogosz, Complete Land Law: text, cases and materials, (2nd edn.

Oxford University Press 2011) Diane Chappelle, Land Law, (8th edn. Pearson Longman, London 2008) Martin Dixon “ Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability” (2003) 2 Modern Studies in Property Law
————— [1].

Roger Sexton and Barbara Bogosz, Complete Land Law: text, cases and materials, (2nd edn. Oxford University Press 2011) 323 [2]. Willmott v Barber (1880) 15 Ch. D. 96 [3]. Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Ltd (1982) QB 133 [4]. Roger Sexton and Barbara Bogosz, Complete Land Law: text, cases and materials, (2nd edn. Oxford University Press 2011) 328 [5]. Nigel Gravells, Land Law: Text and materials, (4th edn. Sweet and Maxwell, London 2010) 589 [6]. Martin Dixon “ Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability” (2003) 2 Modern Studies in Property Law, 177 [7]. Inwards v Baker (1965) 2 QB 29 [8].

Diane Chappelle, Land Law, (8th edn. Pearson Longman, London 2008) 87 [9]. Cobbe v Yeoman’s Row Management Ltd (2008) 1 WLR 1752 [10]. Roger Sexton and Barbara Bogosz, Complete Land Law: text, cases and materials, (2nd edn. Oxford University Press 2011) 330 [11]. Roger Sexton and Barbara Bogosz, Complete Land Law: text, cases and materials, (2nd edn. Oxford University Press 2011) 343 [12]. Thorner v Major (2009) 1 WLR 776 [13]. Diane Chappelle, Land Law, (8th edn. Pearson Longman, London 2008) 90 [14]. Roger Sexton and Barbara Bogosz, Complete Land Law: text, cases and materials, (2nd edn. Oxford University Press 2011) 338 [15].

Roger Sexton and Barbara Bogosz, *Complete Land Law: text, cases and materials*, (2nd edn. Oxford University Press 2011) 338 [16]. Roger Sexton and Barbara Bogosz, *Complete Land Law: text, cases and materials*, (2nd edn. Oxford University Press 2011) 338 [17]. *Greasley v Cooke* (1980) 1 WLR 1306 [18]. Diane Chappelle, *Land Law*, (8th edn. Pearson Longman, London 2008) 89 [19]. Law of Property (Miscellaneous Provisions) Act 1989 (s. 2) (1) [20]. Diane Chappelle, *Land Law*, (8th edn. Pearson Longman, London 2008) 89 [21]. Martin Dixon “ Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability” (2003) 2 *Modern Studies in Property Law*, 179