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PROPRIETARY ESTOPPEL AND THIRD PARTIES AFTER THE LAND REGISTRATION ACT 2002

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MUCH has changed since 1925, even in land law. The emergence of principles of proprietary estoppel has been one of the most striking developments. For some litigants, these principles have been a source of new opportunities; for many judges and academics, they have been a source of new problems. It is therefore no surprise that, by means of what is now section 116 of the Land Registration Act 2002, the Law Commission attempted to deal with one of these problems, albeit only in disputes relating to registered land. That section reads:

> 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).

The section is exactly the same as that proposed in the draft Bill contained in Law Commission Report No. 271.[1] The aim behind section 116(a) is to settle a debate concerning the nature of rights arising as a result of proprietary estoppel. The report explains that, even after all the requirements of a proprietary estoppel claim are made out, the party (B) making such a claim only has an "equity" in his favour.[2] On this analysis, any rights B might acquire as the result of the estoppel only take effect once a court has made an order: until then, B merely has an equity which is "inchoate". A problem then arises as to the nature of this "inchoate equity": in particular, is it a property right? It is very important to know the answer to this question if the land with which the dispute is concerned is transferred by the owner party to the estoppel (A) to

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[1] See Law Com. No. 271, Draft Bill, clause 114.

[2] *Ibid.*, at paras. [5.29–5.32].

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a third party (C).[3] If the "inchoate equity" is not a property right which burdens the transferred land, then B will have no claim against C unless he can establish an independent right arising directly against C. Academic views on this question vary;[4] judicial views might also seem to be inconclusive.[5] Hence the doubt which section 116(a) seeks to avoid.

I. Two Models of Proprietary Estoppel

Before analysing the effect of section 116(a) on this debate, it is worth pausing to question the very terms in which the debate is presented. At first glance, the notion of an "inchoate equity" is a puzzling one. It depends on viewing the acquisition of rights through proprietary estoppel as a two stage process: the first stage consists of the occurrence of the relevant facts giving rise to an equity, the second of the court order awarding rights to satisfy this equity. This is an unusual analysis. It must be remembered that the principles of proprietary estoppel simply provide a means by which rights can be acquired. In this way, these principles have the same function as principles of consent, unjust enrichment or wrongs.[6] Yet it would seem very odd to talk of "inchoate contracts" or to explain the commission of a tort as giving rise simply to a right in the victim to go to court, with any right to damages arising only as a result of a later court order. If all the required facts of a means

[3] On one view, section 116(a) does not aim to make the "inchoate equity" proprietary *for all purposes*, but rather limits itself to ensuring that, in registered land, such an equity operates *as though it were a property right* when it comes to the question of binding third parties. If this is the case, then s. 116(a) will not be of assistance if B wishes to show that his "inchoate equity" is proprietary for a reason unconnected to binding a third party: *e.g.* in order to bring himself within the Family Law Act 1996, s. 33.

[4] The majority view is that the "equity" does have proprietary effect: see *e.g.* R.J. Smith, "How Proprietary is Proprietary Estoppel?", in F.D. Rose (ed.), *Consensus ad Idem: Essays on the Law of Contract* (London 1996); G. Battersby, "Contractual and Estoppel Licences as Proprietary Interests in Land" [1991] Conv. 36 esp. pp. 45–46 and "Informal Transactions in Land, Estoppel and Registration" [1995] M.L.R. 637; K. Gray and S.F. Gray, *Elements of Land Law* (3rd edn., 2001) ("Gray and Gray"), pp. 1020–1023; C. Harpum, *Megarry & Wade: The Law of Real Property* (6th edn., 2000) ("Megarry and Wade"), at [13–029–13–032]. For opposing views see D.J. Hayton, "Equitable Rights of Cohabitees" [1990] Conv. 370 and "Constructive Trusts of Homes—a Bold Approach" (1993) 109 L.Q.R. 485; P. Ferguson, "Constructive Trusts—A Note of Caution" (1993) 109 L.Q.R. 114 and N. Hopkins, *The Informal Acquisition of Rights in Land* (London 2000), p. 154.

[5] For proprietary effect: Morritt L.J. in *Lloyds Bank* v. *Carrick* [1996] 4 All E.R. 630, 642 and His Honour Judge Boggis in the High Court in *Habermann* v. *Koehler* [2000] E.G.C.S. 125, *The Times*, 22 November 2000. Against: Peter Gibson L.J. in *United Kuwait Bank plc* v. *Sahib* [1997] Ch. 107, 142, and Robert Walker L.J. in the Court of Appeal in *Habermann* v. *Koehler* (above), at [23].

[6] See P.B.H. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 Univ. Western Australia Law Rev. 1; W. Swadling in P.B.H. Birks (ed.), *English Private Law* vol. I (Oxford 2000), 4.378–4.484. Of course, this point is even stronger if proprietary estoppel is regarded as a sub-set of one of these three categories: *e.g.* as based on consent, as suggested by S. Moriarty, "Licences and Land Law: Legal Principles and Public Policies" (1984) 100 L.Q.R 376, or as based on unjust enrichment, as suggested by G.H. Jones (ed.), Goff and Jones, *The Law of Restitution* (6th edn., 2002), pp. 230–235.

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of acquiring a right have occurred, it seems unnecessary and unprincipled to postpone the acquisition of that right until a court order. After all, certain statutory jurisdictions aside, the function of the courts is considered to be the recognition and declaration of existing rights, not their variation.[7] If all the requirements of a proprietary estoppel have been made out, it seems unsatisfactory to describe B as simply having "the right to go to court and seek relief". [8] This analysis is not unique to the Law Commission,[9] but it might be seen to understate B's position. After all, certain vexatious litigants aside, everyone has the right to go to court and seek relief, whether their claim turns out to be a good one or not.

An analysis of section 116(a) must therefore begin not with a discussion of possible answers to the question "Is an equity by estoppel proprietary?", but rather with an examination of the worth of the question itself. For such a question only arises if the two stage model of proprietary estoppel is adopted. This model has become the orthodox way of understanding proprietary estoppel,[10] but this article argues instead for the adoption of a different, unitary model.

The new model is based on two assumptions. First, that proprietary estoppel is to be treated in the same way as other means of acquiring rights. Secondly, the potential of those rights to bind third parties does not depend on the fact that they arose through an estoppel, but simply on whether they are proprietary or personal. Under this new model, the answer to the "inchoate estoppel" problem seems obvious. First, as is the case with other means of acquiring rights, any right to which proprietary estoppel gives rise should exist as soon as all the requirements of the estoppel are made out. The existence of the right should not depend on there being a court order. Secondly, the status of that right should be the same as when it arises by means other than estoppel. That is to say that its effect on a third party will depend simply on whether the right is proprietary or not. So if the estoppel gives rise to a fee simple, for example, then the fee simple will arise without the need for any court order, and is capable of binding a third party transferee: it will share these features with an equitable

[7] *Re Polly Peck (No. 2)* [1998] 3 All E.R. 812, 831 *per* Nourse L.J: "It is not that you need an Act of Parliament to prohibit a variation of property rights. You need one to permit it ...". See also P.B.H. Birks, "The Remedial Constructive Trust: Proprietary Rights as Remedies" in Birks (ed.), *The Frontiers of Liability*, vol. 2 (Oxford 1994).

[8] Law Com. No. 271 at [5.29].

[9] Gray and Gray, p. 773 describes a claimant in such a position as having an equity "entitling him to bend the ear of the court of conscience to listen sympathetically to his plea for a restraint upon the landowner's exercise of his rights".

[10] See *e.g.* Gray and Gray, p. 773; Megarry and Wade, at [13–028]; R.J. Smith, *Property Law* (4th edn., London 2003), p. 182; Hopkins *The Informal Acquisition of Rights in Land*, pp. 127–128.

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fee simple arising through a means other than estoppel, such as the equitable fee simple arising through consent when A enters a specifically enforceable agreement to sell his land to B. Whereas if the estoppel gives rise to a licence, for example, then such a personal right will arise without the need for a court order but will not be capable by itself of binding a third party transferee: it will share these features with a licence arising through a means other than estoppel, such as the licence arising through consent when A permits B to occupy his land in return for payment. Any protection B has against C in such a situation will therefore depend on B's establishing an independent right directly against C, whether by a new estoppel or by other means.

This new model resolves the "inchoate equity" debate by rejecting the standard two stage approach to proprietary estoppel, and thus denying the independent existence of such an "equity". It is submitted that the unnecessary interposition of this equity is responsible for the very confusion the Law Commission wishes to resolve. As a result, any interpretation of section 116(a) based on the two stage model will merely deepen this confusion. Rather, the solution is to judge the effect on third parties of rights arising through estoppel in exactly the same way as the effect of rights arising by other means: to look to the right which arises and to ask if that right is proprietary or personal. Hence the most useful interpretation of the section will be one which promotes this new model of proprietary estoppel.

II. The New Model of Proprietary Estoppel

Before such a view can be accepted, the new model must be scrutinised. First, its force in explaining the current law will be examined. Secondly, its coherence in principle will be tested. However, it is worth pausing to note that aspects of the new model can be seen in some current academic thinking about the status of licences arising through proprietary estoppel. It has been argued, chiefly by Battersby,[11] that the effect of a licence on a third party should be the same, whether that licence has arisen as a result of a contract, an estoppel or (presumably) any other means. Hence the confirmation in *Ashburn Anstalt* v. *Arnold*[12] that a contractual licence cannot by itself bind a third party must equally apply to licences arising through estoppel. This insight is based on one of the foundations of the new model: the proprietary status of a right

[11] See G. Battersby, "Informally Created Interests in Land" in S. Bright and J. Dewar (eds.) *Land Law—Themes and Perspectives* (Oxford 1998), pp. 503–504. See also W. Swadling in Birks (ed.), *English Private Law* vol. I, (Oxford 2000) 4.185.

[12] [1989] Ch. 1.

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must depend on the nature of that right, not on the means by which it was acquired. The puzzling cases in which it seems that an "estoppel licence" is given proprietary effect are not inconsistent with this. First, as will be seen below, the right to which the estoppel gives rise in these cases might not be a licence at all, but rather a recognised proprietary right.[13] Secondly, many of these cases[14] were decided in the periods when the Court of Appeal, led by Lord Denning, took the view that contractual licences effectively had proprietary status.[15] It is no surprise that these cases also treat licences arising through estoppel as capable of binding third parties: this consistency of treatment is demanded by one of the assumptions of the new model. Finally, there might be cases in which it is not the original licence arising through estoppel which binds the third party, but rather an independent right which arises directly against C as a result of C's conduct.[16] The constructive trust discussed in *Ashburn Anstalt* v. *Arnold* is one example of how such a right may arise, and is of course equally applicable whether the original licence arose through estoppel or contract.[17]

Battersby's analysis of estoppel licences thus indicates the advantages of aligning estoppel with other means of acquiring rights when considering the effect of rights arising through estoppel on third parties. The aim of the new model is to realise the full potential of this alignment, as a means both to explain the decided cases and also to promote coherence in this branch of the law.

