is due to give judgment on the appeal from *Thomas* v. *Major* [2008] EWCA Civ 732, a case concerning estoppel in the testamentary context. It is to be hoped that the Lords proceed with caution when adapting the *Cobbe* formulation to non-commercial cases of this nature.

Thirdly, having failed to establish a proprietary interest in the land, Cobbe resorted to a personal claim in unjust enrichment. This time, his claim succeeded – on the ground of failure of consideration. Two tricky issues merit discussion. First, what was the value of the Lisle-Mainwarings enrichment? Was it "the difference in market value between the property without the planning permission and the property with it"; or merely the value of Cobbe's services (roughly £150,000)? Deciding in favour of the latter, Lord Scott (giving the only reasoned judgment on the point) explained that the development potential was an incident of the land itself, belonging from the outset to the Lisle-Mainwarings. By securing planning permission, Cobbe merely unlocked that potential. This principled finding brings welcome clarity to a previously uncertain area of the law (see e.g. the discussion in Virgo, *The Principles of the Law of Restitution* (2nd ed, 2006), pp 70–71). The second issue is more problematic. It is increasingly clear that risk-takers cannot bring a successful unjust enrichment claim (see e.g. *Deutsche Morgan Grenfell* v. *I.R.C.* [2007] 1 A.C. 558). Surely Cobbe, knowing that the agreement was non-binding, took a commercial risk that the deal might fall through? *Cobbe* presented an ideal opportunity for the Lords to undertake a much-needed analysis of risk as a bar to restitution. It is very disappointing that they failed to do so.

With hindsight, Cobbe should have snapped up the Lisle-Mainwaring's initial £150,000 settlement offer. Being a commercial risk-taker he was lucky that the Lords awarded him anything at all.

AMY GOYMOUR

PRESCRIPTIVE EASEMENTS: CAPACITY TO GRANT

THE registered proprietors of a house built in the late nineteenth century claimed that their property enjoyed the benefit of an easement, being a pedestrian and vehicular right of way, over Wimbledon Common. They contended that the easement had been acquired by "long prescription" pursuant to section 2 of the Prescription Act 1832, as it had been used openly and as of right for a period of more than 40 years next before the commencement of proceedings. The claim failed before the Adjudicator to the Land Registry, and an appeal to the High Court was dismissed (*Housden* v. *Conservators of Wimbledon & Putney Commons* [2007] EWHC 1171, [2007] 1 W.L.R. 2543) on the grounds

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that the Conservators in whom the common was vested lacked capacity to grant an easement over the relevant land and that long prescription, being based on a presumed grant, could not therefore operate in favour of the claim. However, the claimants succeeded before the Court of Appeal ([2008] EWCA Civ 200, [2008] 1 W.L.R. 1172, Mummery, Carnwath, Richards L.JJ.) which unanimously held that the Conservators had power to grant an easement over the common.

The first issue, that of capacity, involved close interpretation of the Wimbledon and Putney Commons Act 1871, the statute which established the Conservators and vested the common in them. Section 8 conferred on them the power "to take and hold and to dispose of (by grant, demise, or otherwise) land and other property", words which without more would indicate that they had power to grant an easement. However, section 35 provided that, "It shall not be lawful for the conservators, except as in this Act expressed, to sell, lease, grant or in any manner dispose of any part of the commons." This provision, held by the Adjudicator and the High Court to deny the Conservators power to grant an easement over the common, was given a more restrictive interpretation by the Court of Appeal. There can be no doubt that granting an easement over land must amount to a disposal of part of the land, as a new right is being created over land which affects the use to which that land can now be put. However, granting an easement would not necessarily be incompatible with the broad objectives of the 1871 Act to conserve the commons as an unenclosed, and unbuilt on, open space. Adopting a purposive approach, the Court of Appeal held that an express grant of the easement claimed would not contravene section 35 as it would not amount to a disposal of "part of the commons" (as opposed to a disposal of "land" or an "estate, interest or right in land", words which if they had been used would have clearly denied capacity to grant). That was enough to decide the case.

The second issue was whether "long prescription" under section 2 of the Prescription Act 1832 required proof of capacity to make a grant. This much criticised provision states that on 40 years' enjoyment within its terms "the right thereto shall be deemed absolute and indefeasible" save where it was so enjoyed "by some consent or agreement expressly given or made for that purpose by deed or writing". Similar words in section 3 of the 1832 Act, which is concerned with prescriptive acquisition of rights of light, led the House of Lords in 1865 to decide that a right of light could be acquired without any recourse to the fiction of a presumed grant, as the terms of the statute themselves conferred the right: *Tapling* v. *James* 11 HL Cas 290. Megarry and Wade's *Law of Real Property*, (6th ed.) 18–160, considered that as a matter of principle it should therefore be possible for "long prescription" to be effective

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against servient owners, such as certain corporations, which have no power to grant. In *Housden*, Mummery L.J. (giving the leading judgment of the Court of Appeal) was sympathetic to this view, not only on a true construction of the statute but also on policy grounds. However, adherence to precedent (the 1866 decision of the House of Lords in *Proprietors of Staffordshire and Worcestershire Canal Navigation* v. *Proprietors of Birmingham Canal Navigations* L.R. 1 H.L. 254) compelled him to come down in favour of the alternative view that the opening words of section 2 (the reference to "claims which may lawfully be made at the common law, by custom, prescription, or grant") "control the whole section" and import the common law presumption of grant to both short and long prescription periods. It followed that, where a servient owner was legally incapable of granting the easement, the claim must fail, however long the period of use which can be established.

As the Court of Appeal noted in *Housden*, prescription is topical. Not only is it a highly litigious area of the law which has been considered on a number of recent occasions by the House of Lords and the Court of Appeal, it is one of the main items on the agenda of the Law Commission in its current review of the law of easements, covenants and profits à prendre. The Law Commission's Consultation Paper, Law Com CP No 186 (2008), published a matter of days after *Housden*, leaves the reader in no doubt of its provisional view that reform is essential, although it maintains an open mind as to the best way forward for reform of prescriptive acquisition, in particular on the difficult question whether prescription should be abolished outright or whether it should be amended and put into coherent statutory form (see paras. 4.175 to 4.193). The Commission's tentative exposition of a replacement statutory scheme provisionally proposes the removal of the "unsatisfactory" fiction of grant (see para. 4.171) and the replacement of acquiescence as the underlying basis of prescriptive acquisition by long use. Not only would reform along such lines rid the law of reliance on fictions which spawn the potential for injustice, it would lay the necessary foundations for "the simpler law of prescription" which Mummery L.J. conceded has become, in modern conditions, "of more rather than less concern."

STUART BRIDGE

STRIKING THE BALANCE IN CHILD PROTECTION

SHOULD it be possible for the state to obtain a care order where there is an unproven, but strong, suspicion that a child may be at risk of abuse?

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