

Neutral Citation Number: [2024] EW Misc 19 (CC).

Claim No: J00NU318

IN THE COUNTY COURT AT NUNEATON

Trial dates: 28 February to 1 March 2024 (Nuneaton) and 20, 22, 23, 24 and 31 May 2024 (Coventry)

B E T W E E N :

MR PETER CONWAY

Claimant

-and-

(1)MR STEPHEN CONWAY
(2)MRS AMBER MEEK

Defendants

BEFORE HIS HONOUR JUDGE MITHANI KC, sitting at the County Court at Nuneaton on 28, 29 February and 1 March 2024 and in the County Court at Coventry on 20, 22, 23, 24 and 31 May 2024

Mr Cameron Stocks (instructed by Excello Law) for the Claimant

Mr Simon Clegg (instructed by John Mohamed & Co Ltd) for the Defendants

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

His Honour Judge Mithani KC

(31 May 2024)

A THE CLAIM AND COUNTERCLAIM

- 1 In these proceedings, the Claimant is Peter Conway. I will refer to him as the Claimant.

- 2 The Defendants are Stephen Conway and his wife, Ms Amber Meek. I will refer to Stephen Conway as the First Defendant; to Ms Amber Meek as the Second Defendant; and to the First and Second Defendant collectively and, at times, individually as the "Defendants".

- 3 The sole or principal issue in this case is whether the Defendants are entitled to require the Claimant to transfer the property known as "the Barn", which is part of a much larger property that the Claimant owns known as Church Farm, Hospital Lane in Bedworth, CV12 OJZ, to the Defendants. I will refer to that property as "the Barn", and the property which the Claimant owns as "Church Farm".

- 4 If this court comes to the conclusion that the Claimant succeeds in his claim, i.e., that the Defendants are not entitled to require the Barn to be transferred to them, the question arises whether the court should still grant the injunctions specified in the prayer for relief contained in the Particulars of Claim. The answer to this question has to depend on whether it is likely that the Defendants will trespass on the Claimant's land if he succeeds. It seems unlikely that they would. Likewise, if the Defendants succeed in their counterclaim, the court would need to consider whether the grant of the relief set out in paras. 4 and 5 of the

Counterclaim is necessary or appropriate. It does not appear to me that it would be. However, in either situation, the successful party should, ordinarily, be entitled to the other heads of relief sought in their statements of case.

- 5 This is a case where the guidance provided in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited and another* [2013] EWHC 3560 (Comm), about how the court should evaluate competing evidence is important. In that case, Leggatt J said that the presence of contemporaneous documents (and their contents) will be of substantial importance in the assessment or evaluation of the oral evidence of the witnesses. In the context of this case, this is vital. That is because while the Claimant – and his stepson Nathan Walker (“Mr Walker”) who gave evidence on his behalf in support of the claim – are convinced that the agreement purportedly reached between the parties for the sale of the Barn included a buy-back option in favour of the Claimant, the contemporaneous documents generated by the parties’ solicitors show a completely different picture.
- 6 The Claimant accepts that there was an oral agreement that he would sell the Barn to the Defendants. However, he asserts that he had agreed with the Defendants that they would grant him an option to repurchase the Barn, though it was unlikely that he would ever need to exercise that option. The Claimant says that he needed to have that option in case it impeded his ability to develop Church Farm to its full potential.
- 7 It probably does not matter why the Claimant wished to have the option, other than to advance before the court that there was a credible reason for him to want it. However, the important point here is that while he and Mr Walker maintain that the option was

agreed between the parties from the outset, every document I have seen suggests otherwise. Specifically, the documents extracted from the Claimant's solicitors file of papers suggest that this was never mentioned by either the Claimant or Mr Walker¹ to the Claimant's solicitors until very late in the day.

- 8 I do not read *Gestmin* as saying that one simply disregards the oral evidence of the parties. But the important point here is that where there are contemporaneous documents supporting an account put forward by one party, there has to be convincing evidence to demonstrate that those documents do not reflect what the parties had agreed to do. That is not to say that the burden of proof switches from one party to another, simply that the court must regard that as an important consideration in its evaluation of the evidence (both written and oral) that has been adduced in the proceedings.

B BACKGROUND CIRCUMSTANCES

- 9 For the purposes of this judgment, it is only necessary that a brief account of the background circumstances is given.
- 10 As I have indicated, Church Farm is owned by the Claimant. It comprises over 20 acres of land and buildings including the property known as the Barn.
- 11 It is common ground between the parties that discussions took place in or around March 2019 for the purchase of the Barn by the Defendants. The purchase price agreed was £150,000. The Defendants intended to convert the Barn into residential

¹ It is accepted by the Claimant that Mr Walker acted as the Claimant's agent with full authority to give instructions to the Claimant's solicitors about the sale.

accommodation for them and their children pursuant to a planning permission that was obtained in 2006. However, the parties do not agree about the terms of their discussions or with whom those discussions took place.

12 The Claimant asserts that the initial discussions were held between the Claimant and the First Defendant alone and that the oral agreement reached between them included the following terms:

- (a) That payment of the £150,000 was below market value to reflect the works required to renovate the Barn;
- (b) The payment of the £150,000 would be deferred whilst renovation works were ongoing and the Defendants would pay the Claimant the sum of £600 p.c.m., in the interim; and
- (c) There would be a call option for the Claimant to purchase the Barn from the Defendants. This was necessary in case the Barn was required to be included for sale to a third party to develop Church Farm. In the event the buy-back was exercised, the Claimant would pay the market value of the Barn and an additional 10% in compensation.

13 The Defendants assert that the agreement reached between the parties was for the sale of the Barn to them for £150,000 with no call option. They say that the boundaries of the Barn and the land sold with it were as delineated on a plan annexed to the Particulars of Claim. They also maintain that access to the Barn would be given to them by way of a gate situated on the southwest of Hospital Lane and across land comprised in Church Farm.

- 14 The Defendants say that, in reliance upon the agreement they made with the Claimant, they commenced building and renovation works to the Barn in or about March or April 2019. The works carried out by the Defendants were extensive. They say that some of the works were undertaken with the assistance of the Claimant, who the Defendants say was paid £100 a day for providing his services. They assert that a sum of £231,685.20 has been spent by them on works and services to renovate the Barn, including payments made to the Claimant for his services.
- 15 The Claimant does not dispute that a substantial amount of work was carried out to the Barn, though he does not agree the precise amount or value of those works.
- 16 The Defendants maintain that the Barn is largely completed and habitable. The dispute that has arisen between the parties about whether an option was to be included in their agreement has meant that the Defendants have been unable to move into the Barn.
- 17 The Defendants say that they carried out the works to which they refer in reliance upon the agreement they had reached with the Claimant that he would sell the Barn to them.
- 18 It is also the Defendants' case that in late March 2020, an oral agreement was made between the parties by which it was agreed that a sum of £500 each month would be paid for a period of 10 months until the transfer of the Barn to the Defendants took place. The amount was paid by way of a lump sum in October 2021. The Defendants paid £5000 for the 10 months together with a sum of £1500 in respect of the cost of installing a septic tank.

- 19 The parties' relationship broke down when they sought to formalise the oral agreement through their respective solicitors. They could not reach a binding agreement because the Claimant insisted on having an option to purchase the Barn back from the Defendants within a period of 15 years. The Defendants maintained that no such option had been agreed between the parties.
- 20 As a result, this claim was issued on 17 June 2022 by the Claimant seeking, *inter alia*, a declaration that the Defendants were not entitled to enter Church Farm or the Barn and an injunction preventing them from doing so.
- 21 The Defendants defended the claim by way of a defence and counterclaim dated 28 July 2022 denying the terms of the oral agreement and pursuing a counterclaim in proprietary estoppel against the Claimant. The Defendants seek orders that the Barn be transferred to them and injunctive relief enabling access to the Barn to be given to them. The Counterclaim does not seek any alternative relief against the Claimant, such as a claim for unjust enrichment for improving the Barn. However, the Defendants maintain that it is possible for this court to grant them this type of relief under the "further or other relief" head contained in the Counterclaim in the event that the court does not grant them the primary relief sought by them. Alternatively, they say that if the court is not willing to do that, they can bring such a claim in the future. The Claimant rejects this. He contends that an amendment to the Defence and Counterclaim would be required to pursue such a claim in these proceedings. This would not be appropriate for the court to grant because: (a) the court does not have the material before it to assess the value by which the Claimant is alleged to have been enriched; and (b) such a claim would require

the further adjournment of the trial. This would not be appropriate given that the trial has had to be adjourned twice previously. The Claimant further contends that so far as the Defendants intend to bring such a claim in the future, it would be an abuse of process for them to do so. In the event, neither matter is relevant in these proceedings. As regards the first point, no application for an amendment or adjournment was made by the Defendants. As regards the second, what happens in the future is not a concern for the court in these proceedings.

