

**Proprietary Estoppel and Formalities in Land Law and the Land Registration  
Act 2002:  
A Theory of Unconscionability<sup>1</sup>**

In *Griss v Trust Laboratories Ltd & Patrick Cattle*, an unsuccessful application for permission to appeal in the year 2000, Sir Christopher Staughton said of proprietary estoppel that “[t]his is not a subject too familiar to many of us. I dare say that there are few lawyers who are constantly concerned with it”.<sup>2</sup> Unfortunately, nothing could be further from the truth, at least in so far as it suggests that this branch of property law is obscure and marginal. Such is the apparent vitality of the doctrine of proprietary estoppel that one can hardly open a law report concerning the alleged creation, transfer or enforcement of a proprietary right without at least one of the parties pleading estoppel in aid. In the recent past, *Lloyd v Dugdale*<sup>3</sup> has decided that a right generated by estoppel qualifies as a property interest capable of binding a successor in title as an overriding interest under s. 70(1)(g) Land Registration Act 1925;<sup>4</sup> *Chun v Ho (In the Matter of Melodious Corporation)*<sup>5</sup> finds evidence of reliance despite ties of love and affection between the disputants that might otherwise have explained the detriment; *JS Bloor (Measham) Ltd v Calcott*<sup>6</sup> finds that a landlord can rely on proprietary estoppel to prevent a tenant from asserting his rights under the Agricultural Holdings Act 1986; *Campbell v Griffin*<sup>7</sup> sees the equity of estoppel satisfied by a money award, secured by a charge over the land;<sup>8</sup> *Jennings v Rice*<sup>9</sup>

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<sup>2</sup>. Court of Appeal Transcript, 16 February 2000.

<sup>3</sup>. [2001] EWCA Civ 1754, 21 November 2001.

<sup>4</sup>. There is little reference to authority, although a similar view is put forward by Mr Lawrence Collins QC (Deputy Judge) in *Locabail (UK) Ltd v Bayfield Properties Ltd*, Chancery Division Transcript, 9 March 1999, Case no. CH 1997/L/4909. See also Megarry & Wade, *Law of Real Property* (6<sup>th</sup> ed. 2001) at pp. 745 *et seq.* where a majority of the relevant authorities are collected. In any event, section 116 of the Land Registration Act 2002 settles the matter for land of registered title: see below n.39. In the result in *Lloyd*, it was held that Mr Dugdale was not in “actual occupation”, so he had no overriding interest that could bind Lloyd.

<sup>5</sup>. Chancery Division Transcript, 30 November 2001, Case No. TLC 367/00.

<sup>6</sup>. Chancery Division Transcript, 30 November 2001.

<sup>7</sup>. [2001] EWCA Civ 2001, 27 June 2001.

<sup>8</sup>. To the order of £35,000. Interestingly, this was not the “expectation loss” of the claimant (he had been encouraged to believe he would have a home for life), but the court’s interpretation of the infamous “minimum equity necessary to do justice to the plaintiff” per Scarman LJ in *Crabb v Arun*

establishes without doubt that the concrete remedy arising from a successful claim of estoppel may be “expectation” or “reliance” based, or somewhere in between, depending on the particular facts of each case; and *Maloo v Standish Hotels*<sup>10</sup> unequivocally determines “from *Yaxley v Gotts*[<sup>11</sup>] that the precise relationship between proprietary estoppel and section 2 of the 1989 Act has yet to be definitively stated”.<sup>12</sup>

This essay is concerned with a number of these issues, but in particular the relationship between estoppel claims, formality requirements (such as those currently found in section 2 LPA 1989 and those impending under the Land Registration Act 2002) and unconscionability. The immediate point is, however, that the law of proprietary estoppel appears to be fast becoming the panacea for all ills in the law of real property. Perhaps this conclusion is only intuitive, based on a snap-shot of recently decided cases, but it is suggested below that whatever the current position, estoppel is going to become even more central to the resolution of property disputes once the Land Registration Act 2002 takes full effect. It hardly needs stating that it would be beneficial in these circumstances for there to be a reasonable degree of certainty about the conditions for a successful claim as well as an understanding of the role the doctrine plays in the scheme of modern land law. Of course, many commentators would argue that this already exists, or at least that it exists in enough measure to prevent the type of “palm tree justice” that judges declare they do not want to exercise.<sup>13</sup> The current author is less convinced and has doubts that a principled approach to proprietary estoppel has developed sufficiently to enable the courts to deal appropriately with even the current level of estoppel pleas, let alone with what

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*District Council* [1976] Ch 179 at p.198. See also the Privy Council decision in *Cook v Norlands Ltd.*, 27 November 2001, on appeal from the High Court of the Isle of Man, where the estoppel was satisfied by an award of £25,000 “in compensation”.

<sup>9</sup>. [2002] EWCA Civ 159, 22 February 2002.

<sup>10</sup>. Chancery Division Transcript, 6 March 2002, Claim no. HC01C03691.

<sup>11</sup>. [2000] Ch 162.

<sup>12</sup>. *Supra* n.10 para. 69 per Mr L Henderson QC, dismissing an application for summary judgement. Of course, the reference is to s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Note also that proprietary estoppel is not the only conscience based equity currently finding favour with the courts. In *Godfrey v Power*, Chancery Division Transcript, 17 December 2001, Park J finds a “*Pallant v Morgan*” equity applying *Banner Homes v Luff* [2000] Ch 372. For criticism of *Luff et al* see Nicholas Hopkins, *The Pallant v Morgan “Equity”*, [2002] Conv. 35.

<sup>13</sup>. See, for example, Judge Weeks’s comments in *Taylor v Dickens* [1998] 1 FLR 806 at 820 about his reluctance to be issued with “a portable palm tree”. In the context of remedies, Robert Walker LJ in *Jennings v Rice*, *supra* n.9 at para. 43, rejects firmly the suggestion in S Gardner, *The Remedial Discretion in Proprietary Estoppel* (1999) 115 LQR 438 that “the approach is for the court to adopt whatever style and measure of relief it thinks fit, for whatever reason it thinks fit.”

might become an “estoppel boom”. It will be argued below that this principled approach can be developed through a clearer idea of the role that “unconscionability” plays in a successful claim to proprietary estoppel and, in consequence, that unconscionability should not be viewed simply as a rather elusive notion stalking estoppel claims but as the manifestation of a clear policy goal.

### **A: An Estoppel Boom?**

In one sense it is not important to the central argument of this essay about the proper confines of the law of proprietary estoppel - as regulated by a principled understanding of the concept of “unconscionability” - that there *will* be an estoppel boom. For the present writer, the rather haphazard way in which unconscionability is currently approached is reason enough to provoke a re-examination. Nevertheless, *if* there is an estoppel boom, particularly if that is a consequence of the application of the radical provisions of the Land Registration Act 2002, those charged with deciding issues or advising clients will face even more uncertainties and inconsistencies.<sup>14</sup> Furthermore, there is the very real risk that the central provisions of the new Act concerning electronic conveyancing could be undermined by the application of proprietary estoppel in cases where, on a proper understanding of the role of unconscionability, that would be wholly unwarranted.

