

Development Disputes

Current issues for
property litigators

Failed joint ventures: the search for the '*Pallant v Morgan* equity'



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Over the years the Courts have considered a variety of cases arising out of what might be termed 'joint enterprises' for the purchase and occupation or exploitation of land, where the relevant formalities that are required to give rise to a legally binding agreement between the parties have not been observed. In recent times the approach of the Courts to these types of case has been increasingly divergent depending on whether the parties to the enterprise are intending co-habitees of residential property or whether they are commercial entities embarking on a joint venture for the development of land.

This article explores what remedies might be available where commercial parties undertake a joint enterprise relating to land that ultimately fails, and either they have not committed their agreement to writing at all, or else they have left contractual terms vague and incomplete pending further negotiations. Can equity intervene to render informal assurances legally binding when they are made in relation to the purchase and development of land?

In domestic or family cases it is in many ways easier to make a case for equity's intervention where the strict legal formalities have not been observed, so as to hold the parties to their informal assurances. However the role of equity in the commercial context has long been a thorny issue. There is a tension between the need to ensure certainty in commercial dealings and the need to ensure that parties are held to their bargains. Lord Millett in his article "*Equity's Place in the Law of Commerce*"¹ warned that commercial parties should be expected to look after themselves:

"It is of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship who deal with each other at arms' length and can be expected to look after their own interests."

Recent developments in the application of the doctrine of proprietary estoppel and the evolution of the common intention constructive trust demonstrate a clear appetite within the judiciary to limit the scope for equity to intervene in those cases where commercial parties, who may be taken to have access to legal advice and whose dealings one would expect to be documented, seek to enforce agreements or understandings that are claimed to have arisen during negotiations but have not resulted in a binding contract at law.

This article will present an overview of those recent developments; address the history of the application of the constructive trust in one specific commercial context (where the so-called '*Pallant v Morgan equity*'² is said to arise); and conclude with an analysis of *Crossco No 4 v Jolan Limited*,³ a recent Court of Appeal decision in which the rationale for equity's intervention in that specific type of case has been scrutinised and re-assessed.

The need for formality in dealings relating to land

Prior to 17th September 1989 there was no requirement that a contract for the sale or disposition of an interest in land must be made in writing. An oral contract was valid, but it was unenforceable if there was no sufficient memorandum in writing or sufficient acts of part performance.⁴ Under the doctrine of part performance, if one party to an agreement stood by and let the other party incur expense or prejudice his position on the faith of the agreement being valid, then he would not be

1 (1998) LQR 214

2 After *Pallant v Morgan* [1953] Ch 43

3 [2011] EWCA Civ 1619; [2012] 2 All ER 754

4 See section 40 of the Law of Property Act 1925

allowed to assert that the agreement was unenforceable.⁵ It was an essential element of the doctrine of part performance that the acts relied upon should be referable to the contract.⁶

The doctrine of part performance has now been abolished. Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (“**the 1989 Act**”) declares void any agreement for the sale or other disposition of an interest in land which does not comply with the requisite formalities. The contract must be made in writing, must be signed and must incorporate all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

This rule was imposed for policy reasons, seeking to bring certainty to transactions, to fulfil an evidential function and to protect citizens from undertaking complex rights and duties without a proper opportunity to reflect and take advice.⁷

In its “*Report on Formalities for Contracts for the Sale etc. of Land*” published in 1987 the Law Commission observed that:

“...to minimise disputes, reliable incontrovertible evidence of the existence and terms of a transaction needs to be available for later reference, but it is equally important that the law should not be so inflexible as to cause unacceptable hardship in cases of non-compliance.”⁸

A saving provision was therefore introduced into the 1989 Act. Section 2(5) stipulates that nothing in section 2(1) is to affect the creation or operation of resulting, implied or constructive trusts. As we shall see, this has persistently caused difficulties for the Courts in producing coherent jurisprudence in this area.⁹

Developments in the law of proprietary estoppel

The doctrine of proprietary estoppel was initially thought by practitioners to have survived the introduction of the 1989 Act. It was apparently intended by the Law Commission to do so,¹⁰ although that was deliberately not made explicit by the statutory draftsman as it was thought inappropriate to attempt to spell out the requirements and limits of the doctrine or to consider special extensions or restrictions on it.¹¹

The basis of the doctrine is very similar to that of the doctrine of part performance, but with fundamental differences.¹² An equity may be said to arise in the claimant’s favour by estoppel if a landowner makes representations (whether actively, by words or by conduct, or by acquiescence) to the claimant, that the claimant relies upon and acts upon to his detriment, in the reasonable

5 See *Steadman v Steadman* [1976] AC 536 at 540 per Lord Reid

6 *Maddison v Alderson* (1883) 8 App Cas 467 at 479

7 “Report on Formalities for Contracts for the Sale etc. of Land” Law Com. No. 164 at paragraphs 2.7-2.12

8 Law Com. No. 164 at paragraph 4

9 As Lord Neuberger MR states in his article “*The stuffing of Minerva’s owl? Taxonomy and taxidermy in equity*” 2009 CLJ 537: “Section 40 of the Law of Property Act 1925, which section 2 was designed to replace, had its quirks, but it worked perfectly well. Now that the Law Commission, by needlessly meddling, Parliament, with misconceived drafting, and the courts, through inconsistent decisions, have had their wicked ways with section 2, we are worse off than we ever were with section 40.”

