CA on appeal from Norwich County Court (HHJ Downes) before Beldam LJ; Robert-Walker LJ; Clarke LJ. 24th June 1999

J U D G M E N T : Lord Justice Robert Walker:

Introductory

1. This appeal raises a point of some general interest on section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act"). Section 2 of the 1989 Act, so far as now material, provides as follows,

   "(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are being exchanged, in each.

   (5) This section does not apply in relation to -

   (a) a contract to grant such a lease as is mentioned in section 54(2) of the Law of Property Act 1925 (short leases);

   (b) a contract made in the course of a public auction; or

   (c) a contract regulated under the Financial Services Act 1986; and nothing in this section affects the creation or operation of resulting, implied or constructive trusts.

   (8) Section 40 of the Law of Property Act 1925 (which is superseded by this section) shall cease to have affect."

2. It is a remarkable feature of the case that there was not so much as a passing reference to section 2 of the 1989 Act either in the pleadings, or in counsel's submissions, or in the judgment of His Honour Judge Downes (given in the Norwich County Court on 1 September 1997) from which Mr Alan Gotts and Mr Brownie Gotts, the defendants below, appeal to this court. The judgment below was largely concerned with the assessment of the oral evidence which the Judge had heard (although it also contained an important passage, at the end of the judgment, concerned with proprietary estoppel). The Judge accepted the evidence of the claimant, Mr Keith Yaxley, and rejected much of the evidence of the appellants. In this court the appellants do not challenge the Judge's findings of fact but do raise for the first time the significance of section 2 of the 1989 Act. Mr Anthony Allston (for Mr Yaxley) did not contend that this court should not allow the new point to be raised, but did submit that the failure to raise it before was an indication of its frailty.

3. Even though Mr Allston did not object to the new point being taken, either on the hearing of an opposed application for an extension of time for appealing (which was granted by Hutchison LJ on 20 March 1998) or on the hearing of the appeal, all the members of this court have, I think, felt considerable concern about it. The court has been asked to hear an appeal raising issues of law of general importance when the trial judge had no pleadings or submissions directed to those issues, and did not therefore have them in mind when making his findings of fact. I shall have to return to this point in connection with Mr Allston's reliance, if necessary, on a constructive trust.

The facts and the issues on the appeal

4. Although there is no challenge to the Judge's findings they are not entirely clear and (especially in view of the course which this appeal has taken) it is necessary to set out the facts in a little detail. All the parties lived in North Norfolk. Mr Yaxley had for many years worked as a self-employed builder. Mr Brownie Gotts and his son Mr Alan Gotts owned various rented properties in North Norfolk. Mr Yaxley had previously done work for Mr Brownie Gotts and they were friends.

5. In about August 1991 Mr Yaxley heard of a converted house, 15 Vicarage Road, Cromer ("the property") which was for sale freehold at an asking price of £65,000. Mr Yaxley and a friend of his, Mr Scales, decided to buy it if they could raise the necessary funds. Mr Yaxley approached Mr Brownie Gotts for a loan of £32,500. Mr Yaxley's plan was to refurbish the property and let it as flats. Mr Brownie Gotts looked at the property and told Mr Yaxley that he would not make a loan but would buy the property himself (Mr Scales seems to have dropped out of the matter). Mr Yaxley's evidence, which the Judge accepted, was that at a meeting Mr Brownie Gotts orally offered Mr Yaxley a bargain under which he would get the ground floor flat (which he was to convert into two) in return for work on the four flats on the middle and top floors, and then acting as the landlord's managing agent for his upstairs flats as well as for the ground floor flats which Mr Yaxley would own. After thinking about it for a few days Mr Yaxley orally accepted this offer.

6. However when the contracts were exchanged (on or about 30 October 1991) for the purchase of the property the purchaser was named not as Mr Brownie Gotts but as his son Alan, who on 29 January 1992 became the registered proprietor. The purchase price was £60,000 and although the Judge rejected substantial parts of the Gotts' evidence, he appears to have accepted their evidence that the whole of the purchase price was provided by Alan. It was only later that Mr Yaxley came to know these facts. Between January and September 1992 Mr Yaxley carried out work on all three floors of the property. In his witness statement Mr Yaxley estimated that he had spent about £2000 of his own money on materials, together with a great deal of time. He said, *"The value of my time had I charged it to Mr Gotts on a normal basis would have been at least £7,500 and quite possibly substantially more. Thereafter and over the following years until the dispute arose in early 1995, I must have spent hundreds of hours in dealing with the tenants."*

7. Mr Yaxley later quantified what he had spent (in labour, materials and subcontractors' charges in respect of all the flats and the common parts of the property) at £9,346. Nearly half of this sum was spent in respect of the ground floor flats.

8. The Judge accepted that figure as reasonable. He said that although it was challenged, it had not been contradicted by any other evidence. He also seems to have accepted Mr Yaxley's evidence that he did at a fairly early stage ask for some formal legal document showing his interest in the ground floor of the property and that Mr Brownie Gotts said that a document would be prepared. But in the event it was left as what was called a 'gentleman's agreement'. The Judge found that Mr Yaxley had a "close relationship" with Mr Brownie Gotts, and trusted him, but the Judge did not (and was not asked to) find that there was any sort of fiduciary relationship.

9. Mr Yaxley worked first on the flats on the middle floor and then on those on the top floor. Those four flats were let by the end of March 1992 at weekly rents of £55 or £50. The two ground floor flats were ready for letting by September 1992. Some of the rents were paid direct to Mr Alan Gotts (as housing benefit) by the North Norfolk District Council. Mr Yaxley's evidence (which the Judge accepted, and found to be partly confirmed by some documentary evidence) was that every Saturday he collected all the rents which were not paid direct, and took them to Mr Alan Gotts' house either at once or the next morning, and that every three or six months there would be a settling up under which Mr Yaxley received £105 a week for the ground floor flats.

10. In February 1995 Mr Alan Gotts excluded Mr Yaxley from the property, and on 24 April 1996 Mr Yaxley commenced proceedings in the Chancery Division of the High Court. The proceedings were on 19 March 1997 transferred to the Norwich County Court. Mr Yaxley pleaded an oral agreement with Mr Brownie Gotts and alternatively a representation by Mr Brownie Gotts that he would become owner of the ground floor of the property, in reliance on which Mr Yaxley carried out the works, expended money, and performed management duties. He also pleaded that Mr Alan Gotts was a party to, or was fully aware of, the oral agreement and the representation. He sought a declaration that he was entitled to a long lease of the ground floor and an order for execution of such a lease by Mr Alan Gotts; alternatively payment of a sum equal to the value of a long leasehold interest, or equal to the value of his works and services.

11. The Judge apparently found that there was such an oral agreement and that it had been adopted by Mr Alan Gotts. But then without any reference to section 2 of the 1989 Act the Judge referred to the submissions made to him about proprietary estoppel, and the authorities cited to him, including the decision of this court in ***Crabb v Arun District Council*** [1976] Ch. 179. He referred to the three questions posed by Scarman LJ (at page 193), *"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?"*

12. The Judge decided that an equity was established to the extent of Mr Yaxley's ownership of the ground floor of the property. His order (as agreed by counsel after some discussion about the position as between Mr Alan Gotts and his father) was that Mr Yaxley was entitled to ownership of the ground floor for a term of 99 years from 29 January 1992, free of ground rent, and to all rent from the ground floor as from 1 August 1992. Mr Alan Gotts was directed to execute a lease within four months unless he paid Mr Yaxley a sum equivalent to the leasehold interest (the value to be determined, if necessary, by the District Judge). The order also directed an account of the rents of the ground floor flats as from 21 January 1995.

