OVERVIEW OF THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

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ST MARY'S CHAMBERS

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CASE LAW

HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 17

on appeal from: [2005] EWCA Civ 857

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Stack (Appellant)
v.
Dowden (Respondent)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Neuberger of Abbotsbury

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Respondents:
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HOUSE OF LORDS

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LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond, and for the reasons she gives I too would dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. As my noble and learned friend Baroness Hale of Richmond whose speech I have had the privilege of reading in draft indicates, this case is about the property rights of a cohabiting couple in a house which they occupied together as their home until the breakdown of their relationship. They have an obvious interest in the determination of their respective property rights in such a valuable asset. But the issue between them is a matter of general public interest too. It has become an increasingly pressing social problem, as house prices rise and more and more people are living together without getting married or entering into a civil partnership. The situation is complicated by the fact that there is no single, or paradigm, set of circumstances. The only feature which these cases have in common is that the problem has not been solved by legislation. The legislation which enables the court to reallocate beneficial interests in the home and other assets following a divorce does not apply to cohabiting couples. Otherwise the

circumstances which define relationships between cohabiting couples and their property interests are infinitely various.

3. The key to simplifying the law in this area lies in the identification of the correct starting point. Each case will, of course, turn on its own facts. But law can, and should, provide the right framework. Traditionally, English law has always distinguished between legal ownership in land and its beneficial ownership. The trusts under which the land is held will determine the extent of each party's beneficial ownership. Where the parties have dealt with each other at arms length it makes sense to start from the position that there is a resulting trust according to how much each party contributed. Then there is the question whether the trust is truly a constructive trust. This may be helpful in their case but in others may seem to be a distinctly academic exercise, as my noble and learned friend Lord Walker of Gestingthorpe points out. But cohabiting couples are in a different kind of relationship. The place where they live together is their home. Living together is an exercise in give and take, mutual co-operation and compromise. Who pays for what in regard to the home has to be seen in the wider context of their overall relationship. A more practical, down-to-earth, fact-based approach is called for in their case. The framework which the law provides should be simple, and it should be accessible.

4. The cases can be broken down into those where there is a single legal ownership and those where there is joint legal ownership. There must be consistency of approach between these two cases a point to which my noble and learned friend Lord Neuberger of Abbotsbury has drawn our attention. I think that consistency is to be found by deciding where the onus lies if a party wishes to show that the beneficial ownership is different from the legal ownership. I agree with Baroness Hale that this is achieved by taking sole beneficial ownership as the starting point in the first case and by taking joint beneficial ownership as the starting point in the other. In this context joint beneficial ownership means that the shares are presumed to be divided between the beneficial owners equally. So in a case of sole legal ownership the onus is on the party who wishes to show that he has any beneficial interest at all, and if so what that interest is. In a case of joint legal ownership it is on the party who wishes to show that the beneficial interests are divided other than equally.

5. The advantage of this approach is that everyone will know where they stand with regard to the property when they enter into their relationship. Parties are, of course, free to enter into whatever bargain

they wish and, so long as it is clearly expressed and can be proved, the court will give effect to it. But for the rest the state of the legal title will determine the right starting point. The onus is then on the party who contends that the beneficial interests are divided between them otherwise than as the title shows to demonstrate this on the facts.

6. It is worth noting how the solution which Baroness Hale proposes fits in with how the problem would be addressed in Scotland: had the dwelling which the parties purchased in joint names in 1993 been situated in, say, Eyemouth – a few miles north of Berwick-upon-Tweed. The social problems under which cohabiting couples live together in England and Wales are, in general, no different from those that exist in Scotland. Can it be said that the problem would be solved in much the same way both north and south of the border? I think that it can. The law of property in Scotland is, of course, different and so also are Scots family law and the Scots law of obligations. But in the case of cohabiting couples the facts would be examined from a similar starting point.

7. Scots family law does not provide the answer to how the value of the home of a cohabiting couple is to be divided between them when their relationship terminates. Section 27(3) of the Family Law (Scotland) Act 2006 excludes a residence used by cohabitants as the sole or main residence in which they live (or lived) together from the general rule which that section lays down that, subject to any agreement between them to the contrary, money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes or any property acquired out of such money is to be treated as belonging to each cohabitant in equal shares. So the solution in their case must, in the first instance, be found in Scots property law. Except in cases where it can be shown that a title was held in trust although it is ex facie absolute, Scots property law does not distinguish between the legal and the beneficial interests in heritable property.

8. Where the title to a dwelling house is taken in one name only, the presumption is that there is sole ownership in the named proprietor. Where it is taken in joint names those named are common owners and, if the grant does not indicate otherwise, there is a presumption of equality of shares: Kenneth G C Reid, *The Law of Property in Scotland* (1996), para 22. The rights that are thus divided from the outset between those named in the title in the Land Register are rights of ownership. There are no intervening equitable interests. The presumption that the common owners are entitled to share the value of the property equally is

however capable of being displaced by evidence to the contrary. The analysis now moves from the law of property to the law of obligations. This opens the door to evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement during their relationship: *Galloway v Galloway*, 1929 SC 160; *Wissenbruch v Wissenbruch*, 1961 SC 340; *Denvir v Denvir*, 1969 SLT 301. Proof of these matters has been made easier by the abolition of the requirement of proof by writ or oath by section 11 of the Requirements of Writing (Scotland) Act 1995. But cases where this exercise is attempted are rare, in view of the weight that is attached to the state of the title as evidence of the beneficial ownership of the property.

9. More recently resort has been had to restitutionary remedies. In *McKenzie v Nutter*, 2007 SLT (Sh Ct) 17 the title was taken in joint names. The intention of the cohabiting couple was that they would live together as a couple in the property, and that they would both sell their own separate houses and apply the proceeds towards the purchase of their new home. In the event only one party contributed the proceeds of his house towards its purchase and paid the costs associated with maintaining and improving the property. The other party continued to reside in her own house, which due to her bad faith she did not sell. She then insisted on a division and sale of the property. Following the state of the title, the expectation was that when the property was sold the proceeds would be paid to the parties equally. But an order was made that the party who had contributed everything towards its purchase and upkeep was to be entitled to recover the other party's share of the proceeds. As Sheriff Principal Lockhart explained in his judgment, this was on the ground that she had been unjustly enriched because the condition on which the enrichment was given, due to her bad faith, did not materialise.

10. The law of unjust enrichment has also been invoked where the title was taken in the name of one of the co-habitants only and they subsequently separated. It was held that the other co-habitant was entitled to the return of sums which he contributed to the purchase of the house and its refurbishment while the parties were living there: *Satchwell v McIntosh*, 2006 SLT (Sh Ct) 117. The problems which these very unusual cases create are for the most part problems of fact. The law that is to be applied, now that the former restrictions on the mode of proof have been abolished, is relatively uncomplicated.

11. In a case such as this, where the parties had already been living together for about 18 years and had four children when 114 Chatsworth Road was purchased in joint names and payments on the mortgage secured on that property were in effect contributed to by each of them equally, there would have been much to be said for adhering to the presumption of English law that the beneficial interests were divided between them equally. But I do not think that it is possible to ignore the fact that the contributions which they made to the purchase of that property were not equal. The relative extent of those contributions provides the best guide as to where their beneficial interests lay, in the absence of compelling evidence that by the end of their relationship they did indeed intend to share the beneficial interests equally. The evidence does not go that far. On the contrary, while they pooled their resources in the running of the household, in larger matters they maintained their financial independence from each other throughout their relationship.

12. The result might have been different if greater weight could have been given to the inclusion in the transfer of the standard-form receipt clause. But English property law does not permit this, for the reasons explained in *Mortgage Corporation v Shaire* [2001] Ch 743, 753. I think that indirect contributions, such as making improvements which added significant value to the property, or a complete pooling of resources in both time and money so that it did not matter who paid for what during their relationship, ought to be taken into account as well as financial contributions made directly towards the purchase of the property. I would endorse Chadwick LJ's view in *Oxley v Hiscock* [2005] Fam 211, para 69 that regard should be had to the whole course of dealing between them in relation to the property. But the evidence in this case shows that there never was a stage when both parties intended that their beneficial interests in the property should be shared equally. Taking a broad view of the matter, therefore, I agree that the order that the Court of Appeal provides the fairest result that can be achieved in the circumstances.

13. For these reasons, and those given by Baroness Hale with which I am in full agreement, I would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

14. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. Having done so I have set aside as redundant most of the opinion which I had prepared. I cannot usefully add to, still less improve upon, her account of the human and social issues involved, the practicalities of registered conveyancing, and the particular (and in some ways unusual) facts that have led to this appeal reaching your Lordships' House. I am in full agreement with the observation in paragraph 68 of Lady Hale's opinion, which I take to be of central importance to her reasoning and conclusions, that in cases where a house or flat has been registered in the joint names of a married or cohabiting couple (but with no express declaration of trust) there will be a considerable burden on whichever of them asserts that their beneficial interests are unequal, and do not follow the law.

15. I am not sure that I can usefully add anything at all to Lady Hale's opinion. But it may be worth saying something, as a sort of extended footnote, about the theoretical underpinning of this area of the law, and its development since those issues were considered by this House in *Pettitt v Pettitt* [1970] AC 777, *Gissing v Gissing* [1971] AC 886 and *Lloyds Bank v Rosset* [1991] 1 AC 107. Those cases shared three features not present in this case: the dispute was between a husband (or his secured creditor) and a wife; the property in question was in single legal ownership; and the matter relied on by the non-owner claimant was no more than relatively trivial work and expenditure on the property. This last feature made them (as Lord MacDermott LCJ said of the first two in *McFarlane v McFarlane* [1972] N1 59, 66) "not such as to facilitate or encourage a comprehensive statement of this vexed branch of the law."

16. Until the end of the 1960s most of the reported cases are concerned with disputes between married couples, and many of them focus on the issue of whether section 17 of the Married Women's Property Act 1882 was purely procedural, or gave the court a discretion to vary the parties' beneficial interests to accord with the court's view of what was fair. The controversy is well illustrated by *Bedson v Bedson* [1965] 2 QB 666, in which Russell LJ differed from Lord Denning MR. That section 17 is only procedural, and does not confer any wide discretion, was finally and unanimously settled by this House in *Pettitt v*

Pettitt [1970] AC 777. The House was also unanimous in the view that the actual disposal of the appeal (absent a wide discretion under section 17) presented few difficulties. It was almost unanimous in rejecting any general doctrine of "family assets" and in the view that (at least as between husband and wife) the presumption of advancement was no longer appropriate for determining property disputes.

17. There was however little else on which the House agreed, either in *Pettitt v Pettitt* or in *Gissing v Gissing*. Revisiting these cases with hindsight derived from a further thirty-five years or so of reported decisions, we can discern that of all the questions to be asked about "common intention" trusts as they emerge from *Pettitt v Pettitt* and *Gissing v Gissing*, the most crucial is whether the court must find a real bargain between the parties, or whether it can (in the absence of any sufficient evidence as to their real intentions) infer or impute a bargain.

18. In seeking to answer that question we must, I think, focus on the two speeches of Lord Diplock, since these (and especially his later speech in *Gissing v Gissing*) have been hugely influential in the later development of the law. In *Pettitt v Pettitt* [1970] AC 777 Lord Diplock (at p 822E) saw the court's task as being to ascertain the "common intention" of the parties. He saw this as a task to be carried out, not by reference to the old presumptions of advancement and resulting trust, but by examining the facts and imputing an intention to the parties. He saw this as a "familiar legal technique," comparable to finding an implied term in a contract. Lord Diplock used the word "impute" (in various parts of speech) at least eight times in the crucial passage between pp 822H and 825E.

19. *Pettitt v Pettitt* was decided in April 1969. It was followed by *Gissing v Gissing* [1971] AC 886, decided in July 1970. Three of the Appellate Committee—Lord Reid, Lord Morris of Borth-y-Gest and Lord Diplock—had sat on *Pettitt v Pettitt*. In his speech Lord Diplock acknowledged (at p 904E-F) that he had been in a minority in *Pettitt v Pettitt* and that "I must now accept the majority decision that, put in this form at any rate, this is not the law." But then having in *Pettitt v Pettitt* dismissed the resulting trust as old-fashioned and inappropriate, in *Gissing v Gissing* Lord Diplock apparently equated it (at p 905B-C) to a constructive trust:

> "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."

20. Lord Diplock then proceeded to explain the circumstances in which the Court would find a "resulting, implied or constructive trust", and in particular when the Court would "infer [the parties'] common intention from their conduct" ([1971] AC 886 at p 906B). The very important passage which follows (pp 906B-910A) uses the word "infer" (in various parts of speech) at least 23 times. But for the substitution of the word "infer" for "impute" the substance of the reasoning is, it seems to me, essentially the same (although worked out in a good deal more detail) as Lord Diplock's reasoning in *Pettitt v Pettitt,* when he was in the minority.

21. Since then Lord Diplock's speech in *Gissing v Gissing* has dominated this area of the law. It was seized on with particular enthusiasm by Lord Denning MR (see for instance his observations in *Eves v Eves* [1975] 1 WLR 1338, 1341: "Lord Diplock brought it into the world and we have nourished it"). Other judges have been less enthusiastic, being oppressed by the "air of unreality about the whole exercise" (Griffiths LJ in *Bernard v Josephs* [1982] Ch 391, 404). The whole problem is very helpfully discussed in chapter 10 of Gray & Gray, *Elements of Land Law,* 4th ed (2005), especially (as to the lack of reality of the bargain requirement) paras 10.92 to 10.99. Your Lordships may think that only a judge of Lord Diplock's stature could have achieved such a remarkable reversal of the tidal flow of authority as has followed on his speech in *Gissing v Gissing*. But it might have been better for the long-term development of the law if this House's rejection of "imputation" in *Pettitt v Pettitt* had been openly departed from (under the statement as to judicial precedent made by the Lord Chancellor in 1966) rather than being circumvented by the rather ambiguous (and perhaps deliberately ambiguous) language of "inference."

22. In *Pettitt* [1970] AC 777 there was a clear majority as to the need for an actual bargain, however imprecisely expressed: see Lord Morris

of Borth-y-Gest at 804E-G, Lord Hodson at 810E-F and Lord Upjohn at 817G. Only Lord Reid, as I understand his speech (at 795D and 796D) showed some sympathy for Lord Diplock's views on "imputation." In *Gissing* [1971] AC 886 Lord Reid's opinion was again inconclusive, as I understand it but, paradoxically, Lord Reid (at 897F-G) seems to have found "imputation" a more readily acceptable solution than "inference" (which is the recurring theme of Lord Diplock's speech). Lord Morris (at 898C) and Viscount Dilhorne (at 900E-F) considered that the Court could not construct a bargain for the parties if they had not made one. Lord Pearson (at 902G-H), like Lord Reid, favoured imputation, apparently equating it with inference.

23. Lord Diplock's insouciant approach to legal taxonomy in the passage which I have quoted above has attracted a good deal of attention from legal scholars, but relatively little judicial comment. In *Gissing* itself Lord Reid (at 896F) Lord Morris (at 898B) and Viscount Dilhorne (at 901A) simply repeated the formula which appears in section 53(2) of the Law of Property Act 1925, "resulting, implied or constructive trust." Lord Pearson (at 902B) specified a resulting trust as the correct basis. (so had Lord Upjohn in *Pettitt* [1970] AC 777, with great emphasis and at some length, at 813G-815G; he had also referred to estoppel, but only to exclude it). In *Pettitt* Lord Reid had made a passing reference to unjust enrichment (at 795G-H), but found it unhelpful. The law of Scotland has developed the principle of unjust enrichment in this area, as my noble and learned friend Lord Hope of Craighead has explained. So have some Commonwealth jurisdictions. But neither side urged it on your Lordships, and I think it would be unwise for the House to make such a significant change of course in advance of the Law Commission's proposals. A significant judicial comment on the importance of taxonomy in this area was made by Peter Gibson LJ in *Drake v Whipp* [1996] 1 FLR 826, a case which was discussed at length by Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, 242-245. But before coming to that I must refer to the third of the trio of cases in this House, *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

24. In *Lloyds Bank plc v Rosset* [1991] 1 AC 107 the Appellate Committee (no doubt conscious of the widely differing views expressed in *Pettitt* and *Gissing*) concurred in a single speech by the presiding Law Lord, Lord Bridge of Harwich. The wife claimed (against a bank which was her separated husband's secured creditor) an interest in the matrimonial home (which had been purchased ten years after the marriage and was held in the husband's sole name). She relied on a common understanding or intention arising out of her own efforts in arranging for extensive renovation works and herself carrying out some

redecoration (the judge's findings on this are at [1991] 1 AC 107, 129F-131B). At first instance she succeeded on the issue of beneficial interest but failed on a conveyancing issue. She won her appeal ([1989] Ch 350; Purchas and Nicholls LJJ, Mustill LJ dissenting on a conveyancing issue). The House of Lords allowed the bank's appeal on the short ground expressed by Lord Bridge (at 131F):

> "The judge's view that some of this work was work 'upon which she could not reasonably have been expected to embark unless she was to have an interest in the house' seems to me, with respect, quite untenable."

25. Lord Bridge then asked himself whether it was worthwhile to add any general remarks by way of illumination of the law. He limited himself to drawing attention to one "critical distinction." If (at 132E-G) there is to be a finding of an actual "agreement, arrangement, or understanding" between the parties it must

> "be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been."

Lord Bridge continued (132H-133B):

> "In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as to the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

In concurring in this passage the House was unanimously, if unostentiously, agreeing that a “common intention” trust could be inferred even when there was no evidence of an actual agreement. Apart from two bare references to “a constructive trust or a proprietary estoppel” (at 132G and 133F) Lord Bridge did not refer to the elaborate arguments of counsel (at 110G-125C) addressed to him as to the varieties and interaction of these two concepts.

26. Lord Bridge’s extreme doubt “whether anything less will do” was certainly consistent with many first-instance and Court of Appeal decisions, but I respectfully doubt whether it took full account of the views (conflicting though they were) expressed in *Gissing* (see especially Lord Reid [1971] AC 886 at 896G – 897B and Lord Diplock at 909 D-H). It has attracted some trenchant criticism from scholars as potentially productive of injustice (see Gray & Gray, op cit, paras 10.132 to 10.137, the last paragraph being headed “A More Optimistic Future”). Whether or not Lord Bridge’s observation was justified in 1990, in my opinion the law has moved on, and your Lordships should move it a little more in the same direction, while bearing in mind that the Law Commission may soon come forward with proposals which, if enacted by Parliament, may recast the law in this area.

27. Any new legislation is likely to give the Court new statutory discretions comparable to (but probably less far-reaching than) those exercisable under the Matrimonial Causes Act 1973 (as amended). The law would then become more flexible (and so better able to avoid injustice) but at the price of uncertainty and a possible increase in the volume of litigation costs falling on parties with limited resources. But already there is a good deal of uncertainty and the possibility of high litigation costs, as this regrettable case shows. Lady Hale’s opinion points the way to making the outcome of this type of case more predictable, so that parties can be advised with more confidence as to appropriate terms of settlement. Of course there will always remain the risk that ill-feeling between a separated couple will cloud the view of one or both of them as to where their best interests lie.

28. On the assumption that there is not to be some dramatic extension of the law of unjust enrichment, it is reasonably clear that the correct approach to this area lies not in contract law but in looking for a beneficial interest under a trust of some sort (or, possibly, an equity of some sort under a form of proprietary estoppel—but I shall put that on one side for a moment). Whether the trust should be regarded as a resulting trust or a constructive trust may seem a distinctly academic

enquiry, especially as there is so much debate as to the true nature of a resulting trust (for a recent summary of the debate see Underhill and Hayton, *Law Relating to Trusts and Trustees*, 17th ed (2007) paras 3.3 to 3.5). But it is of some importance in understanding the significance of direct or indirect contributions to the acquisition of the property in question.

29. In *Drake v Whipp* [1996] 1 FLR 826, 827 (a cohabitation case in which the property was in the man's sole name, though both had made direct contributions both to the purchase of a barn and to its expensive conversion into a home) Peter Gibson LJ observed:

> "A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention."

30. *Drake v Whipp* was an odd case because Mrs Drake's argument was that there was no common intention and that the judge should simply apply the presumption as to a resulting trust by reference to the barn's initial purchase costs (of which she paid just over 40%) and not by reference to the total costs of purchase and conversion (of which her share was just under 20%). But the judge found, at p 829, that there was a common intention:

> "To purchase the property and carry out a conversion in accordance with plans earlier approved and that each should contribute, according to his or her ability, to the ultimate cost."

He treated this as giving rise to a constructive trust in the proportions of about 80% for Mr Whipp and 20% for Mrs Drake.

31. Peter Gibson LJ (with whom Hirst LJ and Forbes J agreed) said, at p 830, that it would

> ". . . be artificial in the extreme to proceed to decide this appeal on the false footing that the parties' shares are to be determined in accordance with the law on resulting trusts."

On the facts of that case, applying the doctrine of a resulting trust in the way that Mrs Drake proposed would have been doubly artificial, as it would have unnaturally split the project into two elements, only one of which was to be taken into account in the resulting trust exercise; and it would have ignored the parties' actual common intention for the project as a whole. Their common intention, as found by the judge, was for beneficial ownership in shares corresponding to their overall contributions. In a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the names of one or two legal owners) the resulting trust should not in my opinion operate as a legal presumption, although it may (in an updated form which takes account of all significant contributions, direct or indirect, in cash or in kind) happen to be reflected in the parties' common intention.

32. I would (at the risk of confusion) add one qualification. The doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and a commercial partnership. The well-known Australian case of *Muschinski v Dodds* (1985) 160 CLR 583 is an example. The High Court of Australia differed in their reasoning, but I find the approach of Deane J persuasive:

> "That property was acquired, in pursuance of the consensual arrangement between the parties, to be held and developed in accordance with that arrangement. The contributions which each party is entitled to have repaid to her or him were made for, or in connexion with, its purchase or development. The collapse of the commercial venture and the failure of the personal relationship jointly combined to lead to a situation in which each party is entitled to insist upon realization of the asset, repayment of her or his contribution and distribution of any surplus."

However, Deane J described this as a constructive trust, and he had earlier (at p 612) treated a resulting trust as excluded by evidence of the parties' common purpose (building and running an arts and crafts centre), even though that purpose had failed. Professor Birks would have treated this as a resulting trust (see Birks and Rose eds, Restitution and Equity Vol 1 (2000) pp 275-279). Other scholars disagree. *Drake v Whipp* [1996] 1 FLR 826 might have been analysed in this way so as to produce the same result, but only if the whole of each party's contribution had been taken into account in applying the resulting trust.

33. In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case. I agree with Lady Hale that this is, on its facts, an exceptional case.

34. In those cases (it is to be hoped, a diminishing number) in which such an examination is required the Court should in my opinion take a broad view of what contributions are to be taken into account. In (*Gissing v Gissing* [1971] AC 886, 909G, Lord Diplock referred to an adjustment of expenditure "referable to the acquisition of the house." "Referable" is a word of wide and uncertain meaning. It would not assist the development of the law to go back to the sort of difficulties that arose in connection with the doctrine of part performance, where the act of part performance relied on had to be "uniquely referable" to a contract of the sort alleged (see *Steadman v Steadman* [1976] AC 536). Now that almost all houses and flats are bought with mortgage finance, and the average period of ownership of a residence is a great deal shorter than the contractual term of the mortgage secured on it, the process of buying a house does very often continue, in a real sense, throughout the period of its ownership. The law should recognise that by taking a wide view of what is capable of counting as a contribution towards the acquisition of a residence, while remaining sceptical of the value of alleged improvements that are really insignificant, or elaborate arguments (suggestive of creative accounting) as to how the family finances were arranged.

35. That is in my view the way in which the law can be seen developing through a considerable number of decisions of the Court of Appeal, of which I would single out *Grant v Edwards* [1986] Ch 638 (before *Lloyds Bank plc v Rosset*) and then *Stokes v Anderson* [1991] 1 FLR 391, *Midland Bank plc v Cooke* [1995] 2 All ER 562 and *Oxley v Hiscock* [2005] Fam 211. In the last-mentioned case Chadwick LJ

summarised the law as follows (para 69, Lord Bridge's "second category" cases):

> "But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

36. That summary was directed at cases where there is a single legal owner. In relation to such cases the summary, with its wide reference to "the whole course of dealing between them in relation to the property", is in my opinion a correct statement of the law, subject to the qualifications in paras 61 ff of Lady Hale's opinion. I would only add that Chadwick LJ did not refer to contributions in kind in the form of manual labour on improvements, possibly because that was not an issue in that case. For reasons already mentioned, I would include contributions in kind by way of manual labour, provided that they are significant.

37. I add a brief comment as to proprietary estoppel. In paragraphs 70 and 71 of his judgment in *Oxley v Hiscock* Chadwick LJ considered the conceptual basis of the developing law in this area, and briefly discussed proprietary estoppel, a suggestion first put forward by Sir Nicolas Browne-Wilkinson V-C in *Grant v Edwards* [1986] Ch 638, 656. I have myself given some encouragement to this approach (*Yaxley v Gotts* [2000] Ch 162,177) but I have to say that I am now rather less enthusiastic about the notion that proprietary estoppel and "common interest" constructive trusts can or should be completely assimilated. Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the "true" owner. The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice (*Crabb v Arun District Council* [1976] Ch 179, 198), which may

sometimes lead to no more than a monetary award. A "common intention" constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests.

38. Your Lordships have in this case had the benefit of well-focused written and oral submissions from counsel, and helpful citation of relevant academic material. In addition to those mentioned by Lady Hale I have found a good deal of food for thought in Chapter 10 (the divisions of assets on the breakdown of intimate relationships) of Craig Rotherham, Proprietary Remedies in Context (2002).

39. For the reasons given by Lady Hale, to which the above reasons are merely a supplement, I would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

40. The issue before us is the effect of a conveyance into the joint names of a cohabiting couple, but without an explicit declaration of their respective beneficial interests, of a dwelling house which was to become their home. This is, so far as I am aware, the first time that this issue has come before the House, whether the couple be married or, as in this case, unmarried. The principles of law are the same, whether or not the couple are married, although the inferences to be drawn from their conduct may be different: *Bernard v Josephs* [1982] Ch 391, *per* Griffiths LJ at 402.

How does this problem come about?

41. It may be that, in practice, this is a temporary and transitional problem. It has come about because of developments over the last few decades which would not have been foreseen when the applicable principles and presumptions were first devised. The first development is, of course, the huge expansion in home ownership which has taken place since the Second World War and was given a further boost by the 'right to buy' legislation of the 1980s. Coupled with this has been continuing house price inflation, albeit with occasional interruptions such as

occurred at the end of the 1980s. This has meant that it is almost always more advantageous for someone who has contributed to the acquisition of the home to claim a share in its ownership rather than the return of the money contributed, even with interest.

42. Another development has been the recognition in the courts that, to put it at its lowest, the interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men. To put it at its highest, an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between husband and wife or cohabitant and cohabitant. This recognition developed in a series of cases between separating spouses, beginning with *In re Rogers' Question* [1948] 1 All ER 328, *Newgrosh v Newgrosh* (unreported) June 28, 1950, *Jones v Maynard* [1951] Ch 572 and *Rimmer v Rimmer* [1953] 1 QB 63. There was a period during which it was thought that the problem might be solved by resort to the power contained in section 17 of the Married Women's Property Act 1882, in disputes between husband and wife as to the title to or possession of property, to make such order "as it thinks fit". The high-water mark of this approach was *Hine v Hine* [1962] 1 WLR 1124, at 1127-8, in which Lord Denning MR held that this discretion "transcends all rights, legal or equitable". That section 17 conferred any discretion to interfere with established titles was firmly rejected by this House in *Pettitt v Pettitt* [1970] AC 777. Nevertheless, the opinions in that case and in *Gissing v Gissing* [1971] AC 886 contain vivid illustrations of how difficult it is to apply simple assumptions to the complicated, inter-dependent and often-changing arrangements made between married couples. As Lord Reid famously put it in *Gissing v Gissing*, at p 897A, "It cannot surely depend on who signs which cheques".

43. As between married couples, the problem has been addressed (if not solved) by the comprehensive redistributive powers in the Matrimonial Causes Act 1973, if the couple divorce, and in the Inheritance (Provision for Family and Dependants) Act 1975, if one of them dies. The question of who owns what takes second place to the statutory criteria and the approach to those criteria established in cases such as *White v White* [2001] 1 AC 596. The 1975 Act also gives some more limited help to the survivor of an unmarried cohabiting couple. (Neither, of course, is of any assistance in third party challenges, for example from other relatives.)

44. *Inter vivos* disputes between unmarried cohabiting couples are still governed by the ordinary law. These disputes have become increasingly visible in recent years as more and more couples live together without marrying. The full picture has recently been painted by the Law Commission in *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* (2006) Consultation Paper No 179, Part 2, and its *Overview* paper, paras 2.3 to 2.11. For example, the 2001 Census recorded over 10 million married couples in England and Wales, with over 7.5 million dependent children; but it also recorded over two million cohabiting couples, with over one and a quarter million children dependent upon them. This was a 67% increase in cohabitation over the previous 10 years and a doubling of the numbers of such households with dependent children. The Government Actuaries Department predicts that the proportion of couples cohabiting will continue to grow, from the present one in six of all couples to one in four by 2031.

45. Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage – in 2003, 78.7% of spouses gave identical addresses before marriage, and the figures are even higher for second marriages. So many couples are cohabiting with a view to marriage at some later date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000–27, University of Essex. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves "as good as married" anyway (Law Commission, *op cit*, Part 2, para 2.45). There is evidence of a wide-spread myth of the "common law marriage" in which unmarried couples acquire the same rights as married after a period of cohabitation (A Barlow *et al*, "Just a Piece of Paper? Marriage and Cohabitation", in A Park *et al* (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001), pp 29-57). There is also evidence that "the legal implications of marriage are a long way down the list of most couples' considerations when deciding whether to marry" (Law Commission, *op cit*, Part 5, para 5.10).

46. The history of attempts at law reform is another illustration of the complexity of the problem. Under item 1 of its 8th Programme of Law Reform (2001, Law Com No 274), the Law Commission set out to review "the law as it relates to the property rights of those who share a home" (the Commission had in fact been working on the problem for some time). This therefore covered "a broad range of people, including friends and relatives who share a home as well as unmarried couples and married couples (other than on the breakdown of the marriage)". It commented that "It is widely accepted that the present law is unduly complex, arbitrary and uncertain in its application. It is ill-suited to determining the property rights of those who, because of the informal nature of their relationship, may not have considered their respective entitlements". In 2002, however, the Commission published *Sharing Homes, A Discussion Paper* (2002, Law Com No 278). Unlike most Law Commission publications, this did not contain even provisional, let alone final, proposals for reform. Its principal conclusion was that "It is quite simply not possible to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered" (para 1.31). While this conclusion is not surprising, its importance for us is that the evolution of the law of property to take account of changing social and economic circumstances will have to come from the courts rather than Parliament.

47. It may be otherwise with the law of personal relationships. The Law Commission's 9th Programme of Law Reform (2005, Law Com No 293) announced, at Part 3, para 306, a project focussing "on the financial hardship suffered by cohabitants or their children on the termination of the relationship by breakdown or death". Thus it was considering whether defined relationships might give rise to discretionary remedies to make specific capital or income provision on separation or death. Provisional proposals, not unlike those which have been enacted in the Family Law (Scotland) Act 2006, were made in Consultation Paper No 179 (referred to in para 44 above) and the Commission intends to publish its final report by August 2007. As the Commission undertook this project at the invitation of the Government, there may be a real chance that its proposals will be implemented. But, unlike most Law Commission reports, this one will not contain a draft Bill. Implementation will therefore depend, not only upon whether its proposals find favour with Government, but also on whether the resources can be found to translate them into workable legislative form.

48. It is fair to assume, therefore, that the questions with which the courts are confronted in these cases will continue to be with us for some time to come. Nor will the Commission's proposals provide a solution to the precise question which arises in this case – the effect of a conveyance into joint names without express declaration of the beneficial interests. However, there is some reason to hope that, just as this problem may have arisen because of changes in conveyancing practice over recent decades, it may eventually be resolved in the same way.

49. In the olden days, before registration of title on certain events, including a conveyance on sale, became compulsory all over England and Wales, conveyances of unregistered land into joint names would in practice declare the purchasers' beneficial as well as their legal interests. No-one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel: see *Goodman v Gallant* [1986] Fam 106. That case also establishes that severance of a beneficial joint tenancy results in a beneficial tenancy in common in equal shares. Lord Denning's attempt in *Hine v Hine* [1962] 1 WLR 1124, to use section 17 of the Married Women's Property Act 1882 to interfere even with express declarations of trust was firmly rejected by this House in *Pettitt v Pettitt* [1970] AC 777; his suggestion, in *Bedson v Bedson* [1965] 2 QB 666, that severance might not automatically lead to a tenancy in common in equal shares was rightly rejected in *Goodman v Gallant*. The effect of such a conveyance is clear, irrespective of why the property was conveyed into joint names and of the parties' later dealings in relation to it.

50. The question with which we are concerned has become apparent with the spread of registration of title. The formalities required for the transfer of registered land were designed to meet the concerns of the Land Registry rather than the parties. The Land Registry is not concerned with the equities. It is concerned with whether the registered proprietor or proprietors can give a good title to a later transferee. This is entirely consistent with the simplification of conveyancing in the 1925 property legislation, which was designed to allow the legal owners of land to pass a good title to bona fide purchasers for value without notice of the equities existing behind the legal title. But it meant that the form of transfer prescribed by the Land Registry did not require, or even give an obvious opportunity to, the transferees to state their beneficial interests as well as their legal title. When this house was bought in 1993, all that the form required was all that the Land Registry needed to know. This was whether the survivor of joint proprietors was able to give a valid receipt for the capital moneys received on sale (see Form 19(JP)

prescribed under rules 98, 109 or 115 of the Land Registration Rules 1925 (SR & O 1925/1093)) The version of this form in use from 1995 to 1998 did not even require this; indeed, it did not require execution by the transferee(s) at all but only by the transferor(s).

51. The argument that declaring that the survivor "can give a valid receipt for capital money arising on a disposition of the land" in itself amounts to an express declaration of a beneficial joint tenancy was rightly rejected by the Court of Appeal in *Harwood v Harwood* [1991] 2 FLR 274 and again in *Huntingford v Hobbs* [1993] 1 FLR 736; see also *Mortgage Corporation v Shaire* [2001] Ch 743. However appealing the proposition might at first sight appear, choosing "can" rather than "cannot" on the form is consistent with other intentions. The transferees may hold on trust for a third person or they may intend that, while the survivor can give a good title to a third party without appointing a new trustee, the capital moneys received should be subject to different trusts. Whether the declaration (one way or the other) is some indication of what the parties did intend is another matter, to which I must return.

52. The Land Registry form has since changed. Form TR1, in use from 1 April 1998, provides a box for the transferees to declare whether they are to hold the property on trust for themselves as joint tenants, or on trust for themselves as tenants in common in equal shares, or on some other trusts which are inserted on the form. If this is invariably complied with, the problem confronting us here will eventually disappear. Unfortunately, however, the transfer will be valid whether or not this part of the form is completed. The form itself states that the transferees are only required to execute it "if the transfer contains Transferee's covenants or declarations or contains an application by the Transferee (eg for a restriction)". So there may still be transfers of registered land into joint names in which there is no express declaration of the beneficial interests. However desirable such a declaration may be, it is unrealistic, in the consumer context, to expect that it will be executed independently of the forms required to acquire the legal estate. Not only do solicitors and licensed conveyancers compete on price, but more and more people are emboldened to do their own conveyancing. The Land Registry form which has been prescribed since 1998 is to be applauded. If its completion and execution by or on behalf of all joint proprietors were mandatory, the problem we now face would disappear. However, the form might then include an option for those who deliberately preferred not to commit themselves as to the beneficial interests at the outset and to rely on the principles discussed below.

The applicable legal principles

53. I say all this, partly to urge the Land Registry further to review its practice, but mainly to illuminate the factual context in which transfers such as the one with which we are concerned were executed. In what circumstances should it be expected that, independently of the information required by the Land Registry forms, joint transferees would execute a declaration of trust? Is it when they intend that the beneficial interests should be the same as the legal interests or when they intend that they should be different?

54. At first blush, the answer appears obvious. It should only be expected that joint transferees would have spelt out their beneficial interests when they intended them to be different from their legal interests. Otherwise, it should be assumed that equity follows the law and that the beneficial interests reflect the legal interests in the property. I do not think that this proposition is controversial, even in old fashioned unregistered conveyancing. It has even more force in registered conveyancing in the consumer context.

55. Of course, it is something of an over-simplification. All joint legal owners must hold the land on trust (before the Trusts of Land and Appointment of Trustees Act 1996, there was a debate about whether or not this was always a trust for sale, but that is another matter). Section 53(1)(b) of the Law of Property Act 1925 requires that a declaration of trust respecting any land or any interest therein be manifested and proved by signed writing; but section 53(2) provides that this "does not affect the creation or operation of resulting, implied or constructive trusts". The question is, therefore, what are the trusts to be deduced in the circumstances?

56. Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

57. While there is no case in this House establishing this proposition in the consumer context, this is "Situation A" referred to by Lord

Brightman in *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] 1 AC 549, at 559:

> "The lessees at the inception of the lease hold the beneficial interest therein as joint tenants in equity. This will be the case if there are no circumstances which dictate to the contrary."

The issue in that case was whether there were only three quite narrowly defined situations in which the contrary could be found or whether there were other circumstances which could lead to a contrary conclusion. Their Lordships first observed that it was improbable that joint tenancy in equity was intended where joint tenants in law held commercial premises for their separate business purposes. This is a reminder that the parties may not intend survivorship even if they do intend that their shares shall be equal. In many commercial contexts, and no doubt some domestic ones, it will be highly unlikely that the parties intend survivorship with its tontine "winner takes all" effect. Their Lordships went on to point out that there was no fundamental distinction between buying a lease at a premium with a token rent and taking a lease at a rack rent with no premium. In the latter case the rent is equivalent to the purchase money. This is a reminder that property is often acquired over time, so that payment of mortgage instalments is the equivalent of payment of the purchase price. Finally, their Lordships identified, at p 561, the features of the case before them which appeared to them "to point unmistakably towards a tenancy in common in equity, and furthermore towards a tenancy in common in unequal shares". Amongst these were not only that the parties had paid the refundable deposit, stamp duty, survey fees, rent and service charges in unequal shares, but also that those shares were proportionate to the actual square footage which each of them occupied.

58. The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a prime facie case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated, at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.

59. The question is, how, if at all, is the contrary to be proved? Is the starting point the presumption of resulting trust, under which shares are held in proportion to the parties' financial contributions to the acquisition of the property, unless the contributor or contributors can be shown to have had a contrary intention? Or is it that the contrary can be proved by looking at all the relevant circumstances in order to discern the parties' common intention?

60. The presumption of resulting trust is not a rule of law. According to Lord Diplock in *Pettitt v Pettitt* [1970] AC 777, at 823H, the equitable presumptions of intention are "no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of any evidence to the contrary". Equity, being concerned with commercial realities, presumed against gifts and other windfalls (such as survivorship). But even equity was prepared to presume a gift where the recipient was the provider's wife or child. These days, the importance to be attached to who paid for what in a domestic context may be very different from its importance in other contexts or long ago. As K Gray and S F Gray, in *Elements of Land Law*, 4th edition 2005, point out at p 864, para 10.21:

> "In recent decades a new pragmatism has become apparent in the law of trusts. English courts have eventually conceded that the classical theory of resulting trusts, with its fixation on intentions presumed to have been formulated contemporaneously with the acquisition of title, has substantially broken down. . . . Simultaneously the balance of emphasis in the law of trusts has transferred from crude factors of money contribution (which are pre-eminent in the resulting trust) towards more subtle factors of intentional bargain (which are the foundational premise of the constructive trust). . . . But the undoubted consequence is that the doctrine of resulting trust has conceded much of its field of application to the constructive trust, which is nowadays fast becoming the primary phenomenon in the area of implied trusts."

There is no need for me to rehearse all the developments in the case law since *Pettitt v Pettitt* and *Gissing v Gissing*, discussed over more than 70 pages following the quoted passage, by Chadwick LJ in *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, and most importantly by my noble and learned friend, Lord Walker of Gestingthorpe in his opinion, which make good that proposition. The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.

61. *Oxley v Hiscock* was, of course, a different case from this. The property had been conveyed into the sole name of one of the cohabitants. The claimant had first to surmount the hurdle of showing that she had any beneficial interest at all, before showing exactly what that interest was. The first could readily be inferred from the fact that each party had made some kind of financial contribution towards the purchase. As to the second, Chadwick LJ said this, at para 69:

> " . . . in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that *each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property*. And in that context, the whole course of dealing between them in relation to the property includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home." (emphasis supplied)

Oxley v Hiscock has been hailed by Gray and Gray as "an important breakthrough" (*op cit,* p 931, para 10.138). The passage quoted is very similar to the view of the Law Commission in *Sharing Homes* (2002, *op cit*, para 4.27) on the quantification of beneficial entitlement:

> "If the question really is one of the parties' 'common intention', we believe that there is much to be said for adopting what has been called a 'holistic approach' to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all

> conduct which throws light on the question what shares were intended."

That may be the preferable way of expressing what is essentially the same thought, for two reasons. First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* [1970] AC 777 without even the fig leaf of section 17 of the 1882 Act.

62. Furthermore, although the parties' intentions may change over the course of time, producing what my noble and learned friend, Lord Hoffmann, referred to in the course of argument as an "ambulatory" constructive trust, at any one time their interests must be the same for all purposes. They cannot at one and the same time intend, for example, a joint tenancy with survivorship should one of them die while they are still together, a tenancy in common in equal shares should they separate on amicable terms after the children have grown up, and a tenancy in common in unequal shares should they separate on acrimonious terms while the children are still with them.

63. We are not in this case concerned with the first hurdle. There is undoubtedly an argument for saying, as did the Law Commission in *Sharing Homes* (2002, *op cit*, para 4.23) that the observations, which were strictly *obiter dicta*, of Lord Bridge of Harwich in *Lloyd's Bank plc v Rosset* [1991] 1 AC 107 have set that hurdle rather too high in certain respects. But that does not concern us now. It is common ground that a conveyance into joint names is sufficient, at least in the vast majority of cases, to surmount the first hurdle. The question is whether, that hurdle surmounted, the approach to quantification should be the same.

64. The majority of cases reported since *Pettitt* and *Gissing* have concerned homes conveyed into the name of one party only and it is in that context that the more flexible approach to quantification identified by Chadwick LJ in *Oxley v Hiscock* has emerged: see, in particular, *Grant v Edwards* [1986] Ch 638, described by Chadwick LJ as "an important turning point" and referred to with "obvious approval" in *Lloyds Bank plc v Rosset* [1991] 1 AC 107, *Stokes v Anderson* [1991] 1

FLR 391, *Midland Bank plc v Cooke* [1995] 4 All ER 562, and *Drake v Whipp* [1996] 1 FLR 826.

65. Curiously, it is in the context of homes conveyed into joint names but without an express declaration of trust that the courts have sometimes reverted to the strict application of the principles of the resulting trust: see *Walker v Hall* [1984] FLR 126 and two cases decided by the same court on the same day, *Springette v Defoe* [1992] 2 FLR 388 and *Huntingford v Hobbs* [1993] 1 FLR 736; but cf *Crossley v Crossley* [2005] EWCA Civ 1581, [2006] 2 FLR 813. However, Chadwick LJ commented in *Oxley v Hiscock* [2005] Fam 211, at 235:

> "47. It is, I think, important to an understanding of the reasoning in the judgments in *Springette v Defoe* that each member of this court seems to have thought that when Lord Bridge referred, in *Lloyds Bank plc v Rosset* [1991] 1 AC 107, 132F, to the need to base a 'finding of an agreement or arrangement to share in this sense' on 'evidence of express discussions between the partners' he was addressing the secondary, or consequential, question – 'what was the common intention of the parties as to the extent of their respective beneficial interests' – rather than the primary, or threshold, question – 'was there a common intention that each should have a beneficial interest in the property?' . . .
>
> 48. For the reasons which I have sought to explain, I think that the better view is that, in the passage in *Rosset's* case [1991] 1 AC 107, 132F, to which both Dillon LJ and Steyn LJ referred in *Springette v Defoe* [see [1992] 2 FLR 388, at 393E-F and 395B, agreed with by Sir Christopher Slade at 397G] Lord Bridge was addressing only the primary question – 'was there a common intention that each should have a beneficial interest in the property?' He was not addressing the secondary question – 'what was the common intention of the parties as to the extent of their respective beneficial interests?' As this court had pointed out in *Grant v Edwards* and *Stokes v Anderson,* the court may well have to supply the answer to that secondary question by inference from their subsequent conduct. . . "

In the case before us, he observed at para 24:

> “ . . . I have not altered my view that, properly understood, the authorities before (and after) *Springette v Defoe* do not support the proposition that, absent discussion between the parties as to the *extent* of their respective beneficial interests at the time of purchase, it must follow that the presumption of resulting trust is not displaced and the property is necessarily held in beneficial shares proportionate to the respective contributions to the purchase price.”

With these passages I entirely agree. The approach to quantification in cases where the home is conveyed into joint names should certainly be no stricter than the approach to quantification in cases where it has been conveyed into the name of one only. To the extent that *Walker v Hall*, *Springette v Defoe* and *Huntingford v Hobbs* hold otherwise, they should not be followed.

66. However, Chadwick LJ went on to say at para 26, that:

> “. . . there is no reason in principle why the approach to the second question – ‘what is the extent of the parties’ respective beneficial interests in the property? – should be different, in a case where the property is registered in the joint names of cohabitees, from what it would be if the property were registered in the sole name of one of them; although the fact that it has been registered in joint names is, plainly, to be taken into account when having regard ‘to the whole course of dealing between them in relation to the property’.”

But the questions in a joint names case are not simply “what is the extent of the parties’ beneficial interests?” but “did the parties intend their beneficial interests to be different from their legal interests?” and “if they did, in what way and to what extent?” There are differences between sole and joint names cases when trying to divine the common intentions or understanding between the parties. I know of no case in which a sole legal owner (there being no declaration of trust) has been held to hold the property on a beneficial joint tenancy. But a court may well hold that joint legal owners (there being no declaration of trust) are also beneficial joint tenants. Another difference is that it will almost always have been a conscious decision to put the house into joint names.

Even if the parties have not executed the transfer, they will usually, if not invariably, have executed the contract which precedes it. Committing oneself to spend large sums of money on a place to live is not normally done by accident or without giving it a moment's thought.

67. This is not to say that the parties invariably have a full understanding of the legal effects of their choice: there is recent empirical evidence from a small scale qualitative study to confirm that they do not (see G Douglas, J Pearce and H Woodward, "Dealing with Property Issues on Cohabitation Breakdown" [2007] Fam Law 36). But that is so whether or not there is an express declaration of trust and no-one thinks that such a declaration can be overturned, except in cases of fraud or mistake: see para 49 above. Nor do they always have a completely free choice in the matter. Mortgagees used to insist upon the home being put in the name of the person whom they assumed would be the main breadwinner. Nowadays, they tend to think that it is in their best interests that the home be jointly owned and both parties assume joint and several liability for the mortgage. (It is, of course, a matter of indifference to the mortgagees where the beneficial interests lie.) Here again, this factor does not invalidate the parties' choice if there is an express declaration of trust, nor should it automatically count against it where there is none.

68. The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual. Nor may disputes be confined to the parties themselves. People with an interest in the deceased's estate may well wish to assert that he had a beneficial tenancy in common. It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names using the old forms are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase.

69. In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to

divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

70. This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.

The facts of this case

71. It is difficult to give a full account of the relevant facts in this case because of the way in which the judge approached it. He directed himself by citing paragraphs 61 to 67 from *Oxley v Hiscock* [2005] Fam 211, dealing with "Developments since *Midland Bank plc v Cooke*", but not by citing the crucial "Summary" in paragraphs 68 and 69. This means that he failed to draw a distinction between the first and second questions. He concluded his self directions thus:

> "The real question for the Court in [*Midland Bank plc v Cooke*] was to determine what proportions the parties must have assumed to have intended for their beneficial ownership. I also think it is necessary, as I think was pressed on me by one of the parties, that I should approach the latter more broadly, *looking at the parties' entire course of conduct together*." (emphasis supplied)

He then proceeded to do just that, focussing upon their relationship, rather than upon the factors which were relevant to ascertaining their intentions with respect to the beneficial ownership of their home.

72. The parties' relationship began in 1975, when Mr Stack was aged 19 and Ms Dowden was aged 17. The judge found it more likely than not that they were living together in rented accommodation since then. In fact, the evidence did no more than support a conclusion that they became an "item" then, and later spent four months in the United States together, and that Mr Stack often stayed at Ms Dowden's home. Mr Stack accepted that they did not start cohabiting permanently until 1983. Even after that, Mr Stack retained his father's address for some purposes.

73. In 1983, a house in Purves Road London NW10 was bought and conveyed into Ms Dowden's sole name. It had belonged to someone she called "Uncle Sidney" who had expressed the wish before he died that she be given the opportunity to buy it. The executors therefore offered it to her at what they considered a favourable price of £30,000. The correspondence refers at one point to seeing her and Mr Stack together. The judge commented that "this certainly suggests that there was a partnership as man and mistress between the parties at that time".

74. The price of the Purves Road property was £30,000. £22,000 was raised by way of mortgage, of course in Ms Dowden's name. This was an interest only loan backed by an endowment policy. It was common ground that Ms Dowden made all the payments due under the mortgage and that she paid "all the bills for utilities, council tax and the like". When the property was bought she was in regular employment as a trainee electrical engineer with the London Electricity Board. She has remained in employment with the Board or its successor throughout, working extremely hard and eventually rising to become the most highly qualified woman electrical engineer in the London area. In 1983, Mr Stack was "self-employed" as a builder/decorator, claiming no benefits

but making no tax returns and keeping no records. Ms Dowden's evidence was that he did not want to take responsibility for the mortgage.

75. The down payment of £8000 came from a Halifax Building Society account, also in Ms Dowden's sole name. The judge, however, found that this was "joint savings" although he could not find how much Mr Stack had contributed to it. In the Court of Appeal it was said that there was "no evidence" to support this finding. In fact there was some: Mr Stack's evidence was that he had from time to time paid some of his own money into that account. This was vehemently denied by Ms Dowden. Even if the judge preferred his evidence to hers, it is something of a leap from this to characterise the account as "joint savings".

76. After the house was bought, four children were born to the parties. The first was born in 1986, and although Mr Stack was named as the father, he gave his father's address, which was the address to which most of his post and bank account statements were sent. The judge made little of this fact, but it might be thought to indicate something about the quality of the parties' relationship, at least until their first child was born. Three more children were born, in 1987, 1989 and 1991. Ms Dowden returned to work after each maternity leave and the children were looked after by nannies or child minders. Mr Stack began regular employment with Hammersmith and Fulham London Borough Council in 1987 and has remained with them ever since. Ms Dowden's earnings, however, began to outstrip his and were eventually £42,000 per annum to his £24,000.

77. A great deal of work was done on the Purves Road property, some of it redecoration and repairs, some of it alterations and improvements. There is no doubt that the parties worked on this together, although there was a dispute as to exactly how much work each did and the judge found that Mr Stack probably did "more than Ms Dowden gave him credit for" and eventually concluded that "he had been responsible for making most of these improvements". But he could not put a figure on their value to the sale price.

78. The Purves Road property was sold in May 1993 for £90,000, three times the figure for which it had been bought ten years before. After deduction of the mortgage redemption figure of £22,674, solicitor's disbursements and agent's fees, Ms Dowden received a

cheque for £66,613. The judge asked himself whether, if the relationship had broken down at that point, she could have said that the Purves Road property was all hers. He concluded that she could not, given the length and nature of their relationship, given the work Mr Stack had done on the property, and "given that although their finances were kept separately there had been contributions to their living between the parties". This finding was overturned in the Court of Appeal, on the basis that the judge had not addressed the first question – whether Mr Stack had any beneficial interest at all. The only matter which could be relied upon as evidence of a common intention at the time of the purchase would be a contribution to the £8000 down payment. Because, in the Court's view, there was no evidence of such a contribution, it was wrong to treat Mr Stack as having any interest in the proceeds of sale of the Purves Road property.

79. That conclusion is open to the criticism that there was some evidence of such a contribution, albeit rather slim and unsatisfactory, and that would have been sufficient to answer the first question in Mr Stack's favour. The second question – what was the extent of that beneficial interest - would have been much harder to answer and the judge made no attempt to do so. But he would certainly have taken into account the improvements made to the property in trying to quantify the interest.

80. In 1993, another property, in Chatsworth Road London NW2, was bought as the family home. This time it was conveyed into the joint names of the parties, using the then current land registry form. This contained no declaration of trust, but did contain a declaration that the survivor could give a good receipt for capital moneys arising from a disposition of all or part of the property.

81. The price of Chatsworth Road was £190,000. £128,813 (the balance of the price after deduction of the mortgage loan plus stamp duty and legal fees) came from Ms Dowden's Halifax Building Society account. This already contained £57,179 in April 1993, to which were added the proceeds of sale of Purves Road. £65,025 was provided by a loan to both parties from Barclay's Bank, secured by a mortgage and two endowment policies, one in their joint names and the other in Ms Dowden's sole name. The mortgage interest and joint endowment policy premiums (eventually totalling £33,747) were paid by Mr Stack. As contemplated by the parties, the mortgage loan was repaid by a series of lump sum payments, beginning in 1994. It was agreed that Mr Stack contributed £27,000 and Ms Dowden £38,435 towards these capital

repayments. The utilities bills were all in Ms Dowden's name although Mr Stack claimed to have paid some of these. Improvements were also made, although not on the same scale as those to Purves Road. Throughout this time, they kept separate bank accounts and made a series of separate investments and savings. Ms Dowden paid the premiums on the life policy in her name, which she has retained.

82. The parties separated in October 2002. Mr Stack left the property and Ms Dowden remained there with the children. There were proceedings between them in the Inner London Family Proceedings Court under Part IV of the Family Law Act 1996. On 11 April 2003, Mr Stack gave various undertakings to stay away from the property and Ms Dowden undertook to pay up to £1000 per month to reimburse him the cost of alternative accommodation. That undertaking was to continue until 10 January 2004 and was not renewed on that date. The trial judge ordered that £8,100 be paid to Mr Stack before division of the proceeds of sale of the property in respect of this period and neither party has appealed against that. The trial judge also ordered that the sum of £900 per month from 6 October 2004 be paid to Mr Stack out of the net proceeds of sale. The only reason he gave was that the sale would be in Ms Dowden's hands.

83. Mr Stack's claim for an order for sale and equal division of the proceeds was tried over two days in the Central London County Court. On 6 October 2004, the judge ordered that the property be sold and the net proceeds of sale divided equally between the parties, as should the proceeds of the joint endowment policy. Throughout his judgment, there are numerous references to the "partnership" between the parties. He expressed his conclusion thus:

> "It seems to me, although the Defendant has been the bigger wage-earner over this very long association between the parties, they have both put their all into doing the best for themselves and their family as they could. In these circumstances after such a very long relationship a 50/50 share is . . . an appropriate division of the net proceeds of sale."

On the other hand, he held that all their other savings and investments, including an account in Ms Dowden's name with the Chelsea Building Society (opened in 2000 with the redundancy payment she received from London Electricity before being immediately re-employed with one of its successors), represented "the ways where the parties have allowed their earnings and their savings to be separately divided", so that all should lie where they were.

84. Ms Dowden appealed. (Mr Stack was refused leave to cross-appeal in respect of the Chelsea Building Society account and so that issue cannot be pursued before us.) On 13 July 2005, the Court of Appeal allowed her appeal and ordered that the net proceeds of sale be divided 65% to 35% in her favour. A major issue had been the effect of the declaration as to the receipt for capital moneys in the transfer document. Following *Huntingford v Hobbs* [1993] 1 FLR 736, this could not be taken as an express declaration of trust. Nor could it be relied upon for the purpose of drawing an inference as to their intentions, unless the parties had understood its significance. If they had done, the inference that they intended a beneficial joint tenancy would have been "irresistible". With that I entirely agree. But in the court's view there was no evidence that they did. Without that, it was impossible to reach the conclusion that their shares should be equal. Ms Dowden was entitled to at least 65% of the proceeds of sale, and she had made it clear that she was not then seeking any greater share than that. The Court also allowed her appeal against the order that she pay Mr Stack £900 per month from 6 October 2004. Mr Stack appeals to this House and asks that we restore the orders of the trial judge.

85. The property was sold in November 2005, with net proceeds of £754,345. If the £8100 has to be deducted from that, the balance is £746,245. 50% amounts to £373,122.50. The extra 15% claimed by the appellant amounts to £111,936.75. This is a not inconsiderable sum, but the costs of pursuing the argument to this House will have been quite disproportionate.

Applying the law to the facts

86. The starting point is that it is for Ms Dowden to show that the common intention, when taking a conveyance of the house into their joint names or thereafter, was that they should hold the property otherwise than as beneficial joint tenants. Unfortunately, we lack precise findings on many of the factors relevant to answering that question, because the judge addressed himself to "looking at the parties' entire course of conduct together". He looked at their relationship rather than the matters which were particularly relevant to their intentions about this property. He founded his conclusion on the length and nature of their

relationship, which he repeatedly referred to as a partnership, despite the fact that they had maintained separate finances throughout their time together. With the best will in the world, and acknowledging the problems of making more precise findings on many issues after this length of time, this is not an adequate answer to the question. It amounts to little more than saying that these people were in a relationship for twenty seven years and had four children together. During this time Mr Stack made unquantifiable indirect contributions to the acquisition and improvement of one house and quantifiable direct contributions to the acquisition of another. Both co-operated in looking after the home and bringing up their children.

87. In some, perhaps many, cases of real domestic partnership, there would be nothing to indicate that a contrary inference should be drawn. However, there are many factors to which Ms Dowden can point to indicate that these parties did have a different common intention. The first, of course, is that on any view she contributed far more to the acquisition of Chatsworth Road than did Mr Stack. There are many different ways of calculating this. The Court of Appeal rejected the judge’s view that the Halifax account represented “joint savings”, either at the time of the Purves Road purchase or at the time of the Chatsworth Road purchase. Hence they held that the whole of the purchase price, other than the mortgage loan, had been contributed by Ms Dowden. She had also contributed more to the capital repayment of that loan, although Mr Stack had made all the payments necessary to keep it going. It is not surprising that the Court of Appeal reached the conclusion that Ms Dowden was entitled to at least the 65% she claimed.

88. On the other hand, there was some evidence that Mr Stack had made payments into the Halifax account before the Purves Road purchase and that he had made payments thereafter which would have enabled Ms Dowden to save more of her income than would otherwise have been possible. This, together with his contributions towards the substantial improvements made to Purves Road, might suffice to give him some interest in the proceeds of sale, although quantifying that share would be very difficult. It might also suffice to give him some lesser interest in the accumulated Halifax account at the time when Chatsworth Road was bought. Again, quantifying that interest would be very difficult. There was certainly little if anything to support the conclusion that these were truly “joint” savings. But suppose that one apportions the Purves Road proceeds between them in shares of 2 to Ms Dowden and 1 to Mr Stack; the Halifax savings in shares of 3 to her and 1 to him; and shares the mortgage loan equally between them: this would yield total contributions to Chatsworth Road of roughly 64% to

36%. That calculation is, in my view, as generous to Mr Stack as it is possible to be.

89. The fact that it is possible to make two such different calculations on this sort of evidence indicates the pitfalls in an arithmetical approach to ascertaining the parties' intentions. The one thing that can clearly be said is that, when Chatsworth Road was bought, both parties knew that Ms Dowden had contributed far more to the cash paid towards it than had Mr Stack. Furthermore, although they planned that Mr Stack would pay the interest on the loan and premiums on the joint policy, they also planned to reduce the loan as quickly as they could. These are certainly factors which could, in context, support the inference of an intention to share otherwise than equally.

90. The context is supplied by the nature of the parties' conduct and attitudes towards their property and finances. This is not a case in which it can be said that the parties pooled their separate resources, even notionally, for the common good. The only things they ever had in their joint names were Chatsworth Road and the associated endowment policy. Everything else was kept strictly separate. Each made separate savings and investments most of which it was accepted were their own property. It might have been asked, "why then did they make an exception for Chatsworth Road?" This is the obvious question. The obvious answer, which Ms Dowden has never denied, was that this time it was indeed intended that Mr Stack should have some interest in the property. In the light of all the other evidence, it cannot be conclusive as to what that interest was.

91. There are other aspects to their financial relationship which tell against joint ownership. Chatsworth Road was, of course, to be a home for the parties and their four children. But they undertook separate responsibility for that part of the expenditure which each had agreed to pay. The only regular expenditure to which it is clear that Mr Stack committed himself was the interest and premiums on Chatsworth Road. All other regular commitments in both houses were undertaken by Ms Dowden. Had it been clear that he had undertaken to pay for consumables and child minding, it might have been possible to deduce some sort of commitment that each would do what they could. But Mr Stack's evidence did not even go as far as that.

92. This is, therefore, a very unusual case. There cannot be many unmarried couples who have lived together for as long as this, who have

had four children together, and whose affairs have been kept as rigidly separate as this couple's affairs were kept. This is all strongly indicative that they did not intend their shares, even in the property which was put into both their names, to be equal (still less that they intended a beneficial joint tenancy with the right of survivorship should one of them die before it was severed). Before the Court of Appeal, Ms Dowden contended for a 65% share and in my view she has made good her case for that.

93. There remains the question of the payment for Mr Stack's alternative accommodation. This matter is governed by the Trusts of Land and Appointment of Trustees Act 1996. Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation. Thus both these parties have a right of occupation. Section 13(1) gives the trustees the power to exclude or restrict that entitlement, but under section 13(2) this power must be exercised reasonably. The trustees also have power under section 13(3) to impose conditions upon the occupier. These include, under section 13(5), paying any outgoings or expenses in respect of the land and under section 13(6) paying compensation to a person whose right to occupy has been excluded or restricted. Under section 14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions. Under section 15(1), the matters to which the court must have regard in making its order include (a) the intentions of the person or person who created the trust, (b) the purposes for which the property subject to the trust is held, (c) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home, and (d) the interests of any secured creditor of any beneficiary. Under section 15(2), in a case such as this, the court must also have regard to the circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property.

94. These statutory powers replaced the old doctrines of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property. The criteria laid down in the statute should be applied, rather than in the cases decided under the old law, although the results may often be the same. In this case, the judge applied neither. The property had been bought as a home for the parties and their children. By October 2004, three of the children were still minors. Both parties had the responsibility of providing them with a home. Ms Dowden remained responsible for the upkeep and outgoings on the home until it was sold. Mr Stack had to provide himself with alternative

accommodation but had nothing to pay in respect of the upkeep of the family's home until he was able to realise his share in it upon sale. While, therefore, a case could be made for compensating him for his exclusion, it has to be borne in mind that he had agreed to go in the course of proceedings under the Family Law Act 1996. The reason given by the judge took no account, as he was required to do, of the statutory criteria. The fact that the house was to be sold as soon as possible, so that Mr Stack would not be kept out his money for long, was if anything a factor telling against the exercise of this discretion. I would therefore agree with the Court of Appeal on this point.

95. In the result, therefore, I would dismiss this appeal. But the route by which I, and as I understand it the majority of your Lordships, have arrived at that result is different, both in principle and on the facts, from that taken by the Court of Appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

96. I have had the great benefit of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Baroness Hale of Richmond.

97. I gratefully adopt the exposition of the facts of this case in paragraphs 71 to 85 of Baroness Hale's opinion. I shall first consider the extent of Mr Stack's ownership of the beneficial interest in 114 Chatsworth Road ("the house"), and then turn to whether Ms Dowden should have been ordered to pay him in respect of his exclusion from the house.

Beneficial ownership: some general points

98. Where freehold or leasehold property is acquired in the name of two parties, the effect of sections 1, 34, and 36 of the Law of Property Act 1925 is that they must be joint owners of the legal estate: they enjoy equal rights in respect of an undivided title, and survivorship applies. The rules relating to the ownership of the beneficial interest are much

less constrained. In general, the parties are free to agree what they want (and if they are joint owners, it is open to either to sever it). If there is a valid declaration of trust, then (subject to any statutory provisions to the contrary) that determines the beneficial ownership. If not, then, in the absence of agreement, the court has to decide the issue.

99. In that connection, the present type of case, where the parties were an unmarried cohabiting couple, whose relationship has ended, and both of whom claim to have contributed to the acquisition or value of the property, gives rise to particular difficulties, as can be seen from the analysis in paragraphs 15 to 26 of Lord Walker's opinion. This is not surprising. The context is lucidly explained in paragraphs 41 to 52 of Baroness Hale's opinion. Different judges may have different reactions to a particular case, and to the relative importance of, and the proper inferences to be drawn from, particular facts. The task of the judge is normally made no easier by bad feeling between the parties, conflicts of fact, the need to examine finances discussions and actions, the number and incommensurability of relevant factors, and the welter of Court of Appeal authority (not all of which is consistent in approach or result).

100. The room for confusion is reinforced by the fact that the outcome will normally differ from that in a similar but crucially different sort of case, namely where the parties were married. The Matrimonial Causes Act 1973 gives the court wide powers to redistribute assets on divorce. Unlike the Inheritance (Provision for Family and Dependants) Act 1975, the 1973 Act does not extend to unmarried cohabitants, even where (as here) the relationship has lasted longer and produced more children than the average marriage. Accordingly, in such cases, judges have to apply the law in accordance with principles developed by the courts.

101. The determination of the ownership of the beneficial interest in a property held in joint names primarily engages the law of contract, land and equity. The relevant principles in those areas of law have been established and applied over hundreds of years, and have had to be applied in all sorts of circumstances. While both the nature and the characteristics of the particular relationship must be taken into account when applying the principles, the court should be very careful before altering those principles when it comes to a particular type of relationship. After all, these principles are not static and develop as the needs and values of Society change. Thus, the presumption of advancement, as between man and wife, which was so important in the 18^{th} and 19^{th} centuries, has now become much weakened, although not quite to the point of disappearance.

102. However, that does not mean that a change in the principles should be easy or frequent. A change in the law, however sensible and just it seems, always carries a real risk of new and unforeseen uncertainties and unfairnesses. That is a particular danger when the change is effected by the court rather than the legislature, as the change is influenced by, indeed normally based on, the facts of a particular case, there is little room for public consultation, and there is no input from the democratically elected legislature.

103. In the present type of case, while the number of unmarried cohabitants has increased very substantially over the past fifty (and even more over the past twenty) years, the change has been one of degree, and does not, in my view, justify a departure from established legal principles. I agree with Griffiths LJ (see *Bernard v Josephs* [1982] Ch 391 at 402) that the applicable principles are the same whether the parties are married or not, although the nature of the relationship will bear on the inferences to be drawn from their discussions and actions.

104. The Law Commission has considered this topic in the excellent Discussion and Consultation Papers described by Baroness Hale in paragraphs 44 to 47 of her opinion. The fact that the Law Commission has characterised the present state of the law as "unduly complex, arbitrary and uncertain", does not, in my opinion, justify our changing it. The Discussion Paper refers to the impossibility of devising a scheme "which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered". This is a warning shot against the courts (as opposed to the legislature) refashioning the law. All the more so bearing in mind that, as Lord Walker says, the Law Commission may soon make specific proposals for change in this area.

105. In other words, the Law Commission's analysis may well justify the legislature changing the law in this field, but it does not support similar intervention by the courts, other than for the purpose of clarification and simplification. Similarly, the fact that the law of Scotland on this topic may differ from that of England and Wales, as explained by Lord Hope, does not justify the courts changing the law here (or indeed in Scotland), although it may well be another reason for changing and unifying the law on this topic throughout the United Kingdom

106. In my judgment, it is therefore inappropriate for the law when applied to cases of this sort to depart from the well-established

principles laid down over the years. It also seems to me that the law of resulting and constructive trusts is flexible enough to deal with problems such as those thrown up by cases such as this, and it would be a disservice to the important causes of certainty and consistency if we were to hold otherwise. I note that the Court of Appeal's recent decisions in this case and in *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 (both of which were rightly decided) produced an outcome which would be dictated by a resulting trust solution.

107. Accordingly, while the domestic context can give rise to very different factual considerations from the commercial context, I am unconvinced that this justifies a different approach in principle to the issue of the ownership of the beneficial interest in property held in joint names. In the absence of statutory provisions to the contrary, the same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship. In each type of case, one is concerned with the issue of the ownership of the beneficial interest in property held in the names of two people, who have contributed to its acquisition, retention or value.

108. It appears to me helpful for present purposes to consider the issue in a structured way. First, to consider how the beneficial interest is owned at the date of acquisition, which involves identifying the nature and effect of the relevant features of what transpired between the parties up to, and at, the date of acquisition of the property. Then to consider the position at the date of the hearing, which involves identifying the relevant features of what subsequently transpired between the parties, and deciding whether they justify a change in the way in which the beneficial ownership is held. As already explained, I believe that the proper approach to these highly fact-sensitive enquiries should be in accordance with established legal principles and, as far as is consistent with those principles, as simple as possible.

Beneficial ownership on acquisition: where there is no evidence

109. In the absence of any relevant evidence other than the fact that the property, whether a house or a flat, acquired as a home for the legal co-owners is in joint names, the beneficial ownership will also be joint, so that it is held in equal shares. This can be said to result from the maxims that equity follows the law and equality is equity. On a less technical, and some might say more practical, approach, it can also be

justified on the basis that any other solution would be arbitrary or capricious.

Beneficial ownership on acquisition: differential contributions

110. Where the only additional relevant evidence to the fact that the property has been acquired in joint names is the extent of each party's contribution to the purchase price, the beneficial ownership at the time of acquisition will be held, in my view, in the same proportions as the contributions to the purchase price. That is the resulting trust solution. The only realistic alternative in such a case would be to adhere to the joint ownership solution. There is an argument to support the view that equal shares should still be the rule in cohabitation cases, on the basis that it may be what many parties may expect if they purchase a home in joint names, even with different contributions. However, I consider that the resulting trust solution is correct in such circumstances.

111. It is the answer which equity has always favoured (save where the presumption of advancement, not relevant in the context of cohabitants, applied) both historically and more recently. Eyre CB described it as a "general proposition supported by all the cases" in a passage in *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, quoted with approval in *Pettitt v Pettitt* [1970] AC 777 at 814B-G by Lord Upjohn, whose views on this topic were in turn cited with approval by Lord Pearson in *Gissing v Gissing* [1971] AC 886 at 902G-H. Lord Brightman in *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] 1 AC 549 at 559G-H approved the view that a joint tenancy in equity is rebutted where the legal owners "have provided the purchase money in unequal shares". Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708A said that the circumstances in which "a resulting trust arises" included:

> "[W]here A … pays (wholly or in part) for the purchase of property which is vested … in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the … property is held … in shares proportionate to their contributions".

112. By contrast, while Lord Reid's suggestion in *Gissing* at 897B that the notion that equality is equity is no more than a "high-sounding brocard" may be a little extreme, the invocation of such a notion as

between cohabitants, who have contributed unequally to the acquisition of a home, appears to me to be inconsistent with principle. It is almost a resurrection of the "family assets" hypothesis disposed of in *Pettitt* – see at 795B, 809H-810H, and 816G-817H. It involves invoking a presumption of advancement between unmarried cohabitants, where such a presumption has never applied, and at a time when, as I have mentioned, the court is increasingly unenthusiastic about the presumption, even in relationships where it does apply.

113. There are also practical reasons for rejecting equality and supporting the resulting trust solution. The property may be bought in joint names for reasons which cast no light on the parties' intentions with regard to beneficial ownership. It may be the solicitor's decision or assumption, the lender's preference for the security of two borrowers, or the happenstance of how the initial contact with the solicitor was made. As the survey mentioned by Baroness Hale in paragraph 45 of her opinion indicates, parties in a loving relationship are often not anxious to discuss how they should divide the beneficial interest in the home they are about to buy. They would have to debate what should happen if their relationship broke down (the most likely circumstance, albeit not the only one, in which the question would arise). While in some cases they may assume equal ownership, in others they may not. In many cases the point may not even occur to them, and if it does, they may be happy to rely on the law to provide the answer if the need arises. If they are happy with an equal split at the beginning, one might expect them to say so. The fact that they do not do so may be more consistent with the view that they (or at any rate the bigger contributor) would not be happy with that outcome for the very reason that their contributions differed.

114. There is also an important point about consistency of approach with a case where the purchase of a home is in the name of one of the parties. As Baroness Hale observes, where there is no evidence of contributions, joint legal ownership is reflected in a presumption of joint beneficial ownership just as sole legal ownership is reflected in a presumption of sole beneficial ownership. Where there is evidence of the parties' respective contributions to the purchase price (and no other relevant evidence) and one of the parties has contributed X%, the fact that the purchase is in the sole name of the other does not prevent the former owning X% of the beneficial interest on a resulting trust basis. Indeed, it is because of the resulting trust presumption that such ownership arises. It seems to me that consistency suggests that the party who contributed X% of the purchase price should be entitled to X% (no more and no less) of the beneficial interest in the same way if he is a co-purchaser. The resulting trust presumption arises because it is assumed

that neither party intended a gift of any part of his own contribution to the other party. That would seem to me to apply to contributions irrespective of the name or names in which the property concerned is acquired and held, as a matter of both principle and logic.

115. It may be asked why the bigger contributor agreed to the property being taken in joint names, unless he intended joint beneficial ownership. There are four answers to that. The first is that the question sets out to justify what it assumes, namely that, in the absence of any discussion, the parties must have assumed an equal split. Secondly, if the other party was a contributor, he would often want to be a co-owner, and the only way real property can be held in law by two persons is as joint owners. Thirdly, the converse point can be made where a property is acquired in the name of one party: if the other party has contributed to the purchase, his absence from the title is not evidence that he was not intended to have an interest. (In this connection, it seems to me that, where a home is taken in the name of only one party, this is almost as likely to have been a conscious decision as where it is acquired in joint names: where both have contributed to the purchase, it is unlikely that either will have been unaware of the fact that the home was being acquired in the name of only one of them). Fourthly, there are the practical considerations to which I have already alluded.

