Banking Code (3rd rev. ed., 1998), which applies only to personal customers, provides that a bank must now inform its customer if a bankers' reference about him is requested and requires the customer's consent in writing before it is given.

In *Turner*, Sir Richard Scott V.-C. stated (obiter) that paragraph 4.5 of the Code merely reflects the existing common law obligations of banks and does not set new standards. If this is true, the common law requires more than the Jack Committee recommended, for the Code demands express customer consent every time a status enquiry is made. This goes too far. Bankers' references serve a useful commercial function which could be undermined if customer consent is required in each case, for the customer, having been put on notice of the enquiry, might seek to influence the terms of the reference.

RICHARD HOOLEY

A MERRY-GO-ROUND FOR THE MILLENNIUM

IT is good to enter the new millennium knowing that some things never change: despite the reforming zeal of our enthusiastic legislators, property law continues to provide scope for profitable litigation. Indeed, a cynic, remembering the mythical hydra, might think that for every legislative clarification, at least two new problems emerge—but in keeping with a seasonal spirit of optimism, this note will not labour the additional difficulties created by the relevant statutory reform.

Yaxley v. *Gotts* [1999] 2 F.L.R. 941 concerned a "gentleman's agreement", words which throw into disrepute any notion of gentle honour, but which warm the cockles of a Chancery lawyer's heart. Mr. Yaxley and Mr. Gotts, old friends, orally agreed that Mr. Gotts would buy a large, dilapidated house, and that Mr. Yaxley would convert it into flats, would act as the managing agent and would own the ground floor. Mr. Gotts, or at least his son, duly purchased the house in question; Mr. Yaxley spent long hours converting the property and then managed it as agreed. The harmony was shattered when, three years later, Mr. Gotts junior barred Mr. Yaxley from the premises, and denied him any interest in the ground floor. Thus the proceedings began.

When the case came before the county court judge, there was much conflicting evidence as to what had been agreed, and His Honour Judge Downes devoted much of his judgment to determining this. He favoured Mr. Yaxley's version of events and

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held that Mr. Yaxley was entitled to the ownership of the ground floor by virtue of a proprietary estoppel. Mr. Gotts junior was directed to execute a lease of the ground floor, for a term of 99 years free of ground rent, in Mr. Yaxley's favour.

Rather surprisingly, section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which provides that a contract for the sale of land can only be made in writing, was not mentioned during the hearing; it subsequently formed the basis of an appeal by Mr. Gotts. His counsel, quoting from *Halsbury's Laws* that "the doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted to be invalid", argued that the judge should not have used proprietary estoppel to give effect to the oral agreement, which was void under the 1989 Act. Thus the Court of Appeal (Beldam, Walker and Clarke L.JJ.) had to consider the relationship between section 2 and the doctrine of proprietary estoppel.

Section 2 was enacted largely at the behest of the Law Commission, which considered that the then subsisting law, embodied in section 40 of the Law of Property Act 1925, was obscure and uncertain. Readers will recall that under section 40, unless an oral contract for the sale of land was supported by written evidence, it was valid but unenforceable. Readers will also recall that the equitable doctrine of part performance could be invoked to rescue an otherwise unenforceable contract, and that this doctrine, which had been developed by the courts of equity as a response to the formalities requirement under the Statute of Frauds 1677, had provided fertile ground for litigation. It often caused difficulty and, in the opinion of the Law Commission, was best abolished. Section 2 was intended to be an entirely new provision, which would mark a radical change in the law by abolishing an obscure principle and by ensuring certainty in contracts relating to land.

All three members of the Court of Appeal gave reasoned judgments (of varying lengths) and they all decided that an agreement which was apparently invalidated by section 2(1) could still be enforced. Robert Walker L.J. placed reliance on section 2(5), which expressly saves constructive trusts from the scope of the formality requirement. He held that a joint enterprise constructive trust, as described in *Lloyd's Bank* v. *Rosset* [1991] 1 A.C. 107, had been established, and that in this particular area there was no distinction between a constructive trust and a proprietary estoppel. In his opinion, section 2(5) allowed a limited exception, expressly contemplated by Parliament, for those cases in which a supposed

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bargain had been so fully performed by one side, and the general circumstances of the matter were such, that it would be inequitable to disregard the claimant's expectations, and insufficient to grant him a restitutionary remedy.

Beldam L.J. considered it legitimate to take account of the relevant Report of the Law Commission (Law Com. No. 164) and its underlying policy. He was satisfied that the proposal to exclude the uncertainties and complexities of part performance did not affect the availability of other equitable remedies. He held that the provision avoiding oral contracts was insufficient to raise such a significant public interest that an estoppel would be excluded. Again, drawing strength from section 2(5), he thought that Mr. Yaxley should succeed, because he could equally well claim under a constructive trust or a proprietary estoppel. Clarke L.J. agreed. Thus the court in effect ordered the performance of the oral agreement between Mr. Yaxley and Mr. Gotts—not, of course, on the basis of the much-maligned and apparently abolished doctrine of part performance, but on the basis of a constructive trust or proprietary estoppel.

Once again, the difficulty of trying to simplify and clarify land law has been made apparent, People are such perverse creatures that they fail to consult solicitors before entering into agreements, and they also trust their fellow men. So if there is a nice, simple formality requirement, designed to promote certainty, some innocent will always fail to comply and some rogue will always try to take advantage. And then, of course, a strict application of the requirement begins to look unfair. This is why the Statute of Frauds was succeeded by the doctrine of part performance in the first place, and this is why the clear and precise doctrines of constructive trust and proprietary estoppel are now being used to enforce an oral contract. Of course, one could argue that we have proceeded full circle and beyond—but as promised, the point will not be laboured.

LOUISE TEE

THE NON-PROPRIETARY LEASE: THE RISE OF THE FEUDAL PHOENIX

MR. Bruton occupied a flat by virtue of a written agreement with the Quadrant Housing Trust. The agreement specifically categorised itself as a "weekly licence" although it did give exclusive possession to Bruton. For its part, the Trust held the flat as licensee from the freehold owner, Lambeth Council, in order to pursue its charitable

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