10 Law Com. No. 164 at paragraphs 5.4ff

11 Law Com. working paper No. 92 at p.35

12 There need not be any valid contract in existence to give rise to an equity by estoppel; and it is not therefore a requirement that the acts relied upon should be referable to the contract. The detrimental acts need not point to any arrangement between the parties because none may exist.

belief that he has or will get an interest in the land owned by the landowner, and if it would be unconscionable for the landowner to go back on those representations. The form of relief is flexible and is a response to the claimant's expectations (although it is said that the Court will only apply the "minimum equity to do justice").¹³ This may result in the claimant acquiring a proprietary interest in the land, or some lesser interest, or else monetary compensation. The precise nature of the claimant's right remains inchoate until the Court determines how best to give effect to it.

The doctrine has been explained as having its root in "the first principle upon which all Courts of equity proceed", that is:

*"to prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties."*¹⁴

However, subsequent to the passing of the 1989 Act the Courts recognised that the existence of the doctrine had the potential to undermine the purpose of the statute by, in effect, enabling Judges to render enforceable informal assurances relating to land of the type that section 2 was apparently designed to prevent having binding effect.

In order to circumvent the problems posed by the application of the doctrine in the context of section 2 of the 1989 Act, litigants and the Courts in some cases took to re-characterising proprietary estoppel claims as claims for a declaration as to the existence of a constructive trust so as to fall within the exception under section 2(5). Until recent changes in the law brought about by the House of Lords' decision in *Stack v Dowden*,¹⁵ a common intention constructive trust was said to arise where the claimant acted to his detriment in reliance upon a common understanding that he or she would acquire an interest in the defendant's property. So in order to succeed in establishing the existence of a constructive trust the claimant had to demonstrate not only that there was a common intention that both parties should have a beneficial interest in the land, but also that the claimant had acted to his or her detriment on the basis of that common intention so that it would be inequitable for the defendant to deny the claimant an interest.¹⁶

It soon became fashionable for litigants and the Courts to emphasise the similarities between proprietary estoppel and constructive trusts under both of which, according to the prevailing jurisprudence of the time, the claimant had to establish that he or she had suffered some detriment.

Yaxley v Gotts

That was the approach that the Court of Appeal took in *Yaxley v Gotts*.¹⁷ Mr Yaxley had reached an informal agreement with Mr Gotts under which Mr Gotts was to purchase a property that was split into flats, and was to grant a long lease of the ground floor flat to Mr Yaxley in return for him carrying out refurbishment works at the building and acting as managing agent for all the flats. The property was purchased,¹⁸ and Mr Yaxley carried out the building work at his own expense and

13 *Crabb v Arun DC* [1976] Ch 179 at 198 per Scarman LJ

14 *Crabb v Arun DC* cited supra at 187-188 per Lord Denning MR, citing *Hughes v Metropolitan Railway Co.* (1877) 2 App Cas 439 at 448 per Lord Cairns LC

15 [2007] UKHL 17; [2007] 2 AC 432. We shall come on to consider the changes in the law brought about by the decision in *Stack*.

16 See *Gissing v Gissing* [1971] AC 886 at 905; *Grant v Edwards* [1986] Ch 638 at 65; and *Lloyds Bank Plc. v Rosset* [1991] 1 AC 107 at 132

17 [2000] Ch 162

18 By Mr Gotts' son, in the event.

carried out his duties as managing agent. Mr Yaxley claimed that in the circumstances an equity had arisen in his favour by reason of proprietary estoppel.

At first instance he succeeded on that claim and was granted a lease of the ground floor for a term of 99 years rent free. However in the Court of Appeal Robert Walker LJ (as he then was) held that the “*public policy principle*” prevented an estoppel from subverting Parliament’s purpose in the 1989 Act “*except so far as the statute’s saving for a constructive trust provides a means of reconciliation of the apparent conflict*”.¹⁹

He emphasised the common ground between the doctrine of proprietary estoppel and the constructive trust, both being intended to provide relief against unconscionable conduct, and stated:²⁰

“...the species of constructive trust based on ‘common intention’ is established by what Lord Bridge in Lloyds Bank Plc. v Rosset [1991] 1 A.C. 107, 132, called an ‘agreement, arrangement or understanding’ actually reached between the parties, and relied on and acted on by the claimant. A constructive trust of that sort is closely akin to, if not indistinguishable from, proprietary estoppel. Equity enforces it because it would be unconscionable for the other party to disregard the claimant’s rights. Section 2(5) expressly saves the creation and operation of a constructive trust.”

The Court of Appeal held that Mr Yaxley had in fact established an interest in the property under such a common intention constructive trust. However, rather than declaring (as one might expect) that he owned a beneficial interest of some kind in the property, the Court of Appeal upheld the first instance award of a lease of the ground floor for a term of 99 years or, in the alternative, monetary compensation being a sum equivalent to the value of the lease.

The grant of such relief on a finding of a constructive trust is somewhat hard to reconcile with principle. Mr Yaxley obtained a leasehold interest rather than a beneficial interest in the property, giving rise to a landlord and tenant relationship rather than that of trustee and beneficiary; and the grant of alternative monetary compensation is particularly puzzling. This technique of side-stepping the application of section 2 of the 1989 Act is also open to a more general criticism on the ground that it may in some instances effectively result in the Court imposing a remedial constructive trust²¹ on the parties in circumstances where English law does not, at present, recognise the existence of such a remedy.²²

Yaxley has never been overruled, but since it was decided the House of Lords has had two opportunities to consider the role of proprietary estoppel in modern property law, and their conclusions in those two cases emphasise the divergent approach that the Courts will now be expected to take in the

19 At 175C

20 At 180

21 That is, a trust which is imposed by the Court in its discretion whenever it is considered just to do so, the retrospectivity of which is a matter for the Court’s discretion. This is to be contrasted with the institutional constructive trust which arises by operation of law in defined circumstances and in accordance with settled principles of equity – and where the function of the Court is merely to declare that such trust has arisen in the past. See *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] AC 669 at 714 per Lord Browne-Wilkinson.