- 22 This trial came before me on 28 February 2024 for three days. On the third day of the trial, it became obvious that the Claimant was referring to several documents which should have been obtained from his former solicitors' – Kundert Solicitors LLP ("Kundert") – conveyancing file of papers. Mr Walker, who provided most of the instructions to Kundert on behalf of the Claimant, said that he had obtained all the papers from Kundert that they had or that he thought were relevant and that he had disclosed these to the Defendants. However, there were plainly more documents that were available from Kundert's file which neither he nor his solicitors had obtained from them.
- 23 Those documents have now been obtained and are included in a supplementary bundle prepared by the Claimant's solicitors.

C THE ISSUE ARISING IN THESE PROCEEDINGS

- 24 The main issues that arise in these proceedings are:
- (a) Whether the Defendants are able to rely on the doctrine of "proprietary estoppel" where their claim is for the

enforcement of a contract which does not comply with the requirements of s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (“s. 2”). This is a matter of pure law. While the Claimant accepts that if the requirements of proprietary estoppel are demonstrated by the Defendants, there may be some consequences for him, he contends that the manner in which the Defendants’ claim is pleaded makes it impossible for this Court to grant them either the relief sought in their counterclaim or any relief at all. If this issue is determined against the Defendants, it is contended by the Claimant that the whole of the counterclaim must fail.

- (b) Whether the Defendants can demonstrate that the requirements for granting relief under the doctrine of “proprietary estoppel” are satisfied. This is primarily a factual issue.
- (c) The terms of the oral agreement agreed between the parties which the Defendants seek to enforce against the Claimant. This is an entirely factual issue.
- (d) If the requirements of proprietary estoppel are satisfied, the relief that should be granted to the Defendants, based on their pleaded case. Specifically, if the court is minded to grant any relief to the Defendants, the court will need to decide whether that relief should involve the making of an order in the terms sought by the Defendants or whether the equity giving rise to the claim made by them can be satisfied by the grant of the minimum relief necessary to do justice between the parties: see *Guest v Guest* [2022] UKSC 27.

D **THE LAW**

1 The formalities required for a contract for the sale of land under s. 2

25 One has to start with the uncontroversial proposition that for an agreement for the sale of land to be enforceable, it is necessary for the person or persons seeking to rely on the agreement to demonstrate that the formalities specified in s. 2 have been complied with.

26 The relevant parts of s. 2 are in the following terms:

“(1) 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.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

””

(5) ... nothing in this section affects the creation or operation of resulting, implied or constructive trusts.”

27 A properly drafted written agreement will usually incorporate a standard set of detailed terms and conditions of sale. The most commonly used standard conditions of sale are the “Standard Conditions of Sale”, which are current at the date of the preparation of the contract of sale². The parties may – and often

² These were also the conditions that were incorporated in the draft contract sent by Kundert to the Defendants’ solicitors. However, the draft contract was not proceeded with. The most recent version of the Standard Conditions of Sale is the Fifth Edition, published in 2018.

do – vary some of the standard conditions of sale by including “special conditions” in the contract. The terms and conditions of the contract of sale will be construed by reference to the general and (so far as varied) special conditions of sale.

28 A well-drafted contract for the sale of land will contain provisions which regulate all the aspects of the parties’ rights and obligations under the contract. How else – it has to be questioned – would the parties know what they are entitled or required to do under the agreement reached between them if there is a dispute. However, a written contract between the parties will be valid and enforceable even if it does not contain every particular provision or detail that would usually be found in standard sets of detailed terms and conditions of sale, such as the Standard Conditions of Sale, provided it includes the essential terms agreed between the parties. I drew the attention of the parties to the concept of an “open contract”. *Emmett and Farrand on Title*, loose-leaf, Professor Julian Farrand *et al*, Sweet and Maxwell, at para. 2.050, contains the following summary of such a contract:

“An open contract means a contract where only certain terms have been expressly agreed, leaving others to be implied by the general law. The simplest possible contract is where only the parties, property and price are specified, e.g. where A agrees to buy Blackacre from B for £100,000. This is the most “open” contract of all and though it is unbusinesslike it is perfectly effective in law. It is implied that the vendor must show a good title within a reasonable time and then complete the contract by the appropriate conveyance or transfer. It is for the purchaser at his or her own expense to prepare the draft conveyance or transfer for the vendor to execute. Contracts which are wholly open are in practice very rare nowadays and they are likely to disappear because of the stricter formal requirements that now apply to contracts for the sale of land. However, the principles which apply to open contracts form the bedrock upon which conveyancing law is built. ... the open contract rules will regulate the affairs of the parties to the extent that their contract does not do so expressly.”

29 It follows that for a contract for the sale of land to be valid and enforceable, whether under s. 2 or under any equitable principle which permits the enforcement of a contract that does not comply

with the requirements of s. 2, it is only necessary for agreement to be reached on the essential requirements of the contract, such as who are to be the parties to the contract, the proper extent of the land being purchased and the price of the land. As regards any other terms, the court will readily imply rights where this is necessary to give effect to it, in accordance with already established legal principles.

2 The Law – Proprietary Estoppel

30 Leaving aside the complications arising from the interaction between s. 2 and proprietary estoppel, *Snell's Equity*, 34th Edition, 2020, John McGhee KC *et al*, Sweet and Maxwell ("*Snell's Equity*"), at 12-036 describes proprietary estoppel in the following simple terms³:

"The House of Lords' decision in *Thorner v Major* [2009] UKHL 18 confirmed the existence, and helped to explain the operation, of a strand of proprietary estoppel that has come into prominence only in the past fifty years. It applies, it is submitted, where A makes a promise that B has or will acquire a right in relation to A's property and B, reasonably believing that A's promise was seriously intended as a promise on which B could rely, adopts a particular course of conduct in reliance on A's promise. If, as a result of that course of conduct, B would then suffer a detriment were A to be wholly free to renege on that promise, A comes under a liability to ensure that B suffers no such detriment."

"The practical importance of the principle derives from the fact that it can be used as a cause of action in a case where B has acted not in reliance on mistaken belief as to B's current rights (as in acquiescence cases) or as to a matter of fact or mixed fact or law (as in representation cases) but rather simply in reliance on a promise made by A as to A's future conduct. It has therefore provided a means of equitable protection for B, for example, where B has relied on a testamentary promise, on a promise as to B's rights in a family home, and on a promise as to rights that B will acquire in a planned commercial project. That protection is available even if there is no contract between the parties, as B's claim depends not on showing that A was placed under an immediately binding duty as a result of A's promise but rather, it is submitted, on showing that, having made the promise, it would now be unconscionable for A to leave B to suffer a detriment as a result of B's reasonable reliance on the promise."

³ In these and other passages of the works which I have cited, I have ignored the cases and other authorities to which references have been made.

31 In *Thorner v Major*, Lord Walker stated, at [29], that proprietary estoppel was based “on three main elements ... a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.”

32 A somewhat lengthier summary is given in *Megarry & Wade: The Law of Real Property*, 10th Edition, Martin Dixon *et al* (“*Megarry & Wade*”), at para 15-001, on what constitutes proprietary estoppel:

“Proprietary estoppel ... is a means by which property rights may be affected or created. The term describes the equitable jurisdiction by which a court may interfere in situations where the assertion of strict legal rights is found to be unconscionable. Although this jurisdiction is of ancient origin, it has been much developed by the courts in recent years and some of its more “archaic and arcane” features have been abandoned. The flexibility of the jurisdiction is such that the criteria for relief can be stated only in broad terms. Indeed, such is its nature that ‘it is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments’ and that ‘the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine’.”

3 The interaction between s. 2 and the doctrine of “proprietary estoppel”

33 Is proprietary estoppel applicable to the facts that arise in this case?

34 The Claimant contends that proprietary estoppel, cannot, as a matter of law, have any application on the facts of this case. He maintains that what the Defendants are seeking is, essentially, specific performance of the oral agreement that they claim was reached between them and the Claimant. As s. 2 makes that agreement void, proprietary estoppel can have no effect in relation to it – or at any rate not the effect that the Defendants contend for.

- 35 On behalf of the Claimant, Mr Stocks relies on several authorities in support of this contention.
- 36 First, he refers to *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55. In that case, a company (Y) had been formed to purchase a property consisting of a block of flats with potential for residential development. One of the flats was occupied by Y's director. Y and the claimant reached an oral agreement, in principle, for the sale of the land to the claimant. The substance of the agreement was that the claimant would, at his own expense, apply for planning permission; Y would then sell the property to the claimant or to a nominated company for an agreed up-front price of £12m. the claimant would then, at his own expense, develop the land in accordance with the planning permission and sell off the residential units; and the claimant would pay to Y 50 per cent of the amount by which the gross proceeds of sale exceeded £24m. Pursuant to that agreement, the claimant expended considerable sum of money and time to obtain the planning permission. Y then sought to re-negotiate the core financial terms and refused to proceed on the basis of the originally agreed financial terms. The claimant claimed that he was entitled to an interest in the property by virtue of a constructive trust or proprietary estoppel. The Court of Appeal regarded the finding that Y's behaviour in repudiating, and seeking an improvement on, the core financial terms was unconscionable as justifying the creation of a proprietary estoppel. The House considered the grant of relief to the claimant on the bases of the proprietary remedies of proprietary estoppel and constructive trust, and on the bases of the in *personam* remedies of unjust enrichment, quantum meruit and a restitutionary remedy based on complete failure of consideration.