116. Having said that, the fact that a property is taken in joint names is some evidence that both parties were intended to have some beneficial interest. In that connection, the facts of the present case are not without interest. The parties' previous home in Purves Road was acquired in Ms Dowden's name alone. On the face of it at least, Purves Road was acquired solely with money from Ms Dowden's account or borrowed by her alone (although a small amount may have come indirectly from Mr Stack), so it is not surprising that it was acquired in her sole name. When the house at Chatsworth Road was acquired, Mr Stack directly (and through liability for the mortgage) contributed to its purchase, and it is therefore unsurprising that his name was included on the title. However, for reasons already discussed, as he contributed far less to the purchase than Ms Dowden, it seems wrong to deduce from those bare facts that the parties intended that he should have 50% of the beneficial interest.

117. There are two other aspects of the resulting trust analysis which I should like to mention. First, there is the effect of liability under a mortgage. This will normally be a relevant, often a very important, factor, because, as Lord Walker points out, the overwhelming majority

of houses and flats are acquired with the assistance of secured borrowing. There is attraction in the notion that liability under a mortgage should be equivalent to a cash contribution. On that basis, if a property is acquired for £300,000, which is made up of one party's contribution of £100,000, and both parties taking on joint liability for a £200,000 mortgage, the beneficial interest would be two-thirds owned by the party who made the contribution, and one-third by the other. If one party then repays more of the mortgage advance, equitable accounting might be invoked to adjust the beneficial ownerships at least in a suitable case. Such an adjustment would be consistent with the resulting trust analysis, as repayments of mortgage capital may be seen as retrospective contributions towards the cost of acquisition, or as payments which increase the value of the equity of redemption.

118. However, there is an argument that taking on liability under a mortgage should not be equivalent to a cash payment. The cash contribution is effectively equity, whereas the mortgage liability arises in relation to a secured loan. If the value of the property in the example just given had fallen by 25% when it came to be sold, the party who made the cash contribution would lose £75,000 of his £100,000, whereas the other party would lose nothing (unless he would be liable to pay £25,000 to the former, which seems intuitively improbable).

119. In *Ulrich v Ulrich and Felton* [1968] 1 WLR 180, an engaged couple (who subsequently married) had bought a house, she paying one-sixth of the acquisition cost in cash, and he raising the balance by a mortgage in his name. In passages at 186 and 189 (approved in *Pettitt* at 816A), Lord Denning MR and Diplock LJ held it was wrong to treat a mortgage contribution as equivalent to a cash contribution.

120. Desirable though it is to give as much guidance as possible, this is not an appropriate case in which to express a view as to whether liability under a mortgage should be treated as the equivalent of a cash contribution for the purpose of assessing the shares in which the beneficial interest is held. Certainty, simplicity and first impression suggest a positive answer, perhaps particularly where a home is bought almost exclusively by means of a mortgage. More sophisticated economic and legal analysis may suggest otherwise, especially where the cash contributions are very different and, at least in the case of one party, substantial. The point has not been fully canvassed here, because, however one treats the mortgage, the outcome of the appeal is the same.

121. The final aspect I wish to deal with in relation to the resulting trust analysis is where the evidence is so unsatisfactory that it is impossible to reach a clear conclusion as to the parties' respective contributions to the purchase price. In many such cases, the evidence may be so hopeless or may suggest contributions of the same sort of order, and equality would be the appropriate outcome (as in *Rimmer v Rimmer* [1953] 1 QB 63 at 72, approved in *Pettitt* at 804A-B, 810H and 815H). However, in other cases (as here, in my opinion), the court may conclude that, while it is impossible to be precise as to the relative contributions, one party cannot have contributed more (or less) than Y%. In such cases, where Y is clearly below (or above) 50, to decide that the party concerned had more (or less) than Y% of the beneficial interest would be wrong.

122. So, in the absence of any relevant evidence other than the parties' respective contributions, I would favour the resulting trust solution as at the date of acquisition (in agreement with Chadwick LJ as quoted in paragraph 65 of Baroness Hale's opinion). Application of the resulting trust approach in the present case would justify Mr Stack's appeal being dismissed. On the figures summarised by Baroness Hale, Mr Stack could not possibly establish more than a 36% interest in the house as a result of all his contributions. Indeed, on the basis of the evidence, I would put his contribution at around 30%, but, as Ms Dowden is prepared to concede 35%, it is unnecessary to consider that aspect further. Thus, on a resulting trust basis, Mr Stack had no more than a 35% share of the beneficial interest at the date of acquisition.

Beneficial ownership on acquisition: constructive trust

123. Accordingly, in my judgment, where there are unequal contributions, the resulting trust solution is the one to be adopted. However, it is no more than a presumption, albeit an important one. Lord Nicholls of Birkenhead said in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at paragraph 16 that the "use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact", and that the "use … of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position". Although said in the context of undue influence, those words apply equally to the resulting trust presumption, in my opinion.

124. In many cases, there will, in addition to the contributions, be other relevant evidence as at the time of acquisition. Such evidence

would often enable the court to deduce an agreement or understanding amounting to an intention as to the basis on which the beneficial interests would be held. Such an intention may be express (although not complying with the requisite formalities) or inferred, and must normally be supported by some detriment, to justify intervention by equity. It would be in this way that the resulting trust would become rebutted and replaced, or (conceivably) supplemented, by a constructive trust.

125. While an intention may be inferred as well as express, it may not, at least in my opinion, be imputed. That appears to me to be consistent both with normal principles and with the majority view of this House in *Pettitt*, as accepted by all but Lord Reid in *Gissing* (see at 897H, 898B-D, 900E-G, 901B-D, and 904E-F), and reiterated by the Court of Appeal in *Grant v Edwards* [1986] Ch 638 at 651F-653A. The distinction between inference and imputation may appear a fine one (and in *Gissing* at 902G-H, Lord Pearson, who, on a fair reading I think rejected imputation, seems to have equated it with inference), but it is important.

126. An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.

127. To impute an intention would not only be wrong in principle and a departure from two decisions of your Lordships' House in this very area, but it also would involve a judge in an exercise which was difficult, subjective and uncertain. (Hence the advantage of the resulting trust presumption). It would be difficult because the judge would be constructing an intention where none existed at the time, and where the parties may well not have been able to agree. It would be subjective for obvious reasons. It would be uncertain because it is unclear whether one considers a hypothetical negotiation between the actual parties, or what reasonable parties would have agreed. The former is more logical, but would redound to the advantage of an unreasonable party. The latter is more attractive, but is inconsistent with the principle, identified by Baroness Hale at paragraph 61, that the court's view of fairness is not the correct yardstick for determining the parties' shares (and see *Pettitt* at 801C-F, 809C-G and 826C).

128. A constructive trust does not only arise from an express or implied agreement or understanding. It can also arise in a number of circumstances in which it can be said that the conscience of the legal owner is affected. For instance, it may well be that facts which justified a proprietary estoppel against one of the parties in favour of the other would give rise to a constructive trust. However, in agreement with Lord Walker, I do not consider it necessary or appropriate to discuss proprietary estoppel further in this case.

129. It is hard to identify, particularly in the abstract, the factors which can be taken into account to infer an agreement or understanding, and the effect of such factors. Each case will be highly fact-sensitive, and what is relevant, and how, may be contentious, whether one is considering actions, discussions or statements, even where there is no dispute as to what was done or said.

130. In the present case, for instance, there is a disagreement as to the effect of the declaration in the transfer of the house to the parties that the survivor "can give a valid receipt for capital money arising on the disposition of the land". At any rate in the absence of any evidence that the effect of this provision was explained to the parties, I would reject the contention that it has the effect of operating as a declaration of joint beneficial ownership. That contention is based on inference, and the legal basis of that inference is open to argument. Indeed, at the time the home was acquired, any well-informed solicitor would have advised that the law was that such a declaration probably would not give rise to such an inference, in the light of the Court of Appeal's decision in *Huntingford v Hobbs* [1993] 1 FLR 736. Quite apart from that, it seems to me that, in the absence of any evidence of contemporaneous advice to the parties as to the effect of the declaration, the alleged inference would simply be too technical, sophisticated, and subtle to be sustainable, at least in the context of the purchase of a home by two lay people.

131. Any assessment of the parties' intentions with regard to the ownership of the beneficial interest by reference to what they said and did must take into account all the circumstances of their relationship, in the same way as the interpretation of a contract must be effected by reference to all the surrounding circumstances. However, that does not mean that all the circumstances of the relationship are of primary or equal relevance to the issue.

132. I am unimpressed, for instance, by the argument that, merely because they have already lived together for a long time sharing all regular outgoings, including those in respect of the previous property they occupied, the parties must intend that the beneficial interest in the home they are acquiring, with differently sized contributions, should be held in equal shares. Particularly where the parties have chosen not to marry, their close and loving relationship does not by any means necessarily imply an intention to share all their assets equally. There is a large difference between sharing outgoings and making a gift of a valuable share in property; outgoings are relatively small regular sums arising out of day-to-day living, but an interest in the home is a capital asset, with a substantial value. I am similarly unconvinced that the ownership of the beneficial interest in a home acquired in joint names is much affected by whether the parties have children at the time of acquisition. While it justifies the obvious inference that it is to be used for the children as well as the parties, it says nothing on its own as to the intended ownership of the beneficial interest.

133. The fact that the parties operated their day-to-day financial affairs through a joint bank account, into which both their wages were paid and from which all family outgoings were paid, could fairly be said to be strong evidence that they intended the sums in that account to be owned equally. Accordingly, it would normally be easy to justify the contention that a home acquired with money from that account (often together with a mortgage in joint names) should be treated as acquired with jointly owned money and therefore as beneficially owned jointly. However, I am unhappy with the suggestion that, because parties share or pool their regular income and outgoings, it can be assumed that they intended that the beneficial interest in their home, acquired in joint names but with significantly different contributions, should be shared equally. There is a substantial difference, in law, in commercial terms, in practice, and almost always in terms of value and importance, between the ownership of a home and the ownership of a bank account or, indeed, furniture, furnishings and other chattels.

134. The fact that the parties keep assets such as bank accounts and financial investments separate and in separate names could be said to indicate that the parties do not intend to pool their resources. But it could equally be said that the fact that they choose, exceptionally, to acquire the home in joint names indicates that it is to be treated differently from their other assets, namely that it is to be jointly owned beneficially. In my view, however, such evidence is again of little value on its own, as it relates to a very different category of assets, in terms of nature and value, from the home they are buying.

135. The factors I have been discussing in the previous three paragraphs will often, however, have some significance. If there is other, possibly contested, evidence which is said to support the contention that the parties intended a different result from that indicated by a resulting trust analysis, those factors may make it easier for the court to accept, or even to interpret, that evidence as justifying such a different result.

136. For instance, the fact that the parties are in a close and loving relationship would render it easier, than in a normal contractual context, to displace the resulting trust solution with, say, an equal division of the beneficial ownership. That is because a departure from the resulting trust solution normally involves a gratuitous transfer of value from one party to the other. Thus, in the present case, if the outcome for which Mr Stack contends applied at the date of acquisition of the property, it would have involved an effectively gratuitous transfer of value equal to at least 15% of the purchase price of the house to him from Ms Dowden. Such a transfer is less unlikely between two parties in a long-term loving relationship than between two commercial entities or even two friends, but that does not mean that the nature of the relationship of itself justifies the inference of such a transfer.

137. In the present case, I consider that there was simply no evidence to justify departing in Mr Stack's favour from the apportionment of the beneficial interest in the house at the date of acquisition indicated by the resulting trust presumption. None of the facts recited in the opinion of Baroness Hale justify such a departure. It is fair to record that Mr Stack did appear to suggest at one point in his evidence that there was some discussion as to the ownership of the house at the time it was acquired, but the Judge expressly made no finding in his favour about that, and the Court of Appeal was not invited to do so or to remit it for the Judge to make such a finding.

Beneficial ownership: events after the acquisition of the house

138. The fact that the ownership of the beneficial interest in a home is determined at the date of acquisition does not mean that it cannot alter thereafter. My noble and learned friend Lord Hoffmann suggested during argument that the trust which arises at the date of acquisition, whether resulting or constructive, is of an ambulatory nature. That elegant characterisation does not justify a departure from the application of established legal principles any more than such a departure is justified at the time of acquisition. It seems to me that "compelling evidence", to

use Lord Hope's expression in paragraph 11, is required before one can infer that, subsequent to the acquisition of the home, the parties intended a change in the shares in which the beneficial ownership is held. Such evidence would normally involve discussions, statements or actions, subsequent to the acquisition, from which an agreement or common understanding as to such a change can properly be inferred. I have already discussed some of the issues arising in this connection, partly because Ms Dowden and Mr Stack had lived together in Purves Road before they acquired the house at Chatsworth Road.

139. There are, however, one or two aspects I should like to mention. I agree with Lord Walker that, subject of course to other relevant facts justifying a different conclusion, the fact that one party carries out significant improvements to the home will justify an adjustment of the apportionment of the beneficial interest in his favour. In such a case, the cost could be seen as capital expenditure which differs from regular outgoings relating to the use of the home, and is not dissimilar in financial effect, from the cost of acquiring the home in the first place. To qualify, any work must be substantial: decoration or repairs (at least unless they were very significant) would not do.

140. There is also the question of repayments of the mortgage, and payments of other outgoings. I have already discussed the effect of the parties taking a mortgage in joint names, and suggested that, in some cases, repayments of capital could have the effect of adjusting the shares in the beneficial interest. (It is conceivable that that could apply to payments of interest as well). In many cases, the repayments of capital, even if effected wholly by one party, should not be interpreted as indicating an intention to alter the way in which the beneficial interest is apportioned. Thus, the fact that one party is the home-maker (and, often, child-carer) and the other is the wage-earner would probably not justify the former having his share decreased simply because the other party repays the mortgage by instalments, but it may be different where both parties earn and share the home-making, but one of them repays the mortgage by a single capital sum.

141. Consistently with what has already been discussed, I am unconvinced that the original ownership of the beneficial interest could normally be altered merely by the way in which the parties conduct their personal and day-to-day financial affairs. I do not see how the facts that they have lived together for a long time, have been in a loving relationship, have children, operated a joint bank account, and shared the outgoings of the household, including in respect of use and

occupation of the home, can, of themselves, indicate an intention to equalise their originally unequal shares any more than they would indicate an intention to equalise their shares on acquisition, as discussed earlier. So, too, the facts that they both earn and share the home-making, or that one party has a well-paid job and the other is the home-maker, seem to me to be irrelevant at least on their own. Even the fact that one party pays all the outgoings and the other does nothing would not seem to me to justify any adjustment to the original ownership of the beneficial interest (subject to the possible exception of mortgage repayments).

142. In many cases, these points may result in an outcome which would seem unfair at least to some people. However (unless and until the legislature decides otherwise) fairness is not the guiding principle as Baroness Hale says, and, at least without legislative directions, it would be a very subjective and uncertain guide. Further, it is always important to bear in mind the need for clarity and certainty.

143. It is worth repeating that one is concerned with the ownership of what will normally be the most important and valuable asset of the parties, and the way they conduct their day-to-day living and finances is, in my view, at least of itself, not a reliable guide to their intentions in relation to that ownership. Even payments on decoration, repairs, utilities and Council tax, although related to the home, are concerned with its use and enjoyment, as opposed to its ownership as a capital asset. It is also worth repeating that these factors are not irrelevant to the issue of whether there has been a change in the shares in which the beneficial interest in the home is held. They provide part of the vital background against which any alleged discussion, statement or action said to give rise to a change in the beneficial ownership is to be assessed, in relation to both whether it occurred and what its effect was.

144. I am unhappy with the formulation of Chadwick LJ in *Oxley* at paragraph 69, quoted by Baroness Hale at paragraph 61 of her opinion, namely that the beneficial ownership should be apportioned by reference to what is "fair having regard to the whole course of dealing between [the parties] in relation to the property". First, fairness is not the appropriate yardstick. Secondly, the formulation appears to contemplate an imputed intention. Thirdly, "the whole course of dealing … in relation to the property" is too imprecise, as it gives insufficient guidance as to what is primarily relevant, namely dealings which cast light on the beneficial ownership of the property, and too limited, as all aspects of the relationship could be relevant in providing the context .by

reference to which any alleged discussion, statement and actions must be assessed. As already explained, I also disagree with Chadwick LJ's implicit suggestion in the same paragraph that "the arrangements which [the parties] make with regard to the outgoings" (other than mortgage repayments) are likely to be of primary relevance to the issue of the ownership of the beneficial interest in the home.

145. I am rather more comfortable with the formulation of Gray and Gray, also quoted in paragraph 61 of Baroness Hale's opinion, that the court should "undertak[e] a survey of the whole course of dealing between the parties … taking account of all conduct which throws light on the question what shares were intended". It is perhaps inevitable that this formulation begs the difficult questions of what conduct throws light, and what light it throws, as those questions are so fact-sensitive. "Undertaking a survey of the whole course of dealings between the parties" should not, I think, at least normally, require much detailed or controversial evidence. That is not merely for reasons of practicality and certainty. As already indicated, I would expect almost all of "the whole course of dealing" to be relevant only as background: it is with actions discussions and statements which relate to the parties' agreement and understanding as to the ownership of the beneficial interest in the home with which the court should, at least normally, primarily be concerned. Otherwise, the enquiry is likely to be trespassing into what I regard as the forbidden territories of imputed intention and fairness.

146. In other words, where the resulting trust presumption (or indeed any other basis of apportionment) applies at the date of acquisition, I am unpersuaded that (save perhaps in a most unusual case) anything other than subsequent discussions, statements or actions, which can fairly be said to imply a positive intention to depart from that apportionment, will do to justify a change in the way in which the beneficial interest is owned. To say that factors such as a long relationship, children, a joint bank account, and sharing daily outgoings of themselves are enough, or even of potential central importance, appears to me not merely wrong in principle, but a recipe for uncertainty, subjectivity, and a long and expensive examination of facts. It could also be said to be arbitrary, as, if such factors of themselves justify a departure from the original apportionment, I find it hard to see how it could be to anything other than equality. If a departure from the original apportionment was solely based on such factors, it seems to me that the judge would almost always have to reach an "all or nothing" decision. Thus, in this case, he would have to ask whether, viewed in the round, the personal and financial characteristics of the relationship between Mr Stack and Ms Dowden, after they acquired the house, justified a change in

ownership of the beneficial interest from 35-65 to 50-50, even though nothing they did or said related to the ownership of that interest (save, perhaps, the repayments of the mortgage). In my view, that involves approaching the question in the wrong way. Subject, perhaps, to exceptional cases, whose possibility it would be unrealistic not to acknowledge, an argument for an alteration in the way in which the beneficial interest is held cannot, in my opinion, succeed, unless it can be shown that there was a discussion, statement or action which, viewed in its context, namely the parties' relationship, implied an actual agreement or understanding to effect such an alteration.

147. Turning to the present case, I consider that there are no grounds for varying the split of the beneficial ownership, which arose in 1993 on the acquisition of the house, as a result of any events which occurred subsequently, at any rate to an extent more favourable to Mr Stack than the 35% accepted by the Court of Appeal. Subject to one exception, there was nothing said or done by the parties which could justify a change from that which arose at the date of acquisition. As to the exception, I accept that, as a result of his repaying some of the mortgage, Mr Stack has an arguable case for slightly increasing his share of the beneficial interest. However, his share cannot thereby be increased above 36%, assuming all the facts in his favour, and, in my view, his share would remain less than 35%.

The payment issue

148. The parties each had the right to occupy the house and the concomitant expectation of having to share occupation. After some nine years of living together, Ms Dowden excluded Mr Stack against his wishes. On 11 April 2003, the parties agreed a time-limited order in the Family Proceedings Court, which excluded Mr Stack from the house, and required Ms Dowden to pay him (or to credit him against her share of the proceeds of sale of the house) a sum which reflected the cost of his alternative accommodation, later agreed at £900 per month. After that order expired on 10 January 2004, Mr Stack effectively accepted Ms Dowden's decision to exclude him. As a result, Ms Dowden continued in exclusive occupation (with their four children), and Mr Stack had to continue to pay for other accommodation.

149. At the hearing, an order for the sale of the house was sought and granted, and Mr Stack sought a further order that he be paid (or credited) in the meantime at £900 per month. The Judge made that order, after

brief argument, on the sole stated ground that Ms Dowden had control over the marketing and sale of the house. The Court of Appeal thought this reason unsatisfactory, and reversed his decision, on the grounds that the house was soon to be sold, the four children were living there, and there was no basis for assessing the compensation at £900 per month.

150. The court's power to order payment to a beneficiary, excluded from property he would otherwise be entitled to occupy, by the beneficiary who retains occupation, is now governed by sections 12 to 15 of the Trusts of Land and Appointment of Trustees Act 1996, having been formerly equitable in origin. However, I think that it would be a rare case where the statutory principles would produce a different result from that which would have resulted from the equitable principles.

151. The 1996 Act appears to me to apply here in this way. The trustees, Ms Dowden and Mr Stack, agreed pursuant to section 13(1) of the 1996 Act (through the consent order of 11 April 2003 and not seeking to disturb the status quo after it expired) that Mr Stack would be excluded from the house. Accordingly, they could have agreed pursuant to section 13(3) and (6)(a) that Ms Dowden would pay "compensation" to Mr Stack for his exclusion. They initially agreed that in the order of 11 April 2003, but, once it expired, they could not agree whether to exercise that power. Accordingly, the decision whether to require compensation was a matter for the court under section 14.

152. In my view the proper exercise of the court's power in the present case would have been to order compensation. First, both parties had the right in principle to occupy it, Ms Dowden was living there on her own as she wanted, she had excluded Mr Stack against his will, and he was incurring the cost of alternative accommodation: accordingly, such a payment seems appropriate in the absence of any good reason to the contrary. Secondly, the parties plainly thought it was right, when agreeing the order of 11 April 2003, that, as a quid pro quo for his exclusion from the house, Mr Stack should be paid (or credited) at the rate of £900 per month. The circumstances of the parties do not appear to have changed by (or after) 10 January 2004, when they effectively accepted that Mr Stack would remain excluded from the house.

153. Thirdly, when exercising its power under section 14, the court is required to take into account four specific matters set out in section 15(1). In my view, those factors either favour ordering a payment in favour of Mr Stack, or they are neutral or irrelevant. Thus, paragraphs

(a) and (b), the purpose for which the house was bought and the purpose for which it was held, favour the conclusion, as the house was bought as a home for Mr Stack (as well as Ms Dowden and the children), and , at any rate as far as he was concerned, that remained the position. Paragraph (c), the welfare of minors residing in the house, is neutral as there is no suggestion of prejudice to the four children whether or not he was paid. Paragraph (d), the interests of any secured creditor, is irrelevant for present purposes.

154. It is true Ms Dowden had to pay all the outgoings in respect of the house, but Mr Stack had to pay all the outgoings, as well as the rent, in respect of his alternative accommodation. Further, if the compensation was calculated (as it often is) on the basis of the rental value of the trust property concerned, the outgoings would be taken into account when assessing its rental value.

155. I accept that the Judge's reason for ordering payment was weak, no doubt at least in part because of the brevity of the argument and because he was not referred to the 1996 Act. (However, it is only fair to the Judge to say that, as the actual occupier of the house, Ms Dowden did have some control over the progress of its marketing and sale.) I also accept that the Court of Appeal was consequently entitled to reconsider the matter afresh. Nonetheless, I consider that the Court of Appeal went wrong in reversing the Judge's decision on the point. The fact that the children needed a home is not in point. First, it does not meet the main ground for making a payment order, namely Mr Stack's exclusion from the house and having to find and pay for alternative accommodation. Secondly, Mr Stack was paying towards the children's maintenance, and, through his share of the beneficial ownership of the house, helping to house them. Thirdly, there was no evidence to suggest that ordering a payment to Mr Stack would have in any way harmed the children's interests. That Ms Dowden had agreed to pay £900 per month under the order of 11 April 2003 suggests that it would not have had that effect.

156. The fact that the house might have been expected to be sold fairly soon after the hearing is a point which, in my view, is either irrelevant or cuts both ways. It did not alter the position: it merely rendered it more likely to come to an end sooner rather than later. Nor is it as if any wrongful act by Mr Stack caused his exclusion: it was simply due to the relationship breaking down. The fact that, after the order of 11 April 2003 expired, Mr Stack accepted his exclusion should not count against him. To hold that a reasonable acceptance of exclusion would make it

more difficult to claim compensation would put a premium on unreasonableness and encourage litigation.

157. I also disagree with the Court of Appeal on quantum. I can see no reason to depart from the figure which the parties originally agreed, and was not challenged before the Judge, namely £900 per month. It is a figure which had a rational basis (namely the cost of Mr Stack's alternative accommodation). There is, in my view, a strong argument for saying that, on the basis of an analogy with trespass damages, that the court should be able to award compensation based either on the notional rental value of the house or the cost of the alternative accommodation.

Conclusion

158. Accordingly, I agree that Mr Stack's appeal against the Court of Appeal's determination as to the extent of his ownership of the beneficial interest in Chatsworth Road should be dismissed, but I would have allowed his appeal against the Court of Appeal's refusal to order Ms Dowden to pay him £900 per month in respect of his exclusion.

Michaelmas Term
[2011] UKSC 53
On appeal from: [2010] EWCA Civ 578

JUDGMENT

Jones (Appellant) *v* Kernott (Respondent)

before

Lord Walker
Lady Hale
Lord Collins
Lord Kerr
Lord Wilson

JUDGMENT GIVEN ON

9 November 2011

Heard on 4 May 2011

Appellant	*Respondent*
Richard Power	Andrew Bailey
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LORD WALKER AND LADY HALE

1. This appeal gives the Supreme Court the opportunity to revisit the decision of the House of Lords in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432. That case, like this, was concerned with the determination of the beneficial interests in a house acquired in joint names by an unmarried couple who intended it to be their family home. Its reasoning was closely examined, in particular by Rimer LJ, in the present appeal: [2010] EWCA Civ 578, [2010] 1 WLR 2401. The fact that the Court of Appeal itself gave permission to appeal is a mark of the difficulties felt by the majority, not only with the reasoning but also with the outcome to which it led.

2. The decision in *Stack v Dowden* has also attracted a good deal of comment from legal scholars, which we have read although it was not referred to by counsel (who took a sensibly economical approach to the presentation of the appeal). This ranges from qualified enthusiasm (K Gray & S Gray, *Land Law*, 6th ed (2009) para 7-072) to almost unqualified disapprobation (Swadling, “The Common Intention Trust in the House of Lords: An Opportunity Missed” (2007) 123 LQR 511; Dixon, “The Never-Ending Story – Co-Ownership After *Stack v Dowden*” [2007] Conv 456). But counsel have not argued that *Stack v Dowden* was wrongly decided or that this court should now depart from the principles which it laid down. This appeal provides an opportunity for some clarification.

Stack v Dowden

3. Mr Stack and Ms Dowden lived together for 19 years, from 1983 to 2002. They did not marry but they had four children born between 1986 and 1991. Ms Dowden was a well-qualified electrical engineer, and throughout the time when they lived together she worked full-time (except for periods of maternity leave) for the LEB and its successor. Mr Stack was a self-employed builder and decorator until 1987, after which he was employed by Hammersmith and Fulham LBC.

4. They started living together in 1983 in a house acquired in Ms Dowden’s sole name at the price of £30,000. The deposit of £8,000 was paid out of a building society account in Ms Dowden’s sole name; there was a conflict of evidence as to whether Mr Stack had made any contributions to the account. The balance of £22,000 was raised on a mortgage for which Ms Dowden alone was responsible. She made the mortgage payments and paid other household outgoings. Mr Stack kept his finances separate (he had most of his post, including his bank statements, sent to his father’s address). They carried out extensive repairs and improvements

to the house. The judge found that Mr Stack was responsible for most of this work but could not put a figure on its contribution to the sale value of the house.

5. They moved house in 1993. Ms Dowden received over £66,000 from the sale of their first home. Their new home was bought for £190,000. Nearly £129,000 came from Ms Dowden's building society account and the balance from a bank loan secured on the house and on two endowment policies, one in joint names and one in Ms Dowden's sole name. The house was transferred into their joint names with no express declaration of trust, but a standard-form provision that the survivor could give a good receipt.

6. Mr Stack paid the mortgage interest and the premiums on the joint policy, to a total amount of nearly £34,000. The principal of the mortgage loan was repaid by a series of lump sum payments, to which Mr Stack contributed £27,000 and Ms Dowden over £38,000. The utility bills were in Ms Dowden's name and she paid all or most of them. There were some improvements to the property, but not on a large scale. The parties continued to maintain separate bank accounts and each made a number of separate investments.

7. In short, there was a substantial disparity between their respective financial contributions to the purchase. The trial judge held that the proceeds of sale should be divided in equal shares. Although Ms Dowden had been the bigger earner, "they have both put their all into doing the best for themselves and their family as they could". The Court of Appeal allowed Ms Dowden's appeal and divided the proceeds 65% to 35% as she had asked. The House of Lords (Lord Hoffmann, Lord Hope, Lord Walker, Lady Hale and Lord Neuberger) unanimously upheld that order, although Lord Neuberger did so for different reasons from the majority.

8. The curious feature of the decided cases up until then had been that, once an intention to share ownership had been established, the courts had tended to adopt a more flexible and "holistic" approach to the quantification of the parties' shares in cases of sole legal ownership than they had in cases of joint legal ownership. In the former, they had adopted a concept of the "common intention" constructive trust which depends upon the shared intentions of the parties. In the latter, they had tended to analyse the matter in terms of a resulting trust, which depends upon the law's presumption as to the intention of the party who makes a financial contribution to the purchase. This point was made by Lady Hale in *Stack v Dowden*, paras 64 and 65 (see also Peter Gibson LJ in *Drake v Whipp* [1996] 1 FLR 826, 827, cited in *Stack v Dowden*, para 29).

9. The leading opinion in the House of Lords was that of Lady Hale. Lord Hoffmann, Lord Hope and Lord Walker all agreed with it, though Lord Hope and

Lord Walker added some observations of their own. Lord Hope discussed Scots law, drawing attention to the importance in Scotland of the law of unjust enrichment. Lord Walker contributed what he referred to as an "extended footnote", with a detailed commentary on Lord Diplock's speech in *Gissing v Gissing* [1971] AC 886.

10. The conclusions in Lady Hale's opinion were directed to the case of a house transferred into the joint names of a married or unmarried couple, where both are responsible for any mortgage, and where there is no express declaration of their beneficial interests. In such cases, she held that there is a presumption that the beneficial interests coincide with the legal estate. Specifically, "in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved": Lady Hale, at para 58; Lord Walker at para 33.

11. Secondly, the mere fact that the parties had contributed to the acquisition of the home in unequal shares would not normally be sufficient to rebut the presumption of joint tenancy arising from the conveyance: "It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names . . . are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase": Lady Hale, at para 68.

12. Thirdly, the task of seeking to show that the parties intended their beneficial interests to be different from their legal interests was not to be "lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result, unless the facts are very unusual": Lady Hale, at para 68; also Lord Walker at para 33.

13. Fourthly, however, if the task is embarked upon, it is to ascertain the parties' common intentions as to what their shares in the property would be, in the light of their whole course of conduct in relation to it: Lady Hale, at para 60. It is the way in which this point was made which seems to have caused the most difficulty in the lower courts. The difficulty is well illustrated in Lord Wilson's judgment, at paras 85 to 87, which read the judgment in a way which we would not read it. It matters not which reading is correct. It does matter that any confusion is resolved.

14. It was also accepted that the parties' common intentions might change over time, producing what Lord Hoffmann referred to in the course of argument as an "'ambulatory' constructive trust": Lady Hale, at para 62. An example, given in para 70, was where one party had financed or constructed an extension or major improvement to the property, so that what they had now was different from what they had first acquired. But of course there are other examples. The principal question in this case is whether this is one.

15. At its simplest the principle in *Stack v Dowden* is that a "common intention" trust, for the cohabitants' home to belong to them jointly in equity as well as on the proprietorship register, is the default option in joint names cases. The trust can be classified as a constructive trust, but it is not at odds with the parties' legal ownership. Beneficial ownership mirrors legal ownership. What it is at odds with is the presumption of a resulting trust.

A single regime?

16. In an interesting article by Simon Gardner and Katherine Davidson, "The Future of *Stack v Dowden*" (2011) 127 LQR 13, 15, the authors express the hope that the Supreme Court will "make clear that constructive trusts of family homes are governed by a single regime, dispelling any impression that different rules apply to 'joint names' and 'single name' cases". At a high level of generality, there is of course a single regime: the law of trusts (this is the second of Mustill LJ's propositions in *Grant v Edwards* [1986] Ch 638, 651). To the extent that we recognise that a "common intention" trust is of central importance to "joint names" as well as "single names" cases, we are going some way to meet that hope. Nevertheless it is important to point out that the starting point for analysis is different in the two situations. That is so even though it may be necessary to enquire into the varied circumstances and reasons why a house or flat has been acquired in a single name or in joint names (they range, for instance, from *Lowson v Coombes* [1999] Ch 373, where the property was in the woman's sole name because the man was apprehensive of claims by his separated wife, to *Adekunle v Ritchie* [2007] WTLR 1505, where an enfranchised freehold was in joint names because the elderly tenant could not obtain a mortgage on her own).

17. The starting point is different because the claimant whose name is not on the proprietorship register has the burden of establishing some sort of implied trust, normally what is now termed a "common intention" constructive trust. The claimant whose name is on the register starts (in the absence of an express declaration of trust in different terms, and subject to what is said below about resulting trusts) with the presumption (or assumption) of a beneficial joint tenancy.

18. The official Land Registry application form (TR1) for registration of a transfer was replaced on 1 April 1998 by a new form with a box enabling joint transferees to clarify the beneficial ownership of the property. That should help to avoid uncertainty but in practice it does not always do so (this is explained in detail in a case note: "Anything to Declare? Express Declarations of Trust in *Stack v Dowden*" [2007] Conv 364). We understand that the Land Registry does not propose to implement the recommendations for change made by an expert working party which it convened in response to *Stack v Dowden*: see Elizabeth Cooke, "In the wake of *Stack v Dowden*: the tale of TR1" [2011] Fam Law 1142.

19. The presumption of a beneficial joint tenancy is not based on a mantra as to "equity following the law" (though many non-lawyers would find it hard to understand the notion that equity might do anything else). There are two much more substantial reasons (which overlap) why a challenge to the presumption of beneficial joint tenancy is not to be lightly embarked on. The first is implicit in the nature of the enterprise. If a couple in an intimate relationship (whether married or unmarried) decide to buy a house or flat in which to live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint enterprise. That is so even if the parties, for whatever reason, fail to make that clear by any overt declaration or agreement. The court has often drawn attention to this. Jacob LJ did so in his dissenting judgment in this case: [2010] EWCA Civ 578, [2010] 1 WLR 2401, para 90.

20. One of the most striking expressions of this approach is in the judgment of Waite LJ in *Midland Bank plc v Cooke* [1995] 4 All ER 562, 575. It is worth quoting it at some length, even though the case was a single-name case and the couple were married (the husband was 19, and the wife a little older, at the time of the marriage):

> "Equity has traditionally been a system which matches established principle to the demands of social change. The mass diffusion of home ownership has been one of the most striking social changes of our own time. The present case is typical of hundreds, perhaps even thousands, of others. When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure. Despite the efforts that have been made by many responsible bodies to counsel prospective cohabitants as to the risks of taking shared interests in property without legal advice, it is unrealistic to expect that advice to be followed on a universal scale. For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitably be numerous couples, married or

unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it."

21. Gardner and Davidson make the same point at (2011) 127 LQR 13, 15-16:

"The context under discussion is one in which people will not normally formulate agreements, but (this is crucial) the very reason for this – the parties' familial trust in one another - also warrants the law's intervention nonetheless. Unless the law reacts to such trust as much as to more individualistic forms of interaction, those who put their faith in the former rather than the latter will find their interests thereby exposed."

Gardner has termed this "a materially communal relationship: ie one in which, in practical terms, they pool their material resources (including money, other assets, and labour)": *An Introduction to Land Law*, 2nd ed (2009) para 8.3.7.)

22. The notion that in a trusting personal relationship the parties do not hold each other to account financially is underpinned by the practical difficulty, in many cases, of taking any such account, perhaps after 20 years or more of the ups and downs of living together as an unmarried couple. That is the second reason for caution before going to law in order to displace the presumption of beneficial joint tenancy. Lady Hale pointed this out in *Stack v Dowden* at para 68 (see para 12 above), as did Lord Walker at para 33:

"In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case."

The competing presumption: a resulting trust?

23. In an illuminating article, "Explaining Resulting Trusts" (2008) 124 LQR 72, 73, footnote 6) William Swadling has commented:

> "A resulting trust also traditionally arose where A and B contributed unequally to the purchase price and the title was conveyed to A and B as joint tenants, whereby A and B held as equitable tenants in common in proportion to their contributions (*Lake v Gibson* (1729) 1 Eq Cas Abr 290). In *Stack v Dowden* [2007] UKHL 17, a majority of the House of Lords held that this rule no longer applied in the case of 'matrimonial or quasi-matrimonial homes.' "

That is probably a reference to para 31 of Lord Walker's opinion. Lady Hale's opinion does not in terms reach that conclusion. But the extended discussion from para 56 to para 70 (and in particular, the express disapproval of *Walker v Hall* [1984] FLR 126, *Springette v Defoe* [1992] 2 FLR 388 and *Huntingford v Hobbs* [1993] 1 FLR 736) is inconsistent with a resulting trust analysis in this context. It is not possible at one and the same time to have a presumption or starting point of joint beneficial interests and a presumption (let alone a rule) that the parties' beneficial interests are in proportion to their respective financial contributions.

24. In the context of the acquisition of a family home, the presumption of a resulting trust made a great deal more sense when social and economic conditions were different and when it was tempered by the presumption of advancement. The breadwinner husband who provided the money to buy a house in his wife's name, or in their joint names, was presumed to be making her a gift of it, or of a joint interest in it. That simple assumption – which was itself an exercise in imputing an intention which the parties may never have had - was thought unrealistic in the modern world by three of their Lordships in *Pettitt v Pettitt* [1970] AC 777. It was also discriminatory as between men and women and married and unmarried couples. That problem might have been solved had equity been able to extend the presumption of advancement to unmarried couples and remove the sex discrimination. Instead, the tool which equity has chosen to develop law is the "common intention" constructive trust. Abandoning the presumption of advancement while retaining the presumption of resulting trust would place an even greater emphasis upon who paid for what, an emphasis which most commentators now agree to have been too narrow: hence the general welcome given to the "more promising vehicle" of the constructive trust: see Gardner and Davidson at (2011) 127 LQR 13, 16. The presumption of advancement is to receive its quietus when section 199 of the Equality Act 2010 is brought into force.

25. The time has come to make it clear, in line with *Stack v Dowden* (see also *Abbott v Abbott* [2007] UKPC 53, [2007] 2 All ER 432), that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares. The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources.

Inference or imputation?

26. In *Stack v Dowden* Lord Neuberger observed (paras 125-126):

> "While an intention may be inferred as well as express, it may not, at least in my opinion, be imputed. That appears to me to be consistent both with normal principles and with the majority view of this House in *Pettitt* [1970] AC 777, as accepted by all but Lord Reid in *Gissing v Gissing* [1971] AC 886, 897H, 898B-D, 900E-G, 901B-D, 904E-F, and reiterated by the Court of Appeal in *Grant v Edwards* [1986] Ch 638 at 651F-653A. The distinction between inference and imputation may appear a fine one (and in *Gissing v Gissing* [1971] AC 886, at 902G-H, Lord Pearson, who, on a fair reading I think rejected imputation, seems to have equated it with inference), but it is important.
>
> An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend."

Rimer LJ made some similar observations in the Court of Appeal in this case [2010] EWCA Civ 578, [2010] 1 WLR 2401, paras 76-77.

27. Both observations had been to some extent anticipated as long ago as 1970 by Lord Reid in his speech in *Gissing v Gissing* [1971] AC 886, 897:

> "Returning to the crucial question there is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation. If the law is to be that the court has power to impute such an intention in proper cases then I am content, although I would prefer to reach the same result in a rather different way. But if it were to be held to be the law that it must at least be possible to infer a contemporary agreement in the sense of holding that it is more probable than not there was in fact some such agreement then I could not contemplate the future results of such a decision with equanimity."

28. The decision of the House of Lords in *Gissing v Gissing* has been so fully analysed and discussed that it is almost impossible to say anything new about it. However it may be worth pointing out that their Lordships' speeches were singularly unresponsive to each other. The only reference to another speech is by Viscount Dilhorne (at p 900) where he agreed with Lord Diplock on a very general proposition as to the law of trusts. The law reporter has managed to find a ratio for the headnote (at p 886) only by putting these two propositions together with some remarks by Lord Reid (at p 896) which have a quite different flavour. We can only guess at the order in which the speeches were composed, but the third and fourth sentences of the passage from Lord Reid's speech, set out in the preceding paragraph, suggest that Lord Reid had read Lord Diplock's speech in draft, and thought that it was about "an imputation of a deemed intention."

29. This sort of constructive intention (or any other constructive state of mind), and the difficulties that they raise, are familiar in many branches of the law. Whenever a judge concludes that an individual "intended, or must be taken to have intended," or "knew, or must be taken to have known," there is an elision between what the judge can find as a fact (usually by inference) on consideration of the admissible evidence, and what the law may supply (to fill the evidential gap) by way of a presumption. The presumption of a resulting trust is a clear example of a rule by which the law *does* impute an intention, the rule being based on a very broad generalisation about human motivation, as Lord Diplock noted in *Pettitt v Pettitt* [1970] AC 777, 824:

> "It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples 'presumptions' which are based upon inferences of fact which an earlier generation of judges

> drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era."

That was 40 years ago and we are now another generation on.

30. The decision in *Stack v Dowden* produced a division of the net proceeds of sale of the house in shares roughly corresponding to the parties' financial contributions over the years. The majority reached that conclusion by inferring a common intention (see Lady Hale's opinion at para 92, following her detailed analysis of the facts starting at para 86). Only Lord Neuberger reached the same result by applying the classic resulting trust doctrine (which involved, it is to be noted, imputing an intention to the parties).

31. In deference to the comments of Lord Neuberger and Rimer LJ, we accept that the search is primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct. However, there are at least two exceptions. The first, which is not this case, is where the classic resulting trust presumption applies. Indeed, this would be rare in a domestic context, but might perhaps arise where domestic partners were also business partners: see *Stack v Dowden*, para 32. The second, which for reasons which will appear later is in our view also not this case but will arise much more frequently, is where it is clear that the beneficial interests are to be shared, but it is impossible to divine a common intention as to the proportions in which they are to be shared. In those two situations, the court is driven to impute an intention to the parties which they may never have had.

32. Lord Diplock, in *Gissing v Gissing* [1971] AC 886, 909, pointed out that, once the court was satisfied that it was the parties' common intention that the beneficial interest was to be shared in some proportion or other, the court might have to give effect to that common intention by determining what in all the circumstances was a fair share. And it is that thought which is picked up in the subsequent cases, culminating in the judgment of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, paras 65, 66 and 69, and in particular the passage in para 69 which was given qualified approval in *Stack v Dowden*:

> "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property."

33. Chadwick LJ was not there saying that fairness was the criterion for determining whether or not the property should be shared, but he was saying that

the court might have to impute an intention to the parties as to the proportions in which the property would be shared. In deducing what the parties, as reasonable people, would have thought at the relevant time, regard would obviously be had to their whole course of dealing in relation to the property.

34. However, while the conceptual difference between inferring and imputing is clear, the difference in practice may not be so great. In this area, as in many others, the scope for inference is wide. The law recognizes that a legitimate inference may not correspond to an individual's subjective state of mind. As Lord Diplock also put it in *Gissing v Gissing* [1971] AC 886, 906:

> "As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party."

This point has been developed by Nick Piska, "Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*" (2008) 71 MLR 120. He observes at pp 127-128:

> "Subjective intentions can never be accessed directly, so the court must always direct itself to a consideration of the parties' objective intentions through a careful consideration of the relevant facts. The point is that the imputation/inference distinction may well be a distinction without a difference with regard to the process of determining parties' intentions. It is not that the parties' subjective intentions are irrelevant but rather that a finding as to subjective intention can only be made on an objective basis."

35. In several parts of the British Commonwealth federal or provincial legislation has given the court a limited jurisdiction to vary or adjust proprietary rights in the home when an unmarried couple split up. Most require a minimum period of two years' cohabitation (or less if there are children) before the jurisdiction is exercisable. In England the Law Commission has made recommendations on similar lines (Law Com No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown*, 2007), but there are no plans to implement them in the near future.

36. In the meantime there will continue to be many difficult cases in which the court has to reach a conclusion on sparse and conflicting evidence. It is the court's duty to reach a decision on even the most difficult case. As the deputy judge (Mr Nicholas Strauss QC) said in his admirable judgment [2009] EWHC 1713 (Ch), [2010] 1 WLR 2401, para 33 (in the context of a discussion of fairness) "that is what courts are for." That was an echo (conscious or unconscious) of what Sir Thomas Bingham MR said, in a different family law context, in *Re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1, 33. The trial judge has the onerous task of finding the primary facts and drawing the necessary inferences and conclusions, and appellate courts will be slow to overturn the trial judge's findings.

The facts of this case

37. The parties met in 1980. Ms Jones worked as a mobile hairdresser. Mr Kernott worked as a self employed ice-cream salesman during the summer and claimed benefits during the winter if he could find no other work. The judge found that their incomes were not very different from one another. Ms Jones bought a mobile home in her sole name in 1981. Mr Kernott moved in with her (according to the agreed statement of facts and issues) in 1983. Their first child was born in June 1984. In May 1985 Ms Jones sold her mobile home and the property in question in these proceedings, 39 Badger Hall Avenue, Thundersley, Essex, was bought in their joint names.

38. The purchase price was £30,000. This was relatively cheap because the house had belonged to the elderly mother of a client of Ms Jones. The deposit of £6000 was paid from the proceeds of sale of Ms Jones' mobile home. The balance was raised by way of an endowment mortgage in their joint names. Mr Kernott paid £100 per week towards the household expenses while they lived at the property. Ms Jones paid the mortgage and other household bills out of their joint resources. In March 1986 they jointly took out a loan of £2000 to build an extension. Mr Kernott did some of the labouring work and paid friends and relations to do other work on it. The judge found that the extension probably enhanced the value of the property by around 50%, from £30,000 to £44,000. Their second child was born in September 1986.

39. Mr Kernott moved out of the property in October 1993. The parties had lived there together, sharing the household expenses, for eight years and five months. Thereafter Ms Jones remained living in the property with the children and paid all the household expenses herself. Mr Kernott made no further contribution towards the acquisition of the property and the judge also found that he made very little contribution to the maintenance and support of their two children who were

being looked after by their mother. This situation continued for some 14 and a half years until the hearing before the judge.

40. The Badger Hall Avenue property was put on the market in October 1995 for £69,995, but was not sold. This may be some indication of its market value at that time but no more than that. At some date which is not entirely clear, the parties agreed to cash in a joint life insurance policy (not, of course, the endowment policy supporting the mortgage) and the proceeds were divided between them. The judge held that this was to enable Mr Kernott to put down a deposit on a home of his own. This he did in May 1996, when he bought 114 Stanley Road, Benfleet, for around £57,000 with a deposit of £2,800 and a mortgage of £54,150. The judge observed that he was able to afford his own accommodation because he was not making any contribution towards the former family home, nor was he making any significant contribution towards the support of his children. The judge also found that "whilst the intentions of the parties may well have been at the outset to provide them as a couple with a home for themselves and their progeny, those intentions have altered significantly over the years to the extent that [Mr Kernott] demonstrated that he had no intention until recently of availing himself of the beneficial ownership in this property, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property on which he concentrated".

41. At the time of the hearing before the judge in April 2008, 39 Badger Hall Avenue was valued at £245,000. The outstanding mortgage debt was £26,664. The endowment policy supporting that mortgage was worth £25,209. On the basis that they had contributed jointly to the endowment for eight years and five months and that Ms Jones had contributed alone for fourteen and a half years, it was calculated that Mr Kernott was entitled to around £4712 of its value, which would leave Ms Jones with £20,497. 114 Stanley Road was valued at £205,000, with an outstanding mortgage of £37,968 (suggesting that this was a repayment rather than an endowment mortgage). If the whole of the endowment policy was used to discharge the mortgage, the net worth of 39 Badger Hall Avenue would be £243,545. If the mortgage on 114 Stanley Road was an ordinary repayment mortgage, the net worth of 114 Stanley Road would be £167,032.

These proceedings

42. Mr Kernott initiated correspondence with a view to claiming his interest in the property in 2006. Ms Jones began proceedings in the Southend County Court in October 2007, claiming a declaration under section 14 of the Trusts of Land and Appointment of Trustees Act 1996: (i) that she owned the entire beneficial interest in 39 Badger Hall Avenue; alternatively (ii) if Mr Kernott had any beneficial interest in 39 Badger Hall Avenue, that she also had a beneficial interest in 114

Stanley Road, and that these respective interests be determined by the court; and (iii) that either she be registered as sole proprietor of 39 Badger Hall Avenue, or that they be registered as joint proprietors of 114 Stanley Road.

43. At the trial, which took place in April 2008, Ms Jones conceded that, in 1993 when the couple separated, there would not have been enough evidence to displace the presumption that their beneficial interests followed the legal title, so that they were then joint tenants in law and equity. She also conceded that she had no legal claim on 114 Stanley Road. Her contention was that its purchase, along with other events since their separation, was evidence that their intentions with respect to the beneficial interests in 39 Badger Hall Avenue had changed. The judge accepted that contention. In the light of *Stack v Dowden* and *Oxley v Hiscock* he had "to consider what is fair and just between the parties bearing in mind what I have found with regard to the whole course of dealing between them". He concluded that the value of the property should be divided as to 90% for Ms Jones and 10% for Mr Kernott. On the figures given above, had the property been sold then, and the whole of the endowment policy used to defray the mortgage debt, that would have given her £219,190 and him £24,355 (giving him a total of £191,387 from the equity in his home and the sale of the property).

44. Mr Kernott appealed to the High Court, arguing that the judge was wrong to infer or impute an intention that the parties' beneficial interests should change after their separation and to quantify these in the way which he considered fair. The deputy judge, Mr Nicholas Strauss QC, after a careful review of the authorities, concluded that the change in intention could readily be inferred or imputed from the parties' conduct: [2009] EWHC 1713 (Ch), [2010] 1 WLR 2401, para 47. In the absence of any indication by words or conduct as to how their shares should be altered, the appropriate criterion was what he considered to be fair and just: para 49. The judge's assessment could be justified, given that their direct contributions were a little over 4:1 in Ms Jones' favour and that the larger part of the capital gain on the property must have arisen after 1993. By not contributing to that property, Mr Kernott had been able to buy another property on which there was almost as great a capital gain. The parties could not be taken to have intended that he should have a significant part of the increased value of 39 Badger Hall Avenue as well as the whole of the capital gain from 114 Stanley Road: para 51.

45. The Court of Appeal, by a majority, allowed Mr Kernott's appeal and declared that the parties owned the property as tenants in common in equal shares: [2010] EWCA Civ 578, [2010] 1 WLR 2401. Jacob LJ, who dissented, held that the judge had applied the right legal test and that there was a proper basis in the evidence for concluding that the parties must be taken to have intended that they should each have a fair and just share. He would not interfere with the judge's assessment of the fair proportions. Rimer LJ, in the majority, held that there was nothing to indicate that the parties' intentions had changed after their separation. A

crucial part of his reasoning was his interpretation of the decision in *Stack v Dowden*: that it did not "enable courts to find, by way of the imputation route, an intention where none was expressly uttered nor inferentially formed": para 77. Wall P also concluded that he could not infer an intention to change the beneficial interests from the parties' conduct: paras 57, 58.

Discussion

46. It is always salutary to be confronted with the ambiguities which later emerge in what seemed at the time to be comparatively clear language. The primary search must always be for what the parties actually intended, to be deduced objectively from their words and their actions. If that can be discovered, then, as Mr Nicholas Strauss QC pointed out in the High Court, it is not open to a court to impose a solution upon them in contradiction to those intentions, merely because the court considers it fair to do so.

47. In a case such as this, where the parties already share the beneficial interest, and the question is what their interests are and whether their interests have changed, the court will try to deduce what their actual intentions were at the relevant time. It cannot impose a solution upon them which is contrary to what the evidence shows that they actually intended. But if it cannot deduce exactly what shares were intended, it may have no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time. This is a fallback position which some courts may not welcome, but the court has a duty to come to a conclusion on the dispute put before it.

48. In this case, there is no need to impute an intention that the parties' beneficial interests would change, because the judge made a finding that the intentions of the parties did in fact change. At the outset, their intention was to provide a home for themselves and their progeny. But thereafter their intentions did change significantly. He did not go into detail, but the inferences are not difficult to draw. They separated in October 1993. No doubt in many such cases, there is a period of uncertainty about where the parties will live and what they will do about the home which they used to share. This home was put on the market in late 1995 but failed to sell. Around that time a new plan was formed. The life insurance policy was cashed in and Mr Kernott was able to buy a new home for himself. He would not have been able to do this had he still had to contribute towards the mortgage, endowment policy and other outgoings on 39 Badger Hall Avenue. The logical inference is that they intended that his interest in Badger Hall Avenue should crystallise then. Just as he would have the sole benefit of any capital gain in his own home, Ms Jones would have the sole benefit of any capital gain in Badger Hall Avenue. Insofar as the judge did not in so many words infer that this was their intention, it is clearly the intention which reasonable people

would have had had they thought about it at the time. But in our view it is an intention which he both could and should have inferred from their conduct.

49. A rough calculation on this basis produces a result so close to that which the judge produced that it would be wrong for an appellate court to interfere. If we take the value of the property as £60,000 in late 1993 (or £70,000 in late 1995) and the value in 2008 as £245,000, and share the £60,000 (or £70,000) equally between the parties, but leave the balance to Ms Jones, that gives him £30,000 (£35,000) and her £215,000 (£210,000), roughly 12% (14%) and 88% (86%) respectively. This calculation ignores the mortgage, which may be the correct approach, as in 2008 the mortgage debt was almost fully covered by the endowment policy which was always meant to discharge it. Introducing the mortgage liability in 1993 (or 1995) into the calculation would be to Mr Kernott's disadvantage, because at that stage the endowment policy would not have been sufficient to discharge the debt, so the equity would have been less.

Further accounting

50. On this approach, there is no scope for further accounting between the parties (which was obviously contemplated as a future possibility by Rimer LJ on his approach). Had their beneficial interests in the property remained the same, there would have been the possibility of cross-claims: Mr Kernott against Ms Jones for an occupation rent, and Ms Jones against Mr Kernott for his half share in the mortgage interest and endowment premiums which she had paid. It is quite likely, however, that the court would hold that there was no liability to pay an occupation rent, at least while the home was needed for the couple's children, whereas the liability to contribute towards the mortgage and endowment policy would accumulate at compound interest over the years since he ceased to contribute. This exercise has not been done. In a case such as this it would involve a quite disproportionate effort, both to discover the requisite figures (even supposing that they could be discovered) and to make the requisite calculations, let alone to determine what the ground rules should be. The parties' legal advisers are to be commended for the proportionate approach which they have taken to the preparation of this case.

Conclusion

51. In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick LJ in *Oxley v Hiscock* [2005] FAm 211, para 69. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

52. This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above.

53. The assumptions as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, are not appropriate to the ascertainment of beneficial interests in a family home. Whether they remain appropriate in other contexts is not the issue in this case.

54. It follows that we would allow this appeal and restore the order of the judge.

LORD COLLINS

55. I agree that the appeal should be allowed for the reasons given in the joint judgment of Lord Walker and Lady Hale.

56. It is not surprising that the decision in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 gave rise to difficulties. It was a decision which was responding to the increasing number of co-habiting couples with joint interests in their homes, and to the fact that couples (whether married or unmarried) rarely make agreements about their respective shares in their homes, and to the enormous inflation in property prices which has made the division of ownership by reference to initial financial contributions artificial and potentially productive of injustice.

57. The absence of legislative intervention (which continues despite the Law Commission Report on *Cohabitation: the Financial consequences of Relationship Breakdown*, 2007) made it necessary for the judiciary to respond by adapting old principles to new situations. That has not been an easy task. It is illustrated by the fact that in both *Stack v Dowden* and in this case the results at the highest appellate level have been unanimous but the reasoning has not.

58. I would hope that this decision will lay to rest the remaining difficulties, and that it will not be necessary to revisit this question by reconsideration of the correctness of *Stack v Dowden*, by which this court is bound (subject to the application of *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 regarding departure from previous decisions). It should not be necessary because the differences in reasoning are largely terminological or conceptual and are likely to make no difference in practice. But should it be necessary, the court (no doubt with a panel of seven or nine) would need much fuller argument (together with citation of the enormous critical literature which the decision has spawned) than was presented to the court on this appeal.

59. There have been at least three causes of the difficulties with *Stack v Dowden.* The first is that the previous authorities were mainly concerned with a different factual situation, namely where the property was registered in the name of only one of the parties. Second, they did not in any event speak with one voice, particularly on that part of *Stack v Dowden* which has caused most difficulty, namely whether in this part of the law there is any useful distinction between inferred intention and imputed intention: contrast *Gissing v Gissing* [1971] AC 886 with *Lloyds Bank v Rosset* [1991] 1 AC 107. The third reason is that (despite it being trite that it is wrong to do so) Baroness Hale's speech has been treated as if it were a statute, and ambiguities in it have been exploited or exaggerated, particularly the passage at para 60 in which she has been taken as having treated inferred intention and imputed intention as interchangeable, and the passage at para 61 in which she approved, or substantially approved, the reasoning of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69.

60. The reasoning of Baroness Hale and Lord Walker, taken together, in *Stack v Dowden* was as follows: (1) When property is held in joint names, and without any express declaration of trust, the starting point is that the beneficial interest is held equally and there is a heavy burden on the party asserting otherwise: paras 14, 33, 54, 56, 68. (2) That is because it will almost always have been a conscious decision to put the property into joint names, and committing oneself to spend large sums of money on a place to live is not normally done by accident or without giving it thought: para 66. (3) Consequently it is to be expected that joint transferees would have spelled out their beneficial interests when they intended them to be different from their legal interests ([54]) and cases in which the burden will be discharged will be very unusual (para 68). (4) The contrary can be proved by looking at all the relevant circumstances in order to discern the parties' common intention: [59]. (5) There is no presumption that the parties intended that the beneficial interest be shared in proportion to their financial contributions to the acquisition of the property: paras 31, 59-60 (thereby rejecting the approach of the resulting trust analysis as a starting point favoured by Lord Neuberger, dissenting, but not as to the result). (6) The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it: para 60. (7) The search was for the result which reflected what the parties must, in the light of their conduct, be taken to have intended, and it did not enable the court to abandon that search in favour of the result which the court itself considered fair: para 61. (8) The matters to be taken into account are discussed in detail at paras 33-34 and 68-70, and it is not necessary to rehearse them here.

61. The crucial parts of Chadwick LJ's summary of the principles in his magisterial judgment in *Oxley v Hiscock* [2005] Fam 211, paras 68-69 take their main inspiration from the speech of Lord Diplock in *Gissing v Gissing* [1971] AC 886 and the judgment of Nourse LJ in *Anderson v Stokes* [1991] 1 FLR 391, 400-

401. For present purposes it is only necessary to note that his discussion is dealing with the case where a home is purchased in the sole name of one party in a co-habiting couple, each of them has made some financial contribution to the purchase, and there is no declaration of trust as to the beneficial ownership. After a treatment of the way in which a common intention that each will have a beneficial interest can be inferred from discussions between the parties or, in the absence of discussion, from the fact that each has made contributions to the purchase price, Chadwick LJ moved at para 69 to a second question, namely "what is the extent of the parties' respective beneficial interests in the property?". It was in that context that he said:

> "… [I]n many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be accepted that … the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

62. It was in the light of the whole of Chadwick LJ's reasoning that in *Stack v Dowden* Baroness Hale referred to the Law Commission Discussion Paper on Sharing Homes, para 4.27, and went on to say at para 61:

> "First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair."

63. In its context that was plainly a reference to the first stage of the enquiry, namely whether there was a common intention that the property be beneficially owned other than in line with the legal title.

64. I agree, therefore, that authority justifies the conceptual approach of Lord Walker and Lady Hale that, in joint names cases, the common intention to displace

the presumption of equality can, in the absence of express agreement, be inferred (rather than imputed: see para 31 of the joint judgment) from their conduct, and where, in such a case, it is not possible to ascertain or infer what share was intended, each will be entitled to a fair share in the light of the whole course of dealing between them in relation to the property.

65. That said, it is my view that in the present context the difference between inference and imputation will hardly ever matter (as Lord Walker and Lady Hale recognise at para 34), and that what is one person's inference will be another person's imputation. A similar point has arisen in many other contexts, for example, the difference between implied terms which depend on the parties' actual intention, terms based on a rule of law, and implied terms based on an intention imputed to the parties from their actual circumstances: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137, per Lord Wright. Or the point under the law prior to the Contracts (Applicable Law) Act 1990 as to whether (in the absence of an express choice) the proper law of the contract depended on an intention to be inferred from the circumstances or on the law which had the closest connection with the contract.

66. Nor will it matter in practice that at the first stage, of ascertaining the common intention as to the beneficial ownership, the search is not, at least in theory, for what is fair. It would be difficult (and, perhaps, absurd) to imagine a scenario involving circumstances from which, in the absence of express agreement, the court will infer a shared or common intention which is unfair. The courts are courts of law, but they are also courts of justice.

LORD KERR

67. I agree that this appeal should be allowed. There are differences of some significance in the reasoning that underlies the joint judgment of Lord Walker and Lady Hale and that contained in Lord Wilson's judgment. I agree with Lord Collins that these are both terminological and conceptual. I am less inclined to agree, however, that the divergence in reasoning is unlikely to make a difference in practice. While it may well be that the outcome in many cases will be the same, whether one infers an intention or imputes it, that does not mean that the process by which the result is arrived at is more or less the same. Indeed, it seems to me that a markedly and obviously different mode of analysis will generally be required. Before elaborating briefly on that proposition, let me turn very shortly to the areas in which, as I see it, there is consensus among the other members of the court.

68. The following appear to be the areas of agreement:

> (i) In joint names' cases, the starting point is that equity follows the law. One begins the search for the proper allocation of shares in the property with the presumption that the parties are joint tenants and are thus entitled to equal shares;
>
> (ii) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home or (b) that they later formed the common intention that their respective shares would change;
>
> (iii) The common intention, if it can be inferred, is to be deduced objectively from the parties' conduct;
>
> (iv) Where the intention as to the division of the property cannot be inferred, each is entitled to that share which the court considers fair. In considering the question of what is fair the court should have regard to the whole course of dealing between the parties

69. The areas of disagreement appear to be these: (a) is there sufficient evidence in the present case from which the parties' intentions can be inferred? (b) is the difference between inferring and imputing an intention likely to be great as a matter of general practice?

How far should the court go in seeking to infer actual intention as to shares?

70. At para 33 above Lord Walker and Lady Hale have quoted the important judgment of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211 and at para 52(4) have said that, on the authority of what was said in para 69 of *Oxley*, where it is not possible to ascertain what the actual intention of the parties was as to the shares in which they would own the property, each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property. This, I believe, casts the test somewhat differently from the way that it was formulated by Chadwick LJ. At para 69 of *Oxley* he said this:

> "… in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be

> accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property…"

71. Chadwick LJ did not confine the circumstances in which an intention is to be imputed to those where it was impossible to infer an intention. Rather, he considered that it was proper – and necessary – to impute it when there had been no discussion about the amounts of the shares that each was to have or where there was no evidence of such a discussion. Lord Walker and Lady Hale have pointed out that *Oxley v Hiscock* received qualified approval in *Stack v Dowden* [2007] 2 AC 432. It seems clear, however, that there was no approval of the notion that an intention should be imputed where there had been no discussion between the parties for in para 69 of her opinion in *Stack* Lady Hale listed several factors that required to be considered in "divining the parties' true intentions" few of which would involve any verbal exchange whatever.

72. It is hardly controversial to suggest that the parties' intention should be given effect to where it can be ascertained and that, although discussions between them will always be the most reliable basis on which to draw an inference as to that intention, these are not the only circumstances in which that exercise will be possible. There is a natural inclination to prefer inferring an intention to imputing one. If the parties' intention can be inferred, the court is not imposing a solution. It is, instead, deciding what the parties must be taken to have intended and where that is possible it is obviously preferable to the court's enforcing a resolution. But the conscientious quest to discover the parties' actual intention should cease when it becomes clear either that this is simply not deducible from the evidence or that no common intention exists. It would be unfortunate if the concept of inferring were to be strained so as to avoid the less immediately attractive option of imputation. In summary, therefore, I believe that the court should anxiously examine the circumstances in order, where possible, to ascertain the parties' intention but it should not be reluctant to recognise, when it is appropriate to do so, that inference of an intention is not possible and that imputation of an intention is the only course to follow.

73. In this context, it is important to understand what is meant by "imputing an intention". There are reasons to question the appropriateness of the notion of imputation in this area but, if it is correct to use this as a concept, I strongly favour the way in which it was described by Lord Neuberger in *Stack v Dowden* [2007] 2 AC 432 para 126, where he said that an imputed intention was one which was attributed to the parties, even though no such actual intention could be deduced from their actions and statements, and even though they had no such intention. This exposition draws the necessary strong demarcation line between attributing an intention to the parties and inferring what their intention was in fact.

74. The reason that I question the aptness of the notion of imputing an intention is that, in the final analysis, the exercise is wholly unrelated to ascertainment of the parties' views. It involves the court deciding what is fair in light of the whole course of dealing with the property. That decision has nothing to do with what the parties intended, or what might be supposed would have been their intention had they addressed that question. In many ways, it would be preferable to have a stark choice between deciding whether it is possible to deduce what their intention was and, where it is not, deciding what is fair, without elliptical references to what their intention might have – or should have – been. But imputing intention has entered the lexicon of this area of law and it is probably impossible to discard it now.

75. While the dichotomy between inferring and imputing an intention remains, however, it seems to me that it is necessary that there be a well marked dividing line between the two. As soon as it is clear that inferring an intention is not possible, the focus of the court's attention should be squarely on what is fair and, as I have said, that is an obviously different examination than is involved in deciding what the parties actually intended.

Is there sufficient evidence in the present case from which the parties' intentions can be inferred?

76. Lord Walker and Lady Hale have concluded that the failure of the parties to sell their home in Badger Hall Avenue in late 1995, leading as it did to the cashing in of the life insurance policy, meant that Mr Kernott intended that his interest in the Badger Hall Avenue property should crystallise then. That may indeed have been his intention but, for my part, I would find it difficult to *infer* that it actually was what he then intended. As the deputy High Court judge, Nicholas Strauss QC put it in para 48 of his judgment, the bare facts of his departure from the family home and acquisition of another property are a slender foundation on which to conclude that he had entirely abandoned whatever stake he had in the previously shared property.

77. On the other hand, I would have no difficulty in concluding, as did Mr Strauss and as would Lord Wilson, that it was eminently fair that the property should be divided between the parties in the shares decreed by Judge Dedman. Like Lord Wilson, therefore, I would prefer to allow this appeal on the basis that it is impossible to infer that the parties intended that their shares in the property be apportioned as the judge considered they should be but that such an intention should be imputed to them.

LORD WILSON

78. In the light of the continued failure of Parliament to confer upon the courts limited redistributive powers in relation to the property of each party upon the breakdown of a non-marital relationship, I warmly applaud the development of the law of equity, spear-headed by Lady Hale and Lord Walker in their speeches in *Stack v Dowden* [2007] 2 AC 432, and reiterated in their judgment in the present appeal, that the common intention which impresses a constructive trust upon the legal ownership of the family home can be *imputed* to the parties to the relationship.

79. In his speech of dissent (other than in relation to the result) in *Stack v Dowden* Lord Neuberger observed, at para 125, that the distinction between inference and imputation was important. He proceeded as follows:

> "126 An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend."

80. Almost 40 years earlier, in *Pettitt v Pettitt* [1970] AC 777, Lord Diplock sought to develop the law in a way similar to that achieved in *Stack v Dowden.* The action was between spouses and, analogously, was brought at a time when the divorce court lacked power to make a property adjustment order in relation to the matrimonial home. Lord Diplock said, at p 823F-G:

> "Unless it is possible to infer from the conduct of the spouses at the time of their concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts upon the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses."

81. In *Gissing v Gissing* [1971] AC 886, 904E-F, however, Lord Diplock accepted that in *Pettitt* he had been in the minority in suggesting that the common intention could be imputed. So he proceeded to analyse the case in terms of

whether the necessary intention could be inferred; but he added – ingeniously – at p 909 C-E that it might be possible to infer a common intention on the part of the spouses that their interests in the property should be in such proportions as might ultimately be seen to be fair! It is worthy of note, that in *Pettitt* Lord Reid had, at p 795D-G, also been cautiously amenable to the idea of imputing the necessary intention but had, at p 797A-B, expressed a firm preference for Parliamentary intervention; and that in *Gissing*, in the passage quoted by Lady Hale and Lord Walker at para 29 above, Lord Reid saw fit to reiterate those views notwithstanding that the argument in favour of a power to impute had for the time being already been lost.

82. In *Oxley v Hiscock* [2005] Fam 211, paras 68 and 69 Chadwick LJ, pointed out that assertions that the family home was held under a constructive trust raised two questions. The home had been held in Mr Hiscock's sole name so, for Chadwick LJ, the first question was whether Mrs Oxley could establish that they had nevertheless had a common intention that she should have some beneficial share in it. In the present case, however, the home is held in the joint names of the parties so, for us, the first question is whether Ms Jones can establish that they nevertheless had (albeit not necessarily at the outset) a common intention that the beneficial shares of herself and Mr Kernott should be in some proportions other than joint and equal. The second question, which arises in the event only of an affirmative answer to the first, is to determine the proportions in which the beneficial shares are held.

83. In relation to the second question Chadwick LJ concluded, in his summary at para 69, that, where there was no evidence of any discussion between the parties as to the proportions in which their beneficial shares in the family home were to be held, each was "entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property"; and he had made clear, at para 66, that such an entitlement arose because "what the court is doing, in cases of this nature, is to supply or impute a common intention as to the parties' respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which…is shown to be fair". Emboldened by developments in the case-law since the decision in *Gissing*, and apparently in particular by the decision of the Court of Appeal in *Drake v Whipp* [1996] FLR 826, Chadwick LJ thus saw fit to reassert the power to impute. In *Pettitt* Lord Diplock had referred to reasonable spouses rather than to fairness; but reasonable spouses will intend only what is fair.

84. The analysis by Chadwick LJ of the proper approach to the *second* question was correct. In paras 31 and 51(4) above Lord Walker and Lady Hale reiterate that, although its preference is always to collect from the evidence an expressed or inferred intention, common to the parties, about the proportions in which their shares are to be held, equity will, if collection of it proves impossible, impute to

them the requisite intention. Before us is a case in which Judge Dedman, the trial judge, found – and, was entitled on the evidence to find – that the common intention required by the *first* question could be inferred. Thus the case does not require us to consider whether modern equity allows the intention required by the *first* question also to be imputed if it is not otherwise identifiable. That question will merit careful thought.

85. In para 61 of her ground-breaking speech in *Stack v Dowden* Lady Hale quoted, with emphasis, the words of Chadwick LJ in para 69 of *Oxley v Hiscock*, which I have quoted in para 83 above. Then she quoted a passage from a Discussion Paper published by the Law Commission in July 2002 and entitled "Sharing Homes" about the proper approach to identifying the proportions which "were intended" . Finally she added four sentences to each of which, in quoting them as follows, I take the liberty of attributing a number:

> "[1.] That may be the preferable way of expressing what is essentially the same thought, for two reasons.
>
> [2.] First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended.
>
> [3.] Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair.
>
> [4.] For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt*… without even the fig leaf of section 17 of the 1882 Act."

86. I leave on one side Lady Hale's first sentence although, whereas Chadwick LJ was identifying the criterion for imputing the common intention, the context of the passage in the Discussion Paper suggests that the Law Commission was postulating a criterion for inferring it. On any view Lady Hale's second sentence is helpful; and, by her reference to what the parties must, in the light of their conduct, be taken to have intended (as opposed to what they did intend), Lady Hale made clear that, by then, she was addressing the power to resort to imputation. Lady Hale's fourth sentence has been neatly explained – by Mr Nicholas Strauss QC, deputy judge of the Chancery Division, who determined the first appeal in these proceedings, at para 30 – as being that, in the event that the evidence were to suggest that, whether by expression or by inference, the parties

intended that the beneficial interests in the home should be held in certain proportions, equity would not "impose" different proportions upon them; and, at para 47 above, Lord Walker and Lady Hale endorse Mr Strauss's explanation.

87. The problem has lain in Lady Hale's third sentence. Where equity is driven to impute the common intention, how can it do so other than by search for the result which the court itself considers fair? The sentence was not obiter dictum so rightly, under our system, judges below the level of this court have been unable to ignore it. Even in these proceedings judges in the courts below have wrestled with it. Mr Strauss observed, at para 31, that it was difficult to see how – at that final stage of the inquiry – the process could work without the court's supply of what it considered to be fair. In his judgment on the second appeal Lord Justice Rimer went so far as to suggest, at para 77, that Lady Hale's third sentence must have meant that, contrary to appearances, she had not intended to recognise a power to impute a common intention at all.

88. I respectfully disagree with Lady Hale's third sentence.

89. Lord Walker and Lady Hale observe, at para 34 above, that in practice the difference between inferring and imputing a common intention to the parties may not be great. I consider that, as a generalisation, their observation goes too far – at least if the court is to take (as in my view it should) an ordinarily rigorous approach to the task of inference. Indeed in the present case they conclude, at paras 48 and 49, that, in relation to Chadwick LJ's second question the proper inference from the evidence, which, if he did not draw, the trial judge should have drawn, was that the parties came to intend that the proportions of the beneficial interests in the home should be held on a basis which in effect equates to 90% to Ms Jones and to 10% to Mr Kernott (being the proportions in favour of which the judge ruled). As it happens, reflective perhaps of the more rigorous approach to the task of inference which I prefer, I regard it, as did Mr Strauss at [48] and [49] of his judgment, as more realistic, in the light of the evidence before the judge, to conclude that inference is impossible but to proceed to impute to the parties the intention that it should be held on a basis which equates to those proportions. At all events I readily concur in the result which Lord Walker and Lady Hale propose.