It is, of course, trite law that proprietary estoppel can found a claim against an estate owner as well as be a defence to a claim by that estate owner. In either case, a successful plea can result in the award of something concrete for the “victim” (as opposed to the denial of a remedy to the person estopped), although this need not be an immediate proprietary right nor, indeed, any future property right at all.<sup>15</sup> The types of factual situations in which estoppel may arise have been thoroughly researched with considerable skill by others and in this respect there is little that may

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<sup>14</sup>. As Megarry & Wade indicates, “[t]he flexibility of proprietary estoppel...is its strength and its weakness....This is not conducive to the settlement of disputes and leads to costly litigation”, *supra* n.4 at p. 728

<sup>15</sup>. See the money awards in *Jennings v Rice*, *Campbell v Griffin* and *Cook v Norlands*, and the restitutionary award in *Ravenocean v Gardner* (on the basis that there was no estoppel). In *Sledmore v Dalby*, [1996] 72 P & CR 196, the claim to a life interest was denied because, even if there had been the necessary assurances, the claimant had by the date of the hearing received all that he could have expected to receive.

be usefully added here.<sup>16</sup> Of particular interest for the purposes of this paper, however, are those cases where proprietary estoppel has been used to found a claim for a person who is unable to rely on the normal rules concerning the creation or transfer (and sometimes enforcement) of an interest in land. These are what might usefully be called the “formality cases”, being instances where the parties could have, should have or nearly did use the proper formality, but where estoppel is pleaded to fill the void. As the judge said in *Yeo v Wilson*, “[p]roprietary estoppel is one of the oldest devices of equity for giving effect to apparent understandings about the disposition of property, which for one reason or another are not enforceable at law”.<sup>17</sup> So, proprietary estoppel has been used to support some sort of remedy where a contract for the transfer of land was void for uncertainty of subject matter (*Flowermix Ltd v Site Development (Ferndown) Ltd*<sup>18</sup>); where there was no contract at all despite the prospect of one (*Yaxley v Gotts*); where there was no will in favour of the claimant or anybody else (*Jennings v Rice*); where there was a will in favour of someone other than the claimant (*Gillet v Holt*<sup>19</sup>); where an intended devise in a will had lapsed (*Campbell v Griffin*); where a deed was defective as to witnessing (*Mukesh Shah v Panachand Shah*<sup>20</sup>); where an intended lease (the terms of which were settled) was never executed (*Lloyd v Dugdale*); and where a lease may have been uncertain as to its commencement (*Liverpool City Council v Walton*<sup>21</sup>).

The essence of the issue in these formality cases is that one party claims to be entitled to some proprietary right (or the monetary expression of the right<sup>22</sup>) even though in the normal course such creation or transfer would be ineffective due to an absence of formality. Estoppel is seen in such cases as an antidote for the absence of

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<sup>16</sup>. See generally M. Pawlowski, *The Doctrine of Proprietary Estoppel* (1996) and E.J. Cooke, *The Modern Law of Estoppel* (2000).

<sup>17</sup>. Chancery Division Transcript, 27 July 1998, Case no. CH 1997 Y 4026 per Jonathan Sumption QC (Deputy Judge).

<sup>18</sup>. Chancery Division Transcript, 11 April 2000, Case no. HC 1997 06474, Arden J.

<sup>19</sup>. [2000] 3 WLR 815.

<sup>20</sup>. 10 April 2001, Court of Appeal Transcript.

<sup>21</sup>. Chancery Division Transcript, 25 July 2001, Neuberger J. Presumably, the local authority is acting in its “private capacity” (see *Mobil Oil Company v Birmingham City Council*, Court of Appeal, 2 November 2001, [2001] EWCA Civ 1608) and estoppel is not being used to fetter the discretion of a public authority. For the ongoing debate over the latter see, *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204, *Dowderry Construction Ltd v Secretary of State for Transport*, 11 January 2002 [2002] EWHC 2 Admin. and *R v East Sussex County Council ex p Reprotech* [2002] UKHL 8.

<sup>22</sup>. Not “merely” recovery of the costs incurred as a result of the reliance, for such recovery lies in restitution consequent on unjust enrichment rather than in estoppel, as in *Ravenocean Ltd v Gardner*, Chancery Division Transcript, 19 January 2001, Case No. Ch/2000/PTA319 and *Singh v Khan* [1988] EGCS 92.

the required formality. Typically, the requirement of formality arises because of some statutory injunction.<sup>23</sup> These may be statutory provisions of general import, such as sections 1 and 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LPA 1989), the Wills Act 1837 and s. 53 of the Law of Property Act 1925, or less commonly statutory provisions designed to deal with some specific mischief, as in *Oakley v Airclear Environmental Ltd* and the need for a written contract under s. 107 of the Housing Grants, Construction and Regeneration Act 1996.<sup>24</sup> In either type of case, there is always the problem that the use of estoppel appears to contradict the policy behind the legislation by attaching an element of validity to an arrangement – in the sense of permitting the creation, transfer or enforcement of a proprietary right – that the legislation requires to be in a certain form but which the parties have failed to observe.<sup>25</sup> This is what Robert Walker LJ in *Yaxley v Gotts* calls the “public policy principle”<sup>26</sup> and it is considered more fully below for it lies at the heart of the debate about the proper reach of estoppel. For the moment, the simple point is that such concerns (i.e. the public policy principle) do not appear to have unduly hindered the use and development of the doctrine. If anything, estoppel claims appear to have increased in frequency as the formality rules have been tightened. The abolition of the doctrine of part performance and the insistence on written formality by the LPA 1989 perhaps being the chief reason for the current level of estoppel claims. Importantly, however, the 1989 Act is not the end of the changes that have been made to the formality rules for land transactions and, indeed, its importance will diminish if the Act of 2002 fulfils its promise.<sup>27</sup>

The Land Registration Act 2002 has much to say about the way proprietary rights affect land of registered title and, as is well known, its primary purpose is to facilitate the introduction of electronic conveyancing and thereby the compilation of a register that is a near perfect mirror of the title to the land and all the proprietary rights

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<sup>23</sup>. Though not exclusively, see *Walton* supra n.11, where there is non-compliance with the common law rule requiring certainty of commencement for a leasehold estate.

<sup>24</sup>. Chancery Division Transcript, 4 October 2001, Etherton J.

<sup>25</sup>. Importantly, it is not the unenforceable agreement etc. that is being validated, but an estoppel arising out of the circumstances in which the agreement etc. was attempted. Hence, the remedy may not be, indeed often is not, equivalent to that which would have occurred had the agreement etc. been valid according to the formality rules.

<sup>26</sup>. *Supra* n.11 at p.

