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Has English Property Law gone too far in Equitable Protection

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ABSTRACT
In recent decades, whether English property law has gone too far in equitable protection has raised constant debate, which has been characterised by a gulf between the argument that the equitable doctrine has gone too far in allowing remedies to parties and that the protection provided by it is generally reasonable. In this article, I will first demonstrate the process of creating and transferring legal property rights which has so far been set down in English property law and the main equitable doctrines: the doctrine of anticipation, proprietary estoppel, and constructive trust. On the basis of deeply analysing some criticism surrounding these three doctrines respectively, I will draw a conclusion that the equitable doctrines of protection have so far been circumscribed to a reasonable extent and thus not to be too excessive.

KEYWORDS
Equity; Property law; Land law; Anticipation; Proprietary estoppel; Constructive trust

1 Introduction

Before critically analyzing the question whether English property law has gone too far in equitable protection, it is worth noting what is the similarity and difference between legal rights and equitable rights which are generally said to be the only two types of property right in English property law.The term ‘property right’ is often referred to as a ‘right in rem’, which is in contrast with a personal right referred to as a ‘right in personam’. The fundamental difference between ‘a right in rem’ and ‘a right in personam’ has been vividly explained in Birks that ‘a right in rem is a right the exigibility of which is defined by the location of a thing, while the exigibility of a right in personam is defined by the location of the person.’ The practical significance of their difference lies in the basic principle that ‘a property right in a piece of land is capable of binding the rest of the world’, which was illustrated in National Provincial Bank v Ainsworth where the House of Lords ruled that Mrs Ainsworth's ‘deserted wife's equity’ was only counted as a personal right rather than a property right,so that she could not assert it against the repossession of the bank. Therefore, it can be clearly seen that both legal and equitable property rights have constituted the key building blocks of land law, including the sum of total of all those rights capable of binding the rest of the world.

Despite the fact that equitable property rights share a key feature of legal counterparts as both of them are able to be asserted against third parties, there are some underlying distinctions which should be drawn in order to understand why the English court has established an equitable jurisdiction in land law. Historically, the distinction only comes down to a simple fact that equitable rules were established by courts of equity rather than the common law courts. In contemporary societies, however, this separate arrangement has been abolished, leaving a valuable legal legacy in English property law. For example, the essential feature of equitable property rights in modern land law is that it allows courts to flexibly give invaluable protection in situations where the parties would otherwise be denied by any remedy in common law, thus preventing those vulnerable parties from being unfairly exploited. Equity, as suggested by Hackney, ‘has been turned into a systematic body of principles as refined, rigorous and ultimately unyielding as anything produced by the common law.’

In this article, I will first demonstrate the process of creating and transferring legal property rights which has so far been set down in English property law and the main equitable doctrines: the doctrine of anticipation, proprietary estoppel, and constructive trust. Secondly, through deeply analyzing some criticism surrounding them, I will critically assess whether equity does have gone too far in allowing remedies to parties. Through approaching these three doctrines respectively, I can convincingly draw a conclusion that the equitable doctrine of protection has so far been circumscribed to a reasonable extent and thus not to be too excessive.

2 How does equitable interest arise in the first place?

According to the section 1 of the Law of Property Act 1925, there are now only two permissible legal estates,which are freehold and leasehold, and mainly two types of legal interests, which are easement and charge. Also, there are some indispensable formality rules imposed by the common law or statue which should be satisfied before any acquisition or disposition of legal property rights comes about, such as the section 53 of LPA 1925 which stipulates that the creation or operation of legal interests does not take effect unless made in writing, and the section 27 of the Land Registration Act 2002 which specifically stipulates what kind of legal titles must be registered before gained by the purchaser. Therefore, before successfully acquiring a legal property right, one must show that his or her right falls within the scope of either legal estates or legal interests and the formality rules of acquisition have also been satisfied.

If someone fails to show that he has a legal property right in land, he may still acquire an equitable property right which would give him precisely the protection he needs. But the question is, how does the equitable property right arise in the first place? Normally, these equitable rights would arise because of a duty to grant property right from one party to another, such as the doctrine of anticipation based on the maxim that ‘equity looks on as done that which ought to be done’. This doctrine applies where parties have entered into a specifically enforceable contract, so that equity anticipates the grant of those legal rights and thus confers the intended grantee an equitable right mirroring the relevant legal right.