Pankhania v Chandegra (by her litigation friend, Ronald Andrew Eagle) [2012] EWCA Civ 1438

CA, CIVIL DIVISION

MUMMERY, PATTEN, TREACY LJJ

23 OCTOBER, 9 NOVEMBER 2012

9 NOVEMBER 2012

Tenants in common — Real property — Occupation of whole property by one of tenants in common — Property being transferred into names of claimant and defendant as joint tenants to be held as tenants in common in equal shares — Transfer containing express declaration of trust — Defendant moving into property — Claimant subsequently issuing proceedings seeking order for sale and division of proceeds — Judge finding beneficial interest vesting in defendant and dismissing claim — Whether judge erring — Whether possible to go behind declaration of trust

I Lamacraft for the Appellant

J Small for the Respondent

BP Legal; Josiah Hincks

PATTEN LJ:

[1] This is an appeal by the Claimant, Nilesh Pankhania, against the dismissal of his claim for an order for the sale of a registered freehold property at 7, Cossington Street, Leicester ("the property") and for the division of the net proceeds of sale between himself and the Defendant in equal shares. The property was purchased on 7 July 1987 for the sum of £18,500 with the assistance of a mortgage loan from the Market Harborough Building Society in the sum of £17,500. It was transferred by the vendors into the names of the Claimant and the Defendant as joint tenants to be held by them as tenants in common in equal shares and the transfer (in cl 3) contains an express declaration of trust by the Claimant and the Defendant to that effect.

[2] Notwithstanding this, the judge, HH Judge Charles Harris QC, held that the legal and beneficial ownership of the property resided solely with the Defendant and made a declaration to that effect. The Claimant appeals against that order with the permission of Lewison LJ who noted that at no point in his judgment did the judge refer to the fact that there was an express declaration of trust setting out the parties' respective beneficial interests and that, although the judge referred to the Defendant's submission that the transfer was a sham, it is far from clear whether he made any finding to that effect.

[3] I should say at the outset that the judge may not have been helped by the way in which the case was presented to him. Being a Pt 8 claim, there were no pleadings as such. Agreed directions were given for disclosure and the exchange of witness statements and the case was listed for trial on 26 January 2011. Sadly on 19 November 2010, after preparing and signing her witness statement, the Defendant suffered a heart attack which caused severe brain damage. As a consequence, the trial date was vacated and on 18 April 2011 Mrs Ranjana Kotecha, her niece, was appointed her Litigation Friend. The action was directed to proceed as a Pt 7 claim but pleadings were not ordered. On 23 August 2011 Mr Eagle replaced Mrs Kotecha as the Defendant's Litigation Friend and a further hearing took place. On this occasion the Claimant's counsel invited the judge to proceed to determine the issue of beneficial ownership on a summary basis on the footing that the Defendant had not indicated in her evidence any line of argument which would allow her to go behind the express declaration of trust contained in the transfer. HH Judge Hampton declined to deal with the case in this way and instead gave the Defendant permission to serve further evidence which, in the event, was served in the form of a witness statement from Mrs Kotecha. She also ordered both sides to file skeleton arguments.

[4] The action came on for trial before Judge Harris QC on 23 November 2011. The Claimant's counsel, in his skeleton argument, set out the details of the purchase and referred to the declaration of trust in the transfer. He then explained that, notwithstanding the declaration of trust, the Defendant claimed that there was an understanding between the parties at the time of purchase or within the wider family that she was to be the sole beneficial owner and that the property was to be her matrimonial home. The Claimant's case, by contrast, was that the property had been purchased in order to provide a home for his uncle (who died on 23 November 2003) and, subject to that, was to be an investment for the Claimant and the Defendant. The principal areas of dispute therefore were whether there was an underlying agreement or understanding capable of displacing the terms of the transfer. The skeleton then addressed the evidence relied on by the Defendant but did not discuss in any further detail the circumstances in which a party to an express declaration of trust may be entitled to avoid it.

[5] Counsel for the Defendant in his skeleton argument concentrated on the evidential issues about what the parties and their family intended at the time of the purchase. His skeleton entirely ignores the existence of an express declaration of trust in the transfer but refers instead to inconsistencies on the Claimant's part in his account of what was agreed with his uncle and to the Defendant's position that the Claimant was never intended to have any beneficial interest in the property.

[6] In order to put these arguments in context it is necessary to summarise very briefly what the factual dispute was. The Defendant is the Claimant's aunt. The family (including the Defendant and the Claimant's mother, her sister-in-law) came to this country from Kenya in 1967 and the Claimant was born here. In 1968 they were joined by the Defendant's brother, Harjivanbhai, who is the Claimant's uncle referred to in his evidence. The family were all living in a rented flat at 84, Rendell Road in Leicester but later they acquired other property in the same street and the Claimant came to live with his parents at 88, Rendell Road .

[7] The property at 7, Cossington Street (a neighbouring street) was identified as for sale by the Claimant's uncle. At the time of the purchase in 1987 the Claimant was 19 years old. He says in his witness statement that most of the deposit was paid by his uncle who had wanted to purchase the property himself but was not eligible for a mortgage. It was therefore decided that the property should be purchased by the Claimant and the Defendant. He says that the long-term intention was that his uncle would eventually live in the property and that the parties would sell their interests in it to him. But in 1989 the Defendant got married in India and needed a home. He says that he had no objection to his aunt living in the property with her husband at the time but that it was not intended to be a permanent arrangement. Later in 2001 the Defendant changed the locks, refused the Claimant access, and refused to sell the house to the Claimant's uncle. He died in 2003 and the Claimant says he paid the mortgage up to that time. Thereafter the Claimant and the Defendant paid the mortgage in equal shares until 2009 when the Claimant issued the Pt 8 proceedings seeking a sale.

[8] The Defendant in her witness statement also accepts that it was her brother, the Claimant's uncle, who found the property but was not able to purchase it himself. But her evidence is that his intention was that she should purchase it. She says that she proceeded to do that and made a mortgage application to the building society in her sole name but was told that her income was insufficient to enable her to borrow the amount she required. As a result, there was a discussion within the family when it was decided that the Claimant would become a joint purchaser of the property so that his salary could be taken into account for the purposes of the mortgage. She says that after the purchase was completed there was never any intention within the family that the Claimant should occupy the property or treat it as his own and that the intention was that it should become her matrimonial home. The Claimant made no contribution to the deposit and the mortgage payments were made by the Defendant with only occasional assistance from her brother. She accepts that in 2005 the Claimant told the building society that he wished to contribute to the mortgage payments and that he made payments between August 2005 and December 2008 amounting to £2,650. But she says that these payments were never requested by her or discussed between them.

[9] Mrs Kotecha's evidence largely corroborates that of her aunt but she accepted in cross-examination that her statement was based on what her aunt had told her rather than on any first-hand knowledge of her own and it adds really nothing relevant to the issues on this appeal.

[10] The judge set out the family history leading up to the purchase of the property and then said this:

> “The Claimant's case is a simple one. He is a joint tenant by virtue of the conveyance/paper title and normally the beneficial interest would follow the legal interest. It is in those circumstances for the Defendant to establish that the beneficial interest is not in accordance with the legal interest and this, he contends, she cannot do. The Defendant argues firstly that the Claimant has admitted in evidence that the beneficial interest was understood by him to rest with 'the family', not with him personally. Certainly, that the presence of the Claimant's name as joint tenant only came about as a convenient method of obtaining a mortgage, which the Defendant could not have got on her own sole earnings on her own behalf. It is said that the house was intended, if not from the very outset, then certainly very soon thereafter, as a matrimonial home for the Defendant and her husband and it was never envisaged by anyone that the Claimant would have any beneficial interest. In short, the transfer in part to him as an expedient sham. Further, the Claimant has made next to no financial contribution to the acquisition or maintenance of the property.”

[11] He then went on to deal with the law:

> “5 The law in this area is now largely governed by the approach in the House of Lords in *Stack v Dowden* [2007] UKHL 17, as reviewed in *Jones v Kernott* [2011] UKSC 53. The party whose name is on the register starts (in the absence of an express declaration of trust in different terms) with the presumption or assumption of a beneficial joint tenancy, see *Jones v Kernott* at paragraph 17:
>
> 'a challenge to the presumption of beneficial joint tenancy is not to be lightly embarked on . . . . If a couple in an intimate relationship (whether married or unmarried) decide to buy a house . . . in which to live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint enterprise . . . even if the parties . . . fail to make that clear by any overt declaration or agreement. The court has often drawn attention to this. Jacob LJ did so in his dissenting judgment in this case.' Supra paragraph 19.
>
> But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources' Supra paragraph 25.'
>
> 6 In the instant case, the parties were neither married nor living together, intimately or otherwise. At all material times, the Defendant occupied the house and the Claimant never did. There was no business relationship either. As the years went by, the Claimant got no income of any kind from the property. There was no indication of joint enterprise at all, beyond the fact of the purchase itself.
>
> 7 So the question is, can a contrary intention to joint beneficial ownership properly be inferred (not imputed see Jones supra at paragraph 26). The inference involves looking at the facts and the behaviour of the parties to see what these indicate:

'The primary search must always be for what the parties actually intended, to be deduced objectively from their words and their actions. If that can be discovered, then . . . it is not open to a court to impose a solution upon them in contradiction to those intentions, merely because the court considers it fair to do so.' Supra paragraph 46.

8 The principles were summarised at paragraph 51 'the common intention may impress a constructive trust upon the legal ownership'. Supra paragraph 78."

[12] Having reviewed the evidence, the judge set out his findings as follows:

"18 In the light of the evidence, I have concluded that though the Claimant acquired a legal interest in the property by the transfer, it was not accompanied by the beneficial interest for the following reasons:

a) The Claimant agreed that the beneficial interest belonged to the family, of which he was but a fraction.

b) He became a joint tenant simply to enable or facilitate the Defendant's purchase of the house. He had nothing to do with any decision to choose it or buy it and merely acceded to a request to take part in the transaction from a senior family member.

c) He may or may not have contributed £250 to the purchase price, (or perhaps £125), but that was a quite minimal sum in the light of the total price. He never paid anything else save the superfluous £2,650 after 2005.

d) He has never asked for any income from the property.

e) Between at least 1989 and 2005 and probably longer, so for a minimum of sixteen years, he did nothing at all to assert or suggest that he had any entitlement to the property or in the property.

f) He had never sought to live in the property.

19 These factors lead me to conclude that the intentions of the parties were at all material times that the house would be bought for the benefit and at the expense of the Defendant, that insofar as it was not to be her house, which it largely or totally would be, since she was assuming the burden of paying for it, it would be a 'family asset'. That the Claimant's role was to lend his name and an account of his then income to the purchase so that the Defendant could obtain the mortgage, she would not otherwise qualify for. I am satisfied that the Claimant, a good natured, non-assertive and cooperative junior member of an extended Indian family did not believe that by joining in the purchase, he personally was acquiring the benefit of joint ownership in the house. Thus, for many years the state of affairs was undisturbed and unquestioned. I therefore determine that the beneficial interest in the property is vested in the Defendant."

[13] The first of these findings appears to have been based upon a mis-recollection by the judge of the Claimant's evidence. The transcript records the Claimant agreeing in cross-examination that the family (rather than he) viewed itself as the beneficial owner of the property and he went on to say that his aunt had told the solicitor that she and the Claimant wanted to be 50/50 owners. But (this apart), if this was a case where the property had been transferred to the parties as joint tenants with no indication in the transfer as to the beneficial ownership then the judge's approach could not be faulted. The factors which he took into account would all have been relevant to a determination of what was the parties' intention as to who should own the property beneficially and in what shares. But that was not the issue with which the judge was faced. For whatever reason, the parties (both of them of full age) had executed an express declaration of trust over the property in favour of themselves as tenants in common in equal shares and had therefore set out their respective beneficial entitlement as part of the purchase itself. In these circumstances, there was no need for the imposition of a constructive or common intention trust of the kind discussed in *Stack v Dowden* nor any possibility of inferring one because, as Baroness Hale recognised in para 4 of her speech in that case, such a declaration of trust is regarded as conclusive unless varied by subsequent agreement or affected by proprietary estoppel.

[14] The authority she refers to in this context is the decision of this court in *Goodman v Gallant* [1986] Fam 106, [1986] 1 All ER 311, [1986] 1 FLR 513. A couple purchased what had been the Claimant's former matrimonial home in which she believed she had enjoyed a 50% beneficial interest. The property was conveyed to them jointly but the conveyance also contained a declaration that they held the property upon trust for sale to hold the net proceeds of sale upon trust for themselves as joint tenants: ie that they were to be joint tenants in equity. The Claimant severed the legal joint tenancy and sought a declaration that she owned three-quarters of the property beneficially. Both the judge and the Court of Appeal held that the express declaration of trust governed the parties' respective entitlement to the property. Slade LJ (at p 517) said:

> “In a case where the legal estate in property is conveyed to two or more persons as joint tenants, but neither the conveyance nor any other written document contains any express declaration of trust concerning the beneficial interests in the property (as would be required for an express declaration of this nature by virtue of s 53(1)(b) of the Law of Property Act 1925), the way is open for persons claiming a beneficial interest in it or its proceeds of sale to rely on the doctrine of 'resulting, implied or constructive trusts': see s 53(2) of the Law of Property Act 1925. In particular, in a case such as that, a person who claims to have contributed to the purchase price of property which stands in the name of himself and another can rely on the well known presumption of equity that a person who has contributed a share of the purchase price of property is entitled to a corresponding proportionate beneficial interest in the property by way of implied or resulting trust: see, for example, *Pettitt v Pettitt* [1970] AC 777, 813-814, *per* Lord Upjohn. If, however, the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself.
>
> We have prefaced any consideration of the decided cases with these observations because in the light of certain judicial observations we seek to make two points clear. First, in our judgment, ss 34 to 36 of the Law of Property Act 1925 do not enable or assist a person to establish a beneficial interest in land or its proceeds of sale greater than or different in nature from the interest which he would have enjoyed if those sections had not been enacted; beyond transferring the beneficial interests of tenants in common and joint tenants from the land to its proceeds of sale, they have no effect on the nature or extent of such interests. Secondly, the many decisions which deal with the situation where the legal estate in land has been conveyed to persons as joint tenants without any declaration of the beneficial interest are, in our opinion, clearly distinguishable from cases where an express declaration of the beneficial interests has been made.”

[15] In the passage referred to from his speech in *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, [1969] 2 WLR 966(at p 813) Lord Upjohn said:

> “. . . the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest that necessarily concludes the question of title as between the spouses for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage.”

[16] The judge's imposition of a constructive trust in favour of the Defendant was therefore impermissible unless the Defendant could establish some ground upon which she was entitled to set aside the declaration of trust contained in the transfer. He seems (in para 2) to have misunderstood the significance of the transfer which not only made both Claimant and Defendant legal owners of the property but also spelt out their beneficial interests. The whole of his judgment proceeds upon the footing that he had a free hand to decide what was the common intention of the parties at the relevant time but that inquiry was simply not open to him unless the Defendant had established a case for setting the declaration of trust aside.

[17] A declaration of trust can be set aside for fraud, mistake or undue influence but nothing of that kind is alleged in this case. In *Wilson v Wilson* [1969] 3 All ER 945, [1969] 1 WLR 1470, 20 P & CR 780 Buckley J rectified a transfer containing a declaration of trust under which two brothers declared that they were joint tenants of the property in equity in circumstances where neither of them appreciated the effect of the declaration of the beneficial interest; appreciated that the transfer was a deed; and where they clearly intended that one brother should be the sole beneficial owner. But there was no claim for rectification in this case and Mr Small for the Defendant has not advanced a case that the transfer could be rectified so as to omit the declaration of trust. There was no evidence at trial that it was inserted by mistake or that the parties intended to execute a transfer in materially different terms. There is no evidence in the form of the solicitors' file as to how the transfer came to include the declaration of trust and on whose instructions nor do we know what input (if any) the building society had with regard to the form of the transfer although it seems to me unlikely that it would have been concerned with anything beyond both parties being legal owners so that they became parties to the mortgage.

[18] The only ground for going behind the declaration of trust which is referred to by the judge is that the transfer was a sham. Like Lewison LJ, this reference in para 2 of the judgment seems to me to be a précis of Mr Small's submissions rather than a finding by the judge and is, I think, derived from para 9 of Mr Small's skeleton argument in the County Court in which he says:

> "Thus it is submitted that the transaction with C was simply one of convenience. So although the Property was transferred to C and D as Tenants in Common with equal shares it was never the parties' intention that C would have any beneficial interest in the Property."

[19] If, however, the judge intended what he said in para 2 to be a finding that the declaration of trust was a sham then he was, with respect, wrong in my opinion to do so. The evidence relied upon by the Defendant to support her case on beneficial ownership was no more than that the parties (and their family) intended or agreed that she should be the beneficial owner and that her nephew should be on the title as legal owner solely in order to be a party to the mortgage. None of that is sufficient to make the declaration of trust a sham so as to deprive it of any legal effect.

[20] The question of what constitutes a sham trust has been the subject of considerable discussion in recent years, particularly in the context of attempts to shield assets from the claims of divorced spouses or creditors. But what is, I think, clear is that it must be shown both that the parties to the trust deed (in this case, the Claimant and the Defendant) never intended to create a trust and that they did intend to give that false impression to third parties or to the court. So in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, at p 802, [1967] 1 All ER 518, [1967] 2 WLR 1020, Lord Diplock said that:

> "As regards the contention of the Plaintiff that the transactions between himself, Auto Finance and the Defendants were a 'sham', it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."

[21] This is now recognised as an authoritative statement of what has to be proved in order to set aside a transaction as a sham and applies as much to a trust as to any other kind of instrument: see *Hitch v Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [2005] 2 WLR 1213.

[22] None of this has any application to this case. It is not alleged (nor did the judge find) that the parties entered into the declaration of trust in order, so to speak, to mask the true nature of their agreement from other parties. The highest that Mr Small could put it to the judge was that the transaction was one of convenience: ie that the Claimant only became a joint legal owner and tenant in common of the property because his participation was necessary in order to obtain a mortgage. That, however, involved no deception on the building society or the court nor any intention to do so. Although, as the judge found, the joint purchase was carried out to facilitate the mortgage, there is nothing to suggest that the building society was concerned about beneficial ownership. The effect of executing the declaration of trust was therefore to make the Claimant an equitable tenant in common regardless of what the parties may have subjectively intended and to estop the Defendant from denying his title. The sham principle has no application to a situation in which the highest that a party to the deed can put it is that the document does not accurately record what they intended to achieve. Unless the conditions exist for the court to rectify the document, the parties are bound by the legal consequences of what they have signed. It was, of course, always open to them to have executed a deed varying their beneficial interests. But, in the absence of such a deed, the Defendant has no answer to the claim.

[23] I would therefore allow the appeal; order a sale of the property; and make a declaration that the parties are entitled to the net proceeds of sale in equal shares.

MUMMERY LJ:

[24] I agree that the appeal should be allowed for the reasons given by Patten LJ.

[25] In para 15 of his judgment Patten LJ cites a well-known passage from the speech of Lord Upjohn in *Pettit v Pettit* about the legal consequences of an express declaration of trust of the beneficial title. 42 years ago the very same passage was cited to and by Goff J in the Chancery Division in the case of *Re John's Assignment* [1970] 2 All ER 210n, [1970] 1 WLR 955 at 958A-C. That case was about the beneficial ownership of a leasehold house and shop assigned to a husband and wife. The assignment, which was executed in a solicitor's office, contained an express declaration of trust for them as beneficial joint tenants. The husband, for whom Mr Gavin A. Lightman appeared, claimed to be the sole beneficial owner. The express declaration of trust prevailed and the claim failed. The judge held that the property was held in trust for them both in equal shares, the proceedings having severed the beneficial joint tenancy. Goff J rejected MrLightman's contention that there were grounds in that case for going behind the express declaration of trust in the assignment. Fraud was not alleged. A supposed “mistake” was never identified. Rectification was not claimed. The judge summarised the evidence and concluded that “The assignment, as drawn, therefore, accords with the probable intentions and wishes of the parties at the time.” (p 959A)

[26] The position is similar here, except that the express declaration of trust was for the parties as tenants in common in equal shares and not as beneficial joint tenants. There is no room for inserting a constructive trust in substitution for the express trust. Neither fraud nor mistake are alleged. No claim has been made at any stage for rectification of the transfer: cf *Wilson v Wilson* (also cited by Patten LJ) in which the Defendant was granted leave to amend a counterclaim to seek rectification of an express declaration of trust as beneficial joint tenants. The court made a rectification order on the ground of mutual mistake followed by a declaration made that the property was held in trust for the Defendant absolutely.

[27] In the absence of a vitiating factor, such as fraud or mistake, as a ground for setting aside the express trust or as a ground for rectification of it, the court must give legal effect to the express trust declared in the transfer. In the absence of such claims the court cannot go behind that trust. The understanding that the property was to be the Defendant's matrimonial home, the fact that the Claimant never actually lived there, and the fact that he had no involvement in the property other than lending his name to the purchase of the property for the purpose of obtaining a loan on mortgage from the Market Harborough Building Society in 1987 have never been coupled with any counterclaim by the Defendant to set aside or to rectify the express trust.

[28] Finally, reliance on *Stack v Dowden* and *Jones v Kernott* for inferring or imputing a different trust in this and other similar cases which have recently been before this court is misplaced where there is an express declaration of trust of the beneficial title and no valid legal grounds for going behind it.

TREACY LJ:

[29] I agree with both judgments.

Judgment accordingly.

[2024] EWHC 2164 (Ch)

IN THE HIGH COURT OF JUSTICE Claim No: CH-2024-000002
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM DISTRICT JUDGE WILKINSON
IN THE COUNTY COURT AT CENTRAL LONDON (No. 1078 of 2018)
IN THE MATTER OF STUART GRAHAM CYNBERG
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N :

Date: 23 August 2024

Before :

James Pickering KC
(sitting as a Deputy High Court Judge)

- -

Between :

(1) ANN NILSSON Appellants/
(2) EDWARD THOMAS Second & Third Defendants

(As the Joint Trustees in Bankruptcy of Stuart Graham Cynberg)

and

COLLETTE CYNBERG First Respondent/Claimant

- -
- -

Samuel Parsons (instructed by **Brachers)** for the **Appellants**
Oliver Ingham (instructed by **Sternberg Reed LLP)** for the **First Respondent**

Hearing date: 23 May 2024

- -

APPROVED JUDGMENT

James Pickering KC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION

1. In ***Stack v Dowden*** [2007] UKHL 17, Baroness Hale said that an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel. One of the key questions in this appeal is whether "subsequent agreement" in the above context means only a subsequent formal agreement which complies with the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 ("**LP(MP)A 1989**") or whether it is also capable of including a subsequent informal common intention constructive trust.

2. The issue arises in the context of an appeal within a bankruptcy. In a nutshell, a husband and wife bought a property together in joint names; they separated; they reached an understanding of sorts in relation to the property; he later went bankrupt; and subsequently a dispute arose as to whether the husband's trustees in bankruptcy had an interest in the property or whether, as a result of the above understanding of sorts, it was now owned solely by the wife. At first instance, the district judge held that the property was now owned solely by the wife. The matter before me is the trustees in bankruptcy's appeal against that decision.

3. In this judgment, I start by setting out the background to the matter (Part II). I then go on to consider each of the four grounds of appeal (Parts III to VI), before ending with a brief conclusion (Part VII).

PART II: THE BACKGROUND

The start of the relationship

4. The bankrupt is Stuart Cynberg. The applicant is his former wife, Collette Cynberg.

5. In about 2000, Mr and Mrs Cynberg started a relationship together.

The purchase of the Property

6. On 28 February 2001, Mr and Mrs Cynberg bought the property at 9 Chippenham Road, Romford RM3 8EX ("**the Property**") in their joint names. The purchase price of the Property was £87,000. Of that, 5% came from their joint savings. The balance of 95% came from a mortgage in their joint names. On completion, they completed the Land Registry Form TR1. In relation to box 11 of that form (entitled "Declaration of Trust"), they ticked the box which

declared that "The transferees are to hold the property on trust for themselves as joint tenants".

7. Following the purchase, both Mr and Mrs Cynberg worked and together paid the monthly mortgage repayments and the other expenses relating to the Property and the household generally.

8. In February 2003, Mr and Mrs Cynberg had their first child together. In June 2006, they married. In August 2008, they had a second child together.

The separation

9. In late January 2009, Mr and Mrs Cynberg separated. He admitted to an affair and moved out of the Property. At and around that time, there were a number of discussions between them, the gist of which was that he did not wish to retain an interest in the Property and that he was content for her to have the whole Property so long as she left it to their two children in due course.

10. Following the separation, Mrs Cynberg paid for all expenditure relating to the Property. In particular, she paid all of the monthly mortgage repayments (when she could), council tax, utility bills and other household expenditure. Mr Cynberg, who as stated above, had said that he did not wish to retain an interest in the Property, contributed nothing.

The inheritance and the taking of legal advice

11. Several years passed. No formal divorce proceedings were begun, not least because of the expense involved.

12. In about August 2014, Mrs Cynberg received an inheritance of some £72,000 from her late mother. Following this, she carried out various relatively minor works on the Property including new windows (£3,804 in October 2014), new paving (£5,550 in November 2014), heating (£320 in September 2015), fencing (£220 in April 2016) and a shower (£475 on a date unknown).

13. With the benefit of her inheritance, Mrs Cynberg also consulted solicitors with a view to starting divorce proceedings. In 2015 and 2016, her solicitors wrote to her on several occasions pointing out that the Property was still in the joint names of her and Mr Cynberg and, further, that Mr Cynberg had "offered" to transfer the Property to her absolutely.

The divorce

14. On 9 March 2018, Mr and Mrs Cynberg formally divorced.

The bankruptcy

15. On 29 June 2018, a bankruptcy petition was presented (by HMRC) in relation to Mr Cynberg.

16. On 29 October 2018, Mr Cynberg was declared bankrupt.

17. On 4 March 2019, Ann Nilsson and Edward Thomas were appointed as Mr Cynberg's trustees in bankruptcy ("**the Trustees**").

The dispute

18. Following the Trustees' appointment, a dispute arose as to the beneficial ownership of the Property. It was of course uncontroversial that the legal title to the Property remained in Mr and Mrs Cynberg's joint names. Mrs Cynberg, however, pointed to the discussions which had taken place between her and Mr Cynberg at around the time of their separation and asserted that this gave rise to a common intention constructive trust and/or a proprietary estoppel such that the entire beneficial interest in the Property was now held by her alone. The Trustees, on the other hand, asserted that for various reasons those discussions could not have given rise to any such common intention constructive trust or proprietary estoppel such that, at the time of the bankruptcy order, Mr Cynberg still had a beneficial interest in the Property which now, upon their appointment, vested in them as his trustees in bankruptcy.

The present proceedings

19. In early 2020, Mrs Cynberg issued the present claim out of the Central London County Court by way of a Claim Form and Particulars of Claim. The first defendant to the claim was Mr Cynberg. The second and third defendants were the Trustees. By that claim, based on the discussions which she had had with Mr Cynberg at around the time of their separation, Mrs Cynberg asserted a common interest constructive trust and/or proprietary estoppel and sought declaratory relief that the beneficial interest in the Property was held for her alone (and that the Trustees had no interest in the same).

20. As for Mr Cynberg, he did not oppose the relief sought.

21. As for the Trustees, on 7 April 2020, they served a Defence and Counterclaim. By their Defence, they opposed the relief sought on various grounds including that by reason of the express declaration of trust in the TR1 - and in the light of the decision in ***Stack v Dowden*** – no common intention constructive trust could have arisen; further, for various reasons, nor could there have been any proprietary estoppel. By their Counterclaim, the Trustees

asserted that, if contrary to their Defence, there had been such a proprietary estoppel, any transfer effected by it would have amounted to a transaction at an undervalue for the purposes of section 339 of the Insolvency Act 1986 such that Mr Cynberg's share in the Property should be vested in the Trustees in any event.

22. On 12 March 2021, various directions were given including that the matter should be transferred to the Insolvency and Companies List within the Central London County Court.

23. On 16 September 2021, the Trustees issued a cross-application for an order for possession and sale of the Property.

24. On 9 September 2023, the trial of all matters (in other words, Mrs Cynberg's claim for declaratory relief, the Trustees' counterclaim under section 339, and the Trustees' application for possession and sale) took place before District Judge Wilkinson. At the trial, Mrs Cynberg relied on her witness statement and was cross-examined on behalf of the Trustees. Mr Cynberg (who was not represented) also relied on a witness statement (in which he effectively corroborated Mrs Cynberg's evidence) and was also cross-examined on behalf of the Trustees. As for the Trustees, they also relied on witness statement evidence but, given that they had no first-hand knowledge of the underlying matters, were not required to be cross-examined; instead, (and as commonly happens) they relied on the contemporaneous documents. Both Mrs Cynberg and the Trustees also relied on comprehensive skeleton arguments and extensive oral submissions.

25. On 29 November 2023, the District Judge delivered her judgment. In short, she accepted the evidence of each of Mr and Mrs Cynberg to the effect that at around the time of their separation there had been discussions leading to an understanding that the Property now belonged to Mrs Cynberg and, further, that she then acted on that understanding to her detriment by taking over the entirety of the monthly mortgage payments and other household

expenditure, as well as foregoing bringing ancillary relief proceedings and investing the above-mentioned monies in home improvements. On that basis, so the District Judge held, a common intention constructive trust had arisen as at 2009; alternatively, there was a proprietary estoppel, again dating from 2009. Further, given that the common intention constructive trust and/or proprietary estoppel had arisen in 2009, any transfer of beneficial interest from Mr Cynberg to Mrs Cynberg took place outside the statutory period of 5 years prior to the bankruptcy such that the Trustees' counterclaim pursuant to section 339 of the IA 1986 fell to be dismissed. In summary, therefore, the District Judge granted the declarations sought by Mrs Cynberg (including, in particular, that she was the sole beneficial owner of the Property) and dismissed the Trustees' application for an order for possession and sale.

The present appeal

26. On 3 January 2024, the Trustees issued an appellant's notice seeking permission to appeal on 4 grounds (as set out in more detail below).

27. On 15 February 2024, Trower J considered the application for permission to appeal on paper. He refused permission in relation to Ground 1 but granted permission in relation to Grounds 2, 3 and 4.

28. Subsequently, the Trustees sought to renew their application for permission to appeal in relation to Ground 1, following which that application for permission to appeal was listed to be heard at the same time as the substantive appeal in relation to Grounds 2, 3 and 4.

29. In short, therefore, the matter now before me is the Trustees' renewed application for permission to appeal in relation to Ground 1 and, if granted, the hearing of that appeal; and, further, the hearing of the appeals in relation to Grounds 2, 3 and 4.

PART III: THE FIRST GROUND OF APPEAL

The Ground of Appeal

30. The first ground of appeal provides:

> "2. Ground 1: The Judge wrongly decided that (i) the express declaration of trust gave rise to a rebuttable presumption in respect of the parties' beneficial interests in 9 Chippenham Road, Romford RM3 8EX (the "Property"); and (ii) that that presumption was rebutted by a common intention constructive trust: paras 9, 13-14, and 23...
>
> 3. The Judge was bound by the decisions in ***Stack v Dowden*** [2007] UHKL 17 (at [49] and [52]) and ***Pankhania v Chandegra*** [2012] EWCA Civ 1438 (at [13]). The express declaration of trust contained within the Form TR1 dated 28 February 2001 was conclusive; the parties held the Property as joint tenants in law and equity."

31. As prefaced at the start of this judgment, it is now well established that an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel. The question for the present appeal, however, is whether "subsequent agreement" in the above context means only a subsequent formal agreement which complies with the requirements of the LP(MP)A 1989[1] or whether it is also capable of including a subsequent informal common intention constructive trust.

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[1] Section 2 of LP(MP)A 1989 provides:

"(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 exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract."

The authorities

(a) *Stack v Dowden*

32. The starting point is, of course, ***Stack v Dowden***. In that case, Baroness Hale said (with underlining added):

> "49. In the olden days, before registration of title on certain events, including a conveyance on sale, became compulsory all over England and Wales, conveyances of unregistered land into joint names would in practice declare the purchasers' beneficial as well as their legal interests. No one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel: see ***Goodman v Gallant*** [1986] Fam 106...
>
> 52. The Land Registry form has since changed. Form TR1, in use from 1 April 1998, provides a box for the transferees to declare whether they are to hold the property on trust for themselves as joint tenants, or on trust for themselves as tenants in common in equal shares, or on some other trusts which are inserted on the form. If this is invariably complied with, the problem confronting us here will eventually disappear. Unfortunately, however, the transfer will be valid whether or not this part of the form is completed. The form itself states that the transferees are only required to execute it "if the transfer contains transferee's covenants or declarations 7 or contains an application by the transferee (e g for a restriction)". So there may still be transfers of registered land into joint names in which there is no express declaration of the beneficial interests. However desirable such a declaration may be, it is unrealistic, in the consumer context, to expect that it will be executed independently of the forms required to acquire the legal estate. Not only do solicitors and licensed conveyancers

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And see also sections 52 to 53 of the Law of Property Act 1925.

> compete on price, but more and more people are emboldened to do their own conveyancing. The Land Registry form which has been prescribed since 1998 is to be applauded. If its completion and execution by or on behalf of all joint proprietors were mandatory, the problem we now face would disappear. However, the form might then include an option for those who deliberately preferred not to commit themselves as to the beneficial interests at the outset and to rely on the principles discussed below."

33. In short, therefore, where the purchasers complete the relevant form and make an express declaration of trust (as happened in the present case) that declaration will be conclusive "unless varied by subsequent agreement or affected by proprietary estoppel".

34. As was pointed out by counsel for the Trustees in the present case, when referring to variation by subsequent agreement, Baroness Hale did not expressly refer to the same including a subsequent common intention constructive trust. Conversely, however, and as pointed out by counsel for Mrs Cynberg, nor did Baroness Hale expressly state that any such subsequent agreement had to be one which complied with the formal requirements of the LPA 1925. Therein, of course, lies the issue.

(b) *Clarke v Meadus*

35. The next relevant authority is ***Clarke v Meadus*** [2010] EWHC 3117 (Ch) which related to an application to strike out a claim based on a common intention constructive trust (as well as an application for summary judgment on a claim based on proprietary estoppel).

36. At first instance, Master Bragge had struck out the claim based on a common intention constructive trust. Reference was made to ***Stack v Dowden***, following which the Master concluded that such a claim was not permissible where there had been an express declaration of trust.

37. On appeal, however, Warren J noted that the Master had not given any consideration to the question whether a constructive trust might have arisen as a result of matters which had taken place after an express declaration of trust. As was stated at [42]:

> "[The Master] did not address the question whether a constructive trust might have arisen after that date to displace the express trusts declared. Nothing in ***Stack v Dowden*** or ***Goodman v Gallant*** can be read as suggesting that this is not possible: it all depends on the facts."

38. I bear in mind that the above decision was in the context of a strike out (as opposed to a final determination). Nevertheless, as the above passage demonstrates, Warren J was clearly of the view that, in the right factual context, a common intention constructive trust was capable of arising out of matters taking place after the express declaration of trust in question (and that nothing in ***Stack v Dowden*** suggested to the contrary).

(c) ***Pankhania v Chandegra***

39. The next case in time to which I was referred was ***Pankhania v Chandegra*** [2012] EWCA Civ 1438 – a case on which counsel for the Trustees placed some considerable reliance. In that case, Patten LJ held that in circumstances where the parties had made an express declaration of trust:

> "…there was no need for the imposition of a constructive trust or common intention trust of the kind discussed in ***Stack v Dowden*** nor any possibility of inferring one because, as Baroness Hale recognised in [49] of her speech in that case, such a declaration of trust is regarded as conclusive unless varied by subsequent agreement or affected by proprietary estoppel."

40. Importantly, however, in that case the dispute related to an alleged understanding between the parties <u>at the time of the purchase of the property in question</u>. This being the case, there can be little doubt that the above passage was of course an entirely correct application of the law as set out in ***Stack v Dowden***. There was no suggestion of a common intention constructive trust arising out of matters which had taken place subsequent to the express declaration of trust and accordingly no need for the court to consider the point. It is perhaps for that reason that no reference was made to ***Clarke v Meadus***.

(d) ***Bahia v Sidhu***

41. The matter next came up for consideration in ***Bahia v Sidhu*** [2022] EWHC 875 (Ch). In that case, having reviewed the relevant authorities, Joanna Smith J summarised the position as follows:

> "123. Drawing the threads of these authorities together, in my judgment:
>
> i) An express declaration of trust will be conclusive subject to rectification or recission (***Goodman v Gallant***).
>
> ii) A constructive trust cannot be relied upon to contract or override the terms of a subsequent declaration of trust (***Pink v Lawrence***).
>
> iii) Given that the facts needed to establish a constructive trust and a proprietary estoppel are analogous, there is no principled reason to treat a proprietary estoppel claim any differently from a claim of constructive trust in the context of determining the conclusiveness of a subsequent declaration of trust...
>
> however

iv) An express declaration of trust may be overridden by an equity arising in light of representations and promises made after the declaration of trust (see ***Clarke v Meadus***)."

42. It is right to point out that the primary issue in that case was the extent to which an express declaration of trust was capable of being overridden by a prior equity (such as a proprietary estoppel or a common intention constructive trust) (see [123(iii)] above). As can be seen, however, Joanna Smith J also went on to express obiter a view, *obiter dicta*, as to whether (as in the present case) an express declaration of trust was capable of being overridden by a subsequent equity (see [123(iv)] above).

(e) *Nanayakkara v Fernando*

43. I was also briefly referred to the unreported decision of HHJ Monty QC in ***Nanayakkara v Fernando*** (unreported, 9 June 2022). Given, however, that in this case the alleged agreement pre-dated the express declaration of trust, it is of no direct assistance to the present case.

(e) *Re Iqbal*

44. The final case to which I should refer is ***Re Iqbal (Nilsson v Iqbal)*** [2024] EWHC 49 (Ch), a decision of ICC Judge Burton from earlier this year. Significantly, this was a case where an express declaration of trust had taken place by way of a TR1 (in 2003), with the conduct on which reliance was placed in support of giving rise to an equity having taken place subsequently (in 2017).

45. In her review of the relevant legal principles, the Judge started (unsurprisingly) by referring to ***Stack v Dowden*** and, in particular, Baroness Hale's statement that: "*No one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel*". The Judge then went on to consider the above-

mentioned passage of Patten LJ in ***Pankhania v Chandegra***. Having concluded her review, in a section of her judgment entitled "*Was the express declaration of trust set out in the TR1 varied by subsequent agreement?*", the Judge stated:

> "It appears to be Mrs Iqbal's case that the express declaration of trust set out in the TR1 was varied twice by agreement... Even setting aside the inconsistencies in her evidence, neither agreement is recorded in writing. There is consequently no agreement that meets the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 to supersede the express declaration of trust set out in the TR1"

46. In short, therefore, the Judge was clearly of the view that Baroness Hale's statement that an express declaration of trust could be varied by "subsequent agreement" meant that such a variation could only be effective where that subsequent agreement met the requirements of the LP(MP)A 1989 – in other words, a common intention constructive trust could never suffice.

47. The Judge then went on to consider whether a proprietary estoppel had been made out (the same having of course been expressly referred to by Baroness Hale in the above passage as a possible exception to the general rule of conclusiveness), albeit she found that no such case had been made out on the evidence. No consideration appears to have been given to why an equity arising by way of a proprietary estoppel could impact on a prior express declaration of trust but not one by way of a common intention constructive trust. Nor was any reference made to ***Clarke v Meadus*** or to Joanna Smith J's summary of the law in ***Bahia v Sidhu***.

Discussion

48. Having considered the above authorities, it seems to me that the position is as follows:

(1) An express declaration of trust (whether by way of a TR1 or otherwise) will be conclusive unless amenable to rectification or rescission (***Goodman v Gallant***) or varied by subsequent agreement or affected by proprietary estoppel (***Stack v Dowden***).

(2) It is therefore follows that an express declaration of trust is <u>not</u> capable of being overridden by (what would otherwise be) a common intention constructive trust which arises <u>prior to</u>, or <u>at the same time as</u>, the express declaration of trust.

(3) As stated above, an express declaration of trust <u>is</u> capable of being overridden by a subsequent agreement (***Stack v Dowden***). As to what is meant by "subsequent agreement", based on the reasoning and dicta in ***Clarke v Meadus*** and ***Bahia v Sidhu***, while of course this can include a formal agreement which complies with the requirements of LP(MP)A 1989, in my judgment it is not so limited and may include a common intention constructive trust. To this extent, therefore, I respectfully disagree with the view on this point reached by the Judge in ***Re Iqbal*** (where the court did not have the benefit of either ***Clarke*** or ***Bahia***).

49. Standing back, it also seems to me that this is a sensible outcome. Rhetorically, why should an express declaration of trust be capable of being overridden by way of a subsequent equity arising by way of a proprietary estoppel, but not by a subsequent equity arising by way of that very similar beast, a common intention constructive trust? The interpretation put forward on behalf of the Trustees in the present case would result in that somewhat arbitrary distinction – a distinction which certainly does not follow from either ***Stack v Dowden*** (Baroness Hale made no mention of the LP(MP)A 1989) or indeed ***Pankhania v Chandegra*** (which did not involve a common intention constructive trust allegedly arising <u>subsequent to</u> the express declaration of trust in question). The interpretation which I have preferred, however, avoids that arbitrary distinction, as well as being in line with ***Clarke v Meadus*** and ***Bahia v Sidhu*** as set out above.

Conclusion on Ground 1

50. In conclusion, therefore, in the present case, in my judgment, the Judge below was not wrong to find that the express declaration of trust contained in the TR1 was capable of being overridden by a common intention constructive trust. I therefore dismiss the application for permission to appeal in relation to Ground 1.

PART IV: THE SECOND GROUND OF APPEAL

The Ground of Appeal

51. The second ground of appeal provides:

> "4. **Ground 2:** Further or alternatively, the Judge erred in law and/or fact in concluding that any detriment incurred by the First Respondent was (1) sufficient to give rise to any unconscionability; (2) not outweighed by the countervailing benefit obtained by her; and (3) related (in law and/or equity) to the assurances given by Mr Cynberg.
>
> 5. The Judge should have concluded that there was no unconscionability that could found a proprietary estoppel (or common intention constructive trust). On the contrary, she should have concluded that:
>
> (1) the 'detriment' experienced by the First Respondent was a minimal and necessary feature of her continuing to live in the Property, independently of how the beneficial interest was held;
>
> (2) there were significant countervailing benefits to the First Respondent, in that she (i) avoided the need to rent another property; and (ii) obtained the significant increase in the equity value of the Property; and

(3) the true cause (in law and/or equity) of the First Respondent paying the instalments and expenses was her (and her children's) continued inhabitation of the Property and her pre-existing contractual liability to pay the mortgage. The Judge was wrong to conclude that the Respondent's conduct was caused by Mr Cynberg's assurances that the entirety of the beneficial interest was hers."

52. In short, therefore, the Trustees argue that the Judge was wrong to find that the detriment suffered by Mrs Cynberg gave rise to unconscionability sufficient to found a proprietary estoppel. In particular, so the Trustees say, (1) any detriment suffered was minimal, (2) insufficient regard was given to the countervailing benefits enjoyed by Mrs Cynberg, and (3) there was an insufficient causal connection between, on the one hand, the promises and assurances made by Mr Cynberg and, on the other hand, the detrimental reliance in question.

Discussion

(a) Minimal detriment

53. The Trustees argue that the detriment suffered by Mrs Cynberg in the present case was of a wholly different magnitude to the detriment encountered in many of the leading cases.

54. Importantly, however, in making that submission, the Trustees focus on the home improvements to the Property which cost Mrs Cynberg a total of £10,396.

55. In fact, however, the detriment suffered by Mrs Cynberg was found to be much wider than that. Indeed, in paragraph 18 of her judgment, the Judge held that (with underlining added):

> "I find therefore that there was a clear and settled understanding or agreement in 2009 that the entire beneficial interest in the Property belonged to the Claimant. I further find that in reliance on the agreement she and the First Defendant had reached, the Claimant, to her detriment, took over the legal liability and obligations of the First Defendant in respect of the mortgage payments, did not pursue matrimonial financial remedy proceedings for many years, assumed the entire responsibility for all expenses in respect of her home and invested considerable sums into home improvements..."

56. It is right to point out that Mrs Cynberg's "Particulars of Detriment" within her Particulars of Claim referred only to the home improvements to the Property and to her foregoing issuing ancillary relief procedures. By the time that the matter reached trial, however, the issue of Mrs Cynberg having taken over the entirety of the mortgage repayments was squarely before the court. Indeed, during the present appeal, counsel for the Trustees confirmed that no pleading point was being taken in relation to the same.

57. This being the case, it seems to me that the relevant detriment to be taken into account falls into 3 categories: (1) the home improvements, (2) foregoing bringing ancillary relief proceedings, and (3) taking over the entirety of the mortgage repayments.

58. As to the home improvements, if these were the only detriment suffered, I doubt that these would be sufficient to give rise to a proprietary estoppel. The sums involved are relatively small and, after some 15 years, were probably necessary on any basis.

59. As to foregoing bringing ancillary relief proceedings, on the other hand, this does seem to me to give rise to significant detriment. If in 2009 or shortly thereafter Mrs Cynberg had issued ancillary relief proceedings seeking the whole of the Property, it is highly likely (given that the same was supported by Mr Cynberg) that such an order would have been made. In fact, however, Mrs Cynberg did not do so. It is true that she thought the expense of bringing proceedings was too much; but it also appears that she was somewhat lulled into a false sense

of security, believing that there was no real need to apply to court given the agreement she had reached with Mr Cynberg at the time of their separation. By not taking these steps, so it seems to me, she has suffered a non-minimal detriment.

60. As to taking over the mortgage repayments, counsel for the Trustees argued that this could not be properly characterised as a detriment because each payment had the effect of releasing part of the mortgage such that her equity position increased pro rata. In my judgment, however, this somewhat overlooks the reality of the situation. Following the separation, Mrs Cynberg began paying the entirety of the mortgage repayments; but on the Trustees' case she only received 50% of the benefit of those payments in terms of increased equity, with the benefit of the other 50% going to Mr Cynberg. In my judgment, this was a significant detriment suffered by her; moreover, the idea that some 15 years after stopping paying anything towards the mortgage Mr Cynberg could turn around and claim half of the equity in the Property (not that he ever did) would seem to be wholly unconscionable and (to use the expression used in ***Guest v Guest*** [2022] UKSC 27) gut-wrenching. Of course, the Trustees (who now stand in the shoes of Mr Cynberg) can be in no better position.

61. Overall, therefore, it seems to me that no criticism can be made of the Judge's finding that the detriment suffered by Mrs Cynberg was sufficient to found a proprietary estoppel. Indeed, it seems to me that such detriment was far from minimal.

(b) Countervailing benefit

62. The Trustees' next criticism of the Judge was that, in determining the question of detriment, insufficient regard was given to the countervailing benefits enjoyed by Mrs Cynberg. In short, it is said that account should have been taken of the fact that following the separation Mrs Cynberg was able to continue enjoying the benefit of the mortgage which she and Mr Cynberg had originally obtained in circumstances where, following their separation, she

would not have been able to get a mortgage had she applied alone. In short, but for the original mortgage, Mrs Cynberg would have had to have rented somewhere to live; but instead, so it is said, she has gained the benefit of an asset worth (on the Trustees' case) in excess of £117,000.

63. In my judgment, however, this argument once again misses the reality of the situation. As pleaded in her Particulars of Claim, over the years since the separation she had "*formed an emotional attachment to the Property and developed a home for her and her children. Had she been aware that she did not in fact own the whole property, and that the property may need to be sold, she could have made alternative arrangements at an earlier time to vacate and minimise the disruption and upset caused by such a change".* Moreover, any supposed benefit accruing to Mrs Cynberg by having the continued benefit of the original mortgage is, in my judgment, significantly outweighed by the fact that for many years she paid the entirety of the mortgage herself yet (on the Trustees' case) half of the equity in the Property continued to belong to Mr Cynberg. Again, therefore, no criticism of the Judge can be made in her assessment of the relevant detriment.

(c) Insufficient causal connection

64. Finally, on this point, the Trustees correctly refer to the need for there to be a causal link between, on the one hand, the relevant assurance and, on the other hand, the relevant detriment. Their complaint, however, is that the test applied by the Judge was too wide and that in particular she did not consider the counterfactual, i.e. what Mrs Cynberg would have done but for the assurances from Mr Cynberg at around the time of their separation.

65. Again, however, in making this submission, the Trustees focus on the home improvements, arguing that such expenditure was incurred by her, not because of any assurances from Mr

Cynberg but instead that they quite simply needed to be done – in other words, so it is said, she would have gone ahead with such works anyway.

66. Once again, however, this ignores the other (and more significant) detriment suffered by Mrs Cynberg by taking over the entirety of the mortgage repayments. Indeed, it was clear from the evidence that Mrs Cynberg's decision to stay in the Property and pay the entirety of the mortgage repayments was wholly related to Mr Cynberg's assurance that the Property was now hers alone. One can perhaps test it this way: if, rather than make the assurances that he did, Mr Cynberg had instead told Mrs Cynberg that she could take over the entirety of the mortgage repayments but, if she did so, in years to come he would still claim 50% of the equity in the Property, would Mrs Cynberg have acted as she did? The answer is clearly no and, in my judgment, the Judge cannot be criticised for making the findings that she did.

Conclusion on Ground 2

67. In conclusion, I see no reason to interfere in the Judge's determination on detriment (which I find to be correct in any event) and therefore dismiss the appeal in relation to Ground 2.

PART V: THE THIRD GROUND OF APPEAL

The Ground of Appeal

68. The third ground of appeal provides:

> "6. **Ground 3:** Further or alternatively, the Judge erred in law and/or fact in concluding that the assurances given by Mr Cynberg to the First Respondent were sufficient to found a proprietary estoppel (or common intention constructive trust).

7. The Judge should have concluded from the evidence that the understanding or agreement between the First and Second Respondents was that:

(1) Mr Cynberg would remain on the title and jointly liable for the mortgage for as long as the First Respondent was unable to obtain a mortgage in her own name.

(2) Mr Cynberg had only "offered to" (and had not already transferred) the Property to the First Respondent, as recorded in the letters from Moss & Coleman dated 29 April 2015 and 11 March 2016.

8. The understanding in relation to the ownership of the Property therefore related to a contingent (or future state of affairs). The evidence was that, up to the date of the bankruptcy order, the First Respondent was content to take the risks associated with Mr Cynberg continuing to be a joint tenant in law and equity.

9. There is a further compelling reason why this ground of appeal should be heard and allowed, which is that – if correct as a matter of principle – the decision would appear to signal a permissive approach towards parties simultaneously holding contrary private intentions and public intentions."

69. In short, therefore, this third ground of appeal is an attack on the Judge's finding that the agreement or understanding between Mr and Mrs Cynberg was to the effect that the Property was now hers alone; instead, so it is said, any such discussion amounted merely to an offer which was never in fact acted upon.

Discussion

70. In relation to this part of their argument, the Trustees rely heavily on the correspondence to Mrs Cynberg from her own solicitors in which they noted that Mr Cynberg had "offered" to transfer the Property to her absolutely, and then went on to advise her as to the risks of remaining a joint tenant (stating, in particular, that if she were to die her interest would pass to him) thereby suggesting that they, at least, considered that Mr Cynberg still had a beneficial interest to give. As the Trustees note, Mrs Cynberg did not disagree with that position; in particular, so the Trustees say, Mrs Cynberg did not write back saying that the Property was *already* hers.

71. In my judgment, however, this is placing too much reliance on how Mrs Cynberg's solicitors viewed the position. She clearly gave them certain instructions including, presumably, as to the discussions which she and Mr Cynberg had discussed at the time of their separation. Her solicitors then formed a view – apparently to the effect that no transfer of the beneficial interest had yet taken place – hence the correspondence to which I have been referred.

72. Importantly, however, whatever instructions Mrs Cynberg gave to her solicitors in around 2015, and whatever advice those solicitors then gave, cannot of course impact upon the true position in fact and law as at 2009. At the trial, the Judge heard the evidence of both Mr Cynberg and Mrs Cynberg – both of whom were the subject of cross-examination – and formed the view that the discussions which took place back in 2009 had been "clear and straightforward" with Mr Cynberg having told Mrs Cynberg that "the house is yours". In forming that view, the Judge clearly took into account the subsequent correspondence between Mrs Cynberg and her solicitors but found that the evidence of both Mr and Mrs Cynberg (to the effect that he had said that the Property "is yours") was clear and unequivocal – a finding which she was entitled to make. As everyone knew, the legal title still remained in their joint names – hence, perhaps, the subsequent "offer" to transfer – but, as the Judge found, back in 2009 Mr Cynberg had agreed that the Property was now Mrs Cynberg's alone.

73. In short, the fact that Mrs Cynberg's solicitors may have seen things differently is a factor which the Judge should have considered as part of the mix – but she did do so. Having heard the evidence of both Mr and Mrs Cynberg first hand, however, she effectively formed the view that the solicitors had not fully understood the position – a view which was fully entitled to take and one which was, in my judgment, clearly correct in any event.

Conclusion on Ground 3

74. In conclusion, I see no reason to interfere in the Judge's findings on the nature of the common understanding of the parties (which I find to be correct in any event) and therefore dismiss the appeal in relation to Ground 3.

PART VI: THE FOURTH GROUND OF APPEAL

The Ground of Appeal

75. The fourth and final ground of appeal provides:

> "10. **Ground 4:** Alternatively, if a proprietary estoppel arose, the Judge erred in law and/or fact in concluding at paras 17-18 and 23-24 that it arose in January 2009.
>
> 11. The Judge should have concluded that, if a proprietary estoppel arose at all, it was when it became inequitable for Mr Cynberg to renege on his assurances to the First Respondent, which was after the improvements were made to the Property in 2014 and 2015.

12. The Judge should consequently have held that the transaction was a transaction at an undervalue within the meaning of section 339(3) of the Insolvency Act 1986 and ordered that 50% of the beneficial interest in the Property vested in the bankruptcy estate of Mr Cynberg."

<u>**Discussion**</u>

76. By this Ground, the Trustees complain that the Judge did not differentiate between the tests of constructive trust and proprietary estoppel in that the Judgment concluded that the parties reached their common understanding in January 2009 and that the proprietary estoppel was also "founded in 2009".

77. As to this, the Trustees point out, correctly, that any proprietary estoppel could not arise until the detriment was present such that it would be unconscionable for Mr Cynberg to renege on his assurances. They then go on to point out, again correctly, that the home improvements all took place within the 5-year lookback period under section 341(1)(a) of the IA 1986 such that the Judge should have gone on to consider the Trustees' counterclaim based on a transaction at an undervalue for the purposes of section 339 of the IA 1986. On this basis, the Trustees invite me to consider their counterclaim (or alternatively remit it to the County Court for determination).

78. Again, however, the Trustees fall into the trap of focusing only on the home improvements. If the home improvements were the only detriment, then there would be some force in their argument. As explained above, however, the Judge found that the relevant detriment included not only the home improvements but also the foregoing of the bringing of ancillary relief proceedings and, most significantly, the taking over of the entirety of the mortgage repayments. While the home improvements took place over 2014 to 2016 (and therefore

within the 5-year lookback period), the detriment suffered by Mrs Cynberg by, in particular, paying all of the mortgage repayments each month began in 2009.

79. It is clear therefore that the elements of the cause of action of proprietary estoppel were made out at around the time of or very shortly after the separation such that the Judge was entirely correct to conclude that the proprietary estoppel was also "founded in 2009". It also therefore follows that the Judge was right to conclude that, on that basis, the Trustees' counterclaim necessarily fell away.

<u>Conclusion on Ground 4</u>

80. In conclusion, the Judge's analysis in relation to when the cause of action of proprietary estoppel was founded and the subsequent dismissal of the Trustees' counterclaim under section 339 of the IA 1986 was entirely correct such that I also dismiss the appeal in relation to Ground 4.

<u>PART VII: CONCLUSION</u>

81. In conclusion, therefore:

(1) in relation to Ground 1, I dismiss the application for permission to appeal; and

(2) in relation to Grounds 2, 3 and 4, I dismiss the appeal.

82. I conclude by expressing my gratitude to all counsel and their respective instructing solicitors.

JPKC, August 2024

Neutral Citation Number: [2022] EWCA Civ 1648

Case No: CA-2022-000673

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION
THE HON. MR JUSTICE KERR
[2022] EWHC 631 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ANDREWS
and
LORD JUSTICE NUGEE

- -

Between :

Lee Hudson	**Appellant**
- and -	
Jayne Hathway	**Respondent**

- -
- -

Alexander Learmonth KC and Zoë Saunders (instructed by **Veale Wasbrough Vizards LLP**) for the **Appellant**
Michael Horton KC and Guy Holland (instructed by **Ashtons Legal**) for the **Respondent**

Hearing dates : 22 & 23/11/2022

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 14.12.2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction and issues

1. Kerr J, from whom this appeal is brought, framed the original issues accurately and concisely on the first appeal from HHJ Ralton:

> "This is an appeal in a case about equitable ownership of a family home purchased in joint names, initially with equal ownership rights, where the unmarried parties later separate. Must a party claiming a subsequent increase in her equitable share necessarily have acted to her detriment? Or does a common intention alone suffice to alter the beneficial shares? And if the former, was the judge right to decide that the requirement of detriment was met?"

2. His answer to the first two questions was that it was not necessary to show detriment; but that a common intention alone was sufficient. But in case he was wrong, he also answered the third question. His answer to that question was that the trial judge was entitled to find that sufficient detriment had been established. His judgment is at [2022] EWHC 631 (QB).

3. For the reasons that follow, in relation to the original issues, I would hold:

   i) A party claiming a subsequent increase in her equitable share as a result of a post-acquisition changed common intention must show detrimental reliance on that changed common intention;

   ii) The trial judge was right to decide on the facts that the requirement of detrimental reliance was met.

4. I would also hold (in response to a point not argued below) that the communications which expressed the parties' common intention that Ms Hathway should have the whole equitable interest in the family home in fact complied with the necessary statutory formalities. Logically, it is this last question that comes first.

The facts

5. Ms Jayne Hathway and Mr Lee Hudson started a relationship in 1990. He moved into her home and became joint owner. They did not marry. They had two sons. They sold the home and bought another, in joint names. Then in 2007, with a mortgage, they bought Picnic House, again in joint names, with no declaration of trusts. Both worked. His earnings soon overtook hers; she left the financial services industry to work in the charity sector; he remained in financial services.

6. In 2009, Mr Hudson left Ms Hathway for another woman, moved in with her and later married her. They are now estranged. Ms Hathway stayed at Picnic House with the two sons. The mortgage was converted to an interest only basis. It was paid, as before, from the joint bank account into which both their salaries were paid. Over the years,

Mr Hudson substantially paid the mortgage; the amount he contributed far exceeded Ms Hathway's contributions.

7. Then in 2011, the house was blighted by an oil spill, making it very difficult to sell. An environmental disaster was how the trial judge described it. Oil leaked into the house from a neighbouring tank and under the ground beneath the house. An environmental clean up was required. A complicated insurance claim dragged on for years. Over the following 20 months or so, the parties had sporadic email discussions about financial arrangements.

8. On 9 November 2011 Ms Hathway emailed Mr Hudson. Her email read in part:

> "Your shares are the main matter outstanding. You have told me that they are not worth anything. Whether or not that is the case, they form part of what was our collective assets at the time we split. I imagine that you feel that I should have no call on them, you earned them, from all the hours of effort you put in at work – my position is, of course, different – you earned them while we were together, your career advancement was part of our relationship, as was the building of pension funds etc. I hope we are both adult and reasonable enough to reach some sort of compromise?"

9. The email was subscribed "Jayne Hathway".

10. Mr Hudson replied on the same day:

> "My thoughts on this are that anything accrued while we were together is for us to come to an agreement on, which I think fits with what you are saying."

11. The email was subscribed "Lee"; and his full name given. On 24 August 2012 Mr Hudson wrote:

> "We'll sort who deserves what in regards to our joint assets (house, shares, savings etc) when we're in a position to liquidate it all, which obviously depends on when you are ready."

12. The email was subscribed "Lee Hudson".

13. In July and August 2013, Mr Hudson and Ms Hathway agreed terms set out in emails. In an email of 30 July (but not sent to Ms Hathway until the following day) he said:

> "So here it is. We were never married. You have no claim over what is mine. What I consider ring-fenced is what I get from my years of personal graft. They are not up for discussion. I'm not agreeing to give you any. …. The liquid cash, you can have. Savings in the bank, other plans, take it all. Physical property, the contents of the house … again I don't want it; keep it. Which leaves the house, a bad asset which is preventing all of us [from] .. moving on with our lives…. You know what, I

> want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live….
>
> As for a Will, if I were to die before this financial mess is sorted, Heidi [his wife] will have no rights to Picnic House …
>
> What I want is an end to it. So have everything that's available to have now and when the house is sold."

14. The email was subscribed "Lee".

15. Ms Hathway replied on the same day. She said:

> "Can't see any point in putting "my side" of the argument. Not because I don't feel that I have a valid case to make, but because it is clear that it would be pointless."

16. On 12 August 2013 she emailed again:

> "So that we can move forward and get to a point of completely severing our financial connections, your suggestion, as I understand it, is you get sole ownership of your shares and pension, I get the equity from the house, the house contents, savings and income from endowments. Is that right? If so, then I will accept this and will do everything I can to get the house ready for sale as soon as the situation with the oil spill is resolved."

17. He replied on 9 September:

> "Yes, that's right. …
>
> Under this arrangement, I've no interest whatsoever in the house, so whilst I will continue to contribute, I won't do so forever."

18. This email was subscribed "Lee".

19. In the autumn and winter of 2013 there was some discussion about Mr Hudson's buying the house. But as his email of 15 December 2013 made clear what was under discussion was his purchase of the whole house and not simply a half share in it.

20. Time passed and Mr Hudson became impatient with a lack of progress in resolving the oil spill clean up, the insurance claim and the sale of Picnic House. In May and July 2014 he referred in emails to how much time had passed "since we came to a deal". In his email of 2 July 2014 he added:

> "If you want to continue to "wait" on the house to maximise your gain (means nothing to me if it sells for a pound or a million) then that needs to be your decision and your responsibility."

21. On 24 August 2014 he wrote:

> "Remember the House is of no value to me: the deal from one year ago which was supposed to be finalised 6 months ago gave you <u>all</u> liquid assets, including the proceeds of the house sale. I don't care what it sells for. "

22. In January 2015, he ceased contributing to the mortgage. Ms Hathway took over the payments. It was cheaper than renting. The two sons, now young adults, remained at Picnic House with her.

23. The trial judge found that the parties had clearly reached a deal, but at that stage it was accepted that the deal did not satisfy the formalities for transferring legal title, an equitable interest or a declaration of trust.

24. In October 2019, Mr Hudson issued his claim under CPR Part 8 and the Trusts of Land and Appointment of Trustees Act 1996. He sought an order for the sale of Picnic House, with equal division of the proceeds. Ms Hathway agreed that the house should be sold but contended that she was entitled to the whole of the proceeds under a constructive trust following a common intention and agreement, in reliance on which she had acted to her detriment.

25. The detrimental conduct relied on was: paying all interest payments on the joint mortgage from January 2015; desisting from claiming against assets in Mr Hudson's sole name acquired during their relationship; not claiming financial support for the benefit of the children under the Children Act 1989; accepting sole responsibility for the oil spill and insurance claim; at her own expense, maintaining and redecorating the property from January 2015; relying from 2014 on the understanding that she was sole beneficial owner, in conducting her finances and lifestyle; and living frugally to afford the upkeep and mortgage.

26. In her first witness statement Ms Hathway explained at paragraph 13 that Mr Hudson was keen to buy Picnic House, but that she did not relish the thought of a large mortgage. She continued:

> "However, Lee was certain that the equity from our house and our savings of £100,000 would mean a manageable mortgage and, if things became tight, he always said that his shares in Hiscox, the insurance company in which he worked, would be sold to pay it off…. I did not know the full extent of his shareholding in Hiscox but he said that it would be sufficient to cover the mortgage."

27. She said at paragraph 19:

> "I knew that as we were not married I had no claim to his shares or pension or to maintenance, but we had been together for 20 years and Lee and I agreed that there needed to be a fair distribution of the assets that we had built up together."

28. At paragraph 23 of the same statement (referring to her email of 9 November 2011) she said:

> "I was of the view that those assets which both of us secured during our relationship were joint assets however they were held legally and that we needed to reach an agreement as to how they were split… My view was that we had been together for 20 years and that my taking time off for looking after our children and our home, and to support him in his career advancement was one of the primary reasons he was able to earn such significant sums, to build his pension and to secure the shares so that they were our joint assets."

29. In her second witness statement she said at paragraph 37:

> "When I returned to work in the charity sector after having the children, I earned less than I had… I needed to fit my work around the children and around Lee's work in insurance, so I worked fewer hours than Lee. I believed that we were in a happy and stable relationship and that our relationship would endure. My understanding was that we would continue to pool our resources and that when we retired we would live on our combined assets all of which were accumulated whilst we were a couple…"

30. The trial judge held that in order to enforce the agreement evidenced by the e-mails, it was necessary for Ms Hathway to show that she had changed her position or otherwise relied on the agreement to her detriment. But he held on the facts that she had shown that. He considered the pleaded elements one by one; and rejected most of them as amounting individually to detrimental reliance of sufficient substance. But he held that by giving up potential claims against Mr Hudson's shares and pension which both she and Mr Hudson perceived she had (whether or not that belief was well-founded) did amount to relevant detrimental reliance. He therefore held that Ms Hathway was entitled to the whole of the beneficial interest in Picnic House.

31. Kerr J disagreed with the trial judge on the question whether it was necessary for Ms Hathway to show that she had changed her position or had acted to her detriment. He held that any such requirement had been abrogated by the decisions of the House of Lords and Supreme Court respectively in *Stack v Dowden* and *Jones v Kernott*. But if he was wrong about that, he went on to hold that the quality of the asserted change of position or detriment was a matter of evaluative judgment for the trial judge; and that the trial judge was entitled to come to the conclusion that he did.

Is section 53 (1) (c) of the Law of Property Act 1925 satisfied?

32. We are concerned in this appeal with property rights in land, not with discretionary adjustments to property rights. The creation and transfer of property rights in land must, as a general rule, comply with statutory formalities. Such formalities are necessary in order that property rights in land should be certain. The most important of such formalities are those laid down by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (contracts for the sale or creation of interests in

land must be in signed writing) and section 53 (1) of the Law of Property Act 1925 (declarations of trust of land or an interest in land to be manifested by signed writing; and dispositions of subsisting equitable interests to be made by signed writing). Section 2 applies to executory contracts for the disposition of interests in land, but not to instruments which effect an immediate disposition. Section 53 (1), on the other hand, applies to instruments which effect an immediate disposition of an interest. Although the distinction has been described as "elusive", it is nevertheless well settled: *Rollerteam Ltd v Riley* [2016] EWCA Civ 1291, [2017] Ch 109 (referring to previous authority).

33. For reasons which are difficult to understand, whether section 53 (1) of the Law of Property Act 1925 was satisfied was not argued either at trial or on the first appeal. But at our prompting Mr Horton KC applied to amend the Respondent's Notice to take the point that Mr Hudson's emails of 31 July 2013 and 9 September 2013 complied with the statutory formalities.

34. There is no doubt that the court has the power to entertain a new point on appeal. In *Singh v Dass* [2019] EWCA Civ 360 Haddon-Cave LJ set out the principles which this court generally applies in deciding whether a new point may be advanced on appeal:

> "[16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> [17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial…
>
> [18] Third, even where the point might be considered a "pure point of law", the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs."

35. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 Snowden LJ (then sitting in this court as Snowden J) amplified these criteria. He first said that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. He pointed out that there was a spectrum of cases, at one end of which is a case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new

point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

36. In these (and all the other cases) that we were shown, it has been the appellant who wished to raise the new point. In other words, it is the party seeking to overturn the judgment who wishes to do so on the basis of a point not argued below. The effect of that would be to deprive the respondent of a judgment in their favour. Here, by contrast, it is the respondent (who already has two judgments in her favour) who wishes to raise the new point. CPR Part 52.13 simply says that a respondent's notice must be filed where a respondent "wishes to ask the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court." Whether precisely the same principles apply in such a case is not entirely clear. It is, however, fair to say that in an interlocutory appeal in *Riley v Sivier* [2021] EWCA Civ 713, [2021] 4 WLR 84, where the respondent wished to raise a new point, Warby LJ said that this court does not usually allow new points to be taken on appeal although he also rejected the new points on their merits. On the other hand, in *Golding v Martin* [2019] EWCA Civ 446, [2019] Ch 489 this court permitted a respondent to raise a new point which had not been argued below.

37. Mr Learmonth KC objected to the new point on the ground that the case had not been advanced in that way either at trial or on the first appeal, and that the decision not to argue that point had been deliberate. There is, of course, force in that objection. He pointed out that it had been accepted both at trial and on the first appeal that the email traffic did not amount to a contract compliant with section 2 of the Law of Property (Miscellaneous Provisions) Act 1925. So indeed it was, but it is not sought to argue that the email in question did comply with section 2. The argument now sought to be advanced is a different one. The argument depends on the legal effects of the relevant emails, which is a question of law. In those circumstances the court is not bound by one party's concession (*Bahamas International Property Trust Ltd v Threadgold* [1974] 1 WLR 1514, where a point was raised for the first time in the House of Lords), or the positions taken by the parties on a question of interpretation (*Teesside Gas Transportation Ltd v CATS North Sea Ltd* [2019] EWHC 1220 (Comm) at [119]).

38. Mr Learmonth KC also pointed out, correctly, that this point arose for the first time on a second (rather than a first) appeal. But that, in itself, is not an absolute bar to the raising of a new point: *Bahamas International Property Trust Ltd v Threadgold*; *New Zealand Meat Board v Paramount Export Ltd* [2004] UKPC 45.

39. Although, because of the court's sitting arrangements, there had been a break of a clear morning between the time that the point was raised and the resumed hearing of the appeal when Mr Learmonth raised his objections, Mr Learmonth also said that he and his team had not had adequate time to research the law dealing with the point. We decided to allow him a further seven working days in which to make written submissions; and gave Mr Horton three working days thereafter to respond. Both Mr Learmonth and Mr Horton took advantage of that opportunity.

40. Mr Learmonth also submitted that if we allowed the point to be taken there would have been further evidence that might have been called at trial. That evidence would,

in effect, have consisted of what the parties' subjective understanding of the documents was, and further amplification of the background. Although he suggested that in some circumstances subjective evidence is admissible on a question of contractual interpretation (e.g. to identify the subject-matter of a contract or to demonstrate that the parties had their own private dictionary), that argument erroneously conflates *extrinsic* evidence and evidence of *subjective* intent. In my judgment the point is a pure point of law, which depends on the interpretation of the relevant emails. As with any question of interpretation of a written document, the test is an objective one; and I am unable to see how the course of *relevant* evidence might have been affected. Mr Learmonth also said that if the point had been taken, Mr Hudson might have applied to rectify the email. In view of HHJ Ralton's finding of fact about the parties' intentions, that seems to me to be purely theoretical.

41. The third objection was that Mr Hudson had suffered detriment in a broad sense. Had he known that this point was to be taken, he might have had a different approach to a possible settlement of the dispute; and Mr Learmonth also emphasised that the ongoing litigation had had a devastating effect on Mr Hudson personally and, in particular, his relationship with his sons. There is some force in the point about settlement (although that is likely to be the case whenever a party seeks to raise a new point on appeal), but there is less force in the effect of the ongoing litigation. It was, after all, Mr Hudson who initiated the litigation in the first place, Mr Hudson who appealed unsuccessfully against an adverse judgment at trial; and Mr Hudson who has brought this second appeal.

42. In my judgment the new point is at the latter end of the spectrum identified by Snowden LJ. Although I have carefully considered Mr Learmonth's objections, in my judgment the balance of justice comes down in favour of allowing the new point to be taken. I would therefore allow the amendment.

43. Section 36 of the Law of Property Act 1925 (as amended by the Trusts of Land and Appointment of Trustees Act 1996) relevantly provides:

> "(1) Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held in trust, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.
>
> (2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenant…"

44. Since the enactment of the Trusts of Land and Appointment of Trustees Act 1996 a co-owner's beneficial interest is an interest in the land itself, rather than (as formerly) an interest in its proceeds of sale.

45. Section 53 (1) of the Law of Property Act 1925 relevantly provides:

> "(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;…
>
> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will."

46. It is common ground that on acquisition of Picnic House it was held by Mr Hudson and Ms Hathway as joint tenants both in law and in equity. In strictly technical terms, it is not possible for one joint tenant to assign his beneficial interest to another joint tenant. That is because, as a matter of theory, each joint tenant is entitled to the whole of the land. But section 36 (2) expressly preserves the right of one joint tenant to release his interest to the other joint tenant. The difference between a release and an assignment was explained by Lord Millett (albeit in a dissenting speech) in *Burton v Camden LBC* [2000] 2 AC 399, 408:

> "A purported assignment of the interest of one joint tenant to the other joint tenant does not constitute an assignment, because each of the joint tenants is already the owner of the whole. The so-called assignor has no separate interest of his own which is capable of being transferred to the other and which the other does not already own. None of this, of course, applies to a tenant in common, because he has a separate and distinct interest of his own which he can assign either to a third party or to his co-owner.
>
> Before 1926, therefore, one joint tenant could not assign his interest to the other. But he could achieve much the same result by releasing his interest. The release operated to extinguish his interest and not to assign it. The difference, though technical, was not a formality. Since a release did not operate by way of assignment or conveyance, it required no words of limitation. Moreover, where there were three or more tenants, a release by one joint tenant did not destroy the unity of title of the others and so sever their interests, for they did not acquire any interest by the release which they did not already own.
>
> No particular form of words was required for a release. Even if it was drafted as any assignment, it still took effect as a release. The difference was one of substance, not form; it was not merely a matter of language. The ability of one joint tenant to release his interest to the other has been preserved by section 36(2) of the Law of Property Act 1925. It is still not possible for one joint tenant to assign his interest to the other."