A. The New Model: Explaining the Current Law

The new model has advantages as a means of understanding the current law. Put simply, those cases in which judges are happy for an "inchoate equity" to have proprietary effect are cases in which the estoppel gives rise to a proprietary right (or to what was regarded by courts at the time as being a proprietary right). Conversely, those cases in which judges express doubts about an "inchoate equity" having proprietary effect are cases in which the estoppel gives rise to a personal right.

[13] See the discussion of *Inwards* v. *Baker* [1965] 2 Q.B. 29 in the text below at n. 85–92.
[14] *E.g. Inwards* v. *Baker*; *Williams* v. *Staite* [1979] 1 Ch. 291.
[15] Either in the period between *Errington* v. *Errington and Woods* [1952] 1 K.B. 290 and the House of Lords decision in *NPB* v. *Hastings Car Mart Ltd.* [1965] A.C. 1175 or, under the constructive trust device, between *Binions* v. *Evans* [1972] Ch. 359 and *Ashburn* itself.
[16] *E.g.* see the interpretation of *E.R Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 shared by G. Battersby [1995] M.L.R. 637 and Peter Gibson L.J. in *United Bank of Kuwait* v. *Sahib* [1997] Ch. 107, 142.
[17] Hence the possibilty of such a trust was considered in *Lloyd* v. *Dugdale* [2002] 2 P. & C. R. 13.

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Lloyd v. *Dugdale*[18] and *Singh* v. *Sandhu*[19] are good examples of the former category of cases. In *Lloyd* v. *Dugdale* A, the registered owner of a 999 year lease, orally agreed to sell the lease to B. B moved into the property and spent money on building work. A later refused to go through with the sale and sought possession from B, before selling to C. C brought new proceedings for possession and B argued that he had a right, arising through an estoppel, which constituted an overriding interest under the Land Registration Act 1925, s. 70(1)(g). This was accepted at first instance and the Court of Appeal also took the view that B's rights were proprietary and hence were capable of being overriding.[20] On one interpretation, *Lloyd* v. *Dugdale* could be seen as further evidence of a modern tendency to regard an "inchoate equity" as having some form of proprietary status. However, applying the analysis suggested here, the crucial point is that it was decided that the estoppel gave rise to a proprietary right: as a result of B's reliance on his oral assurance, it was considered that A was bound to grant B a lease. Had B qualified under section 70(1)(g), C would have been bound not by some "inchoate equity" but rather by B's equitable lease.

Singh v. *Sandhu* is noted in *Megarry and Wade* as one of the occasions on which it has been accepted "that an equity arising by estoppel can be an overriding interest" if supported by actual occupation.[21] However, in the Court of Appeal it was said[22] that "the only realistic way" to respond to the estoppel was to require a conveyance to B1 and B2 of the fee simple in the land on which B1 and B2 had built, as well as the grant of a right of way giving B1 and B2 access to that land. It is also worth noting Balcombe L.J.'s statement that B1 and B2 "were persons in occupation and any interest they had by virtue of any equity ... would be an overriding interest under s. 70(1)(g)". The new model of estoppel suggested here is consistent both with the result of the case and with the reasoning that it is the proprietary interest arising in response to the estoppel (rather than any inchoate equity) which binds the purchaser.[23]

[18] [2002] P. & C.R. 13.
[19] Unrep. 4 May 1995, C.A.
[20] However, the Court of Appeal held that B could not bring himself within s. 70(1)(g) and B therefore had to argue, in the end unsuccessfully, that he had an independent right arising directly against C by means of a constructive trust.
[21] Megarry & Wade, at [13–032].
[22] *Per* Balcombe L.J. (with whom Auld L.J. and Sir Ralph Gibson agreed).
[23] The reasoning in *Singh* v. *Sandhu* was approved by Lawrence Collins Q.C. in *Locabail (U.K.) Ltd.* v. *Bayfield Properties Ltd.* (unrep., 9 March, 1999) at [32]: "If, therefore, the question arose for decision in this case (which, as will appear, it does not) I would have decided both on principle and on the authority of *Singh* v. *Sandhu* that the interest of a claimant in

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Pennine Raceway Ltd. v. *Kirklees MBC*[24] is often given as an example of the second category of cases, in which the proprietary status of an inchoate estoppel is doubted.[25] An owner of land had granted the plaintiff company the right to use the land for motor racing. After the plaintiff had carried out work to adapt the land for this use, the defendant local authority revoked the permission which was necessary for such racing to take place. Where such a revocation rendered modifications to land abortive, the defendant was obliged by statute to pay compensation to "a person interested in the land". As in *Plimmer* v. *Wellington Corporation*,[26] a narrow construction of the statute was rejected and compensation was deemed payable without the plaintiff needing to show he had a proprietary right. It is Eveleigh L.J.'s statement that "I do not have to say that the appellant's interest is an interest in land in a strict conveyancing sense"[27] which is taken to cast doubt on the proprietary status of the "inchoate estoppel".[28] However, it is vital to note that Eveleigh L.J. viewed the plaintiff as having a licence and that his Lordship also accepted the local authority's argument that a licence is not a proprietary right. The right of the plaintiff which the court was considering, and whose proprietary nature it might be understood to have doubted, is not some form of "inchoate estoppel" but is rather simply a licence.[29]

The advantages of the analysis put forward here are evident in an examination of *Habermann* v. *Koehler*.[30] B1 and B2 had been living in a house since 1980 on the strength of a promise from A that they could live there rent free for the remainder of A's life and could also buy the property from him for the sum he had paid for it. A later mortgaged the property to C without the consent of B1 and B2 and, when he could no longer make mortgage payments, A transferred the property to C. His Honour Judge Taylor granted C's application for possession. He held that B1 and B2 were merely licensees, as their right to purchase had only existed for a limited period of time which had now passed. Permission to appeal was granted by Millett L.J.: not only did B1 and B2 want to challenge the finding that the right to purchase had expired, but they also

occupation who asserts an interest by way of proprietary estoppel can be protected against a third party under section 70(1)(g)".

[24] [1983] Q.B. 382.

[25] See *e.g.* Gray and Gray, p. 774.

[26] (1884) 9 App. Cas. 699.

[27] [1983] Q.B. 382, 391.

[28] See *e.g.* Gray and Gray, pp. 774, 1020. However, it can be argued that this statement simply avoids addressing the question, rather than expressing a view on it.

[29] Similarly, as it was assumed that the estoppel claimant in *Canadian Imperial Bank of Commerce* v. *Bello* had only acquired a licence, it is no surprise that Dillon L.J. doubted that he could have an overriding interest: (1991) 64 P. & C.R. 48, 52.

[30] (1996) 73 P. & C.R. 515; [2000] E.G.C.S. 125, *The Times*, 22 November 2000.

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wished to argue that they had "a proprietary interest by estoppel in an estate *pur autre vie*". The Court of Appeal allowed the appeal on the time limit point, but referred all further issues for a new trial. In particular, they considered that this new hearing would have to address the debate as to the binding effect of a right arising through estoppel on a third party. As a result, the Law Commission noted that the Court of Appeal had doubts about whether "an equity arising by estoppel could bind a purchaser as an overriding interest".[31] However, the uncertainty rather seems to be as to what right the estoppel could properly be seen to give rise to: was it a licence, as suggested by the findings of H.H.J. Taylor or was it rather, as Millett L.J. thought arguable, a lease for the life of A? His Honour Judge Boggis decided at the end of the new hearing that the application of estoppel principles entitled B to be given a lease for the life of A at a peppercorn rent.[32] Hence, as one would expect under the new model given that B was also in actual occupation at the time of the transfer to C, B was allowed to resist C's application for possession.

It must be admitted that the final result in *Habermann* v. *Koehler* is also consistent with the two stage model. On this model, any case in which C is bound can be seen as confirming the proprietary status of the "inchoate equity" that any estoppel claimant enjoys once the facts giving rise to the estoppel have occurred.[33] It might then seem that the law can be adequately explained under the two stage model, provided one is prepared to dismiss the reasoning in *Pennine Raceways*[34] as misguided or out-of-date,[35] and to argue that the inchoate equity existed as an equitable property right before the coming into force of the Law of Property Act 1925, s. 4(1).[36]

However, the two stage analysis, whilst sometimes evident in judges' reasoning, is difficult to reconcile with their actual decisions. *Voyce* v. *Voyce*[37] provides perhaps the clearest example of this. Following a promise from A, his mother, that she would give him a

[31] At least in Law Com. No. 254: para [3.35], n. 96. *Habermann* is not mentioned in Law Com. No. 271.

[32] H.H.J. Taylor had found that A's representation to B had been: "You can live here rent free for the remainder of my life and you can buy the property for the sum that I paid for it".

[33] See *e.g.* Megarry and Wade, at [13–029]. Robert Walker L.J. notes in *Habermann* v. *Koehler* at para. [21] that H.H.J. Boggis relied on Battersby (1991) Conv. 36, in which the debate is conducted in terms of the status of a general "inchoate equity".

[34] And also in *Canadian Imperial Bank of Commerce* v. *Bello* (1991) 64 P & C.R. 48, 52.

[35] See *e.g.* Gray and Gray, p. 774 n. 14.

[36] On a natural reading s. 4(1) prohibits the recognition of equitable property rights in land not in existence before 1926: see *e.g.* F.H. Lawson and B. Rudden, *The Law of Property* (2nd edn., Oxford 1982), p. 220 and A. Briggs, "Contractual Licences: A Reply" [1983] Conv. 285, 290–291. However, it has been argued that the section has a more limited effect: see *e.g.* Smith, *Property Law*, p. 46.

[37] (1991) 62 P. & C.R. 290.

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cottage she owned if he improved its condition, B did work on the cottage and lived there for 32 years. A failed to make the gift to B and instead left the cottage to C in her will. The judge ordered that the freehold of the cottage and its adjoining garden be conveyed by C to B. One of the arguments C made on appeal was that the judge had failed to take account of his position as a third party to the estoppel arising between A and B. This argument was rejected on the basis that C, as a volunteer, could not be in a better position than B. This is of course consistent with the approach advocated here: B's equitable fee simple arose before C received his interest in the property. As Nicholls L.J. noted: "True, [C] was a volunteer. But he was formally given the property some years after the events which occurred in 1958".[38]

It could be argued that the decision is also consistent with the two stage analysis, providing it is the inchoate equity arising in response to the estoppel which is viewed as having proprietary status and binding C.[39] Unusually however, argument on a different point revealed that the court's reasoning is consistent only with the new model. For C was claiming that B's cottage was subject to an easement of light that had arisen in favour of C's farmhouse by means of prescription. The judge had rejected this contention, taking the view that a prescription period could only begin to run at the time of a conveyance of the legal estate in the cottage to B. However, this was refuted in the Court of Appeal. The words of Dillon L.J. are worth quoting in full:

> I regard [the judge's] approach as wrong in law because the equitable rights of [B] had accrued long before. Accordingly, while [B] remained in his occupation of Coles Cottage under the equitable rights which were ultimately satisfied by the direction for a conveyance he was, as is now recognised, the equitable owner against whom a claim to restrain infringement of light could have lain.[40]

Thus it seems clear that B's equitable fee simple is regarded as accruing not from the time of the court order but rather from the time at which all the requirements of the estoppel claim were made out.[41]

[38] *Ibid.*, at p. 295.