13. The grounds of appeal stated in the appellants' notice of appeal start with the contention (which is not disputed) that the Judge should have held that the oral agreement between Mr Yaxley and the Gotts was void by virtue of section 2 of the 1989 Act. The notice then proceeds with what are the essential issues in the appeal:

"The learned Judge was wrong in law to hold that the Plaintiff was entitled to ownership of the ground floor of the property by virtue of the doctrine of proprietary estoppel. He should have held that the doctrine of proprietary estoppel could not operate to give effect to an agreement rendered void by Section 2 of the 1989 Act.

The learned Judge ought to have held that the only relief to which the Plaintiff was entitled was payment on a quantum meruit basis for his work and managing the property."

14. The paucity of legal analysis below has been amply made good in this court, which has been referred to nearly fifty authorities spanning nearly three centuries. It is therefore helpful to begin with the historical background.

The historical background

15. Section 2 of the 1989 Act has repealed and replaced s. 40 of the Law of Property Act 1925, which itself replaced part of s. 4 of the Statute of Frauds Act 1677. It is not in dispute that section 2 is an entirely new provision which marks a radical change in the law: ***Firstpost Homes v Johnson*** [1995] 1 WLR 1567, 1571 (Peter Gibson LJ); ***McCausland v Duncan Lawrie*** [1997] 1 WLR 38, 44 (Neill LJ). Section 40 of the Law of Property Act 1925, by contrast, largely re-enacted the relevant provisions of s. 4 of the Statute of Frauds Act 1677 but in such a way as to incorporate and confirm a volume of case-law on that section, including in particular the equitable doctrine of part performance, which was specifically mentioned in s. 40(2). Section 40 was in the following terms,

"(1) No action may be brought upon any contract for the sale or other disposition of land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court."

16. The development of the law was clearly summarised by Lord Reid in ***Steadman v Steadman*** [1976] AC 536, 540, *"This matter has a very long history. Section 40 replaced a part of section 4 of the Statute of Frauds 1677 (29 Car. 2 c. 3), and very soon after the passing of that Act authorities on this matter began to accumulate. It is now very*

difficult to find from them any clear guidance of any general application. But it is not difficult to see at least one principle behind them. If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable. Using fraud in its other and less precise sense, that would be fraudulent on his part and it has become proverbial that courts of equity will not permit the statute to be made an instrument of fraud.

It must be remembered that this legislation did not and does not make oral contracts relating to land void; it only makes them unenforceable. And the statutory provision must be pleaded; otherwise the court does not apply it. So it is in keeping with equitable principles that in proper circumstances a person will not be allowed "fraudulently" to take advantage of a defence of this kind. There is nothing about part performance in the Statute of Frauds. It is an invention of the Court of Chancery and in deciding any case not clearly covered by authority I think that the equitable nature of the remedy must be kept in mind."

17. The decision of the House of Lords in *Steadman v Steadman* shows that the doctrine of part performance often gave rise to difficulty, even though it had been established by a decision of the House of Lords as early as ***Lester v Foxcroft*** (1701) Colles P.C. 108. The development of the doctrine during the 18th and 19th centuries was fully considered by the House of Lords in ***Maddison v Alderson*** (1883) 8 App Cas 467, especially in the speeches of the Earl of Selborne LC and Lord Blackburn. For present purposes it is sufficient to note that the doctrine relied strongly on the effect of the statute in making an oral contract for the disposition of land merely unenforceable, and not void; that it was essential that there should be a clearly-proved oral contract susceptible of specific performance; and that the claimant should have done acts unequivocally referable to performance of the contract on his part. The principle underlying the doctrine was expressed as follows by Lord Selborne (at page 475), *"In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the statute itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."*

18. It was also of central importance to the doctrine that an oral contract was under the old law not void, but merely unenforceable (see ***Britan v Rossiter*** (1879) 11 QBD 123, 130 and ***Maddison v Alderson*** at pp 474 - 5).

The public policy principle

19. Mr Allston has not contended that the doctrine of part performance, as such, has survived the repeal of s. 40 of the Law of Property Act 1925 and its replacement by section 2 of the 1989 Act. It is clear that it has not survived. But he has contended that a comparable equitable doctrine can and in this case should operate despite section 2, that is the species of equitable estoppel, generally referred as proprietary estoppel, on which the Judge relied. Mr Allston has also (although only after some prompting by the court) asserted the existence of a constructive trust and has relied on the exception at the end of s. 2(5).

20. Mr George Laurence QC (appearing with Miss Louise Davies for the appellants; neither appeared below) did not go so far as to contend that no form of estoppel could operate in relation to an oral or documentary consensus not amounting to a contract because of non-compliance with section 2. Nor did he submit that a plaintiff was in such a situation unable to obtain any restitutionary remedy (on the contrary, the appellants' notice of appeal concedes that Mr Yaxley is entitled to claim on a *quantum meruit* basis). But the appellants rely on the general principle stated in Halsbury's Laws (4th ed, vol 16, paragraph 962) 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 is to be invalid."*

21. The principal authorities supporting this principle (which I will call the public policy principle) are collected in the speech of Viscount Radcliffe delivering the opinion of the Privy Council in ***Kok Hoong v Leong Cheong Kweng Mines*** [1964] AC 993, 1015 - 8. In ***Westdeutsche Landesbank v Islington LBC*** [1994] 4 AER 890, 929, Hobhouse J expressed the same principle in the context of unjust enrichment under an *ultra vires* rate swap transaction, *"The application of the principle is subject to the requirement that the courts should not grant a remedy which amounts to the direct or indirect enforcement of a contract which the law requires to be treated as ineffective."*

22. The appellants also contend that the saving at the end of s. 2(5) has a narrower effect than may at first appear.

Recent cases on s. 2 and estoppel

23. The diligence of counsel has produced five cases, decided in the course of the last three years, in which this court has made some reference to estoppel in connection with s. 2 of the 1989 Act. However none of them has decided or even discussed at length the points which the appellants take in relation to proprietary estoppel and s. 2(5). I can therefore refer to them fairly briefly and I do so in chronological order.

24. ***United Bank of Kuwait v Sahib*** [1997] Ch 107 is an important decision on the effect of a deposit of a land certificate unaccompanied by any document satisfying section 2. Peter Gibson LJ noted (at pp. 139 - 40) that the old law as to the creation of an equitable mortgage by deposit of deeds had been akin to part performance, and was therefore equally inconsistent with the philosophy of the 1989 Act. He noted (at page 141) that the Law Commission's Report on Formalities for Contracts for Sale of Land (No. 164) had contemplated that equitable remedies such as promissory estoppel and proprietary estoppel might be available to do justice in cases where s. 2 had not been complied with. But Peter Gibson LJ did not find it necessary to consider the point further because the claimant bank could not on any view have been bound by any estoppel. Phillips LJ agreed and (at page 144) saw no reason to extend the list of exceptions in s. 2(5).

25. In ***McCausland v Duncan Lawrie*** [1997] 1 WLR 38 this court had to consider the application of s. 2 to the variation of a formal written contract which itself complied with s. 2. The point arose in the context of a striking-out application and the variation was fairly trivial. (The vendors' solicitors had noticed that the contractual completion date was a Sunday and proposed that it should be brought forward two days to the previous Friday, to which the purchasers' solicitors agreed; time was not initially of the essence of the contract and the variation would have had almost no significance if the vendors' solicitors had not served a notice to complete on the Friday, instead of waiting until after the weekend). It is unsurprising that both Neill LJ (at page 45) and Morritt LJ (at page 50) regarded the vendors' estoppel point as arguable, but incapable of being resolved without further investigation of the facts.