47. In *Re Wale* [1956] 1 WLR 1346 Upjohn J said at 1350:

> "Another familiar principle is that an assignment of an equitable estate need not be in any particular form. As Lord Macnaghten said in *Brandt's (William) Sons & Co Ltd v Dunlop Rubber Co Ltd*: "The language is immaterial if the meaning is plain." That, in my judgment, applies as much to a voluntary assignment as to one for valuable consideration as in that case. (See also *Lambe v Orton*). An equitable assignment may take many forms. It may in terms purport to operate as an assignment, or it may take the form of a direction to the trustees in whom the legal estate is outstanding to hold the property on trust for the donee or on new trusts."

48. So as in the case of a release there is no need for any particular form of words. As Lord Macnaghten said in the *Brandt's* case: "It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission."

49. Mr Learmonth submitted that in a domestic or social context there might have been no intention to create legal relations. This is a principle that applies to executory contracts. But assuming that it can apply to immediate dispositions, the fact that although married, the parties are separated, leads to the conclusion that there is no presumption that legal relations are not intended: *Merritt v Merritt* [1970] 1 WLR 1211. Still less so is there a presumption where the parties have never married but are negotiating their final separation. Moreover, it is not a question of subjective intention as Lord Denning MR made clear in *Merritt*.

50. In my judgment Mr Hudson's emails of 31 July and 9 September 2013 are sufficient in point of form to amount to a release of his equitable interest in the house. They evince a clear intention to divest himself of that interest immediately, rather than a promise to do so in the future. His email of 30 July 2013 said in relation to the house, "Take it"; and in his follow up on 9 September he disavowed any interest in it. Further emails, with which Mr Learmonth supplied us at the end of the hearing (and in particular those of 2 July 2014 and 25 August 2014) confirm the finality of that decision. Does that amount to the disposition of an interest in land or an equitable interest?

51. The word "disposition" in section 53 is a word of wide import. In *IRC v Grey* [1960] AC 1, 12 Viscount Simonds said:

> "If the word "disposition" is given its natural meaning, it cannot, I think, be denied that a direction given by Mr. Hunter, whereby the beneficial interest in the shares theretofore vested in him became vested in another or others, is a disposition. But it is contended by the appellants that the word "disposition" is to be given a narrower meaning and (so far as relates to inter vivos transactions) be read as if it were synonymous with "grants and assignments" and that, given this meaning, it does not cover such a direction as was given in this case. As I am clearly of the opinion, which I understand to be shared by your Lordships, that there is no justification for giving the word "disposition" a narrower meaning than it ordinarily bears, it

> will be unnecessary to discuss the interesting problem that would otherwise arise."

52. To similar effect in *Newlon Housing Trust v Alsuleimen* [1999] 1 AC 313, 316 Lord Hoffmann said:

> "'Disposition' is a familiar enough word in the law of property and ordinarily means an act by which someone ceases to be the owner of that property in law or in equity."

53. Likewise, in *IRC v Buchanan* [1958] Ch 289 this court held that a surrender of a life interest under a trust amounted to a disposition. In view of the wide meaning of "disposition", I consider that the same reasoning would apply to the release of his interest by one joint tenant to another joint tenant.

54. Accordingly, the emails of 30 July 2103 and 9 September 2013 amount in point of form, in my judgment, to a "disposition" for the purposes of section 53. But they also need to satisfy the statutory formalities.

55. There is no dispute that the emails I have quoted are "writing" as defined by Schedule 1 to the Interpretation Act 1978. Are they signed? There is no relevant statutory definition of "signed". The touchstone for determining what is a signature is an intention to authenticate the document: *Caton v Caton* (1867) LR 2 HL 127. Applying that principle, it has been held that a printed name may amount to a signature (*Schneider v Norris* (1814) 2 M & S 286); as may the name on a telegram form (*Godwin v Francis* (1869-70) 5 CP 295), or a rubber stamp (*Goodman v J Eban Ltd* [1954] 1 QB 550).

56. It goes without saying that electronic communications in the form of emails were not known to Parliament in 1925. But it is a general principle of statutory interpretation that an Act of Parliament is regarded as "always speaking." What that means is that the words of the Act should generally be interpreted so as to cover new technological developments which the legislators might not have foreseen, if they conform to the policy of the Act in question. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 Lord Steyn said at [25]:

> "In such a case involving the application of a statute to new technology it is plainly not necessary to ask whether the express statutory language is ambiguous. … But in order to give effect to a plain parliamentary purpose a statute may sometimes be held to cover a scientific development not known when the statute was passed. Given that Parliament legislates on the assumption that statutes may be in place for many years, and that Parliament wishes to pass effective legislation, this is a benign principle designed to achieve the wishes of Parliament."

57. In *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 the question was whether an email address automatically inserted by the sender's internet service provider was a valid signature for the purposes of section 4 of the Statute of Frauds 1677 (relating to guarantees). HHJ Pelling QC, sitting as a judge of the High

Court, held that it was not, but that was because it had been automatically inserted. In the course of his judgment, he said at [27]:

> "In the light of the dicta cited above, it seems to me that a party can sign a document for the purposes of section 4 by using his full name or his last name prefixed by some or all of his initials or using his initials, and possibly by using a pseudonym or a combination of letters and numbers (as can happen for example with a Lloyds slip scratch), providing always that whatever was used was inserted into the document in order to give, and with the intention of giving, authenticity to it. Its inclusion must have been intended as a signature for these purposes."

58. He concluded at [29]:

> "I have no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. The fact that the document is created electronically as opposed to as a hard copy can make no difference. However, that is not the issue in this case."

59. *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953 concerned the acceptance of a Part 36 offer which had been contained in an email from solicitors. Mr Peter Prescott QC, sitting as a judge of the High Court, said at [21]:

> "Mr Zelin doubted whether simply typing "Putsmans" on the e-mail amounted to a signature that complied with the practice direction, citing *J Pereira Fernandes SA v Mehta* [2006] 1 WLR 1543, but wisely he did not waste much time on the point. In that case the signature was alleged to be constituted by the words "From: Nelmehta@aol.com" appearing in the e-mail header. It was a mere statement of the sender's e-mail address and it would have been generated automatically after the message was transmitted. It was not put there by the sender with the intention of authenticating the document. In contrast, in our case the word "Putsmans" was deliberately typed in (what is more, after the customary salutation "Yours faithfully"). I have no doubt that its purpose would be recognised throughout the profession. Anyone would think: "Putsmans are signing off on this document". It was intended to signify that document was being sent out with the authority of the defendants' legal representative."

60. *Lindsay v O'Loughnane* [2010] EWHC 529 (QB), [2012] BCC 153 was another case about the validity of a signature for the purposes of section 4 of the Statute of Frauds. Flaux J said at [95]:

> "In a modern context, the section will clearly be satisfied if the representation is contained in an email, provided that the email

> includes a written indication of who is sending the email. It seems that it is not enough that the email comes from a person's email address without his having "signed" it in the sense of either including an electronic signature or concluding words such as "regards" accompanied by the typed name of the sender of the email…"

61. In *Re Stealth Construction Ltd* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 the question was whether a valid charge had been created. The charge was required to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. David Richards J said:

> "[44] … The liquidator accepts, adopting the reasoning of his Honour Judge Pelling QC in *J Pereira Fernandes SA v Mehta* … in the context of the statutory requirements for a guarantee, that Miss Gillis on behalf of the company and Mrs Ireland, by inserting their names at the end of the e-mails sent by them respectively, had "signed" them for the purposes of s 2.
>
> [45] Section 2(3) requires also that the document incorporating the terms be signed by or on behalf of each party. The liquidator accepts that Miss Gillis's e-mail to Mrs Ireland and Mrs Ireland's reply constitutes a single document for these purposes. In my view, this is right where, as here, the second e-mail is sent as a reply and so creates a string, as opposed to [being] simply a new e-mail referring to an earlier e-mail. It is the electronic equivalent of a hard copy letter signed by the sender being itself signed by the addressee."

62. *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674 was another case about the signature of a guarantee. The document concluding the alleged contract of guarantee was an email subscribed "Guy", a reference to the broker, Mr Hindley. Tomlinson LJ said at [32]:

> "It was common ground both before the judge and before us that an electronic signature is sufficient and that a first name, initials, or perhaps a nickname will suffice. Mr Kendrick's point was that the affixing of Mr Hindley's name was not done in a manner which indicated that it was intended to authenticate the document, that being the touchstone… I do not accept Mr Kendrick's first argument. Chartering brokers may communicate with one another in a familiar manner but that does not detract from the seriousness of the business they are conducting. In my judgment Mr Hindley put his name, Guy, on the e-mail so as to indicate that it came with his authority and that he took responsibility for the contents. It is an assent to its terms. I have no doubt that that is a sufficient authentication."

63. He added at [34]:

> "Naturally I accept that the e-mail … is not itself the contract of guarantee. I have no doubt however that the signature on that document of Mr Hindley, assuming his authority, is properly regarded as authentication of the contract of guarantee contained in it and the other document or documents in the sequence to which I have already referred."

64. In *Bassano v Toft* [2014] EWHC 377 (QB) the question was whether a consumer credit agreement had been validly executed. Popplewell J said at [42]:

> "Generally speaking, a signature is the writing or otherwise affixing of a person's name, or a mark to represent his name, with the intention of authenticating the document as being that of, or binding on, the person whose name is so written or affixed. The signature may be affixed by the name being typed in an electronic communication such as an email: see *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* at [32]. Section 7 of the Electronic Communications Act 2000 recognises the validity of such an electronic signature by providing that an electronic signature is admissible as evidence of authenticity."

65. In *Neocleous v Rees* [2019] EWHC 2462 (Ch), [2020] 2 P & CR 4 the question was whether an email subscribed "Many Thanks David Tear" was "signed" for the purposes of section 2 of the Law of Property (Miscellaneous Provision) Act 1989. HHJ Pearce held that it was. The subscription appears to have been automatically generated by the email software. HHJ Pearce said:

> "[54] … It was common ground that the rule that a footer of this type be added to every email involved the conscious action at some stage of a person entering the relevant information and settings in Microsoft Outlook. Furthermore, Mr Tear knew that his name was added to the email. Indeed, the manual typing rather than automatic inclusion of the words "Many Thanks" at the end of the email strongly suggests that the author is relying on the automatic footer to sign off his name.
>
> [55] In such circumstances, it is difficult to distinguish between a name which is added pursuant to a general rule set up on an electronic device that the sender's name and other details be incorporated at the bottom from an alternative practice that each time an email is sent the sender manually adds those details. Further, the recipient of the email has no way of knowing (as far as the court is aware) whether the details at the bottom of an email are added pursuant to an automatic rule as here or by the sender manually entering them. Looked at objectively, the presence of the name indicates a clear intention to associate oneself with the email—to authenticate it or to sign it."

66. At [56] he referred to the policy behind section 2; namely to reduce uncertainty and the need to prove intent by extrinsic evidence. But he continued at [57]:

> "In my judgment, no such difficult arises if the email footer here is treated as being a sufficient act of signing:
>
> i) it is common ground that such a footer can only be present because of a conscious decision to insert the contents, albeit that that decision may have been made the subject of a general rule that automatically applied the contents in all cases. The recipient of such an email would therefore naturally conclude that the sender's details had been included as a means of identifying the sender with the contents of the email, since such a footer must have been added either as a result of a conscious decision in the particular case or a more general decision to add the footer in all cases;
>
> ii) the sender of the email is aware that their name is being applied as a footer. The recipient has no reason to think that the presence of the name as a signature is unknown to the sender;
>
> iii) the use of the words "Many Thanks" before the footer shows an intention to connect the name with the contents of the email; and
>
> iv) the presence of the name and contact details is in the conventional style of a signature, at the end of the document. That contrasts with the name and contact address of Mr Hale, the person alleged to have signed the letter in [*Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567], whose name and address appeared above the text of the letter, in the conventional manner of inserting the addressee's details."

67. There is, therefore, a substantial body of authority to the effect that deliberately subscribing one's name to an email amounts to a signature. Given that so much correspondence takes place nowadays by email rather than by letters with a "wet ink" signature, it is, in my judgment, entirely appropriate that the law should recognise that technological developments have extended what an ordinary person would understand by a signature. I would hold, therefore, that Mr Hudson's emails of 31 July and 9 September 2013 were "signed" for the purposes of section 53 (1) (a) and (c) of the Law of Property Act 1925.

68. It follows, therefore, that by those emails Mr Hudson released his beneficial interest in Picnic House to Ms Hathway.

Constructive trust

69. Strictly speaking, my conclusion on section 53 is enough to dispose of the appeal. But the main reason why Asplin LJ gave permission for this second appeal was to decide the point of principle: namely whether a constructive trust can arise simply as a matter of common intention without the need to show any detrimental reliance on that

intention. That question was fully argued, and I consider that it is appropriate that we decide it.

Is detriment or change of position necessary?

70. These statutory formalities do not affect the creation or operation of constructive trusts. The constructive trust is a creature of equity. In this respect, equity operates by settled principles. In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 Lord Walker, referring to equitable estoppel, said at [46]:

> "My Lords, equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in *Muschinski v Dodds* (1985) 160 CLR 583, 615–616,
>
> "Under the law of [Australia]—as, I venture to think, under the present law of England—proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' and 'the formless void' of individual moral opinion …" (references omitted)."

71. Or to adopt Lord Neuberger's colourful metaphor (*The stuffing of Minerva's owl? Taxonomy and taxidermy in equity* [2009] CLJ 537):

> "… equity is not a sort of moral US fifth cavalry riding to the rescue every time a claimant is left worse off than he anticipated as a result of the defendants behaving badly, and the common law affords him no remedy."

72. Equity acts where the application of the common law would produce an unconscionable result. But it is necessary to have some principles about what equity would recognise as an unconscionable result, otherwise, as Donaldson LJ put it in *Chief Constable of Kent v V* [1983] QB 34 at 45, one might as well "issue every civil judge with a portable palm tree."

73. What, then, would cause equity to regard a common law result as unconscionable? Until recently, at least in the context of the creation of constructive trusts, the answer would not have been in doubt. What makes it unconscionable to resile from a promise or agreement unenforceable at common law is detrimental reliance on that agreement or promise. In *Gissing v Gissing* [1971] AC 886, 905 Lord Diplock said:

> "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."

74. *Grant v Edwards* [1986] Ch 638 is a very important case for two reasons. First, the judgment clearly differentiated between what was needed in order to establish a beneficial interest of some kind and the process of quantifying that interest once established. Second it emphasised (if it needed emphasising) that where there is no writing that satisfies the statutory formalities, detrimental reliance is critical to the establishment of a constructive trust. At 646 Nourse LJ said:

> "In a case such as the present, where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted upon by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it."

75. At 647 he said:

> "There is another and rarer class of case, of which the present may be one, where, although there has been no writing, the parties have orally declared themselves in such a way as to make their common intention plain. Here the court does not have to look for conduct from which the intention can be inferred, but only for conduct which amounts to an acting upon it by the claimant. And although that conduct can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so."

76. Accordingly, even where there has been an express agreement, it is still necessary to find detrimental reliance.

77. He went on to say that where it is established that the claimant made contributions referable to the acquisition of the property "such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted upon it."

78. In the same case Mustill LJ said at 651:

> "(2) The question whether one party to the relationship acquires rights to property the legal title to which is vested in the other party must be answered in terms of the existing law of trusts.

> There are no special doctrines of equity, applicable in this field alone.
>
> (3) In a case such as the present the inquiry must proceed in two stages. First, by considering whether something happened between the parties in the nature of bargain, promise or tacit common intention, at the time of the acquisition. Second, if the answer is "Yes," by asking whether the claimant subsequently conducted herself in a manner which was (a) detrimental to herself, and (b) referable to whatever happened on acquisition. (I use the expression "on acquisition" for simplicity. In fact, the event happening between the parties which, if followed by the relevant type of conduct on the part of the claimant, can lead to the creation of an interest in the claimant, may itself occur after acquisition. The beneficial interests may change in the course of the relationship.)."

79. There are a number of points to be made about this passage. First, there are no special rules of equity applicable in this field. The ordinary law of trusts applies. Second, detrimental reliance is necessary even if there is a bargain. Third, there is no difference between an intention formed on acquisition and one formed after acquisition.

80. Sir Nicolas Browne-Wilkinson V-C said at 654:

> "If the legal estate in the joint home is vested in only one of the parties ("the legal owner") the other party ("the claimant"), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; (b) that the claimant has acted to his or her detriment on the basis of that common intention."

81. That is the first stage of the inquiry. He went on to say:

> "Once it has been established that the parties had a common intention that both should have a beneficial interest *and* that the claimant has acted to his detriment, the question may still remain "what is the extent of the claimant's beneficial interest?" This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important. If this analysis is correct, contributions made by the claimant may be relevant for four different purposes, viz.: (1) in the absence of direct evidence of intention, as evidence from which the parties' intentions can be inferred; (2) as corroboration of direct evidence of intention; (3) to show that the claimant has acted to his or her detriment in reliance on the common intention: Lord Diplock's speech does not deal directly with the nature of the

> detriment to be shown; (4) to quantify the extent of the beneficial interest." (Original emphasis)

82. At 656 he said:

> "But as Lord Diplock's speech in *Gissing v Gissing* … and the decision in *Midland Bank Plc v Dobson* … make clear, mere common intention by itself is not enough: the claimant has also to prove that she has acted to her detriment in the reasonable belief by so acting she was acquiring a beneficial interest."

83. Finally, 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*…. 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."

84. In *Yaxley v Gotts* [2000] Ch 162 Robert Walker LJ said much the same thing about the relationship between constructive trusts and proprietary estoppel at 176, although, as we will see, he later modified his view in *Stack v Dowden*.

85. In *Lloyds Bank plc v Rosset* [1991] 1 AC 107 the main issue was whether an agreement had been sufficiently established. But at 129 Lord Bridge said:

> "Even if there had been the clearest oral agreement between Mr and Mrs Rosset that Mr Rosset was to hold the property in trust for them both as tenants in common, this would, of course, have been ineffective since a valid declaration of trust by way of gift of a beneficial interest in land is required by section 53(1) of the Law of Property Act 1925 to be in writing. But if Mrs Rosset had, as pleaded, altered her position in reliance on the agreement this could have given rise to an enforceable interest in her favour by way either of a constructive trust or of a proprietary estoppel."

86. He added at 132:

> "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 a proprietary estoppel."

87. As we will see, the stringency of the requirement of express discussions has been overtaken by subsequent developments in the law, but the requirement of detrimental reliance has not.

88. In *Stokes v Anderson* [1991] 1 FLR 391 it is equally clear that this court regarded detrimental reliance as an essential ingredient in establishing the existence of a constructive trust.

89. *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 is another important milestone. Chadwick LJ surveyed the law in detail but cast no doubt on the requirement of detrimental reliance to the establishment of a constructive trust. He referred to a number of the passages in the authorities which I have already quoted without any hint of disagreement. In his summary of the law at [68] and [69] Chadwick LJ identified two questions. The first question was whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property. In relation to that question he went on to say:

> "… if the answer to the first question is that there was a common intention, communicated to each other, that each should have a beneficial share in the property, then the party who does not become the legal owner will be held to have acted to his or her detriment in making a financial contribution to the purchase in reliance on the common intention."

90. The need for detrimental reliance is plain. The second stage is the quantification of that interest, in relation to which the court can take a broader view.

91. This body of authority is consistent with the long-standing approach of equity, often summarised in the statement that equity will not assist a volunteer. In *Milroy v Lord* (1862) 4 De G F & J 264 Turner LJ said:

> "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the

> trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift."

92. In *Dillwyn v Llewellyn* (1862) 4 De G F & J 517 Lord Westbury LC said:

> "About the rules of the Court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift."

93. So, too, in the case of the old doctrine of part performance. An oral contract for the sale of land was not enforceable, but part performance by the claimant might raise an equity. In *Maddison v Alderson* (1883) 8 App Cas 467, 475-476 Lord Selborne LC explained:

> "In a suit founded on ... 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 contract itself ... The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

94. Lord Hoffmann also explained this principle (by reference to *Maddison v Alderson*) in *Actionstrength Ltd v International Glass Engineering In GL en SpA* [2003] UKHL 17, [2003] 2 AC 541 at [24]:

> "The reconciliation thus draws a distinction between the executory contract, not performed on either side, and the effect of subsequent acts of performance by the plaintiff. The former attracted the full force of the Statute while the latter could create an equitable rather than purely contractual right to performance. The Statute and the doctrine of part performance could co-exist in this way because contracts for the sale of land almost always start by being executory on both sides and usually remain executory until completed by mutual performance."

Stack v Dowden

95. I come now to *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432. Ms Dowden and Mr Stack were in a long-term relationship, although they were unmarried. The house in which they lived was in joint names. The question was whether Ms Dowden had established an entitlement to more than a half share in the house. The House of Lords

held that she had. At [19] Lord Walker quoted the passage from the speech of Lord Diplock in *Gissing v Gissing* which I have already quoted, which he had described as "hugely influential" in developing the law; and which he also said had "dominated this area of the law". Lord Walker's subsequent discussion was concerned with (a) what was necessary to establish an agreement and (b) what might count as a contribution. I cannot see that he dissented from Lord Diplock's view that detrimental reliance was necessary. Indeed at [35] he singled out both *Grant v Edwards* and *Stokes v Anderson* (both of which had stressed the need for detrimental reliance) as among the cases which had developed the law, without any hint of disapproval. Bearing in mind what he himself said in *Cobbe v Yeoman's Row* a year later, it would be very surprising if he had regarded detrimental reliance as unnecessary.

96. At [37] he said this:

> "I add a brief comment as to proprietary estoppel. In paras 70 and 71 of his judgment in *Oxley v Hiscock* [2005] Fam 211 Chadwick LJ considered the conceptual basis of the developing law in this area, and briefly discussed proprietary estoppel, a suggestion first put forward by Sir Nicolas Browne-Wilkinson V-C in *Grant v Edwards* [1986] Ch 638, 656. I have myself given some encouragement to this approach (*Yaxley v Gotts* [2000] Ch 162, 177) but I have to say that I am now rather less enthusiastic about the notion that proprietary estoppel and "common interest" constructive trusts can or should be completely assimilated. Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the "true" owner. The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice (*Crabb v Arun District Council* [1976] Ch 179, 198), which may sometimes lead to no more than a monetary award. A "common intention" constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."

97. As I read this, Lord Walker's reservations had nothing to do with the necessity (or lack of it) of detrimental reliance but with how the equity should be satisfied. Moreover, in saying that he was less enthusiastic about "completely" assimilating the two concepts, he did not suggest that they belonged in watertight compartments.

98. At [60] Lady Hale referred to Lord Walker's speech with evident agreement. Most of the rest of Lady Hale's speech is concerned with the question when it is proper to infer an agreement that the beneficial interest in the property in question is to be shared in proportions which differ from that which the legal title would suggest. At [61] she said:

> "… the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended."

99. At [64] she also referred to *Grant v Edwards* and *Stokes v Anderson* without any hint of disapproval (and also quoting Chadwick LJ's observation that *Grant v Edwards* was "an important turning point"). Her subsequent discussion is focussed on inferring

an agreement from subsequent conduct. Nowhere does she say that mere agreement after the initial purchase of the property is of itself enough to alter the beneficial interests. At [70], for example, she said:

> "There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then."

100. Following *Stack v Dowden*, this court decided *Qayyum v Hameed* [2009] EWCA Civ 352, [2009] 2 FLR 962. In March 1991 Mr and Mrs Qayyum bought a property for Mrs Qayyum's occupation, which was conveyed into joint names. In July 1991 Mr Qayyum executed a deed declaring that he held his interest on trust for Mrs Qayyum absolutely. In June 2004 Mr and Mrs Qayyum applied for a mortgage loan. In the following month they agreed orally to restore the position under which they were equal beneficial owners of the property. They both executed the charge in favour of the lenders in September 2004. The question was whether that agreement was effective. This, then, was a case of a change in the common intention. The trial judge found that Mr Qayyum had relied on the common intention to his detriment by entering into the mortgage. It was argued that entry into the mortgage was not sufficient detriment; but this court rejected that submission. At [32] Etherton LJ said that the judge "was entitled to find that Mr Qayyum entered into the … mortgage pursuant to, and in reliance on, that … agreement." At [34] he said that by entering into the mortgage Mr Qayyum was accepting a substantial detriment such that it would have been unconscionable to deny him the benefit of the beneficial interest. There was no suggestion that detrimental reliance was unnecessary, even in a case of a changed common intention.

Jones v Kernott

101. *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 was another joint names case. Ms Jones claimed a share in the property that was greater than half. The trial judge found in her favour, but his decision was reversed by the Court of Appeal. Ms Jones appealed successfully to the Supreme Court. The argument put forward by counsel on her behalf was:

> "There was ample evidence from which the trial judge could properly draw the inference that after 1993 the parties intended that the claimant's beneficial interest should be greater than the defendant's, that the claimant acted to her detriment in continuing to pay all of the endowment and maintenance costs, and that it would be inequitable to permit the defendant one half share of the property."

102. There is no suggestion in that argument that detrimental reliance was unnecessary. Indeed, he went on to submit:

> "By the date of the trial the claimant had contributed more than 85% of the purchase price of the property, and since 1993 all of

> the indirect contributions. From 1993 the claimant had also paid all the payments due in respect of the life insurance policy. The defendant would not have been able to put down a deposit or buy a property of his own without the claimant's co-operation in encashing the life insurance policy. The claimant acted to her detriment in paying all the endowment and maintenance costs and in agreeing to encash and share the insurance policy equally, having paid all the premiums since 1993."

103. Lord Walker and Lady Hale delivered the majority judgment. At [16] they referred to *Grant v Edwards* (again without any hint of disapproval). At [48] they appear to me to have accepted counsel's submissions on behalf of Ms Jones. They said:

> "At the outset, their intention was to provide a home for themselves and their progeny. But thereafter their intentions did change significantly. He did not go into detail, but the inferences are not difficult to draw. They separated in October 1993. No doubt in many such cases, there is a period of uncertainty about where the parties will live and what they will do about the home which they used to share. This home was put on the market in late 1995 but failed to sell. Around that time a new plan was formed. The life insurance policy was cashed in and Mr Kernott was able to buy a new home for himself. He would not have been able to do this had he still had to contribute towards the mortgage, endowment policy and other outgoings on 39 Badger Hall Avenue. The logical inference is that they intended that his interest in Badger Hall Avenue should crystallise then. Just as he would have the sole benefit of any capital gain in his own home, Ms Jones would have the sole benefit of any capital gain in Badger Hall Avenue. In so far as the judge did not in so many words infer that this was their intention, it is clearly the intention which reasonable people would have had had they thought about it at the time. But in our view it is an intention which he both could and should have inferred from their conduct."

104. This, then, was a case in which conduct fulfilled all the functions identified by Nourse LJ and Sir Nicolas Browne-Wilkinson V-C in *Grant v Edwards*.

105. They summarised their conclusions at [51]:

> "(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity. (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change. (3) Their common intention is to be deduced objectively from their conduct. … (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original

> intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property"…. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions. (5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4))."

106. I cannot regard this summary as stating that conduct is irrelevant. On the contrary, it is an essential part of point (3). In addition, *Jones v Kernott* was a case in which the change of intention was in fact inferred from conduct.

107. I do not, therefore, detect in either *Stack v Dowden* or *Jones v Kernott* any intention on the part of the court to abrogate the long-standing principle that what makes an unenforceable agreement or promise enforceable in equity is detrimental reliance. The principle of detrimental reliance was not challenged in either case, and that it why it was unnecessary for the court to deal with it. As Professor Dixon put it (*Non-problems, future problems and fairy dust* [2022] Conv 119):

> "… detrimental reliance was not in issue in either *Stack* nor *Jones*, not least because its existence was blindingly obvious on the facts. It was not pleaded as an issue, and was not argued as an issue. To infer therefore that the silence about detrimental reliance in those cases means that it is not required is imaginative. I may not specifically mention that you may not steal my laptop, but I am not authorising you to take it."

108. In my judgment it would have been astonishing if Lord Walker and Lady Hale intended to overrule a long-standing principle that detrimental reliance is necessary to crystallise a common intention constructive trust and to depart from two decisions of the House of Lords affirming that proposition without saying so, particularly in the light of their approving references (in *Stack v Dowden*) to *Stokes v Anderson* and (in both cases) to *Grant v Edwards*. Moreover, if that had been their intention, they would have needed to explain how a mere oral agreement (without more) overcame the statutory formalities laid down by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 53 (1) of the Law of Property Act 1925. Apart from a brief tangential mention of section 53 (1) (b) (not section 53 (1) (a) or (c)) in paragraph [55] of Lady Hale's speech in *Stack v Dowden*, they are not referred to at all in any of the majority speeches or judgments.

109. If that is what they did intend, their intention has gone virtually unnoticed.

Subsequent cases

110. *Quaintance v Tandan* [2012] EWHC 4416 (Ch) was a change of intention case. Ms Tandan and Mr Quaintance bought a property conveyed into their joint names, which apart from monies raised on a joint mortgage, was paid for entirely by Ms Tandan. Nevertheless, at the time of acquisition, their common intention was that the property would be held in equal shares. After a few weeks their relationship broke down and Mr Quaintance left the property, and made no financial contributions of any kind. He left no forwarding address; and made no contribution to the mortgage. Ms Tandan managed to pay the mortgage for a time but ultimately she fell into arrears and the mortgagee repossessed the property and sold it. The proceeds of sale produced a surplus over the mortgage debt. Mr Quaintance claimed half the surplus, but his claim was rejected. The trial judge held that by his actions Mr Quaintance had abandoned not only the property but any interest in it. He wished to have nothing further to do with the property. That intention was (at least inferentially) shared by Ms Tandan. An appeal was dismissed by HHJ Waksman QC, sitting as a High Court judge. It was not suggested in that case that there could not be a concept of abandonment; and HHJ Waksman held at [15] that the finding that the common intention had changed could not be attacked. At [17] he said that once the common intention had changed, it was necessary for the judge to decide what the relevant shares should be. On the facts, the judge was entitled to find that Ms Tandan was entitled to the entire beneficial interest in the property. There is no discussion of any requirement of detrimental reliance on the changed intention, which does not appear to have been argued. But if it were necessary to find detrimental reliance it is, in my judgment, to be found in Ms Tandan's payment of the whole of the mortgage payments, even if only for a relatively short time. I cannot regard this case as authority for the proposition that detrimental reliance is not required.

111. In *Smith v Bottomley* [2013] EWCA Civ 953, [2014] 1 FLR 626, [2021] 2 FLR 1016, Ms Smith claimed a share in property owned by a company which Mr Bottomley had formed. This court held that the claim failed. The first reason was that no promise had been made by the company. Sales J (sitting in this court) articulated the second reason at [61]:

> "Secondly, even if (contrary to my view above) there was a promise by the Company given after it was formed in April 2002, I consider that the analysis proposed by Mr Crossley fails because the detrimental reliance on the part of Ms Smith on which he seeks to rely cannot be clearly and distinctly related to that promise in such a way as to justify the creation of a good claim in equity against the Company."

112. In *Agarwala v Agarwala* [2013] EWCA Civ 1763, [2014] 2 FLR 1069 Sullivan LJ said at [13]:

> "… it was common ground that there was an oral agreement or understanding between the parties as to the terms on which the property was to be bought, held and used. In these circumstances, if Sunil was able to establish, on the balance of probabilities, that the agreement was that he should be the sole beneficial owner, then provided he could also show that he had

> acted to his detriment in reliance on that agreement, he would be able to discharge the onus of showing that the beneficial ownership differed from the legal ownership."

113. One of the grounds of appeal was that the trial judge had made inadequate findings on the question of detrimental reliance. Having considered the judge's judgment as a whole, Sullivan LJ concluded at [32]:

> "While an explicit reference to detriment in para [7] would have been desirable, having set out in para [3](e) the detriment claimed by Sunil, which included the work he put into buying, converting and running the business, the judge was not required to repeat it word-for-word in para [7]. The judge's reference to Sunil managing the letting business must be a reference back to the detriment claimed by Sunil and an implicit acceptance of at least that part of Sunil's case on detriment. It is not without significance that, having referred to the applicable legal principles in para [3](e), which of course include the need for there to be detriment in reliance upon a common understanding, the judge referred again to those principles in his concluding words in para [7]."

114. In *Curran v Collins* [2015] EWCA Civ 404, [2016] 1 FLR 505, in a judgment with which Davis LJ agreed, I said:

> "[77] Overarching all these points is the lack of detrimental reliance. The need for detrimental reliance on the part of the claimant is an essential feature of this kind of case….
>
> [78] Although Ms Crowther's skeleton argument suggested that the need for detrimental reliance had been abolished by *Stack v Dowden* and *Jones v Kernott*, she rightly abandoned that argument in the course of her oral address. The judge's finding on that point at [101] was that Ms Curran did not in any way act to her detriment in reliance on the specious excuse "or at all". That in itself is fatal to Ms Curran's case."

115. In *Montalto v Popat* [2016] EWHC 810 (Ch) Recorder Davis-White QC, sitting as a judge of the High Court, referred to both *Stack v Dowden* and *Jones v Kernott* and said at [107] (2):

> "Once a relevant common intention is divined by the Court, then that common intention will be given effect to by constructive trust provided that the person relying on establishment of the same has acted to his or her detriment in reliance upon the common intention."

116. In *Ely v Robson* [2016] EWCA Civ 774, [2017] 1 FLR 1704, on which Mr Horton KC relied, an informal compromise between an unmarried couple was upheld by way of a common intention constructive trust. But it is important to note why Kitchin LJ came to that conclusion. At [43] he said:

> "In my judgment it follows that, from the time they met in Poole Park, Ms Robson and Mr Ely had a common understanding as to the extent of their respective interests in 6 Torbay Road and thereafter Mr Ely acted to his detriment in reliance upon that understanding. Accordingly, whatever Ms Robson's interest in 6 Torbay Road may have been prior to that meeting, I am satisfied that thereafter Mr Ely held the property on constructive trust for them both and that Ms Robson's interest was limited to the interest defined in the declaration that the judge made."

117. It was the detrimental reliance that made the compromise enforceable as a constructive trust.

118. In *Insol Funding Company Ltd v Cowlam* [2017] EWHC 1822 (Ch), [2017] BPIR 1489, Master Bowles said at [99]:

> "The existence of a continuing common intention, that Ms Cowlam hold an 80% beneficial interest in the Property, is not, however, in my view, the end of the matter, in the determination of her beneficial interest. Such a beneficial interest, if it arises, does not arise as an express trust, since it is not supported by a signed writing in compliance with section 53(1)(b) of the Law of Property Act 1925, but can only arise by virtue of the application of constructive trust principles. Those principles, as is well understood, require, in circumstances where the beneficial interest is not to follow the legal interest, that the party asserting a constructive trust interest different to the legal interest, in reliance upon a common intention, must show that he, or she, has acted in reliance upon that common intention in such a way as to render it inequitable that he, or she, not obtain the intended interest. Although the focus of attention in both *Stack* and *Jones v Kernott* was on the proof of the common intention, whether by agreement, or imputation, there is nothing in either authority to abrogate the requirement of reliance, or the requirement that such reliance render it inequitable that the party asserting the trust be deprived of his or her intended interest."

119. In *Dobson v Griffey* [2018] EWHC 1117 (Ch), HHJ Matthews, sitting as a judge of the High Court, said at [20]:

> "For a common intention constructive trust to arise, the parties must have had a common intention to share the property beneficially, upon the faith of which the claimant then acts in reliance to her detriment. The common intention by itself is not enough for the constructive trust to arise. Otherwise s 53(1)(b) of the 1925 Act would be meaningless. It is the detrimental reliance that makes it unconscionable for the defendant landowner to resile from their otherwise unenforceable agreement."

120. In *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094, at [89] this court clearly considered that it was important that the person alleging the constructive trust (on the facts his personal representative) had "acted to his detriment, in reliance on the express and inferred agreed intention".

121. In *Amin v Amin* [2020] EWHC 2675 (Ch), Nugee LJ accepted at [54] that detrimental reliance is a requirement for a common intention constructive trust.

122. In *O'Neill v Holland* [2020] EWCA Civ 1583, [2022] P & CR 3, Henderson LJ said at [27]:

> "Judge Pelling was in my view right to hold that detrimental reliance remains an essential ingredient of a successful claim to a beneficial interest in a residential property under a common intention constructive trust, in the class of case where the legal estate is in the sole name of the other party."

123. At [32] he pointed out that in both *Stack v Dowden* and *Jones v Kernott* there was no express discussion of detrimental reliance. Having referred to what I said in *Curran v Collins*, Henderson LJ said that it was part of the ratio of that decision and hence binding on this court. If it was binding on the Court of Appeal, *a fortiori* it was binding on Kerr J (and is binding on us). Henderson LJ went on to say at [35]:

> "Nor, for my part, would I wish to question the correctness of the proposition, which seems to me to be firmly based on authority and underlying principles of equity."

124. On 15 February 2022 the Supreme Court (Lords Briggs, Hamblen and Burrows JJSC) refused permission to appeal in *O'Neill v Holland* on the ground that the appeal did not raise an arguable point of law.

125. In *R v Moore* [2021] EWCA Crim 956, [2021] 4 WLR 421, Andrews LJ said at [83]:

> "The issue at the heart of this appeal can be identified as follows: if A gives B money for the express purpose of using it only to purchase an identified property as an investment, A and B agree that A will have an interest in the property pro rata to his financial contribution, and the money is then used to buy the property, does A have a beneficial interest in the property? The answer is yes. It would be surprising if it were otherwise. A has acted to his detriment in consenting to the use of his money to fund the purchase, in reliance on the express promise of an interest in the property. It makes no difference to that answer that the property was subsequently purchased in the name of C, who was B's nominee or agent."

126. The critical importance of detrimental reliance to the intervention of equity was most recently reaffirmed by Lord Briggs, giving the majority judgment in *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911. He said at [10]:

> "… detriment is relevant to both the arising of the equity and to the remedy. Without reliant detriment there is simply no equity at all. This reflects the notion that it is the reliant detriment which makes it unconscionable for the promisor to go back on his promise."

127. Contrary to the view taken by Kerr J, I do not regard the decision of this court in *Barnes v Phillips* [2015] EWCA Civ 1056, [2016] HLR 3 as authority to the contrary. That was a case in which the trial judge inferred an intention to vary the shares in which the property was held by reference to subsequent conduct. He then quantified the altered shares again by reference to conduct. As this court said in *Grant v Edwards* conduct may both establish the common intention and also evidence detrimental reliance. It is plain from the facts that the party whose share decreased had had a substantial personal benefit from exploitation of the property which caused a corresponding detriment to his partner. As Lloyd-Jones LJ put it at [37]:

> "The appellant had received almost 25 per cent of the equity in the property for his own use very shortly before the parties split up in 2005. This entirely warranted an adjustment of the beneficial shares in the property which reflected that change of position. Furthermore the judge was clearly correct in his conclusion that subsequent events required a further adjustment in the intention to be imputed to the parties. Here, the judge properly took account of the respective positions of the parties and, in particular, the payments made in respect of the mortgage and in respect of repairs. … I also consider that he acted correctly in taking account of payments made (or not made) in respect of the children. In this regard the contributions to the mortgage after June 2005 are particularly important. In the period from June 2005 to January 2008 the appellant paid approximately two-thirds of the mortgage contributions and the respondent one-third. However thereafter the appellant failed to contribute towards the mortgage repayments for a period of six years up to trial. In these circumstances it was clearly necessary to vary the intention to be imputed to the parties as to their respective interests in the property. The further adjustment of 10 per cent in the respondent's favour was entirely justified by these changed circumstances."

128. I adhere, therefore, to the view that I expressed in *Curran v Collins*, namely that in the absence of signed writing, detrimental reliance remains a key component in establishing a common intention constructive trust.

The text books

129. At [68] Kerr J said that authors of learned texts do not speak with one voice. But in my judgment, they do. They all take the same view as I expressed in *Curran v Collins*. Emmett on Title states at para 11.115:

> "The third factor requiring emphasis here is that the court's decision as to whether or not there is a common intention

> constructive trust, and if so what are its terms, is still governed by equitable principles. It remains true following *Jones v Kernott* …that in all types of constructive trust, before the court will impose a constructive trust in favour of a non-legal title holder or allow the *Stack v Dowden* … presumptions as to beneficial ownership to be rebutted on the basis of a common intention constructive trust, the claimant must satisfy the court that the intervention of equity is justifiable to remedy the failure to use an express trust or valid contract to confer an interest on the claimant. More specifically, the courts have repeatedly emphasised that a common intention not accompanied by detrimental reliance on shared intentions as to ownership or some equivalent will not give rise to a constructive trust. (although see *Hudson v Hathway* … noted below for a rare dissent).
>
> The insistence that detrimental reliance (or equivalent factor making it unconscionable for a claimant to be denied a beneficial interest) is an essential feature of a common intention constructive trust long pre-dates *Stack v Dowden* … and *Jones v Kernott*…."

130. In Gray & Gray Elements of Land Law (5th ed) the authors state at para 7.3.8 that the imposition of a constructive trust requires proof of three elements: (i) bargain (or common intention) (ii) change of position (or detrimental reliance) and (iii) equitable fraud (or unconscionable denial of rights). They comment that the three elements are interlinked and that the linkage has been made more intense following *Stack v Dowden*. They go on to say at para 7.3.36:

> "In order that a constructive trust should arise in English law, it is not sufficient that a common intention should have been expressed or a bargain made that B should have some equitable entitlement in A's land. If an assurance of beneficial entitlement is purely oral, further elements are required. One of these is that there must be a "change of position" by the party who relies on the bargain or agreement. This requirement is deeply consonant with the ancient idea that an "equity" attaches to a promised entitlement when it has been acted upon."

131. Lewin on Trusts (20th ed) puts it this way at para 10-53:

> "Where the purchaser of the property shares a common intention with the claimant that the claimant is to have a beneficial interest in the property even though he is not a legal owner, either at the time of acquisition or at a later date, and the claimant acts to his detriment upon the basis of the common intention, a trust is imposed so as to give effect to the common intention."

132. At para 10-60 the editors say:

> "A variation in the shares initially declared in a declaration of trust may be effected through a subsequent written declaration. For an express trust to be varied by a subsequent express declaration of trust, the variation must comply with the formal requirement of section 53(1)(c) of the Law of Property Act 1925, which requires dispositions of equitable interests to be in writing. A constructive trust may also be imposed in order to give effect to a common intention to effect such a variation, coupled with the requisite detrimental reliance."

133. At para 10-62 they go on to say:

> "A constructive trust arises in connection with the acquisition by one party of a legal title to property whenever that party has so conducted himself that it would be inequitable to allow him to deny to another party a beneficial interest in the property acquired. This will be so where (i) there was a common intention that both parties should have a beneficial interest either at the date of acquisition or at a later date and (ii) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest."

134. At para 10-73 they say:

> "If the parties reach a fresh agreement, arrangement or understanding after the time of purchase, varying the original beneficial shares, and the claimant acts upon the agreement to his detriment, effect may be given to that agreement as a common intention constructive trust."

135. They add in a footnote that "The element of detrimental reliance on the agreement is crucial in order to vary the existing shares."

136. In Megarry & Wade on Real Property (9^{th} ed) the law is stated at para 10-027:

> "A constructive trust "does not come into being merely from a gratuitous intention to transfer or create a beneficial interest", because such an intention would amount to an unenforceable declaration of trust. B must have acted to B's detriment in reliance upon the parties' common intention and in the reasonable expectation that she would thereby acquire an interest in the property. It is this detriment that takes the trust outside the formal requirements normally applicable to declarations of trusts of land and the claim fails without it."

137. The editors add that:

> "Recent cases, including *Jones v Kernott*, have tended not to comment on the role of detriment in crystallising the constructive trust, but instead focus on factors which establish

> the common intention, possibly because such factors might also constitute the necessary detriment."

138. Snell's Equity (34th ed) states at para 24-056:

> "Simple proof of the oral or inferred agreement between the parties or an unwritten declaration of trust would not be enough to entitle the claimant to an enforceable interest in the property under a trust. Such an arrangement could only take effect as an express trust. It would be unenforceable since it would not be evidenced by writing signed by the party declaring the trust. Accordingly, proof that the claimant has acted to his detriment in reliance upon the agreement that he would take an interest in the property is essential to explaining the constructive trust. In these circumstances it would be fraudulent for the proprietor of the legal estate to rely on the formality requirements to deny the enforceability of the beneficial interest and claim the entire beneficial rights to the property for himself. The constructive trust arises to prevent this result. Where the [agreement] is inferred, then the parties' conduct is both the evidence from which the agreement is inferred and the detriment which gives rise to the constructive trust."

139. In Underhill & Hayton on Trusts (20th ed), article 32 states that a constructive trust may be imposed:

> "where it is the proprietor and the claimant's common intention, express or inferred (but not imputed), that the claimant is to have some beneficial interest in the property and the claimant acts to his detriment in reliance thereon."

140. At para [32.9] the editors state:

> "A constructive trust may be imposed on property, such as a house in A's name that is occupied by A and B as a shared home, to give effect to A and B's express or inferred (but not imputed) common intention (whether at the time of the purchase or subsequently) that B should have a beneficial interest therein, so leading B to act to her detriment in reliance on that intention, thus making it unconscionable to allow A to deny B any interest by pleading the lack of the necessary written formalities for a valid declaration of trust or contract."

141. Wildblood et al on Cohabitation and Trusts of Land (3rd ed) discuss *Stack v Dowden* and *Jones v Kernott* at length in Chapters 4 and 6. They state at para 4-038:

> "It is not sufficient for a claimant to establish only that there has been some express or tacit common intention. Thus a constructive trust does not come into existence simply because D makes some promise or forms some intention to transfer an interest to C or create an interest for C. It is necessary for C

> also to demonstrate that he/she has placed reliance on that agreement to his/her detriment, or at least has significantly altered his/her position in reliance upon the agreement. The importance of this second requirement can easily be overlooked in the quest to demonstrate a common intention; yet so important is the necessity of demonstrating reliance upon the common intention that even an express common intention that the claimant should have a beneficial interest will not give rise to any such interest if, as Scott J said in *Layton v Martin*, the express agreement is "unsupported by any quid pro quo moving from the claimant"."

Sole name/joint names

142. Mr Horton did suggest that there might be a difference between a case in which the property is conveyed into the name of one person only, and a case where it was conveyed into joint names. That is true, up to a point.

143. The starting point in these two classes of case is different (because of the presumption that the equitable interests follow the legal title). Thus, in a sole name case, the claimant has first to rebut the presumption that he or she has no interest at all, whereas in a joint names case, the starting point is that there is a beneficial joint interest. In a sole name case, he or she therefore has an additional hurdle to overcome.

144. In *Stack v Dowden* Lady Hale said at [56]:

> "Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."

145. She went on at [59] to pose the question how the presumption could be rebutted. At [63] she pointed out that the House was "not concerned with the first hurdle." That was because Mr Stack was one of the joint legal owners and thus the presumption was that he had an interest of some kind. So, Mr Horton is right to the extent that in a joint names case the claimant does not have to displace any presumption in order to establish that he or she has *some* beneficial interest in the property. The question then becomes one of quantification.

146. At [65] she referred to *Oxley v Hiscock* and said:

> "The approach to quantification in cases where the home is conveyed into joint names should certainly be no stricter than the approach to quantification in cases where it has been conveyed into the name of one only."

147. There may have been some doubt, following *Stack v Dowden*, whether there was a substantive difference (other than the starting point) between sole name cases and joint name cases. In my judgment, that doubt was laid to rest in *Jones v Kernott*. Lord Walker and Lady Hale said in their joint judgment:

> "[16] In an interesting article by Simon Gardner and Katharine Davidson, "*The Future of Stack v Dowden*" (2011) 127 LQR 13, 15, the authors express the hope that the Supreme Court will "make clear that constructive trusts of family homes are governed by a single regime, dispelling any impression that different rules apply to 'joint names' and 'single name' cases". At a high level of generality, there is of course a single regime: the law of trusts (this is the second of Mustill LJ's propositions in *Grant v Edwards* [1986] Ch 638, 651). To the extent that we recognise that a "common intention" trust is of central importance to "joint names" as well as "single names" cases, we are going some way to meet that hope. Nevertheless it is important to point out that the starting point for analysis is different in the two situations. That is so even though it may be necessary to enquire into the varied circumstances and reasons why a house or flat has been acquired in a single name or in joint names (they range, for instance, from *Lowson v Coombes* [1999] Ch 373, where the property was in the woman's sole name because the man was apprehensive of claims by his separated wife, to *Adekunle v Ritchie* [2007] WTLR 1505, where an enfranchised freehold was in joint names because the elderly tenant could not obtain a mortgage on her own).
>
> [17] The starting point is different because the claimant whose name is not on the proprietorship register has the burden of establishing some sort of implied trust, normally what is now termed a "common intention" constructive trust. The claimant whose name is on the register starts (in the absence of an express declaration of trust in different terms, and subject to what is said below about resulting trusts) with the presumption (or assumption) of a beneficial joint tenancy."

148. In their summary of principle at [51] (which I have already quoted) Lord Walker and Lady Hale said that the principles applied to a joint names case. But they went on to say at [52]:

> "This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above."

149. I agree, therefore, with the way that Nugee LJ analysed the position in *Amin v Amin* at [32]:

> "… it is true that *Jones v Kernott* was a joint names case and the analysis in [51] is expressly said to be applicable to such a case. But at [52] Lord Walker and Lady Hale dealt with sole name cases and, as set out above, said that the parties' common intention had once again to be deduced objectively from their conduct. That is a reference back to [51(3)]. In a joint names case the starting point is the presumption that equity follows the law and hence that the parties are beneficial joint tenants, and the common intention referred to in [51(3)] is the intention, either at the date of acquisition or subsequently, that the parties' beneficial interests should be something other than joint: see [51(2)]. In a sole name case the starting point, as the Judge expressly recognised, … is that the presumption is that the sole legal owner is also the sole beneficial owner, and the common intention referred to in [52] is a common intention that the beneficial interests should be something other than the legal owner being also the sole beneficial owner. But that apart, it seems to me that the exercise that Lord Walker and Lady Hale envisaged is similar in a sole name case to that in a joint names case. In each case what needs to be found to displace the presumption that equity follows the law is a common intention that the beneficial ownership should be something different from the legal ownership; and (save for the case where there is evidence of express discussions as referred to by Lord Bridge in *Lloyds Bank v Rosset*) that is to be deduced objectively from their conduct."

150. It is also true, as I have said, that at the quantification stage the court may be able to take a broader view of what amounts to detrimental reliance. Lady Hale's non-exhaustive list of factors in *Stack v Dowden* at [69] to be taken into account in determining the quantification of beneficial interest at the time of acquisition do include discussions at the time of the transfer; but she does not suggest that discussions alone are sufficient. Moreover, when she addressed the question of a post-acquisition change in common intention at [70] it is notable that she referred to conduct alone.

151. It is also the case that in *Grant v Edwards* (which, as I have said was approved in both *Stack v Dowden* and *Jones v Kernott*) Mustill LJ made it clear that the same principles applied both to an initial common intention and also to a change of common intention post-acquisition. This is consistent with the general principle of equity (and with section 53 (1) (a) and (c) of the Law of Property Act 1925) that a mere oral agreement unaccompanied by any detrimental reliance does not suffice to make a post-acquisition change in common intention enforceable in equity. That is also the view expressed in Lewin at paras 10-53 and 10-73 (quoted above).

Conclusion on the issue whether detrimental reliance is necessary

152. Kerr J expressed his conclusion on the first issue at [61] as follows:

> "By not dealing with the issue of detriment in *Jones v Kernott*, the Supreme Court either omitted mentioning for completeness that it did not need to be proved in the case before them, or omitted to mention a crucial element of the relevant principles to be applied. In my judgment, the latter is less likely than the former."

153. I respectfully disagree. In my judgment Kerr J was wrong to hold that detrimental reliance is no longer required. The overwhelming weight of authority both before and after *Stack v Dowden* and *Jones v Kernott* is to the contrary. Moreover, to hold that an oral agreement, disposition or declaration of trust was binding without more would directly contradict two statutory provisions. Equity cannot repeal the statute.

Was detrimental reliance established?

154. In *Gillett v Holt* [2001] Ch 210 Robert Walker LJ said at 232:

> "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances."

155. He also made the point at 233 that allegations of detrimental reliance are not to be examined at a granular level but that it is necessary to "stand back and look at the matter in the round."

156. Although that was a case of proprietary estoppel, I do not consider that there is any significant difference between the kind of detriment required in that kind of case, and that required in the context of a common intention constructive trust.

157. In *Kelly v Fraser* [2012] UKPC 25, [2013] 1 AC 450 (a case of estoppel by representation), Lord Sumption, giving the advice of the Privy Council said at [17]:

> "… the detriment need not be financially quantifiable, let alone quantified, provided that it is substantial and such as to make it unjust for the representor to resile. A common form of detriment, possibly the commonest of all, is that as a result of his reliance on the representation, the representee has lost an opportunity to protect his interests by taking some alternative course of action. It is well established that the loss of such an opportunity may be a sufficient detriment if there were alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain."

158. In *O'Neill v Holland* (which was a common intention constructive trust case) Henderson LJ said at [62]:

> "'Detriment' in this context is a description, or characterisation, of an objective state of affairs which leaves the claimant in a substantially worse position than she would have been in but for the transfer into the sole name of the defendant. Although the facts which constitute the detriment need to be pleaded, their characterisation is ultimately a matter for the court, in the light of all the evidence adduced at trial."

159. Kerr J did not consider the question of detriment afresh. He said:

> "[98] I agree with Mr Horton that the judge's decisions on detriment were not just primary findings of fact but were evaluative, i.e. they extended to the judge's considered assessment of the quality and character of the primary facts and whether they sufficiently amounted to a detriment. He decided that some of them did while others did not. He gave sound reasons for that assessment. I respectfully defer to it and find no reason to do otherwise.
>
> [99] That applies as much to the findings of "no detriment" criticised by Mr Horton as to those of detriment which he seeks to defend. The judge's thinking was, in essence, that it was the agreement between the parties that was all-important. It was, as Mr Horton rightly submitted, open to the judge to decide that foregoing a weak claim to an interest in personal assets of Mr Hudson was sufficient because Mr Hudson might well have been willing to part with some of his personal assets whether the legal claim to them was good or bad.
>
> [100] The other supposed detriments relied on were not, on the judge's findings, what made it inequitable for Mr Hudson to resile from the main agreement, the lynchpin of the parties' understanding. It was the main agreement which made that inequitable. Although the notion of detriment is broad and unconfined in this domestic context, it was not wrong for the judge to tie the detriment to the central basis of the parties' understanding and to reject other peripheral features as sufficient in themselves.
>
> [101] Thus, while the judge might have viewed with more favour Ms Hathway's mortgage payments after January 2015, her payments of other outgoings of the property, her taking responsibility for the oil spill and its consequences, her conduct of her financial affairs and her lifestyle generally, he was not (contrary to Mr Horton's contention in his respondent's notice) bound to treat those matters as detriments separate from the effect of the agreement. His rejection of those matters as sufficient detriments in themselves was an evaluative decision which was open to him."

160. If the relevant emails had simply been an executory agreement, I do not consider that such agreement which is unenforceable at common law is enforceable in equity without more. If that were the case it would mean, for example, that an oral agreement to sell Blackacre for £100,000 would be enforceable in equity, even though unenforceable at law. What potentially makes an informal agreement enforceable in equity is detrimental reliance.

161. By elevating the fact of the agreement to the “all-important” consideration that made it inequitable to resile from it, I consider that Kerr J took a false step. What matters is what was done in pursuance of the agreement.

162. What, then were HHJ Ralton’s reasons? He considered and rejected a number of factors upon which Ms Hathway relied, either because they did not amount to detrimental reliance at all; or because they were insubstantial. Among these was the fact that Ms Hathway had assumed responsibility for the whole of the mortgage payments. But he said at [65] that Ms Hathway’s desisting from making claims against Mr Hudson’s assets was sufficient detrimental reliance. The assets in question were Mr Hudson’s pension, his share-save schemes and personal savings. The judge rightly said that as “a matter of simple law” Ms Hathway could not claim for a pension sharing order, a lump sum order or a property transfer order. But the parties believed in the concept that wealth generated while the family was together would be shared between them when they separated. At [66] the judge went on to say that Ms Hathway might have had some sort of civil claim in the form of a constructive trust or equity which she could have mounted against the shares. It might have been a weak claim but the judge was not convinced that it was a “non-claim”. Until his email of 31 July 2013 Mr Hudson was not saying no to such claims in principle but was entertaining the concept of unwinding their financial affairs. That, he held, was a significant change in position; because it could not be said that Mr Hudson would have refused making some payment to Ms Hathway even if the court might have decided that no payment should be made. The judge summarised his view at [75]:

> “What she [Ms Hathway] is doing is showing that she did rely on a promise. She gave up the claims she perceived she had and which Mr Hudson also perceived may be live against shares and pension.”

163. Mr Learmonth mounted a full-scale attack on this conclusion. Although he accepted that whether detrimental reliance was substantial might well be an evaluative decision (as Kerr J held), whether Ms Hathway had a valuable claim which she gave up was a question of law. Mr Learmonth argued that Ms Hathway had no viable claim and had not attempted to articulate one.

164. Nevertheless, the judge found as a fact that both Ms Hathway and Mr Hudson perceived that she might have had a claim. We do not have a transcript of the evidence at trial; and consequently, there is no ground upon which we could interfere with the judge’s finding of fact.

What would Ms Hathway’s claim have been?

165. Whether Ms Hathway had a viable claim in law does not appear to have been fully investigated at trial. Mr Learmonth argued that the nature of the claim that Ms

Hathway might have made against the shares was never properly articulated. It is true that it was not spelled out in detail in her statement of case which was pleaded in very broad terms. But by the same token, Mr Hudson never served a request for further information under CPR Part 18.

166. Paragraph 15.2 of the Defence and Counterclaim pleaded:

> "[Ms Hathway] desisted from making any claim against [Mr Hudson] in respect of assets held in his sole name but acquired during the course of the parties' relationship."

167. Given that Ms Hathway had acknowledged in paragraph 19 of her first witness statement that she was not entitled to invoke the redistributive powers of the court, that paragraph must have been referring to a different kind of claim, Moreover, it is not difficult to see what the claim would have been.

168. Ms Hathway had said in her first witness statement that she took the view that assets secured during the relationship were joint assets however they were held legally. She said in her second witness statement that her understanding was that she and Mr Hudson would pool assets. She explained that she had taken time off to look after the children and the home, had fitted her work round that of Mr Hudson and the children and had left a job in the finance sector for one in the charity sector. These were not statements that came out of the blue in her witness statements. They had already been expressed in her email to Mr Hudson of 9 November 2011, to which Mr Hudson appeared to agree in his reply of the same day. Mr Hudson also referred to the shares as "joint assets" in his email of 24 August 2012.

169. It is plain, therefore, that what Ms Hathway would have claimed is that she and Mr Hudson had a common understanding that assets accumulated during their relationship were joint assets and that, in reliance on that understanding, she had acted to her detriment in the ways that she described. The consequence would have been that a constructive trust had arisen in relation to those assets. It is not necessary to say whether the claim would have succeeded; but it was undoubtedly a claim known to the law.

170. It follows that Ms Hathway might well have been able to establish a trust of some sort in relation to the shares. At all events, in my judgment, the judge cannot fairly be criticised for having taken that view. The question was whether Ms Hathway lost an opportunity to pursue alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain.

171. Whether detrimental reliance to that extent in the context of an express agreement is sufficiently substantial is, as I think Mr Learmonth accepted, an evaluative decision for the trial judge.

172. Mr Learmonth had an alternative argument to the effect that if Ms Hathway had ever had a claim to the shares (or to an interest in them) under a constructive trust, she still had that claim. In so far as her agreement to Mr Hudson's proposal was an agreement not to sue, that agreement was invalid because it formed part of a contract for the disposition of an interest in land, and hence had to comply with section 2 of the Law of Property (Miscellaneous Provision) Act 1989. It did not. Since there is no

limitation period applicable to the recovery of trust property, Ms Hathway's claim (if she ever had one) remains intact.

173. This was not a point explored either at trial or on the first appeal. But if (as I consider) Ms Hathway's response was not an agreement not to sue, but a renunciation of any claim she might have had, then I do not consider that the argument is a good one. Quite apart from that, where a beneficiary concurs in a breach of trust, the trustee would have a defence to any claim. As Wilberforce J put it in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86, 108:

> "The result of these authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."

174. In my judgment, in the context of the deal that Mr Hudson and Ms Hathway struck under which Ms Hathway knew that she was giving up any claim to the shares, it would not be fair and reasonable for her now to make a claim to an interest in those shares. In addition, in 2013 Ms Hathway had not established an actual entitlement to a beneficial interest in the shares. All she had was a claim to such an interest. A *claim* to a beneficial interest is, in my judgment, no more than a chose in action, which is not itself an equitable interest in property caught by section 53 (1) (c) of the Law of Property Act 1925. An assignment in equity of such a claim is not required to take any particular form; and consequently, I consider that as a matter of interpretation of Ms Hathway's email of 12 August 2013 can perfectly properly be said to amount to an equitable assignment or release of her cause of action.

175. Finally, I consider that it might have been argued (but it has not) that HHJ Ralton analysed the suggested elements of detriment in over-granular detail, picking them off one by one instead of standing back and looking at them in the round. I am also inclined to agree with Kerr J that HHJ Ralton might have viewed with more favour Ms Hathway's mortgage payments after January 2015 (payment of which was important in both *Jones v Kernott* and *Barnes v Phillips*), but since that aspect of the case was not the subject of a Respondent's Notice in this court, I do not express a concluded view.

176. Nevertheless, I consider that HHJ Ralton asked himself the correct question and I do not consider that we can say that his decision was perverse.

Result

177. For these reasons, which differ from the reasons given by Kerr J, I would dismiss the appeal.

Lady Justice Andrews:

178. I agree.

Lord Justice Nugee:

179. I also agree.

180. As Lewison LJ has so clearly explained, logically the first question is whether the e-mails effected a release by Mr Hudson of his interest in the beneficial joint tenancy to Ms Hathway, and for the reasons given by him I agree that they did. Mr Hudson was not just contracting to do something in the future: he was there and then agreeing that the equity in the house should thenceforth belong entirely to her, something that he confirmed on more than one occasion ("I've no interest whatsoever in the house"; "means nothing to me if it sells for a pound or a million").

181. Such a release, being in fact both a disposition of an interest in land and a disposition of an existing equitable interest, is required by s. 53(1)(a) and (c) of the Law of Property Act 1925 (**"LPA 1925"**) to be in writing and signed by the person disposing of the interest, but these requirements were satisfied on the facts of this case. Mr Hudson added his name "Lee" to the bottom of the e-mails. That is an entirely conventional way to end (or "sign off") an e-mail and I have no doubt that it satisfies the requirement in the authorities that it was added to authenticate the document. Adding your name at the end of an e-mail confirms that the e-mail comes from you. That seems to me enough to mean that the e-mail is signed by you for the purposes of s. 53(1) LPA 1925.

182. If the point is open to Ms Hathway, that is sufficient to decide the appeal. It is only if the statutory formalities were not complied with that it would be necessary for Ms Hathway to rely on a constructive trust and s. 53(2) LPA 1925 (which preserves the creation and operation of constructive trusts). Although the point was not taken in either of the Courts below, I agree that she should have permission to rely on it in this Court for the reasons given by Lewison LJ.

183. Strictly speaking the other points therefore do not arise. But as the masterly exposition of Lewison LJ demonstrates, the suggestion that in cases of this kind a constructive trust can be relied on without the need to show detrimental reliance is not one that can be accepted. And I also agree with him that on the facts of this case HHJ Ralton was entitled to find such detrimental reliance in Ms Hathway giving up any claim to share in the assets in Mr Hudson's name.

184. I therefore agree that the appeal should be dismissed.

Ely v Robson [2016] EWCA Civ 774

Court of Appeal, Civil Division

Sir Brian Leveson P, Kitchin LJ

26 July 2016Judgment

Noel Dilworth (instructed by Wayne Leighton Solicitors) for the Appellant

Jody Atkinson (instructed by Slee Blackwell Solicitors LLP) for the Respondent

Hearing date: 7 July 2016

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Approved Judgment

Lord Justice Kitchin:

Introduction

1. This is an appeal by the defendant, Ms Robson, against the order of His Honour Judge Blair QC made on 12 October 2015 whereby he made a declaration as to the extent of the beneficial interests which she and the claimant, Mr Ely, held in a property at 6 Torbay Road in Poole in Dorset.

The background

2. Mr Ely met Ms Robson in 1986. At that time he was recently widowed and was the father of three sons aged 11, 13 and 14. Not long thereafter, Mr Ely moved with his sons into a property which Ms Robson owned at 37 Ashley Road in Poole and he and Ms Robson began to live together.

3. In 1987 Mr Ely purchased 6 Torbay Road with the assistance of a mortgage. The property was conveyed into his sole name. Ms Robson made no contribution to the purchase price. Mr Ely and Ms Robson moved into the property and in due course they had two daughters, Alicia who was born in 1995 and Bryony who was born in 1998.

4. In 1989 Ms Robson purchased another property at 89 Bournemouth Road in Poole. Mr Ely has always maintained that he contributed around £16,000 towards the purchase price but this has never been accepted by Ms Robson.

5. Unfortunately the close relationship between Mr Ely and Ms Robson did not last and in 2005 they became estranged. Nevertheless, they continued to live together at 6 Torbay Road with their two daughters and, for a time, Mr Ely's three sons. In addition, Ms Robson's aunt, Vera Ellis, moved into the property. From time to time Ms Robson's elderly mother, Mrs Peggy Robson, also came to stay.

6. After the relationship had broken down, Mr Ely asked Ms Robson to move out of 6 Torbay Road but she refused. Accordingly, on 8 February 2007, Mr Ely issued a claim for possession. Ms Robson defended the claim and also counterclaimed, asserting that she and Mr Ely owned the beneficial interest in 6 Torbay Road in equal shares, and that this reflected their common intention.

7. The claim and counterclaim were listed for trial on 13 and 14 September 2007. But in August 2007, so Judge Blair found, Mr Ely met Ms Robson in Poole Park to try to settle their respective claims. No solicitors were present. What happened in the course of this meeting has been bitterly disputed by the parties, as I shall explain. In outline, Ms Robson maintained that their settlement discussions came to nothing because she would not accept anything less than an equal share in the beneficial interest in 6 Torbay Road. Mr Ely, on the other hand, claimed (and Judge Blair accepted) that at this meeting they agreed a compromise of their respective claims to save both of them from incurring yet further legal costs.

8. The terms of that compromise were, so Judge Blair held, set out in a letter sent by Mr Ely's solicitors to Ms Robson's solicitors on 14 August 2007. The essence of the agreement was that Mr Ely would hold 6 Torbay Road on trust for himself for life, with a remainder of 80% to his heirs and assigns and 20% to Ms Robson; that Ms Robson would have the right to occupy 6 Torbay Road for as long as either Vera Ellis or Peggy Robson were alive; that Mr Ely would have the power to sell 6 Torbay Road following the termination of Ms Robson's right to occupy it; and that Mr Ely would relinquish any claim to an interest in 37 Ashley Road or 89 Bournemouth Road. The letter reads in material part:

"… As you are aware our clients have been discussing settlement and have suggested terms of compromise, details of which we set out below.

1. Whilst your client continues to live at Torbay Road, both parties jointly share the outgoings and other costs of the property (including, but not limited to mortgage repayments, utility bills and taxes) and that they likewise share the costs of their daughters' upbringing (including but not limited to schooling, clothing, holidays and gifts).

2. If your client leaves the property she ceases to contribute to the mortgage and household payments but will solely pay the whole of the costs of raising their two daughters.

3. Subject to the trust matters referred to below, your client renounces any and all other claims she has on Torbay Road.

4. Our clients renounces [sic] any and all other claims he has on Bournemouth Road and Ashley Road.

5. Save for the costs of implementing the terms of the proposed agreement (which we suggest our [sic] shared equally between our respective clients) there be no further order as to costs.

6. It is proposed that our client declares a trust upon the following terms:

(i) He remains sole legal owner and trustee of 6 Torbay Road.

(ii) Your client will have a 20% beneficial interest in remainder in 6 Torbay Road, realisable on our client's death.

(iii) Your client has a right to occupy 6 Torbay Road for as long as either Vera Ellis or Peggy Robson live.

(iv) Our client will have the right of appointment up to 80% of the trust funds together with the right to re-mortgage the property.

(v) Our client as trustee to have power to sell 6 Torbay Road whereupon your client's right of residence is terminated.

(vi) Vera Ellis have a right of residence for life but to acquire no capital interest in the property.

Given the complexity of the agreement we have advised our client to seek Counsel's advice in drawing up a settlement agreement and associated trust deed.

Our clients are considering simplifying the above deal in light of the tax implications and practical difficulties in drafting the trust deed.

Before proceeding please confirm that our [sic] client agrees that the above accurately reflects the terms of the proposed settlement."

9. On 30 August 2007 a letter written on the headed notepaper of Ms Robson's solicitors but signed by the solicitors to both parties was sent to the court. It reads, so far as relevant:

"We refer to the above matter which is listed for trial on 13th and 14th September 2007, in the Southampton County Court.

The Claimant and Defendant have been negotiating a settlement of this matter and are both relatively close to reaching a settlement.

In the circumstances, it appears that more time will be required for the parties to correctly set out in writing the terms upon which they agree to settle this matter. However, the trial drawers [sic] nearer and therefore the parties request that the trial listed for 13th and 14th September be vacated and relisted for the first available date after 1st October 2007.

The parties believe that they will be able to finalise terms of settlement before the end of September 2007 and therefore respectfully request that this trial is vacated. Accordingly, we would ask that this letter is placed immediately before a District Judge for an order to be made on the terms suggested. We would further point out that the parties apologise for any inconvenience that may be caused to the court by this request. However, this request is made having regard to the overriding objectives of the court and with a view to saving potential costs of the trial…."

10. The court duly acted on that letter. On 5 September 2007 Deputy District Judge Smith vacated the hearing date and directed that the case should be relisted on the first available date after 1 October 2007.

11. The matter was not, in the event, relisted for trial. The court file no longer exists but the court's computerised log indicates that in January 2008 the court received a letter from or on behalf of Ms Robson

indicating that the case had settled. However, Ms Robson's solicitors have no record of any such letter and Ms Robson maintained that she did not send one either.

The present claim

12. Subsequently, Mrs Ellis and Mrs Peggy Robson died and so, on 24 July 2014, Mr Ely issued this claim for declaratory relief as to the parties' shares in the equitable interest in 6 Torbay Road and for an order for the sale of the property pursuant to s.14 of the Trusts of Land and Appointment of Trustees Act 1996. He asserted in the claim form that he and Ms Robson had reached an agreement on the terms set out in the letter of 14 August 2007.

13. The claim was originally issued as a Part 8 claim because Mr Ely did not know whether Ms Robson would resist it. She did not file an acknowledgement of service, but she did attend at a directions appointment on 1 December 2014. At that hearing it was directed that unless Ms Robson filed evidence in response to the claim within four weeks she would be barred from taking any further part in the proceedings.

14. On 30 December 2014 Ms Robson filed a witness statement in which she asserted that Mr Ely's claim was dishonest and continued, at [15]:

“We had a number of conversations about my position and security vis a vis the Property [6 Torbay Road]. On each occasion the Claimant always reassured me that “*what is mine is also yours”*. And when I specifically challenged him as to whether this included the Property and he insisted that it did, I was led to believe that I had an equal share in the Property along with the Claimant. In the first few years were living together I would say that I had this conversation with the Claimant on probably an annual basis as I felt it was a very important matter that had to be discussed. On each occasion when we had this conversation the claimant made it clear that we shared the Property on an equal basis.”

15. Ms Robson also denied that she and Mr Ely had reached a final agreement in August 2007 or at any other time. She accepted that they had had settlement discussions but maintained that they had not reached a final agreement because they appreciated that any such agreement would need to be in writing and Mr Ely had indicated that it would be a matter on which he would need to take legal advice. She continued that they agreed to vacate the hearing so that settlement discussions could continue and also agreed that the matter should be relisted for the first available date in case the negotiations failed. She also said that they did not explore the possibility of settlement any further and it became clear to her that Mr Ely did not wish to pursue his claim for possession and could not afford to continue paying his solicitors.

16. Mr Ely disputed all of these assertions in his own responsive witness statement dated January 2015. He maintained that Ms Robson had made no contribution to the purchase price of 6 Torbay Road and no real contribution to household expenses or to the maintenance of the property. He also denied that he had ever made any suggestion to Ms Robson to the effect that she had any interest in any of his assets. As for the 2007 proceedings, he was clear that he and Ms Robson had reached a binding agreement for their disposal. There was, in his view, no need to explore the issue of settlement further and there was no need for a trial because they had reached a binding agreement and he trusted Ms Robson to keep her word.

17. On 28 January 2015 directions were given for the case to proceed under CPR Part 7. On 10 February 2015 Mr Ely served particulars of claim seeking a declaration that he held 6 Torbay Road on trust for himself for life with a remainder of 80% to his heirs and assigns and 20% to Ms Robson. Mr Ely's alternative case, on the assumption the settlement agreement was not binding, was that Ms Robson had no interest in 6 Torbay Road or right to reside there and further, that Ms Robson held 89 Bournemouth Road on trust for them both in such shares as the court might think fit having regard to the contribution

which he had made towards its purchase price. Mr Ely also advanced a yet further alternative case that he and Ms Robson had reached an agreement that all of their property and assets would be owned by them equally and that declarations should be made to that effect.

18. Ms Robson responded with a defence and counterclaim dated 11 March 2015. As foreshadowed in her witness statement, she alleged that it was, from the outset, the common intention of the parties that they should own 6 Torbay Road in equal shares as their family home. She continued that, once they had moved into the property, she contributed to the costs and expenses of the family by taking financial responsibility for the upkeep of the property, the needs of the children and the general housekeeping costs. She also disputed that Mr Ely had made that any contribution to the purchase price of 89 Bournemouth Road and asserted that he had no interest in that property or 37 Ashley Road. Turning to the events of 2007, Ms Robson contended that the letter of 14 August 2007 had been sent to her solicitors in an attempt to settle proceedings but that, after the hearing date had been vacated, no further discussions took place between them and it became clear to her that Mr Ely did not wish to pursue his claim because he was unable to pay his solicitors' costs. She therefore sought a declaration that Mr Ely owned 6 Torbay Road on trust for them both in equal shares or in such other shares as the court might determine.

