Liberating Minerva's Owl: The (ir)relevance of s2 LP(MP)A 1989 to Estoppel Claims

Chris Bevan*

The relationship between s2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989)[1] and the doctrine of estoppel has long been a thorny issue; a lingering canker that has bedevilled an otherwise flexible, popular and productive equitable doctrine and one which has frequently been the subject of articles and case notes in this journal and others.[2] This article, coming in the wake of the important judgment in *Howe v Gossop* (2021),[3] draws on this latest pronouncement on the interplay between estoppel and s2 as an opportunity to revisit and re-emphasise the argument that s2 does not and should not have any relevance to proprietary estoppel. It contends that, while the sensible approach of Snowden J in *Howe* is to be welcomed, the judgment does not go far quite enough in finally settling the status of estoppel under the LP(MP)A 1989. Rather, it is argued here, that, building on the judgment in *Howe*, the time has at last come to eschew the unhelpful prevarications over how estoppel can be made to fit within the terms of the 1989 legislation and to acknowledge that the doctrine operates entirely outside the statutory framework. The article proceeds in 4 parts. Part 1 reflects on the relevance of s2 LP(MP)A 1989 to the doctrine of estoppel before a second part examines how, to-date, the courts have grappled to rationalise the often difficult relationship between the two. Part 3 explores the recent case of *Howe v Gossop* and the extent to which it can be seen as ironing out and rationalising the previous authorities on the issue before a closing Part 4 argues that, building on the approach in *Howe* and examining the policy underlying the 1989 Act, this is the moment to settle the issue decisively and, to reference Lord Hoffmann and Lord Neuberger's elegant examination of the doctrine, time to conclusively free Minerva's owl by recognising that s2 has no relevance at all to estoppel claims.

Introduction: the relevance of s2 LP(MP)A 1989 to proprietary estoppel claims

The essential elements that must be satisfied to establish a proprietary estoppel claim are well-rehearsed and are neatly captured in the judgment of Lord Walker in *Thorner v Major*[4] as being: a representation or assurance made by A to B, reliance on that representation or assurance by B and evidence of detriment to B in consequence of her reasonable reliance.[5] The focus of this article is, however, not the fundamental ingredients of an estoppel claim but of the relationship between proprietary estoppel and the requirement for formality in dealings with land and, more specifically, s2 of LP(MP)A 1989.

As will doubtless be familiar to those initiated in matters of real property, section 2 of the 1989 Act provides that contracts for the sale or other disposition of an interest in land must

* Associate Professor in Property Law, Durham Law School

[1] On which see *Megarry & Wade* 9th Edition, Chapter 14.

[2] See, for example,

[3] [2021] EWHC 637 (Ch)

[4] *Thorner v Major* [2009] 1 WLR 776

[5] *Thorner v Major* [2009] 1 WLR 776 at [26] per Lord Walker

satisfy certain formality requirements, in particular, that there must be writing incorporating all the terms which the parties have expressly agreed.[6] S2(1) provides:

'A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.'

Uncertainty and debate arises from the fact that, while s2(5) contains an express exemption from the formality requirements for 'resulting, implied or constructive trusts,'[7] no such exemption is made for proprietary estoppel. This silence vis-à-vis estoppel has provoked enduring questions and dispute as to the impact of s2 on proprietary estoppel claims where, on the facts of a case, the s2 requirements are not satisfied. As such, while it is clear that an agreement purporting to create or dispose of an interest in land that does not comply with the formality requirements is void, the precise relationship of estoppel and s2 has proved more vexed and contested. Examining these issues, Lord Neuberger has described the 1989 Act as a 'misconceived piece of legislation' and, in expressing his preference for the forerunner to the 1989 law, s40 of the LPA 1925, has bemoaned the 'needless meddling' of the Law Commission, the 'misconceived drafting' of Parliament and the 'inconsistent decisions' of the courts' which he argues have 'had their wicked ways with section 2'[8] such that we are in a worse position under the current law.

Drafting criticisms aside, how are we, then, to interpret of s2 in the context of proprietary estoppel? This question appears to coalesce around two key viewpoints. The first view is to regard s2 as constituting, in essence, a barrier or bar to estoppel claims with the effect that, in the absence of formality requirements, claimants should seek redress through the means of a constructive trust in place of an estoppel argument; the constructive trust being as it is exempted from the rigours of s2(1) by s2(5). The second view which is advocated in this article and will be developed later in the final section is that s2 has, should have and should never have had any bearing and any relevance at all on any proprietary estoppel claims. In other words, no estoppel claim should fail simply for want of compliance with the formality requirements of the 1989 Act. The claim, may still, of course, nevertheless fail for not satisfying the remaining estoppel elements or result in an award of no remedy. How, then, have the courts sought to construe and resolve this question? It is this issue which the next section considers.

Judicial determination of the s2 'problem' in estoppel claims: commercial versus familial contexts

This section explores how the courts have addressed the 'problem' of accommodating s2 in estoppel claims and, in so doing, how they have sought to erect a contextual distinction between apparent commercial or contractual contexts and familial and personal contexts. As will be seen, the courts have not adopted an altogether consistent, coherent or readily

[6] S2(1) LP(MP)A 1989.
[7] S2(5) LP(MP)A 1989.
[8] Lord Neuberger of Abbotsbury, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity'(2009) 68(3) C.L.J. 537-549, at 545.

defensible line here which has only served to muddy further the waters. In this section the two headline estoppel cases of *Cobbe v Yeoman's Row Management Ltd*[9] and *Thorner v Major*[10] will be examined.

Cobbe v Yeoman's Row Management

In our modern understanding of the interplay between s2 and proprietary estoppel, the case of *Cobbe* is often regarded as an apposite starting point and, in particular, the *obiter* statements of Lord Scott.

In *Cobbe,* Mr Cobbe, a property developer of some experience had spent considerable time and energy in securing planning permission for the development of land owned by Yeoman's Row Management Limited. Mr Cobbe and Yeoman's had previously discussed financing, the nature of the development and profit-sharing in the event that planning permission was obtained. The idea was that Mr Cobbe would buy the property, develop it, sell it, sharing equally the profits with Yeoman's. The parties determined, however, not to enter a formal agreement until the planning permission was secured. Mr Cobbe proceeded, believing he had reached agreement with Yeoman's that, once permission was obtained, a legally binding arrangement would be entered. Yeoman's, recognising the increased profitability of the project, and just three months before planning permission was obtained, resiled from the shared understanding with Mr Cobbe but without informing him. Instead, once planning permission was granted, Yeoman's offered Mr Cobbe a less attractive financial package which he duly refused. Mr Cobbe began legal action including by arguing a claim in proprietary estoppel. Despite succeeding at first instance and in the Court of Appeal, the House of Lords held that there was no 'certain interest in land' which Mr Cobbe could argue he expected to receive and, further, any arrangement that he relied upon was 'subject to contract.' The estoppel claim failed. Rather, Mr Cobbe was entitled only to a *quantum meruit* for his work in obtaining the planning permission. Of greatest relevance to this article are the *obiter* statements of Lord Scott as to the relationship of s2 to estoppel claims.