37 Refusing the relief sought by the claimant under the doctrine of proprietary estoppel, Lord Scott said, at [29]-

“Section 2 of the 1989 Act declares to be void any agreement for the acquisition of an interest in land that does not comply with the requisite formalities prescribed by the section. Subsection (5) expressly makes an exception for resulting, implied or constructive trusts. These may validly come into existence without compliance with the prescribed formalities. Proprietary estoppel does not have the benefit of this exception. The question arises, therefore, whether 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, can become enforceable via the route of proprietary estoppel. It is not necessary in the present case to answer this question, for the [oral “agreement in principle”] was not a complete agreement and, for that reason, would not have been specifically enforceable so long as it remained incomplete. My present view, however, is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute... ”

38 Though unsuccessful in his proprietary estoppel and constructive trust claims, the House of Lords ruled that he should succeed in one of his “in personam” claims, i.e., in his claim for unjust enrichment which he had pleaded in the alternative. Mr Stocks maintains that this is not possible in the present case as the Defendants have failed to make an alternative claim for unjust enrichment. On that basis, their counterclaim must fail as it is based entirely on the application of proprietary estoppel to enforce an agreement which is void under s. 2. He rejects the suggestion that the reference to “further or other relief” in the prayer for relief specified in the counterclaim allows the Defendants to maintain such a claim, contending, *inter alia*: (a) that the words “further or other relief” do not permit such a wide-ranging claim to be made against the Claimant; (b) no proper particulars are given of such

a claim; (c) no proper evidence has been adduced in relation to such a claim; for example, there is no expert evidence to enable the court to decide the extent to which the Claimant was unjustly enriched, even though the Claimant accepts that he has been unjustly enriched to some extent; and (d) it would be inappropriate for the court to order the taking of an account to ascertain the value of the works carried out to the Barn, not just because there is no prayer seeking such an account but also because it would result in further costs being incurred by the parties and the proceedings being unnecessarily and unreasonably prolonged.

- 39 Second, Mr Stocks relies on the decision in *Howe v Gossop* [2021] EWHC 637 (Ch). In that case, the appellants owned a large amount of land. By a transfer in 2011, they sold a building to the respondents for use as a dwelling-house. At a meeting in 2012, the respondents proposed that the appellants transfer to them two pieces of land (Plot A and Plot B) in return for the waiver of a £7,000 debt. The respondents prepared one of the pieces of land (Plot A) for use as a garden. Relations later broke down and the appellants sought possession of the two pieces of land. Dismissing the appeal against the decision of the trial judge, Snowden J (as he then was) held: (a) that the parties had made an oral agreement in 2012 in the terms of the respondents' proposal; (b) although the requirements of s. 2 for a contract for the sale of land had not been met, that was not fatal to a proprietary estoppel arising; (c) that an estoppel had arisen, to be given effect as if the appellants had granted a licence to the respondents over the Plot A which was irrevocable whilst at least one of them remained alive and continued to own the house; and (d) as the parties had not precisely identified the extent of Plot B, no estoppel had arisen over it.

40 In that case, Snowden J conducted a detailed review of the authorities on the interaction between s. 2 and proprietary estoppel. At [45] onwards of his judgment, he said:

45. A comprehensive, and in my view accurate, identification of the issues arising in relation to Section 2 appears in *Snell's Equity* at paragraph 12-046 under the heading "Formality requirements and other possible bars". That paragraph states, (citations omitted), "[Section 2] provides that contracts for the sale or other disposition of an interest in land must satisfy certain formal requirements, although s. 2(5) contains an express saving for constructive trusts. There has been some uncertainty as to the impact of this section on promise-based proprietary estoppel claims. Two principal views are possible. First, it could be said that [Section 2] imposes a prima facie bar on such claims, and therefore they can be made, if at all, only by means of a constructive trust. Secondly, it could be said that no proprietary estoppel claim is caught by [Section 2], as the section regulates the requirements of a contract for the sale or other disposition of an interest in land, and a proprietary estoppel claim, even if promise-based, is distinct from a contractual claim. The better view, it is submitted, is the latter. In particular, it should be remembered that [Section 2], on its express wording, does not purport to deny all legal effects to a promise, or to render an agreement void: it clearly applies only to contractual claims. It might be argued that the policy behind the statute is more extensive, but it has been accepted that the statute does not deny all legal effects to informal agreements and also that it has no impact on an acquiescence-based claim: "it would be a strange policy which denied similar relief to a claimant who had acted on a clear promise or representation that he should have an interest in the property". Moreover, there are no examples in the case law of an otherwise valid proprietary estoppel claim failing simply because of the effect of [Section 2]. The only practical impact of the first view is that judges have felt obliged to characterise a successful proprietary estoppel claim as giving rise to a constructive trust even if, on the facts of the case, there is no suggestion that A in fact holds any right on trust for B. The law would therefore be more transparent if it were clearly established that [Section 2], as was intended by the Law Commission when proposing the reforms that led to the 1989 Act, has no effect on any proprietary estoppel, whether based on A's acquiescence, representation, or promise." The reference to the intention of the Law Commission when proposing the reforms that led to Section 2 was explained by Beldam LJ in *Yaxley v Gotts* [2000] Ch. 162 at pages 188-190 and reiterated by the Court of Appeal in *Dowding v Matchmove Ltd* [2017] 1 W.L.R. 749 at [26].

46. ... I consider that *Megarry & Wade* actually takes a similar view of the impact of Section 2 in paragraph 15-028 under the heading "Other bars to relief – enforcement contrary to statute". That paragraph states, (citations omitted) : "The court will not give effect to C's equity if and to the extent that to do so would contravene some statute. This latter principle is subject to two qualifications. First, the

court will give such relief as does not conflict with the statute even if it cannot give the more extensive rights which C might otherwise have sought. As has been explained, this requires the court to examine the mischief which the statute sought to address. Secondly, it is not every statutory provision that is fatal to the enforcement of an equity. If the statute merely regulates the dealings between the parties to a transaction, rather than laying down some more general rule of a public character, the court may give effect to an equity in [the claimant's] favour and [the landowner] may be unable to rely on the statute. [The landowner] may therefore be estopped from relying on the provisions of ... a statute requiring compliance with certain formalities for contracts or trusts relating to land.'

47. Further, in the footnote reference to 'certain formalities for contracts' at the end of that paragraph, it is suggested that the view that an estoppel requires a constructive trust to 'shield it from the effect of Section 2' (by use of section 2(5)), 'fails to recognise that estoppels are not caught by Section 2 precisely because they remedy unconscionability. They do not purport to enforce the contract and do not need the shield of Section 2(5) and the constructive trust. Of course, it might be difficult to establish unconscionability arising from a failed contract where the parties are experienced persons of business..'
48. Although having a slightly different emphasis, I consider that those extracts from *Snell's Equity* and *Megarry & Wade* both seek to make the same basic point. Section 2 is aimed at problems in the formation of contracts for sale of land, whereas the purpose of an estoppel is to remedy unconscionability in the assertion of strict legal rights. Accordingly, there is considerable doubt that Section 2 is intended to affect the operation of proprietary estoppel at all, but even if it did, Section 2 could only operate as a bar to the grant of equitable relief if and to the extent that such relief had the effect of enforcing, or otherwise giving effect to, the terms of a contract for the sale or other disposition of an interest in land that the statute renders invalid and unenforceable.
49. So, for example, in *Cobbe* the claimant was in effect attempting to use proprietary estoppel to obtain an order enforcing the terms of an unwritten contract under which he would acquire an interest in the land owned by the defendant. That was why, in paragraph [29] of his speech, Lord Scott focussed directly on the question of whether a claimant could use an estoppel as a means of enforcing such a contract notwithstanding the clear statutory policy invalidating it, 'My present view, however, is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute ...' (my emphasis)
50. Where, however, the alleged proprietary estoppel is not raised in order to enforce the terms of a contract for sale or other disposition of an interest in land, there is no equivalent reason why Section 2 should operate as a bar to the grant of equitable relief. That was the explanation given by Lord Neuberger in paragraph [99] of his speech

in *Thorner*, where there was no question of any contract being agreed between the uncle and the claimant.'