19. Mr Ely served a reply and defence to counterclaim dated 30 March 2015 in which he denied the various assertions made by Ms Robson and maintained that, in reliance upon the representations which she had made to him that she would abide by the terms of the settlement agreement, he had not pursued his claim for possession and had permitted her to remain in 6 Torbay Road. Accordingly, he continued, if the settlement agreement lacked the necessary formalities than it nevertheless took effect by way of constructive trust or gave rise to a proprietary estoppel and that it would be unconscionable for Ms Robson to resile from her representations and she was estopped from doing so.

20. On 12 June 2015 the claim was allocated to the multi-track and directions were given for the trial of a preliminary issue as to whether the parties had reached a binding settlement in 2007. It was in this way that the matter came on for hearing before Judge Blair on 16 September 2015.

The trial and judgment

21. The trial of the preliminary issue before Judge Blair took one day and in the course of it he heard evidence from Mr Ely and from Ms Robson. He also heard evidence from a Mr Barry Collier and from Mr Ely's son, Matthew. This evidence was, so the judge found, supportive of Mr Ely's evidence. At the end of the hearing and having heard full submissions, the judge gave an ex tempore judgment.

22. The judge summarised the evidence given by Mr Ely and Ms Robson. Mr Ely maintained, just as he had in his witness statement, that he and Ms Robson had reached a binding agreement in Poole Park and that the terms of that agreement were set out in the letter from his solicitors of 10 August 2007. Further, Mr Ely continued, Ms Robson represented to him that she would abide by the terms of that agreement and she never at any time suggested to him that the contents of the letter of 10 August 2007 misrepresented their agreement. He then relied upon her agreement and representation by not pursuing his claim for possession and by permitting her to continue to live in 6 Torbay Road.

23. Ms Robson's case as elaborated by her in her evidence was completely different. She said that the contents of the 10 August 2007 letter did not represent in any way an agreement which she had reached with Mr Ely as result of a face-to-face discussions in Poole Park. It was, she said, generated by Mr Ely and his solicitors without any input from her at all. Further, she did have a meeting with Mr Ely in Poole Park but that meeting took place after 10 August 2007. She continued that she made it perfectly clear to Mr Ely at that meeting and at other times that she and Mr Ely owned equal shares in the beneficial interest in 6 Torbay Road and that she would not agree to the terms of settlement set out in the 10 August 2007 letter. Mr Ely was not interested in negotiating with her on any other terms and so, as the judge summarised her

evidence, the litigation 'fizzled out' when Mr Ely could no longer afford his solicitors' bills. She also maintained that she did not write to the court in January 2008 to the effect that the case had settled.

24. Judge Blair rejected Ms Robson's evidence and accepted the evidence given by Mr Ely. There were, he thought, a number of aspects of Ms Robson's evidence that simply did not make sense. First, the contents of the 14 August 2007 letter were entirely consistent with Mr Ely's evidence. Further, if, as Ms Robson asserted, the letter was not based upon a negotiation which had in fact taken place then it was inconceivable that Ms Robson or her solicitors would not have replied to it making that clear. Secondly, if, as Ms Robson also asserted, she had always made clear to Mr Ely that they owned the beneficial interest in 6 Torbay Road in equal shares and her negotiations with Mr Ely had got nowhere then her solicitors would not have signed the joint letter to the court of 30 August 2007 saying that the parties were relatively close to reaching a settlement and believed they would be able to finalise terms before the end of September 2007.

25. That brought the judge to a consideration of the consequences of these findings. He recognised that the correspondence contemplated the drawing up of a formal settlement agreement and associated trust deed but these matters were, in his view, merely a matter of the mechanics whereby the parties' clearly stated objectives would be realised. He recorded, with apparent approval, the submissions of counsel for Mr Ely that there was here sufficient clarity for a proprietary estoppel to arise; that the agreement was unambiguous; that both parties intended the agreement to be taken seriously; that it was clearly Ms Robson's intention that Mr Ely should act upon their agreement; and that Mr Ely did act upon their agreement by not pursuing his claim. The judge expressed his conclusion in this way at [56]:

"… There was certainty here in the negotiated settlement carried out between the claimant and defendant. What was left to do was purely a matter of mechanics to achieve their clearly stated objectives about their interests in the property. I find that the defendant did lead the claimant to believe that she was agreed on those objectives and those principles. The claimant relied on that by not pursuing his claim for a declaration that she had no interest whatsoever in the home. He acted to his detriment in that. The state of the agreement between them, in my view, was perfectly plain. Equity will come to his aid, therefore, in those circumstances …."

26. The judge then proceeded to make a declaration substantially in the terms sought by Mr Ely.

The appeal

27. Upon this appeal Mr Noel Dilworth appeared on behalf of Ms Robson. He submitted that the judge failed fully to appreciate that Mr Ely's case was based entirely upon the discussions which took place in Poole Park before 14 August 2007. Further, whatever the outcome of those discussions, they were incapable of amounting to a binding agreement which satisfied the requirements of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (the "1989 Act"). Then, founding himself primarily upon the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752and the decision of the Court of Appeal in *Herbert v Doyle* [2010] EWCA Civ 1095, 13 ITELR 561, Mr Dilworth submitted that it was clear both from the letter of 14 August 2007 and the joint letter to the court of 30 August 2007 that the proposed terms of the agreement were uncertain and incomplete; that further terms relating to the parties' interests had yet to be agreed; that the whole agreement had to be committed to writing and the necessary formalities complied with; and that the parties did not expect the agreement to be immediately binding. It was, Mr Dilworth continued, incumbent upon the judge to address what it was that converted the discussions referred to in the correspondence into an agreement sufficient to found a constructive trust or proprietary estoppel falling within the scope of s.2(5) of the 1989 Act.

28. Mr Dilworth also submitted that the judge had no proper basis for his finding that Ms Robson led Mr Ely to believe that she agreed the matters set out in the letter of 14 August 2007. Further, he continued, if,

as Ms Robson had asserted, she and Mr Ely owned the beneficial interest in 6 Torbay Road in equal shares then any assessment of the effect of the events of August 2007 upon that interest would require an analysis of the whole course of dealing between the parties including, most importantly, their subsequent behaviour, but no such analysis was ever carried out.

29. Mr Jody Atkinson, who appeared on behalf of Mr Ely, as he did below, submitted that the judge had been invited to find that the circumstances of this case gave rise both to a proprietary estoppel and a constructive trust. He acknowledged that the reasoning of the judge appeared to be focused upon proprietary estoppel but submitted that his conclusions also supported the imposition of a constructive trust. That aside, he submitted that the judge was entitled to make the findings that he did on the evidence and that his reasoning and conclusions are unimpeachable.

30. In considering these rival submissions I would observe at the outset that this is an unusual case in that Mr Ely, the party seeking the declaration, was already the legal owner of 6 Torbay Road. In these circumstances and as Lord Justice Lewison observed in giving Ms Robson permission to appeal, it is not easy to see how the judge thought the case was one of proprietary estoppel because, at least as generally understood, the term describes the equitable jurisdiction by which a court may interfere in cases where the assertion of a strict legal right would be unconscionable. Moreover, Mr Ely has always disputed that, prior to 2007, Ms Robson owned any share in the beneficial interest in 6 Torbay Road and it is far from clear to me that her claim to such an interest constituted an interest in land to which s.2(1) of the 1989 Act could have any application. Nevertheless, I am prepared to accept for the purposes of this appeal that, as Ms Robson claimed, Mr Ely had from the outset held 6 Torbay Road on trust for them both and to consider whether the judge was entitled to hold as he did that the events of 2007 had the consequences for which Mr Ely contended, namely that Ms Robson's interest in 6 Torbay Road was thereby limited to the interest defined in the declaration that he made.

31. I begin with the two decisions upon which Mr Dilworth particularly relied. *Cobbe* concerned a dispute between Mr Cobbe, a property developer, who wished to develop a property owned by Yeoman's Row Management Ltd. Mr Cobbe made an oral “agreement in principle” with Yeoman's Row, acting by its director, Mrs Lisle-Mainwaring, to purchase the property but there remained some terms still to be agreed. Pursuant to that agreement and encouraged by Mrs Lisle-Mainwaring, Mr Cobbe made and prosecuted an application for planning permission and spent a considerable amount of time and money in so doing. The application was successful and planning permission was obtained. Then Mrs Lisle-Mainwaring sought to renegotiate the core financial terms of the agreement.

32. Lord Scott of Foscote (with whom Lord Hoffmann, Lord Brown of Eaton-Under-Heywood and Lord Mance agreed) addressed the argument that the circumstances gave rise to a constructive trust in these terms at [36] to [37]:

“36. The circumstances of the present case are that the property in question was owned by the appellant before any negotiations for a joint venture agreement had commenced. The interest in the property that Mr Cobbe was expecting to acquire was an interest pursuant to a formal written agreement some of the terms of which remained still to be agreed and that never came into existence. Mr Cobbe expended his time and money in making the planning application in the knowledge that the appellant was not legally bound. Despite the unconscionability of the appellant's behaviour in withdrawing from the inchoate agreement immediately planning permission had been obtained, this seems to me a wholly inadequate basis for imposing a constructive trust over the property in order to provide Mr Cobbe with a remedy for his disappointed expectations. This property was never joint venture property and I can see no justification for treating it as though it was.

37. The unconscionable behaviour of Mrs Lisle-Mainwaring is, in my opinion, not enough in the circumstances of this case to justify Mr Cobbe's claim to have acquired, or to be awarded by the court, a beneficial interest in the property. The salient features of the case that preclude that claim are, to my mind, that the appellant owned the property before Mr Cobbe came upon the scene, that the second agreement produced by the discussions between him and Mrs Lisle-Mainwaring was known to both to be legally unenforceable, that an unenforceable promise to perform a legally unenforceable agreement—which is what an agreement 'binding in honour' comes to—can give no greater advantage than the unenforceable agreement, that Mr Cobbe's expectation of an enforceable contract, on the basis of which he applied for and obtained the grant of planning permission, was inherently speculative and contingent on Mrs Lisle-Mainwaring's decisions regarding the incomplete agreement and that Mr Cobbe never expected to acquire an interest in the property otherwise than under a legally enforceable contract. In these circumstances the imposition of the constructive trust on the property and the pro tanto divesting of the appellant's ownership of it seems to me more in the nature of an indignant reaction to Mrs Lisle-Mainwaring's unconscionable behaviour than a principled answer to Mr Cobbe's claim for relief."

33. Lord Walker of Gestingthorpe (with whom Lord Scott and Lord Brown agreed) considered the case in terms of proprietary estoppel and expressed his conclusion in this way at [91]:

"91. … Mr Cobbe's case seems to me to fail on the simple but fundamental point that, as persons experienced in the property world, both parties knew that there was no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability – that is, liability in equity as well as at law, to echo the words of Lord Cranworth LC in *Ramsden v Dyson* LR 1 HL 129, 145 - 146…. Mr Cobbe was therefore running a risk, but he stood to make a handsome profit if the deal went ahead, and the market stayed favourable. He may have thought that any attempt to get Mrs Lisle-Mainwaring to enter into a written contract for the grant of planning permission would be counter-productive. Whatever his reasons for doing so, the fact is that he ran a commercial risk, with his eyes open, and the outcome has proved unfortunate for him. It is true that he did not expressly state, at the time, that he was relying solely on Mrs Lisle-Mainwaring's sense of honour, but to draw that sort of distinction in a commercial context would be as realistic, in my opinion, as to draw a firm distinction depending on whether the formula "subject to contract" had or had not actually been used."

34. Lord Walker also made clear (at [93]) that Mr Cobbe could not obtain any further assistance from the doctrine of constructive trust.

35. *Herbert v Doyle* concerned a dispute between Mr Herbert, who owned a large house and garden, and Mr Doyle and Mr Talati, who owned an adjacent property from which they conducted their dental practice and which had a number of car parking spaces. Mr Herbert wished to develop his property but in order to do so he needed to acquire some of the parking spaces owned by Mr Doyle and Mr Talati. The parties eventually made an oral agreement the essential terms of which were that Mr Doyle and Mr Talati would transfer to Mr Herbert certain parking spaces and pay him a sum of money and he would transfer to them a number of car parking spaces on his property and grant to them certain leases in respect of other parts of his property. Mr Herbert then pressed on with his development and subsequently applied for an order requiring Mr Doyle and Mr Talati to transfer to him the parking spaces as agreed. Mr Doyle and Mr Talati refused to do so, claiming that the agreement was subject to contract and that the necessary formalities had not been complied with. The trial judge rejected that argument but held that Mr Herbert was only entitled to the parking spaces if he transferred the other parking spaces and granted the leases to Mr Doyle and Mr Talati as he had promised. Mr Herbert refused to do so. Mr Doyle and Mr Talati were then given permission to amend their defence and counterclaim to allege that if they performed their side of the agreement then Mr Herbert would be bound to perform his side of it too. The judge held that the parties had come to an agreement, made orally, which created a constructive trust over their respective parts of the property, and so Mr Herbert held the leases and the freehold of the car parking spaces on constructive trust for Mr Doyle and Mr Talati.

36. On appeal counsel appearing for Mr Herbert relied heavily upon the decision of the House of Lords in *Cobbe* and argued that the agreement as found by the deputy judge did not comply with the requirements imposed by s.2(1) of the 1989 Act and did not have sufficient certainty to give rise to a constructive trust falling within the scope of s.2(5) of that Act. Further, the parties had sufficient experience to know that they were acting at their own risk. The agreement was, he continued, incomplete and subject to contract.

37. Arden LJ, with whom Jackson LJ and Morgan J agreed, gave careful consideration to the decision in *Cobbe* and then explained at [57]:

"57. In my judgment, there is a common thread running through the speeches of Lord Scott and Lord Walker. Applying what Lord Walker said in relation to proprietary estoppel also to constructive trust, that common thread is that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act."

38. Applying those principles to the facts as found by the judge, Arden LJ held that the respective property interests of the parties were sufficiently certain at the time they were agreed and remained sufficiently certain notwithstanding the parties' further dealings together. Furthermore, the judge was entitled to find that the agreement was not subject to contract and was not binding in honour only. The appeal was therefore dismissed.

39. With these principles in mind I must now return to the submissions made by Mr Dilworth on this appeal. To recap, Mr Dilworth's central argument is that it is clear from the letters of 14 and 30 August 2007 that further terms relating to the agreement concerning the parties' equitable interests in 6 Torbay Road were yet to be agreed; that the parties intended that the terms upon which they defined their interests in 6 Torbay Road should be embodied in a formal agreement; and that the parties did not expect the terms they had discussed to be immediately binding.

40. I find myself unable to accept these submissions. In my judgment it is important to have in mind the nature of the case which Ms Robson advanced and the substance of the evidence she gave. Her oral evidence was not to the effect that she and Mr Ely had met in Poole Park, that they had settlement discussions, that some progress was made but that there was more to be done. It was rather to the effect that she did not meet Mr Ely in Poole Park until after she had received the letter of 14 August 2007, that the contents of that letter had been generated by Mr Ely and his solicitors without any input from her and that although they did have some discussions after receipt of the letter, she made it clear that she was not interested in a settlement on the terms it contained. Moreover, she continued, she also made it clear to Mr Ely that they owned the beneficial interest in 6 Torbay Road in equal shares.

41. The judge rejected Ms Robson's account and I am satisfied that he was entirely justified in so doing. He had the benefit of seeing and hearing Ms Robson and Mr Ely give their evidence and Ms Robson's account was belied by the contents of both the letter of 14 August and the joint letter to the court of 30 August 2007. I am also satisfied that the judge was in these circumstances entitled to accept the evidence given by Mr Ely. I of course recognise that the terms of the letter of 14 August contemplate the drawing up of a written agreement and a deed of trust. I also accept that the letter of 30 August says that the parties

are “relatively close to reaching a settlement”. But in my judgment neither letter precludes the possibility that the parties had in the course of their meeting in Poole Park in fact agreed the terms of a compromise of their respective claims and that they intended those terms to be binding upon them. This was not a commercial transaction. It was rather an attempt by two persons who had for a number of years happily lived together to resolve the costly litigation that had followed their estrangement. Furthermore, the terms set out in the letter of 14 August are in my judgment sufficiently clear to be capable of forming the basis of a binding agreement and Mr Dilworth did not identify any other matters or issues upon which the parties had still to agree. In all of these circumstances I have come to the conclusion that the judge was entitled to find as he did that the parties did intend their oral agreement to be binding; that they both understood and intended that it should be acted upon; and that all that remained to be done was to put in place what the judge described as the mechanics necessary to achieve their stated objectives.

42. Thereafter, so the judge found, Mr Ely relied upon the oral agreement by not pursuing his claim in respect of 6 Torbay Road or his claims in respect of 37 Ashley Road and 89 Bournemouth Road, and by permitting Ms Robson to continue to live in 6 Torbay Road during the lifetimes of Vera Ellis and Peggy Robson. These findings too are, in my judgment, unassailable.

43. In my judgment it follows that, from the time they met in Poole Park, Ms Robson and Mr Ely had a common understanding as to the extent of their respective interests in 6 Torbay Road and thereafter Mr Ely acted to his detriment in reliance upon that understanding. Accordingly, whatever Ms Robson's interest in 6 Torbay Road may have been prior to that meeting, I am satisfied that thereafter Mr Ely held the property on constructive trust for them both and that Ms Robson's interest was limited to the interest defined in the declaration that the judge made. Put another way, it would in my judgment be unconscionable for Ms Robson to assert to the contrary and she is estopped from so doing. In reaching this conclusion I have also given careful consideration to Mr Dilworth's further submission that the judge could not properly reach the conclusion he did without analysing the whole course of dealing between the parties, including, importantly, their subsequent behaviour. However, it has never been suggested that, at any time after their meeting in Poole Park, the parties reached any further or other common understanding concerning their respective interests. To the contrary, both parties continued to act consistently with the terms of the agreement they had reached on that day until the events giving rise to this claim and the reassertion by Ms Robson of her original claim.

44. For all of these reasons, I would dismiss this appeal.

Sir Brian Leveson P:

45. I agree.

MURPHY v GOOCH
[2007] EWCA Civ 603

Court of Appeal

Mummery, Sedley LJJ and Lightman J

10 May 2007

Property – Cohabitation – Accounts – Occupation rent – Governed by Trusts of Land and Appointment of Trustees Act 1996 – Ouster not needed

The couple, who had one child, purchased a family home under a shared ownership scheme; for £14,875 they acquired a 25% interest in a 99-year lease, the other 75% being vested in a housing association. The couple had raised £15,000 on the security of a mortgage and had also taken out an endowment mortgage policy. After the relationship broke down the woman and the child left the property, leaving the man in sole occupation. During his sole occupation the man made a number of payments in respect of the property, totalling £18,158: £5,257 in respect of mortgage interest payments; £8,870 by way of rent to the housing association; and £4,032 by way of endowment policy premiums. Over 12 years later the woman brought proceedings, seeking, inter alia, a declaration that she and the man were entitled to the property as tenants in common in equal shares, an order for sale, and all necessary accounts. Leaving aside any entitlement to credits, it was agreed that on sale about £24,577 would be available for division between the parties (prior to deduction of the costs of sale). The woman did not make a free-standing claim for occupation rent, but did argue that the man's entitlement to credit in respect of his payments of mortgage interest, rent and endowment premiums was to be offset by an equivalent credit to her in respect of occupation rent. The man's position was that the woman was not entitled to occupation rent, and that, taking his payments into account, the value of the woman's interest was nil. It was agreed that the applicable law was the doctrine of equitable accounting. The judge held that the woman was entitled to an offset for occupation rent to the extent of one half of the man's total credits for payments made (£9,079); the judge therefore quantified the woman's interest in the property at £3,209. The man was to have the option to buy the woman's interest at that figure, otherwise there was an order for sale. The woman appealed on the basis that her offset should not have been limited to one half of the man's total credits, but should have matched the credits for all payments in respect of mortgage interest and rent, plus one half of the premium payments. The man cross-appealed.

Held – allowing the woman's appeal with costs; dismissing the man's cross-appeal with costs –

(1) Applying *Stack v Dowden* [2007] UKHL 17, the court's power to order payment of an occupation rent to a co-owner was no longer governed solely by the doctrine of equitable accounting, but also (so far as applicable) by ss 12–15 of the Trusts of Land and Appointment of Trustees Act 1996. The results might often be the same, but the statutory principles in s 15 so far as applicable must also be applied. No reference had been made to the 1996 Act in the court below, therefore the issues had to be reconsidered and determined with reference to the statute. Justice must be done to the parties, with due regard to the relevant statutory considerations, including: the intentions of the creators of the trust; the purposes of the trust; the welfare of any minors; the interests of secured creditors and the circumstances and wishes of the beneficiaries specified (see paras [11], [14], [15]).

(2) The fact that the woman had disavowed any intention to maintain a free-standing claim to a credit for an occupation rent did not preclude her from using her entitlement to this credit as a form of set-off (see para [17]).

(3) It was open to the court to order credit for an occupation rent if it was just to do so, whether or not there was proof of any ouster. Even if ouster were necessary, it was quite clear that the woman had left the property on the breakdown of the couple's relationship, and that she should be regarded as having been constructively excluded from the property (see para [18]).

(4) The judge had given no satisfactory reason under the equitable doctrine for limiting the woman's offset to one half of the credits claimed by the man. The credits that the man was claiming were in the nature of the costs, expenses and outgoings of his continuing occupation of the property; payments of mortgage interest and rent were not payments of a capital nature or calculated to increase the capital value of the property. An increase in property value due to inflation was not relevant; such an increase in value accrued to the benefit of both parties in equal shares (see para [20]).

(5) Under the equitable doctrine as supplemented by the applicable statutory principles the woman was entitled to a set-off against the entirety of the credits for rent and interest, and of half the credits for endowment policy premiums paid: before the sole occupation had commenced, the court would have imposed as a condition of the man's continued occupation continued payment of interest and rent. The right of offset was available in respect of the full period of the man's sole occupation (see paras [21]–[24]).

(6) The woman's interest in the property was valued for the purposes of an option price at £11,280, the man then being placed under an obligation to obtain the woman's release from all liability under the mortgage. If the property were sold instead, the net proceeds of sale (after payment of the mortgage, and satisfaction of the man's credit of half the endowment policy premiums paid during sole occupation), together with the surrender value of the endowment policy, were to be divided equally. If a sale took place there was no justification for limiting the woman's share to the option price (see para [25]).

Per curiam: public funds had been expended disproportionately to the sums at issue in pursuit of this action. If ever a case cried out for mediation, this case had done so, and if the process of mediation had been adopted a settlement should have been reached at an early date. Even if mediation had failed, the course and outcome of mediation should have given a powerful steer as to whether public funding should have been made available for further pursuit of the action (see para [27]).

Statutory provisions considered

Trusts of Land and Appointment of Trustees Act 1996, ss 12–15

Cases referred to in judgment

Byford v Butler [2003] EWHC 1267 (Ch), [2004] 1 FLR 56, [2003] BPIR 1089, ChD

Pavlou (A Bankrupt), Re [1993] 1 WLR 1046, [1993] 2 FLR 751, [1993] 3 All ER 955, ChD

Stack v Dowden [2007] UKHL 17, [2007] 2 WLR 831, [2007] 1 FLR 1858, [2007] BPIR 913, [2007] 2 All ER 929, HL

Mary Compton-Rickett for the appellant
Robert Sheridan for the respondent

Cur adv vult

LIGHTMAN J:

[1] There are before the court an appeal by Ms Murphy and a cross-appeal by Mr Gooch against parts of the judgment dated 8 August 2006 of His Honour Judge McKintosh sitting in Exeter County Court. The judgment was given on an application by Ms Murphy under s 14 of the Trusts of Land and Appointment of Trustees Act 1996 (the 1996 Act) for a declaration of the nature and extent of the interests of the parties under the trusts of a property at 5 Tudor Close, Paignton, Devon (the property) which they acquired as their home in 1991. The relationship between Mr Gooch and Ms Murphy broke down in 1993, upon which event Ms Murphy (with their daughter) left the property. Since that date Mr Gooch has remained in sole occupation and made all payments arising due in respect of the property. The issue on this appeal is the entitlement of Ms Murphy on the taking of accounts between the parties to offset a credit in her favour in respect of the continued occupation of the property by Mr Gooch against the credits to which he is entitled in respect of the payments which he has made.

Facts

[2] Ms Murphy and Mr Gooch formed a relationship in 1973. One child was born of that relationship, Chantelle Murphy, on 24 August 1990. In April 1991 Ms Murphy and Mr Gooch purchased as their family home under a shared ownership scheme a 25% interest in a 99-year lease of the property (a three-bedroomed home). The other 75% interest was vested in the Devon and Cornwall Counties Housing Association Limited (the housing association). The purchase price of the property was £59,500. Ms Murphy and Mr Gooch paid £14,875 for their 25% share and the housing association paid the balance for its 75% share. Ms Murphy and Mr Gooch borrowed £15,000 in respect of this purchase from the Portland Building Society on the security of a mortgage and took out an endowment mortgage policy with Scottish Life.

[3] The relationship between Ms Murphy and Mr Gooch irrevocably broke down in 1993, resulting in Ms Murphy and Chantelle vacating the property.

[4] Mr Gooch thereafter remained in sole occupation. Ms Murphy in 1994, 1995 and 1996 in letters to Mr Gooch made clear her wish to realise her interest in the property and asked him to purchase it. Mr Gooch declined. It would appear that Mr Gooch had no available funds. In 1999 Mr Gooch became entitled to and was thereafter in receipt of incapacity benefits.

[5] On 27 February 2006 Ms Murphy commenced these proceedings seeking a declaration that she and Mr Gooch were entitled to the property as tenants in common in equal shares, an order for sale, all necessary accounts, and an order that, if Mr Gooch continued in occupation of the property, his continued occupation should be subject to various conditions, including the condition that he should pay Ms Murphy such sum as the court thought fit as compensation for her exclusion from the property. The housing association agreed to abide by any order for sale made in the proceedings.

[6] At the trial it was common ground that Mr Gooch had made between 1994 and 1999 three categories of payment in respect of the property totalling £18,158, namely £5,257 by way of interest instalments under the mortgage; £8,870 by way of rent to the housing association in respect of its 75% interest in the property; and £4,032 by way of premiums under the policy. It was also common ground that the value of the property was £140,000, that the balance due under the mortgage was about £15,000 and that the surrender value of the policy was about £4,577. On this basis (leaving aside any entitlements to credits) there would be available on sale for division between the parties (prior to deduction of the costs of sale) the sum of about £24,577 and, on the agreed basis that Ms Murphy and Mr Gooch were tenants in common in equal shares, this sum was to be shared equally between them. The issue between the parties was whether Mr Gooch's entitlement to credit in respect of his payments of interest, rent and premiums was to be offset by an obligation on his part to give credit in an equivalent sum in the nature of an occupation rent in respect of his sole occupation of the property since 1993. While Ms Murphy claimed an order for sale, she made clear that she did not insist on a sale of the property to realise her interest. She was content that Mr Gooch purchased her interest at its full value. Mr Gooch denied her right to make any offset in respect of his continued occupation since 1993 and maintained that he had made further repayments before 1994 and after 1999, that he was entitled to credits in respect of these further payments and that taking these further credits into account the value of Ms Murphy's interest was nil. He accordingly sought an order that Ms Murphy transfer her interest to him for its value, namely nil. It was common ground before the judge that the question of entitlement to credits and offsets was to be determined by reference to the doctrine of equitable accounting.

[7] The judge held that Mr Gooch was prima facie entitled to credit in respect of all three categories of payment, but that it was necessary to balance against the payments which he had made the fact that Mr Gooch occupied the property rent- and mortgage-free. He went on to hold that it was, in the circumstances, right that there should be offset against the credits to which Mr Gooch was entitled one half of all payments in all three categories, namely £9,079, and that Mr Gooch was entitled to credit for the balance. He decided that Mr Gooch should have an option exercisable within 3 months to buy Ms Murphy's half interest in the property at its full value and for this purpose he then proceeded to value that interest. The process which he adopted was as follows. He took £140,000 as the value of the property and accordingly £35,000 as the value of the parties' quarter share. He deducted from this sum the £15,000 outstanding on the mortgage (reducing the figure to £20,000) and then added back the surrender value of the policy of £4,577, producing a figure of £24,577. (No question arises as to this, the first, part of the process.) He then divided this sum into two and held that one half of this sum (£12,288) represented the value of each of the parties' prime facie entitlement. He then deducted from Ms Murphy's entitlement the sum of £9,079, being the sum to be credited to Mr Gooch in respect of the three categories of payment, producing a valuation of the entitlement on the part of Ms Murphy in respect of her interest in the property of £3,209. (There is a serious question as to the second part of the process.) On this basis he held that the value of Ms Murphy's interest in the property (without provision for any deduction of the costs of sale) should be quantified at £3,209; that Mr Gooch should have the option to buy Ms Murphy's interest for £3,209; and that in case Mr Gooch should not purchase Ms Murphy's interest, there should be an order for sale of the property and that out of the proceeds £3,209 (less half the costs of sale) should be paid to Ms Murphy in full satisfaction of her interest. He also ordered Mr Gooch to pay Ms Murphy one half of her costs, such order not to be enforced without the permission of the court.

[8] Ms Murphy (with permission granted by Jonathan Parker LJ) has appealed against the decision of the judge that the offset to which she was entitled was limited to half of the credits to which Mr Gooch was entitled in respect of interest and rent. She contends that Mr Gooch should not receive any credit in respect of these payments because of her entitlement to offset against the full sums of these credits a credit for the equivalent sum in respect of his sole occupation of the property. She does not challenge his entitlement to credit for half of the payment in respect of the premiums. She also contends that it should be a condition of any order for sale of her interest to Mr Gooch that he should procure her release from all liability under the mortgage and that (in default of such release) Mr Gooch should be ordered to provide her with an indemnity against any liability which she may incur so long as her liability under the mortgage remains undischarged. There can be, and was, no challenge to her entitlement to this protection.

[9] Mr Gooch has cross-appealed, contending that he was not obliged to give any credit in respect of his occupation of the property and that the figures for credits allowed to him by the judge required to be increased to reflect the fact that payments had been made by him before 1994 and after 1999, for which the judge failed to give credit. He contends that, if such increased credit is given to him, the value of Ms Murphy's interest in the property is reduced to nil and the court should order her to transfer to him the property subject to the mortgage together with the benefit of the policy, free from any obligation on his part to make any payment to her.

Relevant legal principles

[10] To resolve questions between co-owners of the character raised in this case, equity developed the doctrine of 'equitable accounting' to facilitate the striking of the balance between the co-owners. This consisted of a body of (non-binding) guidelines or rules of convenience aimed at achieving justice between the co-owners. The thrust of these guidelines was that, where it is just to do so, co-owners may be given credit for moneys paid and expenditure incurred on the jointly-owned property, a co-owner in sole occupation of property may be charged with or required to give credit to his co-owner for an occupation rent and these credits may be offset against each other. At one time the prevalent practice appears to have been that a co-owner in sole occupation would only be required to give credit for an occupation rent if he had actually or constructively ousted the other co-owner or co-owners from the jointly-owned property. But more recent authorities made plain that an occupation rent may be ordered in any case where this is necessary to do broad justice or equity between the parties: see Lawrence Collins J in *Byford v Butler* [2003] EWHC 1267 (Ch), [2004] 1 FLR 56 at para [40]. Lawrence Collins J cited with approval the judgment of Millett J in the case of *Re Pavlou* [1993] 1 WLR 1046, [1993] 2 FLR 751 at 1050C-D and 754 respectively, where Millett J said:

> 'I take the law to be to the following effect. First, a court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forceful exclusion therefore is far from conclusive. Secondly, where it is a matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded

> as excluded from the family home, so that an occupation rent should be paid by the co-owner who remains. But that is not a rule of law; that is merely a statement of the prima facie conclusion to be drawn from the facts. The true position is that if a tenant in common leaves the property voluntarily, but would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with an occupation rent which he or she never expected to pay.'

The present case was argued before and decided by the judge on the basis that the principles of equitable accounting applied.

[11] But, after the date of the judgment, on 25 April 2007 the House of Lords handed down its decision in the case of *Stack v Dowden* [2007] UK HL17, [2007] 2 WLR 831, [2007] 1 FLR 1858. The principal issue before the House of Lords in that case was the approach to be adopted by the court in determining the respective beneficial interests of co-owners of land. But there also arose a subsidiary issue as to the applicable principles to be adopted on the taking of accounts between co-owners and (most particularly) in determining claims by a co-owner out of occupation for an occupation rent from a co-owner in occupation. The House of Lords was unanimously of the view that the court's power to order payment to a co-owner of an occupation rent is no longer governed by the doctrine of equitable accounting but is instead governed by ss 12–15 (and, in particular, the statutory principles laid down in s 15) of the 1996 Act. The results may often be the same (see Baroness Hale of Richmond at paras [93]–[94], with whom three of the Law Lords agreed); indeed it may be that it would be a rare case when the equitable and statutory principles would produce a different result (see Lord Neuberger of Abbotsbury at para [150]). But the statutory principles must be applied.

[12] Baroness Hale of Richmond summarised the relevant statutory provisions and principles as follows, at para [93]:

> '… Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation … Section 13(1) gives the trustees the power to exclude or restrict that entitlement, but under section 13(2) this power must be exercised reasonably. The trustees also have power under section 13(3) to impose conditions upon the occupier. These include, under section 13(5), paying any outgoings or expenses in respect of the land and under section 13(6) paying compensation to a person whose right to occupy has been excluded or restricted. Under section 14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions. Under section 15(1), the matters to which the court must have regard in making its order include (a) the intentions of the person or persons who created the trust, (b) the purposes for which the property subject to the trust is held, (c) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home, and (d) the interests of any secured creditor of any beneficiary. Under section 15(2), in a case such as this, the court must also have regard to the

circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property.'

[13] In broad summary, s 12 of the 1996 Act confers on a beneficiary entitled to an interest in possession a right to occupy land available for his occupation. Section 13 confers on trustees, where there are two or more of such beneficiaries, the powers: (1) to exclude or restrict the entitlement to occupation of any one or more (but not all) of such beneficiaries; and (2) to impose conditions on any beneficiary in relation to his entitlement to occupy, including conditions requiring him: (a) to pay outgoings and expenses in relation to the land; and (b) where the entitlement of another beneficiary to occupy land under s 12 has been excluded or restricted, to make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted and to forego any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary. This section is designed to confer on trustees power to regulate and set the terms for future occupation of trust land. Section 14 confers power on the court on application by trustees or others interested to make such orders as it thinks fit: (a) relating to any of the trustees' functions (which includes their functions under s 13); and (b) to declare the nature or extent of a person's interest in property subject to the trust. It must be under the latter of these two powers that the statutory jurisdiction is conferred on the court to take accounts between co-owners.

[14] Under the previous equitable doctrine the court was concerned only with considerations relevant to achieving a just result between the parties. The statutory innovation is s 15, which requires the court in determining all applications for an order under s 14 to include among the other matters to which it has regard: (1) in all cases (so far as applicable) the four matters referred to by Baroness Hale of Richmond; (2) in the case of applications relating to the exercise by trustees of the powers conferred by s 13, the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees would be) entitled to occupy the land under s 12; and (3) in case of any other application (other than one relating to the conveyance of land to beneficiaries absolutely entitled) the circumstances and wishes of any beneficiaries of full age entitled to an interest in possession. The wider ambit of relevant considerations means that the task of the court must now be not merely to do justice between the parties, but to do justice between the parties with due regard to the relevant statutory considerations and, in particular, (where applicable) the welfare of the minor, the interests of secured creditors and the circumstances and wishes of the beneficiaries specified.

Decision

[15] Since the case was argued before the judge and the judgment was given on the basis that the applicable law was the doctrine of equitable accounting and no reference was made to the 1996 Act, this court must reconsider and determine afresh the issues raised by reference to the 1996 Act.

[16] The issues on this appeal are: (a) whether as a matter of procedure it was open to the judge and whether it is open to this court even to consider whether Ms Murphy should be entitled to a credit in respect of Mr Gooch's occupation of the property; (b) (assuming that it was and is so open) whether in law Ms Murphy was barred from claiming such a credit by reason of absence of proof of ouster of her from occupation by Mr Gooch; and (c) (assuming that she is not so barred) the size of the credit to be allowed to her.

[17] I turn first to the procedural question. The gist of Mr Gooch's case on this question is that Ms Murphy made no claim (and, indeed, disavowed any claim) for payment of an occupation rent and that this precluded any claim to a credit for occupation rent to be set off against the credits to which Mr Gooch was entitled. It is apparent on a full reading of the transcript of the trial that it was clear to Mr Gooch and the judge that the position taken on behalf of Ms Murphy was that, while she did not maintain a free-standing claim to payment of or credit for an occupation rent, she sought to set off her entitlement to a credit for such a rent against the credits claimed by Mr Gooch. That was a perfectly sensible and proper approach to take. The fact that she disavowed any intention to maintain a free-standing claim to the credit did not preclude her from using her entitlement to this credit as a form of set-off.

[18] I turn to the second question: whether there was a need on her part to prove ouster from occupation. In my judgment, it was open to the judge and it is open to this court to order credit for an occupation rent if it was or is just to do so, whether or not there was proof of any ouster. What (if any) credit could or should be given is a separate matter to be determined in accordance with the statutory principles. But even if ouster were necessary, it is quite clear that Ms Murphy left the property on the breakdown of her relationship with Mr Gooch and I am satisfied (as the judge was clearly satisfied) that when she left the property, she should have been regarded (in the same way as a wife leaving a joint home on a breakdown of the marriage) as constructively excluded from the property.

[19] I turn now to the third question, namely the size of the credit to which Ms Murphy is entitled and, in particular, whether Ms Murphy's entitlement to a credit for occupation rent should offset the whole or only half of Mr Gooch's credits for interest and rent. Before answering this question I should remind myself of the statutory principles and consider their application. It is the duty of the court in this case under the statutory principles to do justice between the parties with due regard to the statutory considerations. The first and second of these considerations are the intentions of Ms Murphy and Mr Gooch as creators of the trust and the purposes for which the property is held. The trust was created so that the property should be their joint home (a purpose that has failed since 1993) and Mr Gooch has since that date alone used the property as his home. The third consideration is the interest of any minor who occupies or might be expected to occupy the property as his or her home whose welfare requires consideration. There is no such minor. The fourth consideration is the interests of the building society as mortgagee. The building society's interest will not be prejudiced by the outcome of these proceedings and in particular the success (or otherwise) of Ms Murphy's claim to set off occupation rent against Mr Gooch's credits or a sale of the property. The fifth consideration is the circumstances and wishes of Ms Murphy and Mr Gooch. They are both in straitened circumstances and while Ms Murphy wishes to set off her claim to occupation rent against Mr Gooch's claimed credits, and her wishes and circumstances require the realisation of her interest in the property, Mr Gooch is anxious to avoid eviction from his long-standing home.

[20] The judge held (applying the equitable doctrine) that her entitlement should be limited to one half of the credits claimed by Mr Gooch. But he gave no, and certainly no satisfactory, reason for limiting the credit in this way; and there was no good reason or justification. The credits which Mr Gooch claimed were in the nature of the costs, expenses and outgoings of his continuing occupation of the property: they were not payments of a capital nature or calculated to increase the capital value of the property. It is not relevant that, with inflation, the value of the property has increased since its purchase in 1991. The benefit of this increase in value accrues to the benefit of both parties in equal shares.

[21] If the equitable principles continued to be applicable, I do not think that the judge's decision could stand. There was no or no sufficient reason for limiting Ms Murphy's right to an offset to only one half of the credits to which Mr Gooch was entitled. But the question must now be decided by reference to the statutory principles and, in my judgment, they must likewise result in an entitlement to a set-off against the entirety of the credits for rent and interest.

[22] If Ms Murphy had made or been able to make an application to the court before Mr Gooch's occupation commenced, the court would practically as a matter of course have imposed as a condition of Mr Gooch's continued occupation a requirement of his continued payment of the full interest and rent as proper and necessary in accordance with the statutory principles. Such statutory principles likewise require on an application made after the period of occupation that Ms Murphy should be entitled to offset a credit for occupation rent against the full payments of interest and rent made by Mr Gooch.

[23] I should add that there must be available such a right of offset in respect of the full period of Mr Gooch's sole occupation and, accordingly, it is irrelevant whether the period during which Mr Gooch should obtain credit for payment of interest and rent exceeded that for which the judge allowed, for all relevant payments were made during the period of his sole occupation.

[24] On the agreed basis of a valuation of the property at £140,000, Ms Murphy's half interest is to be valued as follows:

Value of property	£140,000
Value of quarter interest	£35,000
Less deduction of mortgage of £15,000	£20,000
Plus value of policy	£4,577
Less deduction of credit to Mr Gooch for policy payments of one half of premiums of £4,032 (as directed by the judge)	£2,016
Net value of equity	£22,561
Ms Murphy's half interest	£11,280

[25] Accordingly: (1) Ms Murphy should be entitled to set off the credit to which she is entitled for an occupation rent against the credits to which Mr Gooch is entitled in respect of his payment of interest and rent and thereby to cancel them in full; (2) to secure his continued occupation of his home

Mr Gooch should have the option (renewing the option granted by the judge) exercisable within 3 months from today to buy the half share of Ms Murphy based on the agreed valuation of the property at £140,000, subject to the mortgage but with the benefit of the policy, for the sum of £11,280; (3) if Mr Gooch exercises the option he must assume an obligation to use his best endeavours to obtain a release of Ms Murphy from all liability under the mortgage and enter into an undertaking to Ms Murphy to indemnify her against any liability under the mortgage so long as it continues to subsist; (4) in default of exercise of the option or completion of the contract constituted by exercise of it in accordance with its terms, the property shall be sold and the net proceeds of sale together with the surrender value of the policy (after payment together with the surrender value of the policy of the sum due under the mortgage, satisfaction of the credit of £2,032 to which Mr Gooch is entitled in respect of the premiums and all costs and expenses of sale) shall be paid in equal shares to Ms Murphy and Mr Gooch. Ms Murphy's share of these proceeds should not be limited to the option price of £11,280. There is no justification for imposing any such limit.

Costs

[26] Ms Murphy has entirely succeeded on this appeal and Mr Gooch has entirely failed on his cross-appeal. The appeal should accordingly be allowed with costs and the cross-appeal dismissed with costs. As regards the costs below, Ms Murphy should have succeeded on all issues save as to the claim to a set-off against full credit to which Mr Gooch was entitled in respect of the premiums. The judge held (and there is no appeal against his decision on this issue) that her set-off should be limited to one half of the credit allowed to Mr Gooch in respect of his payment of the premiums. In the circumstances I think that she should be entitled, not to 50% as ordered by the judge, but to 90% of the costs below.

Conclusion

[27] I cannot leave this case without expressing my concern and anxiety that public funding has been available to both parties to pursue this action as far as the Court of Appeal. Public funds have been expended disproportionately to the sums at issue. If they are now recouped out of the proceeds of the sale of the property it is doubtful whether anyone outside the legal profession will benefit. If ever a case called for mediation, this case did so, and if the process of mediation had been adopted a settlement should have been reached at an early date. Even if the mediation had failed, the course and outcome of the mediation should have given a powerful steer as to whether public funding should have been made available for further pursuit of the action.

SEDLEY LJ:

[28] I agree.

MUMMERY LJ:
[29] I also agree.

Order accordingly.

Solicitors: *Morecrofts* for the appellant
Eastleys for the respondent

PHILIPPA JOHNSON
Law Reporter

Neutral Citation Number: [2021] EWHC 2971 (QB)

Appeal Ref: QB-2021-001
Case No: F00MB219

THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT MIDDLESBROUGH
ORDER OF MR RECORDER MURPHY DATED 10 DECEMBER 2020

Remote hearing from the
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 November 2021

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

SARAH CATHERINE BAILEY	**Appellant**
- and -	
BARRY JOHN DIXON	**Respondent**

- -
- -

Chris Hegarty (instructed by **Mortons Law**) for the **Appellant**
Collette Price (instructed by **Punch Robson Solicitors**) for the **Respondent**

Hearing date: 4 November 2021 by Microsoft Teams

- -

Approved Judgment

MR JUSTICE SAINI :

This judgment is in 5 main parts as follows:

I. Overview

1. This appeal concerns a property known as 3 Chestnut Road, Eaglescliffe, Stockton-on-Tees ("the Property"). On conclusion of oral argument, I informed the parties that I would allow the appeal and provide my reasons in due course.

2. The Property is jointly owned by the Respondent (the Claimant below) and the Appellant (the Defendant below), who were at one point in a relationship and the carers of the Respondent's grandson, Joey (born on 20 April 2005). Joey's mother had died when he was a few weeks old, and the Appellant and Respondent effectively became Joey's parents, and the Property became the family's home.

3. The Property had originally been in the sole ownership of the Appellant (purchased in 2000) but came to be jointly owned by 2005 between the Appellant and the Respondent. The Property was subject to a mortgage. The relationship between the Appellant and the Respondent deteriorated and the Appellant left the Property. It is not clear when exactly the Appellant left the Property but it was around 2006. The joint tenancy was severed in October 2016.

4. In due course, by a Part 8 Claim Form issued in the County Court at Middlesbrough, the Respondent sought an order for sale of the Property and various ancillary orders under the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") as well as the type of accounting and inquiries common in this form of claim. The Appellant served a Defence and Counterclaim which resisted sale of the Property, on the basis that it should be preserved for the benefit of Joey. She made an application for an occupation order under section 33 of the Family Law Act 1996.

5. Of relevance to the appeal however is the fact that the Appellant also included a pleaded claim for an "occupation rent to reflect [the Respondent's] exclusive occupation of the trust property to reflect her exclusion from such date as the court determines to the date of judgment". This claim was based on what was pleaded as a "constructive ouster" of the Appellant from the property. It was said to give rise to a credit of about £45,000.00 by way of occupation rent (reflecting the Respondent's sole occupation of the Property for a number of years) to be brought into the account in her favour.

6. The trial of the claim came before Mr Recorder Murphy ("the Recorder") in the County Court at Middlesbrough. The Recorder heard evidence and submissions over 2 days and gave an *ex tempore* judgment on 10 December 2020 ("the judgment"). The trial bundle below (which is before me) shows that he was faced with a mass of witness

statements and accusations and cross-accusations. His task was clearly not straightforward and he produced a commendably succinct judgment in what was clearly a hard-fought case with strong feelings on both sides. It also appears that perhaps he was not given as much assistance on the law as has been provided to me.

7. The Respondent was very largely successful on the issues determined by the Recorder. The Recorder made a number of orders on 21 January 2021 consequent on the judgment, including an order for the sale of the Property. He refused to make an occupation order in the Appellant's favour. He also refused to make an order in favour of the Appellant for occupation rent, or compensation, under section 13(6) of TOLATA. The Appellant had argued below that when an accounting and determination of net equity as between the parties was calculated following sale, a credit for such occupation rent should be applied in her favour. The issue on the appeal before me is whether the Recorder was wrong in law in rejecting this occupation rent claim. Permission to appeal on this issue was granted by Stacey J on 1 June 2021.

8. I will need refer to the detail of the Recorder's judgment below, but for introductory purposes, I identify that the Recorder found that there had been a breakdown in the relationship between the parties but ultimately concluded that an occupation rent was not payable because the Respondent had not denied the legal rights of occupation of the Appellant. In argument before me there has been a focus on para. [79] of the judgment in which the Recorder observed as follows when considering the test to be applied in determining whether there had been exclusion by the Respondent of the Appellant:

> "In a landlord and tenant situation it is not much different to the landlord coming in and changing the locks and throwing all your stuff onto the streets. In those circumstances you are obviously entitled to damages because they are not allowed to do that without a court order. Well, this is the equivalent of that. In other words, she would otherwise have effectively been living there but the claimant prevented her from doing so, ie. exercising her rights."

I will refer to this below as the "landlord analogy".

9. In summary, Counsel for the Appellant argues that use of this analogy shows that the Recorder interpreted exclusion as too high a threshold by holding that it was necessary for his client to effectively show that she had been locked out of the Property, as opposed to satisfying the court that there had been constructive exclusion of the Appellant at the end of a relationship. It is said by Counsel for the Appellant that there had in fact been such constructive exclusion of his client arising no later than 2011 (but possibly even earlier). I pause there to note that there is a lack of clarity as to precisely when it is said that there was exclusion.

10. Against this, Counsel for the Respondent argues that there was no misdirection in law and this is an appeal which effectively seeks to overturn factual findings made on evidence heard by the Recorder. Emphasis is placed on how the Recorder found the Appellant to be in certain respects an unsatisfactory witness.

II. Legal Framework

11. Section 13 of TOLATA provides as follows:

> "13 Exclusion and restriction of right to occupy.
>
> (1) Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.
>
> (2) Trustees may not under subsection (1)—
>
> (a) unreasonably exclude any beneficiary's entitlement to occupy land, or
>
> (b) restrict any such entitlement to an unreasonable extent.
>
> (3) The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.
>
> (4) The matters to which trustees are to have regard in exercising the powers conferred by this section include—
>
> (a) the intentions of the person or persons (if any) who created the trust,
>
> (b) the purposes for which the land is held, and
>
> (c) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.
>
> (5) The conditions which may be imposed on a beneficiary under subsection (3) include, in particular, conditions requiring him—
>
> (a) to pay any outgoings or expenses in respect of the land, or
>
> (b) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.
>
> (6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to—
>
> (a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or

> (b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.
>
> (7) The powers conferred on trustees by this section may not be exercised—
>
> (a) so as prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12) from continuing to occupy the land, or
>
> (b) in a manner likely to result in any such person ceasing to occupy the land,
>
> unless he consents or the court has given approval.
>
> (8) The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c)".

12. This section falls to be applied together with sections 12, 14 and 15 of TOLATA which I will not recite. I will however summarise their effect (insofar as relevant) below.

13. In Stack v Dowden [2007] UK HL 17 one of the issues which arose concerned the principles to be adopted on the taking of accounts between co-owners and in determining claims by a co-owner out of occupation for an occupation rent from a co-owner in occupation. The House of Lords was unanimously of the view that the court's power to order payment to a co-owner of an occupation rent is no longer governed by the historic doctrine of equitable accounting but is instead governed by sections 12-15 TOLATA (and in particular the statutory principles laid down in section 15 of that Act) It was said however that the results may often be the same. I refer to the speech of Baroness Hale at [93]-[94] with whom three of the law lords agreed. It was also said that it would be a rare case when the equitable and statutory principles would produce a different result: Lord Neuberger at [150]. But it is the statutory principles that must be applied.

14. Baroness Hale summarised the statutory provisions as follows at [93]:

> "... Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation... Section 13(1) gives the trustees the power to exclude or restrict that entitlement, but under section 13(2) this power must be exercised reasonably. The trustees also have power under section 13(3) to impose conditions upon the occupier. These include, under section 13(5), paying any outgoing or expenses in respect of the land and under section 13(6) paying compensation to a person whose right to occupy has been excluded or restricted. Under section 14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions. Under section 15(1), the matters to which the court

> must have regard in making its order include (a) the intentions of the person or persons who created the trust, (b) the purposes for which the property subject to the trust is held, (c) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home, and (d) the interests of any secured creditor of any beneficiary. Under section 15(2), in a case such as this, the court must also have regard to the circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property."

15. Section 12 of TOLATA confers on beneficiaries entitled to an interest in possession a right to occupy land available for her occupation. Section 13 confers on trustees, where there are two or more such beneficiaries, the power (1) to exclude or restrict the entitlement to occupation of any one or more (but not all) of such beneficiaries; (2) to impose conditions on any beneficiary in relation to her entitlement to occupy, including conditions requiring him: (a) to pay outgoings and expenses in relation to the land; and (b) where the entitlement of another beneficiary to occupy land under section 12 has been excluded or restricted, to make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted and to forego any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.

16. It is clear that this section is designed to confer on trustees power to regulate and set the terms for future occupation of trust land. Section 14 confers power on the court on application by trustees or others interested to make such orders as it thinks fit: (a) relating to any of the trustees' functions (which includes their functions under section 13); and (b) to declare the nature or extent of a person's interest in property subject to the trust. It is under the latter of these two powers that the statutory jurisdiction is conferred on the court to take accounts between co-owners.

17. As explained in <u>Murphy v Gooch</u> [2007] EWCA Civ 693 ("<u>Murphy</u>") at [14], under the previous equitable doctrine the court was concerned only with considerations relevant to achieving a just result between the parties. Statute now governs. Section 15 of TOLATA requires the court in determining all applications for an order under section 14 to include amongst the other matters to which it has regard: (1) in all cases (so far as applicable) the four matters referred to by Baroness Hale in <u>Stack v Dowden</u>; (2) in the case of applications relating to the exercise by trustees of the powers conferred by section 13 the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees would be) entitled to occupy the land under section 12; and (3) in case of any other application (other than one relating to the conveyance of land to beneficiaries absolutely entitled) the circumstances and wishes of any beneficiaries of full age entitled to an interest in possession.

18. The wider ambit of relevant considerations means that the task of the court is now not merely to do justice between the parties, but to do justice between the parties with due regard to the relevant statutory considerations and in particular (where applicable) the welfare of the minor, the interests of secured creditors and the circumstances and wishes of the beneficiaries specified.

19. I will need to return to <u>Murphy</u> in more detail below. It is a highly significant decision in the context of this appeal. It is not referred to by the Recorder in his judgment (nor

indeed are any cases referred to by him). Both Counsel before me (who appeared below) confirmed however that it had been cited to the Recorder.

III. The Recorder's judgment

20. Although the focus of this appeal is the Recorder's rejection of the occupation rent claim, it is appropriate to record some of his earlier findings. He found the relationship between the Appellant and the Defendant had broken down, and that the purpose of the trust of the Property was to provide a family home for them and Joey (the family unit). He recorded that the Appellant said she had been excluded from the Property (on various differing dates) but did not in the event make any findings as to when this occurred. The lack of clarity as regards this aspect of the case remains. Counsel for the Appellant was not able to give a confident answer to my question as to which date was being put forward by his client.

21. The following passages of the judgment encapsulate what I have sought to summarise above:

> "15. […] I do want to flag up and illustrate two pieces of the oral evidence I heard that I found illustrative, informative and actually true. One was from the [Respondent] when describing the situation between himself and the defendant. He essentially said, and the context does not matter for this purpose, that it has been a difficult turbulent relationship that had come to an end. That is plainly true and in fact it had been a difficult and turbulent relationship that had come to an end many years ago in my judgment…"

> "16. There was also a very informative and illustrative piece of evidence given by the [Appellant] which I entirely accept as being true and I think it explains much of what has happened over the past 14 years, which is when the defendant said her primary motivation was and remains to give Joey a safe and secure home and she did see initially the purpose of the home was that the claimant and the defendant to give Joey such stability and security…".

> "19. […] At some stage the property was put into joint names. In 2006 [the Appellant] moved out. [The Appellant] denies it and said this did not happen until 2010 at the earliest. I prefer [the Respondent]'s evidence about that."

22. In considering the parties' evidence the Recorder said:

> "44. As to Mr Dixon's oral evidence […] it can be stated here briefly. He says the defendant has not lived at the house since 2006. […] he accepted it was to be for a family of three but he did not agree the descriptions effectively that the purpose, the entire purpose of this Trust was to provide Joey with a home. He

> said the purpose of it, and I find it exactly if not obvious, was indeed to provide a family home for the three of them. […] Anyways, their relationship stopped before or principally stopped by about 2006 but in any event, he says the defendant stopped living there from 2006 anyway."
>
> "46. The defendant in contract wants to live at 3 Chestnut Road with Joey for the principle [SIC] reason orally stated which is to provide him the security that he requires to complete his schooling and possibly into the longer term. […] She says she was excluded from the property from either 2010, 2011, or 2013, it was not entirely clear to me which, because there was some conflict with her suggestion that she was still sort of living there for period of time in 2011 and 2013. I think she said they still had a physical relationship in 2013 but candidly I will come on to that under the section of occupation rent in a moment..."

23. As to the occupation rent claim, the following passages of the judgment were the focus of submissions of Counsel:

> *"*74. A much more troubling issue of this claim is the question of occupation rent for the time which the defendant says she has been excluded or restricted in her occupation of her own property. I have had various dates suggested for this from 2010, 2013, 2016, possibly 2017, when the occupational order was sought, but it seems to me, and I did have some discussion with counsel about this, that the cornerstone of this application for an occupational rent must be that it is by reason of the claimant excluding the defendant, not by reason of the defendant's choice.*"*
>
> "78. There was undoubtedly obviously a breakdown in the relationship between the two of them. […] But the touchstone for the exclusion of your legal rights to occupy your own premises which effectively is this point within these proceedings, does not necessarily turn and is not determined by whether the relationship has broken down between them and/or whose fault that is, but it has to be one party denying the legal rights of occupation of the other such that they are entitled in the absence to an occupation rent."
>
> "79. In a landlord and tenant situation it is not particularly different to the landlord coming in and changing the locks and throwing all your stuff onto the streets. In those circumstances you are obviously entitled to damages because they are not allowed to do that without a court order. **Well, this is the equivalent of that**. In other words, she would otherwise have effectively been living there but the claimant prevented her from doing so, ie. Exercising her rights."

> "82. […] it is about whether you have been in fact prevented from exercising your own legal right to live in your own property."
>
> "84. Anyway, if I am wrong about all that, I postulate it in a different way. The defendant has not proven on the balance of probabilities that she has been so excluded by the claimant at any time and in fact I do so find that she has chosen not to be in occupation of her own premises and the reason for that is a matter entirely for her but the explanation for her continuing to pay the mortgage on that and indeed to still own the property just to use common parlance, is because her principle [SIC] motivation was to ensure Joey had a safe and stable roof over his head…".

24. It is fair to observe that the Recorder's approach was to the effect that the Appellant had to show she had been barred from exercising her legal right to occupy. That was to be assessed using the landlord analogy – the Appellant had to show something like a landlord changing the locks in a forcible eviction of a tenant.

IV. Occupation Rent: section 13(6) of TOLATA

Submissions

25. On behalf of the Appellant, Counsel made cogent and attractive submissions to the effect that underlying the Recorder's rejection of the occupation rent claim was a basic legal error. He argued that the Recorder had applied too high a test of exclusion and ignored the caselaw which made clear that breakdown of a relationship may suffice to create an entitlement to an occupation rent.

26. On behalf of the Respondent, Counsel made forceful and persuasive submissions seeking to uphold the Recorder's judgment. She argued that it is clear from the Recorder's judgment that in using the landlord analogy, he was he was considering the concept of "exclusion" and what that meant rather than applying a direct analogy. She submitted the Recorder properly considered that some form of exclusion was required as *per* the wording of the statute. It was said to be equally clear from the judgment that the court made findings of fact in relation to whether the Appellant had satisfied him as to the "exclusion" and determined that she had not. She submitted that the court's decision amounts to no more than this: there must be some evidence of the fact that there has been exclusion and not mere choice. She reminded me that the Recorder had considered whether it was unreasonable to expect the Appellant to continue to reside at the property or whether there had been some form of "*constructive exclusion*". She submitted that the mere fact alone of the end of a relationship cannot give rise to an occupation rent. In this regard, reliance was placed on the Appellant's own evidence that she chose to move out at the conclusion of the relationship and thereafter came and went from the property. Strong reliance was placed by Counsel for the Respondent on findings that the Appellant had not satisfied the Recorder that she had been excluded; she had not satisfied him of the date of any exclusion; and she had not discharged her evidential burden of proof in relation to that aspect of the claim. I was reminded that

the Recorder, as the trial judge, was in the unique position of having had the opportunity, over 2 days, of evaluating not only the documentary evidence but also the oral evidence of the parties.

27. Counsel for the Respondent submitted that although the Recorder had "tied himself in knots" with his landlord analogy, he had overall made findings of fact which showed that he was considering whether in all the circumstances it was just to award an occupation rent. She accepted however that the Recorder did not in terms address the statute or the case law. Both Counsel submitted they had directed the Recorder to the terms of section 13 of TOLATA.

Analysis and conclusions

28. Although the Respondent's submissions were very well presented, in my judgment, the Recorder did indeed fall into legal error. It is related to (but not the same as) the legal error which has been the focus of the Appellant's submissions. I identified this apparent error for Counsel when they began oral submissions so they could address it (it not being a point which had been the subject of their skeletons). It was adopted by Counsel for the Appellant. I set it out at [34]-[35] below.

29. It is clear from a consideration of the entirety of the Recorder's reasons for refusing the claim for occupation rent that he considered a single issue to be determinative. That was the requirement of the Appellant to prove as a condition of making a claim under TOLATA that she had been excluded by the Respondent from enjoying legal rights to occupation of the Property. That was an error, as I describe below. The Recorder also considered that this required her to prove something like a landlord's lockout. That was also plainly a legal error.

30. Applying this limited test, the Recorder found that the Appellant had not been excluded [81], and (in the alternative) the Appellant "…has not proven on the balance of probabilities that she has been so excluded by the [Respondent] at any time and in fact I do so find that she has chosen not to be in occupation of her own premises and the reason for that is a matter entirely for her…" [84].

31. I note that the Recorder described this necessity for proof of exclusion as the "cornerstone" issue [74] and said this was to be determined by identifying whether one party had denied "…the legal rights of occupation of the other…": [78]. The Recorder clearly considered that an ouster of occupation was a condition precedent to any claim for an occupation rent.

32. In my judgment, there was a clear and material misdirection of law which infected the Recorder's entire approach to the occupation rent issue. The law is clear that under TOLATA a court may order credit for an occupation rent if it was just to do so, whether or not there was any proof of ouster. Indeed, that is the *ratio* of Murphy which is a Court of Appeal decision deciding this very issue under TOLATA (and not under equitable accounting: see [15]. This is a decision which reviews the equitable accounting case law and the then recent decision in Stack v Dowden [2007] UKHL 17.

33. Having undertaken that review, Lightman J said at [18] of Murphy:

> "I turn to the second question whether there was a need on her part to prove ouster from occupation. In my judgment, it was open to the Judge and it is open to this court to order credit for an occupation rent if it was or is just to do so, whether or not there was proof of any ouster. What (if any) credit could or should be given is a separate matter to be determined in accordance with the statutory principles. But even if ouster were necessary, it is quite clear that Ms Murphy left the Property on the breakdown of her relationship with Mr Gooch and I am satisfied (as the Judge was clearly satisfied) that, when she left the Property, she should be regarded (in the same way as a wife leaving a joint home on a breakdown of the marriage) as constructively excluded from the Property."

34. It is accordingly well-established law which bound the Recorder (and which binds me) that ouster is not a condition precedent and in any event it can be established on a constructive basis. Although this appeal has been argued on the basis that there was in fact constructive exclusion (and the Recorder should have so found), I consider that the Appellant can advance a more basic complaint.

35. That is that the test which the Recorder should have applied is whether it was "just" in all the circumstances to order credit for an occupation rent and having regard to the statutory factors. That is the ultimate question and it was not addressed by the Recorder although Counsel inform me that Murphy was cited to him. The Recorder's error may however have arisen because the parties' submissions focussed on the relevant (but not determinative) sub-issue of ouster.

36. I note that the approach taken by Lightman J in Murphy was supported by the older caselaw he cited, although those cases were decided in the context of equitable accounting (and not under TOLATA). As explained by Lightman J at [10]:

> "…more recent authorities made plain that an occupation rent may be ordered in any case where this is necessary to do broad justice or equity between the parties: see Lawrence Collins J in Byford v. Butler [2004] 1 FLR 56 at 65. Lawrence Collins J cited with approval the judgment of Millett J in the case of In Re Pavlou [1993] 1 WLR 1046 at 1050 C-D where Millett J said:
>
>> "I take the law to be to the following effect. First, a court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forceful exclusion therefore is far from conclusive. Secondly, where it is a matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded as excluded from the family home, so that an occupation rent should be paid by the co-owner who remains. But that is not a rule of law; that is merely a statement of the prima facie conclusion to be drawn from the facts. The

> true position is that if a tenant in common leaves the property voluntarily, but would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with an occupation rent which he or she never expected to pay."”

37. Lightman J further explained that although these observations were made in an equitable accounting and not in relation to the application of sections 12-15 of TOLATA, the view had been expressed in the Supreme Court that it will be a rare case when the equitable and statutory principles would produce a different result. I have referred to this point above.

38. Re Pavlou describes a *prima facie* position that a person who leaves a matrimonial home after a breakdown “may” be regarded as having been excluded. I do not accept that there is any rebuttable presumption to this effect, as submitted by Counsel for the Appellant. It is no more than a conclusion which might be drawn on the facts but it is not any form of legal rule and Millett J made that clear.

39. I allow the appeal on the grounds as reformulated above. It was agreed that the other grounds of appeal did not arise in this situation.

V. Conclusion

40. It follows that the Recorder’s decision on the occupation rent issue cannot stand. I will set that decision aside and the costs order below. I direct that the issue of occupation rent and costs of the claim be freshly determined by a judge other than the Recorder.

Neutral Citation Number: [2022] EWCA Civ 481

Case No: CA-2021-000710
(Formerly A3/2021/1383)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE AT CARDIFF
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE (ChD)
His Honour Judge Milwyn Jarman QC
PT-2020-CDF-000001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2022

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE STUART-SMITH
and
LADY JUSTICE ANDREWS

- - - - - - - - - - - - - - - - - - - -

Between :

BILAL ALI (AS PERSONAL REPRESENTATIVE OF FARZAND ALI (DECEASED))	**Appellant/ Claimant**
- and -	
(1) LAITH KHATIB (AS PERSONAL REPRESENTATIVE OF FATEH BIBI (DECEASED))	**Respondents/Defendants**
(2) SHANAZ AKHTAR RAMZAN (AS PERSONAL REPRESENTATIVE OF MOHAMMED RAMZAN (DECEASED) AND PERSONALLY)	
(3) MOHAMMED IQBAL	
(4) PARVEEN IQBAL	

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Clifford Darton QC (instructed by **Berry Smith LLP**) for the **Appellant**
John Sharples (instructed by **Petersons Solicitors**) for the **2nd, 3rd and 4th Respondents**
The 1st Respondent did not appear and was not represented

Hearing date: 17 March 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, and release to BAILII. The date and time for hand down is deemed to be 11.30 a.m. on Friday 8 April 2022.

Lady Justice Asplin:

1. This appeal raises issues in relation to when occupation rent is payable and the circumstances in which new points can be argued on appeal.

Background

2. The issues arise in the context of a long-running family dispute about the administration of the estate of Mrs Fateh Bibi ("Mrs Bibi") and, in particular, a property comprised within that estate. The property at 149 Corporation Road, Newport, South Wales, (the "Property"), was the family home of Mrs Bibi and her husband, Mr Mohammed Ali ("Mr Ali"). They lived there with their children, Farzand Ali, Mohammed Ramzan, Mohammed Iqbal, the Third Respondent, and Parveen Iqbal, the Fourth Respondent. The children all moved out except for Mohammed Ramzan. He and his wife, Mrs Shanaz Akhtar Ramzan, the Second Respondent, continued to live at the Property, with Mohammed Ramzan's parents, and brought up their children there.

3. Mr Ali died on 22 August 2003 and Mrs Bibi died on 11 July 2006. Their son, Farzand Ali, died in March 2020. His estate is represented by his son who is his personal representative, the Appellant, Dr Bilal Ali. Mohammed Ramzan, Mr Ali and Mrs Bibi's third son, died in May 2013. Shanaz Ramzan is a party to these proceedings, both as her husband's personal representative and in her personal capacity.

4. Title to the Property was transferred to Mr Ali by his son Farzand Ali, in 1986. On Mr Ali's death in 2003, title to the Property passed to his wife, Mrs Bibi. As I have already mentioned, she died in 2006. Under Mrs Bibi's will dated 2 October 2003, (the "2003 Will") the Property was bequeathed and devised to her son Mohammed Ramzan absolutely. It was not until 2011, however, that the legal title to the Property was registered in Mohammed Ramzan's name. The Ramzan family have remained in occupation of the Property throughout.

5. In 2012, Farzand Ali commenced probate proceedings in relation to Mrs Bibi's estate. The 2003 Will was raised in the Defence and was subsequently alleged to be invalid. On 24 January 2014, His Honour Judge Milwyn Jarman QC (the "judge") made an order in those proceedings pronouncing against the 2003 Will and in favour of Mrs Bibi's previous will dated 7 January 1997 (respectively the "2014 Order" and the "1997 Will"). The 2014 Order also provided, amongst other things, that there be liberty to apply for an account for use and occupation of the Property.

6. In April 2016, the judge made a further order appointing the First Respondent, Mr Laith Khatib, as Mrs Bibi's personal representative in place of the Third Respondent, Mohammed Iqbal. Probate was granted to Mr Khatib in respect of the 1997 Will in March 2017. Mr Khatib has not been represented before us, nor did he appear in person.

7. Under the 1997 Will, after payment of her debts, taxes, funeral and testamentary expenses, Mrs Bibi left all her real and personal property whatsoever and wheresoever absolutely to her husband. If he predeceased her, which he did, she gave all her property absolutely and in equal shares to her children, each of whom were named.

8. The Part 8 proceedings which give rise to this appeal were commenced by Farzand Ali in January 2020. Orders were sought, amongst other things, for the sale of the Property with vacant possession, that Shanaz Ramzan deliver up vacant possession of the Property to enable the sale to take place and that she account to Mr Khatib, as Mrs Bibi's personal representative, in respect of the occupation of the Property by Mohammed Ramzan and by herself from the date of Mrs Bibi's death until vacant possession was delivered up.

9. Part of the claim was settled on the terms set out in a Memorandum of Agreement dated 29 January 2020. It provides, amongst other things that: the Second, Third and Fourth Defendants (Shanaz Ramzan, Mohammed Iqbal and Parveen Iqbal) would pay £80,000 to the First Defendant (Mr Khatib) in consideration for their purchase of the Property from Mrs Bibi's estate; and Mr Khatib would pay that sum to Farzand Ali. It was stated that that sum would "satisfy the Claimant's [Farzand Ali's] capital entitlement to the Property as an heir of the estate" and "compromise his claim to purchase the Property from the estate". However, the Memorandum also provides that: "It [the payment of £80,000] shall not prejudice any beneficial entitlement the Claimant [Farzand Ali] has to occupation rent (if any) owed by the Second Defendant [Shanaz Ramzan] to the estate to which he may be entitled as an heir."

10. The terms of that agreement were set out in the schedule to an order dated 17 February 2020 which was sealed the following day. It is referred to in the first recital to a consent order dated 10 September 2020, (the "2020 Order"). The second and third recitals were in the following form:

> "AND UPON the Second Defendant acknowledging that she is liable on behalf of herself and of the Estate of Mohammed Ramzan Deceased, to account to the Estate of Fateh Bibi Deceased for use and occupation of the property situated at 149 Corporation Road in Newport, for a period and in an amount to be determined by the Court if not agreed
>
> AND UPON the parties agreeing to instruct a Single Joint Expert to determine the level of occupation rent which should be paid in respect of the property . . ."

By the 2020 Order, the proceedings were stayed to enable the parties to instruct a single joint expert to give effect to the terms already agreed and to attempt to settle those issues which remained outstanding. The Claimant's solicitors were required to write to the court by a prescribed date, stating whether the case had settled in full and if not, whether a further stay was sought or that the matter be set down for a costs and case management conference. The case did not settle. An expert's report was duly obtained and the matter was heard by the judge. He gave judgment orally on 15 July 2021, having heard the evidence and submissions the previous day.

The judgment

11. In the light of the nature of the grounds of appeal, it is important to have a good grasp of the judgment.

12. Having recorded that part of the claim had been settled, the judge stated that the settlement payment of £80,000 "was expressed to be without prejudice to any beneficial entitlement to occupation rent "if any" owed by Mrs Ramzan to Mrs Bibi's estate to which he [Farzand Ali] may be entitled to as an heir". He then addressed the second recital to the 2020 Order at [9], in the following way:

> "The recital to that order referring to that agreement recorded that Mrs Ramzan acknowledged that she is liable on behalf of herself and her late husband's estate to account to Mrs Bibi's estate for use and occupation of the property for a period and in an amount to be determined by the Court if not agreed. The former solicitor of the Second to Fourth Defendants signed that agreement on her behalf, but she says that was done without her knowledge or authority because her family was in Pakistan at the time. However, Mr Sharples, on her behalf, accepts that there was ostensible authority on the part of the solicitor, as solicitor on record, to sign on her behalf but, if necessary, she now seeks to withdraw that acknowledgement."

13. The judge then noted that the main principles in relation to the award of occupation rent were not in dispute, although their application was, and went straight on to consider the case law in relation to occupation rent in the context of occupiers of jointly owned property and their trustees in bankruptcy ([11] – [18]).

14. The judge's conclusions were that: occupation rent is a form of equitable accounting ([11]) ; that at common law, one tenant in common is not entitled to rent as against the other unless there has been an ouster ([12] – [14]) - *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 and *Dennis v McDonald* [1982] Fam 63; the issue has arisen in the context of bankruptcy where trustees in bankruptcy have sought rent from the occupier of property jointly owned with the bankrupt ([15]); a court of equity will order an enquiry and payment of occupation rent not only where a co-owner has been ousted but also in any case in which it is necessary to do equity between the parties ([16] –[17] – *Re Pavlou* [1993] 1 WLR 1046 and *Murphy*

v Gooch [2007] EWCA Civ 603); and that the default position is that occupation rent is not payable and, accordingly, there should be some conduct by the occupying party, or feature relating to them which makes it fair to depart from the default position ([18] - *Davis v Jackson* [2017] EWHC 698). The judge then recorded that counsel for the Claimant accepted that the facts were not that of a "classic constructive ouster" [19].

15. Having set out parts of section 12, 13 and 14 of the Trustees of Land and Trustees Act 1996 (the "1996 Act") and noted the relationship between the principles of equitable accounting and the payment of compensation under the statutory regime ([20] – [26]), the judge recorded at [27] that counsel agreed that the statutory regime was prospective but that even under the equitable jurisdiction the factors in section 13(4) of the 1996 Act were relevant - (*Amin v Amin* [2009] EWHC 3356.)