Lord Scott noted at paragraph 29:

'Section 2 of the 1989 Act declares to be void any agreement for the acquisition of an interest in land that does not comply with the requisite formalities prescribed by the section. Subsection (5) expressly makes an exception for resulting, implied or constructive trusts …

[9] On which see generally A. Goymour, Cobbling Together Claims Where a Contract Fails to Materialise' (2009) 68(1) CLJ 37-40; B. Sloan, 'Estop me if you think you've heard it' (2009) 68(3) C.L.J. 518-520; N. Piska, 'Hopes, expectations and revocable promises in proprietary estoppel' (2009)72(6) M.L.R. 2009, 998-1015.

[10] On which see generally M. Dixon 'Proprietary Estoppel: a return to principle? (2009) Conv. 260-268; J. Mee, 'The limits of proprietary estoppel: Thorner v Major' (2009) 21(3) C.F.L.Q., 367-383; B. McFarlane., A. Robertson, 'Apocalypse averted: proprietary estoppel in the House of Lords' (2009) 125 L.Q.R., 535-542.

Proprietary estoppel does not have the benefit of this exception. The question arises, therefore, whether a complete agreement for the acquisition of an interest in land that does not comply with the section 2 prescribed formalities, but would be specifically enforceable if it did, can become enforceable via the route of proprietary estoppel. It is not necessary in the present case to answer this question, for the [oral "agreement in principle"] was not a complete agreement and, for that reason, would not have been specifically enforceable so long as it remained incomplete. My present view, however, is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute..."[11]

Terence Etherton critiquing the practical implications of Lord Scott's analysis noted the deleterious consequences for the development and utility of the doctrine of proprietary estoppel if Lord Scott's comment (albeit *obiter*) represented the law:

'If Lord Scott's approach is applied in its entirety, it is difficult to see how there is any scope at all left in the doctrine … Either there is a contract which is complete in all its terms and complies with the formalities prescribed by s.2 of the 1989 Act, in which case there is a legally enforceable agreement and no need to rely on any estoppel, or there is not, in which case there is neither an enforceable contract nor scope for proprietary estoppel.'[12]

Lord Neuberger, writing extra-judicially, argues the result of Lord Scott's approach is 'unpalatable' and would lead to unfortunate results. It would mean, for example, that estoppel claimants able to point to clear assurances and representations of acquiring an interest in land would be forced to rely on a constructive trust argument – which would, in his view, render 'Lord Hoffmann's owl … stuffed, as it could never fly.'[13] Yet perversely, in cases where assurances or representations were imprecise and the facts were 'not near contractual territory'[14] s2 would not pose any difficulty. In other words the clearer and more precise the assurance made (i.e. the stronger the claimant's case) the more likely it is that s2 will prevent the estoppel claim. On this view, 'Lord Hoffmann's owl would be rather perverse – scarcely a wise old owl.'

Both Etherton's and Lord Neuberger's concerns were echoed by McFarlane and Robertson in prophesising the 'death of proprietary estoppel'[15] if Lord Scott's approach was accepted.

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[11] *Cobbe v Yeoman's Row Management* [2008] UKHL 55; [2008] 1 W.L.R. 1752 at [29] per Lord Scott; Lord Walker reached the same conclusion.

[12] T. Etherton, 'Constructive trusts and proprietary estoppel: the search for clarity and principle' (2009) Conv. 104, at 120.

[13] Lord Neuberger of Abbotsbury, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity'(2009) 68(3) C.L.J. 537-549, at 546.

[14] Ibid.

[15] B. McFarlane., A. Robertson, 'Apocalypse averted: proprietary estoppel in the House of Lords' (2009) 125 L.Q.R., 535-542.

Certainly, Lord Scott's approach can be heavilty criticised for seemingly setting the bar so high as to render estoppel arguments redundant in commercial contexts.

Thorner v Major

The House of Lords revisited the issue of s2 and its interaction with estoppel in the leading estoppel case of *Thorner v Major*.[16] In *Thorner ,* David Thorner began work on a farm belonging to his father's cousin, Peter, in 1976. He worked the land, handled paperwork and even offered emotional support to Peter on a full time basis until 2005 when Peter died. During this time, David lived with his father from whom he received pocket money and very occasionally small sums of money from Peter himself. Peter was not a verbose man and rarely discussed personal matters but, it was David's case that Peter had led him to believe he would inherit the farm on Peter's death. This was backed up by comments made to others and by evidence contained in a will Peter had executed in 1997. Peter subsequently destroyed the will and died intestate. David claimed entitlement to the farm on the basis of proprietary estoppel. David succeeded at first instance on the basis of 'implicit statements' made by Peter on which David had relied; a decision reversed in the Court of Appeal but reinstated by the House of Lords who agreed with the first instance judge in finding the assurances made to be sufficiently certain to establish the estoppel claim. While the central issue in *Thorner* was the degree of clarity and certainty needed for an effective assurance, the issue of s2 was addressed and the case of *Cobbe* distinguished. Lord Neuberger was keen to draw a distinction between the differing contexts of the two cases: *Cobbe* was an 'arm's length commercial' context and Mr Cobbe was 'a highly experienced businessman'; *Thorner*, by contrast, reflected a 'familial and personal' context and neither David nor Peter had much commercial experience.[17] On the matter of s2, Lord Neuberger explained:

'Section 2 may have presented Mr Cobbe 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. It was no doubt for that reason that the defendants, rightly in my view, eschewed any argument based on section 2.'[18]

Taken together *Cobbe* and *Thorner* therefore erect an interpretive context-based dichotomy between what might be termed contractual and non-contractual contexts; the former being reflected in *Cobbe*; the latter in *Thorner*. This analysis would appear to run as follows: where the parties (as in *Cobbe*) are experienced in business and could well be expected to enter a contract but consciously have chosen not to do so i.e. both sides are aware that they were not, during negotiations, legally bound, the case is regarded as having a 'contractual connection' and any contract is construed as 'unformulated' and 'in a contractual sense, incomplete.'[19] Here, so the argument goes, s2 would bite to prevent an estoppel claim. In

[16] *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776
[17] *Thorner* per Lord Neuberger at [93], [96].
[18] Ibid at [99].
[19] Lord Scott in *Cobbe* at [18].

short, experienced business people negotiating terms that fall short of a fully constituted contract in compliance with s2 will lose out. By contrast, in a familial and personal (non-commercial) context where there is no evidence of 'contractual connection', *Thorner* tells us that s2 does not so bite to deprive the claimant (who is less experienced in matters of business) of an estoppel claim.