<sup>27</sup>. Note also that proprietary estoppel can be used to circumvent the general policy behind an Act of Parliament, as in *JS Bloor (Measham) Ltd v Calcott* supra n.6 regarding the Agricultural Holdings Act 1996 and (possibly) in *Colchester Borough Council v Smith* [1992] Ch 421 regarding the Limitation Act 1980.

and interests affecting it.<sup>28</sup> Many strategies are employed to this end and not all are relevant here.<sup>29</sup> However, there are provisions that will have an impact for the circumstances in which a proprietary right may be granted, transferred or enforced and, in consequence, a potential impact on the law of estoppel. First, under the provisions of the Land Registration Act 2002 and the Electronic Communications Act 2000, it will be possible in due course to create or transfer proprietary rights either by means of a paper (material) deed or written contract (as now) or by an “electronic” (non-material) deed or written contract.<sup>30</sup> Of itself, this raises no fundamental concerns because it is clear that the electronic deed or contract will be treated as having the same effect as its paper counterpart. Presumably, however, some defect in the execution of the electronic deed or contract will be curable by proprietary estoppel, at least to the extent and in the same circumstances that a defect in a paper deed or written contract is curable. So, for example, a failure to meet one of the four conditions specified in s. 91(3) LRA 2002 for the validity of an electronic disposition would render the disposition itself ineffective but, we might suppose, a claim in proprietary estoppel could still succeed.<sup>31</sup> Secondly, it is the ultimate aim of the Land Registration Act 2002 that the act of creation or transfer of certain proprietary rights will occur simultaneously with their electronic entry on the register. Or, to put the matter the other way round, the attempted creation or transfer of certain proprietary rights will be completely ineffective to create or transfer a right at law or in equity unless an appropriate entry is made on the register. This is the effect of section 93(2) LRA 2002 when it stipulates that a disposition or a contract to make a disposition to

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<sup>28</sup>. “The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections”, Law Commission Report No. 271, *Land Registration for the Twenty-first Century: A Conveyancing Revolution*, para. 1.5. The original is in bold, just to make the point.

<sup>29</sup>. See Elizabeth Cooke, *The Land Registration Bill [2002]* Conv. 11.

<sup>30</sup>. It is envisaged that an Order will be made under s. 8 of the Electronic Communications Act 2000 (ECA 2000) permitting the use of electronic deeds/registered dispositions by inserting a new section 144A in the Land Registration Act 1925. Section 144A of the LRA 1925 will be superseded in due course by s. 91 of the LRA 2002. The Order under s. 8 ECA 2000 will also insert a new section 2A into the LPA 1989 authorising the use of electronic contracts. See generally, LCD Consultation Paper 05/2001, March 2001 (*Electronic Conveyancing: a draft order under section 8 of the Electronic Communications Act 2000*) and LCD Consultation Response, December 2001 (*Electronic Conveyancing – analysis of the responses to the Consultation Paper*).

<sup>31</sup>. Pending the introduction of full electronic conveyancing, failure to register a valid electronic deed where that is required will result (as now) in a failure to transfer an estate at law (s. 27(1) LRA 2002), but the valid electronic deed will be effective to create or transfer an interest in equity (as now). Section

which the section applies “only has effect” when made in electronic form and entered on the register. Of course, what this means in practice is that for those estates and interests specified in the Rules as requiring to be electronically entered on the register in order to be effective,<sup>32</sup> compliance with the “old” formality requirements of a deed or written contract will be futile. The parties who deliberately set out to create or transfer a proprietary right by paper deed or contract will find that have created or transferred nothing. There is no “default position” such as that the interest will subsist in equity and so there is no property right which might nevertheless take effect as an “interest that overrides” a first registration or registrable disposition within Schedules 1 or 3 of the LRA 2002. It even seems that the original parties will not be bound in contract under such a document because failure to meet the electronic requirements renders the transaction without effect and thus does not create “mere” rights in personam sufficient to found a claim for breach.<sup>33</sup> Although it seems strange that a statute about land *registration* should invalidate contracts between the original parties (note: s. 2 LPA 1989 which also invalidates is actually about *contracts*), this seems to be the clear effect of s. 93 LRA 2002 which says that a disposition falling within the section “or a contract to make such a disposition, **only** has effect” if the electronic formalities are complied with (emphasis added).<sup>34</sup>

It seems inevitable, at least to this author, that the imposition of such a system – undoubtedly necessary if electronic conveyancing is to become a reality<sup>35</sup> - will generate an estoppel boom. First, it is anticipated that the great majority of proprietary rights will be subject to section 93 LRA 2002 in due course. The creation or transfer of a registrable estate or disposition will fall within its ambit, as will the creation or transfer of many third party rights that are required to be protected by the entry of a unilateral or consensual notice against the registered title. The latter will include

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27(1) will be disappplied in relation to those estates and interests required to be completed by registration under s. 93 LRA 2002, for such a failure renders the transaction completely ineffective.

<sup>32</sup>. It is envisaged that all registrable dispositions will be so specified as well as, in due course, the great majority of third party rights such as expressly created easements, covenants, options etc.

<sup>33</sup>. I am grateful to the participants at the Property Law Conference 2002 (Reading University, Centre for Property Law), particularly Susan Bright of St. Hilda’s College, Oxford, for their discussion of this point.

<sup>34</sup>. The alternate view – that contracts falling outside s. 93 LRA 2002 but within the current formality rules could nevertheless be valid in contract between the original parties – could have provoked considerable argument about the nature of such contracts, especially if coupled with “actual occupation”. The potential for easy circumvention of s. 93 by a willing judiciary in such circumstances perhaps explains the unrelenting terms of the section.

<sup>35</sup>. “A culture change often requires a culture shock”. I am indebted to my colleague, Dr P McHugh of Sydney Sussex College, Cambridge for this rejoinder during a seminar on electronic conveyancing.

expressly created easements, options, covenants and possibly even leases not required to be entered as a registered estate and which are not within the short lease exception of ss. 52 & 54(2) LPA 1925. Of course, the point is precisely to ensure that virtually all expressly created rights appear on the register. Thus, if they do not appear, they do not exist and resort to estoppel may be the only hope for a disappointed claimant. Secondly, we cannot assume that all property professionals immediately will understand that deeds and written contracts could be completely ineffective, and a remedy in negligence will not secure the proprietary right denied by s. 93 LPA 2002.<sup>36</sup> Thirdly, registration (i.e. the act of creation or transfer) will be electronic, and only authorised persons will be able to transact. Not only will private individuals continue to deal with each other without the benefit of legal advice and hence without understanding the relevant formality rules (as in *Yaxley v Gotts*), even if they did comprehend section 93 LRA 2002, how would they ensure the registration of their right? While it may be true that less than 1% of all transactions are DIY conveyances,<sup>37</sup> the Act will apply to much more than conveyances: as already noted, it will extend to the creation or transfer of many (indeed most) third party rights in land. While DIY conveyances may be relatively rare, the DIY attempted creation or transfer of other rights in property is far more common.<sup>38</sup> Fourthly, and perhaps most importantly, it is now clear from *Lloyd v Dugdale* that an “estoppel” is a proprietary right capable of binding a third party as an overriding interest under the current s. 70(1)(g) LRA 1925 (and hence will be an “interest that overrides” within Schedules 1 and 3 LRA 2002). Indeed, even if *Lloyd* had said otherwise, s. 116 LRA 2002 puts the matter beyond doubt.<sup>39</sup> Thus, whereas the failed creation or transfer of a proprietary right under the rubric of electronic conveyancing will be of no effect at all, even if attempted by deed or valid contract (s. 93 LRA 2002), and so cannot trigger an

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<sup>36</sup>. Carefully drafted Land Registration Rules and appropriate training will minimise the risk, but it is all too clear that clients are not always advised at present to adhere to the requirements of s. 2 LPA 1989. How likely then that compliance with s. 93 LRA 2002 will proceed with ease?