41 Mr Stocks' point is that, in *Howe*, the respondents had sought an irrevocable licence of the land in question rather than specific performance of the oral agreement for the sale of the land and, therefore, were not asserting a proprietary estoppel to enforce the agreement reached in contravention of s. 2. Nor were they seeking to remedy any unconscionability by seeking an order for the sale of the land to them in accordance with the terms of the oral agreement reached. As Snowden J observed, at paras. [53]-[54]:

"But what, in my judgment, is important, is that Mr. and Mrs. Gossop were not asserting a proprietary estoppel in an attempt to *enforce* the agreement that had been reached in March 2012. As set out above, they raised the proprietary estoppel argument in order to defeat the claim for possession against them by Mr. and Mrs. Howe ... Nor was it Mr. and Mrs. Gossop's pleaded case that the unconscionability of Mr. and Mrs. Howe seeking possession of the Green Land should be remedied by an order for sale of the Green Land to themselves in accordance with the terms of the oral agreement of March 2012. Instead, like the respondents in [Sahota v Prior](#), their pleaded case was that the equity which they contended had arisen operated to prevent Mr. and Mrs. Howe seeking to assert their legal right to possession and should be given effect by a declaration that they be entitled to a licence to occupy the Green Land for their lives or until they sold Lea Farm."

42 Mr Stocks asserts that the position that applied in *Howe* does not apply in the present case. In the present case, the Defendants seek what is, in essence, specific performance of a void oral agreement reached by them with the Claimant by relying on the doctrine of proprietary estoppel. He claims that on a proper analysis of *Cobbe* and *Howe*, this is simply not possible because proprietary estoppel will not save the agreement from the consequences of failing to comply with s. 2 or – as Lord Scott put it in *Cobbe* – "Equity can surely not contradict the statute."

43 In addition, Mr Stocks relies on several other cases to make good his above submission. Those cases include: *Herbert v Doyle*

[2010] EWCA Civ 1095; and *Thandi v Saggu* [2023] EWHC 2631 (Ch), the last case being one that I had drawn to the attention of the parties.

44 There is plainly some basis for contending that proprietary estoppel is not available to a party where that party seeks to enforce a contract which is void for want complying with the requirements of s. 2.

45 Mr Stocks accepts that although s. 2(1) prohibits the use of proprietary estoppel to enforce a contract for sale or other disposition of an interest in land, it is not entirely without effect. A claimant who seeks relief that amounts to the enforcement of a non-compliant contract will – as Snowden J observed – need ‘to point to something else as the basis for an estoppel based on unconscionability⁴.’ On the analysis in *Howe*, a party to a contract may rely on an oral agreement for the disposition of an interest in land to support a proprietary estoppel claim, as long as they seek to have the equity satisfied by a form of relief that does not give effect to the agreement. In practice, according to *Howe*, this is likely to mean that if the oral agreement is for the sale of land, an order that satisfies the equity by the grant of a lease or licence will not contravene s. 2(1). The relief is based on the doctrine of proprietary estoppel being a “mere equity”, which should be satisfied by the grant of the minimum relief necessary satisfy it and do justice: see *Guest v Guest* [2022] UKSC 27. In the present case, Mr Stocks argues that this court ought not to grant any relief to the Defendants (including any award of compensation) if, as he contends the court must, dismiss their claim for specific performance. That is because there is no prayer for such relief relied in the Counterclaim; the words “further or other relief” have

⁴ [2021] EWHC (Ch), at [66].

restricted application; and, for the reasons I have already mentioned, those words do not allow the court to award a type of relief which is not specifically pleaded and supported by proper particulars, such as a claim for unjust enrichment.

46 The comments made by Snowden J in *Howe* were *obiter* only and were premised upon what were also the *obiter* remarks of Lord Scott in *Cobbe* at [29], reproduced, above.

47 Mr Simon Clegg, on behalf of the Defendants, states that there is a more powerful line of authority that supports his contention that this court can give effect to the oral agreement reached between the parties despite the terms of the agreement not complying with the formalities in s. 2. In addition, he contends that the Defendants are entitled to enforce the agreement based on the premise that the Barn is held upon by the Claimant on constructive trust (essentially, what is commonly referred to as a “common intention constructive trust”) and the Defendants are entitled to enforce that trust against the Claimant. He states that although the Counterclaim does not expressly refer to the expression “constructive trust”, it is clear from the particulars provided in the Counterclaim that the principles of constructive trust are equally applicable in this case. He points out that s. 2(5) expressly exempts the creation and operation of resulting or constructive trusts where the formalities under s.2(1) are not satisfied. Accordingly, if the ingredients supporting such a trust are satisfied, the court is not limited to awarding the Defendants the minimum relief necessary satisfy that trust in order to do justice, as it would need to do in a proprietary estoppel case.

- 48 Leaving aside whether any constructive trust exists in the present, Mr Clegg relies on several authorities which he claims supports his contention on proprietary estoppel.
- 49 In *Yaxley v Gotts* [2000] Ch. 162, the trial judge had held that a concluded oral agreement under which the purchaser of a house had promised to grant a builder an interest in the house in exchange for materials and services supplied, was enforceable on the basis of proprietary estoppel. On appeal, the Court of Appeal held that the facts supported a conclusion that the builder was entitled to an interest in the house on the basis of a constructive trust, which fell within s. 2(5). However, Beldam LJ noted that when the Law Commission proposed the reforms that were embodied in the 1989 Act, it clearly stated its intention that the legislation was not intended to dilute the court's power to give effect to the principles of proprietary estoppel and constructive trusts. In his view, estoppel could operate outside the statute because it did not undermine the policy of the statute. He observed at pp 191-193:

"The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it. This was not a provision aimed at prohibiting or outlawing agreements of a specific kind, though it had the effect of making agreements which did not comply with the required formalities void. This by itself is insufficient to raise such a significant public interest that an estoppel would be excluded. The closing words of section 2(5) - "nothing in this section affects the creation or operation of resulting, implied or constructive trusts" - are not to be read as if they merely qualified the terms of section 2(1). The effect of section 2(1) is that no contract for the sale or other disposition of land can come into existence if the parties fail to put it into writing; but the provision is not to prevent the creation or operation of equitable interests under resulting implied or constructive trusts, if the circumstances would give rise to them.

There are circumstances in which it is not possible to infer any agreement, arrangement or understanding that the property is to be shared beneficially but in which nevertheless equity has been prepared to hold that the conduct of an owner in allowing a claimant to expend money or act otherwise to his detriment will be precluded from denying that the claimant has a proprietary interest in the property. In such a case it could not be said that to give effect to a proprietary estoppel was contrary to the policy of section 2(1) of the

Act of 1989. Yet it would be a strange policy which denied similar relief to a claimant who had acted on a clear promise or representation that he should have an interest in the property. Moreover claims based on proprietary estoppel are more likely to arise where the claimant has acted after an informal promise has been made to him.

In my view the provision that nothing in section 2 of the Act of 1989 is to affect the creation or operation of resulting, implied or constructive trusts effectively excludes from the operation of the section cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel."

That, to my mind, is the case here. There was on the judge's findings, as I interpret them, a clear promise made by Brownie Gotts to the plaintiff that he would have a beneficial interest in the ground floor of the premises. That promise was known to Alan Gotts when he acquired the property and he permitted the plaintiff to carry out the whole of the work needed to the property and to convert the ground floor in the belief that he had such an interest. It would be unconscionable to allow either Alan or Brownie Gotts to resile from the representations made by Brownie Gotts and adopted by Alan Gotts. For my part I would hold that the plaintiff established facts on which a court of equity would find that Alan Gotts held the property subject to a constructive trust in favour of the plaintiff for an interest in the ground floor and that that interest should be satisfied by the grant of a 99-year lease. I consider the judge was entitled to reach the same conclusion by finding a proprietary estoppel in favour of the plaintiff."

50 Beldam LJ was particularly qualified to proffer a view on the intention behind the enactment of s. 2. He had been the Chairman of the Law Commission at the time of the promulgation of its working paper and report, entitled "Formalities for Contracts for Sales of Land" (see (1987) Law. Com. No.164) on which the 1989 Act was based.

51 The decision of Bean J (as he then was) in *Whittaker v Kinnear* [2011] EWHC 1479 (QB) is another example of a court being prepared to enforce an agreement that did not comply with the requirements of s. 2(1). W had been the freehold owner and occupier of two adjacent registered titles: her house and garden, and some land. She sold them to the respondent (K) but remained in occupation of the house and garden. K defaulted on a mortgage he had granted over the property, a possession order was obtained against him and receivers were appointed to pursue possession of the property. The receivers issued possession proceedings against

W who relied on the defence of proprietary estoppel, contending that she had sold the land to K at an undervalue on the understanding, based on assurances from K, that she could remain living there as long as she wanted. The trial judge held that proprietary estoppel could not succeed because of the application of s. 2 and made an order for possession against W. Allowing the appeal against that decision, Bean J said, at [28]-[36]:

“Lord Scott made it clear that the remarks [in *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, at [29]. Reproduced above) were *obiter*. They are accordingly not binding on me...”