Lord Neuberger writing extra-judicially attempted to illuminate and explain the divergent approaches in *Cobbe* and *Thorner* and the recourse to context, highlighting that in *Cobbe* both parties appreciated their arrangement was binding not in law but in honour only:

'The message from the House of Lords is that it is simply not for the courts to go galumphing in, wielding some Denningesque sword of justice, to rescue a miscalculating, improvident or optimistic property developer from the commercially unattractive, or even ruthless, actions of a property owner, which are lawful at common law.'[20]

Neuberger noted that it was 'easier to accept' that the claimant in a case such as *Cobbe* 'takes his chance' in a commercial, arm's length relationship where the parties have ready access to legal advice and willingly choose to take a risk rather than be legally bound. Perhaps this flexibility is to the advantage of commercial, business people such as Mr Cobbe who may have wanted to be free to walk away rather than be tied down if the deal went sour or that he might use the lack of enforceable legal contract to keep his options open to negotiate a better deal as the project developed. As Neuberger reasoned, '[Cobbe] faced no emotional or social impediment to insisting on some form of legal binding protection before he went ahead with seeking planning permission. Why should equity assist him …?'[21]

By contrast, it is far easier to see why equity would come to the assistance of David Thorner. The idea that David should have pressed his taciturn uncle (a man 'of few words') for a legally binding arrangement in writing has an air of unreality about it in the distinctly informal context in Thorner. This may have been detrimental to the relationship between the parties in a way not so in *Cobbe*. Rather, Thorner evinces all the classic hallmarks of a case ripe for equity's intervention; a case where a quasi-nephew placed trust and confidence in his relative's unwritten, implicit and indirect assurances of inheritance without any legally enforceable written agreement. Such trust and confidence was clearly lacking in *Cobbe*. In no convincing sense could it be argued Cobbe placed his in trust, confidence in Yeoman's.[22] As Goymour rightly pointed out in her note of the case, 'Cobbe … a knowing risk taker … could have ensured that the initial agreement was reduced to writing before relying on it.'[23] No, Mr Cobbe's actions were those of a man of business, of a man familiar to and perhaps well-versed in risk taking, of one concerned to protect his own self-interest.

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[20] Lord Neuberger of Abbotsbury, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity'(2009) 68(3) C.L.J. 537-549, at 541.
[21] Ibid at 542.
[22] Lord Neuberger of Abbotsbury, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity'(2009) 68(3) C.L.J. 537-549, at 542-543.
[23] A. Goymour, Cobbling Together Claims Where a Contract Fails to Materialise' (2009) 68(1) CLJ 37-40, at 39.

If one were to mount an argument in defence of the contextual dichotomy and the different treatment of commercial versus domestic claims to estoppel, it would surely be by underscoring the need for certainty and clarity in the business world, of the desirability of the vagaries (or perceived vagaries) of equity being kept out of commercial relationships as Lord Millett famously argued in his seminal article.[24] This strict approach therefore brings advantages in the arm's length world of commerce where legal advice is routinely engaged. To insist on such a strict approach in a familial or domestic context is less appropriate given, as Hoffmann LJ explained in *Walton v Walton*, 'in many cases of promises made in the family context, there is no intention to create an immediately binding contract.'[25] As Neuberger framed it, 'Where parties can reasonably be expected to regulate their relationship by a binding contract if they want to do so [as in *Cobbe*], equity should fear to tread. Not so where the relationship between the parties is such that they cannot be expected to have recourse to contracts [as in *Thorner*].'[26]

However one seeks to justify it, it will be argued in the fourth section of this article that the contractual/non-contractual dichotomy erected by *Cobbe* and *Thorner* is a false one and, it is contended, is entirely unhelpful, betraying a misunderstanding and misrepresentation of the very heart and nature of proprietary estoppel and of the policy objectives of s2. Before this is explored, however, we turn in the next section to examine the recent decision of the High Court in *Howe v Gossop* in which the court was called upon again to reflect on the relevance of s2 to estoppel claims but, on this occasion, in a context falling squarely between those of *Cobbe* and *Thorner*; a mixed commercial and familial context.

***Howe v Gossop* (2021): revisiting and rationalising the relationship of s2 and estoppel**

In *Howe*,[27] the court was once again called upon to consider the interface of proprietary estoppel and s2 LP(MP)A 1989. This gave the High Court a further opportunity to scrutinise the uneasy bedfellows of s2 and estoppel, reflect upon and rationalise the contextual dichotomy constructed in *Cobbe* and *Thorner* as well as iron out and resolve further yet important issues which may present hurdles to mounting a successful estoppel claim.[28]

Facts of the case

The case of *Howe* concerned a long-running dispute between Mr and Mrs Gossop and Mr and Mrs Howe set against a lengthy and complex factual backdrop which, perhaps surprisingly in light of the recent trend in proprietary estoppel cases, did not involve a family farming business – though did concern previously agricultural land.[29] The Howes owned a residential property (known as White Hart Farm) and a large area of the surrounding land including roads leading to and from the property. In 2011, by transfer, the Howes sold a barn situated on their

[24] P.J. Millett, 'Equity's Place in the Law of Commerce' (1998) 114 L.Q.R. 214.
[25] Unreported, 14 April 1994, at [19].
[26] Lord Neuberger of Abbotsbury, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity'(2009) 68(3) C.L.J. 537-549, at 544.
[27] *Howe and another v Gossop and another* [2021] EWHC 637 (Ch)
[28] On *Howe*, see 'Know your estopping distance' E.G. 2021, 2114, 53.
[29] M. Dixon, Proprietary Estoppel: the law of farms and families Conv. 2019, 2, 89-92