26. ***Godden v Merthyr Tydfil Housing Association*** (15 January 1997, noted at 1997 1 NPC 1 and 74 P & CR DI) was another appeal (this time unsuccessful) against a striking-out order. This court rejected an argument based on estoppel by convention which Simon Brown LJ regarded as impossible (a view with which I respectfully agree). The case is of interest mainly for the citation of the passage in Halsbury's Laws (4th ed vol 16 paragraph 962) stating the public policy principle. That passage was, it seems, pointed out by Sir John Balcombe in the course of argument; Simon Brown LJ saw it as a "central objection to this whole line of argument" - but not, it is to be noted, in a context in which proprietary estoppel was being relied on.

27. Barely a month later *Godden* was cited (in what Peter Gibson LJ called a "somewhat garbled version") in ***Bankers Trust v Namdar*** (14 February 1997). Peter Gibson LJ referred to the view of Morritt LJ in *McCausland* that estoppel may be available. He also referred to the Law Commission's report (paragraph 5.4 - 5.5) and to Cheshire & Burn, Law of Real Property (15th ed page 124). Peter Gibson LJ did not accept that estoppel could have no relevance. But as the consequence was that this court decided not to allow the appellant to take a new point, the matter was not further investigated.

28. Finally in ***King v Jackson*** [1998] 1 EGLR 30 this court took account of an oral agreement to surrender an assured shorthold tenancy, relied on by the landlord, in assessing damages for unlawful eviction under ss. 27 and 28 of the Housing Act 1988. Morritt LJ gave the leading judgment but did not find it necessary to refer to any of the authorities just mentioned.

29. I have no hesitation in agreeing with what I take to be the views of Peter Gibson , Neill, and Morritt LJJ, that the doctrine of estoppel may operate to modify (and sometimes perhaps even counteract) the effect of s. 2 of the 1989 Act. The circumstances in which s. 2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion of s. 2 as a '*no go area*' for estoppel would be unsustainable. Nevertheless the impact of the public policy principle to which Sir John Balcombe drew attention in *Godden* does call for serious consideration. It is not concerned with illegality (some confusion may have arisen from the inadequate report or note shown to this court in ***Bankers Trust v Namdar***) but with what Viscount Radcliffe in ***Kok Hoong*** (at page 1016) called a principle of general social policy - *"to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise."*

30. In this case that principle must of course be applied consistently with the terms in which s. 2 of the 1989 Act has been enacted, including the saving at the end of s. 2(5).

31. Parliament's requirement that any contract for the disposition of an interest in land must be made in a particular documentary form (and will otherwise be void) does not have such an obviously social aim as statutory provisions relating to contracts by or with moneylenders, infants, or protected tenants. Nevertheless it can be seen as embodying Parliament's conclusion, in the general public interest, that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement. If an estoppel would have the effect of enforcing a void contract and subverting Parliament's purpose it may have to yield to the statutory law which confronts it, except so far as the statute's saving for a constructive trust provides a means of reconciliation of the apparent conflict.

32. The latest edition of Goff & Jones, a textbook of high authority, reaches the tentative conclusion (5th ed page 580) that "even if the purchaser can demonstrate that the vendor's conduct was so unconscionable that it would be inequitable for him to rely on the absence of writing, to order the conveyance of, or to declare him trustee of, the property is an inappropriate remedy in that it frustrates the policy underlying s. 2(1) of the 1989 Act".

33. In enquiring whether the parliamentary purpose is frustrated it is necessary to note the wide range of relief which may be granted where a claim to proprietary estoppel is established. Just how wide that range is appears (for instance) from Snell's Equity 29th ed pp 577. The general aim is to "look at the circumstances in each case to decide in what way the equity can be satisfied" (Sir Arthur Hobhouse in ***Plimmer v Wellington Corporation*** (1884 App Cas 699 714) and to achieve "the minimum equity to do justice to the plaintiff" (Scarman LJ in ***Crabb v Arun District Council*** [1976] Ch 179, 198). Sometimes the equity is given effect to simply by dismissing an adverse claim. But in other cases more positive action is needed, extending (as Snell notes at page 578, with numerous examples) both to giving the claimant an equitable lien on the disputed property for his expenditure, and to the positive conferment of title on the claimant. That is the sort of relief referred to in the Law Commission's report (paragraph 5.5) as going to the extent of an order for land to be transferred.

34. None of the recent authorities referred to by counsel is determinative of this appeal. The appellants can derive some assistance from the recognition of the public policy principle in ***Godden,*** and the respondent can derive some comfort from general remarks in ***McCausland*** and ***King v Jackson***, but in all three cases the observations were directed to a very different factual context. 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 s. 2 of the 1989 Act is directed, but they cannot be conclusive as to how s. 2, as enacted, is to be construed and applied.

Proprietary estoppel and constructive trusts

35. At a high level of generality, there is much common ground between the doctrines of proprietary estoppel and the constructive trust, just as there is between proprietary estoppel and part performance. All are concerned with equity's intervention to provide relief against unconscionable conduct, whether as between neighbouring landowners, or vendor and purchaser, or relatives who make informal arrangements for sharing a home, or a fiduciary and the beneficiary or client to whom he owes a fiduciary obligation. The overlap between estoppel and part performance has been thoroughly examined in the appellants' written submissions, with a survey of authorities from ***Gregory v Mighell*** (1811) 18 Ves. 328 to ***Take Harvest v Liu*** [1993] AC 552.

36. The overlap between estoppel and the constructive trust was less fully covered in counsel's submissions but seems to me to be of central importance to the determination of this appeal. Plainly there are large areas where the two concepts do not overlap : when a landowner stands by while his neighbour mistakenly builds on the former's land the situation is far removed (except for the element of unconscionable conduct) from that of a fiduciary who derives an improper advantage from his client. But in the area of a joint enterprise for the acquisition of land (which may be, but is not necessarily, the matrimonial home) the two concepts coincide. Lord Diplock's very well-known statement in ***Gissing v Gissing*** [1971] AC 886, 905 brings this out, *"A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."*

37. Similarly Lord Bridge said in ***Lloyds Bank v Rosset*** [1991] 1 AC 107, 132, *"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting the claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel."*

38. It is unnecessary to trace the vicissitudes in the development of the constructive trust between these two landmark authorities, except to note the important observations made by Sir Nicolas Browne-Wilkinson V-C in ***Grant v Edwards*** [1986] Ch 638, 656, where he said, *"I suggest that in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in **Gissing v Gissing** [1971] A.C. 886. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions."*

39. In this case the Judge did not make any finding as to the existence of a constructive trust. He was not asked to do so, because it was not then seen as an issue in the case. But on the findings of fact which the Judge did make it was not disputed that a proprietary estoppel arose, and that the appropriate remedy was the grant to Mr Yaxley, in satisfaction of his equitable entitlement, of a long leasehold interest, rent free, of the ground floor of the property. Those findings do in my judgment equally provide the basis for the conclusion that Mr Yaxley was entitled to such an interest under a constructive trust. The oral bargain which the Judge found to have been made between Mr Yaxley and Mr Brownie Gotts, and to have been adopted by Mr Alan Gotts, was definite enough to meet the test stated by Lord Bridge in ***Lloyds Bank v Rosset.***

The Judge's findings revisited

40. Mr Laurence's arguments, although skilfully developed in different directions, were all based on the central submission that Mr Yaxley was attempting, in defiance of the legislative policy, to enforce a supposed contract which Parliament has declared to be void (and not merely unenforceable, as under the old law).