One of the members of the court in *Yaxley v Gotts* was Beldam LJ. He had been Chairman of the Law Commission at the time of its working paper and report on Formalities for Contracts for Sales of Land on which the 1989 Act was based. Like Hengham CJCP who in oral argument on a point of statutory interpretation in a case in 1307 (*Aumeye v Anon* YB 33-35 Edw 1 82) said to counsel “do not gloss the statute, for we know it better than you: we made it”, he was in a good position to say what the Commission had in mind. He said: ‘In the present case the policy behind the Commission’s proposals was as clearly stated as its intention that the proposals should not affect the power of the court to give effect in equity to the principles of proprietary estoppel and constructive trusts. Even if the use to be made of the Commission’s report is to be confined to identifying the defect in the law which the proposals were intended to correct, in a case such as the present it is unrealistic to divorce the defect in the law from the policy adopted to correct it. The Commission’s report makes it clear that in proposing legislation to exclude the uncertainty and complexities introduced into unregistered conveyancing by the doctrine of part performance, it did not intend to affect the availability of the equitable remedies to which it referred.’ I therefore accept [the] submission that, notwithstanding Lord Scott’s dicta in *Cobbe*, proprietary estoppel in a case involving a sale of land has survived the enactment of s 2 of the 1989 Act.

In *Cobbe*, Lord Walker did not think it necessary or appropriate to consider the issue of s 2. However, he drew a distinction between commercial and domestic cases, saying ‘It is unprofitable to trawl through the authorities on domestic arrangements in order to compare the forms of words used by judges to describe the Claimant’s expectations in cases where this issue (hope or something more?) was not squarely raised. But the fact that the issue is seldom raised is not, I think, coincidental. In the commercial context, the Claimant is typically a business person with access to legal advice and what he or she is expecting to get is a contract. In the domestic or family context the typical Claimant is not a businessperson and is not receiving legal advice. What he or she wants and expects to get is an interest in immovable property, often for long term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic Claimant does not stop to reflect (until disappointed expectations lead to litigation) whether some further legal transaction (such as a grant by deed or the making of a will or codicil) is necessary to complete the promised title.’ Lord Neuberger drew a similar

distinction between commercial and domestic cases in *Thorner v Major*. I accept Mr Moraes' submission that it is the nature of the parties' dealings, not the nature of the property, which determines whether a case is to be regarded as commercial or domestic. Judge Lochrane classified the present case as commercial. In my view he was right to do so.' The question is then whether, on the assumption that what is pleaded in the Amended Defence may be true, assurances of the kind given by Mr Kinnear to Mrs Whittaker can create a proprietary estoppel or a constructive trust in her favour notwithstanding that the parties went on to sign a contract of sale which made no mention of them.

One lesson to be drawn from *Herbert v Doyle* and *Thorner v Major* is the fact-sensitivity of claims based on proprietary estoppel or constructive trust. As Lord Neuberger said in *Thorner* at para 80, "the meaning to be ascribed to words passing between parties will depend, often very much, on their factual context". He went on to emphasise that the trial judge in that case had the advantage of hearing the parties' oral evidence and was consequently far better able than any appellate tribunal (even with the benefit of transcripts of the evidence) to assess not only how the statements would have been intended by Peter and understood by David, but also whether any understanding and any reliance by David were reasonable'."

52 On behalf of the Defendants, Mr Clegg points to the fact that it is significant that the decision in *Whittaker v Kinnear* was not cited to the court in *Howe*. If it had been, it might have better informed Snowden J of what was in the mind of the Law Commission when the 1989 Act was enacted to replace s. 40 of the Law of Property Act 1925.

53 In *Muhammed v Ary Properties Ltd* [2016] EWHC 1698 (Ch), Master Matthews (as he then was) analysed the authorities on the interaction between s. 2 and the doctrine of proprietary estoppel and said, at [45]:

"In addition, as I mentioned at the hearing, I am aware that Lord Neuberger has stated a view extra-judicially which is at odds with that of Lord Scott. In a lecture to the London Common Law and Commercial Bar Association on 9 June 2009 Lord Neuberger said 'I suggest that section 2 has nothing to do with the matter. In cases such as those in *Crabb v Arun* and *Thorner v Major*, the estoppel rests on the finding that it would be inequitable for the defendant to insist on his strict legal rights ... where there is the superadded fact that the claimant, with the conscious encouragement of the defendant, has acted in the belief that there is a valid contract. I suggest that section 2 offers no bar to a claim based in equity'."

54 He then went on to say, at [46] and [47]:

"I have the *obiter dictum* of one Lord of Appeal in a House of Lords decision [Lord Scott in *Cobbe*], and the considered but extra-judicial view of another Lord of Appeal (now Supreme Court Justice) [Lord Neuberger]. Even more unfortunately, they also point in diametrically opposed directions. There is also the decision of the Court of Appeal in *Yaxley v Gotts*, the scope and ambit of which is not entirely clear, but which certainly supports the notion that at least in some cases s 2 does not bar a claim based on proprietary estoppel. For what it may be worth, my own preference would be for the view espoused by Lord Neuberger [and] Bean J ..."

55 The views expressed in the cases referred to above, supporting the position of the Defendants, is also endorsed by *Megarry & Wade*, at 15-003:

"Despite some dicta expressing concern about the relationship of proprietary estoppel to the formality rules found in the Law of Property (Miscellaneous) Provisions Act 1989, it is now clear that this does not affect the operation of the doctrine."

56 Like *Megarry & Wade*, I prefer the view that proprietary estoppel may make it possible for an agreement that does not comply with s. 2 to be enforced, provided, of course, the ingredients necessary to establish the proprietary estoppel are satisfied.

57 In my judgment, therefore, provided the facts relied upon by the Defendants are made out, they are entitled to equitable relief under the doctrine of proprietary estoppel by the grant of the minimum relief necessary to satisfy the equity arising under it in order to do justice to the Defendants.

4 The interaction between s. 2 and "constructive trust"

58 An interesting question arises whether, on the facts of this case, it would be possible for the Defendants to argue that the Barn was held on a constructive trust by the Claimant for the Defendants.

- 59 *Megarry & Wade*, at 15-038, states that “there is no reason why both a claim in contract and to an equity by proprietary estoppel should not arise from the same factual mix, providing (if the contractual defect is the absence of writing altogether) that there is sufficient evidence of unconscionability to justify circumventing the need for formality in contracts concerning land. However, the existence of a valid or failed contract is not a prerequisite to an equity by estoppel and of course many cases simply do not fit a contractual model.” *Megarry and Wade* then provides examples of when this may be possible and some of those examples appear to me to encompass the facts that apply in this case.
- 60 My provisional view is that if the facts relied upon by the Defendants are established: (a) it would be possible for the relief sought by them to be granted on the usual constructive trusts principles; and (b) the case of the Defendants is sufficiently clearly pleaded to enable them to do that. However, appreciating that the Defendants’ primary basis for claiming the relief set out in the Defence and Counterclaim was that proprietary estoppel applied, and no submissions were made about the application of any other equitable principle or doctrine, I need say nothing further about it.

E BURDEN AND STANDARD OF PROOF

- 61 The burden of proving the facts and matters upon which the Defendants rely on making good their claim for proprietary against the Claimant rests upon them. The standard of proof is the usual civil standard of proof: the balance of probabilities.
- 62 Numerous factual matters have been relied upon or raised by the parties in these proceedings. As far as my approach to the determination of those factual matters is concerned, it is

appropriate for me to make this short point: it is not necessary for me to decide every point which has been advanced by the parties in order to determine the issues in the proceedings. It is only necessary for me to decide whether the matters relied upon by the parties are supported by the evidence which I have heard and, if they are, whether they warrant the relief sought by them against the other party or parties being granted: see, by way of examples, *Weymont v Place* [2015] EWCA Civ 289, at [4]-[6], per Patten LJ; and *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385, CA.

F THE EVIDENCE IN THE CLAIM

63 I heard oral evidence from the parties and from various other individuals.

64 I found the evidence which the Claimant gave, for the large part, to be unreliable. Likewise, I found much of the evidence that his stepson, Nathan Walker gave, also to be unreliable.

65 There were many examples of this. It suffices if I mention a few.

66 Just about every contemporaneous document that was included in the trial bundle demonstrated that, at no time, until very late in the day, was any option to repurchase (or “buy-back” as it was described by the witnesses) the Barn discussed between the parties. Neither the Claimant nor Mr Walker had any answer to the contents of the documents extracted from Kundert’s file of papers that were put to them in cross-examination. They persisted with the response that they had told Kundert that the Barn was to be subject to an option and could not explain why this was not borne out by any letters which Kundert had sent to them or any file notes

of the conversations they had with the Claimant or Mr Walker. They sought to blame the incompetence of various individuals at Kundert for this, alleging that Kundert were told of the option but had failed to record it because they did not do their job properly or simply that they had not thought it important to record it or that they could not understand why there was no record of it until 23 September 2021 because Kundert knew from the outset that there was to be an option agreement.

