

# Caveat venditor - A High Court example of proprietary estoppel and the sale of land

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1. The requirement that contracts for the sale of land be in writing is by now so well-established that it has filtered through the legal system and down into the public consciousness. Nonetheless, inevitably not every oral statement made in the course of a property sale will be committed to writing.
2. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("Section 2") provides that  

"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."
3. The section makes explicit provision that "nothing in this section affects the creation or operation of resulting, implied or constructive trusts."
4. One of the questions that has arisen in respect of section 2 is the extent to which it precludes the operation of proprietary estoppel.
5. In order to establish a proprietary estoppel, it must be shown that there was a promise by one party that was relied upon by another party to that other party's detriment. If those three things are established then the promising party will be prevented ("estopped") from going back on the promise. It has been argued that attempting to establish an estoppel goes against the requirement in Section 2 that all of the terms in a disposition of land must be in writing.

## The facts of Sahota v Prior

6. The Priors had found themselves in financial difficulty and were facing mortgage repossession. They approached a company called Red 2 Black which offered to buy their property and rent it back to them for the rest of their lives as long as they paid the rent.
7. The Priors were induced to sign a 5-year written tenancy agreement but were promised again by Red 2 Black that the written terms of the agreement were not important.
8. Unbeknownst to the Priors, the property was in fact being purchased by Mrs Sahota. For Mrs Sahota's part, she had no idea Red 2 Black had represented to the Priors that it was the purchaser of their home, nor was she aware of the promise made to the Priors that they could remain in the property indefinitely.
9. Mrs Sahota paid £130,000 for the property, the Priors received £52,000, and Red 2 Black apparently pocketed the difference.
10. Red 2 Black's apparent fraud was eventually discovered but by then the transaction had long been completed.
11. Sometime after the 5 year tenancy expired Mrs Sahota attempted to gain possession of the property by way of a Section 21 Notice. The Priors raised an argument of proprietary estoppel.
12. At first instance before Her Honour Judge Hampton sitting at Northampton County Court the Court found in favour of the Priors. The Judge found that Mrs Sahota was bound by the promise made by Red 2 Black that the Priors could remain in the property as long as they paid the rent. Mrs Sahota was estopped from going back on that promise.
13. Mrs Sahota appealed on two grounds; first that the statements made by Red 2 Black could not be attributed to her and secondly that the Priors could not rely on promissory estoppel because of Section 2.

## Proprietary estoppel and Section 2, the law

14. The interaction between proprietary estoppel and Section 2 was examined in three major cases.
15. The first was *Yaxley v Gotts* [2000] Ch 162. Mr Gotts and Mr Yaxley entered into an arrangement to purchase a block of flats. Mr Gotts provided the purchase price, but promised Mr Yaxley that if Mr Yaxley worked on the top four flats in a particular block and acted as a managing agent for them once they were rented out, then he would be given the ground floor flat. Sometime subsequently Mr Yaxley was excluded from possession of the ground floor flat and commenced proceedings based on an oral agreement and proprietary estoppel. The trial judge found in favour of Mr Yaxley.
16. On appeal, it was undisputed that as a contract the oral agreement fell foul of Section 2 of the Act. The question remained whether proprietary estoppel could operate to give effect to the agreement.
17. Robert Walker LJ agreed with the statements of judges in previous cases to the effect that Section 2 did not represent a “no-go” area for estoppel. The circumstances in which an estoppel could arise were so varied as to make such a blanket rule undesirable. The policy behind Section 2 of making dispositions of land more certain was to be weighed against the facts of each particular case.
18. Lord Justice Beldam noted that Section 2 did not expressly outlaw certain transactions but only rendered them void. For that reason Section 2 could not be a total bar to estoppel.
19. *Yaxley* thus established that while the aim of the statute (to provide certainty in sales and other dispositions of land) was to be borne in mind in each case, it was not necessary to bar proprietary estoppel in every case to which Section 2 applied.
20. *Cobbe v Yeoman's Row Management Limited* [2008] UKHL 55 concerned an oral “agreement in principle” whereby Mr Cobbe would apply for planning permission for a residential development on Yeoman's Row's land, and if that permission was obtained Yeoman's Row would sell the land to Mr Cobbe for a given sum. Mr Cobbe acquired

planning permission at which point Yeoman's Row sought to renegotiate a higher price. Mr Cobbe issued proceedings.