41. Mr Allston did not accept the factual basis of this central submission. He said that his case below had been that Mr Yaxley's agreement with Mr Brownie Gotts was only a 'gentleman's agreement' because there was never any intention to create legal relations. I have had great difficulty in trying to reconcile that with Mr Yaxley's pleaded

case, which refers to Mr Alan Gotts being a party to an oral agreement between Mr Yaxley and Mr Brownie Gotts (it also pleads, in the alternative, that Mr Alan Gotts was well aware of representations made by his father to Mr Yaxley). I have also had great difficulty in reconciling what is now said on Mr Yaxley's behalf with the Judge's findings of fact, in which he said that he "was satisfied that [Alan Gotts] adopted and knew full well about the original agreement made by Brownie Gotts" and that there had been, on the part of Mr Alan Gotts "very significant adoption and encouragement of the original agreement."

42. It is to my mind very difficult to be sure whether the Judge found that Mr Alan Gotts orally adopted an oral consensus reached between his father and Mr Yaxley, which all three of them intended to be binding, but which could not subsist as a valid contract solely because of s. 2 of the 1989 Act. If the presence or absence of such a finding were of critical importance to the disposal of this appeal, I would be inclined to remit the matter to the County Court for further findings, despite the delay and expense which would be involved. I have however come to the conclusion that that course is not necessary, and that the appeal should be dismissed even if the parties did arrive at an oral consensus which they believed to be binding, but which was invalidated by s. 2.

The saving in s. 2(5)

43. The true scope of the Judge's findings became increasingly important during the hearing of the appeal as Mr Laurence developed his submissions as to the significance of the saving in s. 2(5) for 'the creation or operation of ... constructive trusts'. He submitted that the saving applies so as to preserve a constructive trust in a factual situation in which such a trust would have arisen under the old law; but that it does not raise or permit a constructive trust in a factual situation in which, under the old law, a purchaser under an oral contract might have relied on the doctrine of part performance. A purchaser under a supposed contract void for non-compliance with s. 2 was therefore, he said, worse off than a claimant who could plead standing-by or encouragement on the defendant's part, and reliance and expenditure on his own part, but who could not and did not plead any oral offer and acceptance. Mr Laurence accepted that that result might appear surprising at first glance, but said that it necessarily followed from the policy which s. 2 gives effect to.

44. On this point Mr Laurence relied by analogy on the decision of this court in ***Lloyds Bank v Carrick*** [1996] 4 All AER 630. Mrs Carrick was a widow who orally agreed with her brother in law, a builder, to sell her house and pay him the proceeds, for which he would provide her with a new house. She did so and moved into the new house, which remained in the brother-in-law's name; later he mortgaged it to the bank. Mrs Carrick's rights were postponed to the bank because they had not been registered as an estate contract. Morritt LJ (with whom Beldam LJ and Sir Ralph Gibson agreed) said at page 639,

"In this case there was a trust of the maisonette for the benefit of Mrs Carrick precisely because there had been an agreement between her and Mr Carrick which, for her part, she had substantially if not wholly performed. As between her and Mr Carrick such trust subsisted at all times after November 1982. I agree with counsel for the bank that there is no room in those circumstances for the implication or imposition of any further trust of the maisonette for the benefit of Mrs Carrick. In ***Lloyds Bank plc v Rosset*** *there was no contract which conferred any interest in the house on the wife. As with all statements of principle the speech of Lord Bridge of Harwich must be read by reference to the facts of the case. So read there is nothing in it to suggest that where there is a specifically enforceable contract the court is entitled to superimpose a further constructive trust on the vendor in favour of the purchaser over that which already exists in consequence of the contractual relationship.*

It is true that on this footing the ultimate position of Mrs Carrick with the benefit of a specifically enforceable contract may be worse than it would have been if there had been no contract. But that is because she failed to do that which Parliament has ordained must be done if her interest is to prevail over that of the bank, namely to register the estate contract. Her failure in that respect cannot, in my view, justify the implication or imposition of a trust after the execution of the charge when the dealings between Mr Carrick and Mrs Carrick before such execution did not."

45. I do not consider that this passage assists Mr Laurence. *Carrick* was decided under the old law and (as Morritt LJ observed) Mrs Carrick had the benefit of a specifically enforceable contract (see also what Morritt LJ said at page 637 f - j). The specifically enforceable contract itself made Mrs Carrick's brother in law a trustee for her, and that left no room for the imposition of a further constructive trust. In this case, by contrast, Mr Yaxley did not have a specifically enforceable contract, and there is room for a constructive trust to operate so as to avoid injustice.

46. Moreover it is important to note that ***Carrick*** was concerned with land not registered under the Land Registration Act 1925, and with the protection of Mrs Carrick's rights against third parties, and whether they fell within some category of interest registerable under the Land Charges Act 1972. Mrs Carrick's counsel conceded that her rights constituted an estate contract. But in informal negotiations between persons who are not lawyers, the distinction between an agreement to sell property and an agreement to subject property to a trust may be far from clear (with *Carrick* compare, for instance, ***Hodgson v Marks*** [1971] Ch 892). In the present case there was evidence that Mr Brownie Gotts said to Mr Yaxley that the ground floor would be his '*for ever*'. There is no evidence that the parties discussed whether the objective was to be achieved by a conveyance which left the rest of the property as a 'flying freehold', or by the grant of a long lease, or by a declaration of trust. It was only after judgment that those technicalities were addressed.

47. ***Hodgson v Marks*** was not cited in the course of argument, but it is well known to property lawyers. It was concerned partly with overriding interests under s. 70(1)(g) of the Land Registration Act 1925 and partly with s. 53 of the Law of Property Act 1925 (to which Mr Laurence did refer briefly in the course of his argument).

Section 53(1) (b) requires a trust of land to be created or evidenced in writing, but s. 53(2) is in terms very similar to the saving at the end of s. 2(5), *"This section does not affect the creation or operation of resulting, implied or constructive trusts."*

48. To recapitulate briefly: the species of constructive trust based on '*common intention*' is established by what Lord Bridge in ***Rosset*** called an "*agreement, arrangement or understanding*" actually reached between the parties, and relied on and acted on by the claimant. A constructive trust of that sort is closely akin to, if not indistinguishable from, proprietary estoppel. Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights. Section 2(5) expressly saves the creation and operation of a constructive trust.

49. I cannot accept that the saving should be construed and applied as narrowly as Mr Laurence contends. To give it what I take to be its natural meaning (comparable to that of s. 53(2) of the Law of Property Act 1925 in relation to s. 53(1)) would not create a huge and unexpected gap in s. 2. It would allow a limited exception, expressly contemplated by Parliament, for those cases in which a supposed bargain has been so fully performed by one side, and the general circumstances of the matter are such, that it would be inequitable to disregard the claimant's expectations, and insufficient to grant him no more than a restitutionary remedy.

50. To give the saving a narrow construction would not to my mind be a natural reading of its language. Moreover it would often require the court to embark on minute enquiries into informal negotiations, between parties acting without legal advice, in order to decide whether or not the parties' '*agreement, arrangement or understanding*' would have amounted to a complete and legally binding contract but for the single fatal defect of non-compliance with s. 2. The course which this case has taken vividly illustrates the problems involved.

51. For those reasons I dismiss this appeal.

JUDGMENT : Lord Justice Clarke:

52. I have had the great advantage of reading the judgments of both Robert Walker LJ and Beldam LJ in draft. They are so comprehensive that it would serve no useful purpose for me to add more than a very few words of my own. I shall therefore briefly address only three topics.

