

CA on appeal from Chancery Division (HHJ Norris QC) before Maurice Kay LJ; Wilson LJ; Sir Peter Gibson. 28<sup>th</sup> February 2007

**JUDGMENT : Lord Justice Wilson:**

**INTRODUCTION**

1. The claimant, Mr Sutcliffe, is a builder and developer. The first defendant, Mr Lloyd, is an entrepreneur. The second defendant, MGL (Rugby) Ltd ["MGL"], is a company controlled by Mr Lloyd. Between 2001 and 2003 there were extensive dealings between Mr Sutcliffe on the one hand and Mr Lloyd and also (so it was held) MGL on the other in relation to a project to construct a block of flats on the site of a former petrol station in Willes Road, Leamington Spa. The site is owned by MGL. The dealings came to an end after planning and other permissions had been secured but before building had begun. In relation to the project Mr Sutcliffe sued Mr Lloyd and MGL for breach of contract and/or for relief pursuant to the doctrine of proprietary estoppel and/or for an award by way of *quantum meruit*. Pursuant to earlier direction, H.H. Judge Norris Q.C., sitting as a judge of the High Court, Chancery Division, conducted a preliminary hearing of the claim, limited to liability. The *quantum meruit* claim was apparently considered to fall within the ambit of the hearing but it was half-heartedly pressed and was dismissed; nothing now turns on it. The judge also dismissed the claim for breach of contract: he held that, although they had firmly anticipated their entry into a contract in relation to the project, the parties had never reached the stage of doing so. But he upheld the claim for relief pursuant to the doctrine of proprietary estoppel. He concluded that there was an understanding between the parties, which it would be unconscionable for Mr Lloyd and MGL to deny, that Mr Sutcliffe would participate in the profit of the development at Willes Road. By order ultimately dated 28 March 2006 the judge declared: "*that there has arisen an equity in favour of [Mr Sutcliffe], following and as a result of [his] participation in the development of the site at Willes Road, which needs to be satisfied by [MGL] and may upon enquiry need to be satisfied by [Mr Lloyd].*"

Thereupon the judge gave directions for the assembly of evidence for a further hearing at which he might determine the nature and extent of the equity; no doubt they are in abeyance pending determination of this appeal. He ordered MGL to pay 70% of Mr Sutcliffe's costs to date, without prejudice to the latter's right to seek an analogous order against Mr Lloyd once relief was determined.

2. MGL and Mr Lloyd appeal against the judge's upholding of the claim by reference to the doctrine of proprietary estoppel. There are four main grounds of appeal, namely:

- (i) In a written agreement dated 15 January 2002 Mr Sutcliffe and Mr Lloyd provided that the agreement represented "*the entire understanding*" between them in relation to "*matters dealt with*" therein. In that (so the argument runs) the project in relation to Willes Road was "*dealt with*" therein albeit in such a way as to create a contract only in relation to an ancillary aspect of it, the judge was not entitled to collect a constituent of the estoppel from extraneous material which he interpreted as evidence of an understanding in relation to the project.
- (ii) In that the judge held that the property to which Mr Sutcliffe's equity attached was part (namely the profit) of the proceeds of development of the property at Willes Road and in that such property is owned by MGL, it was not open to him to hold that it might need to be satisfied by Mr Lloyd personally.
- (iii) Nor, conversely, was it open to the judge to hold that the equity needed to be satisfied by MGL. Here the argument is that the representations held to give rise to the understanding had been made by Mr Lloyd personally; that Mr Sutcliffe never even pleaded that they should be attributed to MGL; and that the judge was wrong so to attribute them.
- (iv) The judge was also wrong to hold that it would be unconscionable to allow MGL and Mr Lloyd to escape the attachment of legal consequences to what he held to be their representations to Mr Sutcliffe that he would participate in the profit generated by the development of Willes Road. In my view Mr Taylor, who appears on behalf of Mr Lloyd and MGL, has not yet secured permission to argue this ground. Upon surveying Mr Taylor's draft grounds of appeal, the trial judge granted permission to appeal upon certain specific grounds and also, unwisely, "*on any ground which asserts that the legal conclusion reached is not justified by the facts found*". Oblivious of the meaning of the words "*on any ground*", which I believe to be "*on any subsequently specified ground*", Mr Taylor interprets the judge's permission as giving him *carte blanche* to raise, without specification in the grounds of appeal, any challenge to the judge's application of the doctrine of proprietary estoppel to the facts which he found. Indeed, in that the notion of unconscionability is the centre of the doctrine to which all of its strands are, as if by vectors, linked, Mr Taylor has felt emboldened to cast all his remaining points under that single rubric. On balance I think that we should give him permission; waive the need for formal amendment; and address the less insubstantial parts of his argument.