<sup>37</sup>. Law Commission Report No. 271 para 13.72.

<sup>38</sup>. It is clear that private individuals often feel the need for writing when dealing with land, irrespective of any knowledge of formality requirements and thus there is often “accidental” compliance with s. 2 LPA 1989. No doubt this will continue, but will they feel the same way about the need to register after writing things down and so visit the District Land Registry for help?

<sup>39</sup>. “It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following-

(a) an equity by estoppel, and

(b) a mere equity,

has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)”.

“interest that overrides” within the Schedules, a successful estoppel can do just this – the Act itself makes that clear even without *Dugdale*. How tempting then to use estoppel both to acquire the right despite the absence of compliance with sections 91 or 93 LRA 2002 (or the intended section 2A LPA 1989) *and* then when the estoppel is established to ally it with actual occupation to make it binding against a third party. In other words, estoppel may well come to be the single most effective way of creating, transferring and enforcing property rights outside of electronic formalities. The greater the injunction to use electronic measure, the greater the scope for claims in estoppel.

Of course, this analysis rather assumes that estoppel actually can save a transaction that fails to comply with the relevant formalities relating to creation and registration as required by the LRA 2002. We might think, for example, that such is the conveyancing revolution and so clear is the Act that the above analysis overestimates the role for estoppel in land registration. However, in reality, this is no new dilemma but merely a version of an old problem: *viz.* when can proprietary estoppel protect a claimant who has not used the degree of formality or followed the correct process required by statute. Whether it be non-compliance with sections 2 or (the intended) 2A of the LPA 1989, (the possible) s.144A Land Registration Act 1925, section 53 of the LPA 1925, or sections 91 or 93 of the LRA 2002, can estoppel come to the claimant’s aid, and why?

### **B: The public policy issue: estoppel and formality.**

The suggestion that there is a tension between the strict requirements of formality (including registration issues) and the court’s desire to achieve a measure of equitable justice between the parties surprises no-one. We might even claim that herein lies the very origins of the equitable jurisdiction and it finds expression in many forms. “Equity will not permit a statute to be an instrument of fraud” is no mere mantra, and the law of secret trusts and the law of constructive trusts in all its manifestations are just two examples of the many ways in which the tension can be resolved. Yet, when it comes to land, there is a greater reluctance to side-step formality rules. Even now, for example, there are doubts about how we can explain the validity of a secret trust of

land<sup>40</sup> and the courts find great comfort in the fact that there are statutory exemptions in favour of constructive trusts of land that provide an easy answer and avoid the need for an enquiry into the reasons why the transaction is enforceable despite the absence of the appropriate formality.<sup>41</sup> In particular, there is great concern about the relationship between s. 2 of the LPA 1989 and the law of estoppel, as witness the argument in *Yaxley* and the *dictum* in *Maloo v Standish Hotels*<sup>42</sup> that “the precise relationship between proprietary estoppel and section 2 of the 1989 Act has yet to be definitively stated”.<sup>43</sup> The point is made succinctly (indeed dogmatically) in *Halsbury’s Laws*, that the “doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid”.<sup>44</sup> Consequently, a contract or other intended disposition of an interest in land that the law requires to take a certain form - for example, in writing or by deed - may not be enforced by estoppel for that would be to undermine the legislative purpose and policy.<sup>45</sup>

In fact, however, the position is more complex. The available evidence suggests that courts will permit estoppel to circumvent “secondary” statutory formality rules or to bar reliance on protective provisions in legislation where this supports (or at least does not contradict) the underlying purpose of the legislation.<sup>46</sup> Consequently, if this underlying statutory purpose can be supported (or not evaded) through the use of estoppel, it is taken for granted that its application is appropriate without proof of special facts over and above those commonly required to establish the estoppel. However, with section 2 of the LPA 1989 the position is quite different and this may explain why its particular relationship with proprietary estoppel generates such uncertainty. The whole point of section 2 of the 1989 Act is to invalidate transactions that do not comply with its formality rules: it is a “primary”

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<sup>40</sup>. For example, whether “writing” is needed for a half-secret trust of land: see *Re Ballie* and contrast with *Ottaway v Norman*.

<sup>41</sup>. See s. 53(2) LPA 1925 and s. 2(5) LP (MP) A 1989. This could be Robert Walker LJ’s position in *Yaxley v Gotts*, and it appears from his judgment in *Jennings v Rice* supra n.9 at para 45 that when proprietary estoppel has “a consensual character falling not far short of an enforceable contract (if the only bar to the formation of a contract is non-compliance with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, the proprietary estoppel may become indistinguishable from a constructive trust”. Presumably, it is distinguishable if these conditions do not obtain.

<sup>42</sup>. Chancery Division Transcript, 6 March 2002, Claim no. HC01C03691.

<sup>43</sup>. *Supra* n.42.

<sup>44</sup>. 4th ed. Reissue, vol. 16 (1992) para. 962, cited by Robert Walker LJ in *Yaxley*, supra n.11 at p. 172.

<sup>45</sup>. For the classic analysis of the policy see L.L. Fuller, *Consideration and form* (1941) 41 Col. L.R. 799.

<sup>46</sup>. For example, *JS Bloor (Measham) Ltd v Calcott*, supra n.6.

formality rule. The use of formality *is* the policy of the statute and so to use estoppel to circumvent it needs a convincing explanation. As Robert Walker LJ made clear in *Yaxley*, “[p]arliament’s requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void.....can be seen as embodying Parliament’s conclusion, in the general interest, that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement”.<sup>47</sup> The same is true, *mutatis muntandis*, of the relevant provisions of the Wills Act and, it is submitted, of the intended section 2A of the LPA 1989 and sections 91 and 93 of the LRA 2002. The whole point of the latter, as made clear in Law Commission Report No. 271, is to force the use of electronic dealings with land by invalidating those dealings that do not comply. Again, the requirement to use this new type of electronic formality is the policy of the legislation and to circumvent it by use of estoppel will need some justification..

In one sense, of course, this might be a matter of degree. If it is true that certain types of statutory formality (in its broadest sense to include registration requirements) can be circumvented by proprietary estoppel when this furthers the policy of the relevant statute (or at least does not undermine it), then surely proprietary estoppel can be used to circumvent “primary” formality rules providing there is a similar policy justification? This is not necessarily uncontroversial, as it is now well known that at least one major academic authority suggests that a proprietary remedy by way of estoppel would be inappropriate, even in the face of unconscionable conduct, if the effect would be to circumvent section 2 of the LPA 1989.<sup>48</sup> Nevertheless, despite these reservations, it is submitted that it is now beyond reasonable doubt that proprietary estoppel can be used to save a transaction which falls foul of section 2 of the LPA 1989. There is no absolute incompatibility between section of the 2 LPA 1989 and proprietary estoppel. First, there is no suggestion in the Law Commission’s 1987 Report on *The Transfer of Land: Formalities for Contracts of Sale etc. of Land* (No. 164) that section 2 should have such an effect.<sup>49</sup> In fact, the view of the Commission in the earlier Working Paper No. 92 (confirmed in Report

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<sup>47</sup>. *Supra* n.11 at p.175.