1. Was there an agreement between the plaintiff and Alan Gotts?

53. Essentially for the reasons given by Beldam LJ I am not persuaded that the judge held that there was an agreement between Alan Gotts and the plaintiff for the transfer or creation of an interest in the property. The only agreement between them alleged in the statement of claim was that Brownie Gotts made the original agreement with the plaintiff on behalf of Alan Gotts. The evidence at the trial did not support such an agency and Mr Allston did not submit to the judge that any such agreement had been made. Nor did he suggest that an agreement had been made or should be inferred between the plaintiff and Alan Gotts on any other basis. The judge was not therefore addressing his mind to such a case so that I am unable to accept the submission made by Mr Laurence that the judge intended to hold that Alan Gotts had taken over and become a party with the plaintiff to an agreement which superseded the agreement between the plaintiff and Brownie Gotts. Moreover I do not think that it follows from the judge's findings of fact that Alan Gotts and the plaintiff ever became parties to such an agreement.

54. In these circumstances, given Mr Laurence's concession that in the absence of such an agreement the appeal must fail, I would if necessary dismiss the appeal on this narrow basis. For my part, I do not think that it would be appropriate to remit the matter to the judge on the question whether or not there was such an agreement in circumstances in which this point was not taken before him and the whole case was conducted on the basis that the only question for decision was whether this was a case of proprietary estoppel, which in turn depended upon whose evidence the judge believed.

2. Constructive Trust.

55. I entirely agree with Robert Walker LJ's analysis under this head. I also agree that it follows from the findings of fact made by the judge that the plaintiff was entitled to a long leasehold interest under a constructive trust. I also agree with his construction of section 2(5) of the 1989 Act. Since section 2(5) expressly provides that nothing in section 2 affects the creation or operation of a constructive trust, it follows that nothing in section 2(1) prevents the plaintiff from relying upon the constructive trust created by the facts which have been summarised by both Robert Walker and Beldam LJJ. I agree that the appeal should be dismissed on this basis.

3. Proprietary Estoppel and the Law Commission.

56. The 1989 Act expressly refers to resulting, implied or constructive trusts but it does not expressly refer to proprietary estoppel, in so far as its principles are different from those relating to constructive trusts. The Act neither expressly saves the operation of the doctrine of proprietary estoppel nor expressly provides that it should have no application. Whether the principles of proprietary (or indeed other classes of estoppel) can be invoked will no doubt depend upon the principle which Robert Walker LJ has quoted from paragraph 962 of the 4th edition of Halsbury's Laws, namely that the doctrine of estoppel may not be invoked to render valid a transaction which the legislature, on grounds of general public policy, has enacted is to be invalid or void.

57. It seems to me that in considering whether a particular estoppel relied upon would offend the public policy behind a statute it is necessary to consider the mischief at which the statute is directed. Where a statute has been enacted as a result of the recommendations of the Law Commission, it is, as I see it, both appropriate and permissible for the court to consider those recommendations in order to help to identify both the mischief which the Act is designed to cure and the public policy underlying it. Indeed, although I agree with Robert Walker LJ that they cannot be

conclusive as to how a particular provision should be construed, I entirely agree with Beldam LJ that the policy behind section 2 of the 1989 Act can clearly be seen from the Law Commission Report to which he refers. In my opinion the contents of that report will be of the greatest assistance in deciding whether or not the principles of particular types of estoppel should be held to be contrary to the public policy underlying the Act. In this regard it seems to me that the answer is likely to depend upon the facts of the particular case. So, for example, an attempt to apply the principles of estoppel by convention is likely to fail, as in Godden v Merthyr Tydfil Housing Association, whereas an attempt to apply the principles of proprietary estoppel might well succeed, depending upon the facts of the particular case.

58. For these few reasons, in addition to those given by both Robert Walker LJ and Beldam LJ, I agree that the appeal should be dismissed.

59. Lord Justice Beldam: The plaintiff, Keith Yaxley, and the second defendant, Brownie Gotts, are friends of long-standing. The first defendant, Alan Gotts, is Brownie Gotts' son. They live in the village of Gimmingham in Norfolk. The plaintiff comes from Mundesley nearby. Brownie Gotts is a property owner for whom the plaintiff, a builder, had done a lot of work in the past. In August 1991 when the plaintiff was working on the home of a friend, an architect and businessman, he got to hear of an empty converted house, No. 15 Vicarage Road, Cromer ("the property"). It was at that time divided into five flats. The owner had been made bankrupt and the property was on the market for an advantageous price of £65,000. Initially the plaintiff intended to buy the property with a friend of his as a joint venture for, although it was in a bad state of repair and needed extensive work done to it, the plaintiff knew that the rents which could be obtained from the property would make it a good investment. The plaintiff approached Brownie Gotts to ask him to lend him half of the purchase price. Brownie Gotts said he would think it over for two or three days but used the opportunity to make his own enquiries about the property and, when he came to see the plaintiff two or three days later, he told him that he had decided to buy the property himself but would bring the plaintiff into the deal giving him the ground floor flat in return for carrying out the necessary works to the whole building. The plaintiff would then act as Brownie Gotts' managing agent for the flats while they continued jointly to own the building. In one of his witness statements the plaintiff said: "*This was indeed a sort of partnership and it was going to be set up firmly in writing by way of an agreement with our joint solicitor, Malcolm Malone.*"

60. Later Brownie Gotts suggested that they did not need a formal agreement. It could be "*a gentleman's agreement*". The plaintiff accepted this.

61. Unknown to the plaintiff, Brownie Gotts arranged that his son, Alan Gotts, should purchase the property. Alan Gotts exchanged contracts on 30th October 1991 and on 29th January 1992 was registered as the owner. Believing that Brownie Gotts had bought the property, the plaintiff began the work to the property in January 1992. It was in a poor state: there was no electricity, the ceilings were down, water was coming in and it needed a lot of work which, in the event, took the plaintiff some three months. By the end of March the flats on the middle and top floor had been put into proper tenantable repair and were let, producing a rental income of £210 per week for (as the plaintiff believed) Brownie Gotts. At about this time Brownie Gotts told the plaintiff that he was going to transfer his interest to Alan Gotts and shortly after this the plaintiff became aware that Alan Gotts knew all about the promise Brownie Gotts had made to him and the arrangements they had made.

62. The plaintiff started work on the ground floor, converting it into two one-bedroom flats. They were finished and let by September 1992. Thereafter the plaintiff collected the rent from all the flats, looked after the property and dealt with the tenants' complaints. Every week he handed over the rents collected to Alan Gotts and every three to six months there would be an accounting between them at which Alan Gotts paid the plaintiff the rents for the ground floor flats.

63. After about two and a half years the friends fell out and Alan Gotts refused to allow the plaintiff to continue to manage the flats and denied there was any agreement that he should have an interest in the ground floor. On the advice of a friend the plaintiff tape recorded a conversation with Brownie Gotts. In this conversation Brownie Gotts admitted that he had promised the plaintiff that he would have the ground floor.

64. In due course the plaintiff issued the present proceedings claiming a declaration and order as to his ownership of the ground floor of the property; alternatively he claimed payment for the value of his interest in the property or at least that the first or second defendant pay him a reasonable sum for the works and services he had carried out. The statement of claim set out the original oral arrangements between the plaintiff and Brownie Gotts and gave details of the works the plaintiff had carried out, including the provision of furniture for all the flats. It continued: "*The Plaintiff carried out the works, expended money and performed management duties as aforesaid in reliance upon and as a direct consequence of the above-mentioned oral agreement and the representation by the second Defendant in about September 1991 to the express effect that the Plaintiff would become owner of the ground floor of the property. The first Defendant was a party to the agreement and representation that had been made to the Plaintiff by the second Defendant and/or was fully cognisant and aware of the terms of such agreement and representation. The said representation was reinforced by the conduct of the Defendants in standing-by, consenting to and approving the carrying out of such works and duties by the Plaintiff.*"

65. The plaintiff claimed a declaration that he was entitled to a long lease of the ground floor of the property for such term as the court might deem just and equitable.

