No backing out now

A recent case shows that constructive trusts can be used to justify an arrangement which has neglected the formalities. Jody Atkinson explains

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'An oral agreement may nevertheless be valid in certain circumstances, as s2(5) states that s2 does not effect the operation of constructive trusts.'

Ely v Robson [2016] is another of the many cases involving unmarried couples fighting over the ownership of their home. Almost a decade ago the Law Commission recommended the introduction of a statutory jurisdiction which would give the courts power to alter interests in property when unmarried couples separate, which would have been similar, but more restricted, than those that the courts have on divorce. However, the government has refused to implement those recommendations. The result is that unmarried couples are largely treated like any other two people having a dispute over property, and are forced to rely on the law of trusts, as it has been developed by the courts over the years (and some would say that the desire to do justice to unmarried couples has had the result that the law of trusts has been bent out of shape). Rather than taking all the circumstances into account and reaching a fair outcome (which is the approach and aim of the matrimonial legislation) disputes between unmarried partners can often turn on conversations had many years ago, as this case illustrates.

The wider interest of the Court of Appeal decision in *Ely* is that it contains important observations on the operation of s2 of the Law of Property (Miscellaneous Provisions) Act 1989. This, as all property lawyers know, imposes a formality requirement: a contract which disposes of an interest in land must be writing and signed by both of the parties. However, as is shown below, an oral agreement may nevertheless be valid in certain circumstances, as s2(5) states that s2 does not effect the operation of constructive trusts.

Facts of the case

This case concerned an unmarried couple, Mr Ely and Ms Robson. They met in 1986, in the aftermath of Mr Ely's first wife's death, and had two children together, in addition to Mr Ely's children from his first marriage. By 2005 the relationship had broken down. Between them, they owned three houses. Two of them, which were let out, were registered in Ms Robson's sole name. The property in which they lived together, Torbay Road, with the children and Ms Robson's elderly aunt, was in Mr Ely's sole name.

Despite the end of the relationship, Ms Robson refused to move out, and so, in 2007, Mr Ely brought possession proceedings. Ms Robson counter-claimed, contending that Torbay Road was held under a constructive trust for her in equal shares, as a result of conversations that had taken place between her and Mr Ely, and contributions that she had made to the property. Mr Ely replied that the only arrangement he would ever have agreed to was that all three properties be shared equally, but Ms Robson refused to agree to that. He felt that it was wholly unfair for her to try and keep both of her properties and then to take half of his in addition to that.

Both sides instructed solicitors and matters were progressing toward a trial. At that point, in the summer of 2007, the parties had a meeting in Poole Park to try and resolve their differences (given that they both lived in the same house, why they had to go to the park to do this was never clear, but this was the way that it happened). The trial judge found that at this meeting the parties reached an agreement. The

essential terms of the agreement were that Ms Robson would be allowed to stay in Torbay Road until her aunt died and then she would leave. Mr Ely would be entitled to live in Torbay Road for the rest of his life, but after his death, 20% would belong to Ms Robson (who was ten years younger than him).

Mr Ely told his solicitor what they had agreed and his solicitor wrote a letter setting out the terms in detail. However, this letter concluded:

> ... given the complexity of the agreement we have advised our client to seek counsel's advice in drawing up a settlement agreement and associated trust deed. Our clients are considering simplifying the above deal in the light of the tax implications and practical difficulties in drafting the trust deed.

Ms Robson's solicitors never wrote back expressly accepting or rejecting the terms of the agreement, but they did participate in a joint letter asking for an adjournment, as the parties were 'relatively close to settlement.'

The court adjourned the trial until January 2008. At this point both parties stopped paying their solicitors. Mr Ely assumed that the matter had simply concluded with their agreement. In January the court computer file recorded that Ms Robson had contacted the court and told them that the matter had settled. Ms Robson denied contacting the court, but the trial judge found that she had.

The parties continued living miserably together in Torbay Road. In 2012 Ms Robson's aunt died, and at some point afterwards Mr Ely reminded her that, under the terms of their agreement, it was now time for her to leave. Ms Robson refused to do so. Her position now was that there had never been any concluded agreement. They had simply agreed to leave matters and agree to disagree. She still contended that she owned half of Torbay Road.

Mr Ely brought a fresh claim in 2014. He contended that the agreement reached in 2007 was binding and this was listed as a preliminary issue. Ms Robson in her defence formally raised s2 of the Law of Property (Miscellaneous Provisions) Act 1989. This states that a contract which disposes of an interest in land must be writing and signed by both of the parties. In this case there was no such document.

The court's decision

His Honour Judge Blair QC found in favour of Mr Ely. He found that he was telling the truth about the agreement and that Ms Robson had agreed to it at the time. The trial judge decided that s2 did not apply, as Mr Ely could rely on the doctrine of proprietary estoppel. Ms Robson had represented to Mr Ely that she agreed to their settlement.

