1. Is it possible to define unconscionability?

Suggested Answer

See 5.2, 5.3 and 5.6.3.. The idea of conscience goes back to the very origins of Equity, where the Lord Chancellor would prevent a defendant enforcing the common law, if it would be against their conscience. This is generally illustrated in Chapter 1. It was used in proprietary estoppel to ameliorate the strict approach of proving every one of the five probanda required by *Willmott v Barber* (1880) 15 Ch.D 96 to establish an estoppel. The five probanda were not thought necessary in *Taylor Fashions v Liverpool Victoria* [1982] QB 133 and the more general principle was invoked that there would be an estoppel, if it would be unconscionable to allow the defendant to break a promise, that the claimant had relied upon to their detriment. The same logic was applied in cases such as *Re Basham* [1986] 1 WLR 1498 and *Gillett v Holt* [2000] 2 All ER 289, where the claimant had acted to their detriment for a long time. It would be unconscionable for the defendant to insist upon their strict legal rights and deny them a remedy. These cases looked at all the factors in the case to decide what was unconscionable. The House of Lords rejected this broad approach in *Yeoman's Row Management Ltd. v Cobbe* [2008] 1 WLR 1752. The fact that Mr Cobbe might have been treated unfairly by Mrs Lisle-Mainwaring was not enough: the basic estoppel elements of representation, reliance and detriment had to be shown. As there was no representation in that case, there was no estoppel. Lord Walker suggested, at 1788, that first the three elements of estoppel must be proved and then the court would decide whether what had happened was so unconscionable that the claimant should succeed. Unconscionability could be relevant when deciding upon the remedy, as suggested in *Henry v Henry* [2010] 1 All ER 988, where what the claimant had suffered had to be weighed against what he had gained.

FURTHER READING: T. Etherton "Constructive trusts and proprietary estoppel: the search for clarity and principle." [2009] Conveyancer 104.

2. Explain the difference between *Thorner v Major* and *Yeoman's Row v Cobbe*.

Suggested Answer

See 5.2.4, 5.2.5, 5.3.3 and 5.7.3. On the face of it, it seems easy to distinguish between *Yeoman's Row Management Ltd. v Cobbe* [2008] 1 WLR 1752 and *Thorner v Major* [2009] 1 WLR 774. *Yeoman's Row* involves a commercial, business situation, whereas *Thorner* involves a domestic, family situation. This commercial/domestic distinction can be seen in the older case *Attorney General of Hong Kong v Humphrey's Estate* [1987] AC 114. Much more certainty and precision is required to establish an estoppel in a commercial situation than in a domestic one. There is a lot of difference between negotiating a business deal to develop a block of flats and working on a farm all one's life in the hope of one day inheriting. In the former situation the parties can be presumed to have access to legal advice, but in the latter, not. On a simple finding of fact, the cases are different. In *Yeoman's Row*

there was no representation that Cobbe would receive a legal interest in the flats, but, in *Thorner*, there was a clear, though unspoken representation, that in return for all his work, David would inherit the farm.
Even so, the approach in these two cases is very different. *Yeoman's Row* insisted that all the elements of estoppel; representation, reliance and detriment must be made out. In particular, the representation must be "clear and unequivocal". *Thorner* was very different, in that there never was a clear statement that David would inherit, it was just assumed by both Peter and David Thorner that David would inherit. Unconscionability was rejected in *Yeoman's Row*, but embraced in *Thorner*. In *Yeoman's Row* the House of Lords was concerned that the formal requirement that contracts for land must be in writing would be endangered if an estoppel was allowed. This did not concern the House in *Thorner v Major.*

Perhaps it all depends on the facts. David Thorner seems more deserving that Cobbe. Cobbe got paid anyway, but David deserved to inherit the farm more than the distant relatives, the Majors. Cobbe argued that there was a contract, but of course there could not be one as this was land and there was no writing. There was no need to argue a contract in *Thorner*, simply that the intestacy rules should not take effect.

