Commercial Transactions and Proprietary Estoppel

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1. Risks of PE arguments in commercial transactions are rising.
2. Especial care must be taken when drafting commercial documents.

Three Pointers Against
3. Commercial parties who know full well their legal rights and decide not to protect themselves by a contract accept the risks of not doing so and an estoppel will not intervene to fill the void – Baird Textile Holdings Ltd. v Marks and Spencer PLC [2001] EWCA Civ. 274
4. Where both parties are fully aware that there is no legally binding contract and either party could walk away, each party thereby took the risk the other might do just that (with their eyes open) and PE will not assist – Cobbe v Yeoman Row Management Ltd [2008] 1 WLR 1752.
5. “It may very well be that proprietary estoppel will not often assist a claimant in a commercial context, but that is probably all to the good...” Lord Neuberger

Pointers For
6. Various classic cases on PE were decided in commercial contexts:
   (i) Plimmer v Wellington Corporation (1883-84) 9 AC 699 Plimmer extended his jetty on land owned by the government and at its request.
   (ii) Laird v Birkinhead Railway Co. (1859) Johns 500 (70 ER 519) acquiescence in construction of the Plaintiff’s branch railway line to connect to Defendant’s railway with reasonable terms to be agreed.
7. Recent cases of a commercial type include:
   (i) Herbert v Doyle [2011] 1 EGLR 119 developer agreeing with adjoining owner to swop parking spaces.
   (ii) Whittaker v Kinnear [2011] EWHC 1479 sale of property to developers with alleged side arrangements as to the vendor retaining rights to live in the property and share in development.
   (iii) Motivate Publishing FZ LLC v Hello Ltd [2015] EWHC 1554 principle of PE applying to the licensing of intellectual property accepted (but claim failed on facts).

Particular Aspects
8. Commerciality is judged by nature of the parties’ dealings, not the nature of the property in dispute (Whittaker v Kinnear ibid. §32)

1 Lecture to the Chancery Bar Association “The stuffing of Minerva’s owl?”
9. The requirements for PE and the divisions between it and other estoppels (e.g. promissory estoppel) and constructive trust are in constant flux still.

10. The Subject to Contract heading is a useful but not infallible protection\(^2\). Similarly an “entire agreement” clause in the contract itself may be desirable but (a) these need drafting with a clear mind on what it says and is meant to achieve and (b) sometimes they are a trap for the unwary (i.e. not for “autopilot” inclusion).

**Danger Areas**

11. Commercial arrangements which are not fully “arms length” (for example see the facts in *Baird* ibid\(^3\)). The safe course is to ensure that any side arrangements or suchlike are fully identified, recorded and formalised (where appropriate) in contractual form.

12. Joint ventures\(^4\) – drafting should take special account of:
   - 12.1 If the venture does not succeed in the acquisition (e.g. what rights and obligations vest in the participants as regards shared information or property thereafter).
   - 12.2 If the venture partially succeeds (e.g. one party acquires the railway line and the other the trains, what constraints might there be with entering into relations with third parties).
   - 12.3 After a successful JV (e.g. information acquired which facilitates further commercial advantages).

**Drafting – Final Point**

13. It is trite to say that transaction solicitors have great experience with drafting for transactions that in fact succeed, Counsel have great experience of where they go wrong and the drafting to anticipate that. It is the latter experience that is useful to tap into to review the drafting before finalisation.

**Conclusion**

14. PE will be looked to increasingly in commercial arrangements, especially where any contract has a lacuna. Practitioners need to be aware of PE and guard against it in their drafting.

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\(^2\) For instance the Courts have at times felt able to go behind the phrase even when used

\(^3\) Where the parties commercial relations meant living very much in each others pockets.

\(^4\) See *Pallant v Morgan* [1953] Ch 43 and *Banner Homes Holding Ltd. v Luff Developments Ltd.* [2000] Ch 372 – traditionally described as constructive trust cases but see Lord Neuberger’s lecture above. In substance the advantage of retaining the argument in the context of constructive trust rather than PE may be just to avoid the more discretionary approach to remedy in PE based claims.

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