**THE FACTS**

3. Until 1991 Mr Lloyd had been employed by TotalFinaElf UK Ltd ("Total"). Thereafter, as licensee, he operated two petrol stations owned by Total; and, together with his cohabitant, Ms Wakelin-Lloyd (for convenience, "Ms Wakelin"), he operated a third at Dunchurch Road, Rugby. By reason of a change in its policy Total terminated the licences. With an eye to development Mr Lloyd resolved to attempt to purchase from Total the site at Dunchurch Road and the site of another petrol station of which he had not been the licensee but at which Total was closing its operation, namely the site at Willes Road. Through a dormant company, namely Nimega Ltd, of which he and Ms Wakelin owned 51% and 49% respectively, Mr Lloyd made offers to buy the sites. In August 2001 Total granted options to Nimega to purchase Dunchurch Road for £165,000 plus VAT and Willes Road for £120,000 plus VAT. In the light of their history as petrol stations, it was necessary for the sites to be confirmed as

environmentally safe for development; and it was provided that the options had to be exercised within three months of the provision by Total of such environmental confirmation. It was appreciated on both sides that any planning permission for development, particularly if residential, would transform the value of the sites. The judge found that hope value in this regard may have been properly factored into the price of Dunchurch Road but that even Total considered that the price of Willes Road was significantly below market value.

4. Mr Lloyd needed the participation of a builder and developer. Mr Sutcliffe was an experienced developer and project manager; knew relevant professionals and could judge their merits; had credibility with funders; and operated a building company. Following preliminary discussions in 2000, Mr Lloyd and Mr Sutcliffe had further discussions in about August and September 2001. Preferring in this regard the recollection of Mr Sutcliffe to that of Mr Lloyd, both of whom he regarded as honest witnesses, the judge found that by 8 October 2001 the two men had reached a clear, if basic, understanding that
  - (a) by the transfer to him at par of Ms Wakelin's 49% and of 1% out of Mr Lloyd's holding, Mr Sutcliffe would become an equal owner – and then co-director – of Nimega with Mr Lloyd;
  - (b) when possible, Nimega would exercise the options to purchase and develop the sites to maximum advantage;
  - (c) the contribution of Mr Lloyd was to have procured the sites at the prices in the option agreements and the contribution of Mr Sutcliffe would be to provide the project management, design and construction;
  - (d) each of them would invest equal amounts in the venture;
  - (e) the eventual profit would be divided equally between them;
  - (f) the above terms would need to be spelt out in greater detail; and
  - (g) the understanding, together with the greater detail, would need to be given effect in a more formal arrangement and meanwhile it was capable of modification and refinement.
5. Pursuant to the understanding Mr Sutcliffe set to work at once. He instructed environmental specialists to liaise with those already commissioned by Total with a view to procuring the confirmation which would trigger the option period in respect of Willes Road. He approached his usual funders in respect of both proposed developments. And, in particular, he chose Mr Manning, reputed for success in relation to complex projects, to be the architect referable to Willes Road and instructed him, ambitious though it was, to prepare an application for permission for residential development. Mr Manning produced what the judge accepted was an amazing preliminary scheme, namely for as many as nine flats, all with secure parking.
6. At an E.G.M. of Nimega in December 2001 Mr Lloyd was authorised to continue discussions with Mr Sutcliffe regarding the development of both sites.
7. At a meeting on 4 January 2002 Mr Lloyd explained to Mr Sutcliffe that the understanding needed to be modified. The engine behind the modification was primarily concern on the part of Ms Wakelin at being deprived of an interest in the developments. The modification was to relate only to Willes Road. In relation to Dunchurch Road the understanding remained, namely that Nimega, to be duly transferred into the equal ownership of Mr Sutcliffe and Mr Lloyd, would purchase it and develop it on the basis, therefore, that its profit would enure equally to the two men. In relation to Willes Road, however, Nimega would, upon exercise of the option to purchase, transfer it to a new company to be owned and run by Mr Lloyd and Ms Wakelin. It by no means followed, however, that Mr Sutcliffe was to have no continuing role in the development of Willes Road or interest in such profit as the development generated. In the words of Mr Lloyd's notes of the meeting, Mr Sutcliffe "contracts to Willes Road for building as previously agreed" and he and Mr Lloyd "can make further loans to [Nimega] if required from Willes Road profit".
8. Thereupon Nimega was duly transferred into the equal ownership of Mr Sutcliffe and Mr Lloyd.
9. The modification upon which Mr Lloyd had insisted at the meeting on 4 January 2002 was duly carried into a written Shareholders' Agreement, drawn by Mr Lloyd's solicitors, which was executed on 15 January 2002 by Mr Sutcliffe, by Mr Lloyd and by both of them on behalf of Nimega. By numerous uncontroversial provisions, Mr Sutcliffe and Mr Lloyd agreed how they would operate Nimega. They also each agreed to lend it £50,000 prior to completion of the purchase of Dunchurch Road; the intention was apparently that it would borrow the balance of the purchase price and all other costs relating to its proposed development of that site. A business plan was appended to the agreement pursuant to its recital (E), which provided as follows: "*[Nimega] intends to exercise the option on the Dunchurch Road site and develop the property and give effect to the business plan dated 10 January 2002 and which is appended to this agreement ...*"
10. Although there is no doubt that the primary subject-matter of the written agreement was the operation of Nimega, which was no longer intended to retain ownership of Willes Road, and that the primary subject-matter of the appended plan was Nimega's development of Dunchurch Road, there are express and implied references in both documents to Willes Road. Thus
  - (a) recital (F) to the agreement provided: "*[Nimega] will, after the exercise of the Willes Road option, forthwith transfer the Willes Road property to Mr Lloyd and Ms [Wakelin] at the price defined in clause 10 below.*"
  - (b) clause 10 of the agreement provided: "*[Nimega] will, at the request of Mr Lloyd and Ms [Wakelin], exercise the option dated 31 August 2001 to acquire Willes Road and will make all reasonable endeavours to complete the purchase of the land and will immediately forthwith transfer Willes Road to Mr Lloyd and Ms [Wakelin] (or to a company owned by them if they shall so request) for the sum [payable by Nimega to Total for the property], plus all reasonable costs incurred thereon.*"