22 For an example of the Court imposing a remedy that resembles a remedial constructive trust see *Brightlingsea Haven Ltd v Morris* [2008] EWHC 1928 (QB) where Jack J distinguished *Cobbe v Yeomans’ Row Management Limited* [2008] UKHL 55, [2008] 1 WLR 1752 and held that an estoppel arose preventing a landlord from denying the grant of leases he had promised orally to the defendants. The Judge held that he could give effect to the estoppel by imposing a constructive trust on the landlord, which would then be exempt from the need for writing by reason of section 2(5).

application of the relevant principles depending on the whether the prevailing context in which the claim is made is “commercial” or “domestic”.²³ In *Cobbe v Yeoman’s Row Management Limited*,²⁴ relief was denied to Mr Cobbe, a property developer, in the context of a commercial transaction. In *Thorner v Major*,²⁵ relief was granted to Mr Thorner, a farmer, when his cousin died intestate and without leaving him a promised interest in the land which he farmed.

Cobbe v Yeoman’s Row Management Limited

In *Cobbe v Yeoman’s Row Management Limited* Mr Cobbe was an experienced property developer who had conducted oral negotiations with Yeoman’s Row Management Limited (“YRML”) concerning the development of land that YRML already owned. The discussions included how the development would be financed and how the profits would be shared if and when planning permission was granted. It was to be Mr Cobbe’s responsibility to progress the planning application and, once permission was obtained, he was to purchase the property for £12 million, to develop it and sell it on, and to share the proceeds of sale with YRML so far as they exceeded £24 million.

The parties made a conscious decision that they would not enter into a formal binding agreement until planning permission had been obtained. Mr Cobbe went ahead and did what was necessary to obtain planning permission, on the basis that he and YRML had an understanding that the parties would, once permission was obtained, enter into a legally binding agreement. However, YRML privately determined that it would not honour the understanding but did not reveal this to Mr Cobbe until after planning permission had been obtained, at which point YRML sought to renegotiate the deal to its advantage.

Mr Cobbe claimed that an equity had arisen in his favour by proprietary estoppel. The House of Lords (reversing both the trial judge and the Court of Appeal) disagreed and held that Mr Cobbe was entitled only to a quantum meruit for the work he had done in obtaining planning permission.

In his speech Lord Scott expressed the view that section 2 of the 1989 Act had been a nail in the coffin of proprietary estoppel.

“My present view 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 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute.”²⁶

The decision is explicable on the basis that the parties to this commercial deal had expressly regarded their agreement as binding in honour only, and Mr Cobbe could not therefore invoke the assistance of equity to give effect to an agreement which he had never intended to have legal, contractual effect. Both parties to the negotiations were experienced commercial people and the joint venture

23 It may well be a difficult question in particular instances whether a case falls on the “commercial” or the “domestic” side of the line.

24 [2008] UKHL 55; [2008] 1 WLR 1752. This was the first time the doctrine had been considered by the House of Lords since *Ramsden v Dyson* (1866) LR 1 HL 129.

25 [2009] UKHL 18; [2009] 1 WLR 776

26 At [29]. Note that section 2 does not apparently apply to “trivial” dispositions of land in settlement of a boundary dispute made pursuant to an informal agreement of the demarcating kind – there is said to be no agreement to convey land. What is “trivial” could be a difficult question however. See *Joyce v Rigolli* [2004] EWCA Civ 29 and *Melhuish v Fishburn* [2008] EWCA Civ 1382 (a case which involved a property developer and the purchaser of a plot: the boundary was to be altered in exchange for the purchaser being given an extra piece of land, resulting in an overall increase in the garden of 1.8%. This was considered “trivial”).

contemplated was a substantial commercial enterprise. Mr Cobbe had taken a calculated risk in undertaking work when he had deliberately not sought to have the agreement formally documented, and the rewards for him if the deal came to fruition would be very substantial indeed. He could not as things stood have had an expectation that he would certainly be granted an interest in land; his expectation was that there would be further negotiations which would give rise to a formal agreement. While YRML may have behaved dishonourably, to behave dishonourably is not (or not always or necessarily) to behave unconscionably²⁷ and an agreement binding in honour only is binding neither at law nor in equity.²⁸ While the Courts did not condone the conduct of YRML, that conduct was ultimately not considered to be of a type that was, in its context, sufficiently lacking in conscience to warrant the intervention of equity.

Furthermore, even if one party's bad behaviour on similar facts were to be considered "unconscionable", the intervention of equity to provide a remedy for unconscionable conduct during the course of negotiations for a business deal which do not give rise to a concluded contract would operate to introduce unwelcome uncertainty into commercial transactions (bearing in mind there is no duty on a party to negotiate in good faith).²⁹ At what point might one party be said to have crossed a line beyond which it is no longer entitled to have regard to its own self-interest, and so that it is to be held to account if it withdraws from negotiations?

