Section 2 turns 25

Is it a happy birthday for s 2 of the Law of Property (Miscellaneous Provisions) Act 1989, asks John Sharples

IN BRIEF

▶ Has s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provided the certainty that was hoped for?

Children don't always turn out as hoped or achieve what they were intended to. Twenty-five years after s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 came into force it is a good time to ask: has it done the job it was meant to?

Under the old law, oral land contracts were enforceable if supported by a written memorandum or part-performance. The result was in many cases uncertainty as to whether there was a binding agreement and, if so, what its terms were—a minefield for the unwary and a litigator's delight. But as Lord Justice Lewison said in *Shirt v Shirt* [2012] EWCA Civ 1029, [2012] 3 FCR 304: "Formal requirements for the disposition of interests in land exist for a good reason. They are designed in part at least to prevent expensive disputes about half-remembered conversations which took place many years before a dispute crystallised."

Section 2 was going to bring certainty. From now on, contracts for the sale of land would have to be *contained* in a document, *signed* by the parties and setting out *all* that had been agreed. Anyone would be able to see from the four corners of the document if there was a binding agreement and what its terms were. Conveyancing discipline would be restored.

The penalty for ill-discipline would be severe: if the parties agreed terms that were not reduced to writing, s 2 would void not only them but the entire agreement, including any signed written contract. As Lord Justice Rimer said in *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] All ER (D) 106 (Jul), its operation was intended to be "merciless".

So far, so promising. But as so often happens with the law, litigants have tested the boundaries of s 2 and the results have seen some weakening of the statutory intention to deliver clarity. Four particular areas of difficulty have exercised the courts.

1. Partly-completed agreements

Tootal Clothing Ltd v Guinea Properties Management Ltd [1992] 2 EGLR 80 was initially thought to have held that s 2 only applied to executory contracts. So once all the "land" elements were completed, it did not matter that other terms, which were still to be performed, were not set out in writing. That remained the view for a number of years (see eg *Kilcarne Holdings v Targetflow* [2005] EWCA Civ 1355, [2005] All ER (D) 203 (Nov) and *North Eastern Properties v Coleman* [2009] EWHC 2174 (Ch). However the court in *Keay* held that was not good law: "The proposition that a void contract can, by acts in the nature of part performance, mature into a valid one is contrary to principle and wrong".

Nevertheless, the principle that a void agreement is effective once completed remains true: the contract merges into the transfer and the latter is effective to vest title in the purchaser and provides its own consideration for the obligations set out in it. However, any attempt to enforce the uncompleted oral terms will fail if the contract, as a whole, did not comply with s 2. This is so even if the outstanding terms are not themselves "land" terms. But what if the oral terms are collateral to the land contract?

2. Side agreements—"Get out of jail free"?

One questionable consequence of s 2 is that it gives a party who later regrets having entered into a land contract the chance to try to get out of it by looking for some—not necessarily important—term that had been agreed but was not reduced to writing. If he succeeds, the whole agreement fails.

Of course he has to prove the oral agreement and courts are vigilant against making such a finding too readily (*Business Environment Bow Lane Ltd v Deanwater Estates* [2007] EWCA Civ 622, [2007] All ER (D) 317 (Jun)). But what if he does? Clearly not every collateral contract results in the whole agreement falling foul of s 2, for example if the oral terms and the land elements are entirely independent of each other. But for some time courts struggled to decide how "related" the two can be without falling foul of s 2. That is, how to separate the benign sheep from the destructive goats?

In *Tootal* Lord Justice Scott (as he was then) considered it was up to the parties to choose whether to hive off part of their "composite agreement" into a separate oral agreement. This, however, as the court later recognised in *Godden v Merthyr Tydfil Housing Association* (1997) 74 P & CR D1, [1997] NPC 1, does not leave it entirely up to the parties to decide what has to be in writing. The line has to be drawn somewhere—but where?

In *Grossman v Hooper* [2001] EWCA Civ 615, [2001] All ER (D) 245 (Apr) the court asked "upon what terms did the parties agree that the land...was to be sold?" and, having answered that, asked "are all those terms incorporated in the document they have signed?". In other words, did the terms

on which it was agreed the land would be sold include one that was not set out in writing? If yes, s 2 bites; if not, then not.