16. He then directed himself that the starting point was to consider whether the circumstances giving rise to the award of occupation rent or statutory compensation were made out and noted that in relation to occupation rent:

> ". . . whilst ouster in the classic sense is no longer necessary, in the words of Snowden J:
>
> > "There ought to be some conduct by the occupying party or at least some other feature of the case relating to the occupying party to justify the court concluding that it is appropriate or fair to order the occupying party to start paying rent. In respect of statutory compensation, there must be an exclusion or restriction of the beneficiary's right to occupy.""

([28]).

He returned to the same point at [33] reminding himself that the "question that must be answered first . . . is whether there is any conduct on the part of Mr or Mrs Ramzan which justifies an award of occupation rent or an exclusion or restriction of the right of occupation of Farzand Ali of the property so as to give rise to statutory compensation".

17. The judge concluded that he was not satisfied on the facts that there was such conduct or exclusion or restriction of Farzand Ali's right of occupation. All that had happened was that the siblings had moved out of the Property when they became adults and Mohammed and Shanaz Ramzan had stayed and looked after the parents. On the death of Mrs Bibi, the situation in terms of occupation continued [34]. The judge also noted that under the 2003 Will, the Property was left to Mohammed Ramzan, that it was not until 2014 that that will was set aside and that the Ramzans had not been involved in the making of the 2003 Will. He also stated that the deterioration in the relationship between Farzand Ali and his siblings as a result of the proceedings commenced in 2012 and business litigation did not amount to conduct by the Ramzans which justified the payment of occupation rent [35].

18. Furthermore, he held that it did not amount to an exclusion or restriction of Farzand Ali's right to occupy under the statutory regime. "He and his siblings had such a right but such a right was not an exclusive one, it was a right to share occupation but, in all the circumstances, that was unrealistic, given that he had his own family home and that Mr Ramzan, who had a similar right even under the 1997 [w]ill, continued to occupy with his family." [36]

19. The judge held, accordingly, that the first requirement for an award of occupation rent or statutory compensation was not made out. He also decided that it could not arise under the recitals to the 2020 Order because: "[R]ead as a whole, it is clear that the liability referred to is in respect of occupation rent "if any"." [37].

20. The judge went on to state that even if he was wrong in concluding that the first requirement was not made out, he would have declined to award occupation rent [37]. He noted that £80,000 was paid under the 2020 Order and referred to the various valuations of the Property, the earliest being in 2010 and the most recent in 2019 and to the various figures given by the single joint expert in relation to rental values. He also quoted Snowden J in *Davis v Jackson* at [69] as follows:

> "The assumption that a trustee in bankruptcy is entitled to an immediate order for sale and the creditors should be compensated in some way for any delay may not always be the case. For example, if the property market is rising the trustee may benefit from a delay, especially if he has not had to contribute to the payment of the mortgage."

21. The Property had been valued: at £160,000 to £165,000 for probate purposes in June 2010; at £190,000 in an unimproved state or £220,000 in its current state in 2014; at £225,000 in May 2018; and at £220,000 in April 2019 in an unimproved state and £250,000 in its current state. Further, the works carried out after Mrs Bibi's death were valued at around £30,000 in the April 2019 report of Mr Graham (Graham & Co.) and the July 2014 report of Mr Parker (Nuttal Parker). The valuation of rental values varied from £500 to £950 between 2006 and 2018, although the evidence of the single joint expert was that the rental value was £800 in 2006 and £1,200 in 2019.

22. The judge also accepted submissions that Mrs Bibi intended that the Ramzans should live in the house until it was sold, and that the house was held for two purposes: to realise the interests of the four siblings but also to house the Ramzans until then, and that the house was intended to be a home for their minor children which was necessary for their welfare [42].

23. He concluded that it was not necessary to carry out an exact comparison of how the £80,000 received by Farzand Ali in 2020 in respect of his quarter interest in the Property

compared with what might have been awarded by way of market rent but, taking a broad view, even if the question of occupation rent or statutory compensation arose, he was not satisfied that it would be just to make an award. To do so would be to over-compensate Farzand Ali and not to do "broad justice" [43].

The judge proceeded on the wrong basis – raising a new point on appeal

24. The first ground of appeal is that the judge applied the wrong test because: Shanaz Ramzan had never enjoyed a right of occupation of the Property after the death of Mrs Bibi; and her husband had only been entitled to a right to a quarter share of Mrs Bibi's residuary estate under the 1997 Will, not a right to a share in the Property itself. Accordingly, it is said that as neither Mr nor Mrs Ramzan was a co-owner of the Property for the purposes of the 1996 Act or in equity, neither of them was liable for occupation rent at all. On the contrary, it is said that Shanaz Ramzan is strictly liable to Mrs Bibi's estate for her occupation of the Property and that of her husband, since the date of Mrs Bibi's death as a trespasser.

25. Reliance was placed upon the explanation of the nature of the residue of an estate in *Dr. Barnardo's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts* [1921] 2 AC 1. That was a case in which a testator left the residue of his property, which comprised stocks and shares, to a charity absolutely. In the period between the testator's death and the date on which the residue was finally ascertained and distributed, the executors received income upon which income tax was deducted at source. The income was part of the fund handed over to the charity and in due course, the charity claimed the return of the income tax which had been deducted. Viscount Finlay, with whom Lord Atkinson, Lord Sumner and Viscount Cave concurred, pointed out that a legatee of a share in residue has no interest in any property of the testator until the residue is ascertained and that, accordingly, the income was that of the executors. See pages 8, 10 and 11.

26. It is said, therefore, that: until the claims against a testator's estate for debts, legacies, testamentary expenses etc. have been satisfied, the residue does not come into existence; accordingly, neither Mohammed Ramzan nor his wife had an interest in the Property or a right to occupy it; and that the analysis of the application of the 1996 Act in relation to interests under a will in undivided shares in land in *Creasey v Sole* [2013] EWHC 1410 (Ch) applies.

27. Mr Darton QC, on behalf of Dr Ali, accepted that the matter had not proceeded on this basis before the judge and that the point was new. He was referred to *FII Group v HMRC* [2020] UKSC 47, [2020] 3 WLR 1369, a case in which the Supreme Court considered the basis upon which the discretion to allow the withdrawal of a concession and new points to be taken on appeal should be exercised.

28. The background to the *FII Group* case is complex and it is unnecessary to rehearse it here. The appeal itself concerned the correctness of two of the most important decisions of the House of Lords on the law of limitation. It arose in the course of long-running proceedings known as the Franked Investment Income Group Litigation. One of the issues which was addressed was the exercise of the court's discretion in deciding whether to allow Her Majesty's Revenue and Customs ("HMRC") to advance the arguments they wished to deploy in the Supreme Court. In the second phase of the FII Group Litigation HMRC had not stated that they wished to reserve the right to mount a broader attack in their limitation defence. On the contrary, they had admitted in pleadings in one of the cases that that party's mistake claims were not time barred. HMRC's proposed broader challenge involved the withdrawal of a concession and a pleaded admission and also raised a new point of law on appeal [85].

29. Lords Reed and Hodge, with whom Lord Lloyd-Jones and Lord Hamblen agreed, referred to several cases illustrating the approach of the courts to the exercise of discretion in such circumstances. The first was *Pittalis v Grant* [1989] QB 605. It was concerned with an application by the landlord appellants to withdraw a legal concession made at first instance and to amend their grounds of appeal to argue for a different interpretation of a provision in the Rent Act 1977. The Court of Appeal allowed the application. Lords Reed and Hodge noted at [86] that:

> "... Nourse LJ, who delivered the judgment of the court, stated the rule of procedure which operates as a norm, by quoting from the judgment of Sir George Jessel MR in *Ex p Firth, In re Cowburn* (1882) 19 Ch D 419, 429 as follows:
>
> > "the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."
>
> Nourse LJ stated that although the court has a discretion to refuse an application to raise on appeal a pure question of law not raised at first instance, the normal practice was to allow the legal point to be taken where the court could be confident that the other party (i) had had an opportunity of meeting it, (ii) had not acted to his detriment by reason of the earlier omission to take the point and (iii) could be adequately compensated in costs: p 611C-F per Nourse LJ."

30. The second case to which their Lordships referred was *Jones v MBNA International Bank* (30 June 2000) [2000] EWCA Civ 514; [2000] Lexis citation 3292. At [87], their Lordships noted that Peter Gibson LJ summarised the practice of the Court of Appeal at para 38, in the following way:

> "It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

They commented in these terms:

> "87 . . . That summary, and particularly the reference to the difficulty of allowing a new point to be taken if further evidence would have been adduced at the trial, reflects longstanding practice: see, for example, *The Tasmania* (1890) 15 App Cas 223, 225 per Lord Herschell; *Ex p Firth, In re Cowburn* (above) per Sir George Jessel MR. As May LJ also made clear in his concurring judgment in *Jones* (para 52), the court has established a general procedural principle in the interests of efficiency, expediency and cost and in the interest of substantial justice in the particular case. There is no absolute bar against the raising of a new point of law even if a ruling on a new point of law necessitates the leading of further evidence, but, as the case law reveals, the court will act with great caution."

31. They went on at [89] and [90] as follows:

> "89. A similar note of appellate caution was sounded in *Singh v Dass* [2019] EWCA Civ 360 in which a claimant sought to raise a new argument under the 1980 Act which he had not advanced at

first instance. Haddon-Cave LJ, who gave the judgment of the court, summarised the relevant principles in these terms:

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b) had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2, paras 30 and 49).
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs (*R (Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] PTR 22, para 29)."

Haddon-Cave LJ's second principle reflects the judgment of the Court of Appeal in *Jones* (above), paras 38 and 52, and his third principle is a paraphrase of what Nourse LJ stated in *Pittalis v Grant* (above) p 611.

90. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337; [2019] 4 WLR 146 the Court of Appeal, in a judgment delivered by Snowden J, stated that an appellate court has a general discretion whether to allow a new point to be taken on appeal (para 21) and considered and analysed the practice set out in *Pittalis* and *Singh*:

> "26. These authorities show that there is no general rule that a case needs to be 'exceptional' before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any

> > prejudice that would be caused to the opposing party if the new point is allowed to be taken."
>
> The court then spoke of a spectrum of cases. At one end, where there had been a full trial involving live evidence and the new point might have changed the course of the evidence or required further factual enquiry, there was likely to be significant prejudice to the opposing party and the policy arguments in favour of finality would be likely to carry great weight. At the other end, where the point to be taken was a pure point of law which could be argued on the facts as found by the judge, the appeal court was far more likely to permit the point to be taken, provided that the other party had had time to meet the new argument and had not suffered any irremediable prejudice in the meantime (paras 27 and 28)."

Their Lordships concluded at [100] that: "[I]n the end, the task for the court is to make an evaluation of what justice requires in the circumstances. . ."

32. In the light of the guidance in *FII*, in summary, Mr Darton submitted that in this case, he should be allowed to argue the appeal on the new basis because: matters had been confused before the judge; *Creasey v Sole* had not been cited at all and the issue was a pure point of law; the matter would not have been argued differently; the evidence would not have been different; there has been no detrimental reliance upon the approach which was adopted; and it would be just to allow it. He added that the claim for relief in the Part 8 Claim was wide enough to encompass a claim for mesne profits.

33. Mr Sharples, on the other hand, submits that amongst other things the new basis: would lead to the need to re-cast the proceedings entirely and amend the pleadings; would have changed the course of the evidence and the way in which the matter was argued; and accordingly, would require further evidence to be adduced and for there to be a re-trial. He also points out that the settlement in January 2020 proceeded on the basis that all of the siblings had a right of occupation.

34. For all the reasons which Mr Sharples gives, I would refuse to exercise the court's discretion in order to enable Dr Ali to raise the proposed new point on appeal. It seems to me that this case is at the end of the spectrum at which it would not be just to allow the new point to be taken.

35. As Mr Sharples submitted, the new basis would require a complete re-casting of the claim. It would be necessary to abandon the claim in the form in which it came before the judge altogether. A claim for damages in trespass/mesne profits is different from the relief which was sought in the Part 8 Claim. At paragraph 2.3 of that claim an order is sought that Mrs Ramzan "do account" to Mr Khatib in respect of the occupation of the Property and the

supporting witness statements proceed on the premise that all the siblings had a right of occupation. They make no mention of trespass.

36. This is much more than a matter of nomenclature. Had the claim been in trespass, it would be more natural for it to have been pursued by Mr Khatib, as claimant in his capacity as Mrs Bibi's personal representative and both the evidence and the argument would have been different. It would have been necessary for the court to determine whether and, if so, at what stage Mrs Bibi's residuary estate had been administered, the nature of Mohammed Ramzan's interest in that estate after administration was complete and whether the analysis in *Creasey v Sole* could be distinguished.

37. Furthermore, as Mr Sharples pointed out, the defences to a claim in trespass would have been different. The Limitation Act 1980 would apply and questions would have arisen as to whether consent had been given to Mr Ramzan and, thereafter, to Mrs Ramzan's occupation of the Property and if so, by whom and in respect of which periods. Questions might also have arisen as to whether the Ramzans were granted a licence to occupy the Property or whether there had been acquiescence. It is likely, therefore, that the evidence before the judge would have been different and, it seems to me, that it is inevitable that the trial would have been conducted differently.

38. As Lords Reed and Hodge pointed out in the *FII* case at [93] in the interests of justice, an appellate court "will normally seek strenuously to avoid an outcome which results in the parties, who have already gone to trial on the quantification of a claim, having to amend their pleadings and to adduce further evidence to apply its ruling on a new issue of law to the facts of their case. In a normal litigation, the need for a re-trial would be a strong and normally determinative pointer against allowing a party to withdraw a concession which had influenced the way in which a litigation had been conducted." It seems to me that the point applies with equal force to the exercise of discretion to allow a new point to be run.

39. In this case, the proposed new basis is more than a new point of law. It changes the nature and landscape of the proceedings altogether and would require a re-trial. In all the circumstances, therefore, it cannot be consistent with the overriding objective to allow Mr Darton to proceed with the first ground of appeal.

The effect of the recitals to the 2020 Order and the Memorandum of Agreement

40. The second ground of appeal is that, in any event, the terms of the Consent Order and recitals to that Order obliged the judge to find that Mrs Ramzan was liable to pay for her use and occupation of the Property because she had agreed to do so or because they gave rise to an evidential estoppel which prevented Mrs Ramzan from arguing otherwise. In effect, therefore, it is said that the only issue before the court was quantum.

41. Before us, Mr Darton, on behalf of Dr Ali, accepted that this issue could not stand as a separate ground of appeal and that it merely explained how the matter came before the

judge in the way that it did. He also accepted that it would have been open to the judge, in appropriate circumstances, to determine quantum at nil. He was right to do so. It seems to me that it is clear from the judgment itself and from the parts of the transcript of the hearing to which we were referred, that an application was made to withdraw what was considered to have been a concession in the terms of the recitals to the 2020 Order and that the judge heard submissions in that regard. In his judgment, the judge approached the matter as one of construction. He concluded that when the 2020 Order was read as a whole, (together with the Memorandum of Agreement) the liability in respect of occupation rent which was referred to was a liability "if any" [37]. Accordingly, he did not address the issue of whether the concession, so called, could be withdrawn because it did not arise on his interpretation of the relevant documents. It was open to him, therefore, to decide that the payment of occupation rent did not arise in the circumstances or that if it arose as a matter of principle, nevertheless, it should not be awarded. He was fully entitled to approach the matter as one of construction and it seems to me that he was right to conclude as he did. There is no appeal against his decision in that regard. In the circumstances, therefore, the recitals cannot now form the basis of a ground of appeal.

The judge was wrong to find that there was no exclusion

42. In any event, it is said that if the approach to occupation rent in *Davis v Jackson* is correct, the judge erred, nevertheless, in finding that the Ramzans' occupation of the Property did not exclude Farzand Ali. Mr Darton submits that this was not a case in which Farzand Ali had been in a position to enjoy the right to occupy but had chosen voluntarily not to do so. On the contrary, it would have been unreasonable to have expected him to do so in the circumstances. It is said that the judge was bound to come to that conclusion given: Mohammed Ramzan's registration as sole proprietor of the Property in 2011 (in reliance upon the 2003 Will); that Mohammed Ramzan remained as sole proprietor until the 2020 Order; the fact that Farzand Ali was "stymied" from realising his legacy under the 1997 Will first by the first probate proceedings in 2012 and then by Mr Khatib's failure to apply for a sale of the Property; and the difficult relationship between Farzand Ali and his siblings which the judge recorded in his judgment in the first probate proceedings.

43. Mr Darton did not place any emphasis upon the difficult relationship between Farzand Ali and his siblings in oral argument and I consider that he was right not to do so. In these proceedings, the judge found that the relationship did not deteriorate until 2012 as a result of the first probate proceedings and business litigation and that the deterioration did not amount to conduct by the Ramzans which justified the payment of occupation rent. It is clear, therefore, that he had the sibling relationship in mind and there is no appeal against his evaluative finding.

44. What of having been "stymied" from realising his legacy under the 1997 Will by the first probate proceedings, in which the validity of the 2003 Will was addressed, and then by Mr Khatib's failure to seek to sell the Property? In this regard, Mr Sharples pointed out that

reliance was not placed upon the effect of the 2003 Will and the dispute in relation to it before the judge.

45. In any event, it seems to me that it does not assist Mr Darton. It was not suggested that Farzand Ali knew of the 2003 Will until it was pleaded in the defence to the first probate proceedings in 2012. In the circumstances, it could not have affected his ability to realise his legacy under the 1997 Will, prior to that time, or after the outcome of those proceedings was known, in 2014. He could have applied to have Mrs Bibi's estate administered and, in fact, he did so, but not until 2020. Furthermore, it is difficult to see that the judge should have found that Farzand Ali was excluded from the Property by the conduct of the Ramzans whilst the probate proceedings were ongoing from 2012-2014, in the light of the fact that he found that the Ramzans had not been involved in the making of the 2003 Will. It is true that after that, Mohammed Iqbal was removed as Mrs Bibi's personal representative and replaced by Mr Khatib but it is difficult to see how that change, of which the judge was fully aware, was a matter which the judge left out of account or which should have led to the conclusion that Farzand Ali had been excluded from the Property.

46. What of Mohammed Ramzan's registration as legal owner of the Property in reliance upon the 2003 Will? It is said that after the registration in 2011, Mohammed Ramzan was, on any view, occupying the Property to the exclusion of the other beneficiaries of the 1997 Will. If he had a joint right to occupy the Property under the 1997 Will, it is said that he chose not to exercise it. He elected, instead, to occupy as sole registered proprietor and as a result, became liable to pay occupation rent, at least from the date of the registration. Alternatively, the registration gave rise to a presumption of ouster.

47. Mr Darton relied upon *Kingsley v Kingsley* [2020] 1 WLR 1909. That was a case in which a brother and sister held farmland on trust for themselves as tenants in common in equal shares and farmed the land in partnership. On the brother's death, the sister remained in occupation and continued farming the land. The executors brought proceedings against her for possession under section 14 of the 1996 Act. The sister did not oppose the order but contended that she should be allowed to purchase the land at a value to be determined by the court. An order to that effect was made and the executors appealed on the basis that there should have been an open market sale. On appeal it was held that there was nothing which drove the court to require full market testing of the value of the land. However, it was held that the deputy judge's order in relation to occupation rent was flawed. He had decided that the sister should not be required to pay occupation rent since her brother's death.

48. Mann J, with whom Moylan and Patten LJJ agreed, stated at [62] that the deputy judge's "root error" was a failure to consider the real question which was a question of fact. Was the sister occupying the farm in order to wind up the partnership or was she occupying it in her own right? That issue was not addressed. Mann J held, however, that the answer to the occupation rent question was straightforward because there was an admission of liability on

the pleadings [64]. Having considered the sister's witness statement and an open offer, Mann J went on at [68] to conclude that it was quite clear that the sister was not disputing that her occupation of the farm since her brother's death had been for her own benefit. He concluded, therefore, that the matter was covered by the concession [70]. I agree with Mr Sharples, therefore, that *Kingsley* is not authority for the proposition that a co-owner who subsequently purports to occupy property in another capacity has inevitably excluded the other co-owner, although that may be the case. In this case, Mohammed Ramzan's registration as sole proprietor of the Property was as a result of a mistake about the validity of the 2003 Will.

49. Furthermore, as Mr Sharples points out, Mohammed Ramzan's status as registered legal proprietor would have limited practical impact in this case, if any. It took place in May 2011 and was based erroneously on the 2003 Will. It was not until 2014 that the court pronounced against the 2003 Will and for the 1997 Will. In fact, the legal title to the Property was always held on the terms of the 1997 Will. Accordingly, after 2011, Mr Ramzan, as registered proprietor, held the legal title on trust for himself and his siblings. Thus, it was not inevitable that his status as sole registered proprietor, based erroneously upon the 2003 Will, amounted to an exclusion of his co-owners.

50. Lastly, under this ground, it seems to me that it cannot be said that the judge erred in failing to take account of Mr Khatib's failure to sell the Property in the period after he was granted probate of Mrs Bibi's estate in 2017. It was accepted by Mr Darton that Mr Khatib should be given a two-year period of grace. The Part 8 proceedings seeking an order for sale were commenced shortly after the expiry of that period, in January 2020. In any event, it does not appear that Mr Khatib's failure to seek an order for sale was relied upon below.

51. It is well known that the questions of whether there was jurisdiction to award occupation rent and whether the court should exercise its discretion to make such an award are highly fact-sensitive. The judge found that it was unrealistic for Farzand Ali to occupy the Property as he had his own family home [36]. He was also not satisfied that Farzand Ali intended to live there or would have done so but for the Ramzans' presence. Those findings are not appealed. They justify the approach which the judge adopted in relation to exclusion.

The judge was wrong not to make an order for occupation rent given the other features of this case

52. In the further alternative, it is said that even if the test in *Davis v Jackson* is applicable and the Ramzans did not exclude Farzand Ali from the Property, the judge should still have made an order for the payment of occupation rent because Farzand Ali had not been in a position to apply for an order for sale. He was obliged to bring probate proceedings and then wait a reasonable period for Mr Khatib to act. Having succeeded in the probate proceedings and realised his "share" by means of the 2020 Order it was unjust for him not to recover an occupation rent.

53. It seems to me that this ground is no more than an attempt to seek a re-exercise of the court's discretion as to whether to award occupation rent and a repetition of the matters which have already been addressed. It does not amount to a factor which the judge failed to take into account when the discretion was exercised. As I have already explained, it is accepted that save for the period from 2011/12 until 2014, Farzand Ali knew of the basis upon which he might claim an occupation right and rent and in relation to the period from 2011 to 2014, the judge found that Mr Ramzan had not been involved in the making of the 2003 Will.

54. In any event, Mr Darton accepted that the argument based upon an inability to sell the Property was not raised before the judge. He submitted, nevertheless, that the judge had taken into account the rise in the value of the Property and the capital amount paid to Farzand Ali when deciding whether he would have awarded occupation rent but, when doing so, had ignored Farzand Ali's inability to realise his interest. This argument is to the effect that the judge was wrong to take account of the increase in the value of the Property and the effect it had on the settlement sum, because Farzand Ali was not at fault in having failed to realise his interest in the Property sooner. As a result, it is said that the judge should have considered occupation rent separately from capital value.

55. It seems to me that this argument is not open to Mr Darton. There is no reference to the treatment of the £80,000 settlement sum in any of the grounds of appeal, nor is there reference to the effect of rising property values upon the payment of occupation rent.

56. In any event, in my judgment, it does not assist him. It is not apparent from the authorities that it is necessary for there to have been some fault in failing to realise an interest in property at an earlier date before any increase in capital value can be taken into account. As Snowden J pointed out at [68] in *Davis v Jackson*, there may well be a legitimate expectation that a bankrupt's interest in a property will be realised quickly and that consideration may go a long way towards justifying a conclusion that it would be unfair to allow an occupying co-owner to resist an order for sale for a substantial period whilst also refusing to pay rent in the meantime. As Snowden J put it, however, at [69]:

> "Whilst plainly relevant, I do not think that these arguments can be conclusive. They seem to pre-suppose that a trustee in bankruptcy is entitled to an immediate order for sale and that creditors should be compensated in some way for any delay. That may not always be the case: eg. if the property market is rising the trustee may benefit from a delay, especially if he has also not had contribute to payment of the mortgage. "

There is no rule, even in the case of a trustee in bankruptcy, therefore, that an increase in the capital value of a property cannot be taken into consideration or that a trustee in bankruptcy or other co-owner must be awarded occupation rent in addition to the benefit they may derive from an increase in the value of the property. It all depends upon the relevant circumstances and what would be fair.

57. It seems to me that on the facts of this case it is impossible to contend that the judge was in error in doing broad justice on the basis of the figures available to him and in taking into account the £80,000 received by Farzand Ali in doing so. Furthermore, he cannot be required to do the precise maths as Mr Darton put it and to set out his calculations. Having taken account of the valuations and the expert evidence as to rental values, he was entitled to take a broad view and conclude that, had it been necessary, he would not have exercised his discretion to award occupation rent.

The judge was wrong not to award occupation rent because it is invariably awarded in the case of trustees in bankruptcy

58. Lastly, it is said that Farzand Ali's position was analogous to that of a trustee in bankruptcy who does not enjoy a right to occupy property jointly owned by the bankrupt. In such a case, Blackburne J held that the court will "ordinarily if not invariably" order the payment of occupation rent: *French v Barcham* [2009] 1 WLR 1124 at [35]. Mr Darton submits that the same approach should have been adopted in this case. He goes as far as to say that the judge should have proceeded on the basis that there is a presumption that occupation rent will be payable in such circumstances.

59. In *French v Barcham,* Mr and Mrs Barcham occupied a property which they owned as tenants in common. A bankruptcy order was made against Mr Barcham with the result that his equitable half interest in the property vested in his trustee in bankruptcy. Twelve years later, the trustee in bankruptcy sought an order for sale of the property and to set off against Mrs Barcham's half share of the net proceeds, an occupation rent in respect of her occupation of the property. On appeal, Blackburne J held that the trustee in bankruptcy was entitled to recover occupation rent. He approached the question in the following way:

> "34. . . . [Counsel for Mrs Barcham] submitted that the trustee was allowed to claim an occupation rent because he stood in succession to and in place of the husband who was to be regarded as excluded from the house. I do not think that this is a correct understanding of why the wife's obligation to pay an occupation rent continued after the husband's bankruptcy. Material to this is to note how, in *Dennis's* case, Purchas J stated the underlying principle. It is that the occupying tenant in common is only free of any liability to pay an occupation rent if the tenant in common not in occupation is in a position to enjoy the right to occupy but voluntarily chooses not to do so. This approach was followed by Millett J in *In re Pavlou* [1993] 1 WLR 1046 in his reference to what he described as "the true position". The essential point, in my view, is that when on

inquiry it would be unreasonable, looking at the matter practically, to expect the co-owner who is not in occupation to exercise his right as a co-owner to take occupation of the property, for example because of the nature of the property or the identity and relationship to each other of the co-owners, it would normally be fair or equitable to charge the occupying co-owner an occupation rent. This proceeds from the fundamental position in law, explained by Lord Denning MR in the passage from *Jones (A E) v Jones (F W)* [1977] 1 WLR 438 set out above, that as between tenants in common both are equally entitled to occupation and one cannot claim rent from the other, which has the result that the mere fact that the one is in occupation and the other is not does not without more give to the one who is not in occupation any claim to an occupation rent from the one who is in occupation. The underlying assumption is that there is no good reason why the non-occupying co-owner should not take up occupation. But if there is some reason why that co-owner is not in occupation and it would be unreasonable in the circumstances for him to take up occupation fairness requires the occupying co-owner to compensate the other for the fact that the one has enjoyment of the property while the other does not.

35. When a trustee in bankruptcy has been appointed of the estate of a co-owner so that that co-owner's interest vests in the trustee, but the other co-owner remains in occupation of the property, application of the principle will ordinarily, if not invariably, result in the occupying co-owner having to account to the trustee of the beneficial interest to which the bankrupt co-owner was formally entitled for an occupation rent. This is because it is not reasonable to expect – even if it were otherwise practicable for him to do so – the trustee in bankruptcy to exercise the right of occupation attaching to the interest in the property that vested in him on his appointment as trustee of the bankrupt co-owner. If it could be shown that the occupying co-owner was given by the trustee to understand that no occupation rent would be charged or was unaware of, and had no reasonable means of discovering, the other co-owner's bankruptcy, the court might take the view that it would not be just to require the occupying co-owner to pay an occupation rent. But short of such circumstances it is difficult to see why the occupying co-owner should not be charged an occupation rent."

60. Snowden J approached the matter differently in *Davis v Jackson.* In that case, Mrs Jackson used her own funds to purchase a property for the purpose of occupying it with her children. Subsequently, Mr and Mrs Jackson executed a deed of trust stating that Mrs Jackson held the property on trust for both of them in equal shares. She fell behind on mortgage repayments and the property was re-mortgaged in the joint names of Mr and Mrs Jackson. As a condition stipulated by the mortgagee, Mr and Mrs Jackson executed a TR1 which declared that they held the property on trust for themselves as joint tenants. Mr Jackson never lived in the house, paid any mortgage instalments or contributed to any of the outgoings. He was adjudged bankrupt, and Mr Davis was appointed his trustee in bankruptcy.

61. Mr Davis sought a declaration that he was entitled to one half of the equity in the property and an order for sale. The District Judge made the declaration and the order for sale, with the net proceeds of sale to be divided equally between Mrs Jackson and Mr Davis. Mrs Jackson applied to appeal against the District Judge's order but her application was rejected by Snowden J. In rejecting her application, however, Snowden J varied the order to provide that it should be subject to an equitable account in respect of the division of the anticipated proceeds of sale. He concluded that he was not bound by the 1996 Act and went on to consider occupation rent under general equitable principles ([48]).

62. He set out those principles derived from the authorities since *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 and commented in relation to *French v Barcham* as follows:

> "61. With respect to Blackburne J, I do not find this analysis entirely convincing. The earlier authorities of *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 and *Dennis v McDonald* [1982] Fam 63 made it very clear that at law, the default position when one co-owner is in occupation and the other is not, is that occupation rent is not payable. It therefore seems to me that there ought to be some conduct by the occupying party, or at least some other feature of the case relating to the occupying party, to justify a court of equity concluding that it is appropriate or fair to depart from the default position and to order the occupying party to start paying rent. "
>
> 62. In *French v Barcham,* Blackburne J rejected a similar argument, suggesting (at paragraph 40) that *Dennis v_McDonald* and *Re Pavlou* had explained the concept of exclusion as a "state of affairs"+ in which the question was whether it was reasonable for the non-occupying party to exercise his right of occupation or not. His approach seems to have been that if it was reasonable for the non-occupying party to exercise his right of occupation, but that he had voluntarily chosen not to do so, he should not be able to claim an occupation rent: whereas if it was unreasonable for the non-

occupying party to go into occupation, he should be entitled to rent.

63. Whilst I agree that cases such as *Dennis's* case and *Pavlou's* case have moved away from any need to show forcible or active exclusion as a requirement for rent to be paid, I do not think that they have moved as far as Blackburne J suggested. According to *Jones's* case and *Dennis's* case, the default position where a trustee in bankruptcy is not in occupation and the co-owner is in occupation should be that no occupation rent is payable. But because it would invariably be unreasonable for a trustee in bankruptcy to seek to take up occupation, Blackburne J's approach would have the result, as a virtually immutable rule, that an occupation rent should be payable. It therefore seems to me that the effect of Blackburne J's approach is to reverse the default position in any case involving a trustee in bankruptcy.

64. It also seems to me that Blackburne J's approach excludes the possibility of the court having any regard to the position that existed prior to the bankruptcy, or to the conduct or circumstances of the non-bankrupt party. I do not think that is consistent with cases such as *Jones's* case, where Lord Denning MR plainly thought that the stepmother, who had inherited her husband's interest in the property and had become a tenant in common with her stepson, should not be entitled to claim an occupation rent because of the agreements between her deceased husband and the son."

63. Snowden J concluded, nevertheless, that it was not necessary to reach a firm conclusion about whether Blackburne J had been right because the court has a broad equitable jurisdiction to do justice between co-owners on the facts of each case and the unusual facts of that case made it readily distinguishable [70] – [72].

64. It seems to me that the position is the same here. The judge was exercising a broad equitable jurisdiction to do justice between co-owners having also taken the statutory provisions in the 1996 Act into account. The issue before him was fact-sensitive and he was entitled to decide as he did. The *Barcham* case does not give rise to any kind of presumption as Mr Darton would have it. If it did and if Mr Darton were correct that an analogy can be drawn between a trustee in bankruptcy and a person in Farzand Ali's position, the court would be required to order the payment of occupation rent in all cases in which one co-owner is not in possession. It would also be unable to have regard to the position prior to bankruptcy or the circumstances of the co-owner in possession. That is not the law and cannot be correct.

65. As Snowden J pointed out, Lord Denning MR made it very clear in *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 at 441 – 2, that the default position at common law where one co-owner was in occupation and the other was not was that occupation rent was not payable. The position was the same in equity unless there was an ouster or a letting to a stranger for rent. The same approach was taken in the Court of Appeal in *Dennis v McDonald* [1982] Fam 63.

66. This approach is consistent with *In re Pavlou* [1993] 1 WLR 1046 and *Chhokar v Chhokar* [1984] FLR 313 in which a broader approach was adopted. In the *Pavlou* case, a husband and wife bought a house and occupied it as their matrimonial home. It was held by them as beneficial tenants in common. The husband left the wife who remained in sole occupation and paid the outgoings. They were divorced and the husband was subsequently made bankrupt. The trustee in bankruptcy brought proceedings for the sale of the property and equitable accounting. The question arose as to whether the wife was liable for occupation rent for any period prior to the husband's bankruptcy. Millett J approached the matter as follows at 1050:

> "I take the law to be to the following effect. First, a court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forceful exclusion therefore is far from conclusive. Secondly, where it is a matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded as excluded from the family home, so that an occupation rent should be paid by the co-owner who remains. But that is not a rule of law; that is merely a statement of the prima facie conclusion to be drawn from the facts. The true position is that if a tenant in common leaves the property voluntarily, but would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with a occupation rent which he or she never expected to pay. "

67. In *Chhokar v Chhokar* the facts were quite extreme. Title to the matrimonial home was held by the husband on trust for himself and his wife as tenants in common in equal shares. After the husband had abandoned his wife in India she managed to return to the matrimonial home. Whilst she was in hospital giving birth to their child, the husband tried to sell the house to a third party at an undervalue in order to attempt to override the wife's equitable interest. She returned to the property and petitioned for matrimonial and ancillary relief. The Court of Appeal allowed the wife's appeal, setting aside an order for

sale and the requirement that she pay occupation rent, save for a period during which she had a tenant. Cumming-Bruce LJ stated at 332:

> "[Counsel for the purchaser] submits that he has a right in law to occupy the property, but he goes on in the next breath to concede that it is a right that cannot be exercised because he succeeded to the rights of the husband in the matrimonial home . . . But, for this purpose, he stands in the shoes of the [husband] and I have been unable to find anything in the authorities which should lead the court to hold that it would be fair, which I regard as the test, to require the petitioner to pay occupation rent to the purchaser] by way of payment for her occupation of the matrimonial home."

68. There is no doubt, therefore, that the court is required to do broad justice between co-owners and to determine what would be fair: *In re Pavlou*, *Byford v Butler* [2004] 1 FLR 56 *Murphy v Gooch* and *Chhokar v Chhokar*. The position is no different where one co-owner has become bankrupt. His trustee in bankruptcy cannot be in a better position. It seems to me, therefore, that Snowden J's approach in *Davis v Jackson* was correct. The fact that a trustee in bankruptcy cannot reside in the property nor enjoy any financial benefit from it whilst the other co-owner is in occupation and the creditors can derive no benefit until the trustee exercises his remedies is not conclusive. Furthermore, as Snowden J explains at [69], it may not always be the case that the creditors should be compensated for any delay in obtaining an order for sale. In a rising market, they may benefit from that delay as a result of an increase in the value of the property. There is nothing to suggest that a co-owner or that person's trustee in bankruptcy must be blameworthy in relation to the delay before its effects can be taken into account.

69. It follows that I do not consider that the judge erred in not taking the approach in the *Barcham* case. He was entitled to make the findings he did in relation to conduct, to evaluate those matters and exercise his discretion in the way he did in order to do broad justice. This includes taking into account the increase in the capital value of Farzand Ali's interest in the Property and the amount he was paid for it.

70. For all the reasons to which I have referred, I would dismiss the appeal.

Lord Justice Stuart-Smith:

71. I agree with both judgments.

Lady Justice Andrews:

72. I agree that the appeal should be dismissed for the reasons given by my Lady, Lady Justice Asplin. I simply wish to add my own endorsement of the observations made by Snowden J in the passage at [61]-[64] of his judgment in *Davis v Jackson*. The starting point in every

case is that a co-owner in occupation is not obliged to pay occupation rent merely because he is living in the property and the co-owner is not. Something more has to be shown which makes it just and equitable that he should pay that other owner for his use and occupation of the property – for example, that he is exploiting the property for his own financial gain, or that he has precluded the co-owner from exercising a right of occupation that he (or she) wished to exercise. The focus should therefore be on the behaviour of the person in occupation.

73. It follows it cannot be right, as a matter of principle, that the obligation to pay occupation rent should turn on the reasonableness or otherwise of the behaviour of the *non-occupying* party in not occupying the property. Yet that is the effect of Blackburne J's analysis in *French v Barcham*, which appears to me, with the greatest respect, to be based on a mischaracterisation of the underlying rationale of earlier authorities such as *In re Pavlou*. There may be all kinds of scenarios in which it is reasonable for a co-owner of property not to exercise his right of occupation, but it does not follow that this automatically provides justification for making the co-owner who is in occupation of that property pay him rent.

74. Snowden J rightly pointed out in *Davis v Jackson* that Blackburne J's approach would have the result, as a virtually immutable rule, that an occupation rent should be payable to a trustee in bankruptcy, thus reversing the default position in bankruptcy cases. Mr Darton's submissions involved an extension of that approach, which would reverse the default position in all, or virtually all, other cases. I respectfully agree with what my Lady says in paragraph 68. There is no special rule in bankruptcy cases; *French v Barcham* is best regarded as turning on its own particular facts and not as laying down any principle of wider application.

75. At the end of the day, the question for the court is what fairness requires on the facts of the individual case. In the present case, the judge took into account all relevant factors, and concluded that justice and equity did not require a departure from the default position. He was entitled to do so, for the reasons that he gave.

'statutory defences' by the courts, the legislature, in order to avoid the risk of legislation being successfully challenged, did not include in the legislation a statutory defence to a charge.

For these reasons, their Lordships have humbly advised Her Majesty that the appeal of the Attorney General in the case of the first respondent ought to be dismissed and they will humbly advise Her Majesty that the appeal of the Attorney General in the case of the second respondents ought to be allowed and the order of Gall J set aside. The Attorney General must pay the costs of the first respondent before their Lordships' Board. There will be no order as to costs in the case of the second respondents.

Appeal in first respondent's case dismissed. Appeal in second respondents' case allowed, with no order as to costs.

Celia Fox Barrister.

Re Pavlou (a bankrupt)

CHANCERY DIVISION
MILLETT J
9 DECEMBER 1991

Insolvency – Property available for distribution – Matrimonial home – Sale under trust for sale – Equitable accounting between trustee in bankruptcy and co-owner left in occupation – Joint tenants – Husband leaving wife in sole occupation – Wife thereafter paying mortgage instalments and repairs and improvements – Husband made bankrupt and joint tenancy severed as a result – Trustee in bankruptcy obtaining orders for possession and sale – Date for commencement of equitable accounting between trustee and wife – Whether equitable accounting should include increased value resulting from wife's payments prior to bankruptcy – Whether occupation rent payable by wife should be set off against mortgage interest payments.

The respondent husband and wife bought a matrimonial home in 1973 which was transferred to them as beneficial joint tenants. The transfer contained an express declaration of trust to that effect. In January 1983 they separated and the husband left leaving the wife in sole occupation of the property. Thereafter the wife paid the mortgage instalments and also paid for repairs and improvements to the home. In March 1987 a bankruptcy order was made against the husband with the result that the beneficial joint tenancy in the property was severed and it was thereafter owned by husband and wife as tenants in common in equal shares. The trustee in bankruptcy of the husband applied to the court for a declaration as to the beneficial interests in the property, an order for possession and an order for sale. It was agreed that the orders for possession and sale should be granted but the wife claimed that she was entitled to reimbursement for her expenditure on the property. It was agreed that there had to be an equitable accounting between the parties but the question arose from what date the accounting should begin.

Held – (1) There was no difference between a beneficial tenancy in common and a beneficial joint tenancy for the purpose of an equitable accounting since in both cases the guiding principle was that neither party could take the benefit of an increase in value of the property without making an allowance for what had been expended by the other in order to obtain the increase. Accordingly, on an order for sale the proportions in which the property was to be divided between the former co-owners had to have regard to any increase in its value which had been brought about by expenditure incurred by one of them. It followed that the wife was entitled to the lesser of one-half of the increase in the value of the property, if any, resulting from her repairs or improvements before and after the bankruptcy order or one-half of her actual expenditure, if that was less than the increase in property value. She was also entitled to credit for one-half of the increase in value of the equity of redemption resulting from from the capital element of the mortgage payments from the date the husband left the property in 1983, and not merely from the date of the bankruptcy order (see p 958 *c* to *h*, post); *Leigh v Dickeson* [1881–5] All ER Rep 1099 applied.

(2) The court would order an inquiry and payment of occupation rent not only where the co-owner in occupation had ousted the other but in any other case in which it was necessary in order to do equity between the parties that an occupation rent should be paid. Where the property was a matrimonial home and the marriage had broken down the party who left the property would in most cases be regarded as excluded from the family home, so that an occupation rent was payable by the co-owner who remained. However, if a tenant in common left the property voluntarily in circumstances where he or she would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with an occupation rent which he or she never expected to pay. On the evidence before the court the question whether it would be just for the wife to pay an occupation rent for the period between January 1983, when the husband left the property, and March 1986, when she presented a petition for divorce, could not be decided. However, the wife was prima facie liable to pay an occupation rent from March 1986 onwards (see p 959 *h* to p 960 *a c*, post).

(3) The wife was prima facie entitled to reimbursement for the interest element in the mortgage payments which she had paid since the date when the husband left the property in January 1983, but, as there was no agreement between the parties to set off the interest element against the occupation rent, the necessary accounts and inquiries would be ordered (see p 960 *c d h j*, post).

Per curiam. The presentation of a petition for divorce by the party remaining in occupation of the matrimonial home should be taken to constitute a refusal to take the other partner back into the matrimonial home and a willingness to pay an occupation rent thereafter (see p 960 *b*, post).

Notes

For the determination of property rights between the husband and wife, see 22 *Halsbury's Laws* (4th edn) para 1030, and for cases on the subject, see 27(1) *Digest* (2nd reissue) 199–202, *1637–1662*.

Cases referred to in judgment

Dennis v McDonald [1981] 2 All ER 632, [1982] Fam 63, [1982] 2 WLR 275, CA.

Gorman (a bankrupt), Re, ex p the trustee of the bankrupt v The bankrupt [1990] 1 All ER 717, [1990] 1 WLR 616, DC.

Hill v Hickin [1897] 2 Ch 579.

Leigh v Dickeson (1884) 15 QBD 60, [1881–5] All ER Rep 1099, CA.

M'Mahon v Burchell (1846) 2 Ph 127, 41 ER 889.

Swan v Swan (1820) 8 Price 518, 146 ER 1281.

Turner v Morgan (1803) 8 Ves 143, 32 ER 307.

Cases also cited

a *Citro (a bankrupt), Re* [1990] 3 All ER 952, [1991] Ch 142, CA.
Goodman v Gallant [1986] 1 All ER 311, [1986] Fam 106, CA.
Suttill v Graham [1977] 3 All ER 1117, [1977] 1 WLR 819, CA.
Turton v Turton [1987] 2 All ER 641, [1988] Ch 542, CA.

b **Motion**

The trustee of the property of the first respondent, Michael Pavlou, a bankrupt, applied by notice of motion dated 10 August 1990 seeking (1) a declaration that he was solely and beneficially entitled to property, 50 Linzee Road, Hornsey, London N8, (2) alternatively, a declaration as to the respective beneficial interests of himself, the applicant, and the second respondent, Theognosia Pavlou, the bankrupt's wife, c in the property, (3) an order that the property be sold and the proceeds of the sale be paid to the trustee, (4) an order that the respondents concur in the sale and join with the trustee in doing such things as might be necessary to secure the sale of the property with vacant possession, (5) an order for delivery up of possession to the trustee and the net proceeds of the sale to be paid to him, (6) alternatively, an order that the net proceeds of sale be decided and paid to the trustee and the second d respondent in such shares as might be thought fit, pursuant to the declaration sought in para (2). The facts are set out in the judgment.

R H Walford (instructed by *Isadore Goldman*) for the trustee.
C I Howells (instructed by *Bartletts*) for the second respondent.

e **MILLETT J.** In this case the two respondents are husband and wife. They married in Cyprus in May 1954. In December 1973 they bought a matrimonial home, 50 Linzee Road, Hornsey, which was transferred into their names as beneficial joint tenants. The transfer contained an express declaration of trust to that effect. Between August 1976 and November 1977 the respondents separated but they got f back together again and continued living in the property as man and wife for a further five years. In January 1983, however, the husband left the property, leaving his wife in sole occupation.

The property had been bought for £12,500 with the assistance of a mortgage in favour of the Halifax Building Society for some £9,500. After the husband left the property, the wife paid all the mortgage instalments, which varied in amounts from g some £90 to £150 depending on the rate of interest from time to time. On 20 March 1986 the wife presented a divorce petition on the ground of desertion. On 8 July 1986 HM Customs and Excise presented a bankruptcy petition against the husband. On 23 July 1986 the wife obtained a decree nisi of divorce, but she has not yet obtained a decree absolute. I have been told that she remains willing and anxious to have her h husband back. She has obtained no ancillary orders for maintenance. On 24 March 1987 a bankruptcy order was made against the husband. It is common ground that the effect of the order was to sever the beneficial joint tenancy in the property and cause it to be owned by the two respondents as tenants in common in equal shares. Three days later, on 27 March 1987, the applicant was appointed trustee in bankruptcy of the husband. He now applies for an order for sale, and the wife seeks j reimbursement for her expenditure on the property.

The wife claims to have spent money on repairs, or improvements to the property at various times. This including a sum of some £2,000-odd, which I am told was paid in 1985, and a sum of some £4,000 paid in 1989. I have not been taken through the evidence in any detail. The case has been argued before me as a question of principle. It is agreed that there must be an order for sale, and that there should be an order against the wife for possession in three months' time. It is also agreed that there must be an equitable accounting between the parties. The question of principle which has been argued is: from what date should the accounting begin? I will take the easiest matter first—improvements and repairs—where the dispute arises from the fact that some of the alleged improvements took place before the bankruptcy order was made.

The trustee in bankruptcy submits that there is no equitable accounting between beneficial joint tenants but only between tenants in common, on the ground that beneficial joint tenants own the entire property per mie et per tout, so that expenditure by one is expenditure on his or her own property, and cannot be described as laid out in part in the improvement of the share of the other co-owner. Accordingly, he submits, the wife is not entitled to be reimbursed for any expenditure by her before the date of the bankruptcy order.

In my judgment there is no distinction between a beneficial tenancy in common and a beneficial joint tenancy. In neither case could a co-owner obtain contribution from his or her co-owner; any reimbursement had to wait a suit for partition or an order by the court for sale of property. On a partition suit or an order for sale, adjustments could be made between the co-owners, the guiding principle being that neither party could take the benefit of an increase in the value of the property without making an allowance for what had been expended by the other in order to obtain it: see *Leigh v Dickeson* (1884) 15 QBD 60, [1881–5] All ER Rep 1099. That was a case of tenants in common, but in my judgment the same principle must apply as between joint tenants; the question only arose on a partition or on the division of the proceeds of sale, the very point of time at which severance occurred if there was a joint tenancy. The guiding principle for the court of equity is that the proportions in which the entirety should be divided between former co-owners must have regard to any increase in its value which has been brought about by means of expenditure by one of them.

I must make it clear, of course, that in deciding as I do that the wife is entitled as against the trustee in bankruptcy to credit for one-half of any repairs or improvements, there has to be an inquiry as to the amount expended and the increase, if any, in the value of the property thereby realised. Much expenditure on property is not reflected in any increase in value, and most expenditure on property results in a much smaller increase in value than the amount expended. The wife will be entitled, as against the trustee in bankruptcy, to credit only for one half of the lesser of the actual expenditure and any increase in the value realised thereby.

The same applies, in my judgment, to any capital element in the repayment of mortgage instalments. The repayment of the capital element in each instalment increases the value of the equity of redemption which inures to the benefit of both joint tenants. Accordingly, the wife is entitled to credit for one-half the increase in value of the equity of redemption which results from the capital element of the mortgage payments since the date on which the husband left the property in 1983, and not merely back to the date of the bankruptcy order.

More difficult questions arise from the wife's continued occupation of the property. Is she chargeable with an occupation rent in respect of any period prior to the date of the bankruptcy order? And is she entitled to credit for the interest element in the mortgage repayments which she has made since the husband left her? I will take the occupation rent first. In *Hill v Hickin* [1897] 2 Ch 579 at 581 Stirling J, having pointed out that, at law, no rent could be recovered by one co-owner from another in sole occupation, said:

> 'It has, however, long been the practice of the Court of Chancery and of the Chancery Division to direct such inquiries as have been directed in the present case: see as to occupation rent, *Turner* v. *Morgan* ((1803) 8 Ves 143 at 145, 32 ER

> 307 at 308); and as to expenditure on improvements, *Swan* v. *Swan* ((1820) 8 Price 518, 146 ER 1281).'

The question was considered in a matrimonial context in *Dennis v McDonald* [1981] 2 All ER 632 at 638, [1982] Fam 63 at 70–71 by Purchas J. Having cited Stirling J's judgment in *Hill v Hickin*, he said:

> 'Counsel for the plaintiff submitted, I think correctly, that when one looks at the judgment in *M'Mahon v Burchell* (1846) 2 Ph 127, 41 ER 889 together with the extract from the judgment of Stirling J in *Hill v Hickin* [1897] 2 Ch 579 the true position under the old authorities was that the Court of Chancery and Chancery Division would always be ready to inquire into the position as between co-owners being tenants in common either at law or in equity to see whether a tenant in common in occupation of the premises was doing so to the exclusion of one or more of the other tenants in common for whatever purpose or by whatever means. If this was found to be the case, then if in order to do equity between the parties an occupation rent should be paid, this would be declared and the appropriate inquiry ordered. Only in cases where the tenants in common not in occupation were in a position to enjoy their right to occupy but chose not to do so voluntarily, and were not excluded by any relevant factor, would the tenant in common in occupation be entitled to do so free of liability to pay an occupation rent. In the instant case the plaintiff is clearly not a free agent.'

That was a case where the wife had left the matrimonial home. The judge proceeded ([1981] 2 All ER 632 at 638, [1982] Fam 63 at 71):

> 'She was caused to leave the family home as the result of the violence or threatened violence of the defendant. In any event, whatever might have been the cause of the breakdown of the association, it would be quite unreasonable to expect the plaintiff to exercise her rights as a tenant in common to occupy the property as she had done before the breakdown of her association with the defendant. In my judgment she falls into exactly the kind of category of person excluded from the property in the way envisaged by Lord Cottenham LC in *M'Mahon v Burchell*. Therefore, the basic principle that a new tenant in common is not liable to pay an occupation rent by virtue merely of his being in sole occupation of the property does not apply in the case where an association similar to a matrimonial association has broken down and one party is, for practical purposes, excluded from the family home.'

I take the law to be to the following effect. First, a court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster, or forceful exclusion, therefore, is far from conclusive. Secondly, where it is a matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded as excluded from the family home, so that an occupation rent should be paid by the co-owner who remains. But, that is not a rule of law; that is merely a statement of the prima facie conclusion to be drawn from the facts. The true position is that if a tenant in common leaves the property voluntarily, but would be welcome back, and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with an occupation rent which he or she never expected to pay.

I have not the material in the present case to judge whether, in the present case, it
would be just for the wife to pay an occupation rent, at least in respect of the period a
between January 1983 when the husband left the property and March 1986, when
she presented a petition for divorce. I acknowledge that her presentation of the
petition for divorce may well have been no more than a reluctant recognition of a
fait accompli. Without deciding the point, but hoping to be of some assistance to the
parties, I would express the view that prima facie, at any rate, the presentation of a
petition for divorce by the party remaining in occupation of the matrimonial home b
should normally be taken to signify a refusal to take the other partner back into the
matrimonial home and a willingness to pay an occupation rent thereafter.

I am unable to decide, on the material before me, whether it would be just or not
to order the wife to pay an occupation rent in the period between January 1983 and
March 1986 but, from March 1986 onwards, the wife is prima facie liable to pay an c
occupation rent.

There remains the question of the interest element in the mortgage payments
which the wife has paid. Once again, prima facie, she is entitled to reimbursement
since the date on which the husband left the property in January 1983, and not
merely since the severance in March 1987.

In many cases the court has simply set off the interest element in the mortgage d
repayments against an occupation rent but, as Vinelott J pointed out in *Re Gorman (a
bankrupt), ex p the trustee of the bankrupt v The bankrupt* [1990] 1 All ER 717 at 726,
[1990] 1 WLR 616 at 626, which incidentally was a case of joint tenants:

> 'That practice is not, of course, a rule of law to be applied in all circumstances,
> irrespective of, on the one hand, the amount of the mortgage debt and e
> instalments paid and, on the other hand, the value of the property and the
> amount of the occupation rent that ought fairly to be charged. It is a rule of
> convenience, and more readily applies between husband and wife, or
> cohabitees, than between a spouse and the trustee in bankruptcy of the other
> co-owner.'

f

In my judgment if the trustee in bankruptcy insists upon the strict accounts being
taken, then he is entitled to do so, unless it can be seen in advance that the amounts
are likely to be so similar that the taking of the two accounts would be a waste of
time, and the costs would outweigh any possible advantages to be gained thereby.
In such a case the court might well impose its own solution of directing the interest
element in the mortgage instalments to be set off against the use and occupation g
without any further inquiry.

In some cases the court may be able to infer an agreement between the parties
that that procedure should be adopted, but in the present case where there are
divorce proceedings and applications for ancillary relief still pending there is no
evidence to justify any inference of that kind. h

Accordingly, in my judgment, it is not correct to describe either party as having
the right to elect to set off. I have not the material to judge whether the inquiries
would or would not be a waste of time. I propose to order all necessary accounts
and inquiries and leave it to the parties to proceed with them if so advised.

j

Order accordingly.

Jacqueline Metcalfe Barrister.

End of Volume 3

Neutral Citation Number: [2021] EWHC 426 (Ch)

Case No: PT-2019-000423

IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 12th March 2021

Before:

DEPUTY MASTER HANSEN

- -

Between:

CHRISTOPHER ALAN ROWLAND **Claimant**

- and -

SHARON MARGARET BLADES **Defendant**

- -

MR PAUL DIPRÉ (instructed on Direct Access) for the **Claimant**

MR THOMAS ROE QC AND MR SIMON LILLINGTON (instructed on Direct Access) for the **Defendant**

Hearing date: 8-12 February 2021

- -

JUDGMENT

1. This is my judgment on the trial of a claim under CPR Part 8 issued on 27 May 2019 for declaratory relief as to the beneficial interests in a large country house known as Tadmarton House, Lower Tadmarton, near Banbury in Oxfordshire ("the Property").

2. On 31 March 2009 the Claimant ("Dr Rowland") and the Defendant ("Ms Blades"), then an unmarried couple in their 50s, caused the Property to be conveyed into their joint names with no declaration of trust. They used it as a holiday and weekend home. The price was £1,550,000. Dr Rowland paid the whole of the purchase price and all the other costs associated with the acquisition. Not long afterwards, the relationship began to break down when Dr Rowland formed a liaison with another woman ("the new partner").

3. Dr Rowland contends that he and Ms Blades acquired the Property on the basis that it was to be entirely his in equity, or alternatively, that the property later became entirely, or mostly, his in equity. Although the relationship broke down in the latter part of 2009, there were times thereafter when the parties' relationship was partially rekindled and there were occasions when they both spent time at the Property together, but primarily it was Ms Blades who continued to use the Property from late 2009 until 2018. On that basis Dr Rowland also claims an occupation rent from Ms Blades. Ms Blades maintains that the parties intended to create and to maintain a beneficial joint tenancy and that there is no basis for the imposition of an occupation rent.

<u>The Factual Background</u>

4. In setting out the factual background, I propose, at this stage, to recite the facts that are either uncontroversial or are incontrovertible in the light of the contemporaneous documents. That said, there is, as one might expect, a significant dispute as to what was said by the parties to one another, and indeed to the conveyancing solicitors, in the run-up to the purchase about the ownership of the Property and thus a stark conflict as to the central issue of common intention and/or

the inferences that should be drawn as to what the parties' common intention was. I shall of course have to resolve that conflict and make appropriate findings of fact, but for the moment I propose to set out the facts in a neutral way, particular as the documents (to a large extent) speak for themselves.

5. Dr Rowland and Ms Blades began their relationship in 2006. At the time Dr Rowland was separated, with one daughter, Hanna. Ms Blades was divorced with no children. Dr Rowland was in his 50s, having been born on 13.3.55. Ms Blades was in her late 40s having been born on 10.6.57. Both had properties of their own. Dr Rowland had a flat in West London ("the Flat") and Ms Blades owned a property in Wooburn Green ("Wooburn Green") in Buckinghamshire. Both maintained separate bank accounts and they never pooled their resources.

6. Both Dr Rowland and Ms Blades are intelligent, professional people. Dr Rowland has a PhD in economics and was working at the material time as a financial analyst. Ms Blades has worked for many years at a senior level in the semiconductor industry.

7. Dr Rowland was a wealthy man at the material time. In the tax year 08/09, his earnings from employment were £1,176,255. In the subsequent tax year 09/10 he earned £757,660. His earnings for previous tax years were lower but still significant: £428,383 (05/06), £232,377 (06/07) and £360,160 (07/08).

8. The parties agree that in the latter part of 2008 they decided to buy a house in the country "*at which to go and stay to enjoy their free time*". The property that they eventually resolved to buy was a 3-storey country house with 9 bedrooms and a considerable amount of land. It was described in the estate agents' particulars as "*a distinguished, fully restored Grade II listed Italianate villa*" with 24 acres.

9. On 26.2.09, Dr Rowland and Ms Blades completed a Form of Authority, which they both signed, in which they instructed Bower & Bailey ("B & B"), solicitors, to act

for them in the purchase of the Property. On the same date, they completed and signed a number of forms which had been sent to them by B & B.

10. The first form was a Buyers Questionnaire. One of the questions was, "*Is this an Investment Purchase or are you going to live in the property*?" to which the available answers on the form were "*This is an investment purchase*" and "*I will be living at the property*". The box which said "*I will be living at the property*" was marked with an "x"**.**

11. The second form was a document entitled "*Joint Ownership of Property*". Under that heading the clients were identified as "*Dr Chris Rowland and Ms Sharon Blades*". The document explained that:

> *"If you are proposing to purchase a property in two or more names then it is important that you understand the different types of joint ownership available".*

12. The document then purported to explain joint tenancy and tenancy in common. Under the heading, "*Joint Tenants*", the document explained that:

> *"If you hold the property as JOINT TENANTS you are each entitled to share equally in the net proceeds of sale (being the proceeds of sale less repayment of any mortgages, agents and legal fees etc.). If one of you dies then the survivor will automatically become the owner of the whole of the property. This is regardless of whether the deceased owner has or has not made a will.*"

13. Under the heading "*Tenants In Common*", the document explained that:

> *"If the property is held as TENANTS IN COMMON then it is possible for you to define each owners exact share of the net proceeds of sale (as referred to above). For example, unless you contributed equally to the purchase monies … the person paying or contributing the largest share of the purchase monies may wish to ensure that when the property is sold they are entitled to*

receive a larger share of the monies remaining (after repayment of the mortgage, etc) than the other joint owner. If you do wish to own the net proceeds of sale in the property in unequal shares then this will need to be recorded in a separate document known as a Declaration of Trust."

14. The document concluded by stating:

"Please consider the above quite carefully and then indicate your choice of joint ownership by circling the appropriate paragraph below. If you wish to own the property in accordance with paragraph C then please telephone us to discuss your requirements in more so that we can draft the appropriate Declaration of Trust (as referred to above) for you."

15. The available options at the bottom of the form were:

A. Joint Tenants

B. Tenants in Common in Equal Shares

C. Tenants in Common in Unequal Shares.

16. Option A was circled and the document was signed by both parties and dated 26.2.09.

17. In an email dated 27.2.09 Dr Rowland explained to Mr Palmer, the conveyancing solicitor at B & B, that:

"... our intention is to purchase Tadmarton House as Joint Tenants and will forward the signed joint ownership form by post".

18. On 28.2.09 Dr Rowland sent back the signed joint ownership form by post to Mr Palmer of B & B and B & B then began the conveyancing process.

19. On 23 March 2019 Dr Rowland emailed Mr Palmer, copied to Ms Blades to say that:

> *"We've now moved enough funds to cover a 10% deposit (surprisingly, money had moved into the liquid account quicker than we had realised). It's coming from a Halifax account in my sole name."*

20. It is common ground that the vendors were in a rush to exchange and complete and were insisting on exchange on 23.3.09 and completion on 31.3.09. A meeting at B & B's offices was scheduled for 23.3.09. The parties were running late. It is common ground that the meeting began at about 6pm and lasted about 1¼ hours. It is also common ground that the vast majority of the time (c. 80%) was devoted to discussing matters of title, boundaries, building control and the like.

21. Mr Palmer made an attendance note of this meeting, the material part of which reads as follows:

> *"SP [i.e. Mr Palmer] discussing joint ownership. Clients had confirmed in initial instructions they wish to own as joint tenants. SP re-explaining difference between joint tenants and tenants in common. Discussion about merits of a declaration of trust. Both clients confirming that they were happy to proceed as joint tenants and do not require decl of trust. SP asking them to give further consideration. Clients agreeing to own as joint tenants but if there was a change of mind they would let SP know before completion.*
>
> *Sharon Blades needs a will. SP to ask Brit to get in contact."*

22. I shall of course return to what was discussed at this meeting because there is an important conflict of evidence. Dr Rowland said he mentioned his daughter, Hanna, and made it clear that the common intention was for the Property to be owned ultimately by his daughter but for Ms Blades to have a right to live in it if Dr Rowland predeceased Ms Blades. Both Ms Blades and Mr Palmer firmly deny that there was any such discussion. Returning, for the moment, to uncontroversial matters, it is common ground that the attendance note records the fact that mention was made of the fact that *"Sharon Blades needs a will"* and it is apparent from the

conveyancing file that Mr Palmer asked his colleague Brit to get in touch with Ms Blades about a will on 24.3.09. However, there is no evidence that the making of a will was ever progressed and no evidence that Dr Rowland raised the issue until after the relationship had broken down. Despite the importance that Dr Rowland attached to this entry in the attendance note, there was no evidence given about wills, neither party produced a will in disclosure, no request was made for disclosure and despite my suggestion that I might find it helpful to see any wills that were made, neither party produced any will.

23. Following the meeting at B & B's offices, contracts were exchanged by telephone by the solicitors on 23.3.09 at 7.30pm. The agreed purchase price was £1,550,000.

24. In a letter dated 24.3.09 Mr Palmer confirmed that contracts had been exchanged with completion scheduled for 31.3.09. Mr Palmer recorded in this letter that:

> *"We also had an opportunity at our meeting to discuss your joint ownership of the property. I note that it is almost certainly the case that you would like to own the property as joint tenants. However, you are considering the issue and if you have any change of plans in this regard, then you will let me know prior to completion".*

25. It is a matter of record (and neither party suggests otherwise) that neither party contacted Mr Palmer to let him know of any change of plan.

26. On 26 March 2006 Mr Palmer wrote to Dr Rowland and Ms Blades enclosing a copy of a draft TR1 transfer deed, asking them to sign and initial it in various places in the presence of a witness but not otherwise to alter it. The draft TR1 provided for a transfer into the joint names of Christopher Alan Rowland and Sharon Margaret Blades.

27. Precisely to try and preclude arguments of the kind that have occupied the Court in this case for 5 days, the Land Registry's (then) standard form of TR1 contained a

panel, panel 10, which is designed to eliminate the opportunity for property buyers to argue about the equitable ownership of property that they own jointly at law. Where there is more than one transferee, the form requires the transferees to choose between three options:

> *"Declaration of trust. The transferee is more than one person and*
>
> □ *they are to hold the property on trust for themselves as joint tenants*
>
> □ *they are to hold the property on trust for themselves as tenants in common in equal shares*
>
> □ *they are to hold the property on trust".*
>
> [The marginal note adjacent to this last option says: "*Complete as necessary*"].

28. None of these boxes was ticked on the draft sent to the parties by B & B and they were not asked to tick any of them and did not tick any of them. The parties duly executed the draft, with none of the boxes ticked, and dropped off the signed and witnessed Transfer at B & B's offices in advance of the date scheduled for completion.

29. Completion took place on 31.3.09. It is common ground that all of the purchase money came from Dr Rowland. There was no mortgage. The total including tax and expenses was £1,618,311. Dr Rowland says, and Ms Blades accepts, that the money derived from his earnings.

30. On the day of completion, Dr Rowland emailed Mark Roberts, his long-time financial advisor. Dr Rowland explained that he was hoping that completion would take place that day and continued as follows:

> *"But [I am] worried that potential inheritance liability is being compounded by Sharon and I buying the property as joint owners, with the view to passing the new house (or a large part of the value of the new house) to*

> *Hanna if we both die. Is my understanding right that this would trigger an inheritance liability between Sharon and me if either of us die (on half the value of the house), then a second inheritance tax liability when the second of us dies and passes the house to Hanna? If my understanding is right, I guess we should reconsider how to pass the house to Hanna in a way that two inheritance tax bills are not triggered. This is in addition to the need to put in place a policy to cover part of the overall inheritance tax liability that might arise on my death."*

31. Mr Roberts replied on 1.4.09 to the effect that Dr Rowland was correct. He went on as follows:

> *"However as I said to you before, the basis of ownership ie. joint tenancy can be severed and a new tenants-in-common arrangement can be set up (and it doesn't have to be a 50/50 split)."*

32. Mr Roberts discussed the possibility of Dr Rowland and Ms Blades each taking out an insurance policy on the other's life, to cover the inheritance tax liability that would arise on the death of either of them as a result of their joint ownership of the Property. He continued:

> *"The second IHT liability would be halved if we did a 50/50 tenants in common arrangement, and Hannah would end up owning half the house. You need to ensure that Sharon has a right to continue living there".*

33. Dr Rowland took out insurance on the Property, under which he was the named insured. The Property was insured as a "Holiday Home".

34. On 14.4.09 B & B applied to register the parties as the new registered proprietors of the Property. On 15.4.09 the Land Registry wrote back to B & B declining to accept the application, in part because panel 10 on the TR1 had not been completed.

35. On 17.4.09 Mr Palmer of B & B resubmitted the application to register the transfer.

He explained that:

> *"We have now amended the application as requested [and] ... We have also completed panel 10 of the transfer as requested".*

36. It is common ground that the completion of panel 10 of the TR1 consisted of Mr Palmer (or someone else at B & B) taking the already-executed TR1 and inserting a cross in panel 10 next to the words "*they are to hold the property on trust for themselves as joint tenants*" and that B & B did not refer back to either Dr Rowland or Ms Blades about this before doing so.

37. Registration was completed on 21.4.09 and Mr Palmer wrote to tell the parties about this on 27.4.09, saying "*The property has been registered within your joint ownership*".

38. When it emerged, in the course of this litigation, that B & B had completed panel 10 without express instructions to do so from either party, Ms Blades wrote to complain about this, as did Dr Rowland. In their response to Ms Blades, dated 17.1.20, B & B explained why they had not reverted to Dr Rowland and Ms Blades before altering the executed deed as follows:

> *"It is denied that there was any duty upon this Firm to 'check' your instructions before completing panel 10 on the TR1. It is clear from the chronology of events ... that this Firm gave clear advice and took your and Mr Rowland's instruction prior to exchange of contract and prior to completion regarding how you both wanted to hold the Property. Stuart Palmer had received your instructions regarding holding the property as joint tenants and therefore had no need or duty to confirm the same yet again before completing panel 10 of the TR1 and re-sending the same to the Land Registry."*

39. As I have already indicated, the relationship between Dr Rowland and Ms Blades ran into problems relatively soon after completion. Dr Rowland formed a relationship with the new partner, and Ms Blades discovered this in or about November 2009. Dr Rowland then continued to see both Ms Blades and the new

partner for more than a year but in the early part of 2011, Ms Blades dropped in unexpectedly at the Flat and found him in bed with the new partner. There was an altercation that resulted in Ms Blades accepting a police caution for assaulting the new partner and Dr Rowland accepting a restraining order preventing contact with either woman for 4 weeks.

40. Ms Blades was clearly very upset by the incident and the break-up of the relationship generally and was being prescribed anti-depressants by her GP even before the altercation. However, it would appear that the couple retained some hope of a rapprochement for some time after November 2009 because they engaged in couples therapy for a number of months in 2010. It would appear that any hopes in this regard ended after the incident in 2011 although even after that date the parties occasionally saw each other. Ms Blades saw a psychotherapist regularly during the course of 2012 in an effort to come to terms with the break-up of the relationship.

41. The contact between the parties was much less frequent and more strained after Ms Blades found out about Dr Rowland's relationship with the new partner in November 2009. However, they remained in contact by email and because both sides (particularly Dr Rowland) placed significant reliance on the course of dealing after the breakdown of the relationship, I need to set out those parts of the course of dealing, almost exclusively emails, which are particularly relied on. In doing so, again I propose to do so neutrally at this stage although I will of course have more to say as to what light, if any, they shed on the common intention, whether at the time of acquisition, or subsequently, particularly as Dr Rowland's alternative case, if I find that the common intention at the outset was to share the Property beneficially, is that those shares became unequal as a result of a post-acquisition constructive trust. The post-breakdown course of dealing is also relevant to Dr Rowland's claim for an occupation rent.

42. On 28.3.10 Stephen Blades, Ms Blades' brother, contacted her to ask if he and his partner could stay at the Property for a couple of days. Ms Blades told Dr Rowland

of this request and said: "*What do you think, it's fine by me, but obviously you need to decide too*".

43. On 26.7.10 Ms Blades wrote a lengthy email to Dr Rowland, which she prefaced with the observation "*Yes I am drunk*", and concluded as follows:

> *"It would be good to meet sometime this week and you can tell me where you are with "her" and me (or not). If we are done then please think in advance about what we will do with TH [i.e. the Property]. I love it up there but if you are going to be with "her" then I do not want "her" up there and will not want you to be up there when I am, if you are going to be going back to her, after you have been at our house!"*

44. On 30.7.10 Ms Blades emailed Dr Rowland suggesting that they should keep in touch once a week by email and continued as follows:

> *"We can then discuss who goes to TH and who doesn't the following weekend?*
>
> *So on the TH weekends:-*
>
> *I'll go this weekend You*
>
> *can go next weekend?*
>
> *Will you want to use TH the bank holiday weekend, that's the weekend of August 28th? …*
>
> *We can discuss the other August weekends on our weekly communication email?*
>
> *Chris, PLEASE, PLEASE do not let "her" into TH".*

45. Dr Rowland replied the following day, agreeing to keep in touch weekly. As regards the Property, he wrote:

"On TH, yes I'll plan on being up there next week-end but no thought at all about the Bank Holiday long week-end. I promised you I wouldn't let [the new partner] in - the place is yours - and I won't let her in."

46. On 10.8.10 Ms Blades wrote:

"I need to start a new life without you and in fact I want to start a new life altogether and I think I would like to move into TH and build a new life up there! There is nothing left for me down this part of the country, for my job and I can commute!

If you want to sell TH, fine, I will still probably move away from WG and start again somewhere else, just let me know what is best for you and 'her' none of this seems to be about me and what is best for me anymore, it's predominantly about you and to a lesser degree 'her'."

47. On 19.8.10 Ms Blades wrote:

"We do need to talk sometime about what we do/how we use TH! I'd like to keep it/use it but if [the new partner] doesn't want that, then let me know and we can sell it and I will walk away! I'd rather you sell it and have nothing, than have the risk of 'her' going up there! It was 'our' place and if nothing else I'd like to keep that memory even if I don't physically have it/or am able to be there anymore! You two now have a nice house in the south of France so I'm not sure how much use you (on your own) will get out of TH anymore?

I'm certainly assuming that you do not/cannot go to TH this weekend as if you are in the country, [the new partner] will not be happy about you being away from her and she is not able to go to TH. To be honest I can't see you being able to go up there very often as I simply cannot accept her going to 'our' house under any circumstances and I'm sure she will not let you be up there on your own, just in case I might be there and also I assume she will want to be with [you] every minute that she can (lucky girl, if she can manipulate that situation happening)…"

48. On 6.9.10 Ms Blades wrote:

> *"Can you let me know if you have any plans to go to TH, this weekend! Please bear in mind that I STILL do not want 'that woman' at our house EVER!*
>
> *Even when I have gotten my head to a place that I do not care anymore that you still are with her, I don't ever want her up there.*
>
> *You haven't been to TH for some time so it is 'your turn' but please do let me know either way so that I can make my own plans around whatever you are doing."*

49. On 12.10.10 Ms Blades commented, in an email to Dr Rowland, that if the Russian plane she was about to travel on fell out of the sky, "*the inheritance tax on TH and my death duties will probably wipe out my 'estate'*."