66. In their defence Alan and Brownie Gotts denied that there was any arrangement between the plaintiff and Brownie Gotts as he alleged. They asserted that any oral agreement with the plaintiff amounted to no more than an offer by Brownie Gotts to permit him to manage the property as an agent and to pay an amount equivalent to the rent of two flats (£100 per week) for his doing so. This agreement was conditional on Brownie Gotts buying the property which, in the event, he did not do. Such agreement as there was between the plaintiff and Alan Gotts was merely that the plaintiff would manage the flats for a weekly sum of £40, plus the cost of labour and materials for any maintenance work and repairs that might arise. The defence alleged that the plaintiff had been fully paid for any work he had carried out or money spent and Alan Gotts contended that he was justified in terminating the agreement on 21st January 1995.

67. The issues thus joined between the parties came for trial before His Hon. Judge Paul Downes in the Norwich County Court on 28th August 1997. The plaintiff was represented by Mr Anthony Allston of counsel and the defendants by Miss F. Toube of counsel. Between counsel the case was conducted, and the judge was invited to approach the issues, solely on the basis that, if he found that the plaintiff's account of the arrangements between himself and Brownie Gotts was correct, the plaintiff would be entitled to the relief he sought but, if on the other hand he rejected the plaintiff's evidence and accepted the evidence of Brownie and Alan Gotts, the plaintiff's claim would be dismissed. The judge dealt with the case on that agreed basis and on 1st September 1997 he gave judgment accepting the plaintiff's evidence that Brownie Gotts had promised him the ground floor of the premises in return for his work, expenditure and management. Discussions then ensued about the form of order which, so far as relevant to this appeal, declared:

"*(a) that the Plaintiff, Keith Yaxley, is entitled to ownership of the ground floor of the property known as 15 Vicarage Road, Cromer, in the County of Norfolk ("the property"), which ground floor is presently divided into flats called flat 1a and flat 1b, for a leasehold interest of 99 years from 29th January 1992.*

(b) that the Plaintiff is entitled to all rentals arising on the letting of the ground floor of the property as from 1st August 1992.

(2) The first named Defendant, Alan Gotts, do within 4 months of the date hereof, execute a lease of the ground floor of the property in favour of the Plaintiff for a term of 99 years, free of ground rent, from 29th January 1992 PROVIDED that if the said Alan Gotts pays the Plaintiff within 4 months of the date hereof, or such further period as the Court may direct, a sum equivalent to the value of such a lease, he, the said Alan Gotts, shall be under no obligation to execute any such lease."

The order also made provision for the determination of the value of the lease in default of agreement and for an account of rents.

68. On 31st October 1997 Alan and Brownie Gotts applied for permission to appeal out of time. They were granted leave by Hutchison L.J. and, by notice of appeal of 20th March 1998, they seek to set aside Judge Downes' order on the grounds that the judge, having found that there was an oral agreement between the plaintiff and Brownie and Alan Gotts that the plaintiff would become the owner of the ground floor in return for refurbishing and thereafter managing the property, such agreement was a contract for the sale or disposition of an interest in land which was void by virtue of Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. The judge was wrong in law to hold that the plaintiff was entitled to ownership of the ground floor by virtue of the doctrine of proprietary estoppel which could not operate to give effect to an agreement rendered void by Section 2 of the 1989 Act. Further the judge ought to have held that the only relief to which the plaintiff was entitled was payment on a quantum meruit basis for his work in refurbishing and managing the property.

69. The ground of appeal gives rise to issues not explored before the judge who was never asked to consider the relationship of the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 to the informal arrangements which had been reached between the plaintiff and Brownie and Alan Gotts. As emerged in the course of the arguments advanced by Mr George Laurence Q.C. who by now appeared with Miss Louise Davies for the Gotts, the issues raised by this new argument cannot be addressed without considering the judge's findings in some detail. I understood Mr Laurence to accept that, unless the judge's findings could be interpreted as including an express or implied informal agreement between the plaintiff and Alan Gotts for the transfer or creation of an interest in the property, the appeal could not succeed. On the other hand Mr Allston for the plaintiff asserted that he had not relied on, and did not now rely on, an agreement with Alan Gotts. His case was, and is, based on proprietary estoppel. If necessary he would also rely on a constructive trust. The question therefore arises whether, on the judge's findings made without the issues now raised in mind, this court can properly decide them. It goes without saying that this court has to scrutinise most carefully an argument or point not taken at the trial and presented for the first time on appeal to ensure that injustice is not caused. The principles the court has to apply were, in my view, clearly stated in ***Connecticut Fire Insurance Co. -v- Kavanagh*** [1892] AC 473 at page 480: "*When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated, would have supported the new plea.*"

70. So I turn to the judge's findings. The judge roundly rejected the evidence of both Alan and Brownie Gotts but in accepting the plaintiff's evidence, no doubt because of the way in which he had been invited by the parties to approach the case, he was content to express his findings in general terms. He held that the plaintiff had asked Brownie Gotts to go into the venture with him but Brownie Gotts had said that he would not go in with him or lend him the money but put forward the proposal that the plaintiff would do the work required throughout the house and thereafter would manage the properties and collect the rents, etc., at his own expense, would convert the ground floor into two flats and when that was done the ground floor would be his "forever" provided he carried out his agreement. He then said:

"As far as Alan Gotts is concerned, I am satisfied that he is not telling the truth about that second agreement for £40 a week to manage the flats and no other involvement. I am also satisfied that he adopted and knew full well about the original agreement made by Brownie Gotts and the Plaintiff. It is quite clear to me that he stood by and allowed the Plaintiff to work on this property at his own expense. I am also satisfied that he, as the owner of the property, paid him the rentals over a number of years, and that he adopted that promise and allowed and encouraged the Plaintiff to carry on in the belief that he owned that ground floor.

The fact that Mr (Alan) Gotts, and I am satisfied that this is the case paid rent over such a long time, allowed him to do the work to the tune of just under £10,000 to those flats at his own expense, amounts to a very significant adoption and encouragement of the original agreement."

71. The judge had been referred to several cases on proprietary estoppel and, in particular, Mr Allston had invited him to approach the case in the manner set out in the well known passage in the judgment of Lord Scarman, then Scarman L.J., in ***Crabb -v- Arun District Council*** [1976] Ch 179 at page 192 where he said: *"In such a case I think it is now well settled law that the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. 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?"*

The judge went on:

"I am satisfied in this case that both these Defendants created in the case of Brownie Gotts, and adopted and then later encouraged by both of them, in particular Alan Gotts, an expectation that he (the plaintiff) would own the ground floor of 15 Vicarage Road, and it was adopted and encouraged by Alan Gotts in particular by paying him rents and allowing him to do considerable work on those premises. He permitted, without objection, the layout of both expenditure and work on the part of the Plaintiff and both, as I say, encouraged by paying rent, the idea that although the property was in Alan Gotts' name for legal reasons, that he (the plaintiff) owned the ground floor.

So I am satisfied on that basis that an equity exists ..."

72. Two questions arise from these findings.

(a) At what stage did Alan Gotts adopt and know full well about the original agreement made between Brownie Gotts and the plaintiff, i.e. that the plaintiff was to have the ground floor after converting it into two flats?

(b) Did the judge intend by the use of the word "adopted" to convey that Alan Gotts had done more than merely stand by and allow the plaintiff to do the work and thereafter carry on as if there was an agreement that he should have the rents, i.e. fulfilling the promise made by the second defendant?