67 The plain fact is that no option or buy-back was agreed between the parties. Whether it was because after the agreement was reached, the Claimant received an offer for his adjoining land from a developer or whether he thought that he was selling the Barn at less than its market value appears to me to be largely irrelevant. What was clear from the few documents produced from Kundert's file of papers before the trial was adjourned was that no option to repurchase the Barn was ever agreed between the parties. Why the entirety of Kundert's file was not obtained when the matter first came before trial is still not clear to me. When the Claimant's solicitors managed to obtain the entire file, the position advanced by the Claimant about an option being agreed simply became untenable.

68 As I have said, every contemporaneous document from Kundert's file of papers demonstrates that no option had been agreed. The revised chronology, prepared by Mr Clegg, containing the relevant chain of correspondence extracted from Kundert's file – the substance of which I agree with – sets out what happened after the parties had reached an agreement about the sale of the Barn. I will only refer in this judgment to some of the documents that unequivocally confirm that at no relevant stage was any option agreed.

69 The first document of relevance is the client care letter sent by Kundert to the Claimant dated 28 January 2020. This followed a meeting which took place between Henry Whitney of Kundert and the Claimant on 8 January 2020. The file note of that meeting makes no reference to any option. This is what it says:

“... Mr Conway is surprisingly relaxed by the current position (I would be a bit cross) and he is happy to transfer the property (and I saw plans) but on the basis that Mr Stephen Conway pays him the £150,000 together with £600 for each month from as yet undecided date to the date of completion to compensate him for the additional cost he is meeting in the terms of his mortgage. We discussed briefly and prolifilary [sic] the need to ensure that the house retains the necessary rights over the barn; that the barn sale does not include the accessway but has a right of way over the accessway and that the barn is to be able to access the septic tank in the field at the back subject to the payment of a reasonable service charge.” (Emphasis supplied).

70 This file note is, by itself, sufficient to lead to the inescapable conclusion that no option was agreed. If an option had been agreed, the file note would have said so at that point. On a matter of that importance, it is inconceivable that the file note would not have referred to the option and the terms upon which the Barn was to be repurchased by the Claimant under the option. The file note represented the scope of Kundert’s instructions by the Claimant. It is highly unlikely that Kundert would not have mentioned the grant of the option if those were their instructions.

71 It was contended on behalf of the Claimant that the first sentence of the emphasised words of the file note is an implicit reference to the option. That is palpably incorrect. It is plain from considering the rest of the emphasised words that what was being referred to was the need to ensure that the land retained by the Claimant, i.e., Church Farm, had sufficient rights over the Barn. If it did not, the position concerning the enjoyment by the Claimant of the retained land could be severely impeded. This situation is common

in conveyancing transactions where part of a property is being transferred by a vendor to a purchaser. The inclusion of an appropriate provision about the reservation of rights over the land sold avoids any arguments in the future about what rights over the transferred land were intended to be enjoyed by the owner of the retained land.

- 72 There was no reference in the client care letter dated 28 January 2020 to a buy-back option. Three points may be made in this context: first, the client care letter was recording the scope of the instructions of Kundert by the Claimant agreed at the meeting on 8 January 2020. If the Claimant is correct about having told Kundert of the option at the outset, it is remarkable that Kundert did not include this within the scope of their instructions in the client care letter; second, if there was a failure on the part of Kundert to record that their instructions about the option properly, neither the Claimant nor Mr Walker thought it appropriate to inform them that this was so; and third, when the draft contract was sent by Kundert to the Defendants' solicitors, no mention of any option agreement was made in the contract. There was some suggestion on the part of the Claimant and Mr Walker that the option agreement needed to be separate from the contract for the sale of land. There is no substance in this point. But even if the transfer document and the option agreement needed to be separate, the reference to the option agreement in the draft contract, or the provision of a draft option agreement at that stage, was essential if this had been agreed between the parties. No mention at all was made in any correspondence from Kundert about any option being agreed.

73 The further communication between the parties' solicitors shows that the Defendants' solicitors were to disregard the draft contract sent to them by the Claimant's solicitors.

74 There then followed a further client care letter from Kundert to the Claimant dated 16 September 2021, the material parts of which said:

"Your Instructions

Your instructions resulting from our consultation are to advise and act for you in connection with the sale of the freehold of the above Property for £150,000 to Amber Meek.

What We Will Do

We will draft the contract for the sale of the Property and the Land Registry Transfer of part, taking your instructions on any property enquiries. We will deal with the negotiation of any amendments and title queries etc. We will complete the sale and account to you for the net proceeds of sale. We will also deal with the Deed of Covenant and consent required from Radiosite Limited in order to comply with the Restriction registered against the Property at the Land Registry."

75 There is no reference in that letter to the grant of any option.

76 Kundert sent an email to Mr Walker on 16 September 2021, at 11.49, in which they said:

"I have now been able to produce the first draft Transfer document containing the rights and obligations of the parties etc. I attach this and would be pleased if you would have a look through and let me know if you need anything changed. I would not, expect you to deal with the legal nuances but the main obligations and rights should be clear enough. I also attach the draft plan which I have prepared based on the one you sent. It is a draft at this stage and so we can amend it if it not quite right. In any event I will need a hard copy of the plan probably (if this is how you received it) because the scale can change when it is printed out and that will make it unacceptable to the Land Registry."

77 There was no reference to an option in that email or any previous emails which were extracted from Kundert's file.

78 The first time it would appear that Kundert were informed about the requirement for an option was on 23 September 2021. The manuscript file note of the conversation which Kundert had with Mr Walker states:

“TC with Nathan when Peter is going to speak to Buyers of the Barn to see how they wish to proceed. He may end up reimbursing their costs of the build so far.”

79 There is no reference in this file note to any option. However, it is possible that Mr Walker mentioned the option at that stage because the second sentence of that file note refers to the possibility of the Claimant having to reimburse the Defendants’ costs of the building works incurred by them up to that stage. In my judgment, it is clear that the Claimant was introducing a new requirement for an option into his dealings with the Defendants at that stage (and possibly later) which might not have been acceptable to the Defendants. That was why Mr Walker was referring to the possibility of having to reimburse “their costs of the build so far.”

80 The first formal mention of the option to the Defendants came on 1 November 2021 when Kundert wrote to the Defendants’ solicitors in which they said, *inter alia*:

“Further to your email of 26 October, we have received further instructions from our client as follows.

Simultaneously with the sale and purchase of the Property, your Client is to grant ours an Option (possibly up to 15 years) to buy back the Property at market value to be the average of three independent valuations. The Option to contain a timetable to completion in the usual way.”

81 Whether (as the Defendants maintain) the requirement to include an option for the repurchase of the Barn came about as a result of the meeting that the Claimant and Mr Walker had with Mark Birks

of Avison Young about the possibility of the development of Church Farm (or for some other reason) does not seem to me to be of any significance. The fact is that at that stage, the change in the position of the Claimant was communicated for the first time to the Defendants' solicitors. The Claimant was not agreeable to sell the Barn to the Defendants without the inclusion of the option.

82 The oral evidence of the Claimant and Mr Walker on the issue simply did not withstand proper scrutiny. As I have indicated, both of them persisted in their assertion that they made it clear to the Defendants and Kundert what they wanted. They could simply not understand why this was not recorded in any of the file notes and other documents extracted from Kundert's file.

83 Apart from the implausibility of the evidence of the Claimant and Mr Walker, two points on this issue should be mentioned: first, the Defendants were purchasing the Barn as – what the Second Defendant described – “a forever family home” for their family. It was, she said, to be “our dream home, built to our own specification.”

84 The Second Defendant was not challenged on this aspect of her evidence. If that was the intention of the Defendants, it is difficult to see why they would agree to sell their “dream house” in which they had invested such substantial sums of money to the Claimant, not just uprooting their own family in the process but possibly having to sell it him for less than the investment they had made in the house. That is because there could be no guarantee that 10% plus the market value would exceed the investment they had made in the property. But, even more, they could have been called to sell the Barn to the Claimant within days of moving into it, based on what the Claimant says were the terms of the option.

85 Second, the failure of the Claimant to provide disclosure must be viewed with concern. While I cannot say that the failure to provide disclosure was deliberate, I see no good reason why Kundert's file of papers could not have been obtained well before the start of the trial. Certainly, in my judgment, the Claimant's solicitors should have been more pro-active in obtaining Kundert's file and disclosing it at a much earlier stage in the proceedings.

86 I agree with Mr Stocks that the failure to provide proper disclosure works both ways. I am unable to understand how there can be so few documents in the Defendants' solicitors' file of papers. Unlike Kundert who only acted in the proposed sale of the Barn, the Defendants' solicitors in these proceedings also acted for the Defendants in the proposed purchase of the Barn. The Claimant should have made more detailed enquiries about the absence of documents, such as a client care letter for the purchase of the Barn and, have sought specific disclosure, if the outcome of those enquiries did not provide him with a satisfactory answer. The fact is that it is simply unacceptable for disclosure to be dealt with in such a slipshod way by the parties, particularly where there will be a record of the instructions that were given by the parties to their respective solicitors about what was agreed.