land to Mrs Gossop for conversion into a residential property. Under the terms of the transfer, Mrs Gossop was granted a right of way over another road which gave access to the site from the south. It was agreed that Mrs Gossop would resurface the access road by the end of 2012 and, once completed to Mr and Mrs Howe's satisfaction, Mrs Gossop would be paid a sum of £7,000. Mrs Gossop carried out the work. At trial, it emerged that, at a meeting attended by Mr Gossop, Mr Howe and Mr Howe's son in March 2012, Mr Howe put forward a proposal to the Gossops that two additional pieces of land be transferred to the Gossops in return for a waiver of their obligation to pay the £7,000. The evidence presented at trial was that the meeting was short, the parties orally agreed on the proposal and shook hands on the deal. Nothing was committed to writing and there had been no suggestion of writing by any party at the meeting – though Mr Gossop gave evidence that he expected the agreement would be reduced to writing at some later stage. The Gossops proceeded to clear the additional land and incorporate it into their existing property. This involved a significant amount of work removing builder's rubble, importing topsoil, sowing grass and fencing. The parties later fell out and the Howes sought possession of the additional two plots of land that had been subject to the oral agreement. Mr Howe disputed what had been said at the meeting in 2012 and argued that no agreement had been reached and that the shaking of hands was merely a courteous parting gesture. At trial, the judge found Mr Howe to be a 'profoundly unimpressive witness,' who was 'arrogant, argumentative, petulant, contrary and evasive'; preferring the evidence of the Gossops. The Gossops defended the Howes' possession action on the basis of proprietary estoppel; arguing they were entitled to a licence for life to occupy and use the land.

First instance judgment

In addition to contending that the essential elements of estoppel were not made out, the Howes also argued that an estoppel argument could not be advanced in this factual matrix as a result of the operation of s2 LP(MP)A 1989. Their case, in essence, was that the oral agreement was not legally binding and, further, that no estoppel could arise for lack of compliance with the statutory formality requirements. Counsel for the Howes reasoned:

1. 'That Section 2 creates a very high hurdle' – and that, in other words, the facts had to be 'exceptional' before a proprietary estoppel could arise in respect of an agreement that did not comply with Section 2;

2. That Mr Howe had given no assurance to the Gossops that the oral agreement would be treated as valid and binding notwithstanding the failure to comply with Section 2;

3. That the estoppel claim should fail because there were still terms to be agreed in relation to one of the plots of land and that, given there had been only one composite agreement, this was fatal to the estoppel claim in relation to the second plot;

4. That this was a 'transactional' case and thus closer to *Cobbe* rather than a 'familial' case closer to *Thorner* and that this context mitigated against proprietary estoppel arising;

5. That the parties did not intend the oral agreement reached at the meeting in 2012 to be immediately binding; that there had been an intention to commit the agreement to writing at a later time and so the estoppel claim should fail.

At first instance, Saffman HHJ found the elements of the estoppel claim to be made out by the Gossops. Mr Howe had made an oral offer at the meeting in 2012 to transfer the two plots of land in return for a waiver of liability to pay £7,000. This offer had been accepted by the Gossops,[30] and there was no basis for concluding that these assurances could not seriously be relied upon.[31] It had been reasonable for the Gossops to conclude that the Howes would follow through on their assurances and substantial work was carried out on the land by the Gossops in reliance on their representations.[32] The many visits Mr Howe took to the site as the work was being carried out persuaded the court that Mr Howe's conscience was bound.[33] It was, as a result, unconscionable for the Howes to seek possession of the plots of land.

Saffman HHJ also rejected the arguments founded on s2 LP(MP)A 1989 holding that even where an agreement did not comply with s2 LP(MP)A, a proprietary estoppel could still arise. The facts did not have to be 'exceptional' before an estoppel could exist. The fact Mr Howe did not give an assurance that he did not intend to rely on the absence of formalities complying with s2 was not fatal to the estoppel claim. Equally, the 'transactional' nature of the case was just one factor to be taken into account and did not prevent an estoppel arising. The fact that Mr Gossop had anticipated committing the agreement to writing at a later time did not preclude the Gossops from claiming an equity had arisen earlier.

Saffman HHJ granted the Gossops an irrevocable licence over the land. The Howes appealed.

Judgment of the High Court

On appeal, the Howes advanced a number of arguments; essentially taking issue with many of the Judge's findings at first instance but it was in the High Court that the argument around s2 LP(MP)A 1989 was given fullest voice. The Howes' contended:

1. That the case was 'transactional' in nature involving an agreement between parties dealing at arm's length which failed to be legally binding because it did not comply with s2. Relying on dicta from Arden LJ in *Herbert v Doyle* (2010)[34] and a passage from *Megarry & Wade*, the Judge had been wrong in law to reject the argument that a case had to be 'exceptional' before a proprietary estoppel can arise. This case was not exceptional and so the agreement would be void under s2.

2. There were additional bars to relief which prevented an estoppel arising including uncertainty over the extent of the plots of land in question and that there was a lack of

[30] At [148]-[149] and [172]-[174])
[31] At [187]-[188]
[32] At [192], [199]
[33] At [203].
[34] *Herbert v Doyle* [2010] EWCA Civ 1095 at [57]

clarity as to the agreement in relation to one plot in particular. Under the authority of *Cobbe*, in these circumstances, the estoppel argument should fail.

3. The Howes had given no separate representation or assurance that the oral agreement could be treated as immediately binding despite non-compliance with the formality requirements under s2. The Judge had failed to take adequate account of the fact that the parties contemplated or intended that a formal, legal contract would be required for the sale of land at a later time.

4. Taken together, the Judge should have found it was not unconscionable for the Howes to refuse to give effect to the informal agreement reached at the meeting in March 2012.

For the Gossops, it was argued that there was a spectrum of cases and circumstances in which proprietary estoppel might operate and that the central requirement was a finding of unconscionability; that s2 was not an absolute bar to the operation of proprietary estoppel in such a case as this and there was no hurdle requiring 'exceptional' circumstances before an estoppel could arise. Although the parties were dealing with each other at arm's length, they were not merely negotiating towards a more formal contract but had reached what they believed to be an agreement that was binding and could be acted upon. It made no difference to the application of estoppel principles that Mr Gossop believed the agreement would later be committed to writing.