- (c) paragraph (1) of the plan, entitled "Company purpose and objective", provided: "[Nimega] is formed to facilitate business between [Mr] Sutcliffe ... and [Mr] Lloyd ... The first project being the acquisition and development of the former petrol station at ... Dunchurch Road ... The initial objective and understanding being that [Mr Lloyd] acquired the site and [Mr Sutcliffe] would develop it through his business ... Both parties would charge reasonable expenses, with the net profit being split equally within the framework of [Nimega]. If successful, it is envisaged that the company will continue to undertake similar projects or any other venture considered appropriate and beneficial."
- (d) paragraph (3)(a) of the plan, entitled "Salary", provided: "Beyond the Dunchurch Road ... and Willes Road ... projects, any legitimate work undertaken by a shareholder/director's business or other company should be charged for in the normal manner ..."
11. Clause 17.1 of the agreement, which is the foundation of the first ground of appeal, provided: "This Agreement supersedes any previous agreement between the parties in relation to the matters dealt with herein and represents the entire understanding between the parties in relation thereto."
12. In relation to such changes in the original understanding as were discussed at the meeting on 4 January and wrought by the written agreement dated 15 January 2002, the judge clearly accepted the evidence of Mr Sutcliffe that he was not particularly happy about them; that his solicitor advised him that the agreement did not leave him in a good legal position and that the arrangements for the development of Willes Road should be formalised; and that his response to the solicitor had been that he trusted Mr Lloyd to honour his agreement. The judge later proceeded to make a further important finding, namely to accept as reliable Mr Sutcliffe's evidence that both he and Mr Lloyd had in January 2002 agreed that the changes were not such as to remove Willes Road from the "orbit" or "orbit" of their original understanding and specifically that, as before, Mr Sutcliffe was to have an equal share in the profit of its development. In this regard the only change was that the mechanism for Mr Sutcliffe's receipt of that share could no longer be his equal ownership, through Nimega, of Willes Road itself and would have to be by way of joint venture or included in the terms of his remuneration for the proposed works of construction. In making this finding the judge clearly afforded weight to the inference in paragraph 3(a) of the plan, which Mr Lloyd conceded was properly to be drawn from it, namely that Mr Sutcliffe was to charge for his proposed work at Willes Road not "in the normal manner" but at cost. The judge's finding was that Mr Sutcliffe was to charge only at cost because, as before, he was to share the profit of the development.
13. While Mr Sutcliffe duly lent £50,000 to Nimega in aid of the purchase of Dunchurch Road, Mr Lloyd lent it only £35,000. The size of Nimega's bank loan therefore had to be increased beyond projection. In March 2002 it purchased Dunchurch Road. In the event, however, its proposed development of Dunchurch Road did not proceed. All subsequent activity relevant to the present proceedings surrounded the proposed development at Willes Road (which hereafter I can safely describe as "the development").
14. Mr Lloyd and Ms Wakelin resolved to place ownership of Willes Road into a new company rather than to receive it directly themselves. So in February 2002 MGL was incorporated. The division of its shares is not visible in the papers before us; but Mr Lloyd had not challenged either the judge's conclusion that it has at all material times been under his control or indeed the judge's description of it as "his company". There was an immaterial departure from the provisions of the agreement dated 15 January 2002: for it was agreed that, in lieu of its exercise of the option to purchase Willes Road and subsequent transfer of the property to MGL, Nimega would assign the option to MGL. In January 2002 Total supplied the environmental confirmation, albeit then limited to commercial use, which triggered the period for exercise of the option until 27 April 2002. Thus on 16 April 2002 Nimega transferred the option to MGL, which on 22 April 2002 exercised it. Completion of the purchase took place on 21 June 2002. An important feature is that Mr Sutcliffe helped MGL to pay the purchase price. For he lent £110,000 to Nimega, which enabled it first to repay the loan of £35,000 to Mr Lloyd, who thereupon lent it to MGL, and second to make a direct loan of £30,000 to MGL.
15. Furthermore throughout 2002 Mr Sutcliffe took numerous further steps in aid of the development.
- (a) At times throughout 2002 Mr Sutcliffe, with ultimate success, worked with experts and government agencies to achieve extension of the environmental confirmation to residential use.
- (b) In February 2002 Mr Sutcliffe gave formal instructions to Mr Manning to prepare a planning application in accordance with his scheme. The application was submitted in April 2002 and granted in August 2002.
- (c) In March 2002 Mr Sutcliffe commissioned a valuation of the proposed development for the purposes of applications for funding.
- (d) In June 2002 Mr Sutcliffe, purporting to act on behalf of MGL, selected chartered quantity surveyors and instructed them to estimate the development costs, excluding any profit element; thereafter he liaised with them with a view to the progression of their work.
- (e) Also in June 2002 Mr Sutcliffe reported to the Nimega board about the satisfactory progress of the plans for the development.
- (f) Following the grant of planning permission Mr Sutcliffe instructed consulting engineers to dig trial pits in order to assess the foundations of neighbouring properties and the feasibility of Mr Manning's plan.
- (g) Following a meeting in September 2002 Mr Sutcliffe instructed the consulting engineers and a building regulations specialist to prepare an application for building regulations approval. It was submitted in November 2002 and subsequently granted.