87 I am unable to accept the submission made by Mr Clegg that the failure to call someone from Kundert to give evidence was deliberate. My impression from the evidence I heard was that some attempt was made to call Henry Whitney of Kundert (who is understood to have retired) to give evidence but this did not prove fruitful. In any event, I am not sure what he could have said about his dealings with the Claimant and Mr Walker, other than what is included in the file notes and communication passing between him

and the Claimant, Mr Walker and the Defendants' solicitors. Mr Whitney would no doubt have conducted hundreds of such transactions in the course of his professional career; and to expect him to remember this transaction over and above what was recorded in his file would be asking too much of him. I do not, therefore, draw an adverse inference against the Claimant for having failed to call him. But the failure to provide proper disclosure is inexcusable.

88 The evidence of Dean and Maria Gallagher that there was no discussion of an option when they were negotiating the purchase of the Barn supports the position advanced by the Defendants that no option was agreed between the Claimant and the Defendants. They were both very impressive witnesses. However, one must remember that the mere fact that the grant of a buy-back option was not mentioned to the Gallaghers does not, by itself, lead to the conclusion that negotiations conducted by the Claimant with others (including the Defendants) were along similar lines. For example, if one considers the evidence of Damian Foster, it points in the contrary direction. He maintains both that the Claimant had told him that he would want an option to repurchase the Barn if he had sold it to them and that the First Defendant heard him say that while the Claimant was discussing the proposed purchase with him. I am a little less convinced by what he had to say, given that at no time did he appear to ask him how anyone one would have agreed to the proposal for the buy-back if they had – as he intended to do – converted the Barn into a family home.

89 I prefer the forthright and more convincing evidence of the Gallaghers over the evidence of Mr Foster. With the caveat expressed above, I am clear that the evidence of the Gallaghers provides further support that, at or about the time that the

Claimant and the Defendants were conducting their negotiations, the grant of an option was not in the contemplation of the Claimant. Their evidence also provides further support that the rights in favour of the Barn over the retained land were the (what was described in the oral evidence) "extensive rights" contended for on behalf of the Defendants.

90 The fact that I found the evidence of the Claimant and Mr Walker to be unreliable does not mean does not mean that I found the accounts which the Defendants gave to be fair or dependable on every issue before the court. For example, the suggestion by them that the file note made of the conversation on 8 January 2020 was forged or false is simply untrue. However, I accept the substance of their account which is largely supported by the contemporaneous documents from Kundert's file included in the trial bundles.

91 I also accept what they say about the monthly payment which they agreed to make and that they were to acquire the "extensive" rights contended for by them.

92 I am not sure that the written and oral evidence of Keith Smith assist with the issues that I need to decide in the claim and counterclaim. The same may be said of the written and oral evidence of Mark Birch. Neither of them could assist with the discussions that took place between the Claimant and the Defendants.

93 I should also make one further point clear because Mr Stocks relied upon it in his cross-examination. The letter from Kundert sending the draft transfer to the Defendants' solicitors was marked "Subject to contract". Nothing in this case turns on that.

Whether using that expression is a force of habit with solicitors (as Mr Clegg suggested), or whether Kundert thought it necessary to make it clear that no agreement had been reached between the parties, is immaterial. Once the equity based on proprietary estoppel has materialised, using expressions such as “subject to contract” will not be of any significance.

G DISCUSSION AND ANALYSIS

1 Ingredients of promissory estoppel

94 I can deal with this in short order.

95 Having set out the law and my findings, I need to decide whether the defendants have been able to satisfy the three-fold test in *Thorne*.

96 In *Snell's Equity*, at 12-038, it is said that:

“the elements of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments and that the courts’ task is to “look at the matter in the round” Nonetheless, in every case, the court’s analysis will benefit if the particular questions that may arise in a proprietary estoppel claim are approached in a systematic way. This can be done by considering in turn each of ‘the three main elements’ of proprietary estoppel: ‘... a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.’

2 Representation or assurance

97 I believe it to be common ground that there was an oral agreement between the parties for the purchase of the Barn. So far as the Claimant alleges that no agreement was reached, I reject what he says.

98 Leaving aside the terms of the agreement, it is clear to me – and indeed it cannot seriously be contended otherwise – that a sufficiently clear and unequivocal representation or promise was made, or assurance given, to the Defendants by the Claimant that the Claimant would sell the Barn to the Defendants. The Claimant simply “sat back” and allowed the Defendants to do substantial amounts of renovation and other works to the Barn at great cost to them (and even assisted them with the carrying out of those works) in the sure belief that he would sell the Barn to them. Whether or not the Defendants paid him for his services does not seem to me to be material. The fact is that they spent over £200,000⁵ in renovating the Barn before the Claimant decided to impose a condition with regard to the sale of the Barn, which was not agreed and which he knew would not be acceptable to the Defendants.

3 Reliance by the Defendants

99 There cannot be a more clear-cut instance of “reliance” on the facts of this case. The Defendants spent substantial sums of money to carry out the works to the Barn. They would not have spent that money if they thought, for a moment, that the Claimant would be able to withdraw from the oral agreement which they had reached.

4 Detriment

⁵ I accept that this figure is disputed by the Claimant. For the purpose of deciding whether this limb of the three-fold test is satisfied, that is largely irrelevant.

100 A proprietary estoppel can arise only if the Defendants are able to show that, as a result of a course of conduct adopted in reliance on the Claimant's acquiescence, representation or promise, they would suffer a detriment if the Claimant were wholly free to assert his rights against the Defendants. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it.

101 "Detriment", too, is obvious on the facts of this case. The detriment suffered does not just include the vast sums of money spent by the Defendants to renovate the Barn but the substantial amount of time they invested in carrying out, or supervising and monitoring the carrying out of, the renovation works.

5 Unconscionability

102 So far as applicable to this case, this requirement is also satisfied. The outcome desired by the Claimant from these proceedings is to be able to retain the Barn free from any rights of the Defendants to it. He also resists the Defendants' claim to unjust enrichment or compensation on various grounds (including the ground that it has not been pleaded) despite the fact that Mr Walker on behalf of the Claimant, had expressly indicated to Kundert on 23 September 2021 that the Claimant might "end up reimbursing [the Defendants'] costs of the build so far." He would also resist any fresh claim brought by the Defendants for unjust enrichment on the basis of abuse of process and – if he is successful in these proceedings – would no doubt also seek costs against the Defendant. The upshot of all of this is that he would walk away without any repercussions for his conduct, knowing that the Barn is worth considerably more now as a result of the works carried out by the Defendants than

it was when the oral agreement was reached. If the court were to countenance this type of unacceptable on the part of a party to a claim, it would be falling substantially short of the standards it needs to uphold to do justice to the parties, particularly where, as here, it is exercising its equitable jurisdiction in relation to a claim

103 For all those reasons, the substance of the counterclaim seeking equitable relief in these proceedings must succeed, subject to the other matters mentioned by me below.

6 Terms of the oral agreement between the parties

104 I have already indicated that the oral agreement between the parties did not include a call option for the purchase of the Barn. The other issues about the terms of the agreement are whether an extended right of way was agreed between the parties, as contended for on behalf of the Defendants and whether the parties had agreed that the Claimant would be paid £600 per calendar month until the purchase price of the Barn was paid in full.

105 However, before I deal with these two issues, it is appropriate for me to deal with some of the other issues raised by the Claimant.

106 As mentioned by me above, a written contract between the parties will be valid and enforceable even if it does not contain every particular detail that would usually be found in standard sets of detailed terms and conditions of sale, such as the Standard Conditions of Sale. However, it must include the essential terms agreed between the parties. Provided those

terms are sufficiently clear, the other terms can be implied under what is commonly referred to as the rules for an “open contract”.

107 As Mr Stocks rightly points out in para. 39 of his skeleton argument, there is no issue as to the extent of the property which was to be acquired by the Defendants. However, there is a dispute about the extent of the right of way that was to be enjoyed by the Defendants. I deal with this below.

108 Mr Stocks contends that the court cannot be satisfied whether the oral agreement for the purchase of the Barn was reached between both Defendants or just one of them. He refers to the fact that Kundert were requested by the Defendants’ solicitors to prepare the draft transfer in the name of the Second Defendant only whereas the position advanced by the Defendants was that they had agreed to purchase the Barn jointly.

109 There is nothing in this point. In the first place, the draft contract, though not proceeded with, was in the name of both Defendants, so the suggestion that the proper identity of the purchasers was not clear is misconceived. The parties appear to have decided subsequently that the transfer was to be in the name of the Second Defendant only. The First Defendant gave a perfectly good explanation for this. He and his wife were not in dispute about who would take the purchase; they were married and it was open to them to decide who should take a transfer of the land; and there was no objection on the part of the Claimant that the transfer should be taken in the name of the Second Defendant only.