Ms Robson appealed to the Court of Appeal. Her first point was that s2(5) of the Law of Property (Miscellaneous Provisions) Act 1989 made an exception only for constructive trusts, not proprietary estoppel. The Court of Appeal, with Lord Justice Kitchin giving the only judgment, held that this was an area where there was no real difference between the doctrine of constructive trust and proprietary estoppel. One required a common understanding, the other required representations: these could be two ways of describing the same thing. Both required detrimental reliance. Both were not affected by s2, due to s2(5), as the estoppel in this case would take effect by imposing a constructive trust upon the property.

The trial judge decided that s2 did not apply, as Mr Ely could rely on the doctrine of proprietary estoppel.

In reliance upon that representation Mr Ely had not pressed on with his possession proceedings, but had allowed her to remain in occupation at Torbay Road. It would be inequitable for Ms Robson to rely on her strict rights under s2 for a written contract and she was estopped from doing so.

The next point was that proprietary estoppel could not operate in Mr Ely's favour, as he was the legal owner of the property. The Court of Appeal observed that the usual circumstances in which proprietary estoppel arose was where the legal owner made representations to the claimant, on which the claimant relied, and that the legal owner would be the one estopped from resiling from his representations. However, the doctrine was a flexible one, and there was no reason why it could not be used the other way round.

Ms Robson's final and most substantial appeal point was on the effect of the House of Lords decision in *Cobbe v Yeomans Row Management Ltd* [2008], as subsequently applied in *Herbert v Doyle* [2010]. *Cobbe* was a case in which a property developer assisted a landowner in obtaining planning permission. The property developer and landowner had an agreement that was 'binding in honour' that the property developer would receive a share in the increase in value. However, both parties knew that their agreement was not legally enforceable, and that there would be a subsequent formal agreement which would set out the precise terms. The House of Lords held that the doctrines of proprietary estoppel and constructive trust could not operate in these circumstances. It was not clear what the property developer was meant to receive under the agreement, and he had taken a commercial risk with his eyes open, because he knew he was reliant on the 'honour' of the landowner.

In *Herbert v Doyle*, at 57, Arden LJ had appeared to suggest that *Cobbe* would prevent the operation of the doctrine of proprietary estoppel whenever the circumstances were that the parties intended to go on to 'make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property.' Ms Robson argued that this applied in her case; there had been an intention, as evidenced by the letter written by Mr Ely's solicitors, to take advice from counsel, and draw up a formal settlement document and trust deed.

The Court of Appeal accepted Mr Ely's submissions that, given the actual result in *Herbert*, this could not have been what Arden LJ had meant. What was meant was that proprietary estoppel could not operate if it was not reasonable for the representation to be relied upon, either because it was plainly not intended to be immediately binding, or because the terms of the representation were too unclear. This might be because, as in *Cobbe*, further negotiations were clearly envisaged. The facts of *Herbert* were that two neighbouring landowners were engaged in negotiations, because one wanted to build an infill property, but in order to do so he would need to exchange some parking spaces with his neighbour. There was an awareness of the operation of s2 and the need for agreements to be in writing. Eventually they reached an agreement over one neighbour's kitchen table that they would exchange parking spaces (it was not precisely clear which) and there would be a payment of an agreed amount of money. The building project was begun in reliance upon that agreement. The Court of Appeal held that it was then too late for the parties to resile, even though there was no agreement in writing and no agreement about precisely which spaces were to be exchanged. They held that the agreement was sufficiently certain to be relied upon and there was an intention that it should be immediately binding. If the parties were not able to resolve precisely which spaces were to be exchanged the court could resolve that for them.

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Court of Appeal's decision

The Court of Appeal held that same reasoning applied in *Ely*. The agreement between Mr Ely and Ms Robson was certain in its terms, which were set out in the solicitor's letter. There was nothing significant left to be worked out in subsequent negotiations. The agreement was intended to be relied upon immediately; it was not expressly or implied 'subject to contract'. Mr Ely did rely upon it (as did Ms Robson) by not pressing on with the litigation in which both of them hoped to achieve a substantially better result. It was too late for them now to resile from it. The formal contract or a trust deed were merely 'the mechanics necessary to achieve their stated objectives.' The failure to produce them did not render the agreement void.

Lessons for practitioners

Drawing the threads together, the primary lessons to be drawn from this are as follows:

As every adviser knows, it is important formally to close off a deal. All of this trouble could have been avoided if the parties' lawyers had drawn up a simple heads of agreement document which both parties had signed.

It is easy to be seduced by formalism arguments and expect that an agreement will be unenforceable due to a failure to comply with some formality requirement. The courts are very slow to unpick a bargain, particularly where the parties have relied upon it and it has remained in place for some time. The doctrine of proprietary estoppel will frequently have a part to play where that dispute involves ownership of land.

Finally, although the Supreme Court unhelpfully refuses to assimilate them, the doctrines of proprietary estoppel and constructive trusts are substantially alike, and in many circumstances identical. They are flexible doctrines designed to ensure that there is escape from strict legal rules (such as the formality requirements for transfers of interest in land), where application of those rules would produce an inequitable result. They are accordingly not formulaic, and therefore not subject to arbitrary restrictions, such as only being available to the person who is not the legal owner of the land. ■

Ely v Robson
[2016] WTLR 1383
Herbert v Doyle
[2009] WTLR 589
Yeomans Row Management Ltd v Cobbe
[2008] WTLR 1461