21. One of the arguments raised by Mr Cobbe was that Yeoman's Row was estopped from denying that Mr Cobbe has some interest in the land. Yeoman's Row raised Section 2 as a barrier to the estoppel.
22. At first instance and in the Court of Appeal Mr Cobbe's proprietary estoppel argument was successful.
23. However in the House of Lords Lord Scott disagreed, primarily on the basis that no estoppel could be established in the first place. Mr Cobbe was an experienced businessman who knew that an oral agreement "binding in honour" was not legally enforceable. The question for Lord Scott was essentially: What, exactly, was Yeoman's Row estopped from asserting in relation to the oral agreement? to which the answer was: Nothing.
24. Section 2 was therefore not directly relevant to the matter at hand.
25. *Obtiter* Lord Scott considered that "a complete agreement for the acquisition of an interest in land that does not comply with the section 2 prescribed formalities, but would be specifically enforceable if it did" could not become enforceable by the route of proprietary estoppel. That would be to defeat the object of the statute.
26. *Thorner v Major* [2009] UKHL 18 was a non-contractual case. The issue was whether Mr Thorner, who had performed substantial work on a farm without pay on the understanding that he would inherit the farm, could establish a proprietary estoppel.
27. As it did not concern a "contract for the sale or other disposition of an interest in land" the estoppel in *Thorner* did not fall foul of Section 2. Commenting on *Cobbe*, Lord Neuberger described that case as turning upon its own unusual facts, including the fact that Mr Cobbe was attempting to enforce "a right which was, in a sense, contractual in nature".

## The decision of Mrs Justice Falk

28. Justice Falk upheld the decision of Judge Hampton below.
29. On the issue of whether the promise made by Red 2 Black could be attributed to Mrs Sahota, the Court held that Mrs Sahota was bound by the statements made when she adopted the transaction without taking active steps to ascertain its terms.
30. On the issue of estoppel and Section 2, the Court agreed with the principle that estoppel could not render enforceable an agreement which Parliament had by that principle rendered unenforceable. However the Court disagreed that that was what the Priors were attempting to do.
31. The Priors were not attempting to enforce a *term* of the contract, but merely the promise that they would not be evicted as long as they paid the rent.
32. The Judge distinguished the circumstances from those of *Cobbe*. *Cobbe* had involved a commercial transaction between businessmen. Mr Cobbe *knew* that what he was seeking to enforce was essentially a contractual term.
33. The Judge found that the present case was closer to the non-contractual promise made in *Thorner*.
34. Thus the subjective understanding of the Priors characterised the estoppel that they were claiming. The Priors were not, according to the Court's characterisation, saying that Mrs Sahota was estopped from denying the existence of a contractual term. Rather she was simply estopped from going back on a promise.
35. Further, the present agreement could be characterised not merely as a sale of land but as a sale and a subsequent tenancy, with the promise relating to the tenancy. The stringent language of Section 2 does not apply to tenancy agreements which are instead governed by section 53 of the Law of Property Act 1925. That provision merely states that "no interest in land can be created or disposed of except by writing" and contains no provision requiring that instrument of writing to incorporate *all* of the terms of the contract.

## Lessons to be drawn from *Sahota v Prior*

36. There are three lessons to be drawn from this case:

1. At the conveyancing stage: Section 2 is not sufficient to prevent oral agreements being relied upon by either of the parties after the exchange of contracts. More conventional means (such as an entire agreement clause) should be used to guard against the possibility. This is particularly true where any oral negotiations have been conducted by the seller's agent.
2. At the dispute stage: A party should not place too much confidence in Section 2, even in circumstances where the creation of a trust is not in issue and where there is a written contract. The mere existence of a written contract will not prevent proprietary estoppel from operating as long as the subject of the estoppel can be framed as something other than a contractual term. That framing is more likely where the party to whom the statement was made is not business-savvy.
3. In sale-and-leaseback contracts specifically: The ability to conceptually split "the contract" in two may further weaken the protection that a seller has under Section 2.

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