<sup>48</sup>. Goff & Jones, *The Law of Restitution*, 5<sup>th</sup> ed. (1998) p. 580. Note, however, it is the form of remedy that is disputed, not the possibility that the claimant may be successful. Of course, this is in line with the authors’ general position that the restitutionary base of many of our established remedies should be recognised.

No. 164) was that it “appears to us obviously out of the question to exclude the application of these general judicial doctrines (restitution as well as equitable estoppel) in this particular area of sales etc. of land”.<sup>50</sup> Of course, we might be tempted to argue over the relevance of Law Commission Reports when determining the effect of primary legislation – see the different views in *Yaxley* itself – but it cannot be denied that the raising of the formality threshold was not *intended* to prevent a claim by proprietary estoppel. As for other “formality rules, it is submitted that likewise there is no absolute prohibiting the use of proprietary estoppel to save an otherwise void transaction - providing of course that the paramount test of unconscionability is passed. As for sections 91 and 93 LRA 2002 in particular, it is not surprising that the role of proprietary estoppel is not canvassed directly in the relevant preparatory material published by the Law Commission – after all the point of the LRA 2002 is to ensure that more matters are registered than currently is the case under the LRA 1925 and it would be a surprise to see the Commission offering a ready way to avoid these changes! However, it may well be significant that the Law Commission thought it important that the new legislation establish conclusively the “proprietary effect” of estoppel within the new world of electronic conveyancing: hence section 116 LRA 2002. After all, it is not *critical* to the success of the new scheme that the true nature of estoppel should be spelt out, not, that is, unless it is anticipated or suspected that many more cases will arise when the new provisions take effect. Secondly, while Robert Walker LJ concludes in *Yaxley*, following on from *Godden v Merthyr Tydfil Housing Association*<sup>51</sup> that “estoppel by convention” has not survived the enactment of 2 of the LPA 1989,<sup>52</sup> he has “no hesitation in agreeing ....that the doctrine of estoppel may operate to modify (and sometimes even counteract) the effect of section 2 of the Act of 1989”.<sup>53</sup> Once again, it is submitted

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<sup>49</sup>. The enactment of the 1989 Act was a result of the Report.

<sup>50</sup>. Working Paper No. 92 at p. 35 and see Report No. 164 at pp. 19-20.

<sup>51</sup>. Court of Appeal Transcript, 15 January 1997, Case No. CCRTI 96/1430/G.

<sup>52</sup>. “Estoppel by convention” is founded on the existence of an agreed state of affairs between the parties as the basis of their transaction. If this shared assumption proves to be false, neither may then resile from the assumption: *Amalgamated Property Company v Texas Bank* [1982] 1 QB 84. Clearly, a shared assumption that a contract concerning land is valid, when in fact it is void due to the absence of the required formality, cannot *of itself* justify the court in enforcing the contract as if it were valid. This would, to use Sir John Balcombe’s words in *Godden* “drive a coach and horses through a recent Act of Parliament [the 1989 Act] enacted for very specific reasons of public policy”, *supra* n. . That is not to say, however, that a claim that once fell within “estoppel by convention” could not fall within proprietary estoppel, provided of course that the unconscionability test was met.

<sup>53</sup>. *Supra* n. 51 at para. 174. Both Clarke LJ and Beldam agree, perhaps even more forcefully. On one view, Robert Walker LJ is happy to preserve proprietary estoppel because it falls within the saving of

that what is good for section 2 of the LPA 1989 is also good for the other formality requirements noted above.<sup>54</sup> Thirdly, this author has found no case where the alleged incompatibility of proprietary estoppel with the requirements of section 2 (or its equivalents) has been raised successfully as a complete defence to an estoppel claim. It is not always wise to speculate, but perhaps this is because it is commonly assumed that the requirements of the section do not *ipso facto* bar to a claim in proprietary estoppel. If, instead, it is thought that the relative absence of discussion about the relationship of proprietary estoppel and section 2 can be explained because not all cases involve failed contracts (and thus the formality rules were not relevant), there is revealed a misunderstanding about how the great majority of proprietary rights come into existence - that is, some degree of formality is nearly always required and the fact that the parties did not intend to transact by deed or written contract (which then failed) does not make the apparent undermining of the primary formalities rules any less important, just less obvious. Fourthly, and most importantly, there *is* a positive reason why section 2 and its equivalents (including sections 91 and 93 LRA 2002) do not *ipso facto* prevent a claim in proprietary estoppel. Simply put, reliance on the lack of normally required formality will not defeat the claim to a proprietary right where this would be unconscionable. Put positively, the reason why it is possible to use proprietary estoppel to generate a property interest in favour of a claimant despite the absence of the normal formality rules - be they found in sections 1, 2 or (the intended) 2A of the LPA 1989, s. 53 of the LPA 1925 or sections 91 or 93 of the LRA 2002 - is because of the need to prevent unconscionable conduct. This is why unconscionability is the foundation of estoppel.<sup>55</sup> It is the antidote to the otherwise fatal absence of formality. Consequently, as argued below, a coherent understanding of the role of unconscionability can be achieved only by relating it to those formality rules. The requirements of the latter are the key to understanding the former.

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constructive trust under s. 2(5) LPA 1989, the doctrines being synonymous in these type of cases: see above n.11. This is not the current author's reading of *Yaxley*

<sup>54</sup>. See above text accompanying n.47.

<sup>55</sup>. See Oliver J's famous dictum in *Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.* [1982] QB 133 at 151, reporting the judgment of February 1979, that what is required is a "broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick of unconscionable behaviour". Or, in the words of Robert Walker J in *Gillett v Holt*, "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the

## C: Analysing unconscionability

### (i) Unconscionability as a function of assurance, reliance and detriment

The central role which unconscionability plays in the law of estoppel seems, at least to the present writer, to be in inverse proportion to the analysis devoted to it in the cases. All judges are agreed that unconscionability is vital, but few seem willing to share their understanding of the concept. There is a denial that the court is engaged in “palm tree justice”, but little to tell us where the beach has ended. The implication is, of course, that unconscionability must mean *something* reasonably definable, but the identification of its essential elements seem to be unimportant provided that in the case before the judge it is clear that “in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make”.<sup>56</sup> Academically, the seam is deeper and richer, but apart from the robust analysis of those commentators who for policy reasons positively favour a broad and largely undefined concept of unconscionability, there is little that helps in the search for a firmer concept if one disagrees that unconscionability is better left shapeless.<sup>57</sup> The present author is not content with a shapeless concept of unconscionability, but instead sees both good reason and good need to define unconscionability more tightly. The reason is that, as will be argued below, the concept actually fulfils more than one function in the law of estoppel, one of which is vital to the very existence of a successful claim. The need is, as argued above, that if there is to be an estoppel boom, it is better to have a clearer idea of when an estoppel plea can be successful before the boom arrives.