- (h) Also in September 2002 Mr Sutcliffe responded to Mr Lloyd's written request to arrange a valuation for borrowing purposes. Mr Lloyd had written "I am sure that we will sell a number of units "off plan" and suggest that initially we release only three or four units at a starting price of £250,000".
16. In his substantive judgment handed down on 15 December 2005 the judge summarised the effect of the above, and posed a question, as follows: "In summary, by about the end of 2002 Mr Sutcliffe had by the selection, co-ordination and supervision of a professional team coupled with his own input prepared for MGL a residential project at Willes Road of quality and density higher than might have been expected. The site that cost £120,000 had become a project that was estimated to realise residential sales of £2.2 million ... The question is: why had he done all this? Was it simply in the hope that he would be awarded a building contract? Or was it because he thought that there was an understanding or framework in place that he would be rewarded for all this application with a share in the development profits, though the precise contractual arrangements conferring this entitlement had not been put in place?"
17. The judge also surveyed concerns on the part of Mr Sutcliffe in 2002 that his position in relation to the development might become vulnerable; and he charted efforts by Mr Sutcliffe and Mr Lloyd to put their arrangement in relation to it on a formal basis.
- (a) In June 2002 Mr Lloyd was about to make a lengthy visit to the U.S. Mr Sutcliffe expressed concern to him that, in the event of Mr Lloyd's death, he, Mr Sutcliffe, would have difficulty in establishing his rights in respect of the development. Mr Lloyd in effect agreed to humour him. It was agreed, first, that, by an exchange of correspondence, MGL would agree to pay £100,000 to Mr Sutcliffe for his management of the development project. The figure was arbitrary; and for some reason no such correspondence actually passed. It was agreed, second, that, by executing a codicil to his will, Mr Lloyd would bequeath his shares in Nimega to Mr Sutcliffe in the event of his death while abroad. The codicil was duly executed.
- (b) In October 2002 Mr Lloyd informed his solicitor that "[Mr Sutcliffe] and I are looking to formalise our building contractual position between [MGL] and [him] for the development of Willes Road that is simple [and] that will satisfy the banks".
- (c) At about the same time Mr Sutcliffe wrote to his accountant (and in similar terms to his solicitor) that "We ... have a site in Leamington which we are going to do as a joint venture between [me] and ... [MGL]. The basis being that I build it and we split the profit. Is there a simple form of contract for this...?"
- (d) In October 2002 the quantity surveyors prepared written proposals for production to the bank in which, on instructions from Mr Sutcliffe, they asserted "[Mr Sutcliffe] will build at cost ... [and] will not include profit as [he has] a stake in the success of the development". The proposals were sent to Mr Lloyd, who made no objection to this assertion.
- (e) Late in 2002 the solicitors for Mr Sutcliffe and for Mr Lloyd and MGL were at odds as to the mechanism by which Mr Sutcliffe would participate in the profit of the development. But throughout the negotiations there was, so the judge found, a clear recognition even on the part of Mr Lloyd and MGL that Mr Sutcliffe was intended so to participate.
- (f) By letter to Mr Lloyd dated 11 November 2002, his solicitor referred to "the bones of your agreement that MGL will provide the property, [Mr Sutcliffe] will build the flats and the parties will share the profit" and stated that, with funds to be borrowed, MGL will "use these to discharge the ongoing expenses of [Mr Sutcliffe] ... with a final payment to be made by reference to the ultimate profit made by MGL".
- (g) By email sent to Mr Sutcliffe at about the same time, Mr Lloyd stated "[You have done work] on the basis of understanding and agreement [that a contract would be reached] and ... we have to keep [issues between our solicitors] in perspective within this framework ... the agreement with you for building this site is in the end a profit share and you will be reimbursed all costs incurred in relation to building the site ...".
18. Late in 2002 and/or early in 2003 there were also discussions between Mr Lloyd and Mr Sutcliffe in relation to a possible sale of Willes Road to one of various other developers. It was Mr Lloyd's evidence that Mr Sutcliffe seemed keen on the idea, perhaps because he had come to the view that he lacked the resources and drive necessary in order to effect the development himself. The judge found that these discussions were significant for two reasons:
- (a) Mr Sutcliffe would be unlikely to have been interested in a sale unless he understood that, irrespective of performance of any works of development, he was already entitled to a share in the increase in the value of the site; and
- (b) Mr Lloyd would be unlikely to have consulted Mr Sutcliffe about a possible sale unless he accepted that the latter had a financial interest in its outcome. To one agent Mr Lloyd had written "I was pleased to receive the informal proposition ... of £700,000 for the Willes Road site ... once again I have to discuss this with [Mr Sutcliffe]".
19. The breakdown of the relationship between Mr Sutcliffe on the one hand and Mr Lloyd and MGL on the other occurred on 31 March 2003. Four days earlier Mr Lloyd had given Mr Sutcliffe an ultimatum with which, ostensibly through no fault of his own, he was unable to comply. Both sides invited the judge to take the breakdown of the relationship as a "given" and not to adjudicate on the disputed reasons for it, which were accepted not in any event to impact upon the issues raised by the claim. Ironically the first solicitors' letter following the breakdown was a letter written on behalf of MGL in which it was alleged that there had been a contract between MGL and Mr Sutcliffe in relation to the development; and that he had repudiated it and was liable to MGL for losses thereby sustained.