73. Mr Laurence argued that, by using the word "adopted", the judge intended to convey that Alan Gotts had taken over and become a party with the plaintiff to an agreement which superseded the agreement which he had found was made between the plaintiff and Brownie Gotts. On this basis the judge was, by finding that there was a proprietary estoppel, enforcing an agreement which by virtue of Section 2 of the 1989 Act was void. Such an approach was contrary to the expressed policy requirement that any such contract had to be made in writing and had to incorporate all the terms which the parties had expressly agreed in one document. In my view this interpretation of the judge's findings faces considerable difficulty for several reasons:

(i) The judge has found that the plaintiff was unaware that Alan Gotts had purchased the property and was the registered owner until about March 1992. The plaintiff had thus carried out a substantial amount of work in the belief that he was doing it for Brownie Gotts and pursuant to the promise made by Brownie Gotts that after doing the work he would have the ground floor forever.

(ii) The judge made no express finding that Alan Gotts when he acquired the property was aware of the promise made by Brownie Gotts to the plaintiff. However it seems to me there are indications that the judge believed that Alan Gotts was aware of his father's promise to the plaintiff from the start. For instance, he said that Alan Gotts had "allowed him (the plaintiff) to do the work to the tune of just under £10,000 to those flats at his own expense". This was the full amount of the value of the work and materials supplied and so would imply that he had knowledge of the promise made by his father at least in January 1992.

(iii) It seems most unlikely having regard to the relationship between Alan and Brownie Gotts that Alan Gotts would not at the outset have known of the arrangements his father had made with the plaintiff.

(iv) In carrying out the works of conversion of the ground floor into two flats, the plaintiff was not doing the work pursuant to any express or implied agreement with Alan Gotts. He was doing it because he believed that the ground floor would be his when he had done the work.

(v) The judge's use of the phrase "amounts to a very significant adoption of the original agreement" does not clearly indicate that he was finding an express or implied agreement between the plaintiff and Alan Gotts for the creation of an interest for the plaintiff in the ground floor.

74. On this analysis, whilst the plaintiff was working on the top two floors between January and March 1992, he was doing so in the mistaken belief that Brownie Gotts was the owner of the property; Alan Gotts, knowing of this mistaken belief, allowed the plaintiff to continue to carry out the work on his property knowing that his father had represented that the plaintiff would have the ground floor.

75. It would not be possible to imply an agreement between the plaintiff and Alan Gotts from these facts but they would give rise to a claim of proprietary estoppel. When, from April to September 1992 the plaintiff was working on the ground floor, he by then knew that Alan Gotts was the owner but neither Alan nor Brownie Gotts had said that the promise made by Brownie Gotts was withdrawn. There was a continuing representation of which Alan Gotts was aware that if the plaintiff did the work of converting the ground floor it would be his "forever".

76. Again it would be difficult to imply a contract between Alan Gotts and the plaintiff from these facts but they would support a case of proprietary estoppel. It would be unconscionable for Alan Gotts to deny the plaintiff an interest in the property. I have grave misgivings whether this court can be satisfied on the judge's findings that if the facts had been more fully investigated they would have established beyond doubt the essential basis of the new plea.

77. But I do not think that, even if the judge's findings should be interpreted as Mr Laurence suggests, his arguments afford Alan Gotts with a defence to the plaintiff's claim.

78. In passing the 1989 Act, Parliament intended to implement three Reports of the Law Commission. The first two dealt respectively with Deeds and Escrows (Law Com. No. 163) and Formalities for Contracts for Sale of Land (Law Com. No. 164). The two Reports were the result of an examination made by the Commission in accordance with its First Programme of Law Reform of the system of unregistered conveyancing with a view to its modernisation and simplification. Section 2 of the Act was primarily intended to overcome the complexities which had arisen from the doctrine of part-performance and from problems caused by the interpretation of Section 40 of the Law of Property Act 1925.

79. In para. 5.8 of its Working Paper (No. 92) the Commission was concerned to make it clear that, if it did recommend that contracts which were not made in accordance with statutory formality were void, the party would not necessarily be left remediless by the law. After reviewing common law remedies which might be available, the Commission said at page 35: *"In addition to any common law remedies, some significant equitable intervention would not be ruled out. In particular, the doctrines of "promissory estoppel" and "proprietary estoppel" respectively might be applicable: these operate, in essence, where one person (A) has acted to his detriment and another person (B) was responsible for this - under the former doctrine, B will be precluded from resiling from his promise or representation, whilst under the latter doctrine, B will be precluded from denying A's supposed rights in B's property ... It appears to us obviously out of the question to exclude the application of these general judicial doctrines (restitution as well as equitable estoppel) in this particular area of sales etc. of land. Equally, it is thought inappropriate to attempt to spell out and perhaps circumscribe the requirements and limits of these still developing doctrines simply for present purposes or even to consider special extensions or restrictions."*

80. In its Report to Parliament the Commission said at page 16:

"Part performance.

4.13 The Law of Property Act 1925, section 40(2), expressly preserves the doctrine of part performance. The working paper outlined the problems, and particularly the uncertainties, that had developed with respect to part performance. Inherent in the recommendation that contracts should be made in writing is the consequence that part performance would no longer have a role to play in contracts concerning land. Without writing there will be no contract for either party to perform. The next Part contains an explanation of what remedies will be available if the parties have made an agreement which fails as a contract for want of formality. We believe that those remedies are quite adequate to ensure that the recommendation will not itself lead to a multiplicity of unacceptably hard cases, if any at all."

81. In the next part of its Report, Part V: THE POSITION IF FORMALITIES ARE NOT OBSERVED, the Commission repeated the excerpt from its Working Paper quoted above, adding that it had received no comments which had led it to resile from its views on available remedies. In a section headed "Part Performance and Equitable Estoppel" the Commission pointed out the distinction between enforcing a contract by specific performance and the operation of doctrines of estoppel. It cited a passage on equitable estoppel from Snell's "Principles of Equity" 28th Edition 1982, Part VI, Chapter 5, Pages 554-563, which pointed out that in many cases justice could not be done by the mere use of the doctrine by way of defence or by recoupment of expenditure even where this is small. The Commission cited cases in which the court had concluded that the circumstances justified the grant of a lease, a perpetual easement or other perpetual licence. It cited the case of ***Pascoe -v- Turner*** [1979] 1 WLR 431 in which acquiescence in improvements had given rise to an estoppel which called in equity for an outright conveyance. The Commission said:

82. "We see no cause to fear that the recommended repeal and replacement of the present section as to the formalities for contracts for sale or other disposition of land will inhibit the courts in the exercise of the equitable discretion to do justice between parties in individual otherwise hard cases."