Snowden J in delivering his judgment spent considerable time examining what he described as 'the relevance of section 2' to proprietary estoppel including revisiting and rationalising the authorities of *Cobbe* and *Thorner* on this issue.[35] Snowden J cited heavily from the *obiter* statements of Lord Scott in *Cobbe* (and from Lord Walker) as well as examining the contextual distinction as drawn out and explained by Lord Neuberger in *Thorner.*[36] Importantly, however, Snowden J held that the instant case fell between what he called 'the two factual extremes'[37] of *Cobbe* and *Thorner*. The facts of *Howe* did not reflect the informal familial context in *Thorner* where a contract between David and Peter would never have been contemplated. Here, the parties had previously contracted for the sale of land and were dealing at arm's length. However, the facts were also not consonant with the case of *Cobbe* where the parties were experienced in the world of commerce and were aware that their informal agreement would not be legally binding in the absence of a more formalised contract and who intentionally left terms of the agreement to be subsequently negotiated. Reviewing the authorities and academic texts on the role of s2, Snowden J held:

'Section 2 is aimed at problems in the formation of contracts for sale of land, whereas the purpose of an estoppel is to remedy unconscionability in the assertion of strict legal rights. Accordingly, there is considerable doubt that Section 2 is intended to affect the operation of proprietary estoppel at all, but even if it did, Section 2 could only operate as a bar to the grant of equitable relief if and to the extent that such relief had the effect of enforcing, or otherwise

[35] From [34]
[36] From [34] to [43].
[37] From [44]

giving effect to, the terms of a contract for the sale or other disposition of an interest in land that the statute renders invalid and unenforceable.'[38]

On this view, in *Cobbe*, Mr Cobbe was seeking to use proprietary estoppel as a means of enforcing an otherwise unwritten agreement under which he would acquire an interest in the land owned by the defendant. This was why, said Snowden, Lord Scott's speech focused on how far estoppel could be engaged to enforce a contract notwithstanding the clear statutory language invalidating it. This is what Lord Scott meant in his dictum that 'proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void.'[39] Where, as in *Thorner*, there was never any question of a contract being agreed between the parties, there is no reason why s2 should operate to bar the grant of equitable relief.[40]

Snowden J drew on a third case to elucidate his analysis, *Sahota v Prior* (2019),[41] in which Falk J in the High Court upheld the decision of the County Court judge that an estoppel had arisen that enabled tenants to remain in their landlord's property for life as a result of assurances made upon which the tenants had reasonably relied. Falk J, rejecting the argument that s2 defeated the proprietary estoppel claim, noted:

'[The tenants] are not trying to enforce a contract for the sale or other disposition of land. They are not seeking to bind [the appellant] to transfer a property interest to them pursuant to a contract. What they are trying to assert is that [the appellant] is prevented from recovering possession of their home from them during their lifetime, because of an assurance on which they relied when they transferred the property and subsequently did work on it.'[42]

Of course, the facts of *Howe* were not only different to *Cobbe* and *Thorner* but also different those in *Sahota* which concerned assurances given entirely outside any agreement for sale. How, then, can it be said s2 does not bite in a case with parties are dealing at arm's length? Snowden J held that the important difference between *Howe* and *Cobbe* was that the Gossops were not asserting an estoppel in order to enforce the agreement reached in March 2012 but rather as a defence to defeat the Howes' claim to possession of the land.[43] In short, the Gossops were not calling upon equity to sweep in to save the day and revive an unformulated contract but rather to mount an estoppel claim to shield them from the action for possession. This argument is only strengthened by the fact that the Gossops were not seeking an order for sale (i.e. transfer) of the plots of land under the terms of the informal agreement. Rather, they sought as a remedy for their estoppel a licence to occupy the land for life. On this basis, nothing in s2 of the LP(MP)A prevented the operation of proprietary estoppel in this case.

[38] At [48].
[39] *Cobbe* at [29] per Lord Scott.
[40] Snowden J at [50].
[41] *Sahota v Prior* [2019] EWHC 1418 (Ch)
[42] *Sahota* at [26] per Falk J
[43] Snowden J at [53].

As to whether there was a requirement that the case be 'exceptional' before a proprietary estoppel could be established, Snowden J rejected this suggestion.[44] Counsel for the Howes had relied upon a short passage in *Megarry & Wade* concerning the role of unconscionability in an estoppel action. At paragraph 15-020, the authors note:

'...in cases where the parties have tried, but failed, to enter into a binding contract for the disposition of an interest in land, the failed agreement may give rise to an estoppel when it is unconscionable to rely on the failure. However, this will only be in *exceptional* cases, and it may well be only where [the landowner] has expressly or impliedly promised not to rely on the lack of formality in the disputed transaction. It would be difficult to establish the equity if the parties intended to enter into a formal agreement setting out the terms on which land was to be acquired or where further terms remain to be agreed.' [emphasis added]

This reference to exceptionality is said to spring from the case of *Herbert v Doyle* (2010)[45] in which Arden LJ drew on the speeches of Lords Scott and Walker in *Cobbe* noting that:

'There is a common thread running through the speeches of Lord Scott and Lord Walker. Applying what Lord Walker said in relation to proprietary estoppel also to constructive trust, that common thread is that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act.'[46]

Reflecting on Arden LJ's dicta, Snowden J emphasised the Court of Appeal decision of *Dowding and another v Matchmove Ltd* (2016) which, whilst focusing on the common intention constructive trust aspect of the claim (refusing to express a view on the proprietary estoppel issue), helpfully explained that Arden LJ's comments in *Herbert v Doyle* were merely intended as clarifications, as descriptions of the facts of *Cobbe* and not to be regarded as creating new bars on giving equitable relief. *Matchmove* was a case where the parties had reached an agreement in principle but intended to make a formal agreement setting out further terms at a later date and the parties did not regard the agreement in principle as immediately legally binding on them. As such no constructive trust arose.

For Snowden J, neither the passage from *Megarry & Wade* nor Arden LJ's comments in *Herbert* suggested that there was a requirement that the facts of a case be 'exceptional' before proprietary estoppel could be found. Reference to exceptionality in *Megarry* was 'simply a comment or characterisation'[47] inserted by the authors and not intended to be

[44] See discussion from [56].
[45] *Herbert v Doyle* [2010] EWCA Civ 1095 .
[46] *Herbert* at [57] per Arden LJ.
[47] Snowden J at [65].

elevated to a specific or additional hurdle in the test for estoppel. By reference to the case of *Kinane v Mackie- Conteh* (2005), Snowden reiterated the important point that simply overcoming the potential pitfall of s2 does not result automatically in a successful claim; the other components of proprietary estoppel must be satisfied: assurance, reliance, detriment and unconscionability. Pointing to an informal agreement alone will not suffice.

Drawing together his analysis and dismissing the Howes' appeal, Snowden J therefore underlined that s2 was no bar to the Gossops' claim to proprietary estoppel on the basis that estoppel was pleaded in this case not to enforce of the terms of the oral agreement but to defend the possession proceedings. This was not a circumstance, such as *Cobbe*, where the parties knew that nothing would be binding until a formal contract had been signed. The evidence accepted by the court was that, in *Howe* all the parties believed that the oral agreement reached was immediately binding.[48] Moreover, there was no requirement to satisfy 'some super-added test' of exceptionality before an estoppel claim could succeed.[49] Finally, there was nothing legally or logically inconsistent in a party seeking to have an oral agreement later reduced to writing and, when that is refused, to contend that an equity has arisen at an earlier stage.[50]

Liberating Minerva's Owl: the case for the irrelevance of s2 to proprietary estoppel claims

The decision in *Howe* is undoubtedly a sensible and welcome judgment and one that seeks to re-examine and rationalise a corpus of case law in which the court has long toiled (often unsuccessfully) to get to grips with the precise relationship between s2 of the LP(MP)A 1989 and the doctrine of proprietary estoppel. In so far as Snowden J's judgment clarifies the circumstances in which s2 should be regarded as presenting no bar to an estoppel claim, it is helpful in returning some common sense and flexibility to the doctrine of estoppel and certainly will calm the nerves of practitioners advising clients and those who have argued and feared that Lord Scott's dicta in *Cobbe* sounded the death knell for estoppel. Equally, the round rejection of the imposition of any additional test of 'exceptionality' into the law of estoppel based upon dicta in *Herbert v Doyle* is to be supported.