[39] Indeed, one could argue that the terminology used by Dillon L.J. (*ibid.*, at p. 294) is more consistent with the two stage approach: "I do not find any indication that the court has sought to protect a volunteer successor in title from a donor who has notice of the circumstances from which an equity has arisen and notice that the claimant to an equity is, and was at the time of the deed of gift to him, in occupation of the property".

[40] *Ibid.*, at p. 294.

[41] Note Lawrence Collins Q.C. in *Locabail* v. *Bayfield* (unrep., 9 March, 1999), at [30]: "The decision in *Voyce* v. *Voyce* (1991) 62 P. & C.R. 290 is inconsistent with the argument that the estoppel claimant has no interest in land until the court makes the final order". Or, as Nourse L.J. put it in *Sen* v. *Headley* [1991] Ch. 425, 440: "Where an application of [proprietary

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There are many further examples of decisions based on the fact that rights arising through proprietary estoppel exist before any court order is made.[42] In *Plimmer* v. *Wellington Corporation*,[43] for example, the relevant statute limited compensation to those who "immediately before the date of the passing of the said Act had any estate or interest in, to or out of the lands by the said Act vested in the corporation". The court's decision was not that an estoppel entitled B to rights which arose only upon a court order but rather that B had already acquired a licence, which existed before the passing of the Act vesting the land in the respondent corporation. In *Unity Joint Stock Mutual Banking Association* v. *King*[44] B1 and B2 had attempted to grant a mortgage to the plaintiff bank. At the time of the purported mortgage, the equitable estate in the land was vested in A, the father of B1 and B2. Nonetheless, the plaintiff bank argued B1 and B2 did have an interest in the land, arising through estoppel, which existed at the time of the purported mortgage. The plaintiff bank then claimed that the purported mortgage operated to give them a charge over this interest of B1 and B2. Sir John Romilly M.R. decided that, as A had allowed his sons to occupy and build on the land, B1 and B2 were entitled to a lien over the land to recover the value of their expenditure. This interest must have arisen before the time of the court order, as it was regarded as having been validly mortgaged to the plaintiff bank.

Unfortunately, such authorities demonstrating that proprietary estoppel can give rise to proprietary rights before an order of the court were not referred to by counsel in *United Bank of Kuwait* v. *Sahib*.[45] In that case, B wished to rely on an estoppel to establish a charge on A's property which could take priority over C's charging order. However, Peter Gibson L.J. rejected this, deciding that "[i]n the absence of a valid contract to mortgage, [B] had and has no proprietary right in [A's land] unless and until the court declares what right B has".[46] There are a number of possible responses to this statement. First, it might be argued that, in the absence of citation of the relevant authorities, little weight should be attributed to it.[47] Secondly, it is not clear that, on the facts of the case, B had

estoppel principles] gives the promisee a right to call for a conveyance of the land no doubt it could be said, perhaps it has been said, that the right is the consequence of an implied or constructive trust which arises once all the requirements of the doctrine have been satisfied".

[42] For further examples, see the list given by C.J. Davis, "Proprietary Estoppel: Future Interests and Future Property" (1996) Conv. 193, n. 3.

[43] (1884) 9 App. Cas. 699.

[44] (1858) 25 Beav. 72. See also S. Baughen, "Estoppels over Land and Third Parties: An Open Question?" [1994] 14 L.S. 147.

[45] [1997] Ch. 107.

[46] *Ibid.*, at p. 142.

[47] See P. Critchley, "A *Via Media* for Estoppel and Third Parties?" [1998] Conv. 502, 504.

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acquired any property rights even under the new model of proprietary estoppel. As the estoppel argument seems to have been added by counsel as something of an afterthought, there is little precision about the facts relied on as giving rise to the estoppel. It is said that A acknowledged the efficacy of a purported security in correspondence with B, but there seems to be no detrimental reliance on this, as B had already given A all the agreed credit by this stage. Peter Gibson L.J. does state that "[A] was estopped against [B] from denying that he agreed with [B] that [A's land] should stand as security".[48] However, this is not the same as saying that A was estopped from denying that B had a charge over his land. There was no dispute that A and B had *agreed* there should be such a charge: the point was that in the absence of writing, such an agreement could not suffice to create a charge.[49] On this analysis, the estoppel only prevented A from denying that an unwritten agreement to charge the property had been reached and hence could not give rise to a property right. Thirdly, given the particular facts of the case,[50] the decision might be motivated by a desire not to undermine the policy considerations behind the Law of Property (Miscellaneous Provisions) Act 1989, s. 2: it is now difficult to maintain such a stance in the face of the decision in *Yaxley* v. *Gotts*.[51]

Finally, the new model of proprietary estoppel also provides the best explanation of the Court of Appeal's decision in *Birmingham Midshires Mortgage Services Ltd.* v. *Sabherwal*.[52] Counsel in that case submitted that, where the interest of a party claiming a beneficial share of a family home arises by estoppel, that interest is not capable of being overreached. Robert Walker L.J. rejected this argument, noting that it would lead to inconsistent results, given that such a share is plainly subject to overreaching if arising under a resulting or constructive trust as a result of the claimant's direct financial contributions.[53] The Court of Appeal thus decided that the position of the estoppel claimant as regards a third party depends on the type of right enjoyed by the claimant (in this case, a beneficial share under a trust of land), not the means by which that right was acquired. Hence the issue is not "can an inchoate

[48] *Ibid.*, at p. 141.
[49] Law of Property (Miscellaneous Provisions) Act 1989, s. 2.
[50] B's principal argument was that an equitable mortgage had been created by means of a deposit of title deeds. This was rejected on the basis that such a means of creating a mortgage depended on there being a valid contract and hence required writing. Peter Gibson L.J. at p. 142 was unhappy with the prospect that "in every case of a deposit which is invalid as an equitable mortgage by reason of section 2, an effective security would nevertheless arise by reason of estoppel or constructive trust".
[51] [2000] Ch. 162.
[52] (1999) 80 P. & C.R. 256.
[53] *Ibid.*, at [23–28].

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estoppel equity be overreached?" but rather "can the right to which the estoppel has given rise be overreached?"[54] Robert Walker L.J. suggested that the answer to the latter question turns on whether that right is a "family" rather than a "commercial" interest.[55] However, there is no basis for such a distinction in the Law of Property Act 1925;[56] rather, when a conveyance is made by trustees of land, sections 2(1)(ii) and 2(2) of that Act make it clear that "any equitable interest or power having priority to the trust" can be overreached, unless excepted by s. 2(3). As a result, a beneficial interest under a trust of land must be subject to statutory overreaching whether it arises through estoppel or any other means, and whether it arises in a "family" or "commercial" context.

B. The New Model: Coherence in Principle

It should be no surprise that rights arising through proprietary estoppel behave in the manner prescribed by the new model. The position was powerfully defended by Browne-Wilkinson J. in his judgement in *re Sharpe*.[57] The occupant's claim to an irrevocable licence was based on a principle viewed by his Lordship as being "akin to or an extension of a proprietary estoppel".[58] Counsel for the trustee in bankruptcy argued that the occupier did not have a substantive right, but rather a claim to an equitable remedy and that "the time to decide whether to grant such a remedy is when the matter comes before the court in the light of the then known circumstances". Counsel then pointed to the occupier's conduct in failing to put forward her claim, despite enquiries, until after the trustee had contracted to sell the property. This argument employs the two stage analysis, under which, until a court order is made satisfying the equity, an estoppel claimant merely has a right to ask the court for a remedy. However, this dislocation of the remedy from the facts giving rise to the estoppel claim was forcefully rejected by Browne-Wilkinson J. who stressed that:

> [I]n order to provide a remedy the court must first find a right which has been infringed ... in cases such as this, it cannot be that the interest in property arises for the first time when the court declares it to exist. The right must have arisen at the

[54] Hence the formulation of the issue adopted by G. Ferris & G. Battersby "The General Principles of Overreaching and the Modern Legislative Reforms 1996–2002" (2003) 119 L.Q.R. 94 at n. 110 is misleading.

[55] *Ibid.*, at [28], supporting the analysis in Megarry & Wade, *The Law of Real Property*, (5th edn., 1984) at p. 409: see now Megarry & Wade at [4–080].

[56] Indeed, the distinction seems to be unworkable. Would the result in *City of London Building Society* v. *Flegg* [1988] A.C. 54 have been any different if the beneficiaries had all been business partners and the land used as business premises as well as a home?

[57] [1980] 1 W.L.R. 219.

[58] *Ibid.*, at p. 223.

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> time of the transaction in order for the plaintiff to have any right the breach of which can be remedied.[59]

The strength of this approach comes from its commitment to treating proprietary estoppel as simply a means of acquiring rights, and then treating rights which arise through proprietary estoppel in the same way as rights arising through other means. Given it is abundantly clear that rights arising through consent, unjust enrichment or wrongs are treated as arising at the time of the relevant "transaction", why should rights arising through proprietary estoppel operate any differently?[60]

This alignment of rights arising through proprietary estoppel with rights arising through other means has advantages in practice as well as in principle. For it is often true that, on the same set of facts, rights can arise both through proprietary estoppel and through other means. In *Hussey* v. *Palmer*,[61] the facts of which are very similar to *re Sharpe*, Lord Denning M.R. seems to regard the rights of the occupier as arising in response to an unjust enrichment of the legal owner of the property.[62] Whether these rights take the form of a beneficial interest under a resulting trust, a lien, or simply a personal claim for repayment of expenditure they are regarded as taking effect as soon as the unjust enrichment occurs, without any need to wait for a court order. More frequently, there is an overlap between principles of proprietary estoppel and the means of acquiring rights based on "common intention" established in *Gissing* v. *Gissing*.[63] Indeed, this similarity has frequently been remarked on by the courts.[64] Given that such a constructive trust is accepted as arising before any order of the court, why should rights arising under proprietary estoppel behave any differently?[65]

It seems that the arguments for rejecting the two stage approach are compelling. Treating proprietary estoppel as simply another means as acquiring rights, and expecting those rights to arise as

[59] [1980] 1 W.L.R. 219, 225.

[60] It should be stressed again that this point is stronger still if proprietary estoppel is regarded as simply an example of rights being acquired through consent, unjust enrichment or the commission of a wrong: see n. 6 above.

[61] [1972] 1 W.L.R. 1286.

[62] Lord Denning M.R. said of the trust which arose in that case: "It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received". *ibid.*, at p. 1290.

[63] [1971] A.C. 886.

[64] See *e.g.* Lord Bridge in *Lloyds Bank* v. *Rosset* [1991] 1 A.C. 107, 132–133 and Robert Walker L.J. in *Yaxley* v. *Gotts* [2000] Ch. 162, 177.

[65] Further, the rights which lead to a constructive trust in cases such as *Pallant* v. *Morgan* [1953] Ch. 43 and *Banner Homes Group plc* v. *Luff Developments Ltd.* [2000] Ch. 372 are acquired on a basis apparently similar to proprietary estoppel and seem to arise before any order of the court: see *Time Products Ltd.* v. *Combined English Stores Ltd.* (unrep., 2 December 1974, Oliver J.).