It is well known that a court will search for some form of assurance issuing from the person alleged to be estopped in favour of the claimant, on which the claimant has relied to his or her detriment. Although, as we are reminded in *Gillet*, the court should take an holistic approach to proof of the estoppel and should view the

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doctrine”, supra n.19. Many similar pronouncements can be found: see M Thompson [1998] Conv. 210 at 216 and M Dixon, *Estoppel: A panacea for all wills?* [1999] Conv 46 at p.47.

<sup>56</sup>. Per Lord Brown-Wilkinson in *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113 at 117.

<sup>57</sup>. See Thompson *supra* n.55 and [2001] Conv. 78; Cooke *supra* n.16 at pp. 85 *et seq*; M Dixon, *Estoppel, Unconscionability and formalities in Land Law* (2000) CLJ 453. Consider also M Halliwell, *Estoppel: Unconscionability as a Cause of Action* (1994) 14 L.S. 15 and N Bamforth, *Unconscionability as a vitiating factor*, LMCLQ 538.

matter in the round, it is clear that many claimants are disappointed because they cannot establish one of these elements.<sup>58</sup> What is less frequent is the rejection of an estoppel on the simple ground that there is no unconscionability, at least in terms of disallowing the claim *ab initio* rather than modifying the remedy.<sup>59</sup> Such cases are rare, and we must wonder why. For the present writer, there are two possibilities. Either, the concept of unconscionability is so poorly understood that judges prefer (or are forced by the paucity of analysis) to deny an estoppel on the ground of the absence of one of the three “elements” of assurance, reliance and detriment rather than venturing into the murky waters of unconscionability. Understandably, if we have no clear concept of unconscionability, it is difficult to deny a claimant on the basis that it is absent. Alternately, we could argue that unconscionability is so bound up with “assurance, reliance and detriment” that in reality it has ceased to have a meaning independent of these three criteria and hence the denial of a claim proceeds most easily by denying the existence of one of these three elements.

In fact, although the present writer is of the view that first alternative is very near the mark, it is this second approach to estoppel and unconscionability that now seems to be gaining ground. In *Gillet v Holt*, Robert Walker LJ endorses the view that it is the detrimental reliance on the representee’s assurance that makes the representation irrevocable, so that any attempt thereafter to revoke it by the representee is unconscionable.<sup>60</sup> This echoes Carnwath J’s views in the High Court in that case that it is unconscionable to withdraw an assurance once it is, with the representor’s knowledge, relied on to detriment.<sup>61</sup> Clearly, this assessment of what “unconscionability” means has important consequences. In essence, it sees unconscionability simply as a function of assurance, reliance and detriment. Once there has been detrimental reliance on an assurance, it is unconscionable to withdraw it. Hence, “unconscionability” has no independent existence outside of these three

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<sup>58</sup>. For example, in *Bryan v Shoultz*, Court of Appeal, 21 April 1999, there was no reliance, the assurance having been withdrawn before it was acted on (see also *Stoeckert v Geddes*, Privy Council 13 December 1999 and *Aylwen v Takla*, Court of Appeal, 6 April 2000). In *Jones v Stones* [1999] 1 WLR 1739 there was no assurance (see also *Yeo v Wilson*, supra n. ). In *Orgee v Orgee* (1997) EGCS 152 there was no detriment (and see also *Singh v Khan*, supra n. and *Takla*). In *Gillett* itself, the holistic approach did not prevent the court identifying with some precision the relevant assurance, reliance and detriment.

<sup>59</sup>. One example is *Oakley v Airclear*, supra n.24. See below text accompanying note for the relevance of the distinction made in the text.

<sup>60</sup>. *Supra* n.19, approving W.A. Swadling’s comments on *Taylor v Dickens* at [1998] Restitution Law Review 220. Later in the judgment, Robert Walker LJ notes again that “it is the other party’s detrimental reliance on the promise which makes it irrevocable” at p.229.

requirements for it is defined purely in their terms. The corollary is, of course, that unconscionability exists *by definition* whenever there is an assurance, reliance and detriment, because non-performance of the assurance after detriment will always be unconscionable.<sup>62</sup> Such a view is at odds with those that view unconscionability as at the heart of the doctrine – in the sense of providing its underlying rationale – because, quite simply it denies the concept of any discernible meaning. It is a non-definition.

If it is true that unconscionability is now to be regarded as no more than a function of assurance, reliance and detriment, this author submits that the approach is flawed and unprincipled.<sup>63</sup> There are a number of reasons. First, and formally, it is submitted that this “definition” of unconscionability is not supported by *Taylor Fashions* itself. A straightforward reading of Oliver J’s judgment suggests that before an estoppel can be established there must be an assurance, reliance and detriment (albeit holistically examined), but that this must occur in circumstances where the court is satisfied that it would be unconscionable to allow the party making the assurance to go back on it. Or, put shortly, *Taylor Fashions* and cases following suggest that assurance, reliance and detriment are necessary but not sufficient. Secondly, if unconscionability is simply the reflection of a withdrawn assurance after detrimental reliance, how does it justify the grant of an estoppel remedy in the formality cases, bearing in mind that estoppel is an exception to the normal formality rules? The whole point of the formality rules is to ensure that a representation about a property right shall be capable of enforcement only if it is in a proper form. If the proper form can be ignored simply because the representee has relied on the representation to detriment, that is tantamount to saying that the formality rules invalidate only “voluntary” promises, being those where there is no detriment issuing from the promisee. In fact, the role of such formality rules is to ensure that *even if* a person detrimentally relies on an “unformalised” promise, it cannot be enforced because that is the very point of the formality rule: *viz.* to invalidate clearly intended and acted on transactions because they do not comply with the overriding formality requirements. These requirements are, in their turn, the manifestation of a legislative

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<sup>61</sup>. [1998] 3 All ER 917 at 929.

<sup>62</sup>. This does not necessarily mean that the claimant must succeed, for estoppel remains a discretionary equitable jurisdiction. It does mean, however, that a party cannot dispute unconscionability once the three factual elements have been established.

<sup>63</sup>. Although the approach under discussion is inherent in the treatment of estoppel in *Gillett*, one suspects that the Court of Appeal would not wish to be shackled so that they were obliged to find unconscionability if detrimental reliance had occurred.

policy about certainty and predictability. The exception is, of course, where there is unconscionability, but if we then “define” the concept purely in terms of the provable, factual criteria of assurance, reliance and detriment, we have no external reference point by which to justify the application of proprietary estoppel and are close to ignoring the formality rules completely (and hence subverting the statutory will) or effectively returning to the days of part performance.<sup>64</sup> Consequently it is submitted that unconscionability cannot reside solely in the fact that the representation is withdrawn after detriment, for the invalidity of agreements made in such circumstances is exactly what the rules of formality require. The public policy principle which requires invalidity can be displaced by proprietary estoppel only if the doctrine incorporates a concept of unconscionability that is “externally defined” without reference to the three elements required to prove the factual basis of the estoppel.