However, this part of the article argues that the court in *Howe* did not go far enough in banishing once and for all the gremlins of s2 from the law of estoppel and, moreover, in that it attempted to rationalise, explain and further justify the contextual dichotomy erected by *Cobbe* and *Thorner*, the spectre of s2 and its chilling effect on estoppel claims remains intact. In short, a punch was thrown but no knockout blow was delivered. Snowden J indicated his view that there was 'considerable doubt' that s2 was intended to affect the operation of proprietary estoppel. This is welcome but Snowden J also left the door open to continued debate and contestation by adding that, 'section 2 could … operate as bar to the grant of equitable relief if and to the extent that such relief had the effect of enforcing the terms of a contract that the statute renders invalid and unenforceable.'[51] This prevarication is, respectfully, unwelcome and a missed opportunity to adopt a stronger rejection of any

[48] Snowden J at [81]-[83].
[49] Snowden J at [73].
[50] Snowden J at [79].
[51] Snowden J at [48].

relationship between s2 and the doctrine of estoppel. As a result of Snowden J's judgment in *Howe* and as the law currently stands, the impetus founded in *Cobbe* and *Thorner* still of the need for consideration be given to the context in which a claim is made (commercial or familial) still remains as does the requirement to examine the nature of the right asserted and the relief sought as well investigation into the particular background and experience of the parties. Questions must still be asked as to whether the parties believed the agreement was immediately binding or whether it would only be binding once committed later to writing and courts will, in light of *Howe*, need to examine closely whether what is being sought amounts to enforcement of an unformulated contract (*Cobbe*) or whether estoppel is being raised not to enforce a contract (as in *Howe* itself). On one view, *Howe* signals something of a softening of approach to the context-based dichotomy of *Cobbe* and *Thorner* which has forced many cases into a contextual straight-jacket. However, in failing to decisively reject any application of s2 of the LP(MP)A 1989, the law remains unresolved and problematic.

Legal practitioners anecdotally report that proprietary estoppel claims have been demoted to the domestic context only in light of the distinctions drawn in *Cobbe* and *Thorner*. Practitioners have been essentially hamstrung by the context-dependent interpretations of the interface of s2 and estoppel. Frequently, as in *Howe* itself, many cases do not fall neatly into one context or another, for example dealings involving small or family businesses, associations between distant relatives where agreements are often not committed to writing. In such cases, while *Howe* does offer much needed clarification, going further to offer a fulsome acknowledgment of the irrelevance of s2 to estoppel claims would be a welcome step. Rather than equivocation, it should be made plain that s2 is entirely irrelevant to the operation of the doctrine and should offer no bar to its application whatever the contextual backdrop of the case. Acknowledging this in the courts would free up the doctrine of estoppel such that its potential can be explored more fully across all contexts whether they be commercial or domestic.

The purpose of this article and this part in particular is to (re)make the case for a fulsome denunciation of any relationship of the 1989 provision to the doctrine of proprietary estoppel by (1) reiterating the fundamental difference between contractual and estoppel claims; and (2) by revisiting the policy objectives of the 1989 Act both of which underscore the inapplicability of s2 to estoppel. It is argued in this section that, building on the new energy that *Howe* has injected into the debate around the relationship between s2 and estoppel, that is the moment not to offer further and unhelpful strained interpretations by which estoppel can be seen to work within the terms of s2 nor to offer suggestions for how we might better understand the commercial/familial dichotomy elucidated in *Cobbe* and *Thorner* but rather to assert that wholesale, whatever the context (be it commercial or familial), s2 has no bearing on, is never any bar to and has no relevance to estoppel claims. To borrow from Lord Hoffmann's invocation of and references to estoppel re-imagined as Minerva's Owl (as discussed by Lord Neuberger)[52] it is time to liberate Minerva's Owl from the cage of s2.

Strictly-speaking, of course, to-date, there has been no example of a case where an otherwise valid estoppel claim has failed simply as a result of non-compliance with s2 for even in *Cobbe*

[52] See Lord Neuberger of Abbotsbury, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity'(2009) 68(3) C.L.J. 537-549.

itself, the s2 argument was not directly in issue and comments made *obiter* only as, quite independently of s.2, the agreement between Mr Cobbe and Yeoman's did not have contractual effect as it lacked sufficient certainty and equally was not intended to create legal rights. Nevertheless, there is a very real practical impact to the continued confusion and ambiguity that exists even post-*Howe* as to the place and role of s2 in estoppel claims. There is, it is argued, value in settling the precise relationship between s2 and proprietary estoppel. One central reason is that, as a result of the misunderstandings or misconceptions of the status of s2 in estoppel claims, judges have felt obliged to repackage otherwise effective and successful estoppel claims as giving rise to constructive trusts even in cases where there is little or no evidence that one party holds any right or interest on trust for another.[53] We see this most clearly in the case of *Kinane v Mackie-Conteh* (2005) where Arden and Neuberger LJJ make the assumption that a claimant should rely on s2(5) and force a constructive trust argument in order to escape the problems of s2 vis-à-vis estoppel. Such an approach, is both unconvincing and unnecessary for, as is explored below, in *Kinane* as in many other cases, the claim is not contractual in nature at all and, as such, should never be impacted by s2 of the 1989 Act. Disguising an estoppel claim in the clothes of constructive trust may achieve a just and, in some senses, satisfactory result but lacks principle and precisely the same outcome can be reached by acknowledging that s2 simply has no role to play in estoppel claims. Recognising the irrelevance of s2 to estoppel claims would therefore have the result of rendering judicial reasoning more transparent.