This however can be a rather easier test to state than apply. *Hooper* said it was answered by asking whether the land contract was conditional on—or, one might add, varied by—the side agreement. But if the side agreement is simply conditional on the land contract or the two are entirely independent of each other, s 2 is not a problem. For example, a collateral oral agreement making the sale conditional on the vendor's back-to-back purchase or to adjust the stated contract price (eg on securing planning permission) both fall foul of s 2. But typical oral agreements to buy fixtures and furnishing conditional on exchanging contracts for the sale of the house (and not vice versa) are not.

Some terms however fall in the middle, for example an agreement to undertake work pre-completion: is that a term of the land contract (bad) or a true collateral agreement ie a promise to do the work *if* the parties enter into that contract (good)? As *Keay* shows, this may sometimes turn on how the term is framed in the pleading.

Also, what is not yet wholly clear is the effect of an "entire agreement" clause. There seem to be a few possibilities. First it may denude the oral terms of contractual effect, as Mr Justice Lightman said in *Inntrepreneur Pub Co v East Crown Ltd* [2000] 3 EGLR 31, [2000] All ER (D) 1100, leaving (just) a s 2-compliant contract. Alternatively, as Mr Justice Briggs suggested in *North Eastern Properties*, it may allow the court to construe the oral terms as independent of the land contract, so that both are separately enforceable (unless the oral agreement is itself a "land" contract, in which case it alone is voided by s 2). But if neither is possible, s 2 will void both parts of the agreement. However clarification of this complex issue would be welcome.

3. Rectification

Faced with these difficulties, parties who agreed oral terms which are not truly collateral under the *Hooper* test have sometimes sought to rely on rectification instead.

In *Oun v Ahmad* [2008] EWHC 545 (Ch), [2008] All ER (D) 270 (Mar) Mr Justice Morgan (as he was then) held that was not available if the parties expressly chose to omit the term. The difficulty however lies in the concept of express agreement. Will a tacit one not do and, if not, why not? Is it enough the parties intended the writing to say everything it did or must you prove a specific intention to exclude the oral terms? *Francis v F Berndes Ltd* [2011] EWHC 3377 (Ch), [2012] 1 All ER (Comm) 735 provides part of the answer. Mr Justice Henderson held rectification was barred in more circumstances than that of express agreement (without stating exhaustively what they were) including where the legal error was as to the existence or operation of s 2. This has the effect of restricting rectification in these cases to cases of simple oversight and where that is something other than as to the existence or effect of s 2.

4. Proprietary estoppel

Another potential way around s 2 is the use of proprietary estoppel by a purchaser, yet its application in this context is controversial and courts still struggle to define the circumstances when it is available.

This issue warrants an article by itself and what follows is a very brief outline only. Estoppel is clearly available where the circumstances giving rise to it also give rise to a constructive trust (s 2(5)): *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711. Yet the member of the court in *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] All ER (D) 229 (May) disagreed as to whether an estoppel unassociated with a constructive trust could get around s 2. Various decisions support one or other point of view. See the discussion in *Emmett on Title paras 2.030.02 et seq*.

The contrasting decisions in *Cobbe v Yeomans Row Management Ltd* [2006] EWCA Civ 1139, [2006] All ER (D) 01 (Aug) and *Thorner v Major sub nom Thorner v Curtis* [2009] UKHL 18, [2009] 3 All ER 945 suggest a distinction between estoppels in the domestic context, where s 2 appears to be irrelevant, and those in the commercial sphere, where an estoppel capable of getting around s 2 cannot arise where the expectation is of entering into a s 2-compliant agreement or where the agreement lacks certainty or completeness (although restitutionary remedies may be available).

This, however, appears to leave open the question whether an estoppel can operate in relation to an oral agreement that falls foul of the *Hooper* test or in the commercial sphere where the need for a s 2-compliant contract is not appreciated but the parties reach an otherwise-complete and certain agreement that was intended to be binding. An argument as to availability of estoppel in those scenarios appears to be open to anyone brave and rich enough to try it.

Conclusion

So it is perhaps fair to conclude that section 2 has not (at least yet) given us quite the certainty that was hoped for, although expectations of perfect clarity were always unrealistic. Over the coming years courts can be expected to address the outstanding issues above as well as deal with fresh challenges posed by lawyers' and litigants' inadvertence, indiscipline or ingenuity. **NLJ**

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