### THE JUDGE'S CONCLUSIONS

20. By reference to the above facts, the judge concluded:
- (a) that from the outset there had been a clear understanding on the basis of which Mr Sutcliffe and Mr Lloyd were prepared to proceed in relation to the development;
  - (b) that the understanding had taken the form of a joint venture;
  - (c) that prior to January 2002 the proposed mechanism of the venture had been their equal ownership of Willes Road through Nimega and that in and after January 2002 it had been changed to a building or other contract by which Mr Sutcliffe would secure an interest in the profit of the development;
  - (d) that both men had conducted themselves on the footing that there was such a joint venture. Of particular relevance in this regard were:
    - (i) Mr Sutcliffe's advance to Nimega in order to facilitate the passage of funds to MGL vital to its purchase of Willes Road;
    - (ii) Mr Sutcliffe's investment of substantial time and effort in compiling the entire development package; and
    - (iii) Mr Lloyd's acceptance of Mr Sutcliffe's interest in the discussions about sale of Willes Road to another developer; and
  - (e) that Mr Sutcliffe had provided a key to the success of the development.
21. The judge then accepted the invitation of Mr Taylor to collect the elements of the doctrine of proprietary estoppel from the formulation in "The Law of Real Property" by Megarry and Wade, 6<sup>th</sup> ed., at para. 13-001, as follows: "An equity arises where –
- (a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property;
  - (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and
  - (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive."
22. Ultimately the judge expressed his overall conclusion as follows: *"In my judgment both parties proceeded from the autumn of 2001 on the understanding that Willes Road was to be developed as a joint venture in the manner I have outlined: from January 2002 this original understanding was modified so that Mr Sutcliffe's participation in the development profit was not to come to him through ownership of shares in the company that owned the development site, but through the award of a contract or contracts which would contain a profit share mechanism. Mr Sutcliffe gave of his skills (imparting key knowledge and applying critical judgement) on the faith of that understanding (which understanding Mr Lloyd shared). It would be unconscionable for Mr Lloyd to take advantage of the fact that the parties did not in the event agree detailed terms as they had contemplated."*

### FIRST GROUND OF APPEAL

23. Mr Lloyd and MGL argue that the effect of clause 17.1 of the written agreement dated 15 January 2002, namely the "entire understanding" clause set out at [11] above, should have been to preclude Mr Sutcliffe from relying on such material extraneous to the agreement as the judge considered to demonstrate the understanding in relation to the development which was the necessary initial constituent of the estoppel.
24. Reminding himself that the clause provided that the agreement represented the entire understanding between the parties only "in relation to the matters dealt with herein", the judge rejected the argument in the following words: *"Willes Road was not 'dealt with' in the shareholders' agreement. Part of the arrangements concerning it (viz. who was to acquire it) were recorded but the shareholders' agreement plainly assumes that there were other (unrecorded) arrangements, which is why the business plan refers to Willes Road as a 'project' and as a project where [Mr Sutcliffe] is to build at cost."*
25. I consider that the judge was right to hold that the arrangements between Mr Sutcliffe and Mr Lloyd in relation to the development were not "dealt with" in the agreement and thus that in this regard clause 17.1 was not engaged. In the Shorter Oxford English Dictionary the words to deal with are defined as to act in regard to, handle, dispose of, handle effectively, grapple with and treat. In the context of an entire understanding clause, the more apposite of those definitions are handle effectively, grapple with and, in particular, dispose of. The agreement, of which the primary subject-matter was the operation of Nimega, did not dispose of the arrangements in relation to the development. There was one provision referable to it, not centrally important, namely that Willes Road would not be retained in Nimega. But in relation to the matters of central importance, namely the arrangements for its development and the destination of the profit, nothing was spelt out. In the business plan there was one reference to it, curiously almost in parenthesis. This was a plan which, as recital [E] (set out at [9] above) makes clear, was appended to the agreement in order to explain the way in which the parties would develop Dunchurch Road. Although paragraph (1) of the plan, set out at [10(c)] above, suggests that at that time the only specific project was indeed for the development at Dunchurch Road, paragraph 3(a) of the plan, set out at [10(d)] above, suggests, almost inconsistently, that there is a second specific project, namely at Willes Road, in relation to which Mr Sutcliffe would, as at Dunchurch Road, charge for his work only at cost. Far from the arrangements in relation to it being there disposed of, the development at Willes Road therefore hangs in the plan like a loose thread. But loose threads can catch the eye: this one entitled the judge to make the significant finding, consistent with a mass of other evidence, that Mr Sutcliffe was to charge only at cost because he was to share the profit of the development.