The case for the irrelevance of s2 to estoppel: estoppel claims are not contractual claims

The provisions of s2 of the 1989 Act are and have always been concerned with contractual relationships and, efforts by judges and academics to fit estoppel into the framework of s2 are, it is suggested, a fruitless exercise and indeed a red herring for one fundamental reason: proprietary estoppel is at its core and in its inherent nature not concerned with contractual relationships at all (to which mischief s2 is expressly directed) but rather estoppel is concerned with preventing unconscionable conduct. Unlike contractual promises which are binding from the moment they are made and irrespective of any evidence of reliance on the promise, estoppel claims give rise to no immediate obligation to afford the claimant their expectation. Moreover, where a contract is entered for the creation or transfer of interests in land, specific performance will be available to ensure the property right is acquired.[54] The position in estoppel is quite different. An expectation raised through estoppel may not be remedied at all or may be vindicated by the award of a personal remedy only. Equally, for estoppel, evidence of reasonable reliance on assurances made and detriment are required. Estoppel claims operate self-evidently in an entirely distinct fashion to contractual claims. As Lord Hoffmann explained in *Walton v Walton* 'estoppel … does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls to be due to be perf to be due to be performed and asks whether, in the circumstances

[53] See for example *Yaxley v Gotts* [2000] Ch. 162 CA; *Herbert v Doyle* [2010] EWCA Civ 1095; *Kinane v Mackie-Conteh* [2005] EWCA Civ 45; [2005] W.T.L.R. 345.
[54] See, for example, *Walsh v Lonsdale* (1882) L.R. 21 Ch. D. 9.

which have actually happened, it would be unconscionable for the promise not to be kept.'[55] Contract is forward-looking in that it determines the rights and obligations of the parties ahead into the future of the relationship. The terms of that contract are determined by reference to the facts, what was said and what was committed to writing at the time of the agreement. Estoppel is backward-looking in that it involves examining the assurances, representations, promises made in the past. This explains why despite succeeding in establishing an equity, a court may conclude that no or only partial relief may be awarded where, for example, the detriment was insufficient[56] or where the benefits received by the claimant outweigh any detriment suffered.[57] Contract and estoppel therefore target very distinct liabilities and, what becomes clear as we move in the next section to consider the policy objectives of s2, is that the 1989 provision was only ever intended to apply to contractual claims. On this basis, estoppel does not need to be jurisprudentially shoe-horned into the s2(5) exemption for constructive trusts to be protected from the rigours of the s2(1) formality rule.

The policy objectives of s2 LP(MP)A 1989

Much ink has been spilled and many hours dedicated to hearing legal argument on the relevance of s2 to proprietary estoppel yet far less time has been spent unpicking the policy objectives that lay behind legislating for s2. A brief examination of the rationale behind the statutory provision buttresses the case for the irrelevance, disassociation, and inapplicability of s2 to proprietary estoppel. By revisiting the policy objectives of the 1989 statute, the case can be remade for liberating estoppel from the constraints and formality requirements of the 1989 law. What, then, was the policy behind s2?

Beldam LJ explained in detail in *Yaxley v Gotts* (2000)[58] that the 1989 Act was enacted in order to implement the recommendations of three Law Commission reports. In the second of these reports, *Formalities for Contracts for Sales etc of Land*,[59] the key policy underlying s2 was explained by the Law Commission. The Commission noted that given the uniqueness of land itself, there was a need for consumer protection, for certainty in dealings with land and highlighted the 'channelling' function of creating a standardized form of transaction. Robert Walker LJ also in *Yaxley* suggested the s2 provision, '... can be seen as embodying … 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.'[60]

[55] Cited by Lord Walker in *Thorner v Major* at [57].
[56] See, for example, *James v James* [2018] EWHC 43 (Ch) and *Jones v Watkins* Unreported, 26 November 1980.
[57] *Sledmore v Dalby* (1996) 72 P. & C.R. 196.
[58] *Yaxley v Gotts* [2000] Ch 162 at 188–190; see also Dowding v *Matchmove* [2017] 1 WLR 749 at [26].
[59] *Formalities for Contracts for Sales etc of Land* (Law Com. Report No 164), at [2.8] to [2.12].
[60] *Yaxley* at p175 per Walker LJ.

Crucially, later in the report,[61] the Commission emphasised that nothing in its proposed new law was intended to exclude the application of any equitable doctrine in this arena and particular mention was made of proprietary estoppel. It was concern for the development of equitable doctrines that prompted the inclusion of the s2(5) exemption for resulting, implied and constructive trusts in the law. Arden LJ in *Kinane v Mackie-Conteh* (2005)[62] added that:

'The policy of section 2(1) of the 1989 Act is to protect the public by preventing parties from being bound by a contract for the disposition of an interest in land unless it has not been fully documented in writing. However, in section 2(5) Parliament has acknowledged that under section 2(1) there is a risk that one party will seek to take advantage of the sanction provided by that subsection when it is unconscionable for him so to do. To that extent, section 2(5) plays a role similar to that of part performance, although it operates more flexibly than that doctrine. Unconscionability on the part of the party seeking to rely on subsection (1) is the touchstone giving rise to a constructive trust. It will arise where a party led another party to believe that he would obtain an interest in property to another and then stands by while that other party acts to his detriment in reliance on that promise…'[63]

Arden LJ's reference to unconscionability and constructive trusts should equally be read as applying to proprietary estoppel as unconscionability is itself the long-recognised touchstone of that doctrine also.

What emerges is that s2 was principally intended to surmount the complexities in the law that arose from the doctrine of part-performance and through the, at times, incoherent interpretation of section 40 of the LPA 1925, the forerunner to s2 of the 1989 Act.[64] As the Law Commission made plain in its reports, the intention in reforming the law was that parties would not be left remediless through operation of the newly-proposed law because, 'in addition to any common law remedies, some significant equitable intervention would not be ruled out. In particular, the doctrines of 'promissory estoppel' and 'proprietary estoppel.'[65] The report continued that it was felt inappropriate to attempt to spell out and perhaps circumscribe the requirements and limits of these still developing doctrines.[66] Self-evidently, there was never any intention that the law that was to become s2 of the 1989 Act would serve to bar or constrain the development of proprietary estoppel. As Beldam LJ explained, 'the policy behind the Commission's proposals was as clearly stated as its intention that the proposal should not affect the power of the court to give effect in equity to the principles of proprietary estoppel … it did not intend to affect the availability of the equitable remedies to which it referred.'[67] The principle that a party cannot rely on an estoppel in the face of a statute depends entirely on the nature of the particular enactment in question, the purpose of the provision and the social policy underpinning it.[68] S2 was not a provision aimed at

[61] *Formalities for Contracts for Sales etc of Land* (Law Com. Report No 164), at [5.1] to [5.3].
[62] [2005] EWCA Civ 45
[63] *Kinane* at [32] per Arden LJ.
[64] On which see Philip H. Pettit, 'Farewell section 40' (1989) Conv. 431-443
[65] *Formalities for Contracts for Sales etc of Land* (Law Com. Report No 164), at [5.2].
[66] Ibid.
[67] *Yaxley* at 190 per Beldam LJ.
[68] Ibid.