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soon as the relevant facts have occurred, is consistent not just with the decided cases but also with principle. It is therefore worth pausing to ask how the two stage approach has acquired the near-universal acceptance it now enjoys.

III. Sources of the Two Stage Approach

There are a number of sources which converge to give the two stage approach its current strength. First, judges commonly describe the facts which give rise to an estoppel as "raising an equity". This phrase is, by itself, insignificant. It is merely used as a shorthand for stating that B has an equitable right and hence cannot be taken to imply that what B has instead is a mere right to go to court and seek a remedy. Indeed, the terminology of "raising an equity" can be seen in many of the cases which were shown above to be inconsistent with the two stage approach.[66] It has also been employed as a shorthand to describe equitable rights arising through means other than estoppel, without involving any denial of the fact that these rights arise before an order of the court.[67]

Secondly, but linked to this usage, is Scarman L.J.'s formulation of the operation of proprietary estoppel in *Crabb* v. *Arun District Council*.[68] This frequently cited statement sets out three questions which the court must answer: "First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?" There is nothing in this statement which necessitates an adoption of the two stage approach in which an inchoate equity exists prior to any rights conferred by a court order. This can be seen from Scarman L.J.'s judgment in *Crabb* v. *Arun D.C.* itself. First, he considers if *any* right arising through proprietary estoppel can be said to exist. Secondly, he considers the extent of the right so arising. However, there is no suggestion that these questions have to be asked at different times, so that the extent of the right is unclear until the court order. It is true that the third of Scarman L.J.'s three questions can only be answered at the time of judgment, as the court has to take account of the prevailing factual situation so as to make an order which gives best effect to B's

[66] *E.g. Plimmer* v. *Wellington Corporation* (1884) 9 App. Cas. 699; *Voyce* v. *Voyce* (1991) 62 P. & C.R. 290.

[67] Particularly in cases relating to the enforceability of contracts under the doctrine of part performance: *e.g. Steadman* v. *Steadman* [1976] A.C. 536 and also to describe a right of equitable set-off: *e.g. Federal Commerce* v. *Molena Alpha* (*The Nanfri*) [1978] Q.B. 927. The usage can also be seen in relation to equitable defences: *e.g. Ministry of Health* v. *Simpson* [1951] A.C. 251, including promissory estoppel: *e.g. Brunner* v. *Moore* [1904] 1 Ch. 305. "An equity" can also be used to refer to any reason justifying the intervention of a court of equity: *e.g. Strong* v. *Bird* (1874) L.R. 18 Eq. 315, 316.

[68] [1976] Ch. 179, 193.

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right.[69] As his Lordship put it, the court must "determine in these proceedings upon what terms [B] should be put to enable him to have the benefit of the equitable right which he is held to have".[70] However, this cannot hide the fact that B's right pre-dates the judgment of the court. Indeed, in fashioning the necessary order, Scarman L.J. took into account that, after the facts giving rise to the estoppel occurred, A had deliberately maintained a gate which led to "sterilisation of [B's] industrial estate for a very considerable period of time". This is relevant not as part of some general inquiry into the merits of the parties' conduct, but rather as it "was an infringement of an equitable right possessed by [B]".[71] To say that A's conduct in the period between the estoppel arising and the eventual court order constitutes an interference with B's equitable right is consistent only with the new model, not the two stage approach.

The third source of the "inchoate estoppel equity" which lies at the heart of the two stage approach is perhaps the most telling. For it involves the crucial separation of this "equity" from the substantive right arising through the estoppel. The "equity" can then be used to fill the gap in time between the facts giving rise to the estoppel and the court order, hence permitting the supposed postponement of the substantive rights to the later point. The dubious nature of the resulting two stage approach is signalled by the fact that this third source is Lord Denning M.R.'s judgment[72] in the Court of Appeal in *NPB* v. *Hastings Car Mart*.[73] In deciding if a "deserted" wife had a right to occupy the former matrimonial home which was capable of binding a third party, Lord Denning stated that: "She has no legal estate or equitable interest in the land. All that she has is a licence. But not a bare licence. She has a licence coupled with an equity. I mean an 'equity' as distinguished from an equitable interest ... It is an equity which the court will enforce against any successor except a purchaser for value without notice."[74]

The idea of a "licence coupled with an equity" seems an odd one, but his Lordship gave three "illustrations", the second of which is of most interest:

> There are many cases where the owner of land has granted another a licence to occupy land and to execute works upon it, so that the licensee can use them for his own purposes. It has

[69] See also text below at n. 97–102.
[70] [1976] Ch. 179, 198–199.
[71] *Ibid.*, at p. 199.
[72] With which Donovan L.J. agreed.
[73] [1964] Ch. 665.
[74] *Ibid.*, at p. 686.

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> invariably been held that, once the works are executed, the licensee has an "equity" which is binding on the licensor and his successors: see *Duke of Beaufort* v. *Patrick*[75] and *Dillwyn* v. *Llewelyn*.[76] There may be no binding contract to grant any particular interest to the licensee, but nevertheless the court will look at the circumstances in each case to decide in what way the "equity" can be satisfied: see *Plimmer* v. *Wellington Corporation*.[77] Quite recently there was a similar case, but the court reached the same result by invoking the doctrine of estoppel: see *Hopgood* v. *Brown*.[78] But whether it be called an "equity" or an "estoppel", the fact remains that the successor was bound just as the original licensor.[79]

This passage is of vital importance as it shows the roots of many of the misunderstandings which have plagued the law relating to proprietary estoppel. It relies on three cases in which third parties were bound by rights arising through proprietary estoppel in order to argue that third parties can also be bound by a "licence coupled with an equity". This rests on a misconception of why the third party is bound in these three cases. The third party is bound not by any licence of B, but rather because of a recognised proprietary right which B has acquired as a result of the proprietary estoppel. Of course, if B is occupying A's property with A's permission, B can be said to have a licence *in addition to* any property right arising through the estoppel. However, it is not the licence which binds the third party, as the licence is simply a personal permission from A. So in *Dillwyn* v. *Llewelyn*, for example, it is not B's licence to occupy which might bind C, but rather his equitable fee simple. The reason B's position differs from that of a standard licensee is not because he has any "equity" but simply because he has an equitable fee simple, which is a property right capable of binding third parties. The wife in *NPB* v. *Hastings Car Mart* had no such property right, whether arising by proprietary estoppel or other means, and hence, in the absence of an independent direct right against the bank, she had no means to resist their application for possession, as was confirmed in the House of Lords.[80]

Of course, there is another problem with Lord Denning's analysis. Although it is said that Mrs. Ainsworth had a "licence coupled with an equity", the nature of this equity is not explained. A clue can be taken from the fact that Lord Denning also regards the licensee in *Winter Garden Theatre (London) Ltd.* v. *Millennium*

[75] (1853) 17 Beav. 60.
[76] (1862) 4 De G.F. & J 517.
[77] (1884) 9 App. Cas. 699.
[78] [1955] 1 W.L.R. 213.
[79] [1964] Ch. 665, 687.
[80] [1965] A.C. 1175.

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Productions Ltd.[81] as possessing an "equity". It seems that this equity stems from the fact that the licensee in that case, like the wife in *NPB*, could obtain an injunction against the licensor to prevent its removal. However, to infer from this that the licensee has something more than a personal right against the licensor is fallacious: the injunction upholds a right *as against the licensor* to remain on the property, not a simple right to remain. Lord Denning's notion of a "licence coupled with an equity" elides this distinction.[82] A contractual licensee who can obtain an injunction to prevent the licensor removing him in breach of contract has an "equity" in the sense of having the right to go to court to receive an equitable remedy; so does a licensee who has also acquired a recognised proprietary right through means of a proprietary estoppel. However, the position of those two parties as against a transferee of the land is not the same.

It is therefore no surprise that, on appeal, the House of Lords frustrated Lord Denning's imaginative attempt to protect the wife's occupation in *NPB* v. *Hastings Car Mart*.[83] This meant the end of the idea that, in a case simply involving a licence, something called an equity might arise which had an independent existence and could even bind third parties.[84] Yet, as the House of Lords did not need to address themselves to Lord Denning's analysis of the estoppel authorities, the notion persisted that such an equity might arise in those cases. Indeed, the real problem may well be that, after the Court of Appeal judgment in *NPB*, but before the House of Lords' decision to reverse it, *Inwards* v. *Baker*[85] came before the Court of Appeal.[86] Encouraged by A, his father, B built a bungalow on A's land and lived there for twenty years. On A's death, the land vested under his will in trustees who held for the benefit of persons other than the son. After having allowed B to remain in occupation for a further 12 years, the trustees brought possession proceedings. In finding for B, Lord Denning M.R. repeated his analysis of the proprietary estoppel cases in *NPB*. B had spent money on the land in a belief created by A that he would be allowed to remain there for life and that "raises an equity in the licensee such as to entitle him to stay. He has a licence

[81] [1948] A.C. 173.

[82] The same false inference (that protection for the licensee as against the licensor necessarily leads to protection as against a third party) is made by Lord Denning in *Errington* v. *Errington and Woods* [1952] 1 K.B. 290, 299.

[83] [1965] A.C. 1175

[84] At least until *Binions* v. *Evans* [1972] Ch. 359 and *DHN Food Distributors Ltd.* v. *Tower Hamlets LBC* [1976] 1 W.L.R. 852, when the same idea was reborn under the guise of a constructive trust.

[85] [1965] 2 Q.B. 29.

[86] Judgment was given by the Court of Appeal in *NPB* on 26 June 1964 and by the House of Lords on 13 May 1965. *Inwards* v. *Baker* was decided on 13 January 1965.

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coupled with an equity".[87] Counsel for the trustees argued that A could have sold the land to a purchaser who would then have been able to remove B, but Lord Denning rejected this: "I think that any purchaser who took with notice would clearly be bound by the equity".[88]

Following *Inwards* v. *Baker*, an unreserved judgment espousing reasoning soon to be rejected by the House of Lords, the idea took root that reliance on an assurance concerning land gives rise to an "equity" allowing B to go to court to claim relief. As can be seen from his judgment in *NPB*, Lord Denning used the notion of this "equity" to protect licensees occupying land from third parties. A licence alone might not confer such protection, but a licence coupled with an equity was a different matter. There are a number of apparent ironies here. First, given the original purpose behind this use of the "inchoate equity" was to ensure that third parties could be bound, it might seem strange that the main debate concerning this "equity" addresses precisely this question. Yet this debate arose simply because the "equity" is not an effective means of achieving the end of binding third parties. For as Lord Upjohn pointed out in the House of Lords in *NPB*,[89] and as Lord Denning himself admitted in the Court of Appeal,[90] it is not a recognised proprietary right. As used by Lord Denning in the context of licences, all it seems to denote is the availability of an injunction to uphold a personal right against the licensor. The resort to the "equity" can be seen as stemming from an imaginative attempt to argue that licensees can be protected against third parties, by side-stepping the obstacle that the law does not regard licences as conferring proprietary rights: it is a precursor to Lord Denning's efforts to do the same by means of a constructive trust.[91] Yet no such device is necessary in those estoppel cases where the estoppel gives rise to a recognised proprietary right. So, in *Inwards* v. *Baker* itself, B should be seen not as having "a licence coupled with an equity" but rather as enjoying a licence (now revoked) and equitable rights arising through estoppel. One of the difficulties with *Inwards* is that the Court of Appeal simply decided that the trustees' application for possession should be denied; there was no need to specify precisely what rights B had acquired as a result of the estoppel. However, as Lord Denning regarded it as inequitable for B's expectation of a home for life to be defeated, it might well be that B had a life interest, or a lease for his life. If so, it would

[87] [1965] 2 Q.B. 29, 37.
[88] *Ibid.*
[89] [1965] A.C. 1175, 1237–1239
[90] [1964] Ch. 665, 686.
[91] See *e.g. D.H.N. Food Distributors Ltd.* v. *Tower Hamlets L.B.C.* [1976] 1 W.L.R. 852.