A third reason why unconscionability is not merely a function of assurance, reliance and detriment is that there are at least two types of case that cannot be explained by such an analysis. It is an established principle of the law of proprietary estoppel that a court will not come to the aid of a party relying on an assurance, reliance and detriment if the parties have proceeded on the basis that their dealings are “subject to contract”. The primary authority is the well known Privy Council decision in *Attorney-General of Hong Kong v Humphrey’s Estate (Queen’s Gardens) Ltd*,<sup>65</sup> but it does not stand alone. A clutch of decisions have followed and confirmed the principle. So, in *Evans v James*,<sup>66</sup> *Edwin Shirely Productions Ltd v Workspace Management Ltd*,<sup>67</sup> and *Taylor v Inntrepreneur Estates*<sup>68</sup> no estoppel could exist because it was not unconscionable for the representor to rely on the lack of formality.<sup>69</sup> Importantly, the point in these cases is *not* that there is no assurance,

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<sup>64</sup>. It is submitted that this is precisely what occurred in *Flowermix v Site Developments*, supra n.18, where Arden J effectively enforced a contract that was void for uncertainty, apparently on the ground that the failed contract amounted to an assurance relied on to detriment. There is no indication of where the unconscionability resides, save a passing reference to *Taylor Fashions* and *Gillett v Holt*.

<sup>65</sup>. [1987] 1 AC 114.

<sup>66</sup>. Court of Appeal Transcript, 20 July 2000

<sup>67</sup>. (2001) 23 EG 158, 22 February 2001.

<sup>68</sup>. Queens Bench Division Transcript, No 1997 T No. 76, Mr .W Williams Q.C.

<sup>69</sup>. A claim of estoppel was also denied in *Canty v Broad*, Court of Appeal Transcript, 25 May 1995, CCRTF 94/1112/B (expressly subject to contract); *Akiens v Salomon* (1993) 65 P & CR 364 (occupation expressly “subject to lease”); *Derby & Co Ltd v ItC Pension Trust Ltd* [1977] 2 All ER 890 (expressly subject to contract”) and *Pridedean Ltd v Forest Taverns Ltd* [1996] PLSCS 66 (although no express subject to contract provision, the whole basis of dealings was that a formal contract would be concluded).

reliance or detriment, but that even assuming these factors, it is not unconscionable to rely on the formality rules which the “subject to contract” statement indicates will be required. In other words, “unconscionability” in these cases is seen to be independent of the three familiar elements and, indeed, is not present and estoppel is denied. Of course, it is not surprising that the courts should find that there is no estoppel in these cases for it is hard to see how it could be unconscionable to rely on the absence of formal requirements when you have indicated that their presence is essential to the conclusion of a valid agreement.<sup>70</sup> Importantly, however, it is not there *cannot* be an estoppel in these type of case. It is, rather, that it is difficult to prove. As Lord Templeman noted in *Humphrey’s* “it is possible but unlikely that in circumstances at present unforeseeable, a party to negotiations set out in a document ‘subject to contract’ would be able to satisfy the court that...some form of estoppel had arisen to prevent both parties from refusing to proceed with the transaction envisaged by the document”.<sup>71</sup> Although it might be thought unwise to supply that which Lord Templeman thought “unforeseeable”, it is submitted that these “unlikely” circumstances would exist if, despite the “subject to contract” dealings between the parties, the representor had led the claimant to believe that the right or advantage promised would accrue in any event. That is, whether or not the formalities apparently insisted on ever came to pass. This argument is developed more fully below but demonstrates that the withdrawal of an assurance relied on to detriment is only unconscionable when the assurance also expressly or impliedly confirms that it will be enforceable without the normally required formality.

The second set of circumstances that is not explained by the “non-definition” approach to unconscionability is the everyday sale and purchase of residential property. It is well known that a seller is not obliged to proceed with the sale unless the parties proceed to an exchange of written contracts within section 2 of the LPA 1989. This is despite the fact that the seller has assured the purchaser that the house will be sold and, almost certainly, the purchaser will have acted in detrimental reliance. Nevertheless, if the seller withdraws after the detrimental reliance, even to sell to another person at a higher price, estoppel cannot rescue the original purchaser.

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<sup>70</sup>. Once again, this shows that the doctrine of estoppel and the concept of unconscionability are intrinsically bound up with the formality rules concerning the creation or transfer of an interest in land.

<sup>71</sup>. *Supra* n. at 127. See *Salvation Army Trustee Co. Ltd. v West Yorkshire M.C.C* [1980] 41 P & CR 179 where the agreement from which the estoppel successfully arose appears not to have been made “subject to contract”, despite an intention to do so.

It simply is not unconscionable for the seller to behave in this way. This tells us two things. First, that the “unconscionability” required to trigger an estoppel does not exist simply because the representor behaves “badly”. It is not a moral concept when used to first found a claim. Perhaps it has a limited, almost technical meaning.<sup>72</sup> Secondly, that once again the simple proof of an assurance withdrawn after detriment does not equate to unconscionability. The reason is that in these types of case, the normal expectation of “buyer” and “seller” is that there must be compliance with formality rules (i.e. a written contract) before they are bound. Consequently, insistence on these formalities cannot be unconscionable irrespective of the detrimental reliance of the other party.<sup>73</sup>

### **(ii) A different definition of unconscionability in the law of proprietary estoppel**

The burden of the above analysis accepts the uncontroversial proposition that the concept of unconscionability is central to a successful claim in proprietary estoppel. However, the contention is that this core concept has largely escaped the attention paid to the other “elements” of estoppel and that, in consequence, there is a degree of uncertainty and inconsistency in the case law. In itself, this might be thought undesirable, but if there is to be an estoppel boom (as the present author envisages), the need for a greater degree of clarity assumes more significance. In any event, now that it is clear that an estoppel is proprietary in the sense that it may bind successors in title, there is a premium on certainty and consistency. The argument also has suggested that there is an intimate connection between estoppel and the statutorily imposed requirements of form for the valid creation, transfer or enforcement of a proprietary right. In turn, it has been argued that “unconscionability” is the key concept in explaining this link and that, in consequence, the definition of the latter is bound up with the requirements of the former. However, it is also clear from the cases that unconscionability is used liberally in the case law and academic commentators

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<sup>72</sup>. See below for the different roles of unconscionability.

<sup>73</sup>. This not to suggest that it is the “revocability” of such an assurance that is the litmus test of unconscionability, for that argument *per se* has been exploded by *Gillett* in dealing with the relevance of the alleged revocability or otherwise of a will. However, it does suggest that the common assumption that contracts for the sale/purchase of a house must be in writing and that wills can be changed, often ensures that the representor’s subsequent withdrawal of the assurance is not unconscionable precisely because insistence or reliance on the relevant formalities is cannot be impugned when such insistence or reliance is commonly expected.

have rightly identified that a very broad approach has adopted in some cases. That is not disputed here. Instead, the argument is that “unconscionability” fulfils more than one role in the law of proprietary estoppel. First, as a defining feature of when a claim can succeed. This is a narrow concept, related to formality and without which a claimant cannot win. Secondly, as a broader concept related more to the background merits of a claim and affecting how the court deals with an estoppel that is already established according to the “narrow” concept of unconscionability described above.