In *Cobbe*, the House of Lords in effect determined that a commercial claimant cannot establish that it is entitled to relief on grounds of proprietary estoppel unless it can show that it acted in the belief that it had a legal right and a legally enforceable claim. Academic commentators at the time therefore identified *Cobbe* as a watershed, consigning the doctrine to legal history, at least as far as commercial cases are concerned.³⁰

Thorner v Major

By contrast with the facts and the context in *Cobbe*, the parties in *Thorner v Major* were two "taciturn and undemonstrative men committed to a life of hard and unrelenting physical work".³¹ Mr Thorner was unsophisticated, a farmer who went to work for no pay on his cousin's farm and was led to believe that he would inherit the farm on his cousin's death if he continued to live and work there and provide support and companionship. Mr Thorner's cousin was said to have been a man of few words, and Mr Thorner could not point to explicit assurances on which he had relied, only implicit statements and oblique assurances which he had understood to mean that he would eventually inherit the land. The House of Lords (reversing the Court of Appeal and upholding the decision at first instance) held that Mr Thorner was entitled to the farm on grounds of proprietary estoppel.

The House of Lords in *Thorner* considered that it would be unrealistic to suggest that a claimant in the context of family relationships and arrangements ought to approach a solicitor to have what might only be oblique assurances reduced to writing in a legally binding document. The Committee distinguished *Cobbe* on the basis of the very different context in which the parties were operating there, and emphasised the unusual nature of the facts in that case. In most domestic cases, it was said, it would not be appropriate or necessary to require the claimant to demonstrate that he believed that he had a legally enforceable right in order to succeed in a proprietary estoppel claim.

27 See Lord Neuberger MR's article, cited supra.

28 See Lord Wensleydale in *Ramsden v Dyson*, cited supra: "If any one makes an assurance to another, with or without consideration, that he will do or will abstain from doing a particular act, but he refuses to bind himself, and says that for the performance of what he has promised the person must rely on the honour of the person who has made it, this excludes the jurisdiction of the Courts of equity no less than of Courts of law."

29 See the discussion in the article of Julian Greenhill "Good Faith" Clauses in Development Agreements in this book.

30 See in particular "The Death of Proprietary Estoppel" [2008] LMCLQ 449 by B McFarlane and A Robertson.

31 At [59] per Lord Walker

Developments in the law of the common intention constructive trust

In *Stack v Dowden*,³² the House of Lords considered the role of the common intention constructive trust in the domestic sphere. The parties co-habited in a property held in their joint names. It was not in dispute that each had a beneficial interest and the only question was the size of the share where there had been no explicit declaration of the parties' beneficial interests. It was held (with Lord Neuberger dissenting) that there is a presumption in cases of cohabitation of residential property that beneficial interests mirror the legal title, and that this can be rebutted by evidence of contrary intention.

The important point to note for present purposes is that in *Stack* the House of Lords relaxed the requirements for a finding of constructive trust in the domestic context. It is no longer necessary for a cohabitee to show detrimental reliance or change of position based on a common understanding; instead, the Court infers an agreement as to the beneficial sharing of property after reviewing the parties' entire relationship and course of conduct.³³

In the commercial sphere, however, the presumption that beneficial interests mirror the legal title does not apply and the Court will not engage in a wide survey of the parties' relationship or conduct. The presumption will be that a resulting trust arises according to how much each party has contributed to the purchase, because financial contributions are most likely to reflect the intention of the parties in the commercial context.

Inter-relation between proprietary estoppel and constructive trust claims

In *Thorne* Lord Walker rejected the "apocalyptic" suggestion that the decision in *Cobbe* had sounded the death knell for proprietary estoppel.³⁴ The doctrine lives on, then, but how is it to be applied in the commercial context? How does it now sit alongside the requirements for formality in section 2(1) of the 1989 Act? When will public policy considerations prevail, and will the Courts continue to resort to invoking the common intention constructive trust to plug the gap?

Clearly not every proprietary estoppel claim based on an informal assurance of obtaining an interest in land fails because of public policy considerations. A proprietary estoppel claim seems more likely to succeed in a situation where section 2 does not somehow 'bite', as the assurances are so informal and so imprecise that they cannot be considered in any way contractual. That is not a particularly desirable state of affairs since the clearer and more definite the assurances given, the less likely it seems that the equity will arise.

Although there is of course no distinction in section 2 itself between domestic and commercial cases, context has now been elevated to a position of paramount importance. In domestic cases the Courts are far more willing, after surveying the parties' relationship and the nature of their expectations, to make a finding that an equity has arisen under the proprietary estoppel doctrine. Section 2 of the 1989 Act is not even engaged in most domestic situations and, consequently, there is said to be no need to find a separate remedy by invoking the common intention constructive trust so as to circumvent the statute. As Lord Neuberger stated in *Thorne*:³⁵

32 [2007] UKHL 17; [2007] 2 AC 432

33 See also *Jones v Kernott* [2012] 1 AC 776 where the Supreme Court held that if the evidence does not show what beneficial shares the parties intended, it is for the Court to decide what shares were either intended or fair.

34 McFarlane and Robertson regarded the decision in *Thorne* as bringing proprietary estoppel "back from the brink": see their article "Apocalypse averted: proprietary estoppel in the House of Lords" [2009] LQR 535.

35 At [99]

"Section 2 may have presented Mr Cobbe [in Cobbe v Yeoman's Row] with a problem, as he was seeking to invoke an estoppel to protect a right which was, in a sense, contractual in nature ... and section 2 lays down formalities which are required for a valid 'agreement' relating to land. However, at least as at present advised, I do not consider that section 2 has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection."
[Emphasis added]

The assimilation of the doctrine of proprietary estoppel with constructive trusts, whether in domestic or commercial cases, is in any event probably no longer to be considered sound in principle.