26. Indeed Mr Taylor cannot have it both ways. Either the understanding in relation to the development was indeed "dealt with" in the agreement (including in the plan appended to it), in which case the terminology of paragraph 3(a) of the plan compels the conclusion that there was a contract, however short on detail, to effect the development and to share the profit equally. Or (which is the preferable view) the understanding in relation to the development was not "dealt with" in the agreement, in which case the "entire understanding" clause is not engaged.
27. Mr Taylor argues that the construction of clause 17.1 which, like the judge, I favour would deprive it of all effect. His argument is invalid: the agreement 'deals with' the arrangements between the parties thereto for the development of Dunchurch Road and for the operation of Nimega and the clause effectively precludes reliance on any extraneous understanding in relation thereto.
28. There is, however, a second reason why the clause is irrelevant. For it can preclude reliance only on such understandings extraneous to it as had arisen prior to its date. Mr Taylor argues that no understanding arising after its date, namely 15 January 2002, emerged in evidence or, in particular, was pleaded. By paragraph 19 of his Particulars of Claim, however, Mr Sutcliffe averred: "*In or about mid 2002 [Mr Sutcliffe] and [Mr Lloyd] agreed that Willes Road would be developed before Dunchurch Road ... Further it was by implication agreed that in so doing the terms applicable thereto were those which had been agreed between [them]. It was made by [Mr Lloyd] both on behalf of Nimega and [MGL].*"

In a later paragraph he claimed that, if all matters thus pleaded did not amount to an agreement, they nevertheless created an estoppel. In my view paragraph 19, drafted of course prior to reliance in the defence on clause 17.1 of the agreement, was an adequate pleading that after 15 January 2002 Mr Lloyd (and indeed MGL: see [34] below) had, with Mr Sutcliffe, reiterated the terms of the understanding, as modified at the meeting on 4 January 2002, about the development. As for evidence that, by words or inference from conduct, the parties had thereafter so reiterated them, there was a mass of it: see [14], [15], [17] and [18] above.

## SECOND GROUND OF APPEAL

29. The first of Mr Taylor's two more technical arguments is that, in that Mr Sutcliffe's equity was held to attach to part of the proceeds of development of a property at Willes Road which Mr Lloyd caused to be vested in a company under his control rather than even jointly in himself, it was not open to the judge to hold that the equity might need to be satisfied by Mr Lloyd personally.
30. In paragraph 2 of a supplementary judgment handed down on 13 March 2006 the judge explained his reasoning as follows: "*... I have held that the original understanding was reached between Mr Sutcliffe and Mr Lloyd but that there was never any suggestion that MGL did not regard itself as also bound by that understanding , and [so] took unconscionable advantage. In these circumstances the equity stands primarily to be satisfied by [MGL] (at whose disposal profits from the project apparently are). But I do not know what has become of the proceeds of the development, and the binding of MGL did not release Mr Lloyd (in the event that he acquires or has acquired directly or indirectly an interest in the profits of the development). In those circumstances I will declare that there has arisen an equity in favour of [Mr Sutcliffe] which needs to be satisfied by [MGL] and may upon inquiry need to be satisfied by [Mr Lloyd].*"
31. It goes without saying that the court cannot flit whimsically between seeking to enforce an equity against the property, when owned by a company, to which it holds it to be attached and seeking to enforce it against the personal property of the company's sole director and spokesperson. In *Cobbe v. Yeoman's Row Management Ltd* [2006] 1 WLR 2964, being a decision of this court given subsequently to the judge's judgment and upon facts which, at their centre, bear striking resemblance to those in the present case, a lien placed upon such a director's personal property in order to secure satisfaction of an equity attaching to the company's property was set aside. But in that case no relief by way of proprietary estoppel had been claimed against the director; the only, different, claim made against her had been dismissed; and the property to which the equity was held to attach was at all material times vested in the company. In the present case, by contrast, the option to purchase Willes Road was held first by Nimega, originally controlled by Mr Lloyd and then owned equally by him and Mr Sutcliffe; and it was then transferred to MGL, a company accepted to be subject to Mr Lloyd's control, only because he and Ms Wakelin preferred not to receive it directly. Mr Sutcliffe had always pleaded that, as well as MGL, Mr Lloyd was himself fixed with the estoppel; and, in that MGL was not incorporated until February 2002, the contributor to the understanding with Mr Sutcliffe prior to that time can in effect only have been Mr Lloyd personally. Even in relation to the subsequent reiteration of the understanding Mr Lloyd never made clear to Mr Sutcliffe that his words and actions were on behalf only of MGL (or, for that matter, on behalf only of himself: see [34] below). In such circumstances the judge was entitled to hold that Mr Lloyd himself was in principle liable to satisfy the equity to the extent, if any, that he had caused or might cause any of the profit of the development to vest in himself and that it was unable to be satisfied by MGL. The unusual wording of the order, namely that the equity "*may upon enquiry need to be satisfied*" by Mr Lloyd, might have collected an initial pencilled question-mark; but on analysis, it is attributable only to the severing of the determination of the claim into two hearings and thus to the judge's inability at this half-way stage conclusively to adjudicate upon the personal liability of Mr Lloyd.
32. For the above reasons I reject Mr Taylor's submission – if he will forgive my recasting it to what I regard as his best advantage – that the judge's order against Mr Lloyd was, at best, a premature attempt to lay the ground for following or tracing the property to which the equity attaches into the hands of a third party, namely Mr Lloyd, who could not otherwise be liable in relation to it. Nor does Mr Taylor begin to make good his proposition that no promise can set an estoppel in train unless, at the time when he makes it, the promisor owns the property

which is the subject of it. An arbitrary limitation of that sort is antithetical to the malleable character of the doctrine; and *In re Basham Decd* [1986] 1 WLR 1498 a proprietary estoppel was held to attach to a deceased stepfather's estate as a result of promises which he had made to his stepdaughter during the last 40 years of his life to the effect that she would inherit his estate, whatever its nature and extent might turn out to be.