50. On 13.12.10 Ms Blades mentioned, in an email to her sister Jennifer, that things with Dr Rowland were "*up in the air*". She went on:

> *"He often talks about TH and that we should have dogs up there when we retire up there …"*

51. The email correspondence suggests that Dr Rowland Ms Blades spent Christmas together at the Property.

52. In a long undated letter, but sent in or about February 2011, Ms Blades wrote to Dr Rowland as follows:

> *"You had given me hope of a longer term relationship. Clearly I misinterpreted your actions. I clearly misunderstood the buying of TH.*
>
> *I read too much into the things you were saying to me?*
>
> - *'I'm so looking forward to growing old together'*
> - *'When we retire up here…'*
> - *'Lets sell WG [Wooburn Green] and buy more fields…'*
>
> *Tadmarton House*

> *I so love TH and loved sharing it with you. […].*
>
> *When we first bought it I thought it would be our home …*
>
> *I always wanted a house in the country and I want to thank you for helping me fulfil that dream but I now see how worthless it is without having someone (you) to share it with!*
>
> *In time I hope I can see it again as my home and a sanctuary from the hurt and the busy, work consuming life. If not then I will continue to 'furnish' the top floor and maybe we should rent it out as a holiday home and get some income from it?"*

53. On 18.3.11 Ms Blades wrote to Dr Rowland as follows:

> *"I am planning to be at TH as often as I can. If however you (without [the new partner]), Hanna or your friends want to go there anytime, please do let me know as I have several weekends planned with friends and family over the coming weeks, although on my own this weekend to reflect on the last stupid 4 weeks and to catch up on some much needed work projects. … BUT TH is your house too so if you want to/need to use it, (without [the new partner]) then do let me know and I will re-arrange things to suit your plans, where I can. I have no plans to go there with any new partners."*

54. On 13.4.11 Ms Blades emailed again, saying:

> *"As you are not acknowledging or replying to my letters, text messages or emails, I have to assume that you want nothing to do with me and have completely 'moved on' from me ….*
>
> *I'll assume that you will never be going to TH again so I will be there as often as possible …*
>
> *In time I guess we will have to decide if/when we get shot of the place".*

55. On 30.4.11, in an email which is heavily relied on by Dr Rowland, Ms Blades wrote:

> *"If you have decided to never come to TH again, it doesn't seem right for you to be paying all of the bills! I wish I had the funds to be able to take on all of the bills for TH but regrettably I cannot! So I was thinking that*

perhaps I should pay all the day to day utility type bills and you pay the more structural bills and bills that maintain the property in its current form. (At the end of the day, TH is an investment for you and Hanna)".

56. On 2.5.11 May 2011 Ms Blades wrote to Dr Rowland with a proposal: "*if you are planning to never come to, or use TH again … I (we) rent it out for short term corporate lets*." Her message concluded: "*So please do one day, let me know your thoughts on the above. I'm keen to move ahead with this plan but TH belongs to both of us*".

57. On 1.6.11 Dr Rowland replied by email to the long, undated letter from Ms Blades referred to above. He did not contradict Ms Blades' account of what he had said about retirement to the Property. And he wrote:

> *"As far as TH is concerned, I've no intention of trying 'to take it away from you' – it's at least as much yours as mine. And I would like to spend some time up there – I still have an invitation to honour to Joanne and Adrien (and I'll never take [the new partner] there). More importantly, I'd just like to be in the place for a few days (but I won't turn up without pre-arranging with you …*
>
> *Not sure I'm enthusiastic about your renting out plans. Have wondered if you want to move in fully…"*

58. On 27.11.11 Ms Blades recorded in an email an informal agreement that Dr Rowland would pay "*the majority of the bills that were considered to be 'structural/safety' type of bills*". Dr Rowland replied on 28.11.11: "*Yes, of course I'd be happy to contribute or pay to these bills – as agreed*".

59. After 2011 the email correspondence thins out and for 2012 and 2013 is mostly concerned with bills.

60. On 6.1.14 Ms Blades emailed Dr Rowland and observed that: "*Running TH is a continually challenging job, I love being here but it is not an easy task by any means*!" "*I wish*", she wrote, "*I had sufficient funds to buy TH from you …*"

61. On 7.2.14 Dr Rowland emailed Ms Blades as follows:

> *"I'm also trying to do a bit of financial planning with Mark (Roberts), notably on inheritance tax. My recollection of our agreement is that TH should be available for whoever survives the other, but TH should ultimately pass to Hanna. But also that that arrangement should be after any inheritance incurred on the way - ie so that you can pass the rest of your estate on to whomever you want without a chunky inheritance tax bill because of TH. Not sure how all that gets implemented, but maybe there needs to be a life assurance policy on your life to cover inheritance tax on TH, which I should fund. Also, all sorts of will-writing issues that will need to be addressed - I haven't but not certain if you ever did?"*

62. Ms Blades replied, on 13.2.14 as follows:

> *"Yes we do need to sort out TH and inheritance tax etc. Now that Eva [Ms Blades' niece] is around I want to be able to leave her a good legacy and provide for her too. By the time she is 25 years old I will probably be long gone. I do have a will but TH is not even mentioned. Also we need to bear in mind that I have spent many many thousands of pounds on TH and hopefully contributed to its increase in value, so perhaps that needs to be in the equation somewhere too!"*

63. Dr Rowland returned to the subject of their February 2014 correspondence on 26.4.14 when he wrote as follows:

> *"I'm also trying to tidy up my financial affairs etc such that life would be relatively straightforward for Hanna if I fell under a bus. That made me realise that we sort of had an agreement about Tadmarton House, but … that agreement probably needs some details filled in. One aspect I was talking about with Mark (Roberts) was the idea that you should have access to it passed my death, but that it would be left to Hanna. I'm aware that the legacy to Hanna shouldn't create an inheritance tax burden on your estate, so the legacy to Hanna should be after inheritance tax on Tadmarton House is satisfied. One solution to that might be to put in place some insurance policy that pays out to cover the inheritance tax on Tadmarton House in that circumstance, which I'd pay for"*.

64. Ms Blades, in her reply on 2.5.11 did not directly address whether she agreed that they had "*sort of had an agreement*". However, she suggested, that: *"on our deaths why don't we just get TH sold to take care of inheritance tax/death duties*?"

65. On 1.6.14 June 2014 Dr Rowland asked whether Ms Blades had ever made a will leaving the Property to Hanna, commenting: "*as I recall, TH will pass to the other one of us on the first death*."

66. On 25.9.14 Ms Blades wrote to Dr Rowland, saying:

> *"Don't forget to let me know if you want to come up to TH sometime."*

67. On 28.9.14 Dr Rowland wrote:

> *"I would love to pay a visit to TH. However, as I guess I'm not flavour of the month, I'll leave it for you to let me know some good dates when you're not entertaining, etc."*

68. There was no reply to this email.

69. During 2015 there was a brief rapprochement in the relationship, the parties apparently meeting at the Property in the summer of that year. It appears that any rapprochement with Ms Blades was very short-lived. Later that year, in or about October 2015, Dr Rowland said he stopped seeing the new partner.

70. On 27.1.17 Dr Rowland asked to meet Ms Blades "*to chat about your thoughts on Tadmarton – I know it's tough to keep on top of the place and wondered if made sense to think about selling it?*".

71. On 12.2.17 Ms Blades saying that she did not want to have any such discussions.

She said:

> *"Tadmarton has become my home and I spend as much time as I can there … My plan has been to retire to TH (like you and I had discussed when we originally bought TH!). […].*
>
> *You chose to walk away from Tadmarton and I have been living there, looking after it and caring for it ever since. Are you really going to try and take TH away from me too?*

72. On 3.3.17 Dr Rowland asked whether Ms Blades had made a will leaving the Property to Hanna "*in line with the original intention given that I paid 100% of the purchase price*".

73. Ms Blades replied on 12.3.17 to the effect that she had not and said this:

> *"My understanding is as follows:*
>
> 1. *The property is in joint equal names and as such is half mine*
> 2. *If I die before you, the jointly owned property will become yours and you will be liable for inheritance tax on my half, as it goes to you.*
> 3. *If you die before me, the jointly owned property will become mine and I will be liable for the inheritance tax on your half, as it comes to me".*

74. There then ensued a course of email correspondence containing proposals of various kinds or indications of what either party might countenance by way of settlement. None of this was marked "without prejudice", it was in the trial bundle and no one objected to my looking at it. It is not clear whether at this time either party had sought further formal, legal advice – it would appear not - but it seems to me that this later material is of very limited evidential value in ascertaining the common intention at an earlier (and happier) time, particularly as these "offers" were invariably prefaced with some kind of assertion of what the party considered to be their strict legal rights.

75. What is clear is that later in 2017 Dr Rowland did obtain further, formal legal advice. As he explained in an email dated 22.11.17 his legal advisers "*suggested we should put in place a Declaration of Trust to confirm the financial side of Tadmarton*", and he copied a draft of what he proposed to Ms Blades. It contained the following recitals:

> *"**WHEREAS**:*
>
> *A. By a transfer dated 31st March 2009 ... the Property ... was transferred to Christopher and Sharon to be held by them on the basis that the survivor of them could give a good receipt for capital monies being beneficial joint tenants*
>
> *B. Christopher and Sharon have agreed that their joint tenancy of the property should be severed and from the date of this declaration their interest in the property and its proceeds of sale and their income from it shall be held as mentioned below."*

76. The draft then went on to effect a declaration of trust in unequal shares, under which Dr Rowland would be entitled to the first £1,618,311 of the net proceeds of any sale and any balance over this would be shared in proportion to the parties' respective contributions to the Property's "*improvement/repair/decoration etc*"

77. Ms Blades did not agree to sign the declaration of trust. On 24.12.17, having taken legal advice, she said this:

> *"The position, I am advised, is very straightforward – we are joint beneficial owners as appears by the TR1 which incorporates a declaration of trust in box 10. The TR1 is a deed and was executed by us both and accords with our agreement, reached after the appropriate legal advice and explanations, to hold the property as joint tenants as is evidenced by various documents in the conveyancing file.*
>
> *Consequently upon any sale we are entitled to share the net sale proceeds (after costs of sale) equally".*

78. In October 2018 there was a mediation which did not resolve the dispute but did lead to agreement as to how the use and expenses of the Property should henceforth be shared, the agreement being that each party would have alternate use of the property for blocks of 2 weeks from the beginning of November 2018. The end of October 2018 therefore marks the end-point of any claim for occupation rent, if any is payable. These proceedings were issued on 27.5.19.

The Issues

79. At §12 of his Particulars of Claim Dr Rowland contends that:

> *"… at the time of the purchase there was a common understanding between the Claimant and the Defendant that the Property was beneficially the Claimant's, that the Property in the event of the death of the Claimant was to devolve wholly to his daughter Hanna Rowland with the Defendant to retain the right to live at and/or make use of the Property for the duration of her life".*

80. Alternatively, Dr Rowland contends (at §16 of his Particulars of Claim), that:

> *"the separation of Dr Rowland from Ms Blades brought the shared recreational/free-time purpose of the trust of the Property to an end, and the respective beneficial interests of the parties fall to be determined by reference to their actual contributions to the ongoing costs of the repair and upkeep of the Property."*

81. Dr Rowland further contends (at §17) that "*Ms Blades from September 2009 vetoed the use of the property by Dr Rowland in the company of his new partner*" and (at 9) that "*by reason of the exclusive use by her of the Property ... the Claimant is entitled to an occupational rent for the period from September 2009 to end of October 2018*".

82. Dr Rowland further contends (at §18) that he paid a total of £208,602, being the costs of structural work, council tax, insurance, gardening and energy costs, "*as an unmatched contribution*" and it is said that:

> *"this fact compels the inference that the common intention of Dr Rowland and Defendant was that Dr Rowland was the sole beneficial owner but if Dr Rowland and Defendant were 50% joint beneficial owners then this fact alters the beneficial ownership and imputes an increase of the proportion of the beneficial interest due to Dr Rowland as a result of his additional contributions being greater than 50% falls to be made by the court [sic]. In these circumstances the increase in actual proportion of his beneficial interest is at least 10% and makes a total of 60% at least."*

83. At §(3) of the prayer for relief Dr Rowland quantifies his claim for an occupation rent in the sum of £371,000. As to that claim there is a report dated 20 November 2020 prepared by a single joint expert, Edward Briggs, who offers his opinion on the likely rental value of the Property on various bases. That report is supplemented by an addendum dated 10 December 2020.

84. In the course of the trial, having heard the various ways in which he was putting the case for Dr Rowland, I raised with Mr Dipré the question of whether he was minded to apply to amend his claim to include a claim for proprietary estoppel. He reflected on the point and decided not to make any application to amend.

85. Ms Blades' case is that the Property is and always has been held by the parties on a beneficial joint tenancy, and that no occupation rent is due.

86. Against that background, the parties had agreed the issues as follows:

    (i) What are the parties' respective beneficial interests in Tadmarton House? ("Issue 1")

    (ii) Is there any occupational rent payable by Ms Blades and, if so, how much? ("Issue 2")

    (iii) Should the TR1 be rectified? ("Issue 3")

87. In fact, before me the parties agreed that Issue 3 is redundant. The Claim Form included a claim for rectification of the TR1 so as to show Box 10 unticked. However, the TR1 as executed by the parties did not have Box 10 ticked or checked and in those circumstances, whatever Mr Palmer may have thought his instructions permitted him to do, the parties have agreed, in my judgment correctly, that I should proceed on the basis that there is no declaration of trust and nothing to rectify.

<u>The Law</u>

88. At first blush, this is a classic dispute about the beneficial interests in a property conveyed into the joint names of an unmarried coupled but without an express declaration of trust. That was certainly how the case was presented in the pleadings and Skeleton Arguments. On that basis, the applicable law is to be found in *Stack v Dowden* [2007] 2 AC 432 and *Jones v Kernott* [2012] 1 AC 776. The principles to be taken from those two cases can be summarised as follows:

(i) The starting point is that equity follows the law and thus the parties are to be taken as joint-tenants in equity;

(ii) This is a presumption but it is not to be lightly dismissed because, according to *Jones v Kernott*, it is how both parties are likely to see their relationship developing and because evidence of an agreement as to any other share is likely to be misremembered and tainted by ill-will: at §51 per Lord Walker and Baroness Hale;

(iii) The conclusion that equity follows the law can, however, be displaced by showing that the parties had a different common intention when the property was first acquired or that they formed a different common intention at a later date, providing of course there is detrimental reliance.

(iv) This displacing common intention may be express or inferred ("*deduced objectively from their conduct*"): *Jones v Kernott* at §51 per Lord Walker and Baroness Hale;

(v) The relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that person's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party: *Jones v Kernott* at §51(3);

(vi) Each case will turn on its own facts. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it;

(vii) Many more factors than financial contributions may be relevant to divining the parties' true intentions, including any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses.

(viii) The express or inferred common intention usually will also determine the size of the shares of the co-owners. The court should give effect to the intention thus discovered. If, however, there is no evidence to this effect, the court may impute an intention so as to ensure that the co-owners obtain that share which the court considers fair having regard to the whole course of dealing between them and the property.

89. There was no disagreement between Counsel about the applicable principles. However, I raised with both Counsel the question whether this was indeed a case which falls within the *Stack v. Dowden* paradigm. Baroness Hale identified the issue in *Stack v Dowden* in these terms at §40:

> *"My Lords, the issue before us is the effect of a conveyance into the joint names of a cohabiting couple, but without an explicit declaration of their respective beneficial interests, of a dwelling house which was to become their home".*

90. Later, at §58, she set out her conclusion as follows:

> *"For the reasons already stated, at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved".*

91. At §69, she emphasised the importance of context ("*context is everything*") and explained that the domestic context is very different from the commercial world. To similar effect, Lord Walker said this at §33:

> *33. In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law.*

92. The decision in *Stack v Dowden* marked a significant departure, indeed the decisive break, from the resulting trust approach that had invariably been employed where parties to a joint purchase had contributed in unequal shares.

93. The move away from the resulting trust approach, at least in the domestic consumer context, was cemented by the joint decision of Baroness Hale and Lord Walker in *Jones v Kernott* where they said this at §25:

> *25. The time has come to make it clear, in line with Stack v Dowden [2007] 2 AC 432 (see also Abbott v Abbott [2008] 1 FLR 1451), that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares. The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources.*

94. However, in referring back to Baroness Hale's judgment in *Stack v Dowden*, Baroness Hale and Lord Walker had earlier in their joint judgment clarified the fact that:

> *10. The conclusions in Baroness Hale's opinion were directed to the case of a house transferred into the joint names of a married or unmarried couple, where both are responsible for any mortgage, and where there is no express declaration of their beneficial interests.*

95. The present case is not on all fours with the typical domestic case. A number of features warrant particular mention. Firstly, although the parties were in a relationship at the time of acquisition, the Property was not bought as a family home in which they were to live together on a full time basis. It was a weekend retreat. Each of Dr Rowland and Ms Blades had their own, separate homes. Whilst they were still together as a couple, the parties spent time together at each other's properties and time together at the Property but they had independent, busy lives and their circumstances were not the typical domestic circumstances of a cohabiting couple buying a quasi-matrimonial home with the assistance of a mortgage. Secondly, Dr Rowland provided the whole of the not inconsiderable purchase price. There was no mortgage, let alone a joint mortgage. There was no financial contribution at all from Ms Blades to the acquisition of the Property. Thirdly, the parties never pooled resources in any shape or form and never had a joint bank account either before or after the date of acquisition.

96. In those circumstances, I raised the issue with Counsel whether I should take the presumption established by *Stack v Dowden* (and confirmed in *Jones v Kernott*) as my starting point. I also raised with them the possible significance in this context of the subsequent Privy Council case of *Marr v Collie* [2018] AC 631 where Lord Kerr said this:

> *53. If what Baroness Hale described as a "starting point" (that joint legal ownership should signify joint beneficial ownership) is to be regarded as a presumption, is it in conflict with the presumption of a resulting trust where the parties have contributed unequally to the purchase of property in their joint names? A simplistic answer to that question might be that, if the property is purchased in joint names by parties in a domestic relationship*

the presumption of joint beneficial ownership applies but if bought in a wholly non-domestic situation it does not. In the latter case, it might be said that the resulting trust presumption obtains.

54. The Board considers that, save perhaps where there is no evidence from which the parties' intentions can be identified, the answer is not to be provided by the triumph of one presumption over another. In this, as in so many areas of law, context counts for, if not everything, a lot. Context here is set by the parties' common intention—or by the lack of it. If it is the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the answer.

97. Mr Roe, Counsel for Ms Blades, reminded me that if I considered there to be a conflict between *Marr v Collie* and *Stack v Dowden*/*Jones v Kernott*, I should apply the latter two cases, being binding decisions of the House of Lords and Supreme Court. That is no doubt right as a matter of precedent (see e.g. *Willers v Joyce and another (No2)* [2018] AC 843) but in the event, whilst rightly emphasising the "*centrality of intention*" (see *Marr v Collie* at §56), both Counsel agreed that I should approach this case as if it is a domestic consumer case (and in many ways it is much more akin to a domestic case than a commercial case) and take as my starting point the presumption that equity follows the law. If that is the starting point, it will be presumed that the legal effect of a conveyance into joint names is that the parties are also beneficial joint tenants but it is open to the party asserting otherwise to prove (the burden being on him/her) that the beneficial interests are unequal and one party may in fact be no more than a nominee with the entire beneficial interest vested in the other: see e.g. *Abbey National Bank plc v Stringer* [2006] EWCA Civ 338. My search is to ascertain the parties' shared intentions, and I have, ultimately, reached firm conclusions which do not turn on where the burden lies, or the resolution of any clash of presumptions, but rather on my conclusions as to what was actually intended by the parties, to be deduced objectively from their words and their actions. If that can be discovered, as is the case here, then whatever I may think about the fairness of the ensuing result, it is not open to me to impose a

solution upon the parties in contradiction to those intentions, merely because I consider it fair to do so: *Jones v Kernott* at §46.

98. In *Stack v Dowden* Baroness Hale also had cause to consider issues relating to the liability, as between beneficiaries, to pay an occupation rent where one occupies trust property to the exclusion of another. At §93 she said this:

> ***93*** *There remains the question of the payment for Mr Stack's alternative accommodation. This matter is governed by the Trusts of Land and Appointment of Trustees Act 1996. Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation. Thus both these parties have a right of occupation. Section 13(1) gives the trustees the power to exclude or restrict that entitlement, but under section 13(2) this power must be exercised reasonably. The trustees also have power under section 13(3) to impose conditions upon the occupier. These include, under section 13(5), paying any outgoings or expenses in respect of the land and under section 13(6) paying compensation to a person whose right to occupy has been excluded or restricted. Under section 14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions. Under section 15(1), the matters to which the court must have regard in making its order include (a) the intentions of the person or person who created the trust, (b) the purposes for which the property subject to the trust is held, (c) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home, and (d) the interests of any secured creditor of any beneficiary. Under section 15(2), in a case such as this, the court must also have regard to the circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property.*

99. Sections 12-15 of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") provide as follows:

> ***12 The right to occupy***
>
> *(1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time—*

(a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or

(b) the land is held by the trustees so as to be so available.

(2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.

(3) This section is subject to section 13.

13 Exclusion and restriction of right to occupy

(1) Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.

(2) Trustees may not under subsection (1)—

(a) unreasonably exclude any beneficiary's entitlement to occupy land, or

(b) restrict any such entitlement to an unreasonable extent.

(3) The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.

(4) The matters to which trustees are to have regard in exercising the powers conferred by this section include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the land is held, and

(c) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(5) The conditions which may be imposed on a beneficiary under subsection (3) include, in particular, conditions requiring him— (a)

to pay any outgoings or expenses in respect of the land, or

(b) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.

(6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to—

(a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or

(b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.

(7) The powers conferred on trustees by this section may not be exercised—

(a) so as prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12) from continuing to occupy the land, or

(b) in a manner likely to result in any such person ceasing to occupy the land,

unless he consents or the court has given approval.

(8) The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c).

14 Applications for order

(1) Any person who is a trustee of land or has an interest in a property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order—

(a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

(b) declaring the nature or extent of a person's interest in property subject to the trust,

as the court thinks fit.

15 Matters relevant in determining applications

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d) the interests of any secured creditor of any beneficiary.

100. At §94 of *Stack v Dowden* Baroness Hale said: "*These statutory powers replaced the old doctrines of equitable accounting ... [and] the criteria laid down in the statute should be applied, rather than in the cases decided under the old law, although the results may often be the same*". On the facts and applying the considerations in TOLATA, Baroness Hale agreed with the Court of Appeal who had reversed the Judge at first instance.

101. However, both parties drew my attention to *Davis v Jackson* [2017] 1 WLR 4005 in which Snowden J said this at §§43-48:

43 On one view, the statements by Baroness Hale and Lord Neuberger in Stack's case might be taken to have decided that TOLATA provides an exhaustive regime to determine whether a payment in respect of occupation of property by a co-owner is to be made in any case, and that the older principles developed in the case law on equitable accounting are no longer applicable in any circumstances.

44 That is not, however, the view that has been taken in subsequent cases.

45 In particular, in French v Barcham [2009] 1 WLR 1124, Blackburne J expressly rejected the argument, run by a spouse against a claim for an occupation rent by her husband's trustee in bankruptcy, that Stack's case had decided that TOLATA amounted to an exhaustive regime. After referring to Baroness Hale's speech, Blackburne J continued, at paras 19– 20:

> *"19. … But it is important to note that she referred to both parties having a right of occupation. It was in that context that she was addressing her remarks. I do not understand her to have been suggesting that in cases where one of the parties has no statutory right of occupation, the statutory provisions have the effect that that party can no longer claim an occupation rent in any circumstances whatever. Lord Neuberger of Abbotsbury, who was the only other member of the House in Stack's case to express any view on the question of compensation under section 13 referred, at para 150, to 'The court's power to order payment to a beneficiary, excluded from property he would otherwise be entitled to occupy, by the beneficiary who retains occupation' (emphasis added) as being governed by sections 12 to 15 of the 1996 Act. He was, in my view, careful to emphasise that the jurisdiction applies only where the beneficiary claiming the compensation has been excluded from the property that he would otherwise be entitled to occupy.*
>
> *"20. Finally, I do not accept Mr Learmonth's submission that it would make nonsense of the statutory regime contained in the 1996 Act if the regime were not exhaustive of the entitlement to compensation for exclusion from occupation. As worded the power to award compensation under section 13(6) is only exercisable as a condition to be imposed on the occupying beneficiary in relation to his occupation of the property in question. See section 13(3). It appears to look at the matter prospectively in the context of the occupying beneficiary's continued occupation. It is not difficult, especially if that view of section 13(6) is correct, to envisage cases of exclusion where both beneficiaries had a right of occupation yet where the statutory regime would not seem to be applicable. Where*

the scheme applies, it must be applied. But where it plainly does not I do not see why the party who is not in occupation of the land in question should be denied any compensation at all if recourse to the court's equitable jurisdiction would justly compensate him."

46 Some commentators have supported this approach, pointing out that there is nothing in the Preamble to TOLATA to suggest that it was intended entirely to abolish the principles of equitable accounting entirely in relation to the payment of occupation rent, and suggesting that it would be an undesirable result if it were taken to have done so: see e g Susan Bright, "Occupation Rents and the Trusts of Land and Appointment of Trustees Act 1996: From Property to Welfare?" [2009] Conv 378. I find those arguments persuasive.

47 I also note that neither Stack's case nor the Court of Appeal decision in Murphy v Gooch [2007] BPIR 1123 that followed it, were cases involving trustees in bankruptcy. In such cases, if sections 12–15 of TOLATA were held to be an exhaustive regime, it would have the surprising result in practice that neither a bankrupt nor the trustee in bankruptcy would ever be able to claim a credit or payment under section 13 in respect of the occupation by a co-owner of jointly-owned domestic property for the period after the appointment of the trustee in bankruptcy, because neither would be able to establish a statutory right to occupy under section 12. The bankrupt would no longer have any beneficial interest in the house so as to fall within section 12(1) because his interest would have vested in the trustee. And a claim by the trustee would inevitably be defeated by section 12(2) which provides that a beneficiary does not have a right to occupy land if it is "unsuitable for occupation by him". It is difficult to envisage any circumstance in which it would be "suitable" for a trustee in bankruptcy to take up occupation of a domestic house with the bankrupt and/or their cohabitee. When compared to the result in pre-TOLATA cases such as In re Gorman [1990] 1 WLR 616 and In re Pavlou [1993] 1 WLR 1046, this would undoubtedly have amounted to a major change in the law in a very obvious category of cases, which plainly neither Baroness Hale nor Lord Neuberger had in mind when they both commented that they thought that it would be a rare case in which application of the TOLATA regime would have any different result than under the old equitable principles.

48 I therefore do not accept that I am bound to apply the statutory regime under TOLATA to this case.

102. It seems to me that that discussion is very much directed to bankruptcy cases and should not cause me to take a different approach to this case than that provided for under TOLATA. In fact, as I understood their submissions, neither party suggested

that I should discard the statutory regime in favour of the general equitable principles or that the result would be any different if I did. However, Mr Dipré for the Claimant contended that in considering questions of ouster or exclusion or restriction, I could derive assistance from the old case-law, and in particular cases such as *Re Pavlou* [1993] 1 WLR 1046 where Millett J said this (at 1050):

> *I take the law to be to the following effect. First, a court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forceful exclusion therefore is far from conclusive. Secondly, where it is a matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded as excluded from the family home, so that an occupation rent should be paid by the co-owner who remains. But that is not a rule of law; that is merely a statement of the prima facie conclusion to be drawn from the facts. The true position is that if a tenant in common leaves the property voluntarily, but would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with an occupation rent which he or she never expected to pay.*

103. The principles were there discussed in the context of the matrimonial home and the breakdown of a marriage, but it seems to me that the same principles should apply where an association similar to a matrimonial association has broken down and one party is, for practical purposes, excluded from the jointly owned property.

104. Dr Rowland's pleaded claim in relation to what used to be called equitable accounting related only to the alleged liability of Ms Blades to pay an occupation rent. Insofar as the pleaded claim refers to Dr Rowland's expenditure on "structural work", that was in the context of the post-acquisition constructive trust (resulting in unequal interests) that Dr Rowland contended for in the alternative to his primary case that Ms Blades had no interest at all in the Property. There was no suggestion, and no expert evidence, that any such payments on the part of the Dr Rowland had increased the capital value of the Property entitling Dr Rowland to a credit.

Accordingly, insofar as such a claim was advanced in Dr Rowland's closing submissions, I find that Dr Rowland is not entitled to any credit on this account: see e.g. *Re Pavlou* at 1048G-1049B.

The Evidence

105. I heard live evidence from the following witnesses: Dr Rowland, Mark Roberts and Hanna Johnston, Dr Rowland's daughter, for the Claimant; Ms Blades, Stephen Blades, Jennifer Blades, Corrina Lyons and Karen Hall. In addition, Ms Blades called Stuart Palmer, the conveyancing solicitor at B & B, who was the subject of a witness summons.

106. I propose to set out the gist of the most important parts of the parties' evidence together with the important evidence of Mr Palmer. The other evidence was of limited assistance but where appropriate I shall refer to it.

107. Dr Rowland verified his witness statement dated 24.5.19 and was then crossexamined. He described getting together with Ms Blades in 2006. At the time he was separated from his wife but not yet divorced. His principal residence was a flat in London. He said that he and Ms Blades did not set up home together but spent a lot of time together as a couple either at his flat or her house. He also accepted that they had gone on exotic holidays together which he had paid for and that he had bought Ms Blades a diamond necklace. He admitted that he saw his relationship with Ms Blades as a serious and potentially long-term relationship. He said he was not the sort of person to have short-term flings. He was asked whether he agreed that he was clever, literate and educated. He said he had a good understanding of some facets of life, particularly economics, but was naïve about other areas. When he met Ms Blades, he was working as a financial analyst for Dresdner Kleinwort Wasserstein. Whilst his earnings fluctuated considerably, he was consistently earning substantial six-figure sums. He said that he and Ms Blades began discussing buying a country house towards the end of summer 2008. They looked at a number of properties and eventually alighted upon Tadmarton House. He said that there had been some discussion about Ms Blades selling her house at Wooburn Green but she was concerned about being reasonably close to her work

and also wanted to pay off her mortgage. He had the money available and funded the entire purchase price.

108. Dr Rowland was asked about the circle around the word “Joint Tenants” on the Joint Ownership of Property form and accepted that it was probably his handwriting. He was asked what the parties’ intentions were and he said that there was a very clear common understanding that the Property was part of the inheritance for his daughter, Hanna. He said he understood that there would need to be a mechanism to pass the Property to Hanna and thought that mechanism would be a will by Ms Blades. He said the Property had been bought as joint tenants purely to give Ms Blades the assurance that she could live there for the remainder of her life, in the event that Dr Rowland predeceased her. He said that Ms Blades promised to change her will to leave the Property to Hanna. He was asked about Mr Palmer’s attendance note and said that the meeting on 23.3.09 had been a rather rushed affair, principally concerned with boundaries and the like. Whilst he accepted that he had no reason to believe that the attendance note had been made up, he did not accept that the note was full and accurate. He said he clearly recalled that he and Ms Blades explained to Mr Palmer what their intentions were, viz. that Ms Blades should be able to live in the Property after Dr Rowland died but that the Property would go to Hanna thereafter and that Ms Blades was going to re-write her will to give effect to that intention. He was asked whether there any specific agreement to this effect with Ms Blades to which he replied: “*Yes. We spoke about it, discussed it and agreed it. I am clear. I cannot tell you the exact date*”. He said that Mr Palmer had not elaborated greatly on the difference between joint tenancy and tenancy in common at the meeting on 23.3.09 but had explained that joint tenancy was consistent with his wish that the Defendant should be able to live at the Property after his death. He said he understood the rule of survivorship and understood that the Property was as much owned by Ms Blades as by him but insisted that he had an assurance from Ms Blades that the Property would be left by to Hanna in her will. He was asked about the reference to a declaration of trust in the Joint Ownership of Property form and said that they did not need a declaration of trust because Ms Blades had committed to protecting Hanna by re-writing her will. It was put to him that the idea of Ms Blades re-writing her will only made

sense if she had an interest in the Property to dispose of. Dr Rowland's answer was: "*I understand your point now but at the time I did not understand that point*". He accepted that no one had contacted Mr Palmer after the meeting on 23.3.09 to notify him of any change of plan. He maintained that there was never any intention that Ms Blades should have any beneficial interest in the Property. The only right that she was ever intended to have was a right to use the Property for her lifetime. He was asked why the purchase of the Property was not funded with contributions from both parties and his reply was this: "*I had cash resources available to me. Any offer of funds from Ms Blades would only be possible if she sold her property and she did not want to do this because the property was closer to her work. She also expressed a desire that she wanted to get to the point where she had paid off her mortgage*".

109. He was asked about his relationship with the new partner. He said Ms Blades first found out about the relationship in November 2009 but matters came to a head in early 2011 when there was an altercation at his flat after Ms Blades found him in bed with the new partner. He said that following her discovery of the affair in November 2009, Ms Blades put restrictions on his use of the Property. He said he was prohibited from going to the Property with the new partner. He could go alone at times dictated by Ms Blades but Dr Rowland said that for much of the time with which we are concerned he was with the new partner and would have wanted to go to the Property with her. However, he feared "*a scene or something worse*" if he ignored Ms Blades' request and considered that he had to comply, albeit he considered the request unreasonable. Dr Rowland said he considered the restriction as applying to the new partner, the new partner's friends, and any other partner.

110. At the end of his evidence I asked Dr Rowland whether he had given any thought to what might happen to the Property if the relationship did not work out. His reply was: "*No, we were looking at things in a positive way. We did not discuss contingencies as to what might happen if the relationship did not work out*". However, he also reiterated his evidence to the effect that, whatever happened, the Property was to be bequeathed to Hanna.

111.Mark Roberts, Dr Rowland's financial adviser, then gave evidence. He said he was surprised that the Property had been conveyed into joint names. He was asked why he was surprised and he said it was because there had been no mention of a gift and yet Ms Blades had become a co-owner with no financial input. He said he knew about the proposed purchase before 31.3.09 and had expressed his surprise to Dr Rowland before that date. I interpose that, notwithstanding that, no change of intention was communicated to Mr Palmer.

112.Finally, I heard from Hanna Johnston, Dr Rowland's daughter. She said that her understanding of the transaction was that it was primarily an investment by her father. Her earliest discussions with her father on this subject, she said, had been at Glastonbury in the summer of 2009, i.e. after completion of the purchase. She maintained that in these conversations her father had said to her that the plan was for the house to be in both his and Sharon's names but they had an agreement that the Property would "fall" into her name once both he and Sharon died. She was asked whether she had had any contact with Ms Blades in 2008 or in the run-up to the purchase and she said she had not.

113.I then heard evidence from Ms Blades. Ms Blades verified her two witness statements dated 21.6.19 and 22.6.20. She was then cross-examined. It was put to her that she was embittered by the breakdown of the relationship and this had caused to give false evidence. She admitted that her life had been "*ripped apart*" by the breakdown but denied that she was bitter and insisted that she had always understood that she owned half the Property. She was asked about who paid for certain holidays that they took together and she accepted that she paid for a holiday to Norway. She accepted that Dr Rowland was generally careful and did not throw away his money.

114.She agreed that the parties had decided that they wanted to buy a house in the country in the latter part of 2008 and had seen a number of properties. She said they fell in love with the Property. She was asked what discussions the parties had had about the ownership of the Property and said that there were no actual discussions or specific conversations. She said: "*I thought it was agreed that we were joint owners*" but reiterated that there were no actual discussions. She said: "*I assumed* *his intention was the same as mine and that we were to be joint owners*". She was asked about the parties' discussions as to how they planned the purchase of the Property once they had decided to buy it. She said that they had initially discussed pooling resources with her selling her house. However, she said she still had a mortgage which she wished to pay off and was concerned about the distance she might have to travel from the Property to work. She explained that the sellers were keen to sell quickly, and they therefore put in an offer knowing that Dr Rowland had all the money available to purchase the Property. She said that the intention was that she would then sell her property at some point and buy some fields with a view to cultivating elephant grass but then the new partner had "*come on the scene*". It was put to her that she was an independent person who wanted to keep her property at Wooburn Green separate. She accepted that she wanted to pay off the mortgage on that property but insisted, in relation to Tadmarton House, that "*the Property was a joint property for the rest of our lives. It was going to be our joint property*". She was asked whether Dr Rowland ever said that he wanted to gift her 50% of the Property. She replied: "*No, but it proceeded as a joint purchase*". She was asked whether the parties had, prior to the purchase, discussed Hanna's inheritance prospects. She said that they had not. She was pressed on what whether Hanna was discussed in the context of the Property and how it was to be funded and replied: "*I do not recall a conversation about Hanna when we discussed buying the Property with his money*". She was asked whether that meant she could not recall such discussions or whether they did not occur. She confirmed the latter was the position. She was asked about conversations with Mr Roberts, who had become her financial adviser too, in 2010 when (it was said that) Hanna's inheritance was discussed. She said she did not recall any such conversation. She said her concern at that time was a potential IHT liability.

115. She was cross-examined at length about the long undated letter she sent to Dr Rowland in or about February 2011 and it was put to her that that was only consistent with an acknowledgment on her part that the Property belonged entirely to Dr Rowland and that he had made no gift of 50% of the Property to her. She accepted that she did not mention the word "*gift*" but she insisted that she understood the Property to be "*half mine*" and that this understanding was consistent

with the fact that the parties had been together for a long time and "*were moving to the next level*". She was also aware at this time or understood that Dr Rowland had received a very substantial bonus. She was again pressed on whether "*Hanna and her prospects formed any part of their discussions*" and she replied: "*I do not recall such discussions in the context of the acquisition of the Property*". She said the first occasion on which Dr Rowland suggested that Ms Blades only had a life interest was in his email dated 26.4.14. It was put to her that she had agreed and/or promised to make a will in Hanna's favour but she denied any such agreement or promise. She said: "*We never discussed wills. Wills were irrelevant. It was not a consideration at all at that time. They were not relevant because we were going to spend the rest of our lives together*". She was asked whether wills were relevant to Dr Rowland, to which she replied: "*They may have been but he did not say anything*".

116. Ms Blades was then asked a series of questions about the Joint Ownership of Property form. She said that they had read it many times, it was very clear and they had both signed it on 26.2.09. She said she had a good recollection of the meeting with Mr Palmer on 23.3.09 at which Mr Palmer had reiterated the terms of the form and "*explained things very clearly*". She said that Mr Palmer explained the concepts of joint tenancy, tenancy in common and a declaration of trust and confirmed the basis on which he understood the parties wished to proceed whilst also inviting them to give further consideration to the issue. She said that there were no discussions between her and Dr Rowland on the subject of ownership between 24.3.09 and 31.3.09. She was asked again about Hanna and whether she formed part of the discussions with Mr Palmer on 23.3.09 and said that there was no mention at that meeting by Dr Rowland of any wish to secure Hanna's inheritance. She said she had no recollection of any discussion about her making a will, although she accepted that Mr Palmer may have raised the issue as a standard enquiry. She was asked about Dr Rowland's pre-purchase discussions with Mr Roberts and it was put to her that it was inherently improbable that Dr Rowland would have discussed Hanna's potential inheritance with Mr Roberts but not with her. She replied: "*I don't recall prior to purchase any discussion about Hanna's inheritance*".

117. She was asked about her subsequent correspondence with Dr Rowland and in particular her email of 30.4.11. She said she was in a highly emotional state at that time and assumed she would pre-decease Dr Rowland and that the Property would then pass to him and in due course to Hanna. She insisted that it was not until 2014 that Dr Rowland began discussing Hanna's inheritance and her (Ms Blades) only having a life interest. She was cross-examined at length about the post-acquisition correspondence and dealings with the Property, but maintained, notwithstanding the potential compromises that were discussed, that she always thought it was "*joint property*" and that she was "*an equal owner*" and that when she talked about buying the Property, she was talking about buying out Dr Rowland's interest.

118. Finally, she was cross-examined about matters relating to the claim for an occupation rent. She accepted that she effectively excluded Dr Rowland from going to the Property with the new partner from November 2009 because she regarded the Property as "*our place in the country*" and "*made it plain from November 2009 that [the new partner] would not be welcome*". However, she said that the "prohibition" only lasted until July 2012 by which time she had "*come to terms with the relationship*", although she accepted that she never lifted the "prohibition". She also said that she was not generally at the Property during the week but tended to spend Saturday and Sunday there. She denied that she generally made a long weekend of it to embrace the Friday and/or the Monday.

119. I then heard from Mr Palmer, the conveyancing solicitor at B & B. He had not made a witness statement, not out of any reluctance to do so, but because he had not been asked. He was therefore examined in chief by Mr Roe and cross-examined by Mr Dipré. Mr Palmer said that he had qualified in 1998 and specialised in property law, in particular residential conveyancing and commercial property. He became a partner at B & B in 2000. He described himself as "*an experienced property lawyer*". He described the Joint Ownership of Property form as a standard form sent out at the start of the transaction to clients who are purchasing in joint names designed to capture their wishes and intentions in relation to ownership but also to explain the options available to them. He said his understanding of how the purchase was being funded was that both parties were contributing, albeit by the

time of his meeting with the parties on 23.3.09, he understood the contributions were unequal. He did not know what the respective percentage contributions were and did not ask.

120. He was asked about his attendance note of 23.3.09 and said he made that note on the evening of 23.3.09. He was asked about his general practice in such circumstances and said this:

> *"The advice in relation to joint ownership is not one size fits all. The advice depends on the circumstances of the transaction and the parties themselves. I do generally have a core advice which I give in relation to joint ownership and it broadly follows the format of the form we sent out. Essentially I would explain what it means to be owners as joint tenants, I would explain survivorship and that in the event of the parties splitting up the equity is owned on a 50:50 basis. I then go on to explain the alternative where survivorship does not apply and their defined share passes under their will or intestacy rules. I then go on to explain that if you own as tenants in common, it is not necessarily 50:50 and that it is possible to define the division of the equity in any proportions by means of a declaration of trust. I would explain that the net equity means the proceeds of sale after repayment of any mortgage and the costs of sale. In particular I would discuss the position if the parties were making unequal contribution, in which case it would strongly advisable to have a Declaration of Trust which records those unequal contributions so that net proceeds are divided in accordance with the initial contributions. In the event that they intend to own as tenants in common, I would suggest that it is strongly advisable that they make wills to ensure that their defined share is left to their intended beneficiary rather than leaving it to be dealt with by the intestacy rules".*

121. He was asked what advice he gave on 23.3.09 and said that there would have been a very similar discussion, although, perhaps unsurprisingly given the passage of time, he said he now relied to a large extent on his attendance note and disclaimed any precise recollection of what was discussed. He said it was apparent from his attendance note and believed that he discussed joint ownership in the terms set out above and discussed with the parties that if they owned as joint tenants, there was a presumption that the equity would be owned on a 50:50 basis.

122.He was asked whether he knew that Dr Rowland was funding the whole purchase. He did not recall being told that Dr Rowland was funding the whole of the price but said this:

> *"In the course of the meeting it became clear that Dr Rowland was intending to make a larger contribution to the purchase price, and it was for that reason that I asked them to think long and hard about their choice to own as joint tenants. I can see that from the fact that I essentially gave them a cooling off period. I asked them to think carefully about their choice and let me know if they changed their mind".*

123.He confirmed that neither party thereafter intimated any change of plan. It was put to him by Mr Dipré that it had been made clear to him during the meeting that the Property would ultimately be owned by Dr Rowland's daughter but Ms Blades would have right to live in it. He replied as follows:

> *"No. There was no reference to his daughter at the meeting. If Dr Rowland had said that was his intention, my file note would have reflected that and my advice would have been that joint tenancy was not appropriate".*

124.He described the omission to complete Panel 10 on the TR1 as a clerical error and considered that it could be completed as it was without reference back to the clients. He said that in his view he was authorised to tick the first box in panel 10 as being in accordance with his clients' instructions.

125.It was put to him again that Hanna was discussed at the meeting on 23.3.09 but he denied this and was firm in his recollection that she was not discussed and that had she been discussed in the terms suggested the advice would have been very different. He was asked how the subject of whether Ms Blades needed a will came to be discussed and he said this:

> *"When we meet with clients in a conveyancing transaction, we have an opportunity to generate work for the private client team. That's not the overriding intention but it is always good advice for clients to make a will and my standard question is do you have a will? I think I asked both if they needed a will. It was a general question we ask clients – it was just a general question. There was no mention made of Hanna".*

126. Ms Blades also called her brother, Stephen, and sister, Jennifer, to give evidence together with her friend, Corrina Lyons and her former psychotherapist, Ms Hall, but with the exception of Jennifer, I do intend to refer to their evidence as it has not assisted me in coming to my conclusions. However, I should, briefly, refer to Jennifer's evidence because she witnessed the parties' signatures on the TR1. As to that she said this: "*At no time did either the claimant or the defendant mention any intention or understanding on the part of either, or both of them that the house that they were buying was for Hanna in any form. When I witnessed them signing the TR1 form, they were both so extremely happy and excited about buying their new house. There were no comments, statements, discussions at that time to me of the house being bought other than for them both*".

<u>Overall Assessment of the Evidence</u>

127. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at §§15-22, Leggatt J (as he was then) reminded judges of the fallibility and unreliability of human memory and emphasised the fact that memories are "*fluid and malleable, being constantly rewritten whenever they are retrieved*" (§17). He reminded us that "*external information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection*"; in particular it can happen that "*our memories of past beliefs are revised to make them more consistent with our present beliefs*" (§17). He observed that "*the nature of litigation is such that witnesses often have a stake in a particular version of events*" (§19), most obviously where that witness is a party, and he concluded his valuable observations by reiterating the importance of the contemporaneous documents and the need to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth (§22).

128. I also remind myself of what Baroness Hale said, to similar effect, but directed to this specific context, in *Stack v Dowden* at §68:

> *In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in selfexculpatory or vengeful terms.*

129. I shall set out my detailed findings of fact below but before I do so, I should set out my overall conclusions on the reliability of the evidence which I heard, in particular that of the parties and Mr Palmer.

130. I have concluded that none of the witnesses were deliberately lying. Insofar as Dr Rowland and Ms Blades both mounted a direct challenge to the other's credibility, I am not persuaded that either has made good on their challenge. However, on the central issue of common intention, I do not accept Dr Rowland's evidence and prefer the evidence of Ms Blades and Mr Palmer.

131. Dr Rowland's evidence was straightforwardly given and generally clear and consistent. However, that does not mean I accept everything he says. On the contrary I have concluded that his evidence about what was discussed in the run-up to the purchase, and critically his evidence of what was discussed at the meeting with Mr Palmer on 23 March 2009, is unreliable. I am not persuaded it is tainted by ill-will but I am clear that he has misremembered the important pre-purchase discussions and conversations from 2009. Whether this is because external information has intruded into his memory and caused a significant change in recollection or whether his memories of these past events have been revised to make them consistent with his present beliefs does not ultimately matter; I am satisfied that his evidence that Hanna's potential inheritance was part of the discussion with Mr Palmer on 23.3.09 when the parties were discussing the ownership of the Property is something that Dr Rowland has come to believe but was not part of the discussions at that time. Similarly, I am not persuaded by his evidence that the issue was discussed with Ms Blades in the run-up to the acquisition of the Property, still less that there was any express agreement or understanding such as to displace the presumption that, following a purchase in joint names, equity follows the law. That

is not to diminish in any way the importance of Hanna to her father; indeed Ms Blades said more than once, that Hanna was a central figure in Dr Rowland's life and he would want to ensure that she was well provided for. However, I am satisfied she was not uppermost in his mind at this time. Dr Rowland is and was a generous man and at the time of the transfer the parties were very much in love. In those circumstances, I have concluded that Dr Rowland's evidence on the issue of common intention up to and including completion of the Transfer is unreliable. I have no doubt that he regrets his earlier generosity but I am satisfied that nothing he did or said at the material time to either Ms Blades or Mr Palmer could or would have caused either of them to think that he intended anything other than that which is to be deduced objectively from his conduct, namely an intention that he and Ms Blades would own the Property jointly at law and in equity, and intending that, on the death of one of them, the surviving joint tenant would become the sole owner by right of survivorship. He may have had some different, private and uncommunicated "understanding" about how Hanna fitted into all this, which may have been genuinely held on a subjective basis but I am satisfied that there was no express common intention at variance with that which one would naturally infer from the parties' words and conduct proximate to the transaction.

132. Ms Blades' evidence was also reasonably clear and consistent, although she plainly found the process of giving evidence more difficult and was very keen, perhaps overly keen, to get her points across, and in doing so almost descended into legal submissions. She also had a tendency to ramble, and this gave an appearance of evasiveness at times. However, on balance, I have concluded that her evidence was broadly reliable and on the critical events of 23.3.09 and what happened at the meeting with Mr Palmer, her evidence was corroborated by that of Mr Palmer. I was at one stage concerned that her oral evidence was in conflict with her written evidence but on further consideration I have concluded that that is not the case. Her evidence is, and always has been, that Dr Rowland did, and more to the point, said nothing to displace the natural inference from their pre-acquisition conduct, namely that they were buying the Property in joint names because, having been advised about the different forms of joint ownership, they intended to share equally in the

net proceeds of sale, as the Joint Ownership of Property form had explained, and each intended that, in the event of the other predeceasing them, the survivor would become the sole owner of the Property.

133. In assessing Mr Palmer's evidence, it is important to recall that Mr Palmer was not an altogether disinterested witness; his firm have been threatened with legal action by both parties. I have reminded myself of this fact in considering his evidence. However, I have concluded that his evidence is reliable and should be accepted. It was clear, forthright and consistent and tallied with the contemporaneous documents. There may be legitimate cause for concern on the part of both parties that he did not see fit to go back to them for their express instructions on how he should complete panel 10 in the TR1 and, had he done so, this litigation might have been avoided. There may also be cause for concern that, having discovered by the time of the meeting on 23.3.09, as Mr Palmer admitted he had, that the parties were contributing in unequal shares, he did not enquire further or suggest that Dr Rowland take independent legal advice. However, those issues form no part of this litigation, and I do not intend to express any view on these matters. I have approached Mr Palmer's evidence with care, bearing in mind that he has a stake in one particular version of events, but have concluded that he is a witness whose evidence I should accept.

Findings of Fact and Conclusions

134. *Issue 1: Beneficial Interests*. Towards the end of February 2009 the parties received from B & B the Joint Ownership of Property form which explained "*the different types of joint ownership available*". The form explained that joint tenants are "*each entitled to share equally in the net proceeds of sale*". It also explained the right of survivorship. I find as a fact that the parties both read it and largely understood it. I accept that it did not explain, as it might have done, that joint tenants at law could be tenants in common in equity but there was a clear explanation of tenancy in common and the circumstances in which that might be appropriate, including where the parties had contributed in unequal shares to the purchase price.

135. The key to understanding joint tenancies and tenancies in common is always to consider the legal estate separately from the equitable interest. Thus A and B may be legal joint tenants but equitable tenants in common. The effect of A's death in those circumstances is that B is solely entitled to the legal estate but A's equitable interest passes under his will or intestacy. I note that Dr Rowland specifically says in his witness statement that "*The conveyancing solicitor never explained the difference between joint tenants in law and joint tenants in equity*" and I am prepared to accept that evidence. To that extent Dr Rowland may have had a less than complete understanding of the law. There are, potentially, other complaints that can be made about the legal advice he received from B & B, particularly once Mr Palmer knew (as he accepted that he did) that the parties were contributing to the purchase in unequal shares. Mr Palmer said he did not know the extent of the inequality (100:0) but it might be said that he should have asked, and had he done so, matters would have taken a different course. However, as I have previously indicated, this is not a professional negligence claim against B & B and nothing I say should be taken as an adverse finding against the firm. However, Dr Rowland's understanding of the consequences of a conveyance into joint names is clearly relevant to the present claim, albeit in no way decisive (see e.g. *Stack v Dowden* at §67), and I have therefore carefully considered the extent to which he understood the possible consequence of a conveyance into joint names. Having done so, I am satisfied that he did in fact understand and intend joint beneficial ownership with the right of survivorship and he did so because he was in love with Ms Blades at the time and saw his long term future as being with her. Importantly, I reject Dr Rowland's evidence that he made any mention of Hanna (or a desire to leave the Property to her) to Mr Palmer on the occasion of their meeting on 23.3.09. Had he done so, I am satisfied that, as Mr Palmer said, his "*file note would have reflected that and my advice would have been that joint tenancy was not appropriate*". Having carefully considered what the parties did and said in the run-up to completion, and pointedly, what they did not say, I have concluded that the only intention discernible to Ms Blades or reasonably understood by her to be manifested by Dr Rowland's words and conduct at the material time was a common intention to own the Property as beneficial joint tenants. The conveyance into joint names was not an accident; it was a conscious decision. The conveyance into joint names, in

the context of parties who were then in love and saw their future together, and who had previously read, digested and signed the Joint Ownership of Property form (and circled "*Joint Tenants*") and returned it to B & B saying that "*our intention is to purchase Tadmarton House as Joint Tenants*", is the best evidence of what was intended. Nor should it be forgotten that, even after exchange of contracts, Mr Palmer in his letter dated 24.3.09 gave them a "*cooling-off period*" as he described it and invited them to let him know of any change of plan before completion. They did not do so.

136. Dr Rowland relied heavily on the mention in Mr Palmer's attendance note of the fact that Ms Blades needed a will as supporting his contention that he was concerned to protect Hanna's inheritance. I am satisfied, however, that Mr Palmer raised the issue of a will as a matter of general routine in an effort, as he said, to generate work for his private client team. When pressed in cross-examination as to whether Hanna and the need to protect her inheritance had been mentioned at the meeting on 23.3.09, Mr Palmer was insistent, and in my judgment entirely credible, when he replied:

> *"No, I can be quite clear on that. If he had revealed that, the file note would have said so; it would have been a significant factor and the advice would have been that tenancy in common and a declaration of trust would have been appropriate".*

137. The relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that person's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party: *Jones v Kernott* at §51(3). What the parties said and did in the runup to completion only bears one interpretation and no one could or would have reasonably understood that the parties' conduct evinced any other intention than joint beneficial ownership. True it is, as Dr Rowland said and Ms Blades accepted in evidence, he never said in terms that he was gifting half of the Property to Ms Blades. However, he never said that he was not, and insofar as Dr Rowland had some different intention at odds with the intention reasonably to be divined from his

words and conduct, I am satisfied and find as a fact that he did not communicate it to Ms Blades or Mr Palmer. In any event, there is, it seems to me, a palpable lack of clarity as to what this different intention may have been, beyond some kind of general wish to ensure that Hanna was well provided for. Dr Rowland made much of his last-minute exchange with his financial adviser, Mr Roberts, on 31.3.09 when mention was made of Hanna and a possible "*second inheritance tax liability*" but Ms Blades was not copied into this email and Mr Roberts appeared to be proceeding on the basis that the parties were buying as joint tenants in equity because he said: *"... the basis of ownership i.e. joint tenancy and a new tenancy-incommon arrangement can be set up (and it doesn't have to be a 50/50 split)*". I am satisfied that if Dr Rowland had some different intention, he did not communicate it to Ms Blades and it was not a common intention.

138. It is quite possible that, with the passage of time, Dr Rowland has convinced himself that he had some clear contrary intention which he communicated to Ms Blades and Mr Palmer, but I am satisfied that he said and did nothing to disabuse them of the conclusions that they would naturally have drawn from what he said and did prior to 31.3.09. Listening to Dr Rowland's evidence, and Mr Dipré's closing submissions, and I intend no disrespect to either, I was reminded of what Baroness Hale said in *Stack v Dowden* at §62 where she said this:

> *62. Furthermore, although the parties' intentions may change over the course of time ... at any one time their interests must be the same for all purposes. They cannot at one and the same time intend, for example, a joint tenancy with survivorship should one of them die while they are still together, a tenancy in common in equal shares should they separate on amicable terms ... and a tenancy in common in unequal shares should they separate on acrimonious terms ...*

139. Ultimately, Dr Rowland's evidence on the critical issue of common intention just did not hang together and fit with the contemporaneous documents. Accordingly, insofar as his evidence is inconsistent with the evidence of either Ms Blades or Mr Palmer, I reject it and prefer their evidence.

140.In coming to this conclusion, I have not ignored the later correspondence and its possible impact on any conclusion about what the common intention was. However, I have concluded that there is, on a careful analysis, nothing in that material which should cause me to revisit my conclusion. Both sides can point to correspondence which might be thought to lend some support their case. The high-point of Dr Rowland's case based on this material is probably Ms Blades' email dated 30.4.11 where, at the end of that email, she said: "*At the end of the day, TH is an investment for you and Hanna*". However, that has to be read in context. The context was that Dr Rowland had "*lost all interest in the house*" as Ms Blades had recorded in the earlier part of the email. It was therefore nothing more than an investment for him. However, I am satisfied for the reasons I have already given no mention was made of Hanna at the time of acquisition and it is to be recalled that the Buyers Questionnaire had been completed on the basis that the Property was *not* an investment purchase. I would also note that only a few days later, on 3.5.11, Ms Blades was reminding Dr Rowland that "*TH belongs to us both*" and within a month, on 1.6.11, Dr Rowland was confirming that "*it's at least as much yours as mine"*.

141.It is true that Dr Rowland also, in 2014, made reference to the fact that "*we sort of had an agreement*", but I confess I find this correspondence singularly unpersuasive as to the fact or terms of any such agreement. In Dr Rowland's own words, "*that agreement probably needs some details filled in*", but as a matter of fact I reject the suggestion that that there was any agreement of the kind that he now alleges.

142.Both parties made what might be termed declarations against interest but I have to consider the whole course of dealing and reach an overall conclusion. When all is said and done, the post-acquisition correspondence and conduct is coloured by the fact that the parties' relationship was breaking down or had broken down. It is no surprise that Dr Rowland's priorities had changed and Hanna's interests appear to have been uppermost in his mind but that was not the position in February/March 2009. Hanna's own evidence does not really shed any light on what the common intention of these parties was in February/March 2009.

143. I am satisfied that both parties expended reasonably substantial sums of money on the Property after the relationship had broken down but in the circumstances and having regard to the terms in which these matters were discussed I infer nothing about the common intention beyond a sensible and pragmatic determination on the part of both parties to look after the Property. I accept that Ms Blades had an obvious interest in paying the running costs because she was using the Property but I do not consider that the agreement on the part of Dr Rowland to pay for structural items bears any great significance. Nor do I consider the fact that Dr Rowland paid more than Ms Blades to be of any significance. According to the parties' respective schedules, Dr Rowland paid about £208,000 whilst Ms Blades paid about £141,000 towards the costs of running and maintaining the Property. There was no challenge to Dr Rowland's figure. Mr Dipré suggested that Ms Blades' figure was inflated by what he submitted were gratuitous overpayments by Ms Blades to her brother, Stephen, who did the gardening at the Property. I do not need to and do not intend to resolve that dispute. It makes no difference to the outcome of the case. On any view, Ms Blades made a substantial financial contribution to the upkeep and running costs of the Property which was probably in excess of £100,000, the precise figure is immaterial, and it is not therefore right to say, as the Particulars of Claim alleged, that Dr Rowland had made an "*unmatched contribution*" to the costs associated with the Property. Insofar as the suggestion was that Ms Blades had contributed nothing, I reject that suggestion and am satisfied that she had expended in excess of £100,000 on the Property between 2009 and 2018. This averment on

the part of Dr Rowland was made to support an allegation that the Claimant was the sole beneficial owner, alternatively was entitled to "*a total of 60% at least*" on the basis of his "*additional contributions*" and that the Court should impute such an intention. I find that Dr Rowland paid more because he was much wealthier than Ms Blades and could afford to do so. It was no more complicated than that. However, I am satisfied that in expending money on the Property, both parties did so in the belief that they had an interest in it and thus an interest in maintaining it. In the circumstances, I neither infer nor impute some other common intention at variance with that established at the time of acquisition.

144. The die was cast on 31.3.09. The parties could have formed a different intention thereafter but I am satisfied that they did not. Mr Dipré could not point to any postacquisition agreement to this effect and could not claim that expenditure incurred by Dr Rowland was in reliance on any such agreement and to his detriment. I am satisfied that there was no express agreement to vary the existing beneficial interests and in the absence of such an agreement, the court should be slow to infer from conduct alone that the parties intended to vary existing beneficial interests established at the time of acquisition: see e.g. *James v Thomas* [2008] 1 FLR 1598 at §24. When I asked Mr Dipré to clarify when the variation he relied on occurred, he said "not later than April 2011". In my judgment, there is nothing in the whole course of conduct after acquisition, whether before or after this date, to support any inference that the parties intended to vary the existing beneficial interests. The parties' conduct is readily explicable by reference to their pragmatic agreement to share the running costs in the manner agreed and in any event is not such as to warrant any inference. I would also note that as late as November 2017, Dr Rowland's then lawyers had prepared a draft Declaration of Trust which recited that the parties were "*beneficial joint tenants*". I reject Dr Rowland's alternative case and am satisfied that the parties' post-acquisition conduct is not such as to warrant any inference or imputation varying the beneficial interests. Nor does it affect my conclusion as to what the common intention was at the time of acquisition.

145. In one sense, the outcome is a harsh one for Dr Rowland who contributed the whole of the purchase price in acquiring a country house to be used as a weekend and holiday retreat by a couple who each had their own properties and who never saw fit to pool their resources. Before *Stack v Dowden*, the result may have been a different one and I have not overlooked the fact that in *Stack v Dowden* the Court actually departed from the presumption of joint beneficial tenancy principally on the basis that the contributions to the purchase were unequal and the parties had never pooled their resources. However, that was a case where the Court had to fill the void left by the complete absence of any indication of what the parties intended. In the present case, there was very clear evidence as to the advice given to the parties at the time of the transfer and what they did in response to that advice, and I

am satisfied that this sheds decisive light on what they intended and what would reasonably be deduced as their intentions. Whilst a number of the factors referred to as relevant in *Stack v Dowden* (§69) might be thought to point in the opposite direction, I am satisfied that the cumulative weight of the signed Joint Ownership of Property form, Dr Rowland's email dated 27.2.09 confirming (having read that form) that the parties intended to purchase as joint tenants and Mr Palmer's attendance note of 23.3.09, coupled with the lack of any response to his letter dated 24.3.09, is such that I should conclude that the parties intended to be joint owners at law and in equity. Whatever I may think about the fairness of the result is irrelevant; *Stack v Dowden* and *Jones v Kernott* marked a decisive break and move away from the presumed resulting trust in this context and as Baroness Hale famously said in *Stack v Dowden*, "*in law, context is everything*" and "*cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual*" (§69).

146. *Issue 2: Occupation Rent.* The claim for an occupation rent covers the period from September 2009 until the end of October 2018, a period of 110 months ("the Full Period"). Mr Edward Briggs FRICS, the single joint valuer, provides three different valuations as follows for the Full Period: (1) the total annual rent payable assuming an assured shorthold tenancy ("AST") is put at £584,000; (2) the total rental income for occasional weekend and short usage for short term licenses is put at £495,000; (3) the average daily rate for occasional weekend and holidays during the period is £260 per day for long weekend (3 days) and bank holiday use and £104 per day for other days.

147. I have to consider whether an occupation rent is payable in principle and if it is, on what basis and over what period it should be paid. In their closing submissions the parties proposed and I agreed that I would decide the issue of principle and find the necessary facts and the parties would then file brief written submissions (limited to 2 pages) to deal with quantum by reference to the valuation evidence of Mr Briggs.

148. There is no question here of an actual physical exclusion or ouster as it used to be called. At one time the prevalent practice appears to have been that a co-owner in

sole occupation would only be required to give credit for an occupation rent if he had actually ousted the other co-owner from the jointly-owned property but the more recent authorities made it plain that an occupation rent may be ordered in any case where this was necessary to do broad justice or equity between the parties: see e.g. *Re Pavlou* (above). However, the law has again moved on and I must apply the statutory principles derived from ss.12-15 of TOLATA, rather than the old rules of equitable accounting, even if the result is likely to be the same. As Lightman J explained in *Murphy v Gooch* [2007] EWCA Civ 603 at §14:

> *"The wider ambit of relevant considerations means that the task of the court must now be, not merely to do justice between the parties, but to do justice between the parties with due regard to the relevant statutory considerations".*

149. It is the duty of the court applying the statutory principles to do justice between the parties with due regard to the statutory considerations. The first and second of these considerations are the intentions of Dr Rowland and Ms Blades as creators of the trust and the purposes for which the Property is held. The trust was created so that the Property should be their joint weekend/holiday home (a purpose that had failed by November 2009) and from that date I am satisfied that Ms Blades used the Property to the effective or constructive exclusion of Dr Rowland, at least so far as weekend usage is concerned. I say that for the following reasons. Ms Blades accepted in evidence that she "*made it plain from November 2009 that [the new partner] would not be welcome*". True it is, that on occasion she "invited" Dr Rowland to provide her with dates when he might want to visit the Property, but Ms Blades was very much in control of the agenda and in situ at the Property, certainly at weekends (which was the only time that Dr Rowland could realistically go), and any invitation was always subject to the clear proviso that Dr Rowland was not to attend at the Property with the new partner. That stipulation is perhaps understandable on one level, given Ms Blades' strong feelings on the subject, but I consider it to have been an unreasonable restriction and Ms Blades never withdrew it. I accept that Dr Rowland acknowledged Ms Blades' sensitivity around this subject, and agreed not to take the new partner to the Property, but I do not believe

that I should hold this against Dr Rowland and find that he thereby voluntarily excluded himself. It seems reasonably clear that had Dr Rowland ignored Ms Blades' wishes and taken the new partner to the Property, there is every risk that there would have been another altercation of the kind that occurred in early 2011 when Ms Blades turned up at Dr Rowland's flat unexpectedly.

150. It is, it seems to me, a matter of fact and degree in any particular case whether there has been an exclusion or an unreasonable restriction within the statutory sense and on balance I consider that there has been, as from 1 November 2009. Ms Blades said that she had come to terms with Dr Rowland's relationship with the new partner by the summer of 2012 and that any liability (none being accepted) should cease as from that date but she never informed Dr Rowland then or at any other time thereafter that he was free to use the Property with the new partner. However, Dr Rowland's relationship with the new partner ended in October 2015 and there was, I find, nothing to stop Dr Rowland from making fair use of the Property from 1 November 2015. Dr Rowland said he regarded Ms Blades' restriction as applying to any new partner but it was not put in those terms and I propose therefore to take 1 November 2015 as the cut-off point.

151. Having regard to the statutory considerations, the breakdown of the parties' relationship, Ms Blades' prohibition of user by Dr Rowland in the company of the new partner and the weekend use made of the Property by Ms Blades since then to the effective exclusion of Dr Rowland, I consider that it is just that Ms Blades pay an occupation rent to Dr Rowland.

152. The period for which Ms Blades is liable to pay an occupation rent will be the period from 1 November 2009 until 30 October 2015, a total of 72 months. During that period I find that Ms Blades' use to the exclusion of Dr Rowland was, on average, for 3 days a week, being a Saturday and a Sunday and either a Friday or a Monday. Ms Blades maintained in evidence that, in general, she only used the Property for the Saturday and Sunday but in an email to Dr Rowland dated 2.5.14 she confirmed, referring to the Property, that she was "*often here Monday's and*

Friday's as well as the weekend". I note too that when in the course of 2014 it was necessary to tell insurers about the Property's occupation, Dr Rowland informed the broker, with Ms Blades' agreement, that "*Sharon is there just about every weekend and those weekends normally cover Fridays and Mondays (as she works from home)*". I accept there were variations in the pattern of usage, sometimes more and sometimes less (because Ms Blades was away on business), and nor have I forgotten the fact that on rare occasions after November 2009 the parties spent a limited amount of time *together* at the Property, but doing the best I can I am satisfied that an average of 3 days' use by Ms Blades taking in the weekend is a reasonable basis upon which to proceed. I do not consider it likely that Dr Rowland would have wished to, or been able, to use the Property during the week and I therefore do not consider it just to award compensation on the more expansive basis advanced by Dr Rowland in his Particulars of Claim. However, for the avoidance of any doubt, I am satisfied that Dr Rowland would have wished to and would have been able to use the Property for 3-day weekends when it was his turn, but for the unreasonable exclusion/restriction. I would invite Counsel to address me on the appropriate daily rate in their written submissions on quantum. There would have been 4 such 3-day periods per month, but Ms Blades as a beneficial co-owner was entitled to use the Property 50% of the time in any event, and this will need to be reflected in any calculation. I hope the parties will be able to agree quantum in the light of these findings but if they cannot, I will determine the issue on the papers in the light of the parties' submissions. The calculation of an occupation rent in such circumstances is more of an art than a science but I am satisfied that the approach set out above does broad justice to the facts of this case.

153. The result is that Ms Blades succeeds on Issue 1 and Dr Rowland succeeds to a limited extent on Issue 2.

Post-Script

154. After the circulation of a draft of this judgment in the usual way pursuant to Practice Direction 40E of CPR 40 and pursuant to paragraph 147 above, I received further

written submissions from the parties dealing with the quantum of the claim for an occupation rent in the light of my findings above and the valuation evidence of Mr Briggs, together with submissions on costs. I now determine those two outstanding issues and certain minor consequential matters relating to the final form of order.

155. *Occupation Rent*. I am bound to say that I was unpersuaded by either of the parties' submissions in relation to quantum. In my judgment, the Claimant's figures were unrealistically high contending for a daily rate of £650 per day and a total figure of £288,800 and the Defendant's figure were unrealistically low, contending for a daily rate of £83.34 (or £250 per 3-day weekend) and a total figure of £36,000.

156. I remind myself that having found that Ms Blades should pay an occupation rent to Dr Rowland, my task in ascertaining the amount of such rent is to do justice between the parties with due regard to the relevant statutory considerations and having regard to my findings of fact above. It seems to me that the fairest way to arrive at the appropriate figure in the particular circumstances of this case, dealing as we are with a holiday home (albeit a very grand one) and an exclusion at weekends (including a Monday or a Friday) only, and having regard to the principles on which mesne profits are calculated by way of analogy, is to ascertain a daily rate for such weekend usage that reflects the open market value of such usage.

157. On my findings the Defendant unreasonably excluded Dr Rowland and thereby had the exclusive use of the Property every weekend (including a Friday or a Monday) for 6 years. She was of course a beneficial joint tenant and the figures must therefore be adjusted accordingly but, in my judgment, the appropriate calculation is 6 years x 52 weeks x 3 (days) x the appropriate daily rate x 50%.

158. In arriving at the appropriate daily rate, I must have regard to the expert evidence of the joint expert, Mr Briggs. In considering the evidence of the joint expert, I consider that Mr Briggs' Valuation 3 is the most relevant and helpful in the present circumstances. This valuation considers "*the rent that would be payable for*

occasional weekend and short usage of Tadmarton House from September 2009 to October 2018". At paragraph 24.3.1 of his Report Mr Briggs says this:

> *"I am of the opinion that the Rental Value that would have been payable over the period September 2009 – October 2018 for the occasional weekend and short usage of the Property over the period is as set out in the table below:*

Date	*Yearly*	*Monthly*	*Daily*
Sep-18	*£62,550*	*£5,212*	*£171*
Sep-17	*£60,191*	*£5,016*	*£165*
Sep-16	*£57,922*	*£4,827*	*£159*
Sep-15	*£55,739*	*£4,645*	*£153*
Sep-14	*£53,637*	*£4,470*	*£147*
Sep-13	*£51,615*	*£4,301*	*£141*
Sep-12	*£49,669*	*£4,139*	*£136*
Sep-11	*£47,797*	*£3,983*	*£131*
Sep-10	*£45,995*	*£3,833*	*£126*"

159.It seems to me that that these are the figures I should adopt. I reject the Claimant's submission that I should use his suggested figure of £650 per day. This figure is based on a starting point of £2500 for a 3-day weekend and hence an initial daily rate of £833 which is then discounted as explained at §§13-16 of Mr Dipré's quantum submissions. However, it seems to me that in adopting this figure, Mr Dipré is not properly reflecting the evidence of Mr Briggs, in particular the evidence which he gives at paragraph 24.3.1 of his Report in relation to Valuation 3 which he confirms as correct at page 9 of his Addendum. I also reject the Defendant's submission that these daily rates should be discounted by 40% because "*these are full market rates likely to have been secured from holidaymakers booking through, e.g., booking.com and who by definition are therefore likely to be paying for a special treat".* I consider the open market rate to be the appropriate rate, having regard to the analogy with mesne profits. I had previously mentioned the figure of £260 per day (paragraph 146 above) but on reflection I agree with the Defendant's submissions that this is not the appropriate daily rate for the reasons explained by Mr Briggs at page 10 of his Addendum.

160. Applying the appropriate daily rates for the 6 years in question produces the following:

2009-2010: £126 per day x 3 days = £378 x 2 per month = £756 x 12 =	£9,072
2010-2011: £131 per day x 3 days = £393 x 2 per month = £786 x 12 =	£9,432
2011-2012: £136 per day x 3 days = £408 x 2 per month = £816 x 12 =	£9,792
2012-2013: £141 per day x 3 days = £423 x 2 per month = £846 x 12 =	£10,152
2013-2014: £147 per day x 3 days = £441 x 2 per month = £882 x 12 =	£10,584
2014-2015: £153 per day x 3 days =£459 x 2 per month = £918 x 12 =	£11,016
Total	£59,958

161. I therefore assess the occupation rent or compensation payable under s.13(6) of TOLATA in the sum of £59,958. In my judgment, this figure does justice between the parties, giving due regard to the relevant statutory considerations and my findings of fact above.

162. *Costs*. The Defendant has succeeded on the main issue, Issue 1, relating to the beneficial interests in the Property. That issue took up the lion's share of the time and evidence and argument (and preparation). I remind myself too that the dispute was over a property now worth in excess of £2m. The Claimant has succeeded (in part) on Issue 2 but by comparison, in terms of value, his "success" is a relatively modest one. He has not succeeded in full by any means (and I do take this factor into account) but it is a meaningful success, not a pyrrhic victory, and I do have regard to the amount of time spent on Issue 2, as reflected in the papers, the course of argument and my judgment. Neither party has drawn my attention to any relevant offers in relation to Issues 1 or 2 that bear on the issue of costs. There is no doubt whatever that the overall winner and successful party is the Defendant. On that basis, Mr Roe submits that she should be awarded all her costs and I should not be too ready to depart from the general rule that the unsuccessful party pays the successful party's costs: see e.g. *Fox v Foundation Piling Ltd* [2011] EWCA Civ

790. I have carefully considered that submission but reject it; I consider that such an order would not properly reflect the fact that Ms Blades resisted making any payment at all by way of an occupation rent and lost that argument. The order for costs that I make in the exercise of my discretion, having regard to all the circumstances of the case, is an order that the Claimant do pay 90% of the Defendant's costs of the action to be subject to detailed assessment if not agreed. I order the Claimant to make an interim payment on account of costs in the sum of £100,000 by a date to be agreed between the parties or settled by me, and the Claimant may satisfy the first £59,958 of this liability by setting off against it the sum owing to him by way of an occupation rent.