In *Stack v Dowden* Lord Walker referred to *Yaxley* and said that he was:

"...now rather less enthusiastic about the notion that proprietary estoppel and 'common interest' constructive trusts can or should be completely assimilated. Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a 'mere equity'. It is to be satisfied by the minimum award necessary to do justice ... which may sometimes lead to no more than a monetary award. A 'common interest' constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."³⁶

Furthermore in the domestic sphere, as we have seen, it is no longer necessary to show detrimental reliance or change of position based on a common understanding in order to establish a common intention constructive trust, by contrast with proprietary estoppel.

As for commercial cases, where those involved are experienced business people, and in particular if the agreement is oral and both parties know that there is no concluded contract, then a claim to an equity by reason of proprietary estoppel would seem likely to fail in most instances.

However the case of *Herbert v Doyle*³⁷ is particularly important for commercial parties in this context. There the appellant asserted that an oral agreement, which he had made with the respondents concerning the transfer to them of car parking spaces, fell foul of section 2(1) of the 1989 Act. The issue was whether a constructive trust could be found so as to engage section 2(5) of that Act. The Court of Appeal was concerned to establish that the agreement was sufficiently certain to form the subject matter of a constructive trust. Arden LJ said, regarding the relationship between proprietary estoppel and the constructive trust:³⁸

"It appears from Cobbe that, in some situations at least, both doctrines have a requirement for completeness of agreement with respect to an interest in property."

It was held in *Herbert v Doyle* that the agreement reached between the parties was indeed sufficiently certain to form the basis of a constructive trust, even though there were some matters that remained to be settled.

36 At [37]. It has been argued that the common intention constructive trust following *Stack* should be seen as a discretionary remedial trust – see Etherton LJ "*Constructive Trusts: a New Model for Equity and Unjust Enrichment*" [2008] CLJ 265.

37 [2010] EWCA Civ 1095

38 At [10]

The *Pallant v Morgan* equity: a new species of constructive trust?

In the event that a joint venture relating to land has not been documented in a formal way and subsequently fails, and if it is insufficiently certain to enable the Court to find either a binding contract or a constructive trust so as to fall within section 2(5) of the 1989 Act, then commercial parties will do better to look elsewhere than proprietary estoppel to find a remedy.

The House of Lords in *Cobbe* confirmed that there is still the potential for a remedy for commercial parties based on the so-called *Pallant v Morgan* equity as explained³⁹ by Chadwick LJ in *Banner Homes Group plc v Luff Developments Limited*.⁴⁰ Under this doctrine, a constructive trust is said to arise so as to prevent one party to a proposed joint venture from retaining the whole benefit of a property intended to be purchased for the purposes of the joint venture if there is something in the circumstances of the acquisition which would render it unconscionable for him to do so.

Lord Scott in *Cobbe* described the context in which the equity will arise as follows.⁴¹

“A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the Court will regard him as holding the land on trust for the joint venturers. This would be either an implied trust or a constructive trust arising from the circumstances and if, as would be likely from the facts as described, the joint venturers have not agreed and cannot agree about what is to be done with the land, the land would have to be resold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of sale divided equally between the joint venturers.”

The pre-acquisition agreement between the parties is said to ‘colour’ the subsequent acquisition and constitute the buyer a trustee if he seeks to act inconsistently with it. In this way, where parties have been engaged in negotiations which do not give rise to a binding contract and the acquiring party decides to go ahead and act in his sole interest, he can be held to his informal bargain.

The House of Lords in *Cobbe* distinguished the *Pallant v Morgan* line of cases on the facts before it, on the basis that the property in *Cobbe* was already owned by YRML. There was no joint enterprise for its acquisition on the open market and Lord Scott considered that there was no room for a constructive trust of this type where the arrangement or understanding was reached in relation to a property already owned by one of the parties.⁴² If the property was never joint venture property, and was owned by the defendant before it embarked on negotiations with the claimant, then there can be no basis for the imposition of a constructive trust: the *Pallant v Morgan* equity arises only because the defendant has acquired property in circumstances where it would be inequitable to allow him to treat it as his own. That would not be the case if he already had an existing entitlement to the land.

39 If not manufactured – see “*The Pallant v Morgan* ‘equity’?” by Nicholas Hopkins [2002] Conv. 35

40 [2000] Ch 372

41 At [30]

42 At [33]

In *Pallant v Morgan* itself, two neighbouring landowners wanted to acquire at auction particular lots of land adjacent to their properties. Their agents attended the auction and agreed that if the defendant's agent was successful they would split the lots acquired according to a valuation formula. The formula was left to be agreed at a later date. The claimant's agent abided by an informal agreement that he would not bid at the auction, and as a result the defendant was successful in acquiring one lot for at least half the cost he would have had to pay if the claimant had been bidding against him. He subsequently wished to pull out of the agreement. Harman J held that specific performance of the agreement was not available, as it was insufficiently certain. He decided that the land was nevertheless held for both parties jointly and that if the parties failed to agree on the division of the property it would have to be resold and the proceeds divided equally between them subject to reimbursement of the defendant's expenses.