### THIRD GROUND OF APPEAL

33. The other of Mr Taylor's more technical arguments is converse to the first; and my negative response to it will already be discernible. The argument is that neither by his *pleading* did Mr Sutcliffe allege, nor by his *evidence* did he justify, the attribution to MGL – as opposed to Mr Lloyd – of any such understanding with Mr Sutcliffe as formed the necessary initial constituent of the estoppel; and, were he successful in securing the setting aside of the relief granted against MGL or even merely in establishing that the ground for it had never properly been pleaded, Mr Taylor would proceed to attack the award of costs against MGL.
34. Paragraph 19 of the Particulars of Claim, set out in [28] above, in my view clearly contains a *pleading* that, albeit limited to the period "in or about mid 2002", Mr Lloyd was acting on behalf of MGL as well as of himself in reiterating the understanding with Mr Sutcliffe. As for the *evidence*, it seems to me that, when, after MGL's exercise of the option to purchase Willes Road in April 2002 and particularly after its acquisition of the property in June 2002, Mr Lloyd, who controlled MGL, reiterated by words and conduct the understanding with Mr Sutcliffe as to the development of MGL's property, it behoved him to make clear to Mr Sutcliffe, if such was the case and bizarre though it would have been, that he was speaking and acting only in a personal capacity and not on behalf of MGL. Unsurprisingly, as Mr Taylor accepts, Mr Lloyd did not give evidence that he had ever so indicated. In such circumstances the judge was correct to infer that Mr Lloyd was so speaking and acting on behalf of MGL as well as of himself. Indeed in the autumn 2002 Mr Lloyd, Mr Sutcliffe and Mr Lloyd's solicitor each expressly identified Mr Sutcliffe's relationship as being with MGL: see [17(b), (c) and (f)] above. Moreover in their Defence Mr Lloyd and MGL positively averred that the steps taken by Mr Sutcliffe in 2002 in aid of the development, in effect as set out at [15] above, were carried out at the request of MGL (rather than of Mr Lloyd) in anticipation of a contract between him and it.

### FOURTH GROUND OF APPEAL

35. Mr Taylor asks us to stand back; to look in the round at the points in [36] below; and to conclude that the judge was wrong to hold that it would be unconscionable to allow his clients to escape the attachment of legal consequences to any such promises as they made to Mr Sutcliffe in relation to the development.
36. Mr Taylor's points are these:
  - (a) The understanding in this case was not between family members but between astute businessmen who anticipated entry into a contract but never achieved it. Although a proprietary estoppel can arise during a period of anticipation of entry into a contract (see the Cobbe case above, in particular per Mummery L.J. at [55] and [56]), equity should be slow to disorientate businessmen by attaching legal consequences to their dealings during a period in relation to which they would reasonably expect otherwise.
  - (b) The promises of Mr Lloyd and (for the purposes of this argument) of MGL were thin and woolly. In particular they lacked one feature, the presence of which is either necessary to the creation of an estoppel or at any rate an important factor in any conclusion that it would be unconscionable to accede to the later stance of the promisors. The absent feature is that Mr Lloyd and MGL never suggested to Mr Sutcliffe that their promises were irrevocable or, in the words of Arden L.J. in *Kinane v. Mackie-Conteh* [2005] EWCA Civ 45, at [29], that they "created an enforceable obligation".
  - (c) Although Mr Sutcliffe acted to his detriment in reliance on their promises, his actions were insubstantial; they cost him little in terms of time or money; they mainly took the form of procuring third party assistance, which, in his absence, Mr Lloyd and MGL could probably have procured through other channels; and, in particular, they amounted only to straightforward, initial steps towards what, pursuant to the understanding, was to be Mr Sutcliffe's substantial contribution, namely the physical development, which in the event he never undertook.
  - (d) In principle Mr Sutcliffe's proper remedy, if any, would have been by way of *quantum meruit*. His claim in that regard was dismissed only because he failed to lay sensible evidence of *quantum* before the judge. It is no function of equity to pile remedy upon remedy.
  - (e) The judge ignored the fact, established in evidence, that the relationship of Mr Lloyd and MGL with Mr Sutcliffe broke down only because of unreasonable delay on the part of the latter in "breaking ground" at Willes Road. The fact should have compelled a conclusion, no doubt expressed in terms of what was conscionable, that Mr Sutcliffe deserved no equitable embrace.
37. Of Mr Taylor's points at [36] above, one is misconceived in law; a second is not open to him to make; and the others have insufficient force to entitle us to reverse the judge's conclusion.
38. The point which is misconceived in law is the suggestion at [36(b)] above to the effect that it is either necessary to the creation of a proprietary estoppel or at any rate an important factor in the weighing of what is unconscionable that the promisor should have made clear that his promise was irrevocable (or enforceable), i.e. unable in law to be revoked (or able in law to be enforced). Equity intervenes to make the promise unable to be revoked (and able to be enforced) not at the time when it is made but only at a significantly later stage, namely in the events both that the promisee should have acted to his detriment in reliance upon it and that the promisor should have sought unconscionably to withdraw from it. Equity does not require the promisor, in making the promise, to misstate the law in this regard. In the words of Robert Walker L.J. in *Gillett v. Holt* [2001] Ch 210, at

229D, "[the trial judge] must, it seems to me, have been exaggerating the degree to which a promise of this sort must be expressly made irrevocable if it is to found an estoppel. As already noted, it is the other party's detrimental reliance on the promise which makes it irrevocable."