In contrast to the doctrine of anticipation, constructive trust and proprietary estoppel are two types of contentious equitable doctrine which could arise in the absence of any written document, formal grant of right or registration. It has been well-established by the section 6 of TOLATA 1996 that a trust could arise from the situations where the trustee has a right of the trust property and is under a duty to use that right for the benefit of the beneficiaries, rather than for his own benefit. This has been vividly explained by Hackney that ‘the particular novelty of the trust is that the beneficiary need not to have been a party to a transaction establishing the trust, yet he is still able to enforce it, and what is more, the person who does set up the transaction finds he has no standing to intervene to see that it is honoured.’ And the case which provides the clearest structure of trust in the martial context is Williams & Glyn’s Bank v Boland, where Mr Boland had acquired his freehold of the land with the financial assistance of Mrs Boland and as a result, he was under a duty to hold that freehold on trust for both himself and his wife, rather than just for his own benefit. What is more, Mrs Boland’s beneficial interest under trust was counted as an ‘overriding interest’ defined under the Schedule 3 of the LRA 2002 and was thus enforceable against not only his husband, but also the repossession of bank. The nature of the beneficial interest acquired by Mrs Boland is called the 'common intention constructive trust' based on the existence of a common intention between the couples to share the joint ownership of the family home.

Proprietary estoppel is also an independent claim which does not require the existence of contract between parties, nor does it require a party to formally give a property right to another. Rather, it could arise in situations where a party has given another party a clear assurance, and another party has thus relied on the assurance and acted to his or her detriment. A graphic demonstration of the power of proprietary estoppel was vividly made by the court in Thorner v Major, where Lord Hoffmann stated that ‘David was entitled to the beneficial interest in the farm and farming business as they were at Peter’s death’, which effectively protected David who bona fide relied on Peter’s promise.

3 Whether equity has behaved excessively in giving remedies?

Having illustrated three types of equitable protections above, it can be clearly seen that although equitable rights which can also be regarded as ‘proprietary’, it does behave in a different fashion to those at common law. As suggested by Burrows, ‘where there is a difference between common law rules and equitable rules, we need to ask whether that difference can be justified.’ However, the history cannot justify why we should keep two different sets of rules, and due to the fact that equity is an intrinsically discretionary doctrine, it seems to have substantially undermined the formality rules which are strictly imposed by the common law. Thus, an inevitable question which must be raised in English law is—has equity gone too far in the sense of giving remedies to different parties? Personally speaking, the English courts have so far struck a good balance between common law and equity, and I can justify that any doubts as to the ‘excessiveness’ of equitable jurisdiction in English property law will turn out to be untenable.

While a comprehensive regime for the determination of family property rights has not been established, English property law has been through a radical modification to the traditional common law doctrine. In Stack v Dowden and Jones v Kernot, for example, the foundation for both the acquisition of beneficial interests under constructive trusts and the subsequent division of quantification shares is the 'common intention' of both parties, which vividly shows a so-called ‘familialisation’ process aiming at ‘accommodating the specific needs of family members.’ Undoubtedly, whether the courts in those two cases have provided sufficient justification to treat the family home cases differently in the absence of legislative reforms has indeed arouse a great many controversies, such as Dixon who has doubted the nature of such trust by suggesting that ‘call it family law, call it an exercise of the court’s inherent equitable jurisdiction, but, maybe, do not call it property law.’ From my perspective, however, ‘common intention constructive trust’ does operate in pace with the social and economic developments, such as the huge expansion of marital home since the second world war which urgently requires the courts to make discretionary adjustment between parties following their breakdown of a marriage or the dissolution of a partnership. Also, when it comes to the dispute between a mortgagor and civil partners, such discretionary power seems to be more necessary as is shown by the section 14 of TOLATA which ‘allows court to declare the nature or extent of a person's interest in property subject to the trust as the court thinks fit.’ Therefore, allowing equity to treat home cases differently can be satisfactorily justified.

As for the proprietary estoppel, the main criticism is that the formality rules in common law might be undermined if allowing promise to acquire a proprietary right in the absence of any grant of property right or contractual promise.

Thanks to the test of unconscionability, the application of proprietary estoppel has so far been controlled within a reasonable limit, on the grounds that even if all the elements (assurance, reliance and detriment) have been satisfied, a successful claim is still subject to the fact that reneging the promise must be unconscionable on a holistic assessment. Moreover, although estoppel has been recognized by the section 116 of LRA as 'an interest capable of binding successors', before the court order is made in the favour of promisee, he or she only has an 'inchoate equity', which is the case despite the satisfaction of the estoppel test. Finally, in some particular circumstances, the promisee can only get a personal right after the court order is made discretionarily, such as cash payment or licence33. In such cases, the promisees' right cannot bind other people who subsequently get the legal title from the promisor. These limitations of applying proprietary estoppel do show that the equity has adopted a restrictive stance in giving remedies to relevant parties.

4 Conclusion

As suggested by Smith, 'doing without any equitable safety value will be very difficult' as it is the rule of law itself that requires judges to adopt their discretionary powers to deal with those whose actions are regarded as unfair in common law. Meanwhile, Smith warns that 'equity cannot be wholly discretionary' on the basis that, once someone acquires an equitable interest, it would have been prima facie binding the rest of the world. Based on my analysis above, at least for now, English property law does have been controlled within reasonable limits in terms of giving remedies to those who are in need of help from equitable jurisdiction.

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