Harman J appears to have based his decision on agency principles. He found that the defendant's agent had acted for both parties in bidding for the land, having agreed that the parties would decide on the division of the land if the bid were successful; and he held that the Court would intervene to award a remedy because if the defendant were to retain the land for himself that would be "tantamount to sanctioning a fraud".⁴³ He relied on *Chattock v Muller*⁴⁴ in which a purchaser of land was considered to have acted both for himself and as agent for the plaintiff following a pre-acquisition agreement for the division of the land.⁴⁵ In *Chattock*, the Court also referred to fraud and to the rule in *Rochevoucauld v Boustead*⁴⁶ under which the Courts may intervene in order to prevent fraud where land is acquired with the intention that it is to be held on trust for the claimant.

Pallant v Morgan may therefore be seen as an example of a case where the Court may intervene so as to prevent fraud if specific performance is not available. However it could be argued that it was re-characterised by Chadwick LJ in *Banner Homes* as a case in which the Court may declare the existence of a constructive trust on the basis of an arrangement, reliance, detriment and unconscionability.

In *Banner Homes* the parties were sophisticated commercial entities negotiating a joint venture for the redevelopment of land. They were business rivals both interested in acquiring a development site. Luff wanted to share the risk of acquisition with a partner and so the parties reached an oral agreement to the effect that Banner Homes would withdraw from the purchase of the land and Luff would go ahead and purchase it through an SPV; and after the purchase the parties would become part of a joint venture partnership for the exploitation of the land. There were extensive negotiations as to the operation of the joint venture partnership but the parties were unable to agree all outstanding issues by the date when completion of the purchase was due to take place.

Luff had second thoughts and decided that it would proceed without Banner Homes, but it kept that decision to itself for fear that Banner Homes would, if alerted, make a rival bid for the site. Luff then purchased the land through the SPV which was its wholly owned subsidiary and then withdrew from negotiations and sought to develop the land alone. Banner Homes claimed to be entitled to a half share in the site under a constructive trust. Chadwick LJ agreed and declared that Luff held the shares in the SPV on trust for itself and Banner Homes equally, charged for payment by Banner Homes of half the purchase price of the shares.

43 At 48

44 (1878) 8 Ch 177

45 See also *Du Boulay v Raggett* (1989) P&CR 138 in which the Court held that a purchaser of land had acted for himself and as agent for others under a pre-acquisition agreement. It was conceded that, in those circumstances, it would be unconscionable for the purchaser to retain the land for himself.

46 [1897] 1 Ch 196

Chadwick LJ analysed the authorities in detail, including *Pallant v Morgan*, and set out the ingredients necessary for a constructive trust to arise in these circumstances.

- (1) An arrangement or understanding must precede the acquisition of the property by one party to the arrangement. This pre-acquisition arrangement 'colours' the subsequent acquisition and leads to the defendant being treated as a trustee if he seeks to act inconsistently with it. Chadwick LJ observed that *"the concepts of constructive trust and proprietary estoppel have much in common in this area"*.⁴⁷
- (2) It is no bar to the equity that the pre-acquisition agreement is too uncertain to be enforced as a contract nor that it is plainly not intended to have contractual effect.
- (3) The pre-acquisition agreement must contemplate that the acquiring party will take steps to acquire the property; and that if he does so the non-acquiring party will obtain some interest in that property. It is also necessary that the acquiring party has not informed the non-acquiring party before the acquisition (or before it is too late for the parties to be restored to a position of no advantage / no detriment) that he no longer intends to honour the arrangement or understanding.
- (4) It is necessary that in reliance on the arrangement or understanding the non-acquiring party should do or omit to do something which confers an advantage on the acquiring party in relation to the acquisition of the property; or something that is detrimental to the ability of the non-acquiring party to acquire the property on equal terms.

*"It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it."*⁴⁸

In many cases the advantage/detriment is found in the agreement of the non-acquiring party to keep out of the market. That operates to the advantage of one (he can bid without competition from the other) and to the detriment of the other (who loses the opportunity to acquire the property for himself). However the equity will still arise if there is advantage to one without detriment to the other (if, for example, the agreement to keep out of the bidding confers an advantage but the failure to bid does not in fact cause detriment because the other could not afford to acquire the property himself) or vice versa.

- (5) It is not a necessary feature that the non-acquiring party should have agreed to keep out of the market – advantage / detriment may be found elsewhere. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself. Those circumstances may arise where the non-acquiring party was never 'in the market' for the whole of the property to be acquired but provides support in relation to the acquisition of the whole which is of advantage.

Criticism of the reasoning in *Banner Homes*: the decision in *Crossco*

In *Crossco*, Etherton LJ conducted a detailed analysis of the basis for the *Pallant v Morgan* equity as explained and applied in *Banner Homes* including a review of the academic literature.

47 At 397

48 At 398

Crossco concerned the demerger of a substantial commercial organisation between two sides of a family. One side was to receive the organisation's property interests ("**Gill's Side**"), and the other was to receive its trading interests ("**Philip's Side**"). In particular, Philip's Side was to continue operating an amusement arcade from the ground floor of a building the freehold of which was to be owned by Gill's Side. The arcade was held under a lease that contained a break clause. The existence of that break clause was overlooked by Philip's Side in the negotiations for the demerger; and it was not decided during the process whether Philip's Side would, after the separation of the parties' interests was concluded, continue in occupation under the lease in existence or whether a new lease would be negotiated. Once the division had taken place, Gill's Side sought to exercise the break clause to terminate the lease so as to redevelop the premises.

At first instance Morgan J held that the break clause had been validly exercised. He rejected a claim that an equity arose by proprietary estoppel or that a constructive trust arose under the *Pallant v Morgan* equity. The Court of Appeal agreed.