FUTRHER READING: Martin Dixon "Proprietary Estoppel: a return to principle. A commentary on Thorner v Major". [2009] Conveyancer 260.

3. Is it possible accurately to define what is meant by detrimental reliance?

Suggested Answer
See 5.5 and 5.4.Traditionally the detriment required in proprietary estoppel was expenditure upon land, for example building a house, as in *Dillwyn v Llewelyn* (1862) 4 De GF & J 517. Lord Denning put forward the view in G*reasley v Cooke* [1980] 1 WLR 1306 that detriment was not required, but this is usually interpreted to mean that detriment does not necessarily have to be expenditure on the land itself. Cooke had acted as an unpaid carer to the Greasley family for over thirty years and in return had been promised a home for life. Other "caring" cases have followed, such as *Re Basham* [1986] 1 WLR 1498 Underpaid work has also been accepted in *Gillett v Holt* [2000] 2 All ER 298 and *Thorner v Major* [2009] 1 WLR 774, as has forsaking better job opportunities in the previously mentioned *Re Basham* and *Gillett v Holt*. These last two cases make clear that it is often not possible to just isolate one factor as the detrimental reliance; it is an accumulation of actions. The court may also have to weigh up whether the claimant gained more than they lost in order to decide on whether there is detriment. This "proportionality" is seen in *Henry v Henry* [2010] 1 All ER 988 and also in *Davies v Davies* [2016] EWCA Civ 463.

FURTHER READING: A. Lawson "The Things We Do For Love: Detrimental Reliance and the Family Home". 1996 Legal Studies 218.

4. Does a proprietary estoppel escape the writing requirements of section 2(5) of the Law of Property (Miscellaneous) Provisions Act 1989 and section 53(2) of the Law of Property Act 1925?

Suggested Answer

See 5.7 and 2.8.

The whole point of a doctrine such as proprietary estoppel is to provide a means for the court to avoid strict statutory requirements, if it is appropriate to do so. *Crabb v Arun D.C.* [1976] Ch. 179 refers to older authority to support this idea. It all links with the equitable maxim, "Equity will not permit a statute to be used as an instrument of fraud", which can be found at 4.4. A problem arose with the enactment of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which required that a contract for land must be in writing, otherwise it is void. The older law, in section 40 of the Law of Property Act 1925, was less strict. The contract only had to be evidenced in writing and oral contracts for land could be enforced under the equitable doctrine of part performance. This doctrine allowed a party, who had carried out their part of the oral contract, to compel the performance of the contract. The 1989 Act intended to abolish part performance, but, at least according to the Law Commission report on which the Act is based; it was not the intention to abolish other equitable doctrines, which might allow the courts to avoid the writing requirement. At section 2(5) the Act explicitly excludes resulting, constructive and implied trusts from the writing requirement, but estoppel is not mentioned. The court in *Yaxley v Gotts* [2000] Ch 162, felt, on balance, that it was not the intention of Parliament to prevent estoppel from being used to avoid the writing requirement. As there was a constructive trust as well in that case, the point was not crucial. The House of Lords in *Yeoman's Row Management Ltd. v Cobbe* [2008] 1 WLR 1752 felt that proprietary estoppel could not be used to contradict the writing required, by Parliament in the Law of Property (Miscellaneous Provisions) Act 1989. Again, the point was not vital for the decision as there clearly was no oral contract for land in that case. The subsequent House of Lords case, *Thorner v Major* [2009] 1 WLR 774 did not comment on this issue as Thorner was disputing inheritances under an intestacy, not claiming that he ever had a contract of land. Therein may lay the key for understanding this aspect of *Yeoman's Row*. Cobbe failed because he tried to claim that there was a contract of land. There clearly could not be, as any agreement between him and Lisle-Mainwaring was oral. The court might be able to evade the writing requirements in the Law of Property (Miscellaneous Provisions) Act 1989, but they cannot go into direct conflict with the clearly expressed wishes of Parliament.