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not be B's licence which binds a possible purchaser, but simply this equitable proprietary right.[92] It is only Lord Denning's desire in *NPB* to rely on such estoppel cases as evidence that certain *licences* can bind third parties which causes this vital point to be overlooked.

Underlying the confusion seen not just in *Inwards* v. *Baker* but also cases such as *E.R. Ives Investments Ltd.* v. *High*,[93] is a failure rigidly to distinguish between types of right (such as licences) on the one hand and means of acquiring rights (such as proprietary estoppel) on the other. Asking if a type of right is capable of binding third parties, *i.e.* if it is proprietary, is a sensible and significant enquiry. However, asking the same of a means of acquiring rights is mistaken and misleading. It would seem odd to ask "do contracts/unjust enrichments/torts bind third parties?". The answer depends of course on whether the particular means of acquiring rights has led in a particular case to the acquisition of a proprietary right. If so, it is that proprietary right which is capable of binding a third party. Yet, largely due to the confusion between licences and rights arising through estoppel, the question "do estoppels bind third parties?" is often put.[94] This misguided question can only be understood sensibly by means of a further misconception: by assuming that there is some distinct type of right, such as an "inchoate equity", to which estoppels always give rise, independently of whether the estoppel is satisfied by a personal or a proprietary right.

IV. An Objection to the New Model

The new model is based on an assumption that rights arising through proprietary estoppel, like rights arising through consent, unjust enrichment or wrongs, should take effect as soon as all the relevant facts have occurred without the need for a court order. However, it is possible to object to this alignment of proprietary estoppel with other means of acquiring rights. The point is made directly by Rotherham: "In any event, the degree of judicial

[92] The result in *Inwards*, but not Lord Denning's reasoning, can be explained in two other ways. First, the case did not involve a purchaser but only trustees taking the land under a will. These trustees would be bound by any personal rights binding A, such as a licence for B's life. Secondly, the trustees were happy to allow B to occupy the property for a further 12 years. This acquiescence may have been sufficient to found a new estoppel claim personally binding the trustees.

[93] [1967] 2 Q.B. 379. The right acquired by B in *Ives* was clearly an equitable easement, yet it was described as an "equity" by Lord Denning M.R. and Danckwerts L.J. and as an "estoppel" by Winn L.J. partly in order to circumvent registration requirements applying to equitable easements.

[94] Compare the submission of counsel in *Birmingham Midshires Mortgage Services Ltd.* v. *Sabherwal* (1999) 80 P. & C.R. 256 at paras. [24–28], discussed in the text above at n. 52–56.

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discretion involved in the determination of the appropriate remedy makes it difficult to conceive of any interest declared in a proprietary estoppel action as having arisen automatically".[95] The reply which will be made to this crucial objection is two-fold. First, it will be argued that the current law of proprietary estoppel affords judges much less discretion than has been assumed.[96] In particular, the courts' willingness to recognise that rights arising through estoppel may not be consensual in basis, and therefore need not always match the expectation of the claimant, should not be mistaken for a discretion significant enough to prevent estoppel giving rise to rights before an order of the court. Secondly, it will be submitted that the law of estoppel should develop in a way which limits such discretion as it currently displays. In particular, the introduction of the Land Registration Act 2002, s. 116(a) should be a powerful catalyst of such a development.

There are two linked but distinct ways in which judicial discretion could interfere with the new model of estoppel. First, if the courts considering an estoppel claim conduct an on-going evaluation of the parties' conduct and positions then it can be argued that the outcome of that claim is indeterminate until the cut-off point of a court order. Before such an order fixes the rights to which the estoppel has given rise they have a fluid, protean nature, best represented as an "inchoate equity".[97] It may seem that support for such an analysis can be found in a case such as *Baker* v. *Baker*,[98] in which the Court of Appeal emphasised the need to adopt a flexible approach and to take account of the parties' current circumstances before making its order. However, a distinction must be drawn between deciding what right an estoppel gives rise to (establishing the extent of the equity) on one hand, and how best to give effect to that right (satisfying the equity) on

[95] *Proprietary Remedies in Context* (Oxford 2002), p. 308.

[96] S. Gardner, "The Remedial Discretion in Proprietary Estoppel" [1999] 115 LQR 438, 464–465 considers this point, noting in particular the "modern equitable tradition of exaggerated reference to discretion". Equally, there is a tendency to play down the degree of discretion available at common law, as noted by A.S. Burrows, "We Do This At Common Law But That In Equity" (2002) 22 O.J.L.S. 1. Indeed, the argument made in this section (that the differences between estoppel as an equitable source of rights and common law means of acquiring rights have been exaggerated) closely matches that of Burrows.

[97] This analysis can be seen in *obiter* remarks of Cumming-Bruce L.J. in *Williams* v. *Straite* [1979] Ch. 291 at 300–301: "I do not think that in a proper case the rights in equity of the defendants necessarily crystallise forever at the time when the equitable rights come into existence ... the true analysis is that, when the plaintiff comes to court to enforce his legal rights, the defendant is then entitled to submit that in equity the plaintiff should not be allowed to enforce those rights and that the defendant, raising that equity, must then bring into play all the relevant maxims of equity so that the court is entitled then on the facts to look at all the circumstances and decide what order should be made, if any, to satisfy the equity".

[98] [1993] 2 F.L.R. 247.

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the other.[99] In order to ensure that B's right is made most effective, it is essential that the court allow prevailing circumstances to be taken into account when devising its order. This does not mean that B's right is only established at that point. In *Baker* v. *Baker*, for example, there would have been little value in ordering that B should be free to share the property with A, as the breakdown in relations which led to the litigation also ensured B had no wish to go back into occupation.[100] Rather, the Court of Appeal stated that, when he left the property, B had a right to occupy it rent-free for life: given that right could not now be enjoyed in specie, it was the value of the right at the time of B's departure which had to be calculated in assessing the compensation B could obtain from A. The fact that the court sought to give effect to B's right by a means appropriate to the circumstances prevailing at the time of its order does not mean that right can only have arisen at that point. In particular, it does not provide a means by which to distinguish rights arising through estoppel from rights arising through consent, unjust enrichment or wrongs: rights arising though such means take effect before an order of the court even though the court when making its order has the same power to take into account factors arising after the right has been acquired.[101] Further, if an estoppel has led to B's acquiring equitable rights of ownership, then the discretion which the court has to react to changing circumstances can be seen to depend not on the fact that B's rights arose through an estoppel but rather on the fact that those rights are subject to the trust of land regime, which gives trustees and the court wide statutory powers to control the manner in which B's rights are enjoyed.[102]

Nonetheless, it seems there are cases in which the extent of B's right, rather than simply the nature of the order giving effect to it, does vary according to changing circumstances. Rotherham relies on *Sledmore* v. *Dalby*[103] to argue that "It is particularly difficult to

[99] As Birks has often noted *e.g.* in "Proprietary Rights as Remedies" in Birks (ed.), *Frontiers of Liability*, 214, this distinction between the right and the order giving effect to it can be glossed over by a careless use of the idea of a "remedy"; such usage is particularly prevalent in discussion of estoppel claims.

[100] See *per* Roch L.J. [1993] 2 F.L.R. at p. 257.

[101] See *e.g. Wroth* v. *Tyler* [1974] Ch. 30, *Patel* v. *Ali* [1984] Ch. 283. Rotherham relies in particular on the decision of the Australian High Court in *Giumelli* v. *Giumelli* (1999) 161 A.L.R. 473 as demonstrating the wide remedial discretion conferred on a court adjudicating an estoppel claim, yet J. Edelman, "Remedial Certainty or Remedial Discretion in Estoppel After *Giumelli*?" (1999) 15 J.C.L. 179 convincingly shows that the factors taken into account in that case are no wider than those applicable when deciding whether to order specific performance of a contract.

[102] See Part I of the Trusts of Land and Appointment of Trustees Act 1996. The point also holds good for cases arising when the Law of Property Act 1925, s. 30 was in force: see *e.g* Moriarty's explanation of *Dodsworth* v. *Dodsworth* (1973) 228 E.G. 1115: (1984) 100 L.Q.R. 376, 385.

[103] (1996) 72 P. & C.R. 196.

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regard interests awarded in proprietary estoppel cases as arising automatically given the willingness of the courts to decline a remedy where, after incurring detrimental reliance on an expectation encouraged by an owner of land, a party has received substantial benefits from the owner".[104] In that case, despite having done some work on a property in the expectation of being able to remain there for the rest of his life, B was unable to resist A's claim for possession. This was not because the Court of Appeal decided that no estoppel had arisen; rather, in the words of Roch L.J., it was "no longer inequitable" for A to defeat B's expectation, as "the minimum equity to do justice to [B] on the facts of this case was an equity which has now expired".[105] For, after having spent money on improving the property over a three year period, B had enjoyed a further 15 years of rent-free accommodation. However, neither the result nor the reasoning in *Sledmore* v. *Dalby* is inconsistent with the new model. First, the extent of rights arising through means other than estoppel can also be reduced as a result of "compensating advantages" received by a claimant;[106] again, this does not mean that those rights can only arise on an order of the court. Secondly, the "equity" which had been exhausted can be viewed as the equitable right which B acquired as a result of the estoppel. This right arose with B's beginning to do work on the property in reliance on the expectation of acquiring a right to remain. However, given the minimal nature of the work done, the court considered that the proprietary estoppel should not give rise to a life interest or a lease for life but to a lesser interest, such as a right to occupy for a period shorter than that which elapsed between his reliance and A's action for possession. Hence the "expiration" of B's right can be seen to depend on the nature of that right, rather than on the means by which it was acquired.

Nonetheless, it cannot be denied that, because of the requirements of the means by which it arises, a right arising through proprietary estoppel is particularly likely to change over time. This is made clear by the recent judicial insistence that any right acquired through proprietary estoppel must be proportionate

[104] *Proprietary Remedies in Context*, p. 308.
[105] *Ibid.*, at pp. 204–205.
[106] See *e.g. British Westinghouse* v. *Underground Electric Rlys Co. of London Ltd.* [1912] A.C. 673. The phrase "compensating advantage" is taken from A.S. Burrows' discussion in *Remedies for Tort and Breach of Contract* (2nd ed., London 1994), pp. 119–132. It is also clear that a claim in unjust enrichment will be reduced by relevant advantages received by the claimant from the defendant, as the only claim which may be brought is to the defendant's net enrichment: see *e.g. Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1994] 4 All E.R. 890, Q.B.D. *per* Hobhouse J at p. 491; B. McFarlane & R. Stevens "In Defence of *Sumpter* v. *Hedges*" (2002) 118 L.Q.R. 567, 583–584.