83. It is conventionally objected that it is only permissible to use statements in a Report to Parliament for the purpose of identifying the defect in the law which recommendations or proposals are intended to correct. The limitations of such an approach were graphically exposed by Lord Simon of Glaisdale in ***Black-Clawson Ltd. -v- Papierwerke***

A.G. [1975] AC 591 at page 651. He said: *"But the technique of a draft Bill with commentary is so common nowadays in reports to Parliament as to excuse, I hope, some expatiation on the matter. The argument against recourse to such a commentary is that if what Parliament or parliamentarians (or, indeed any promulgators of a written instrument) think is the meaning of what is said is irrelevant, so must be the opinion of any draftsman, including the draftsman of a Bill annexed to a report to Parliament. But I confess that I find this less than conclusive. In essence, drafting, enactment and interpretation are integral parts of the process of translating the volition of the electorate into rules which will bind themselves. If it comes about that the declared meaning of a statutory provision is not what Parliament meant, the system is at fault. Sometimes the fault is merely a reflection of human fallibility. But where the fault arises from a technical refusal to consider relevant material, such refusal requires justification. The commentary on a draft Bill in a report to Parliament is not merely an expression of opinion - even if it were only that, it would be an expression of expert opinion, and I can see no more reason for excluding it than any other relevant matter of expert opinion. But actually it is more: that experts publicly expressed the view that a certain draft would have such-and-such an effect is one of the facts within the shared knowledge of Parliament and citizenry. To refuse to consider such a commentary, when Parliament has legislated on the basis and faith of it, is for the interpreter to fail to put himself in the real position of the promulgator of the instrument before essaying its interpretation. It is refusing to follow what is perhaps the most important clue to meaning. It is perversely neglecting the reality, while chasing the shadows. As Aneurin Bevan said: "Why read the crystal when you can read the book?" Here the book is already open: it is merely a matter of reading on. Certainly, a court of construction cannot be precluded from saying that what the committee thought as to the meaning of its draft was incorrect. But that is one thing: to dismiss, out of hand and for all purposes, an authoritative opinion in the light of which Parliament has legislated is quite another."*

84. In the present case the policy behind the Commission's proposals was as clearly stated as its intention that the proposal should not affect the power of the court to give effect in equity to the principles of proprietary estoppel and constructive trusts. Even if the use to be made of the Commission's Report is to be confined to identifying the defect in the law which the proposals were intended to correct, in a case such as the present it is unrealistic to divorce the defect in the law from the policy adopted to correct it. The Commission's Report makes it clear that in proposing legislation to exclude the uncertainty and complexities introduced into unregistered conveyancing by the doctrine of part performance, it did not intend to affect the availability of the equitable remedies to which it referred.

85. The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it. This was not a provision aimed at prohibiting or outlawing agreements of a specific kind, though it had the effect of making agreements which did not comply with the required formalities void. This by itself is insufficient to raise such a significant public interest that an estoppel would be excluded. The closing words of Section 2(5) "... nothing in this section affects the creation or operation of resulting, implied or constructive trusts" are not to be read as if they merely qualified the terms of Section 2(1). The effect of Section 2(1) is that no contract for the sale or other disposition of land can come into existence if the parties fail to put it into writing; but the provision is not to prevent the creation or operation of equitable interests under resulting implied or constructive trusts, if the circumstances would give rise to them.

86. Quite apart from the views expressed by the Commission, it was well recognised that circumstances in which equity is prepared to draw the inference that a party is entitled to a beneficial interest in land held by another may frequently also give rise to a proprietary estoppel.

87. So in ***Lloyds Bank -v- Rosset*** [1990] 1 AER at page 1111, Lord Bridge said at page 1118: *"The first and fundamental question which must always be resolved is whether, independently of any influence to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel."*

88. In ***Grant -v- Edwards*** [1986] Ch 638 the plaintiff claimed an interest in a house owned by the defendant jointly with his brother. The brother had no interest in the property and the defendant told the plaintiff that her name was not included on the title because it might prejudice matrimonial proceedings pending against her husband. It was their joint intention that she should have an interest in the property and she contributed substantially to the general household expenses. The court held that the plaintiff was entitled to a half share in the property on the ground that equity would infer that the house was held on trust for them both. Sir Nicholas Browne Wilkinson, Vice-Chancellor, said at page 656: *"I suggest that in other cases of this kind, useful guidance may in future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in* ***Gissing -v- Gissing*** *[1971] AC 886. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have*

been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions."

89. There are circumstances in which it is not possible to infer any agreement, arrangement or understanding that the property is to be shared beneficially but in which nevertheless equity has been prepared to hold that the conduct of an owner in allowing a claimant to expend money or act otherwise to his detriment will be precluded from denying that the claimant has a proprietary interest in the property. In such a case it could not be said that to give effect to a proprietary estoppel was contrary to the policy of Section 2(1) of the 1989 Act. Yet it would be a strange policy which denied similar relief to a claimant who had acted on a clear promise or representation that he should have an interest in the property.

90. Moreover claims based on proprietary estoppel are more likely to arise where the claimant has acted after an informal promise has been made to him.

91. I accept that Mr Laurence's argument receives support in "The Law of Restitution", Goff and Jones (5 Ed. 1988) where at page 579 the authors state: *"It would appear from the Report of the Law Commission which led to the enactment of the 1989 Act that the statutory purpose was the attainment of certainty. If the contract is not in writing, it is void. To compel the vendor to convey the property to or to declare that he holds the property as a trustee for the purchaser would appear to frustrate the policy underlying the section. However, the courts will also have to take into account Section 2(5) of the statute which provides that:*

"Nothing in this section shall affect the creation or operation of resulting, implied or constructive trusts."

English courts have never allowed a statutory provision, such as Sections 53 and 54 of the Law of Property Act 1925 to stand in the way of their equitable jurisdiction to grant relief in the case of a plain, clear and deliberate fraud. The case law, arising from a contracting party's attempt to invoke Section 53(1)(b) of the Law of Property Act 1925 is clear authority for the principle that it is fraudulent conduct to repudiate an oral undertaking to hold land on trust for another. When the plea of equitable fraud was successfully invoked, the promisor's oral agreement to hold land on trust for the promisee or a third party was specifically enforced; the promisor was said to be a constructive trustee of the land for the benefit of the promisee or the third party. But in these cases the land has been conveyed to the promisor, and the imposition of a constructive trust did not enforce a void contract; the contract was unenforceable by action. Consequently we reach the tentative conclusion that even if the purchaser can demonstrate that the vendor's conduct was so unconscionable that it would be inequitable for him to rely on the absence of writing, to order the conveyance of or to declare him a trustee of the property is an inappropriate remedy in that it frustrates the policy underlying Section 2(1) of the 1989 Act ... If the courts refused to perform specifically an oral contract between a dishonest vendor and an honest purchaser, they will certainly deny that remedy to a purchaser who cannot prove that his vendor behaved unconscionably."

92. But academic opinion is not unanimous; see Professor Treitel, Law of Contract, 9th Ed. 1995, page 165.

93. For my part I cannot see that there is any reason to qualify the plain words of Section 2(5). They were included to preserve the equitable remedies to which the Commission had referred. I do not think it inherent in a social policy of simplifying conveyancing by requiring the certainty of a written document that unconscionable conduct or equitable fraud should be allowed to prevail.

94. In my view the provision that nothing in Section 2 of the 1989 Act is to affect the creation or operation of resulting, implied or constructive trusts effectively excludes from the operation of the section cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.

95. That, to my mind, is the case here. There was on the judge's findings, as I interpret them, a clear promise made by Brownie Gotts to the plaintiff that he would have a beneficial interest in the ground floor of the premises. That promise was known to Alan Gotts when he acquired the property and he permitted the plaintiff to carry out the whole of the work needed to the property and to convert the ground floor in the belief that he had such an interest. It would be unconscionable to allow either Alan or Brownie Gotts to resile from the representations made by Brownie Gotts and adopted by Alan Gotts. For my part I would hold that the plaintiff established facts on which a court of equity would find that Alan Gotts held the property subject to a constructive trust in favour of the plaintiff for an interest in the ground floor and that that interest should be satisfied by the grant of a 99 year lease. I consider the judge was entitled to reach the same conclusion by finding a proprietary estoppel in favour of the plaintiff. I, too, would dismiss the appeal.

ORDER: Appeal dismissed with costs; permission to appeal to the House of Lords refused; stay pending a petition to the House of Lords.

MR G LAURENCE QC with MS L DAVIES (Instructed by Messrs Bircham & Co, London SW1H 0DY) appeared on behalf of the Appellant
MR A ALLSTON [MR D HAPPE - for judgment] (Instructed by Messrs Hansell Stevenson, Norfolk NR1 4DS) appeared on behalf of the Respondent