prohibiting or outlawing agreements of any specific kind, though it had the effect of making agreements which did not comply with the required formalities void. Nevertheless, 'this by itself is insufficient to raise such a significant public interest that an estoppel would be excluded.'[69]

A secondary yet related motivation underscoring s2 can be identified; namely the need to ensure that the parties to contracts but also the courts are in a position to be able to identify the terms that make up the substance of those contracts. Recognising this is critical for our analysis of the relationship of s2 to proprietary estoppel as it is far more difficult to understand the necessity for such certainty in non-contractual estoppel claims. As McFarlane has explained, 'non-contractual claims … do not assert a basic entitlement to enforce the terms of an agreement.'[70] As explored earlier, estoppel claims are distinctly non-contractual in nature. Indeed, it was Etherton J in *Cobbe* who noted, 'equity and the relief [arising from proprietary estoppel claims] are not remedies for breach of contract.'[71] In that way by appreciating that the underlying policy objective of s2 was to bring certainty to contractual claims, it makes the case for the inapplicability of this provision to proprietary estoppel.

Of course, one could attempt to construct an argument that the policy of s2 is more extensive than just bringing certainty to contractual claims and thereby seek to advance an expansive reading of the provision which might then be said to impinge upon estoppel claims. On this view, the provision might be said to protect the public from the legal consequences of any unwritten intentions in relation to land. If this argument and interpretation of s2 were to be accepted, it would have the effect of barring contractual claims as well as those based on proprietary estoppel.[72] Yet, such a view is unsound if for no other reason that the express language of s2 refers to the making of 'a contract for the sale or other disposition of an interest in land' and to the terms of a contract and to contract exchange.[73] It becomes almost unarguable, then, to suggest that the policy underpinning the provision extends to non-contractual claims. The result is that s2 should be read and understood has having no relevance at all to estoppel claims. Recourse to *Snell's Equity* offers further support for this approach and reading of s2.[74] The authors note that, in construing the provision, 'the better view' is that 'no proprietary estoppel claim is caught by [section 2] as the section regulates the requirements of a contract for the sale or other disposition of an interest in land, and a proprietary estoppel claim, even if promise-based, is distinct from a contractual claim.'[75] Indeed, even a cursory reading of the express wording of s2 reveals that the provision in no

[69] Ibid at 191.
[70] B. McFarlane 'Proprietary estoppel and failed contractual negotiations' (2005) Conv. 501-523, at 511.
[71] *Cobbe* at [169].
[72] This argument is raised by C. Davis, "Estoppel: An Adequate Substitute for Part Performance?' (1993) 13 O.J.L.S. 99 at 120-123 and is explored by E. Cooke, *The Modern Law of Estoppel* (Oxford, 2000), at 146-148.
[73] S2 generally but s2(1), 2(2) and 2(3) LP(MP)A 1989 in particular.
[74] *Snell's Equity* 34th Edn (London, 2019) at [12-046].
[75] Ibid.

way purports to deny legal consequences to a promise or to render an informal, non-contractual agreement void but rather explicitly applies only to contractual claims.[76]

In conclusion, this article has used the recent and important decision in *Howe* as the touchpaper for a re-evaluation of the vexed issue of the relationship between s2 and the doctrine of estoppel. An examination of the problematic contextual dichotomy constructed by the courts in *Cobbe* and *Thorner* and a close reading of the case of *Howe* itself has been offered as the groundwork for re-making the case for the irrelevance of s2 to the estoppel claims. It has been contended that while *Howe* goes some way in seeking to lay to rest the long-running saga of the uncomfortable interface of s2 and the doctrine of estoppel, it does not go far enough in settling decisively the issue. When one revisits the essential nature of estoppel claims as being non-contractual and unconscionability-based; and further buttresses this by re-emphasising the clear policy objectives of s2 LP(MP)A 1989, it becomes all too apparent that the constraints of that provision were never intended to impact on the doctrine of estoppel. Thus, even valiant attempts by the court in *Howe* fall short of the fulsome denunciation of any relationship between s2 and estoppel. The cases of *Cobbe* and *Thorner* have erected an unhelpful, unprincipled and unwarranted contextual dichotomy between commercial and familial cases which has unduly stymied the development of the doctrine of estoppel (in particular in the commercial context) and attempts thereafter to justify this distinction have only served to further and inappropriately intertwine estoppel in the universe of s2. What this article has done is return to *Cobbe* and *Thorner*, re-make the case for the inapplicability of s2 to estoppel and for liberating the doctrine from further unnecessary debates around its interface with the 1989 legislation. As Dixon has argued in this journal,[77] the recent popularity and spike in claims arguing proprietary estoppel (largely involving farmland) may be connected to the inherent flexibility of the doctrine and of the court's equitable jurisdiction to award a range of remedies to vindicate such claims. Dixon seeks to draw a tentative parallel between the recent growth of estoppel and the development of the common intention constructive trust in the 1970s and 1980s. The connection between estoppel and the CICT is instructive for the debate encircling the relevance of s2 to estoppel as explored in this article. First, s2 provides an express exemption for constructive trusts not extant for estoppel meaning (as noted earlier), practitioners and the courts have been forced to dress up perfectly clear estoppel claims in the clothes of the CICT. Secondly, the CICT like estoppel is an unconscionability-based, equitable device which shares, in key respects, facets and features of the equitable jurisdiction of estoppel. The point is surely that, in contrast to the lingering constraints of s2 on estoppel and the ongoing questions as result of the *Cobbe*/*Thorner* contextual interpretations, the CICT has been permitted to largely run free and to develop organically in a far less inhibited manner. Estoppel has not been afforded same opportunities to develop across contexts. Lord Denning described the doctrine of estoppel as 'one of the most flexible and useful in the armoury of

[76] S2(1) LP(MP) A 1989

[77] Dixon, Proprietary Estoppel: the law of farms and families Conv. 2019, 2, 89-92

the law.'[78] The doctrine has enormous potential to do justice in the informal arena of non-contractual claims. As this article has sought to argue, to reject any role and relevance for s2 in relation to estoppel claims and to dismantle the unhelpful commercial/familial contextual binary would be both principled and pragmatic as no owl and certainly no equitable doctrine can fly with clipped wings.

[78] Lord Denning M.R. in *Amalgamated Investment* & *Property Co. Ltd.* v. *Texas Commerce International Bank Lid.* [1982] 1 Q.B. 84, at 122.