The proprietary estoppel claim was not dealt with at length. It was held to have failed as there was no representation that Philip's Side would be able to remain on the ground floor for the remainder of the term without the break clause. Furthermore the parties had not reached agreement as to the question of the physical extent of Philip's Side's occupation of the ground floor and they had never discussed the duration of any leasehold interest. It was impossible therefore to say that one side had an expectation of a "*certain interest in land*"⁴⁹ that is a requirement of proprietary estoppel.

It was the constructive trust claim that received far more attention from the Court of Appeal. Philip's Side argued that the *Pallant v Morgan* equity gave rise to a common intention constructive trust since there was an agreement and common expectation as a result of which it was unconscionable for one party to enforce its strict legal rights. Gill's Side argued that the proper explanation for the decision in *Banner Homes* was to be found in breach of fiduciary duty – and as the Judge had found that neither side owed any fiduciary duties on the facts, the claim must fail. Neither party had agreed to act for the other in respect of the project and so when engaged on the project they were not in any sort of pre-existing fiduciary relationship.

The Court of Appeal considered that it was bound by *Banner Homes* to treat the claim as one in which a constructive trust potentially arose under the *Pallant v Morgan* equity but held that no such trust did arise because Philip's Side was not claiming a beneficial interest in the property rather than a leasehold interest; and because the parties' conduct and evidence showed that neither side wished to commit itself until a particular point in time. While the absence of a concluded agreement on all terms of a joint enterprise is not necessarily a bar to a *Banner Homes* constructive trust, the commercial context and the absence of agreement on critical parts of the commercial deal may indicate that there was never a common intention to enter into any kind of legal commitment.⁵⁰

Etherton LJ nonetheless considered that, although he was bound by *Banner Homes*, given developments in the law since that decision it was appropriate for the Court to revisit the principles on which it was based and the so-called *Pallant v Morgan* equity.

Etherton LJ observed that in *Banner Homes* Chadwick LJ had relied on cases emphasising the close relationship between the common intention constructive trust and proprietary estoppel (such as

49 At 398

50 See *Herbert v Doyle* [2010] EWCA Civ 1095 at [57] per Arden LJ

Yaxley) in order to find “some underlying coherence” in the cases.⁵¹ However, as explored above, that close overlap is now in doubt following the analysis and decision on proprietary estoppel in *Cobbe* and Lord Walker’s more cautious thoughts in *Stack* as to the assimilation of the doctrines. Furthermore, the developments in the analysis of the common intention constructive trust in the domestic context following *Stack*, which expose an increasing divergence of approach between domestic and commercial cases, also now cast doubt on the reasoning applied in *Banner Homes*.

Etherton LJ did not agree that the *Banner Homes* constructive trust is, properly analysed, an example of a common intention constructive trust in the nature of that found in domestic cases such as *Lloyds Bank v Rossett* and *Stack*. In his view, that line of cases:

“...can be clearly seen in retrospect as a specific jurisprudential response to the problem of a presumption of resulting trust and the absence of legislation for resolving disputes over property ownership where a married or unmarried couple have purchased property for their joint occupation as a family home... The jurisprudence in that distinctive area is driven by policy considerations and the special facts that normally apply in the dealings between those living in an intimate relationship.”

The considerations that lie behind the development of the common intention constructive trust in the domestic context do not therefore apply to the commercial context, where parties normally take legal advice about their rights and expect to reduce their agreements to writing. In the domestic sphere the parties’ actual, inferred or imputed intentions might change over time, and the common intention constructive trust has been described as an ‘ambulatory’ trust due to its ability to take into account those changes. The same could not be said of commercial cases, as Etherton LJ concluded.⁵²

“The passage of time and developments in the law have, in my judgment, shown the connection between the common intention constructive trust and the Pallant v Morgan equity as explained and applied in Banner Homes to be untenable. In a commercial context ... [the parties] do not expect their rights to be determined in an ‘ambulatory’ manner by retrospective examination of their conduct and words over the entire period of their relationship. They do not expect the Court to determine their respective property rights and interests by the imputation of intentions which they did not have but which the Court considers they would have had if they had acted justly and reasonably and thought about the point.”

In the view of Etherton LJ, the cases in which the *Pallant v Morgan* equity may be said to have arisen can and should be explained in “wholly conventional terms” by the existence and breach of fiduciary duty. While there are alternative principled explanations for a range of constructive trusts “at a high level of abstraction”, there is no need to invoke those explanations. In many commercial cases either the defendant will have bid for the property as the claimant’s agent, or else the defendant’s agent (as in *Pallant v Morgan* itself) will have bid for the property on behalf of both parties.

In those cases which can be termed ‘joint venture’ cases,⁵³ Etherton LJ considered that it is to be inferred that the particular nature of the relationship between the joint venturers was such as to give rise to fiduciary duties.

51 At [80]

52 At [87]

53 For example, *Holiday Inns Inc. v Broadhead* (1974) 232 EG 851

“In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial co-venturers. It is clear, however, that in special circumstances they can arise...In my judgment, the result in Banner Homes can only properly be explained on that basis.”⁵⁴

Etherton LJ considered that explaining and confining the cases in this way was sound policy because it recognised the need for certainty in commercial transactions, and reflected the usual practice and desirability for business transactions to be effected by binding written contracts.