The law requires that the promisor should make clear not that the promise *cannot* be revoked but that it *will not* be revoked. In the words of Mummery L.J. in the **Cobbe** case above at [51], "*the crucial element is that the defendant has created or encouraged the belief on the part of the claimant that the defendant will not withdraw from the assurance, arrangement or understanding.*" In that the judgment of this court in the **Cobbe** case postdates the judge's judgment, the "*crucial element*", thus defined, was not clearly drawn to his attention and he did not specifically address it. But, had he been asked to do so, he could have reached only one conclusion, namely that, from October 2001 in the case of Mr Lloyd and from early in 2002 in the case of MGL, each of them so persistently and over so many months, gave assurances, by words and conduct, to Mr Sutcliffe that he was to enjoy a share in the profit of the development, and so protractedly watched him act to his detriment in reliance upon them, that they thereby made clear that their assurances *would not* be revoked. Indeed Mr Taylor does not argue to the contrary: his argument is cast on the absence of a "*could*", not on the absence of a "*would*".

39. The point which is not open to Mr Taylor to make is that at [36(e)] above, namely that the breakdown of the relationship between the parties was attributable to Mr Sutcliffe's unreasonable delay. Mr Taylor does not directly challenge the judge's observations that "*Although I received detailed evidence as to the breakdown of negotiations it was not suggested by either party that which of them was ultimately the cause of the breakdown affected their respective rights. For the purpose of adjudicating upon those rights I was simply to take the breakdown of the negotiations as a 'given'.*"

In his grounds of appeal Mr Taylor did not include a complaint that the judge had failed to find – and then to weigh – the fact that Mr Sutcliffe was guilty of unreasonable delay; and not even under the generic permission unwisely granted by the judge did Mr Taylor secure permission to complain about it. On the basis that there would be no complaint in this court about the judge's findings – or absence of findings – of fact, the five trial bundles were, by agreement, condensed into parts of two bundles. I agree with Mr Clegg, on behalf of Mr Sutcliffe, that it is intolerable that he should be the subject of an attempted ambush on a point of fact which could never reasonably have been considered to be an issue before this court.

40. I turn finally to Mr Taylor's other points. His argument referable to policy at [36(a)] above has some validity. I agree, however, with the comments of Etherton J, who gave the judgment at first instance in the **Cobbe** case, [2005] EWHC 266, at [129], that "*... it will only be in exceptional cases that a claimant will be able to satisfy the requirements of proprietary estoppel in a case of continuing negotiations towards a possible contract ... A "floodgates" argument is no justification for refusing relief ...*"

Mr Taylor's argument at [36(c)] above referable to the extent of the acts done, and in particular not done, by Mr Sutcliffe arises more directly in the second stage of the enquiry at which the judge will identify the minimum equity to which in justice Mr Sutcliffe is entitled. In this regard the judge has already indicated that Mr Sutcliffe "*cannot fairly hope to share in the profit of the development to the same extent as if he had undertaken the building*". Mr Taylor's argument at [36(d)] above that Mr Sutcliffe's proper remedy, if any, was by way of *quantum meruit* must be set beside his denial before the judge that such a remedy was available to Mr Sutcliffe even in principle. In any event, in that the focus of the remedy would have been on the objective value of the work done by Mr Sutcliffe, rather than its subjective value to Mr Lloyd and MGL in terms of the enhancement of their ability to extract profit from the development, it would have failed to reflect the essence of the understanding from which they have unconscionably sought to resile.

## CONCLUSION

41. I would dismiss the appeal.

### Sir Peter Gibson:

42. I agree.

### Lord Justice Maurice Kay :

43. I, too, would dismiss this appeal. I am in complete agreement with the reasoning of Wilson LJ save in one respect. In paragraph 25 of his judgment he concludes that the judge was right to hold that the previous arrangements between Mr Sutcliffe and Mr Lloyd in relation to the development were not "*dealt with*" in the agreement of 15 January 2002 and, accordingly, clause 17.1 of the agreement was not engaged. He then explains this conclusion, drawing support from some, but not all, of the synonyms of "*deal with*" to be found in the Shorter Oxford English Dictionary. It seems to me that the agreement, in particular in recital (F) and clause 10, did "*deal with*" Willes Road in that it provided for its future legal ownership in a way which was at variance with the previous understanding. My analysis is that this did cause the "*entire understanding*" clause to be engaged on 15 January. If the clock had stopped then, I would have found it difficult to hold for the equity upon which Mr Sutcliffe relies. However, for the alternative reason given by Wilson LJ in paragraph 28 of his judgment, I consider that such an equity is firmly established on the evidence of the period thereafter.

Mr David Taylor (instructed by Varley Hibbs LLP, Coventry) appeared on behalf of the Appellants  
Mr Simon Clegg (instructed by Alsters Kelly, Leamington Spa) appeared on behalf of the Respondent.