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to the detriment suffered by B.[107] In *Jennings* v. *Rice*,[108] for example, B claimed to be entitled to all of A's estate (worth £1.285 m.) or at least A's house and furniture (worth £435,000) as, believing he would receive all A's property, he had spent time looking after A. However, the Court of Appeal stressed that detriment incurred by B in reliance on an assurance does not immediately suffice to prevent A's going back on that assurance. Rather, the degree as well as the fact of detrimental reliance is critical. Given this, it is clear that, whilst B's right might be seen to diminish over time in *Sledmore* v. *Dalby*, the more typical case will be where, through further detrimental reliance, the right of an estoppel claimant increases.[109] However, this does not prevent acceptance of the new model: to say that B's right may change over time does not mean that B's right does not exist before an eventual court order. The extent of a right arising in response to the commission of a wrong may well vary over time according to the extent of damage suffered by the claimant;[110] the extent of a right arising in response to an unjust enrichment will vary over time according to changes in the surviving enrichment of the defendant:[111] this does not mean those rights cannot exist without a court order. Indeed, the recent emphasis on the link between the detriment suffered by B and the extent of B's right highlights the artificiality of the two-stage model of estoppel. For example, according to that model, the claimant in *Gillett* v. *Holt*[112] had only "the right to bend the ear of the court" during the 38 years in which he worked for, and in reliance on, the defendant.

Hence the mere fact that the extent of a right arising through estoppel can vary over time cannot be said to interfere with the adoption of the new model and cannot distinguish estoppel from other doctrines, such as unjust enrichment, which are accepted as giving rise to rights without an order of the court. However, proprietary estoppel is viewed as involving a discretion not just

[107] See Hobhouse L.J. in *Sledmore* v. *Dalby* at pp. 208–209, relying on the judgment of Mason C.J. in *Commonwealth of Australia* v. *Verwayen* (1990) 95 A.L.R. 321.

[108] [2003] 1 P. & C.R. 100.

[109] Subject to the fact that the expectation of B will set the maximum limit of any such rights, as B obviously cannot complain about enjoying exactly the rights he expected when incurring the detrimental reliance: see *e.g. Baker* v. *Baker* [1993] 2 F.L.R. 247 and *per* Hobhouse L.J. in *Sledmore* v. *Dalby* at p. 209. The order in *Crabb* v. *Arun D.C.* may seem to surpass B's expectation as he was not required to pay for the easement. However, this can be explained as compensation for interference with B's existing equitable easement which occurred before the court order. See text above at n. 71 and Gardner (1999) 115 L.Q.R. 438, 445.

[110] Note in particular *Lim Poh Choo* v. *Camden & Islington Health Authority* [1980] A.C. 174 (award of damages revised due to fresh evidence, brought forward during the hearing of an appeal in the House of Lords, as to the cost of future care.)

[111] This is exemplified by the change of position defence: see *e.g. Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548, *Scottish Equitable plc* v. *Derby* [2001] 3 All E.R. 81.

[112] [2000] 2 All E.R. 289.

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because of the length of time in which factors relevant to its operation can arise, but also because of the sheer number of such factors. There has been a marked tendency since the seminal judgment in *Taylor Fashions Ltd.* v. *Liverpool Victoria Friendly Society Ltd.*[113] to relax the requirements of proprietary estoppel: repeated reference is made to its underlying equitable basis. So, when faced in *Gillett* v. *Holt* with an apparent restriction of its flexibility in the context of promises to make testamentary gifts, Robert Walker L.J. stressed that "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all elements of the doctrine. In the end the court must look at the matter in the round".[114] It is at this point that a possible justification for the two stage analysis becomes apparent. For if it is the case that proprietary estoppel is a very flexible, conscience-based doctrine, then it becomes very difficult to claim that, before a court order, it can give rise to property rights which are capable of binding third parties. Such a third party could raise the same objections forcefully made by Lord Wilberforce in *NPB* v. *Hastings Car Mart* to the claimed proprietary status of the deserted wife's right of occupation.[115] Purchasers should at the very least have some chance of knowing what they are buying: proprietary rights should not have a form, nor be allowed to arise in a fashion, which is ill-defined, unstable and hard to identify. One answer to this is to say that any sensible purchaser faced with a situation in which a right may have arisen through estoppel will simply "run a mile",[116] so that if he does proceed to buy the property he takes the risk of there being such a right. However, this cannot be satisfactory. The mischief to which Lord Wilberforce averts in *NPB* does not consist simply in those who purchase being bound with vague rights, but also in potential purchasers being deterred by the chance of such rights having arisen. The marketability of land and the ease of its conveyance should be promoted: warding off purchasers whenever they think there may be even a *chance* of a situation being squeezed into the accommodating arms of estoppel achieves the opposite. Given this, the only sensible approach for those who wish to endow estoppel with this flexibility is to say that third parties should only be bound once the rights to which estoppel gives rise have been made

[113] [1982] Q.B. 133.
[114] [2000] 2 All E.R. 289, 301. Robert Walker L.J.'s statement echoes both the approach and language of Lord Donaldson M.R. in *J.T. Developments Ltd.* v. *Quinn* (1991) 62 P. & C.R. 33, 55. See also Aldous L.J. in *Jennings* v. *Rice* [2003] 1 P. & C.R. 100 at [36].
[115] [1965] A.C. 1175, 1247–1250
[116] See R.J. Smith, "How Proprietary is Proprietary Estoppel?", in F.D. Rose (ed.), *Consensus ad Idem: Essays on the Law of Contract* (1996), p. 245.

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sufficiently certain by means of a court order.[117] It is therefore worth noting that the recent trend to liberalise the test for estoppel has also been accompanied by some *obiter* indications of a possible move away from allowing B to use estoppel to acquire a property right without a court order.[118]

It should be noted immediately that even this flexible approach cannot fully justify the two-stage model of estoppel, as it provides no reason why personal rights arising through proprietary estoppel should not take effect without an order of the court. Nonetheless, if one were making a decision in the abstract between this flexible model and the new model advocated here, then the choice would boil down to a judgment about the test for estoppel. On one view, judges should have a very free rein to give expression to underlying notions of "unconscionability". As when acting under a statutory jurisdiction to adjust property rights on divorce, judges in estoppel cases should attempt to reach a result responding not just to the past conduct of the parties, but also to their future needs.[119] However, estoppel would then operate differently to other means of acquiring rights such as consent, unjust enrichment and wrongs. Rather than declaring what rights already exist judges, as in the divorce jurisdiction, would be allocating rights for the future, engaging in what might be called a "redistributive project".[120] It would be impossible (both conceptually and practically) to say that proprietary estoppel gave rise to rights: rather, it could at most be said to give rise to a right to "bend the court's ear" in the hope of being awarded the court order necessary to complete the creation of a right.[121]

On the second view, proprietary estoppel would be aligned with other means of acquiring rights. The test for estoppel might be seen to aim for the prevention of a specific instance of "unconscionable

[117] This link between a very flexible conception of estoppel and the two stage approach is very clear in the writing of Professor Hayton: see "Developing the Law of Trusts for the Twenty-First Century" [1990] 106 L.Q.R. 97 at n. 26; [1990] Conv. 370; (1993) 109 L.Q.R. 485. Hayton's view was explicitly adopted, extra-judicially, by Lord Browne-Wilkinson: Holdsworth Lecture (1996) 10 Trusts Law International 98.

[118] See *United Bank of Kuwait* v. *Sahib* [1997] Ch. 107 and also an obiter dictum of Robert Walker L.J. in *Habermann* v. *Koehler* [2000] E.G.C.S. 125, *The Times*, 20 November 2000 (C.A.), at [23]: "[I]t is only by the judge's order, made years after [C] became registered proprietor, that the inchoate rights created by proprietary estoppel have crystallised into a defined proprietary interest". In *Campbell* v. *Griffin* [2001] EWCA Civ 990 (27 June 2001, C.A.), at [36] Robert Walker L.J. also stressed that "the court has a very wide discretion in satisfying an equity arising under the doctrine of proprietary estoppel".

[119] *Sledmore* v. *Dalby* and *Baker* v. *Baker* both involve an assessment by the court of the future needs of the parties.

[120] Gardner (1999) 115 LQR 438, 459–460. Or, it might be that proprietary estoppel would be used as a vehicle to promote the allocation of property rights based on what J.W. Harris calls "home needs": see "Doctrine, Justice and Home-Sharing" [1999] 19 O.J.L.S. 421, 432–433 and 439–441.

[121] This would mean that in *Gillett* v. *Holt* [2000] 2 All E.R. 289, B had no proprietary right during any of the 38 years in which he worked for A.

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conduct", but only in the same way as, say, the test for unjust enrichment. For a limited set of criteria would be used to identify the occurrence of that particular form of unconscionable conduct, just as such criteria are used in, say, the law of torts. The one potential obstacle preventing proprietary estoppel operating like any other means of acquiring rights would be removed. Rights so acquired, whether personal or proprietary, would arise before any order of the court.

Of course, one's preference between these two models depends on one's general conception of property law, and, indeed, of law generally.[122] It is a contest between competing models of justice which can be cast in terms of a battle between flexibility and certainty.[123] It is a battle often fought in the field of "remedial constructive trusts".[124] In the opinion of this author, the somewhat despairing plea of Browne-Wilkinson J. in *re Sharpe* is worth remembering.[125] In order to do justice to the many thousands of people who never come into court at all but wish to know what their rights are, it is important for principles of proprietary estoppel, just like those of consent, unjust enrichment and tort, to be defined with certainty. Indeed, there are good reasons for wishing proprietary estoppel to be more, not less, certainly defined than those other means of acquiring rights. First, when combined with fractured family relationships, uncertain legal principles make for fierce litigation, which can often all but consume the disputed property. Secondly, proprietary estoppel is particularly concerned with claims to personal or proprietary rights involving land, a context characterised by a preference for formality. It might seem perverse to have a system increasingly based on the need for official records of rights, yet also containing an excepted form of acquiring rights operating writ large. Finally, precisely defining the basis of proprietary estoppel is essential in order to answer other pressing questions about the doctrine. For example, is proprietary estoppel sufficiently distinct from contract so as to justify the non-application to estoppel claims of the Law of Property (Miscellaneous Provisions) Act 1989, s. 2?[126] What is its relation to

[122] Note Gardner's reference to the rule of law: (1999) 115 L.Q.R. 438, 462 and see also Harris n. 123 below.

[123] Or, in a more sophisticated and slightly different analysis, in terms of a conflict between "utility rationality" and "doctrinal rationality": see J.W. Harris, "Legal Doctrine and Interests in Land" in J.M. Eekelaar & J.S. Bell (eds.) *Oxford Essays in Jurisprudence* (Oxford 1987).

[124] For contributions to that debate supporting the view of proprietary estoppel put forward here see P. Birks, "The Remedial Constructive Trust: Proprietary Rights as Remedies" in Birks (ed.) *The Frontiers of Liability*, vol. 2 (Oxford 1994), 214–223 and *re Polly Peck (No. 2)* [1998] 3 All E.R. 812, especially *per* Nourse L.J. at p. 831.

