

PROPRIETARY ESTOPPEL, CONSTRUCTIVE TRUSTS AND FORMALITY RULES

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1. Introduction

1. Why does it matter if a claim is said to be based on a constructive trust rather than on proprietary estoppel? Formality rules seem to provide one reason. s.53(1)(a) of the Law of Property Act 1925 requires signed writing for the creation or disposition of an interest in land and s.2 of the Law of Property (Miscellaneous Provisions) Act requires writing, signed by both parties and setting out all terms expressly agreed between them, for the conclusion of a contract for the sale or other disposition of an interest in land. However, both rules are subject to an exception in favour of constructive trusts: s.53(2) of the 1925 Act and s.2(5) of the 1989 Act make clear that neither formality rule can affect the "creation or operation of resulting, implied or constructive trusts".
2. Neither formality rule has an explicit exception in favour of proprietary estoppel. It thus seems that a claimant, B, may wish to base his claim on a constructive trust rather than on proprietary estoppel in order to avoid either formality rule. If B wishes to do this, it becomes crucial to locate the dividing line between constructive trusts and proprietary estoppel. However, the argument of this paper is that, if B can bring a proprietary estoppel claim, then, as far as formality rules are concerned, it simply does not matter whether B's claim can also be seen as giving rise to a constructive trust. So, a desire to avoid formality rules, by itself, does *not* provide a reason for distinguishing constructive trusts from proprietary estoppel.
3. The argument of this paper is that, if B can bring a proprietary estoppel claim, then that claim will be unaffected by formality rules, *whether or not it also gives rise to a constructive trust*. It is true that neither s.53 of the 1925 Act nor s.2 of the 1989 Act contains an explicit exception for proprietary estoppel. However, no such exception is necessary as a claim based on proprietary estoppel is, in any case, beyond the scope of those formality rules.
4. This analysis, as this paper will show, is accepted in practice and supported by principle. As will be seen in the next section, four Court of Appeal decisions are inconsistent with the view that, to avoid a formality rule, a proprietary estoppel claim has to give rise to a constructive trust. As will be seen in the third section, this should come as no surprise, as there no reason in principle why a proprietary estoppel claim should ever be subject to either s.53(1)(a) of the 1925 Act or s.2(1) of the 1989 Act. A possible objection to this argument, based on the House of Lords' decision in *Actionstrength Ltd v International Glass Engineering SpA*,¹ will be considered and rejected in the fourth section. In the fifth section, a number of wider points, going beyond

¹ [2003] 2 AC 541.

the immediate context of formality rules, will be made about the relationship between constructive trusts and proprietary estoppel.

2. Practice

5. Four Court of Appeal decisions demonstrate that a proprietary estoppel claim will be unaffected by formality rules, whether or not it gives rise to a constructive trust. *Crabb v Arun D.C.*² provides a convenient starting point. B had entered into negotiations with A, a neighbouring landowner, for the grant of a right of way over A's land. An access point was agreed in principle but no final deal was reached. When A later erected a fence around its land, it initially left a gap at the planned access point, and then put in a gate at that point. As a result of this conduct of A, B believed that the planned easement would be granted and relied on this belief by selling off part of his land without reserving a right of way over that land as a means of access to the retained part. This meant that, when A locked its gate and denied B access over A's land, B had no means of accessing his retained land.
6. B's claim in *Crabb* was based on proprietary estoppel. Clearly, B could not argue that A had granted B an easement; nor could B argue that A had made a contractual promise to do so. However, B had relied on a belief, for which A was responsible, that B would acquire a right in relation to A's land, and, in the absence of a claim against A, B would suffer detriment as a result of his reliance. As a result, B had a proprietary estoppel claim; this claim led to A's being under an obligation to grant B the planned easement. To compensate B for the loss he had suffered by being unable to access his land, A was obliged to grant B this easement for free.
7. There is no discussion of constructive trusts in *Crabb*; nor should there be. No trust arose in that case, as B's proprietary estoppel claim led to A's being under an obligation to give B an easement. And there is no reference to formality rules. A's counsel did not argue that B's proprietary estoppel claim led to the unwritten creation of an interest in land contrary to s.53(1)(a) of the Law of Property Act 1925; nor did he argue that B's claim led, in effect, to the enforcement of an agreement which, due to s.40 of the Law of Property Act 1925, could not be enforced as a contract. It seems then, unless the Court of Appeal's decision is to be regarded as flawed, that a proprietary estoppel claim is unaffected by formality rules even if it does not give rise to a constructive trust.
8. In *Taxley v Gotts*,³ A and B agreed that, in return for B's converting A's house into flats and acting as A's managing agent, A would give B a lease of the ground floor flat. B completed this work and acted as A's managing agent for two years. During that time, B had been collecting rent for A but the rent from the ground floor flat was paid over to B. A then sought to renege on the agreement and refused to grant B the promised lease.

² [1976] Ch 179.

³ [2000] Ch 162.

9. B's claim in *Yaxley* is best seen as based on proprietary estoppel. Clearly, B could not argue that A had granted B a lease; nor could B argue that A had made a contractual promise to do so. However, B had relied on a belief, for which A was responsible, that B would acquire a right in relation to A's land, and, in the absence of a claim against A, B would suffer detriment as a result of his reliance. As a result, B had a proprietary estoppel claim. The first instance judge responded to this claim by declaring that B was entitled to the promised lease of the ground floor flat and ordering A to grant B such a lease *unless* A, within four months, paid B a sum equivalent to the value of such a lease. This order is a strange one. Either A is obliged to grant B a lease or he is not. If A is obliged to grant B a lease, then, unless B agrees to accept money in lieu, A should not be able to avoid this obligation by paying B money. And if A is instead only obliged to pay B money, it is hard to see why this obligation should be buttressed by the threat of having to give B a lease. However, this order was confirmed by the Court of Appeal. As B was not living in the ground floor flat, but was rather receiving rents and hence treating it as a source of income, it may be that the appropriate response to B's claim was simply to order A to pay B the value of the lease. This would suffice to avoid the detriment B would suffer if he had no claim.
10. In *Yaxley*, B's claim led either to A's being obliged to grant B a lease or to A's being obliged to pay money to B. Either way, there is no trust in that case. As A holds no right on trust for B, there can, of course, be no constructive trust. And, as in *Crabb*, formality rules did not prevent B's acquiring his right. In this way, the result in *Yaxley* can be seen as supporting the view that a proprietary estoppel claim is unaffected by formality rules even if it does not give rise to a constructive trust.
11. However, the Court of Appeal in *Yaxley*, differing from *Crabb*, did explicitly discuss formality rules and did view B's claim as giving rise to a constructive trust. The reason for this seems to be that the claim in *Yaxley* is very close to a contractual one. The formality rule, now set out in s.2 of the 1989 Act, provided the *only* reason why B could not bring a contractual claim. As a result, the argument that enforcing the parties' agreement would be inconsistent with s.2 comes to the fore and was adopted by A's counsel. The Court of Appeal rejected this argument by characterising B's claim as giving rise to a constructive trust and hence relying on s.2(5). Yet there is a real difficulty with the Court of Appeal's approach in *Yaxley*. Simply put: where is the trust?
12. In *Kinane v Mackie-Conteh*,⁴ A's company urgently needed money from B to set up a letter of credit. B was willing to make a loan (at just 100% interest) but required security. A sent B a signed letter promising to give B a charge over A's home. B advanced the loan as a result. A did not repay as promised

⁴ [2005] EWCA Civ 45, [2005] WTLR 345.