*(a) Unconscionability as a defining feature of estoppel. The double assurance.*

In so far as the general law requires the creation, transfer or enforcement of proprietary rights to take a certain form – be that under the LPA 1925, the LPA 1989 or the LRA 2002 – estoppel can be used to side-step these requirements only when there is a clear justification. That it would be “unconscionable” for one of the parties to rely on the absence of the required formality in order to deny the other’s right is that reason. This means that unconscionability cannot be merely a function of the assurance, reliance and detriment that factually establishes the estoppel for otherwise it is devoid of meaning and does not explain why it is justifiable to validate an arrangement without compliance with the formality rules. Despite judicial affirmation of such an approach, it is entirely circular and, in any event, cannot explain how estoppel works (or rather does not work) in a number of situations. However, “unconscionability” *can* explain why the absence of formality can be ignored – in the sense that a right still ensues for the claimant – if the concept is tied to the formality rules. Hence, it will be unconscionable for a representor to withdraw from an assurance, relied on to detriment, if the assurance of a right carries with it (expressly or impliedly) a further assurance that the right will indeed be granted despite the absence of the formality that is normally required to create, transfer or enforce the right in favour of that claimant.<sup>74</sup> Thus a successful estoppel can be triggered only by a “double assurance”: an assurance that the claimant will have some right over the representor’s land combined with an assurance that the right will ensue even if the formalities necessary to convey the right to that claimant are not complied with. It is the withdrawal of the promise of the right after the second assurance has been made

(assuming detrimental reliance) that constitutes the required unconscionability for a successful claim in estoppel. Necessarily, therefore, if the representation is “subject to contract” or is given in circumstances where the need for formality is notorious (house sales, wills), there needs to be strong evidence of a “second” assurance before an estoppel can arise. Mere detrimental reliance in these (or any cases) cannot generate an estoppel because it is not unconscionable to insist on the formality that is either expressly or notoriously required. This “second” assurance about formality – that is, the assurance running alongside the promise of some right – can in all cases be express or implied. In *Yaxley*, for example, the fact that the defendant indicated that a “gentleman’s agreement” was perfectly sufficient to safeguard each party’s rights was an express second assurance that formality safeguarding the claimant would not be insisted on: hence estoppel could run in the claimant’s favour as it was unconscionable to insist on formality after making the second assurance.<sup>75</sup> In fact, in many cases – possibly most – the second assurance will be readily implied from the facts. In *Gillet* for example, the repeated assurances that Mr Gillet would inherit under the will, made over the previous forty years, can readily imply an assurance that the right would be forthcoming irrespective of any formal requirements that the law might impose.<sup>76</sup> So it would be unconscionable to go back on this after detrimental reliance. Note, however, that even in “subject to” cases, or cases where the formality requirements are notorious, an estoppel is still possible provided that, in the former, there is a second assurance that the insistence on an enforceable contract will not be maintained and, in the latter, that there is something equivalent to suggest that the anticipated and notorious formality requirements can be dispensed with. The same reasoning can then be applied to the registration requirements of the LRA 2002: viz. that an estoppel could arise, but only if the claimant can establish some express or implied assurance that the right promised (the first assurance) would be granted irrespective of compliance with the new electronic registration formalities. If this

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<sup>74</sup>. So, a promise to leave property to X by will, but which never occurs or which is superseded by a valid will in favour of Y, can amount to such a promise *in favour of X*.

<sup>75</sup>. *Supra* n 11. See also the discussions in *Lloyd v Dugdale supra* n.3.

<sup>76</sup>. It might be thought that the forgoing analysis does not actually explain *Gillet* for it appears that the relevant second assurance was that Mr Holt would actually use the required formality to grant rights to Mr Gillett (i.e. the will), rather than that Mr Gillett could have the grant without any formality. However, the real point is that the repeated assurance over 40 years that the land would be given to Mr Gillett was actually an assurance that the land would so devolve with come what may. It was in effect an assurance that the land would be Gillet’s in *any* event, with formality or without, (i.e. a double assurance) rather than an assurance that Gillett could **only** have the land by will.

might be difficult to do, perhaps that is just as well given both that a paramount aim of the LRA 2002 is to ensure fuller registration of property right and that at the same time it confirms the proprietary effect of estoppel.

Clearly, this is a narrow view of unconscionability and hence a narrow view of estoppel. However, it is not suggested that there should be some mechanical search for a double assurance. Rather that it should be recognised that it is this duality in the assurance that constitutes the estoppel and that a court should be sure that it exists before finding for the claimant. As indicated, in many cases, the requirement can be implied readily from the facts of the case and this will be a matter for judgment and consideration. In others, it will be harder to establish, especially if there is some overt reference to, or notoriety about, the formality that is usually required. The key is to recognise what is being looked for because, at least for this author, there can be no successful estoppel (irrespective of detrimental reliance) without first establishing unconscionability in the sense discussed above.

*(b) Unconscionability as the manifestation of the broad equitable jurisdiction.*

It is not always the case with a principle of equity that proof of certain “conditions” necessarily leads to a remedy for a claimant. So it is with proprietary estoppel. Although it is submitted that unconscionability in the narrow sense just discussed must be present before a claim can succeed, that does not mean that it will succeed. The “double assurance”, withdrawn after detrimental reliance is necessary but not sufficient. There still remains the broad equitable jurisdiction either to deny the remedy or to modify the remedy because of the background circumstances of the case. This, it is submitted, is what is meant by many authorities when they refer to a broad principle of unconscionability. For example, it is clear from the judgment in *Yeo v Wilson* that the claimant would not have succeeded in gaining a remedy even if he had been able to prove the required elements for proprietary estoppel. As the judge said, the claim would be denied “on the additional ground<sup>77</sup> that in the unusual circumstances of this case it could not have been unconscionable for Mr Ellis to bequeath his estate elsewhere [because] the history of his relationship with Mr Yeo is an appalling story of deliberate persistent and oppressive manipulation of a vulnerable

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<sup>77</sup>. The relevant elements of estoppel were not in fact made out.

old man by a greedy and self-obsessed lover who had established a powerful psychological hold over him”.<sup>78</sup> Of course, this may well be an extreme example, but the point is well made. Likewise, it seems that the courts do consider wider principles of justice and fairness when seeking to satisfy the equity of an established estoppel. In *Campbell v Griffin*, it appears that one important consideration in granting a monetary as opposed to a property-based remedy was the desire to be as even-handed as possible between the claimant and the other persons likely to benefit under the deceased’s will.<sup>79</sup> The court did not want a property claim clogging the title and keeping the other beneficiaries out of their money. Of course, this is not the unfettered and unprincipled discretion rejected by Robert Walker LJ in *Jennings v Rice*<sup>80</sup> but it is in keeping with the use of estoppel as a remedy protecting those who cannot rely on formality and who instead must plead the favour of the court.

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<sup>78</sup>. *Supra* n.10. See also the reference to the plaintiff’s character in *Moloo v Standish Hotels*, *supra* n.10.

<sup>79</sup>. *Supra* n.7.

<sup>80</sup>. *Supra* n.9.