Arden LJ, while agreeing with the final determination reached by Etherton LJ took a different view of the principles at play. She agreed that the decision in *Banner Homes* could be interpreted on the basis that the defendant’s agent acted for both the plaintiff and the defendant at the auction and a fiduciary relationship was therefore created between them. She commented that it is an elementary principle that a fiduciary cannot make a secret profit out of the trust (see, for example, *Keech v Sandford*)⁵⁵ and that, in that situation, it would be unnecessary to resort to a constructive trust of any kind.⁵⁶

Arden LJ pointed out that the analysis of *Banner Homes*, based on a common intention constructive trust of the ‘domestic’ kind, was accepted by Lord Scott in *Cobbe*. Although the decision in *Stack* and subsequent co-habitation cases may mean that common intention constructive trusts will be limited in the future to ‘domestic’ cases alone, Arden LJ did not consider that the position was:

“so clear as to make it possible at this stage for this Court to hold that Banner Homes cannot stand with decisions of the House of Lords and Supreme Court, and to treat the ratio of Banner Homes as not binding on it.”⁵⁷

Banner Homes is invoked in practice in circumstances where parties have been in commercial negotiations over the acquisition of some property but the negotiations have for some reason failed and there is no legally enforceable agreement. The Court of Appeal considered that there was an advantage in re-interpreting the case law as proposed by Etherton LJ as that would restrict the number of situations in which the *Pallant v Morgan* equity could be invoked; and that approach would be consistent with developments in the law of proprietary estoppel. Arden LJ concluded:⁵⁸

“For the law in general to provide scope for claims in respect of unsuccessful negotiations that do not result in legally enforceable contracts would, in my judgment, be likely to inhibit the efficient pursuit of commercial negotiations which is a necessary part of proper entrepreneurial activity.”

Comments on *Banner Homes*

At the level of principle, there is certainly a particular difficulty in *Banner Homes* with the characterisation of the element required to give rise to unconscionability as either advantage to the acquiring party or detriment to the non-acquiring party. It was no part of the doctrine of the common intention constructive trust that a beneficial interest in property arises where an advantage is conferred on the defendant with no corresponding detriment suffered by the claimant, and this requirement seems to be better suited to a claim based on unjust enrichment. *Banner Homes* seems

54 At [88]

55 (1729) Sel. Ca. Ch. 61

56 At [128] referring to *Paragon Finance plc v Thakerar & Co* [1998] 1 All ER 400

57 At [129]

58 At [133]

to adopt the approach of requiring the acquiring party to disgorge unconscionable gains in order to remedy the wrong of retaining property for himself inconsistently with the parties' pre-acquisition arrangement. It could be argued that it is odd to impose a constructive trust in these circumstances, so as to provide the claimant with a proprietary interest when potentially no loss or detriment has been suffered.⁵⁹ Furthermore, the objection could once again be taken that the trust appears to be in the nature of a remedial constructive trust which English law does not at present recognise.⁶⁰

Some aspects of Chadwick LJ's decision also present practical problems for commercial parties. For example, the acquiring party is said to be under a duty to inform the non-acquiring party about his "intention" not to proceed with the arrangement – where he has "serious doubts" that the parties will manage to reach a final agreement, or begins to have "second thoughts over the wisdom of having [the non-acquiring party] as a joint venture partner."⁶¹ However, where the parties are still negotiating at arm's length at the pre-acquisition stage the acquiring party could argue that no duty of disclosure arises, as any such duty would seem to impose on the parties obligations of good faith that would not otherwise arise in this context.⁶²

Furthermore, where the parties know that no binding agreement as to the division of the property post-acquisition has been reached (as in *Pallant v Morgan* itself), the argument could be run that they have done nothing more than take a calculated risk, accepting that no agreement might eventually be reached, so that each side is free to protect and pursue its own interests.

Conclusion

There is a resurgence of judicial enthusiasm for applying a more robust approach to commercial cases where equitable remedies are sought, on the grounds of promoting certainty in commercial transactions. Intervention based on conscience or motive or intention is said to be inapposite in a sphere where the parties are entitled to look to their own self-interest in their dealings with one another.

If Etherton LJ's analysis of the authorities and the rationale for the imposition of a trust in the *Banner Homes* type of case is correct, and the trust that arises is in fact founded on breach of fiduciary duty, it is hard to see how the elements laid down in Chadwick LJ's judgment in *Banner Homes* can stand.

However, for the time being and until the matter comes before the Supreme Court for a decision, *Banner Homes* is considered to be binding at Court of Appeal level even if not considered by some to be 'good law', and clients must be warned of its effect. They would be well advised to disclose in advance of the purchase of the land any intention to pull out of negotiations and to make an independent bid.

59 As still appears to be required in the commercial context despite its banishment from the domestic context.

60 As Etherton LJ notes in *Crossco* there are two other possible analyses of the constructive trust in *Banner Homes*. One of them is that it is a particular instance of an equity which arises if (a) the purchaser has made an undertaking to confer on another a right relating to the property to be purchased and (b) the purchaser has by means of that undertaking acquired an advantage in relation to the acquisition of that property (see Ben McFarlane "Constructive trusts on a receipt of property *sub conditione*" (2004) LQR 667). The other is that it is a particular instance of a constructive trust which arises when a person, acting in reasonable reliance on another's undertaking, forgoes the opportunity to achieve the substance of the undertaking in some other way (see Simon Gardner "Reliance Based Constructive Trusts" in *Constructing and Resulting Trusts* ed. Charles Mitchell (2010)).

61 At 379 and 380

62 See *Walford v Miles* [1992] 2 AC 128, HL and the article of Julian Greenhill "Good Faith" Clauses in *Development Agreements* in this book.