FURTHER READING: Law Commission Report on Transfer of Land: Formalities for Contracts of Sale etc. of Land (1987) (Law Com. No. 164).

5. What is the difference between a constructive trust and a proprietary estoppel?

Suggested Answer

See 5.8.

Constructive trust and proprietary estoppel have different historical origins and different things need to be proved to establish a constructive trust as opposed to an estoppel. For a constructive trust a common intention must be proved to exist between the parties (see Chapter 17Trusts of the family home). For a proprietary estoppel, it is only necessary to prove that a representation has been made. The representation does not have to be

expressed in clear, legal terms, at least in a domestic case, such as *Thorner v Major* [2009] 1 WLR 774. It is also possible for an estoppel to arise merely because the defendant has acquiesced in the claimant's mistaken belief as to their legal rights. This can be seen in cases such as *Crabb v Arun District Council* [1976] Ch 179 (see 5.3.3) and old cases like *Ramsden v Dyson* [1866] LR 1 HL 129 (see 5.2.1). In contrast, for a constructive trust an "agreement, arrangement or understanding" between the parties must be proved "based on evidence of express discussions between the partners": *Lloyds v Rosset* [1991] 1 AC 107 (see 17.4.1).

Theoretically, constructive trust and proprietary estoppel are very different. In a trust, the beneficiaries have a right to a share of the land. This comes from the basic definition of a trust in *Westdeutsche Landesbank v Islington LBC* [1996] AC 669 at 705:
"(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property..." (See 2.5).
In contrast, the remedy given by the court for a proprietary estoppel is flexible and in the discretion of the court. It is not about clarifying property rights that already exist, but depends upon all the circumstances and can vary from giving the defendant the whole house (*Pascoe v Turner* [1970] 2 All ER 945, to giving them a mere licence to occupy the land: *Greasley v Cook* [1980] 1WLR 1306 (see 5.4.1).

That said, it is perfectly possible for a constructive trust and a proprietary estoppel to both exist on the same set of facts. A representation might easily be interpreted as an agreement. This is remarked upon by many cases, such as *Yaxley v Gotts* [2000] Ch 162. The common intention constructive trust, used to resolve disputes about the family home, was developed combining elements of both estoppel and constructive trust. This is discussed in cases such as *Lloyds v Rosset* [1991] 1 AC 107 and, particularly in *Grant v Edwards [1986] Ch 638.*

Modern cases such as *Stack v Dowden* [2007] 2 All ER 929 and *Jones v Kernott* [2012] 1 AC 776, have stated that the constructive trust should be used in family home cases. There is nothing to stop a claimant arguing for both a constructive trust and a proprietary estoppel, but the courts have suggested that it will add nothing to the chances of success: constructive trust should be used:
"In these circumstances it is not necessary to consider in detail the claim based on proprietary estoppel. In my view the result would be the same." *Apsden v Elvy* [2012] EWHC 1387 at para. 129. (See 17.10.2).

The common intention constructive trust has taken on some aspects of proprietary estoppel. The common intention is not fixed at the start of the relationship, as thought in *Lloyds v Rosset [*1991] 1 AC 107, but can change to reflect changed circumstances, as seen in *Jones v Kernott* [2012] 1 AC 776. The constructive trust is *ambulatory* and the beneficial interests can change. The Supreme Court, in *Jones v Kernott* [2012] 1 AC 776, still insist that the court must find the common intention of the parties and that the remedy is not discretionary, in contrast to estoppel, but some commentators doubt how real this distinction is. (See thinking point at 5.8.4.)

Occasionally, a claimant has succeeded in establishing an estoppel, when they cannot establish a constructive trust: e.g. *Southwell v Blackburn* [2014] EWCA Civ 1347 and *Matharu v Matharu* [1994] 2 FLR 597. In those cases, the courts recognised a right of

occupation, rather than a proprietary interest as they would have done under a constructive trust.