[125] [1980] 1 W.L.R. 219, 226.

[126] See *Yaxley* v. *Gotts* [2000] Ch. 162.

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other means of acquiring rights which cannot be explained as examples of consent, unjust enrichment or tort?[127] Indeed, only then can one begin to examine the fundamental question of why proprietary estoppel, but not promissory estoppel, can be regarded as such a means of acquiring rights.

In any case, we do not have the luxury of making the choice between the two models in the abstract. The decisive advantage of the new model is that it better reflects the existing law. First, the flexible model cannot account for the cases discussed in Part IIA in which it is accepted that estoppel can give rise to a property right without the need for a court order;[128] or the recent observation of Lawrence Collins Q.C. in *Locabail* v. *Bayfield* that: "The decision in *Voyce* v. *Voyce* is inconsistent with the argument that the estoppel claimant has no interest in land until the court makes the final order".[129] Secondly, the flexible model exaggerates the degree of discretion a court has when deciding if B can successfully make an estoppel claim. The fact that the Court of Appeal has recently encouraged a more liberal approach to certain of the requirements of such a claim does not mean that a court can undertake a general and unregulated inquiry into the question of whether B has been treated "unconscionably". In particular, the recent recognition in *Jennings* v. *Rice* that an estoppel claim need not give effect to B's expectation, and hence that rights thereby arising need not be consensual in basis, does not mean that the courts are necessarily engaged in a process of creating new property rights which arise only at the time of their order. Contrary to Rotherham's assumption,[130] recognising that property rights can arise through means other than the consent of a property owner is not the same as claiming the jurisdiction to redistribute property rights so forcefully denied by the Court of Appeal in *re Polly Peck (no. 2)*.[131] Finally, the flexible model cannot survive the introduction of the Land Registration Act 2002, s. 116(a) as that section clearly recognises that, even before a court order, an estoppel claimant will have a right capable of binding a purchaser of registered land. The possible interpretations of this section will be considered below, but it will clearly be significant in forcing courts to limit what

[127] See N. McBride, "A Fifth Common Law Obligation" (1994) 14 L.S. 35 and Harris [1999] 19 O.J.L.S. 421, 447–448.

[128] *E.g. Unity Joint Stock Mutual Banking Association* v. *King* (1858) 25 Beav. 72; *Voyce* v. *Voyce* (1991) 62 P. & C.R. 290;

[129] Unrep., 9 March, 1999, at [3]

[130] See Rotherham, *Proprietary Remedies in Context*, esp. pp. 33–42 and 296–297.

[131] [1998] 3 All E.R. 812 esp. *per* Nourse L.J. at 831: "[W]e must recognise that the remedial constructive trust gives the court a discretion to vary property rights. You cannot grant a proprietary right to A, who has not had one beforehand, without taking some proprietary right away from B. No English court has ever had the power to do that, except with the authority of Parliament; cf. *Chapman* v. *Chapman* [1954] A.C. 429".

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discretion already exists in estoppel, in order to avoid the unfairness, so forcefully identified by Lord Wilberforce in *NPB* v. *Hastings Car Mart*, of allowing purchasers to be bound by uncertain claims over land. The irony is that whilst section 116(a) was implemented to clarify the operation of the two-stage model, its introduction will lead to a limitation of the discretionary element in estoppel claims and hence the removal of the only realistic obstacle to the adoption of the new, unitary model.

V. S. 116(A) Land Registration Act 2002: The Possible Meanings

Although enacted "for the avoidance of doubt", it is possible to interpret this provision in three ways; the model of proprietary estoppel adopted by the courts will be decisive as to which interpretation is chosen.

Interpretation 1: The Two Stage Model with the "Inchoate Equity" having Proprietary Effect

The wording of section 116(a) was determined by the Law Commission, who espouse the two stage model of proprietary estoppel. The Law Commission's aim was, in their own words, that "the proprietary status of an equity arising by estoppel should be confirmed in relation to registered land".[132] The place of the inchoate equity within the revised land registration scheme would thus be clarified. On this interpretation, even before a court order is made in his favour, B (the party asserting the estoppel) has a proprietary right which can be protected by the entry of a notice on the register. Given the informal context in which estoppels often operate, such registration may be thought unlikely. Crucially, however, the proprietary status of the inchoate estoppel means that if B is in actual occupation he will have an overriding interest capable of binding C, a transferee of the registered land.[133]

The Law Commission argue that this is also the true position under the current law.[134] It is certainly the case that the Land Registry are prepared to protect inchoate estoppels by notice on the register. However, the validity of such registration has not been tested in the courts: such practice merely reflects the Land Registry's view of the current law. As to an inchoate equity's being an overriding interest, reference is made to *Lee-Parker* v. *Izzet (no. 2)*.[135] However, that is merely a case in which the transferee chose

[132] Law Com. No. 271 at [5.30].
[133] Land Registration Act 2002, Sch 3, para. 2.
[134] Law Com. No. 271 at [5.30].
[135] [1972] 1 W.L.R. 775.

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not to contest that an equity arising by estoppel might bind when accompanied by actual occupation.[136]

The first point to make is that, on this interpretation, section 116(a) is clearly incompatible with the flexible model of proprietary estoppel, as it allows B to acquire a right capable of binding C even before a court order. The second point is that, as seen above, particularly with the benefit of certain cases decided after Report No. 271, the Law Commission's view of the present law is mistaken. Understanding the current law correctly is crucial to interpreting section 116(a) which was clearly intended to reflect that current law, not to change it. The true position is that B has a registrable or potentially overriding interest only if the estoppel gives rise to a proprietary right. Hence if the estoppel merely gives rise to a personal right, such as a licence or the right to recover damages from A, then it makes no sense to say B has some sort of right which is capable of binding C. An example may demonstrate this. As a result of A's promise that the land will be his, B does work on A's land. A court decides that, given the slight nature of the detriment as compared to the value of A's land, it would be disproportionate to order that A convey the freehold to B. Rather, A is ordered to pay B a sum of money, perhaps reflecting the benefit A has received as a result of B's work. If A were to transfer the land to C *after* a court order recognising that B had such a right, then C could not be bound by that right.[137] Why should C be in a worse position as a result of receiving the land *before* such a court order? The crucial point is that the estoppel has not given B an abstract right to receive money, or indeed a right to receive money from whomever happens to be the current owner of the land. Rather, B has a right *to make A* pay him the necessary money.[138] It is illogical for C to be made to pay B that sum: why should C be made to act as a guarantor for this personal obligation of A?[139] It has been pointed out that sometimes third parties can be made to pay money in respect of obligations entered into by a predecessor in title:[140] if A and B enter a restrictive covenant then

[136] In any case, it was decided that the occupier could not make out an estoppel claim, as he had not suffered any detriment.

[137] Unless the court decides that B had an equitable lien over the land for the value of the work done, as in *Unity Joint Stock Mutual Banking Association* v. *King* (1858) 25 Beav. 72. As such a lien is an established proprietary right, C could be bound by it. It is questionable whether, given this consequence, enough thought was given in *King* to whether a lien should arise as a result of the estoppel. Compare the more careful consideration of the merits of a lien in *Napier and Ettrick (Lord)* v. *Hunter* [1993] A.C. 713.

[138] It is interesting to note that this is the same elision as made by Lord Denning in *Errington* v. *Errington and Woods* and *NPB* v. *Hastings Car Mart*: see text above at n. 81–82.

[139] Note that s. 116(a) does not indicate whether A would also remain liable. It might be argued, by analogy to the scheme under the Landlord and Tenant (Covenants) Act 1995 and due to the proprietary nature of the equity, that A's liabilty ends when the property is sold.

[140] See P. Critchley [1998] Conv. 502, 507.

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damages might be awarded against C, in lieu of an injunction, if the covenant is breached by him. However, in such a case the damages award gives effect to B's recognised property right. Estoppels, like contracts, should bind purchasers only in so far as they give rise to proprietary rights.[141]

Although they view section 116(a) as solving one of the most persistent debates relating to estoppel, the Law Commission's interpretation of that section re-awakens another such debate which might have been thought settled. For, on this view of the section, a licence arising through proprietary estoppel operates differently to a contractual licence: the former can bind C, provided the land was transferred to him before a court order granting B the licence. It could be argued in such a case that it is not the licence itself which binds C, but rather the independent "equity" that arose as a result of the estoppel before the licence was awarded by the court. Yet why does no such "equity" arise in the case of a contractual licence: surely a contractual licensee also has the right to "bend the ear of a court of equity"? Once again, unconvincing distinctions arise as a result of separating estoppel from other means of acquiring rights. Indeed, it seems that the position under section 116(a) could be even less satisfactory than that favoured by Lord Denning in *NPB*: at least his Lordship intended that contractual and estoppel licences should be treated consistently.[142]

It might thus seem that section 116(a) has the potential to create a new property right: the licence arising through estoppel. Yet its effect would be more dramatic than this: on the Law Commission's interpretation of the section proprietary estoppel *always* gives rise to a proprietary right. The separation of the "equity by estoppel" from the substantive rights to which the estoppel gives rise raises as a real possibility the bizarre position that such an "equity" has proprietary effect, even if the right to which it leads is merely personal.[143] Surprisingly, there is a weight of academic support for such a conclusion.[144] For example, Smith argues: "... there is a

[141] Equally, both estoppels and contracts can bind purchasers if they result in a variation of property rights, such as the covenants in a lease: see *Brikom* v. *Carr* [1979] Q.B. 467 where the variation was analysed either as resulting from estoppel (*per* Lord Denning M.R.) or from contract (*per* Roskill L.J.).

[142] Consistency could be re-gained by arguing that contractual licences also have proprietary effect: perhaps by re-analysing them as estoppel licences; perhaps even by invoking s. 116(b). However, there is no suggestion that this was intended by the Law Commission and this would bring yet further change to the law by reversing *Ashburn Anstalt* v. *Arnold* in registered land.

[143] This use of an "equity" to disguise the true nature of a personal right to which estoppel gives rise seems to give statutory force to Lord Denning M.R.'s sleight of hand in *NPB* v. *Hastings Car Mart*: see text at n. 79–80 above.

[144] See *e.g.* Smith, "How Proprietary is Proprietary Estoppel?", in Rose (ed.) *Consensus ad Idem*; Battersby [1991] Conv 36, [1995] M.L.R. 637; Gray and Gray, pp. 1020–1023; Megarry and Wade, pp. 746–748.

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large body of cases holding that proprietary estoppels bind successors in title. So it seems that the equity involved in an estoppel is a special and discrete proprietary right, albeit one having respectably old origins".[145] However, this analysis shares the Law Commission's mistake: the large body of cases to which Smith refers consist instead of *proprietary rights arising through estoppel* binding successors in title. Rather, the Law Commission propose a *new* form of proprietary right, created by statute and occurring only in registered land, which exists as soon as the facts necessary for a successful estoppel claim are made out.[146] On the view of the Law Commission, the question of whether this estoppel claim gives rise to a personal right or a property right is irrelevant: the purchaser will always be bound, at least in registered land. The law of estoppel would therefore be robbed of the filter which is so vital when considering other means of acquiring rights: that the claimant will be able to assert his claim against a stranger only if that claim gives rise to a recognised property right. This is a strange result indeed to attribute to part of the Land Registration Act 2002,[147] a statute whose aim is to allow transferees to place faith in a quick, cheap system of electronic conveyancing.