110 It is plain that the agreement was concluded by the Claimant with both Defendants. While not having checked the position under an open contract, the position concerning transfers in the

Standard Conditions of Sale (General Condition 1.5) contains an express prohibition against transfers being in the name of any person other than the parties to the contract. However, this condition is often relaxed where there is likely to be a sub-sale of the property or (in commercial cases) transfers between companies in the same group in order to save stamp duty. In the present case, all that the Defendants had asked was for one of them to take the transfer. That does not mean that the parties to the contract cannot be identified or that the validity of the contract (so far as it is suggested that the identity of the parties was not clear) can be impugned.

- 111 As to the dispute between the parties about the rights of way which were to be included, the Claimant contends that the only right of way to be provided to the Defendants was to access the front of the Barn, namely the double garage and front door and there was no wider right of way over the adjacent property or to the side and rear of the Barn. The Defendants contend that they were to obtain a much wider right of way with or without vehicles over adjacent property in accordance with the plan included at page 497 of the Bundle.
- 112 The Claimant states that there was no purpose or benefit to the Defendants' in having a right of way to the north-west of the front door or to the rear and side of the Barn, given such areas were to be enclosed by a fence. In addition, such a right of way was not part of any negotiations between the parties' solicitors and the Defendants' solicitors did not complain or seek a wider right of way.
- 113 I reject that assertion. I accept the evidence of the Defendants on this issue. The boundaries were delineated by the plans

submitted for planning permission. It was clear from the plan submitted by the Claimant to his solicitors what those were and they reflect not just the evidence of the Defendants (which I accept in preference to that of the Claimant) but also the position on the ground. Moreover, the Gallaghers were clear about what they had been told about the rights of way over Church Farm if they had decided to purchase the Barn and they carefully marked what they had been told on the various photographs contained in the bundles in the course of their cross-examination by Mr Stocks.

114 The plans in respect of planning permission clearly show parking at the side of the house and, as the Defendants say, it is also clear that there was to be a right of way to reach those parking places.

115 The Second Defendant's explanation about this – largely consistent with her oral evidence – at paras 11-13 of her first witness statement was:

"In my List of Documents at item 11 is the Planning Permission Plan. At Item 19 is the Plan of the right of way agreed for access to the property and parking. At Item 20 is a Plan of the right of way Mr Conway proposed in a Contract. This is a different Plan and was not the one which we agreed to as it did not provide an access to the front door or access to side parking. We became aware of the amended right of way when we received the draft Contract and Option Agreement which were sent to my Solicitors on 29 March 2022. This Plan does not reflect the agreed access which is what I have shown in shaded red to the front and side of the Barn. The access Mr Conway proposed does not give any access except to enter the garage. This means we would not have access to our front door or side parking. It is inconceivable that we ever agree to this... During the initial conversations with Mr Conway, Steven I discussed who may potentially live in his farmhouse following the sale and if this would affect us in any way. Mr Conway stressed that when the rear boundary wall was built we would have complete privacy... Regarding our right of way over his land to access our property and the side parking, he stated this would be written into the Contract and any agreement with the new owners of his house would stipulate this also. He didn't see a problem with our privacy and potential owners anyway as he emphasised the point that his house is separated by electric gates from the land we would have right of way over. This reassured us. There was no reason to doubt him."

116 There is very little in the Claimant's witness statement about this. The thorough explanation given by the Second Defendant about precisely what was discussed between the Defendants and the Claimant, combined with the clear explanation of what was discussed by the Gallaghers with the Claimant, is clear evidence that the parties had agreed to the Defendants enjoying the "extended" rights of way contended by them.

117 At para. 24 of her first witness statement, the Second Defendant provides the following explanation about the payment of £500.00 that the Defendants paid to the Claimant:

"It was my idea, which I suggested to Mr Conway in March 2020, that we would pay him £500 a month interest for 10 months back dated to January until October to secure and pin him down to a time frame to complete the sale. I felt that £5000 would be a manageable additional price to pay in an attempt to protect our investment so far and a large enough amount that he would accept and not insist it to be cash. We also paid the entire cost of £1,500.00 for a new septic tank. This would be servicing the various dwellings and businesses on the estate, so not only or the barn but also for Mr Conway's property."

118 However, the Claimant states that the Defendants had agreed to pay the sum of £600 per calendar month by way of interest until the purchase of the Barn was completed. I am unable to accept what he says. The suggestion that the Defendants wanted the purchase price deferred because they could not pay the purchase price and also pay for the substantial amount of works which were carried out to the Barn at the same time, appears to me to be without substance.

119 There is no evidence whatsoever that the Defendants would not have been able to pay both the purchase price of the Barn and pay for the works carried out to the Barn. However, in any event, if they were asked to prioritise whether they should pay towards the purchase price of the Barn or the works required to it, they

would undoubtedly have opted for the former for fear of losing the Barn if they did not do so.

- 120 It is also significant that the draft contract which was not proceeded with had no provision for the payment of any interest pending completion. Nor is there any evidence of the Claimant chasing the payment of the sum of £600 per month, perhaps not surprisingly because it would be further evidence of the oral agreement. It is also difficult for me to see how the Claimant can allege that he should be entitled to be paid £600 per month while – as I have found – he was not prepared to complete the sale of the Barn because he wanted an option over it.
- 121 The only evidence that the Claimant can rely upon to make good this claim is the meeting which he had with Kundert on 8 January when he mentioned this to Kundert. This is no more than his own bare statement about what was agreed by him with the Defendants. Of course the suggestion by the Second Defendant that this was a forged or false document is untrue. While there may well have been a good basis for contending that the Defendants should pay sums to the Claimant for occupying the Barn when carrying out works to it if there had been a written contract which was governed by one of the standard sets of conditions, there is no evidence of any agreement about that here⁶. If the Claimant had agreed to go ahead with the sale of the Barn without the option, and the Defendants had failed to pay the purchase price agreed, he might have been able to repudiate the contract by serving a notice to complete. However,

⁶ See, for example, General Condition 5 of the Standard Conditions of Sale which provides, *inter alia*: "If the buyer is not already lawfully in the property, and the seller agrees to let him into occupation, the buyer occupies on the following terms ... (d) to pay the seller a fee calculated at the contract rate on a sum equal to the purchase price (less any deposit paid) for the period of the licence."

it is a misconception for him to suggest that the purchase price should have been paid by the Defendants. As both Defendants pointedly observed in the course of their examination, the Claimant would not have accepted the purchase price without an option and the Defendants would not have been agreeable to pay the purchase price if they were required to enter into an option.

H CONCLUSION AND REMEDIES

- 122 In the circumstances, the Defendants are entitled to succeed in these proceedings.
- 123 So far as the claim is concerned, it should be dismissed. There is no suggestion that the Defendants will seek to enter the Barn or any part of Church Farm for which the injunction was sought until completion of the sale.
- 124 So far as the counterclaim is concerned, the court has to grant the minimum relief necessary to satisfy the Defendants' rights which have arisen under the estoppel found by me to exist against the Claimant.
- 125 I am clear that this must be in the form of enabling the Defendants to enforce the terms of the oral agreement by an order for specific performance. The terms will be those which I have found to have been agreed between the parties and any implied terms under the "open contract" principles. I do not consider that any lesser relief is appropriate and I say so primarily for these reasons. This was not a commercial venture between the parties. In addition, the Barn was supposed to be the dream home for the Defendants and their family. Accordingly, to give them any lesser relief does not seem to me

to be appropriate. Furthermore, any compensation for unjust enrichment or other form of relief would prolong these proceedings even further and this court should avoid that, particularly as the court would likely have to order the taking of an account to assess the extent and value of the works carried out by the Defendants. I believe the remedy proposed by me is consistent with the principles set out in *Guest v Guest*.

- 126 I should say that if I had decided to grant the Defendants compensation for unjust enrichment, I would not have found myself unable to do so because there was no prayer for this or for an account in the Counterclaim.
- 127 I do not consider that a declaration in the terms of para. 1 of the prayer for relief in the Counterclaim is appropriate. However, I am prepared to grant the substance of the relief set out in para. 2. Paras 4 and 5 do not seem to be to be appropriate at this stage. If this matter proceeds to completion, the prayers in those paragraphs will be superseded by the rights which the Barn will enjoy under the transfer anyway and I doubt whether the Claimant will interfere with those rights. The relief in para. 3 does seem to me to be appropriate, though I hope that the parties will come to an agreement about how the relief in para. 2 may be implemented to avoid the uncertainty of having to rely upon the terms under the so-called "open contract" rules.
- 128 It would be helpful for me to have a draft order reflecting my judgment for consideration when judgment is handed down.
- 129 I will deal with any outstanding matters and the issue of costs when I hand judgment down. One matter that seriously concerns me is why the Defendants did not agree to mediation when it was put to them. The importance of mediation can never be

over-emphasised: see, for example, the recent decision of the Court of Appeal in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416. The Defendants will have to advance compelling reasons why the offer of mediation was rejected out of hand by them.

I ACKNOWLEDGMENTS

130 I again express my deep and sincere gratitude to counsel, both for the manner of the presentation of their clients' case and for their cooperation throughout the trial.