EASEMENTS - Easements by estoppel

Hoyl Group Ltd v Cromer Town Council [2015] EWCA Civ 782; [2016] 1 P&CR 3; [2015] HLR 43

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It is always worth bearing in mind that any proprietary right is in theory capable of arising by way of proprietary estoppel and/or by way of a constructive trust, and easements are no exception. Informal dealings which might be insufficient to amount to an implied grant, or might be insufficient to establish a prescriptive claim, might nevertheless be amenable to analysis as a fully-fledged proprietary estoppel giving rise to, for example, permanent rights of way.

In the case of *Hoyl Group Ltd v Cromer Town Council* the Court of Appeal upheld a first instance decision that a right of way over the council's land in favour of a basement flat constructed by the claimant had arisen by proprietary estoppel. The brief facts of the case were that the council owned an historic house, which comprised a basement, a ground floor and upper floors. The council occupied the ground floor. Hoyl took tenancies of the upper floors, and in addition took a tenancy of the basement intending to convert it into a residential apartment. The basement was accessed from the ground floor via an internal door leading into the basement. Hoyl (as required to do so under the terms of the lease) obtained the council's approval to Hoyl's plans for the alteration of the layout and conversion of the basement, which plans involved stopping-up the internal door and provided for external access to the basement apartment over garden land retained by the council. The council approved the plans and stood by whilst the works were completed and the internal door stopped-up.

At first instance the court adopted the well-known principles set out in *Megarry & Wade* (8th Ed, 2012) at paragraph 16-001:

"(a) the landowner induced, encouraged or allowed the other party to believe that he has or will enjoy the easement;

(b) in reliance upon that belief, the other party had acted to his detriment to the owner's knowledge; (c) the landowner acts unconscionably in denying the other party the easement..."

On the facts, the court at first instance held that those principles were made out and that a right of way over the garden land arose by way of proprietary estoppel.

The appeal raised a number of points, the most relevant of which related to the extent of the

knowledge required on the part of the defendant as to the claimant's belief that it had or was thereby acquiring an interest in land in the context of establishing a proprietary estoppel. The council's argument was that in a case of estoppel by acquiescence it was necessary for the estopped party to have knowledge of the claimant's mistaken belief of his rights, and referred to the classic formulation or probanda requiring such knowledge in *Willmott v Barber* (1880) 15 Ch D 96:

*"*In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act ... on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff ... Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistake of his rights. If he does not there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right ...*"*

In the leading judgment of Floyd LJ the Court of Appeal reviewed the jurisprudence concerning the requisite knowledge required in a case of estoppel by acquiescence. True enough, *Willmott v Barber* required the estopped party to know of the claimant's mistaken belief of his legal rights, but much water had flowed under the bridge since that decision.

The Court of Appeal referred to the judgment of Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 which favoured a broader approach directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that he *knowingly, or unknowingly* allowed or encouraged another to mistakenly assume legal rights, rather than inquiring whether the circumstances could be fitted within the confines of some preconceived formula or the strict probanda of *Willmott v Barber*. Properly regarded, knowledge of the true position of the party alleged to be estopped is merely one of the factors to be considered in the inquiry, and may be most pertinent in considering the requirement of unconscionability. Such knowledge might be determinative in a case of pure acquiescence, in which no active encouragement was offered at all, but might be less relevant in a case where there was some active encouragement coupled with acquiescence and inactivity.

The Court of Appeal pointed out that this approach was approved by the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at 1779, in which Lord Walker referred to the probanda in *Willmott v Barber* as "*something of a stumbling block in the development of equitable estoppel*", and might only be relevant to cases where the defendant's sole encouragement had been passive non-intervention i.e. pure acquiescence.

Furthermore, the broader approach had been approved by the House of Lords in *Thorner v Major* [2009] UKHL 18 where Lord Walker approved the analysis of an estoppel as being based on three main elements of representation/assurance, reliance & detriment, and held that cases of pure acquiescence were to be analysed as cases in which the landowner's conduct in standing-by in silence served as the required element of representation/assurance. Thus, there was no additional requirement that the estopped party was to have known of the other party's mistaken belief, but an inquiry into that knowledge might well be relevant in cases of pure acquiescence.

In those circumstances, the Court of Appeal held that knowledge on the part of the council of the mistaken belief of *Hoyl* was not strictly required. It was not necessary to rigidly apply the probanda of *Willmott v Barber*, and furthermore it was wrong to analyse the council's inactivity and failure to act separately from its instances of active encouragement. A proprietary estoppel did not have to fit neatly into the pure acquiescence-based pigeon hole, or the representation/assurance pigeon hole, nor were acts of mere acquiescence to be dissected out of the factual matrix and analysed in isolation. In those circumstances the court had been entitled to treat the case as one of active encouragement rather than pure acquiescence. For those reasons the appeal was dismissed.

This judgment, no doubt, favours claimants and it is clear that the Court of Appeal has continued to follow the development of the equitable jurisprudence away from lists of probanda, strict categorisation and rigid dividing lines, in favour of a broader analysis of the facts of any given case by reference to more simply stated core principles of representation, reliance, detriment & unconscionability.

It is, however, notable that pure acquiescence cases are "different" in at least two material respects. Firstly, in a pure acquiescence case it is necessary for the claimant to demonstrate that he believed that he *had or would have* the legal right in question. Whilst in general a belief in the acquisition of rights in the future *can* form the basis of an estoppel, this can only be so in cases where there was an express or implied promise that such a right would be granted (which cannot be the case in a case of pure acquiescence). Secondly, as discussed above, although the defendant's knowledge of the claimant's mistaken belief is not a strict requirement, the defendant's knowledge may in the context of any case be highly relevant or even determinative of a claim in a case of pure acquiescence.