However, it could be argued that the purchaser can instead be protected by a filter unique to an estoppel claim: despite section 116(a), the purchaser will only be bound if it would be "unconscionable" *for him* to deny B's claim. On this view, which is not explicitly discussed by the Law Commission, the "equity by estoppel" which binds C is simply B's right to go to court and ask for a remedy; in awarding that remedy the court can take into account the fact that the land is now in the hands of C rather than A and make appropriate adjustments. The treatment of estoppel rights would therefore resemble that of a statutory right of occupation under the Matrimonial Homes Act 1983, s. 1, as considered in *Kaur* v. *Gill*.[148] In that case, the majority of the Court of Appeal approved the approach of the first instance judge who, whilst admitting that the wife's statutory right bound the purchaser by reason of its registration, nonetheless relied on section 1(3) of the Act, which required the court to consider "all the circumstances of the case" before deciding how to give effect to the wife's right. As a result, the judge took into account the particular

[145] Smith, n. 144 above at p. 244

[146] But which is then presumably extinguished by a court order awarding the rights necessary to respond to that estoppel claim.

[147] It must also be queried whether a section enacted for the avoidance of doubt could be taken to override the Law of Property Act 1925, s. 4(1) by permitting the creation of a new equitable interest in land.

[148] [1988] 2 F.L.R. 328.

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circumstances of the purchaser and decided that, due to the purchaser's blindness, he had greater need to occupy the property than the wife.

Nonetheless, it is evident that there are many problems with such an approach. First, there is a pressing difficulty as to defining in what circumstances C may be said to have acted "unconscionably" so as to warrant B's acquistion of a remedy against him. Standards have been developed so as to describe the particular form of unconscionable behaviour which estoppel claims aim to prevent: there is a clear need for the claimant to have detrimentally relied on a representation, or on an assumption known to and encouraged by another. In the basic situation considered here, in which A transfers land to C, the representation or encouragement has been made by A alone. It will therefore be very unlikely that C has acted "unconscionably" within the meaning given to that word in the context of estoppel claims.[149] If it is intended that, when considering C's position, the notion of unconscionability is to be different and of wider application, then it is entirely unclear what that form of "unconscionability" is to involve. Secondly, as a filter to protect C, the concept of unconscionability is at once too weak and too strong. Too weak, as C still risks being bound by a claim of B should a court decide that C's conduct can be described as "unconscionable". The difficulty for C of predicting when such a conclusion might obtain will do little to reduce the inhibitory effect of section 116(a) on registered purchasers of land. Too strong, as it provides unnecessary further protection for C in a situation where, before the transfer to C, B's reliance justifies B's having a property right. In such a situation, if B's right is protected through registration or actual occupation, then it is difficult to see why a court should nonetheless have the opportunity to deny B's claim against C. Indeed, this discussion demonstrates the crucial point that there is simply no need to "re-invent the wheel"[150] by introducing the slippery notion of unconscionability into a discussion of when B's claim may bind C. The law has already developed means of settling this difficult, if not impossible, issue: first, B must show that he acquired a property right prior to the transfer to C;[151] secondly, it is then open to C to show that, due to the circumstances of the transfer, B's property

[149] Indeed, if C, in words or action, were expressly to confirm B's belief, then an independent estoppel claim may arise directly against C. In that situation, there is no need for B to argue that C is bound by an earlier estoppel arising against A.

[150] Compare P. Birks, Book Review of *Proprietary Remedies in Context* (2003) 119 L.Q.R. 156, 160.

[151] Of course, if B has a right directly against C (be it proprietary or personal), arising as a result of C's conduct, then B need not rely on an earlier property right as a means to bind C.

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right does not bind him. The solution of the first issue depends on the type of right which B has acquired, not the particular means by which he has acquired that right. An interpetation of section 116(a) which allows any estoppel claim B has acquired against A to bind C, provided C has acted "unconscionably", muddies the answer to the second question in order to off-set an abuse of the first. It is hard to see how such a result would help further the stated objectives of the Land Registration Act 2002.

Interpretation 2: The Flexible Model of Estoppel: No Rights at all until a Court Order

It is possible to interpret section 116(a) so as to give it an effect exactly opposite to that intended by the Law Commission.[152] It could be pointed out that the section does not say that an "equity by estoppel shall have effect as an interest capable of binding successors in title from the time the equity arises". Rather, the section could be taken to mean that such an equity has no effect *until* the point at which it becomes capable of binding successors in title. For those who favour the flexible model of estoppel under which the equity cannot give rise to a proprietary right until an order of the court, the section thus confirms their view of the present law and ensures that an estoppel claimant has no right before the time of the court order. C will therefore take the land free from any claim by B unless B has already obtained an order awarding him a proprietary right.

This interpretation shares its basic problems with that of the Law Commission. First, it gives section 116(a) too broad an effect. Consider the situation where proprietary estoppel gives B a personal right against A, such as a licence or a right to sue A for damages. Such a right will never take effect as an interest capable of binding successors, which means, on this interpretation, that the equity arising by means of that estoppel will never arise. It thus seems that B would never be able to enforce a personal right arising through proprietary estoppel. Secondly, it is inconsistent with the current law that section 116(a) is intended to confirm, as it depends on the view that proprietary estoppel cannot give rise to rights affecting C before an order of the court is made.

Interpretation 3: Adopting the New Model

As drafted by the Law Commission, section 116(a), with its isolation of the "equity by estoppel", is dependent on the two stage approach. However, both interpretations based on the two stage

[152] The possibility of this intepretation is also noted by Smith, *Property Law*, p. 189.

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approach have been found wanting. Failure is guaranteed as soon as one poses the question "Is the inchoate estoppel equity proprietary?" First, one's answer is bound to be too blunt. If one says "Yes", as the Law Commission do, then one is forced to give personal rights proprietary effect and to place undue burdens on purchasers. This is inconsistent with the wider aims of the Land Registration Act 2002. If one says "No", as in the second interpretation, then one is forced to rob property rights arising through estoppel of their ability to bind third parties before a court order is obtained, thereby placing undue obstacles in the way of parties relying on an estoppel. This is inconsistent with the Law Commission's intention to acknowledge proprietary estoppel as an important mechanism for the creation of proprietary rights in land.[153] Secondly, one's answer will be inconsistent with the existing law which the section purports to confirm. For the results of the decided cases do not reflect the two stage approach with its feature of treating rights arising through estoppel differently from rights arising through other means.

However, it is submitted that there is a third interpretation which overcomes these problems. This interpretation depends on using section 116(a) conclusively to reject the very two stage approach to which it seems to give statutory approval. It also involves departing from the Law Commission's favoured interpretation of the section.[154] However, it ensures that the section, as intended, does simply confirm the present law. It also allows proprietary estoppel to operate as a useful means of acquiring property rights, without placing new burdens on transferees of registered land. To do this, the third interpretation must ensure that, whilst proprietary estoppel gives rise to rights as soon as all the necessary facts have occurred, without the need for a court order, those rights will only bind third parties if they are proprietary in nature. This conclusion can be reached if an "equity by estoppel", as used in section 116(a), is taken to mean "a recognised proprietary right arising through estoppel".[155] The

[153] See Law Com. No. 271 at [5.30].

[154] This is not a decisive objection. Compare Robert Walker L.J. in *Yaxley* v. *Gotts* [2000] Ch. 162, 176 when considering the interpretation of the Law of Property (Miscellaneous Provisions) Act 1989, s. 2: "Nor can anything in the Law Commission's report (or its earlier working paper) be decisive. The report and the working paper are invaluable guides to the old law and to the problems which constituted the 'mischief' at which section 2 of the Act of 1989 is directed, but they cannot be conclusive as to how section 2, as enacted, is to be construed and applied". Note also Burrows' view that the Contracts (Rights of Third Parties) Act 1999, s. 2(3)(b) has a consequence which is the exact opposite of that intended by the Law Commission at [9.45–9.47] of Law Com. No. 242: see "The Contract (Rights of Third Parties) Act 1999 and its Implications for Commercial Contracts"[2000] L.M.C.L.Q 540, 547.

[155] This is also the only means by which to make sense of Lord Denning M.R.'s view in *NPB* v. *Hastings Car Mart* [1964] Ch. 665 and *Inwards* v. *Baker* [1965] 2 Q.B. 29 that a "licence coupled with an equity" can bind a successor in title: see text above from n. 74–80.

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question the Law Commission are taken to have asked is then "Does a proprietary right arising through estoppel take effect only from the time of a court order?" The answer provided by the section is in the negative, as such a right is said to have effect as an interest capable of binding successors from the time it arises. This reading might be thought tautologous: of course a proprietary right arising by estoppel has proprietary consequences from the time it arises; the crucial question is rather when does it arise. But the statute should not be viewed as redundant: it is answering this very question by describing the proprietary right arising through estoppel as an "equity by estoppel". This shows it must arise before any court order, as an "equity" is the term sometimes used to describe what an estoppel claimant has before any court order. It could be said that such an interpretation gives too narrow a meaning to "an equity by estoppel" as it does not include personal rights arising through estoppel. Yet, one could not expect a statute enacted for the avoidance of doubt to change the law by declaring that such personal rights may bind successors in title. Further, one could argue that the Law Commission intend this limited meaning of an "equity by estoppel", as the examples they give of current law reflecting the section all involve estoppels giving rise to proprietary rights.[156] And finally, it has already been persuasively argued that a similar restrictive meaning must be given to the phrase "a mere equity" in section 116(b).[157]

VI. Conclusion

It is readily admitted that the interpretation of section 116(a) favoured in this article is a strained one. After all, there is often no perfect answer, even in land law. However it is submitted that it is the least harmful interpretation that can be given to an unfortunate section. It promotes the stated aim of the Law Commission to confirm proprietary estoppel as an important mechanism for the informal creation of property rights whilst also seeking to protect purchasers of registered land; it ensures that the section, enacted for the avoidance of doubt, does reflect the existing law; it completes the work of the House of Lords in *NPB* v. *Hastings Car Mart* by re-assimilating the "equity by estoppel" to the recognised

[156] Law Com. No. 271 at [5.30] refers to the cases given in Megarry & Wade, at [13–028–13–032]. However, all these cases can be explained either as examples of third parties being bound by recognised property rights, arising in response to an estoppel (see *e.g.* the discussion of *Singh* v. *Sandhu* in the text above from n. 19 and that of *Inwards* v. *Baker* in the text above from n. 90–92) or as instances of the third party being bound by an independent right arising as a result of his own conduct (see Battersby's analysis of *E.R. Investments Ltd.* v. *High*: [1995] M.L.R. 637).

[157] See Smith, *Property Law*, pp. 29–31.

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equitable proprietary rights from which Lord Denning M.R. tried to separate it. Further, and most importantly, the interpretation recommended here also furthers the alignment of proprietary estoppel with other means of acquiring rights by rejecting a two stage model which is unsupported both by principle and authority.

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