163. It only remains for me to thank Counsel and the parties for the sensible and cooperative manner in which this remote trial was conducted.

IMPORTANT NOTICE This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child[ren] and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case Nos: F00OX065 & OX19POO630

IN THE FAMILY COURT AT OXFORD

IN THE MATTER OF TRUST OF LAND AND TRUSTEES ACT 1996 AND IN THE MATTER OF SCHEDULE 1 CHILDREN ACT 1989

Date: 3rd June 2020

Before: Her Honour Judge Vincent

Between:

V

Applicant

and

W

Respondent

Hearing date: 21st April 2020

The Applicant represented herself at the final hearing
Miss Michelle Freedman of counsel for Respondent, instructed directly by him

JUDGMENT

Introduction

1. The Applicant V is fifty, the Respondent W is fifty-three. They were in a relationship from 1995 until 1st January 2017. They have two children, D, who is nineteen and in her first year of university, and E, who is fourteen. The parties bought a house together in July 1997 at [*address redacted*]. I am concerned with two applications:

   (i) The Applicant has applied for a declaration under s14 Trust of Land and Appointment of Trustees Act 1996 (ToLATA) for declaration of the parties' respective beneficial entitlement, and an order for sale;

   (ii) The Respondent has made an application under Schedule 1 of the Children's Act 1989 for the Applicant's share of the property to be held on trust for the benefit of the parties' son until such time as he finishes education.

2. In June 2019 the property was valued at £440,000. It has a mortgage of around £94,000.

3. The Applicant is an accountant and earns £3,900 net a month. She works in London and [*redacted*] and continues to stay in the family home, usually from Monday evening through to Friday morning.

4. The Respondent had his own haulage company but due to illness has been unable to work since around 2015. He is hopeful that further treatment will bring about some improvement and he can return to work in due course.

5. On Friday 17th April 2020, one working day before the final hearing, the Respondent conceded that the declaration of beneficial interest should be of fifty percent shares in the property. His previous position had been that the beneficial interest should be divided 85/15 in his favour.

6. This issue now having been resolved, the remaining issue for the Court to determine is when the property should be sold. The Applicant wishes the property to be sold as soon as reasonably practicable. The Respondent says the property should not be sold until E, the parties' youngest child, has turned 21, or finished his education, whichever is later. E will leave school in June 2024. He will turn 21 in January 2027. If he went to university he might be expected to finish in the summer of 2027 or 2028, depending on whether or not he took a year off beforehand.

7. On 17th June 2019 the ToLATA case was allocated to the multi-track and stayed for a period of three months to give the parties the opportunity to negotiate.

8. The Schedule 1 application was filed on the Respondent's behalf by his solicitor, on 29th October 2019.

9. On 7th November 2019 District Judge Devlin made directions orders in both the ToLATA and Schedule 1 Applications. He made orders for filing of evidence and listed both a financial dispute resolution hearing making clear that the two applications were to be dealt with together, and a two-day trial in respect of both

applications. Both orders issued state clearly that both applications will be listed for final hearing together.

10. It is unfortunate that the notice of hearing dated 18th February then said that a 'directions hearing' in the Schedule 1 case was to be heard by the Court alongside the ToLATA application with a time estimate of 2 days, but anyone in any doubt need only have referred back to the two substantive orders, which made the position absolutely clear. Both parties attended the hearing on 7th November and were represented by lawyers.

11. Matters were not resolved at the hearing on 13th March 2020 and the two-day final hearings remained listed.

12. Due to the Covid-19 pandemic a pre-trial review was listed before HHJ Lloyd-Jones on 17th April 2020. The respondent conceded the split of the beneficial interest should be 50/50. He sought an order that his schedule 1 application be stayed until the arrangements for care of the parties' youngest child E had been resolved. If not agreed, he suggested he should be given the opportunity to make a section 8 Children Act 1989 application, and only once that had been concluded, could the Court properly consider the schedule 1 application.

13. Given his change of position in respect of the declaration of beneficial interest, HHJ Lloyd-Jones reduced the time estimate of the final hearing to one day. As she was unable to view the bundle at the hearing, which took place remotely, she put off the question as to whether the Schedule 1 application should be stayed for me to decide.

14. The hearing before me took place on Tuesday 21st April 2020 using the Cloud Video Platform. I had been able to download the trial bundle and review the Court file.

15. The Applicant represented herself at the hearing, the Respondent was represented by counsel. I heard evidence from each of the parties, and we took a number of breaks throughout the day to make sure that the Respondent was able to give instructions to his counsel, and because remote hearings are tiring for everybody. When the Applicant was giving evidence and the Respondent took a break to give instructions to his counsel, the Applicant stayed in the video conference with me and my clerk, so as to ensure that she did not have contact with anyone else while she was still giving evidence. I heard submissions and I read position statements from each of the parties. I had dealt with another remote hearing before starting the trial in the morning, and there were some technical issues in getting everyone connected to the call so we did not start hearing evidence until nearly 2pm. It had been a long day and so I decided to reserve my judgment and send it out to parties by email.

The law

The Trusts of Land and Appointment of Trustees Act 1996 ("ToLATA").

16. A trustee of land (both applicant and respondent are trustees of [*the property*] within the meaning of the Act) may apply for an order declaring the nature or extent of a person's interest in the property subject to the trust, or in respect of the exercise by the

trustees of any of their functions, including the power of sale pursuant to section 14 of the Act.

17. Section 15 sets out the matters to which the Court is to have regard in determining such an application:

15 Matters relevant in determining applications

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d) the interests of any secured creditor of any beneficiary.

18. Unlike applications under the Children Act 1989, the welfare of any minor children is a relevant factor to consider, but is not the Court's paramount consideration. This is because the order sought is not in respect of the child's upbringing within the meaning of section 1(1) of the Children Act 1989.

Schedule 1 Children Act 1989.

19. Schedule 1of the Children Act enables a parent or person named in a child arrangements order as a person with whom the child is to live, to apply for any of a range or orders which enable the child to be provided for financially. In this case, the Respondent asserts that (although there is no child arrangements order to that effect) he is the carer of the parties' younger child and seeks under paragraph 1(d) of Schedule 1:

An order requiring a settlement to be made for the benefit of the child and to the satisfaction of the court, of property-
(i) To which either parent is entitled (either in possession or in reversion) and
(ii) Which is specified in the Order.

20. In this case the Respondent seeks an order that the Applicant's share in the property should be held on trust for E until such time as he finishes university, and then to revert to the mother.

21. In deciding whether to exercise its powers under paragraph 1, the Court must have regard to all the circumstances, including the matters set out at paragraph 4 of the Schedule, as follows:

4(1) In deciding whether to exercise its powers under paragraph 1 or 2, and if so in what manner, the court shall have regard to all the circumstances including—

(a) *the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;*
(b) *the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;*
(c) *the financial needs of the child;*
(d) *the income, earning capacity (if any), property and other financial resources of the child;*
(e) *any physical or mental disability of the child;*
(f) *the manner in which the child was being, or was expected to be, educated or trained.*

22. The child's welfare is again not the Court's paramount consideration, because the order sought concerns his or her maintenance rather than their upbringing. However, the relevant factors are such that an assessment of the needs of the individual child in the light of the available resource are likely to be the determining factor. The applicant applies for the benefit of the child, not for him or herself.

23. I have been referred to and read the cases of Re P (a child)(financial provision) [2003] EWCA Civ 837 and N v D [2008] 1 FLR 1629.

Respondent's application to stay his application under schedule 1

24. Having considered the arguments put forward on behalf of the Respondent, I refuse the application for a stay of the Schedule 1 Application for the following reasons:

(i) the proposal is that the application be stayed for an uncertain period of time, to afford the parties the opportunity to negotiate and then for proceedings under s8 Children Act 1989 to be issued and concluded. This would cause unnecessary delay and uncertainty for the parties and for their children;

(ii) in these proceedings there is considerable overlap of the issues in the two applications. Evidence has been obtained in accordance with the directions made. To stay one of the applications would effectively give the Respondent a second opportunity to seek the outcome he wishes based on the same transaction that was in issue at this hearing. This offends against basic legal principle that matters which can be brought before the Court at one time should not be re-adjudicated;

(iii) if the schedule 1 application were to be stayed then any findings made by the Court in respect of the ToLATA application would be at risk of being undermined. The Court would not have the option of ordering the property to be sold because until the Schedule 1 application was decided, the parties would be unable to take such a step;

(iv) the Respondent was legally represented at both the initial directions hearing before DJ Devlin, and the neutral evaluation/dispute resolution hearing in March 2020. The orders made by DJ Devlin made it absolutely clear that the two applications were to be managed and heard together, and this is what happened at each hearing. The Respondent has not suggested that he ever contended that at the hearing on 13th March the Court was not in a position to assist the parties in respect of both the ToLATA and the Schedule 1 Application;

(v) The Respondent has not previously sought any further directions in respect of the Schedule 1 application, nor identified any gap in the evidence that means the Court would be unable to decide it at the final hearing;

(vi) The Respondent has suggested that the Court cannot consider the application until the question of child arrangements order has been resolved. This is not a gap in the evidence, the Court has information before it from both parties about what the current arrangements actually are. It is a request for more time so that the father can improve his current position. The schedule 1 application is significantly weakened by the absence of his having a child arrangements order or even evidence of the Applicant's agreement that he should be regarded by the Court as E's main carer. The Respondent does not accept this. The real reason that he seeks an adjournment is to enable him to take steps to improve his case in this respect. It was submitted by his counsel that because he has been acting in person at times in this litigation he may not have fully understood this. However, the Schedule 1 application was filed on his behalf by his solicitor, and he was legally represented at previous directions hearings and in the pre-proceedings period had the benefit of legal advice and assistance. I do not regard this as a good reason to stay his Application under Schedule 1 now;

(vii) If there has been any delay in respect of the Schedule 1 application, the Respondent has only himself to blame. He was invited to issue the application by letter sent to his solicitors on 3rd March 2019 but did not send one to the Court until 29th October 2019;

(viii) The parties have prepared witness statements which covered all relevant matters but having had discussions at the start of the hearing, in which we were able to clarify the issues, I allowed both parties to expand on their evidence in chief, in order to describe to me in more detail the current arrangements, and what they said the impact would be upon themselves, each other and the children, if the property was either sold, or sale of the property delayed. The Court had all the relevant information before it in order to determine both applications.

Evidence

25. I have read all the documents in the bundle and I heard evidence from both parties. The evidence was tested by cross-examination.

26. The parties hold very different perspectives on their situation, and both strongly feel the other is being unfair to them. There was however relatively little dispute over basic facts.

27. The picture emerges as follows. The parties have lived in the house since they bought it. It has four bedrooms and is in a sought-after village in Oxfordshire. Both children have lived all their lives in the house. The paternal grandparents for many years lived nearby, and recently sold their house and downsized to a property in the same village. They have been a constant presence in the children's lives as both parents worked, so the paternal grandmother has been there to see the children when they came home from school, until their parents came back from work. Both children went to [*name redacted*] school, E has another four years of school. They travelled to and from school by a school bus which picked them up and dropped them off right outside the door. The journey is around ten minutes. E is a talented football player, playing for a number of different local teams and his father takes him to training on a couple of weekday evenings a week and he plays matches at the weekend for both school and clubs out of school. D is in her first year of university. During lockdown she is staying with a friend.

28. Since the parents separated on 1st January 2017, both parents have continued to live in the house but it has become an increasingly intolerable situation. The mother's evidence was not challenged that when at home she spends her time in an upstairs bedroom with an en-suite bathroom. Although she has not been expressly banned from the kitchen, she is made to feel so unwelcome by the Respondent and his parents, that she does not prepare meals for herself or others when she is in the home. She has a fridge in the bedroom.

29. Her evidence was not challenged that she is at the property from Monday evenings through to Friday mornings and that she commutes to work in [redacted] or London (save at the moment due to the pandemic, she is working remotely and based at her partner's property in [*County A*]). It was put to her that sometimes she spends a night at her partner's house in [*County B*]and she agreed, but said this was rare, when she was working late and exhausted and couldn't get back to Oxfordshire in good time. She said her partner lived in [*County A*] not his house in [*County B*]. Her evidence was not challenged that since the separation she has never spent time in the property alone with the children - because the father has always been there, or if he is out, then one or both of his parents are there. He said in his evidence, that if he was out, his parents would come round to 'look after the property' and that this is what E wanted. The Applicant told me that as a consequence of these arrangements she and E spend time together in the evenings in the bedroom that she uses, while the Respondent and often his parents are downstairs in the living room.

30. The relationship between the Applicant and the Respondent and their parents has deteriorated significantly so that it is adversely affecting E. The Respondent said in his evidence about this that his parents were 'not impolite' to the mother but acknowledged that, 'they don't speak to you.' He implied that by not speaking to her they were avoiding unpleasantness, but plainly it is a very difficult atmosphere. Both parties referred to an incident where there had been an argument between the Applicant and the paternal grandfather. The details of this are in dispute but the Respondent accepted that at one point he (the Respondent) had tried to take the mother's phone out of her hand and in doing so had placed his hand over hers and that the force of the pressure exerted caused the phone's automated response to dial 999. The mother spoke to the police and later filed a report.

31. The Applicant had a detailed grasp of the issues, the options she saw available to them, and in particular the parties' respective financial situations.

32. In February 2019 a financial adviser was asked to give a view as to the Applicant's mortgage capacity. Two scenarios were given – the property is sold and the Applicant has a deposit of around £130,000, alternatively, the property is not sold but the Applicant is released from the mortgage. At the time the mortgage account was £9,000 in arrears. The opinion was that, 'taking into account mortgage arrears' she would not be able to get a mortgage even with a deposit, and that it was likely to be at least a year before any lender would look at this, with an interest rate of perhaps 9% or 10%.

33. I am cautious as to the weight that I give to this document, which is a letter, not a witness statement or expert report. Even before Covid-19 pandemic, interest rates were low, I query where the figure of 9 or 10% interest comes from. The writer has not explained the rationale for her view, other than making it clear that the fact of the arrears is very significant. The Respondent gave evidence that the arrears have now been cleared, so that factor while relevant as part of the credit history, is likely to have different weight. We are in a very different financial landscape now than then.

34. The Applicant has worked full time for many years in the finance departments of large companies. After E was born she worked for [*redacted*]. Her current job is with [*redacted*]. She earns £4,500 net a month (after employer deductions including pension and tax). She has pensions from her previous employments but is not drawing any income from them nor has any other source of income. Her current job has not been affected by the current crisis save that she is working remotely, but remains in full-time employment. She has a senior position with her current employer, managing a team. She has very recently applied for a mortgage with [*redacted*], although not yet heard back.

35. The Respondent has unfortunately for him been out of work for the past five years and is on limited income. He has not provided his bank statements for an accurate picture of his financial situation, and although he told me he had applied for universal credit he has not put any evidence relating to this before the Court. His evidence was unclear at times as to his sources of income. For example, he told me that he himself had cleared off mortgage arrears of £12,000 from his savings, but in fact he later said that it was his parents who had cleared them by paying a lump sum. The mortgage at the moment is £1,379 a month. The Respondent's parents continue to give him significant financial support and they are also paying E's school fees. The Respondent suggested to me that he would be able to pay the mortgage in the future because he expects to return to work. It is also his case that the Applicant should continue to pay half the monthly cost of mortgage every month. Previously she was paying £250 a month to him, but more recently has agreed to pay half the monthly mortgage bill.

36. Both the Applicant and the Respondent suggest that they need at least a three-bedroom house. It was suggested to the Applicant that she only needed a two-bedroom house, as D was now an adult and independent. This rather undermines the Respondent's argument that E however will need to rely upon his father to house him past his eighteenth birthday.

37. The Respondent said that he had ‘full charge’ of E during the week and that even when the Applicant was staying in the property, she left at 7am in the morning and did not return until 8.00 p.m. at the earliest. E’s school bus comes at 8.00 a.m. and he comes home at 5.30 p.m., usually having done his homework. He trains with various football teams for an hour on three nights a week and has matches on Saturdays and Sundays.

38. The father said that it would be ‘problematic’ for both him and E if the property were to be sold. He pointed out that his parents and his sister lived in the village and this was E’s base.

39. Even though he has now conceded that their respective shares in the property should be declared at fifty percent, the Respondent seemed keen to emphasise his view that he had made the larger contribution to the property. He said in his oral evidence that he had paid the mortgage and bills and she had paid only £250 a month, but he has not challenged her evidence that she paid for D’s school fees, uniform and additional expenses, which amounted to a greater expense than the mortgage. He did not challenge her evidence about the way the household finances were managed during the relationship, with each contributing to the best of their ability to the shared expenses of their family life.

40. His grasp of finances was a bit hazy. He said ‘my whole well-being is to look after E’s well-being the implication of finances is not my prior concern’. My impression of the way he gave his evidence was that he tended to see things very much from his own point of view, that he does not have a good grasp of the financial implications of the situation and that he does not like the thought of change. He does not envisage that he or E should have to leave the property and so has not let himself think of the practical consequences that might follow from that. He regards the mother as wanting to cause maximum upheaval for E, but did not in my judgment seem to acknowledge that there was anything unsettling or difficult for E – or D - in the continuation of the current situation. He did not however challenge the mother’s evidence that E’s school had raised concerns about the impact of the present living arrangements on E.

41. It was agreed that following the hearing in March 2020 the mother would stop the £250 direct debit and pay fifty percent of the mortgage direct to [*the bank*]. The father suggested that he was worse off as a result of the loss of the direct debit but plainly his contribution to the mortgage has significantly reduced from around £1,100 to about £700. The Respondent has an income of £825 a month which comes as drawings from capital accrued in his haulage business which is not trading at the moment. It is not clear to me how long this income would sustain if he did not go back to work. The Applicant asked him how he intended to pay the mortgage in the future, and whether if she moved out and sale was deferred for a year whether he would pay her rent, and how he intended to pay for maintenance and upkeep. He did not have any answers to any of these questions and tried his best to avoid answering them. When pressed he said that his parents would continue to pay the mortgage and when he returned to work he would be able to meet the payments. However, when asked if his parents might assist him to raise a lump sum to rehouse or buy out the mother’s share, he said that he had no expectation of them assisting him financially.

42. His main issue he said about the prospect of moving house was that E was collected to and from the front door by the school bus and that the paternal grandparents doted on him, did everything for him and provided a complete support network to him. He emphasised that it was his mother who he said had tended to the children on a daily basis to enable the mother to go to work, but did not seem to accept that this must have also enabled him to go to work. He said he did not want his son to become a latch key kid and he needed a support network around him.

43. The Respondent suggested that E did not particularly like spending time with his mother, but said that he thought E could spend one week in every four with him, providing she was able to take him to his football commitments. The Applicant's view is that it would be better if E spent more or less half his time with each parent. At the moment D is staying with a friend in lockdown as she does not wish to stay in the family home. The mother said that she expected D to live with her in university holidays, provided she could rehouse herself and pandemic restrictions are lifted.

Analysis

ToLATA

44. Having regard to the section 15 factors in turn.

(a) the intentions of the person or persons (if any) who created the trust;

45. The parties did not record their intentions in respect of the property when they purchased it. The Applicant's recollection of the conversation they had with their solicitor at time of purchase was that they were advised that each would inherit the other's share in the event of death, and that there was never any suggestion that they would not own it in equal shares.

46. The parties purchased the property together, the Respondent, assisted by his parents, providing the deposit, the Applicant investing her savings in refurbishment. They brought their family up together in it, and both worked throughout the partnership, investing the money they earned into the house and the family. They borrowed against the property for further improvements and also to pay off some debts incurred by the Respondent.

47. The parties did not apparently have any discussions either at the time they bought the property or until their separation about what would happen to the property in the event they separated. The Applicant thinks it should be sold and the proceeds divided, the Respondent wishes to remain living in the house with E.

(b) the purposes for which the property subject to the trust is held,

48. The house was purchased as a family home. The parents' relationship has broken down and the family unit now exists in a different form. The house has been the childhood home for D and for E. Since separation the house has continued to be a home for the children and for both parents, but the situation is fraught with difficulty. The Applicant is prevented from using her share of the home as she would otherwise

be entitled to do. The atmosphere is tense and filled with resentment and this is very difficult for all parties, particularly the children of the family.

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

49. I am concerned with E who is still a minor. The Respondent contends that his welfare is only met by his continuing to live in the same house in which he has always lived.

50. The Applicant contends that it is not in E's welfare to remain living in this very difficult environment.

51. E's school has expressed concern about the atmosphere in the home and the impact it has had on E's welfare. The father accepts that E witnessed the altercation between him and the mother when the police were called.

52. E needs security and stability. His parents should provide him with somewhere to live, to ensure that he can go to school, be supported in his education and out of school activities, to be supported in his social life. At the age of fourteen he should be developing his own identity and taking some steps towards independence so that he will eventually be able to leave home and take care for himself. As well as physical security and stability his emotional needs are very important. He needs to be protected from his parents' dispute, not to feel worried or responsible about either of his parents and to know that even though they do not always agree with one another, they are able to find a way to work together so that they can co-parent and continue to take responsibility for him.

53. In my judgment there are significant concerns that E's welfare needs are not met by the current situation.

54. I am not persuaded that his physical needs can only be met by his continuing to live in the four bedroom house in [*redacted*].

(d) the interests of any secured creditor of any beneficiary.

55. There is sufficient equity in the property to discharge the mortgage. The extent of the impact of the pandemic is unknown. The Respondent is not at this time in a position to meet the mortgage in full without assistance from his parents and has no evidence that he will be able to invest in it so as to keep it in good repair let alone make improvements to it over the next few years. If sale were delayed, the property may increase in value or stay relatively stable, but on any view the parties would be taking a risk that they would be receiving less in equity if sold at a later stage.

Schedule 1, section 4 factors

(a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;

56. On current evidence they each hold about £160,000 to £170,000 equity in the property.

57. The Applicant is likely to continue to earn well in her job as a senior manager and will continue to have the ability to contribute towards employer pension schemes. She can afford to rent a suitable alternative on her current income, but without a deposit, she is unlikely to be able to raise a mortgage on a new property.

58. The Respondent cannot afford to live in the property without assistance from the Applicant or from his parents. It would not in my judgment be reasonable to expect the Applicant to contribute towards the mortgage payments in circumstances where she is not living in the property and not receiving any occupation rent from the Respondent. The Respondent's evidence is that continuing financial assistance from his parents is not guaranteed, and in a letter from them to the Court, they have stressed that continuing to pay E's school fees is '*an ever-increasing struggle'.*

59. Of course it is hoped that with the benefit of further treatment for his medical condition, he will be back at work in due course. However, he could not provide any realistic timescale for this, nor evidence as to his expected level of income and expenditure. Given that the mortgage has already fallen into arrears while he has been responsible for making the payments, there is a significant risk that this would happen again. The Respondent was not able to provide any evidence of how he proposed to find funds to keep the property in a good state of repair pending sale. In the circumstances, if the property were not sold by the parties, there is a real risk that it would be repossessed at a later stage.

(b) the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;

60. As the parties are no longer in a relationship they both need to be able to live separately. They both need to live in accommodation that enables their children to spend time with them. This would be the case if E was spending roughly half his time with each parent as his mother suggests, or 75/25 as his father suggests. D while at university does not have a home of her own and each of the parents would wish to have a home with sufficient space for her to spend time with them. D's next year will be a work placement and her intention would be for that to be in [*redacted*] and that she could live with her mother.

61. Both parties have significant unsecured liabilities and there is no indication from the Respondent as to how he might expect to service his debts without a sale of the Property.

(c) the financial needs of the child;

62. I am concerned with E who is still a minor. He needs to continue to be financially supported by his parents, clothed, fed, and have his daily needs provided for. It would be nice for him to continue to live in or near the village where his grandparents and paternal aunt live, and close to his school. It would be nice for him to live in a house with a garden and where his friends can stay for sleepovers, but none of these are needs. He does not need to continue to live in a four bedroom house.

(d) *the income, earning capacity (if any), property and other financial resources of the child;*

63. E does not have a separate income, property or other financial resource.

(e) *any physical or mental disability of the child;*

64. E does not have any physical or mental disability.

(f) *the manner in which the child was being, or was expected to be, educated or trained.*

65. E is at private school and his grandparents are paying his school fees. It is hoped and expected that he may continue to attend the same school until he completes his A-levels. His older sister is at university and his parents hope and expect the same for him. On behalf of the Respondent father it was suggested that D aged nineteen was now independent and her mother did not need to live in a three bedroom house as D could be expected to provide for herself. It is not clear to me why the Respondent applies a different approach to E. It seems to be expected that E would also leave home to go to university and return home in the holidays.

66. I would expect that both parents would want to rehome themselves in properties where both their children would be able to continue to visit as young adults.

Conclusions

67. In respect of each of the applications the parties have the same position; the Applicant seeks a sale as soon as possible, the Respondent seeks the sale to be deferred for a further seven or eight years. While the ToLATA and Schedule 1 applications place emphasis on different factors, both require the Court to consider all the circumstances. I therefore consider the applications together.

68. Having had regard to all the evidence it is plain and obvious that the Respondent was right to concede that the parties' respective beneficial interests in the property should be declared as being fifty percent each.

69. The Respondent accepts that he owns only half the property, but he wishes the Applicant to have no benefit from her half share for another seven or eight years. He asks that she continues to pay for half the mortgage, yet has no intention of her deriving any benefit from that, for example by receiving an occupation rent either from him or a lodger.

70. If the property were not sold, the Respondent would effectively hold the property on trust for the Applicant for seven or eight years. Even if for the minimum period up to E's eighteenth birthday, there is a real risk that the Respondent would be unable to maintain the mortgage payments and keep the property in a good state of repair and upkeep, thereby putting his ability to safeguard the Applicant's share at risk.

71. If the property were to be sold then the Respondent would be able to use his share of the equity, combined with his continuing income, to rent an alternative smaller property with lower living and maintenance costs. He is in a worse position than the Applicant so far as obtaining a mortgage is concerned, because he has been out of work for so long. However, on either a ToLATA or an Schedule 1 Application, I am not directed as I might be had the parties been married, to strive to achieve an outcome where a lower earner in the partnership may effectively be compensated by the other to achieve parity, but to look in the round at the financial situations of the parties, the needs of the children and to take that into account when considering what if any orders should be made in respect of the property they both own in equal shares.

72. If the Applicant is prevented from realising her share in it for a period of four, seven or eight years her financial stability is at risk. She is unlikely to be released from the mortgage account. The Respondent has been unable to make the mortgage payments consistently, she has been exposed to the adverse consequences of a poor credit rating and will continue to face that risk, as he does not have a job and he cannot meet the payments. Approaching her sixtieth birthday, even if with the benefit of a lump sum, she is highly unlikely to be able to obtain a mortgage at that time.

73. If the property were sold the Applicant could use the deposit to improve her current situation and rent, or in time apply for a mortgage for, a new property in which she and the children could spend time together.

74. The parents would both be able to rehouse themselves within a reasonable distance of E's school. He is 14 years old and the school has a minibus. There is no requirement for him to live only ten minutes away from his school. There is no necessity for him to live in the same village as his grandparents, although of course it would be to his and their continuing benefit if they were able to live nearby.

75. Although the Applicant's income exceeds the Respondent's, her financial situation is not so comfortable that she could realistically meet both her own needs which include providing for E and her older daughter, and make financial provision for E in his father's care.

76. There is in my judgment no good reason to require the parties to provide E with accommodation in his current four bedroom home, either until he finishes school or beyond that time.

77. The Respondent asserts that he is E's full-time carer but has no child arrangements order to that effect. Having had regard to the evidence I have read and heard, I find that he has effectively prevented the mother from taking on the extent of a caring role she wished to for her children because she has not been allowed to be in the house alone with her children, and has been made to feel uncomfortable, excluded and unwanted. Even taking into account those constraints, it would appear that the current situation most resembles a shared care arrangement and the Respondent is in my judgment in difficulties in establishing that he would be entitled to apply for an order under schedule 1 in any event.

78. For all these reasons in my judgment the property should be put on the open market as soon as reasonably practicable and sold for the best price that can be obtained. If the

parties are able to negotiate with one another so that one buys out the other's share then that may provide a sensible way forward.

Costs

79. The Applicant has applied for the Respondent to pay her costs in both the ToLATA application and the Schedule 1. The normal order in civil cases is that costs orders 'follow the event' i.e. that the unsuccessful party must pay the costs of the successful party. In family cases, the usual order is no order as to costs, but that does not apply to applications made under Schedule 1, so again the starting position would be that the unsuccessful party must pay the costs of the successful party.

80. I hope that the parties will be able to work out the terms of a draft order between them, that reflects this judgment, including provision as to costs, and that I may be able to save them further time and expense of attending a further hearing. In that case, I will formally hand down the judgment in the parties' absence and make an order in the terms agreed. If the parties are unable to resolve matters, I shall list a further remote hearing as soon as possible.

Joanna Vincent
HHJ Vincent
Family Court, Oxford

Hearing date: 21st April 2020
Judgment sent out by email: 7th May 2020
Judgment handed down: 3rd June 2020

Welch v Welch [2015] EWHC 2622 (Fam)

FAMILY DIVISION

HOLMAN J

31 JULY 2015

31 JULY 2015

Family proceedings — Orders in family proceedings — Financial provision — Applicant wife and respondent husband divorcing — Final hearing as to financial remedies taking place before district judge — Wife making various applications — Husband cross-applying for civil restraint order — Whether orders sought should be granted

V Welch appeared in person

R Bates for the Respondent

None stated at original source

HOLMAN J:

[1] This is an ex tempore judgment which I begin at 4.50pm on the very last Friday of the summer term after a hearing which has occupied two days. Frankly, the entangled complexities of the relationship between these parties and their litigation could be the subject matter of a book. In the circumstances, I can only touch upon the more significant matters in outline.

[2] I have before me a number of applications by a former wife, Vivien Rosalind Welch, and a cross application by her former husband, Denis William Welch. They are in fact now divorced by decree absolute, and the husband has remarried. This was a second marriage for both of them. They first met through some form of online agency. They began to live together in early 2007. They finally separated in 2013. They both have children from their previous marriages but none jointly of their own. The husband is now aged 66, and the wife is now aged 59.

[3] It is quite clear that during the course of much of this marriage the wife continued to be engaged in litigation against her previous, first husband, Mr Harrison. As will emerge, that has had a profound effect upon their subsequent financial situations. In judgments in the present proceedings District Judge Hess has, in a number of places, described the approach of the wife both to that litigation against her first husband and this litigation against her second husband as obsessive, or obsessional, and indeed irrational. By way of example only, District Judge Hess said at para 87 of his judgment dated 9 September 2014 that ". . . in this litigation, and in the previous litigation, the wife has . . . been obstinate, unrealistic and obsessive”. I stress that those are his words after hearing evidence over several days. They are not my choice of words; I merely repeat as part of the background what that judge concluded.

[4] There was a final hearing as to financial remedies before District Judge Hess during September 2014. At that time, effectively, the wife had no remaining assets or funds of her own at all. Prior to this marriage she had owned the property in which in fact she still lives, called Inglenook in or near Guilford. But during the subsistence of the present marriage that had been transferred into the joint names of the wife and the husband, on trust, as to 99% to him and 1% to her. Therefore, at the time of the hearing last September that was effectively his house, not hers, although she remained, and does remain, in occupation. He in fact lives in Singapore. Therefore, she had no assets. She had no income. She owed an enormous debt standing, at that date, at about £414,000, as a judgment debt, together with interest thereon, to her previous solicitors, Withers LLP.

[5] The district judge was faced with a dilemma that if he ordered the husband to pay a lump sum to, or make any other capital provision for, the wife, Withers, being possessed of their judgment, would be likely at once to seek to enforce it against the lump sum or capital so awarded. The way that District Judge Hess avoided that was to say that the wife must vacate Inglenook so that it could be sold, but that the husband must purchase a property, chosen by her, to a value not exceeding £250,000, in which she must be permitted to live for the rest of her life. Insofar as maintenance was concerned, he considered, and this is a matter to which I will return again later, that the wife did have an earning capacity, but that she still had a need for maintenance at the rate of £1,000 a month, or £12,000 a year.

[6] The wife was dissatisfied with that outcome and applied to the High Court for permission to appeal. That application came before Roberts J It became linked also with an application firmly rooted in the proposition that there had been non-disclosure by the husband, and deception by him of District Judge Hess. Roberts J ruled upon those applications in two written judgments which she handed down during February 2015, although I am unclear as to the precise date of the principal one. At all events, there is a typed judgment by Roberts J extending to some 34 pages, and 89 paragraphs, dating from February 2015 and an “addendum” judgment extending to some further seven pages and 20 paragraphs, which does bear the date 20 February 2015. If I may say so, in those carefully crafted, written judgments Roberts J clearly considered both the relevant law and the factual matrix and circumstances of this case with very great care. Her conclusion was that there had not been any significant non-disclosure, or lies, or misleading of the court. She refused permission to appeal. It is important to stress that I, sitting at the same level as Roberts J, cannot of course in any way sit on appeal from her decision to refuse permission to appeal.

[7] Economy and proportionality require that I do not again set out at great length the history and all the matters so fully and carefully described and analysed by Roberts J, in those two judgments. Therefore, so far as I am concerned, and this judgment is concerned, I incorporate them by reference. Anybody wishing to have a full appreciation and understanding of this case, and indeed this judgment, must first read those judgments.

[8] It might have been thought that the matter would then have come to some rest, but the wife issued a further application to vary the maintenance order that District Judge Hess had made so relatively recently as 9 September 2014. In this regard it is relevant to mention that at preamble, or recital 2(a) of the order of 9 September 2014, District Judge Hess had recorded the following:

> “District Judge Hess has expressed the following views in relation to any future application: that, whilst it is not possible to debar a person from making an application under section 31 Matrimonial Causes Act 1973 to vary a spousal periodical payments order, the circumstances of the making of this order are such that a court would be very unlikely to consider favourably a variation application by either party.”

Clearly, therefore, an application issued and coming before him within nine months of that order, particularly containing that recital, was not perhaps the most promising of applications.

[9] At the hearing on 2 June 2015 the wife, who on that occasion appeared in person, first made an application that District Judge Hess should recuse himself from hearing her application. The essential basis of that seems to have been that the wife believed that District Judge Hess and leading counsel, who from time to time acted for the husband, namely Mr Patrick Chamberlayne QC, had some sort of familiarity with each other, and specifically that they had both spoken together at some seminar a few months earlier. It appears that the truth with regard to the seminar was that on the same day they were both speaking at seminars organised by the same company, Jordans, but that one of them was speaking in Newcastle and the other in London. More generally, District Judge Hess was to explain in his ruling on the recusal application that it was probably true of every single barrister practising in this field that there may be casual social encounters between the barrister and judges, either after the judge became a judge, or indeed earlier when the judge was still a practitioner. As District Judge Hess said in para 10 of his ruling on this point “This is probably true of every single barrister in this field. These social events have many hundreds of people at them at any one time. To suggest that a judge should recuse himself, or herself, on the basis of having attended an FLBA event at the same time as a barrister appearing before him/her is a completely inappropriate suggestion and totally without merit.”

[10] One of the many applications before me is for permission to appeal from the decision of District Judge Hess not to recuse himself. I refuse permission to appeal. I absolutely agree with every word that District Judge Hess said in his judgment on that topic. Frankly, if every time a judge had had some passing encounter, social or otherwise, with a specialist barrister in a specialist field the judge had to recuse himself, there would be few cases that could be effectively heard.

[11] The essence of the wife's application to vary at that stage was effectively a renewed assertion that the husband had failed to disclose material, and had lied to and misled District Judge Hess at the main hearing when the maintenance order had been made. At the hearing on 2 June 2015 the wife was permitted to cross-examine the husband at very considerable length over, as I understand it, about three hours. Notwithstanding the sustained cross-examination by the wife, the district judge clearly concluded in his substantive judgment of 2 June 2015 that he still considered the husband to be essentially an honest person who had been frank with his overall disclosure as to his financial circumstances. In the upshot, the district judge refused the application by the wife to vary upwards the maintenance order that had been made as recently as the previous September. In the course of his judgment that day he said, at para 30 “It seemed to me that the findings that I made about the way in which she has pursued litigation in September 2014 have, if anything, become worse. She is every bit and possibly more vengeful, obsessive, irrational and unjustified now than she was then . . . .” Once again, I stress that those are not my words, they are the words of the district judge who had, by then, heard from both parties at considerable length over an aggregate of about five days.

[12] As well as rejecting the application for a variation upwards of the level of maintenance, District Judge Hess made what to my mind is a somewhat unusual order on 5 June 2015. Paragraph 16 of his order dated 5 June 2015 provides as follows:

> “On the basis that the Applicant will have a significant liability to pay the Respondent's costs as set out in paragraphs 9 to 11 of this order, and on the basis that the amounts of costs sought (subject to detailed assessment) is in excess of the total liability the Respondent has to the Applicant under the term periodical payments order of 9 September 2014, the Respondent's liability to pay periodical payments to the Applicant under paragraph six of the order made on 9 September 2014 shall be suspended until such time as District Judge Hess shall further consider the matter following the outcome of the detailed assessments of the costs ordered at paragraphs 9 to 11 of this order and such other costs orders made from time to time hereafter. The court directs that the matter shall be considered by him by a paper application in the first instance following the detailed assessments of the costs orders herein. He may, at his discretion, decide to deal with the matter on paper or list a further hearing . . . .”

That, as I say, is a relatively unusual provision in my experience.

[13] As I understand the thinking behind it, the maintenance order was made at the rate of £12,000 a year for a fixed term (having regard to the age of the husband) of six years. In other words, the total amount payable by the husband until the ultimate termination of the maintenance order would have started out as £72,000. However, pursuant to costs orders already made, it was being asserted that (subject to detailed assessment) the wife already owed the husband costs of around £70,000. Therefore, District Judge Hess obviously took the view that it was wrong and unjust that on the one hand there should be an unsatisfied debt by the wife to the husband for costs of the order of £70,000, and on the other hand the husband should continue to be expected to pay, month in, month out, £1,000 a month to an ultimate total of about £70,000. Of course, one does understand the rough justice and thinking behind that approach. The other side of it is that the purpose of maintenance is to enable the payee, month in, month out, week in, week out, day in, day out, to provide a roof over her head, clothes on her body, and food and other necessities of life. It was indeed clear from para 28 of the judgment of District Judge Hess of 2 June 2015 that his maintenance award had been designed simply to meet what he described as the “basic need” of the wife, for he said at para 28 “This is not a case where I was attempting to share income, or award a percentage of the likely income. It seemed to me that the wife had a basic need of £2,000, some of which could be met by her own ability to earn and some of which should be met for a period of time by the husband . . . .” Therefore, he was there clearly assessing her “basic need” as £2,000 a month, or £24,000 a year, towards which he was requiring the husband to pay half.

[14] It is not completely clear to me how, if the wife had a “basic need” for the necessities of life of £2,000 a month, of which she herself could at best only contribute half by her own earnings, that “basic need” could be justifiably put on hold in that way because of the outstanding amounts owed by way of costs. Clearly, in another case, and in different circumstances in which a maintenance order may have been made to meet more than merely “basic need” but also a more generous standard of living, then there would be scope to restrict the payee to “basic need” whilst there was an outstanding significant costs debt. However, given that the award itself was limited “basic need”, I have some reservations (I put it no higher) about the appropriateness of the order in para 16 on the facts and in the circumstances of this case.

[15] At all events, the wife was very dissatisfied also with the decision and order of District Judge Hess of 2 June 2015 and 5 June 2015, and so she added an application for permission to appeal from that decision and order to the raft of applications that are now before me today. As I understand it from the first page of her own “position statement/skeleton argument” for the present hearing, dated 25 June 2015 (as revised 24 June 2015), there are now the following applications, broadly, before the court, in the order in which she lists them. First, an application to set aside altogether the order of District Judge Hess of 9 September 2014. Second, an application to strike out the cross-application that the husband has made for a civil restraint order. Third, an appeal against the order for possession that District Judge Hess made in relation to Inglenook on 15 April 2015. Fourth, her appeal against the order of District Judge Hess, dated 5 June 2015, which is a reference, I think, to para 16, which I have just quoted above. Fifth, an application that she has issued for permission to use documents from these proceedings in proposed proceedings in the Queen's Bench Division, and also in any prospective criminal proceedings. Sixth, an application to transfer all these matrimonial matters from the level of District Judge Hess to the Royal Courts of Justice. Although not expressly set out on that page of her position statement, there is also, undoubtedly, a current application for permission to appeal from the decisions of District Judge Hess not to recuse himself (which I have already refused) and his decision of 2 June 2015 not to vary upwards the maintenance.

[16] I propose to refer first to certain aspects of the course of the hearing on 2 June 2015 itself. It is clear that the wife has a very, very longstanding complaint and belief that there has been repeated non-disclosure by the husband and the withholding of documents. The hearing on 2 June 2015 began, as I understand it, at the beginning of the normal court day, and during the course of the morning Mrs Welch (who was acting in person) was cross-examining her husband. She was very keen to see certain Singapore tax documents, and, in particular, his tax return in form B1, and the Singapore form IR8A for the calendar and tax year 1 January to 31 December 2014. The form IR8A is the Singapore equivalent of a UK P11D in which taxable expenses are returned.

[17] No documents were produced during the course of the morning whilst the wife was clearly digging away to receive them. Immediately after the lunch break, as can be seen from the official transcript of the proceedings that day, now in the wife's red bundle at tab 4, p 32, Mr Jonathan Tod, who was appearing on behalf of the husband that day, produced some documents. Initially there was indeed a reference to “the tax return”. It is, however, quite clear that the document which he produced was not the tax return but was the Singapore revenue authority's notice of assessment, dated 2 May 2015, with respect to the tax year 1 January to 31 December 2014. That showed, as Mr Tod explained, total income from employment of SGD$483,085, which I am told is approximately STG£240,000.

[18] In an answer on bundle p 32, internal p 2 of the transcript, Mr Tod said “This is a notice of assessment of tax. It relates to the period from 1 January to 31 December 2014, so you see the top figure (employment) is SGD$483,000 gross . . . . That I think is a mixture of various forms of income, including of course the SGD$339,000 net, which is the redundancy figure. The redundancy figure gross is SGD$413,540 . . . .” Mrs Welch clearly complained bitterly further down the same page that the document that was being produced was not the document that she was eager to see. It was the notice of assessment. She wanted to see the tax return, namely the form B1.

[19] Moving on, and now at bundle p 33, internal p 3, Mr Tod also produced the accounts for the year ending 30 June 2014 from a firm called One World Maritime from which the husband derives income. The cross-examination then continued. It is quite clear that Mrs Welch was continuing to dig for production of the form B1. She said, at the top of p 35, internal p 5 “. . . and that is a B1, and a B1, as you know, is a consolidated statement which adds in all your income, not just the tax return from IHC, because the tax return that you have produced here was from IHC . . .”. In the middle of bundle p 36, internal p 6, the district judge said to Mr Welch, the witness: “The simple question is do you happen to have the consolidated statement [viz the form B1] for the year 2014?” to which Mr Welch replied: “I have submitted all the documentation I have, sir”. A little later, around bundle p 42, internal p 12, Mrs Welch started asking about the IR8A, to which Mr Welch said: “I've got a copy of that document on my iPhone”. He appears to repeat that in an answer in the middle of bundle p 43, internal p 13. Also on that page Mrs Welch asked: “Let's have a look at your phone again, shall we, to see if we can find the B1?” to which Mr Welch replied: “This is the B . . . . I've done a search of the documentation that I've received from my accountant. I've got the IR8A . . . .” It thus appears that, at any rate by that point of the cross-examination that afternoon, Mr Welch, who clearly had his mobile phone with him, had turned up, on the phone, both the B1 and the IR8A. Unfortunately, the questioning somewhat drifted away from those documents at that point and they do not appear actually to have been produced. Therefore, the first very strong point made by Mrs Welch during the course of this hearing is that there was continuing non-disclosure and deception by the husband in his failure at that hearing to produce the actual tax return, form B1, and the form IR8A.

[20] There is then a further twist to the matter. There was a hearing before myself on 25 June 2015. On that date all these matters raised by Mrs Welch were listed, I think, for final hearing. Very, very tragically her own mother died about 24 hours before that hearing. Common humanity required that I should not embark upon a hearing of this kind when, understandably, Mrs Welch was deeply affected by grief, and extremely busy with organising the funeral. She did, however, appear before me that day. In court on that day she asked again to see the B1 for the year ending 31 December 2014, and the IR8A for that year. She said that she believed that the husband's solicitors were in possession of those documents. On that occasion Mr Patrick Chamberlayne QC was appearing on behalf of the husband. He said, on instructions, that Gordon Dadds, the husband's solicitors, did not have those documents, but to put the matter beyond doubt I made an order at para 8 of my order that day as follows:

> “Gordon Dadds must, in an open letter signed by a partner, and sent to the wife and lodged with the court . . . confirm, if it be the case, that they do not have in their possession now, and did not have in their possession on or before 2 June 2015, copies of all or part of any of the following documents in relation to their client, Denis William Welch:
>
> (i) his Singapore tax form or document IR8A . . . for the year ending 31 December 2014; or
>
> (ii) his Singapore tax form or document B1 consolidated tax return for the year ending 31 December 2014; or
>
> (iii) his Singapore B1 consolidated tax assessment for the year ending 31 December 2014.”

[21] In response to that order a partner of Gordon Dadds called David Ruck wrote a letter dated 6 July 2015 to both the wife and, as it is headed, myself. That letter is relatively lengthy and I cannot quote from it at length in this judgment. It sets out, at the bottom of the second page, and going into the top of the third page, a number of tax-related documents in their possession, which they then attached to the letter in a bundle of documents which, during the course of this hearing, we numbered from pp 1 to 35. Mr Ruck categorically stated towards the bottom of the third page of the letter that Gordon Dadds have not come into possession of any other documentation relating to Mr Welch's tax affairs than those.

[22] The letter also asserted that all those listed documents were disclosed to Mrs Welch “in the lunch hour” at the final hearing of the variation application. It is now accepted by and on behalf of Gordon Dadds that that was an error. No documents at all were given to Mrs Welch during “the lunch hour”. Rather, what happened was that the two categories of documents that I have mentioned, namely the Singapore notice of assessment and the financial statements for One World Maritime, were produced in the courtroom (and copies obviously handed at that moment to Mrs Welch) when the hearing resumed after lunch. In a case in which conspiracy theories abound, and Gordon Dadds know very well indeed that Mrs Welch is highly mistrustful of her husband, of any lawyers who act for her husband, and indeed of at least two judges, namely District Judge Hess and Roberts J (both of whom she has asked to recuse themselves), it was deeply regrettable that Mr Ruck did not take more care before drafting or signing off that letter to ensure its scrupulous accuracy. It has inevitably raised the index of suspicion by Mrs Welch during this hearing that Gordon Dadds asserted that that sheaf of documents were given to her during the lunch hour at the final hearing when in truth no documents were given to her during the lunch hour. Further, only a small part of the documents listed by Mr Ruck in the letter were actually handed to her at all during the day of the final hearing of the variation application.

[23] Painstakingly, during the course of this hearing, we have, I think, finally established that all the documents, namely pp 1 to 35 of the documents attached to the letter of Mr Ruck fall in fact into three categories. A number of the documents were in fact exhibited to a statement of the husband, made on 27 May 2015, and were actually already in the hands of Mrs Welch prior to the hearing on 2 June 2015, so that is the first category of documents.

[24] Some of them, namely the notice of assessment and the financial statements of One World Maritime, were handed across the table in the courtroom after lunch on 2 June 2015. That is the second category of documents.

[25] There are in fact within the bundle two pages, now numbered 9 and 10, which were not exhibited to the statement of Mr Welch of 27 May 2015, and were not handed to Mrs Welch or District Judge Hess on 2 June 2015, and which, so far as I am aware, only first went over to her at all when she received this letter of 6 July 2015. That is the third category of documents. As it happens, those two sheets really do not take the case any further at all. They are essentially the statement of account as between Mr Welch and the tax authorities showing how much he has paid by monthly instalments, and how much he still owes at any one time, and they add nothing to Mrs Welch's knowledge and understanding, or that of the court, of the overall financial circumstances of the husband.

[26] Therefore, it was, frankly, a bad mistake by Mr Ruck in the circumstances of this case to make the two categories of error which he made in that letter: first, saying that any documents had been handed at all to Mrs Welch during the lunch hour; second, saying that all the exhibited documents, that is pp 1 to 37, were handed to her at all that day, for actually most of them were not, although many of them she already had in her possession. Inevitably, this has raised in Mrs Welch a huge suspicion that, as she would say, “once again” the husband and/or his solicitors are gravely misleading the court. She remained convinced that Gordon Dadds do have in their possession, and are withholding, the Singapore form B1 and the Singapore form IR8A for the year 1 January to 31 December 2014. For that reason I offered her the opportunity, which she rapidly accepted, to cross-examine and ask questions of Ms Emma Morris, the solicitor (though not a partner) in Gordon Dadds who has had considerable conduct of this case, and has been present in court throughout this hearing.

[27] Ms Morris went into the witness box yesterday afternoon on affirmation. She was adamant that she had never seen the IR8A, or the B1 in question. She said, further, that she had caused a search to be conducted by various search names upon the computer system of Gordon Dadds to see if these documents were recorded anywhere in their system. She said she had “put in every conceivable title” and the documents have not been identified.

[28] In the light of that evidence of Ms Morris, which I unreservedly accept, I am personally absolutely satisfied that Gordon Dadds do not have in their possession now, and have not had in their possession at any time before or on 2 June 2015, either the husband's form B1, or his form IR8A for the tax year 1 January to 31 December 2014.

[29] Insofar as those documents are concerned, it appears from the transcript that even during the hearing on 2 June 2015 Mr Welch had in fact identified them on his mobile phone, but at the last minute was not required or pressed to produce them. At all events, in my judgment, the absence of those particular documents at that hearing does not in any way whatsoever undermine the decision which District Judge Hess reached at that hearing.

[30] I turn from that issue with regard to those documents to a number of other matters raised by Mrs Welch at this hearing. It is, I think, only fair to her to record that, if given the opportunity to do so, she could, over very many days, elaborate at very great length upon a vast range of matters in this case. She says, for instance, that there are still over 60 items of non-disclosure by the husband. She says that all this is part of "a pattern of behaviour" and "an abuse of process which has infected every single judgment in this case". However, time has not, frankly, permitted me to go into the kind of intense and enormous detail that Mrs Welch would wish.

[31] Her general attack on both the order of September 2014 and the order of 2 June 2015 broadly falls under two heads, which I take in no particular order. First, she says that as of today, late July 2015, there are a number of "*Barder*" events. Here, it is perhaps appropriate to interpose that Mrs Welch is, if I may respectfully say so without wishing to be condescending, a woman of obvious high intelligence. She has addressed me throughout with great courtesy and charm. She is highly articulate. She has undoubtedly devoted immense amounts of time to her protracted litigation against two husbands over the last 15 years or so, and she knows a great deal more law in this general area of the law than most law students, if not their professors. Therefore, when I talk shorthand about *Barder* events, Mrs Welch, who herself uses that expression, knows exactly what I am talking about.

[32] In a document addressed to me today, and dated 31 July 2015, she says at para 8: "Four major *Barder* events have arisen as at July 2015". I will address each of those in turn. The first so-called *Barder* event is that she has produced a very recent email, dated 27 July 2015 (that is, earlier this very week) in which she says that Withers are now willing significantly to reduce or write off the debt. It will be recalled that as at last September she owed Withers, together with accrued interest, £414,000. We have roughly calculated that additional interest, to today, brings the debt today to around £440,000. However, she produces an email dated 27 July 2015 from Stephen Butcher, the revenue control manager for Withers, in which he says:

> "Without prejudice, Dear Vivien, I have spoken to Andrew Wass [who I understand is a partner in the firm] who advises that if the sum of £150,000 (STG£150,000) is readily available, then Withers LLP will present you with a document that confirm that this amount would be accepted as full and final settlement of all amounts owing to them. Until you are able to confirm this as a formal offer of settlement, and the funds are readily available, then Withers LLP's position remains the same."

Pausing there, I infer that the "position" of Withers is that they will seek to enforce by any means available to them the full debt owing to them, together with interest thereon.

[33] Therefore, the first point that Mrs Welch makes is that although District Judge Hess treated her as owing something of the order of £414,000 to Withers, and that that clearly influenced the manner in which he fashioned his award, she may now in fact only have to pay Withers £150,000, so, as she puts it in her document "Withers' debt being written off, save for £150,000, places £290,000 back on the assets schedule. The Withers' debt being central to the way in which the judgment was found, and how the assets were distributed, or not distributed in the wife's case."

[34] First of all, this is not in my view at all in the category of a *Barder* event. The fact that many months after the final hearing of ancillary relief a significant creditor may stretch out a hand of mercy and compromise to a debtor spouse is not itself a *Barder* event at all. Frankly, it may be no more than Withers feeling a sense of absolute desperation, having learnt the manner in which the district judge fashioned his order, which was highly benevolent to the wife in the circumstances, and highly disadvantageous to Withers. But in any event the email from Stephen Butcher is clearly on the basis that the sum of £150,000 "is readily available". I am afraid that today Mrs Welch cannot put her hands to a pound, let alone £150,000. If (I stress if) I were to conclude that on the basis of this, or other so-called *Barder* events, the existing order should be set aside, the whole matter would of course have to be referred back to District Judge Hess for rehearing. I have no idea what he might decide, and, frankly, it could be many months indeed before there was any question of £150,000 being "readily available".

[35] Further, before this could result in any benefit to Mrs Welch, whose overarching need is for a home, the district judge would have to conclude that she should receive capital which was the aggregate of what she reasonably requires for a home, plus £150,000. In view of the fact that the husband has already paid out very large sums towards the costs of the catastrophic litigation with the first husband, it may be that the district judge would take a great deal of persuading to make provision from the assets of the husband for £150,000 to pay to Withers. In my view, therefore, there is nothing in that alleged *Barder* event.

[36] The next so-called *Barder* event is not, in truth, a *Barder* event at all. It is put as follows “New evidence proves funding of the historic litigation was not by the Respondent, rather, by the wife, making a nonsense of the judgment's construction and meaning a total cost to the wife given the 100% add back of those costs . . . . This new evidence (schedule of payments from Withers LLP) only arose as at 10 June 2015 . . . .” In order to understand this point it is necessary to return to the judgment of District Judge Hess of September 2014.

[HOLMAN J: I mention, for the record, that we have had a break now of about five to ten minutes, between somewhere around 6.10pm and 6.15pm so that the staff could leave and probably most of us could go to the lavatory.]

[37] In order to understand this point it is necessary to turn to paras 31 and 32 of the transcript of the judgment of District Judge Hess of 9 September 2014. He dealt there with the extent to which Mr Welch, the husband, had funded, or contributed to the funding of the litigation by Mrs Welch against her first husband, Mr Harrison. District Judge Hess said:

> “All of this litigation which took place between 2007 and 2012, almost exactly the span of the marriage, was disruptive and expensive. It is very clear on the evidence that I have been presented that this litigation was paid for entirely by the husband . . . . He then did some analysis of the figures and concluded that , . . . something in the region of £500,000 was spent by the wife on her litigation, which was funded by the husband's money. That includes payment of Manches' indemnity costs order in the setting aside application.”

[38] Therefore, there was a finding by District Judge Hess that the husband had contributed about half a million pounds of his money to funding the wife's litigation against her first husband. The document to which the wife refers, and upon which she relies as the so-called *Barder* event, is a schedule, apparently produced by Withers, showing the dates, and amounts, and descriptions of payments received on their ledger in 2006 and 2007. I infer that it does show the total amount received by Withers in relation to this litigation. The bottom-line total is, in round figures, £166,000. The first three items were received in or before August 2006, so Mrs Welch makes two points: first, those items, which total just over £40,000, could not have been funded by Mr Welch since she did not even know him at the time. Second, the bottom-line figure is £166,000, which is far short of the half million pounds referred to by the district judge.

[39] There are, however, very considerable difficulties with this aspect of Mrs Welch's case. First, this material cannot possibly be regarded as a “*Barder* event”. This is not something occurring subsequent to the decision and order of September 2014. Indeed it relates to matters occurring during 2006 and 2007, namely the making of the payments. Mrs Welch says she has only just received this ledger document from Withers. She says that solicitors who at one stage acted for her in the present litigation tried to get this information from Withers earlier, and that Withers, being themselves locked into litigation with her, were not forthcoming. Actually, I am not willing to accept that as an answer, since ultimately speaking the accountant, or a similar person, at Withers could have been required to attend the hearing on subpoena and bring his ledger with him, although patently it would never have come to that. The fact of the matter is that this material is not only not *Barder* material, but does not begin to satisfy the *Ladd v Marshall* criteria for adducing fresh evidence (I interpose that Mrs Welch is also very familiar with the case of *Ladd v Marshall* and that area of the law in relation to the admissibility of fresh evidence).

[40] Further, this document does not in any way undermine the broad assessment by District Judge Hess that Mr Welch contributed something of the order of half a million pounds to funding the litigation. First, as the district judge himself said, he was including within that figure payment of indemnity costs of Manches, who I assume are solicitors acting at some stage for the first husband, Mr Harrison. The figure of those indemnity costs was apparently £221,000, so a total of the costs actually received by Withers of £166,000, and the costs paid to Manches of £221,000 is itself £387,000. Additionally, however, Mr Richard Bates, who appears today on behalf of Mr Welch (for him, like me, this is I believe a first appearance in this litigation, apart from my brief walk-on part on 25 June), has told me that additional payments were £126,000 to Charles Russell, and £93,000 to Mishcon de Reya. A total of all those figures is in fact £606,000, that is, over £100,000 more than the half million pounds assessed by District Judge Hess. Therefore, this is not a *Barder* event. The document from Withers is not admissible under *Ladd v Marshall* principles since the evidence was reasonably obtainable long before September 2014, and in any event it does not ultimately prove what Mrs Welch asserts.

[41] I will refer next to the fourth of her *Barder* events. This is that "The Respondent has not retired, has stated that he has no intention of retiring and was never unemployed, where the final judgment is completely predicated on that being true affecting the division of assets including the need to sell the family home . . .". It does appear to be the case that Mr Welch has not yet retired, though whether not to retire amounts to an "event" is perhaps something of a moot point, but at all events the district judge himself did not treat Mr Welch has having retired. At paras 62 to 64 of his judgment of September 2014 he dealt with the working position and earning capacity of the husband. He quoted a passage in a statement in which the husband had said that he was trying to get work, that he had been unsuccessful and was fearing he might be at the end of his career, but went on to say that it may be that he will get work, and he is hoping he will get work to keep him going in Singapore, at least until next year. At para 64 of his judgment District Judge Hess said "Broadly speaking, I accept that self-assessment. He may get something. I am not finding that for definite he will never work again, but it does not seem to me that he is likely to get anything very substantial, very long lasting and that he is very much towards the end of his working life." Therefore, in that passage District Judge Hess clearly foresaw that the husband might in fact continue to work, and was not making any definite judgment or assessment that the husband had retired, or would now retire. Therefore, the fact that the husband is currently apparently still working to some degree is not on any basis a *Barder* event. At most, it might impact on yet further consideration of the level of maintenance, which ties in with the alleged *Barder* event, number three. That is as follows. The wife says in her document, "The wife, last week, was classified as disabled, being unable to work, by the health authority, and provides proof of that. The judgment relies upon her ability to work in order to support herself and the family . . . ."

[42] I make plain at once that this is not conceivably a "*Barder* event" that in any whatsoever may undermine, or require reconsideration of, the decision and order of September 2014 in the circumstances as they then were. However, at that time, and indeed in his judgment of 2 June 2015, on the application to vary the maintenance, the district judge clearly took the view that the wife was, and is, capable of working and earning an income. He dealt with that at paras 66 to 67 of his judgment last September. He said:

> "The wife does not work at the moment, and has not really done any work since 2007, partly because she has been really a professional litigant in all of that time through all of this litigation, culminating in this litigation. She did work before that . . . . I do not accept that there is any health ground which prevents her from working at the moment. She is resourceful and intelligent, and might have been rather better if she had put some of her energies into pursuing some work rather than pursuing litigation, but there we are. Even at age 58, it seems to me that it should be possible for her to find some work . . . . There is no reason that I can see why she should not get some work. I accept that it is going to be a limited amount and for a limited number of years, but I see no reason why she should not earn at least £10,000, £15,000 perhaps, for the remainder of her working life until her state pension age probably."

Pausing there, I believe that the current state pension age for a woman aged then 58, now 59, is probably about 67.

[43] Therefore, in that passage the district judge was attributing to the wife an earning capacity of between £10,000 to £15,000 per annum, which indeed fits with a passage that I have already read out from para 28 of the later judgment of 2 June 2015 in which he assessed her "basic need" at £2,000 a month. Since he ordered the husband to pay £1,000 a month, there was clearly an assumption there that she could earn of the order of £1,000 a month herself. Quite clearly, in his June judgment, District Judge Hess did regard the wife as continuing to have an earning capacity of that order. He said at para 29 "It is perfectly plain that she is not seeing it in any way as her role to obtain remunerative employment. She has continued with her litigation mind set and the potential victim of that litigation mind set is the husband." At para 34 he said:

> "Her statement does not contain a single word about her attempts to get work. It is quite clear that she has not made any. She has told me that she has been 'on the sick' as she put it since a day or two after the 2014 hearing. I have not seen the medical evidence which says that, I have seen some medical evidence from her purporting to justify non-attendance at particular court hearings, but it seems to me a fact that she has spent almost every working day since September 2014 pursuing this litigation. I repeat the point that I made in September that it would be far better if she put her energies into actually obtaining good remunerative employment than persecuting her former husband."

It is therefore quite plain that in June District Judge Hess was continuing to treat her as having an earning capacity if only she diverted from pursuing this litigation to getting a job.

[44] The document which Mrs Welch has produced at this hearing is a letter dated 20 July 2015 from Cosham Benefit Centre in Wolverhampton. This refers to "a recent change" and "a decision on your capability for work". It continues, "You meet the eligibility criteria for support group. This means you are not required to take part in any work-related activity . . .". As a result of that, she is granted what is described as "extra money" bringing her total weekly entitlement up to £123.70. The letter is certainly concise and I do not know what material or evidence was available to the benefit centre when making that assessment. That said, it appears, at least superficially, that the state (which is very sparing with spending money at the moment) has determined that the "capability for work" of the wife is such that she is "not required to take part in any work-related activity", and that the state will pay to her "extra money". If all that be right (and it may require a great deal of further investigation) it is of course possible that the conclusion of District Judge Hess in both September 2014 and June 2015 that Mrs Welch is fit enough to work, and capable of working, although correct then, may require reconsideration now. I stress that that is not a *Barder* event. However, whilst the very last thing I would wish to do is to encourage any further litigation at all, these new facts with regard to her health and work "capability" may (I stress may) justify some reconsideration on a variation application, both of the level of periodical payments, and also of that provision in para 16 of the order of 5 June 2015, which I quoted above. With regard to the level of periodical payments, District Judge Hess clearly thought that this lady requires approximately £2,000 a month to meet her basic needs. He assumed that she could herself earn at least £1,000 a month, and therefore required the husband to contribute only the other £1,000 a month. It may (I stress may) now appear that she cannot be expected herself to contribute £1,000 a month, and indeed that the most she can contribute is the monthly equivalent of £123.70 a week which she receives from the state. That would leave a quite significant shortfall.

[45] The other point is that District Judge Hess reached the decision in June that the maintenance payments should be "suspended" in view of the large amount of costs that the wife owes to the husband. As I observed earlier, in a case in which the maintenance order makes provision which has some "generosity" within it, then it may well be an appropriate and acceptable approach to say that payments of maintenance should be suspended until the costs debt has been erased. In this case, however, we are now talking about subsistence. At the moment, the lady is apparently not capable of working. At the moment, she has a mere £123.70 a week, or £6,432 a year coming in, against an assessed "basic need" of £24,000 a year. In those circumstances it may (I stress may) be that the provision of para 16 of the order of 5 June 2015 requires reconsideration. Maintenance in a case like this is about subsistence. The lady has no capital assets whatsoever. She appears currently to have no income, or source of income other than £123.70 a week. It may be that there simply is not room in this case to suspend the maintenance any longer, leaving her on the breadline, however great her costs debt to her former husband. I stress these are not *Barder* events, but they do mean that I am not prepared in this case to make some kind of all-embracing extended civil restraint order that would preclude even the making of a further application to vary the level of maintenance.

[46] I turn from those alleged *Barder* events to some of the other matters that Mrs Welch has raised before me today. In view of the hour, and the serious risk that this judgment may shortly cease to be being recorded because all recording machinery in the Royal Courts of Justice may get switched off, I must deal with this extremely shortly. She remains absolutely convinced that there has been serious non-disclosure in this case, notwithstanding, first, that District Judge Hess, although well aware of the contention, was quite satisfied that the husband was being open and honest. Second, that Roberts J, who scrutinised with the utmost care a great deal of further information introduced by Mrs Welch, concluded, most obviously at para 18 of her addendum judgment, that, "I did not, and do not, consider that this evidence is sufficient to justify a wholesale reopening of wife's financial claims against the husband . . .". That, as I say, is a conclusion by a judge who is renowned for her ferret-like capacity to get to the truth of non-disclosure after a very careful scrutiny of the documents. She had said also, in para 78 of her primary judgment:

> "I can find no basis for finding that this is compelling material which justifies a reopening of these issues on the basis of a clear fraud perpetrated on the court by the husband. Contrary to the wife's assertions, in my view this 'fresh evidence' proves very little, apart from the fact that the husband has been consistent in his efforts to secure further employment . . . . I can find no cogent or reliable evidence to substantiate her allegation that he has placed funds out of the reach of the wife or the court, or that he continues a 'champagne lifestyle', which would suggest that he has access to significant and (as yet) undisclosed funds . . . ."

[47] During the course of this hearing, although undoubtedly she would like to have developed her arguments at far greater length, Mrs Welch has homed in in particular on the following matters. First, there is the question of whether or not there was undisclosed employment by a company called Ampelmann. At para 14 of her addendum judgment Roberts J said, "I have gone back to analyse the evidence which has been put before me on this issue and nowhere do I find corroboration for the wife's assertion that he was employed by this company prior to the hearing in September 2014 . . .". Mrs Welch has returned to the fray and her profound belief that even before that hearing the husband was employed by, and in receipt of income from, that company. However, this was the subject of cross-examination and evidence during the hearing on 2 June 2015. At an answer at the bottom of the red bundle, tab 4, p 51, internal p 23 of the transcript, the husband said, in relation to that company:

> ". . . I was first contacted by Ampelmann maybe in July or August . . . of 2014 . . . . I will make no bones about this. They had made some enquiries, then they went away. I heard nothing more until they had actually spoken to two of the ex-directors of IHC in Holland. It is a Dutch company. They didn't come back to me until I think it was November, and the first pay cheque that I got from them was in December, the middle of December, and I didn't get paid the full amount that we'd agreed in terms of my daily rate because I'd only worked half of the month . . . ."

He was asked whether he was still working for them, at the top of bundle p 52, internal p 24, and he said that he was still doing work for them, although he doubted that it would go on much further in view of the invasion of the company's staff by various private investigation enquiries that the wife had been making, and he continued by saying:

> "I fully believe that my term with Ampelmann is going to be over in September [viz 2015] and what is more I am working under real duress with them. This is very young company. The person I report to is 34 years old, and I have been told variously by him to get my act together, and more recently that he was disappointed because I didn't have the killer instinct in terms of going for future business . . . ."

[48] Therefore, it seems to me that this whole issue about Ampelmann was further explored at the hearing on 2 June 2015 when Mrs Welch had the various documents that she now relies on. The husband was cross-examined. He gave that evidence, all of which is to the effect, as Roberts J had herself concluded, namely that he was not employed by that company prior to the hearing in September 2014. I am not in the least persuaded that there is now some basis for challenging and setting aside that order because of non-disclosure as at early September 2014 of some hidden employment with Ampelmann. In short, the employment with Ampelmann came later.

[49] Next, Mrs Welch relies on an association between the husband and an organisation called GasPartners. At p 118 of tab 3 of her red bundle she produces a document downloaded from the Internet, headed "Welcome to GasPartners". This states that GasPartners is a joint partnership between various named people, one of whom is Denis Welch. A little further on there are photographs and brief biographies of the various so-called partners, and these include a photograph, which I am told is a photograph of, and a description of Denis Welch. Therefore, Mrs Welch has a deep conviction that this is a prosperous partnership from which the husband has been, and is, extracting a good income, and in which he may indeed have substantial capital. This also was the subject of cross-examination before District Judge Hess in the June hearing at bundle pp 20, 21 and 28, internal pp 38, 39 and 46 of the transcript, in tab 4 of the red bundle. In summary, Mr Welch described that GasPartners was a group of individuals, including himself, with whom he was trying to do business. He said, at bundle p 21, that he had had no income whatsoever from GasPartners, although he did not deny the existence of GasPartners. He explained that the purpose of the partnership was to try to develop an opening in Asia for the application of liquid natural gas as a fuel for vessels. The district judge asked, "So have you earned any money from GasPartners since the September hearing?" Answer, "None whatsoever. None whatsoever". At p 28 there is the following:

> "Mrs Welch: 'So, Mr Welch, you lied to Roberts J . . .' Answer: 'I've lied to nobody sir . . . What lie did I?' Question: 'You did not disclose the GasPartners'. Answer: 'I've made no income from GasPartners . . . . It's an opportunity to develop business

> in the future'. Question: 'No, it's more than income. It's', Answer: 'It's not a going concern, it's not earning any money, and we have no contracts'."

[50] Mrs Welch, of course, relies upon that downloaded document from the Internet, but that does not in fact disclose that it is generating any income, and so far as I am aware there is simply no reliable evidence to show that he does derive any current income of any significance from GasPartners.

[51] The third area upon which Mrs Welch places much reliance is the whole area, which I have already described in considerable detail, of, as she would say, concealment and obfuscation with regard to his tax position.

[52] I turn, therefore, to rule briefly upon the range of applications that Mrs Welch has made. I am not satisfied that any grounds whatsoever exist for successfully challenging and setting aside the order made in September 2014. There is no ground based in any significant non-disclosure. There is no ground based on a subsequent *Barder* event. I refuse permission to appeal from the decision of District Judge Hess not to recuse himself in June. I refuse permission to appeal, as an appeal, from any part of the decision and order of 2nd or 5 June 2015. It has not been shown to me that at the time that he made those orders there was any error by District Judge Hess in his approach. I do, however, consider that grounds may exist now (I stress may) which would justify a yet further application to vary the level of maintenance and/or the current suspension on the actual payment of the maintenance.

[53] Mrs Welch is required to vacate and give possession of the property at Inglenook by, I think, the end of today. She has of course already gained an extension of the giving of possession of roughly a month from my order of 25 June, which, as expressed in that order, I granted, ". . . as an exercise in common humanity, the wife's mother having just died and her funeral being on Friday 3 June 2015 . . .". Therefore, I suspended possession until at any rate the conclusion of this hearing, but I continued as follows:

> "The wife must clearly understand that the possession order is necessarily consequent upon the underlying order as to financial remedies and that permission to appeal from that order has already been refused, and, accordingly, unless the underlying order is now set aside on some new and other ground, she must inevitably give possession of Inglenook and cannot expect further indulgence of the court."

[54] Therefore, as recorded there, Roberts J had already refused permission to appeal from the making of the possession order. For the reasons I have now given, I am unable, and unwilling, to set aside the underlying order of September 2014 on any ground, whether of non-disclosure or a *Barder* event, and so, very soon, the possession order must, without any possible basis for further extension, take effect. I will be willing, at the conclusion of this judgment, to hear an application as an act of mercy for some further relatively short postponement, because it would be inhumane and intolerable for Mrs Welch to be evicted by bailiffs tomorrow, or in the immediate future.

[55] There is the application to transfer all these proceedings from the level of District Judge Hess (now His Honour Judge Hess) to the level of the High Court here at the Royal Courts of Justice. The essential effect of my decisions is that there is nothing now to transfer. There is a subsisting statutory right in Mrs Welch, or indeed Mr Welch, to apply to vary the continuing maintenance order, but there is not the least basis for transferring that to London, and indeed every reason why it should not be transferred to the Royal Courts of Justice. This is, in absolute terms, a very low maintenance order. This is a case which has been dealt with at considerable length by District Judge Hess, and it is a case in which any further application should be made to him with judicial continuity. It is no obstacle that he is now a circuit judge who sits in Portsmouth. Indeed, Portsmouth is every bit as local and convenient to Mrs Welch, who lives in or near Guildford, as is The Strand in London. In any event, the language of para 16 of the order of 5 June 2015 contemplates continuing involvement by His Honour Judge Hess, as he now is, in this case.

[56] That, I think, leaves the following further matters: Mrs Welch has asked on the one hand for some permissive order to use documents from these family proceedings in proceedings in the Queen's Bench Division. Mr Welch on the other hand has asked that I should make an extended civil restraint order. Mrs Welch has said today that she cannot in fact now afford to commence any further proceedings in the Queen's Bench Division, but, to put it bluntly, her mask slipped and she certainly would like to start suing Mr Welch for a range of matters, including perjury, and, she says, wrongful imprisonment in Singapore last summer.

[57] In my view the conditions clearly exist in this case for the making of a civil restraint order pursuant to Practice Direction 4B attached to r 4.8 of the Family Procedure Rules 2010, and the conditions exist for the making of an "extended civil restraint order". Mrs Welch has "persistently made applications which are totally without merit". Roberts J and District Judge Hess have both already certified that some of the applications made to them were totally without merit. I, for my part, am willing to certify, and do certify, that some of the applications made to me at this hearing are also totally without merit. Therefore, the essential requirement of para 3.1 of the practice direction is satisfied.

[58] Frankly, this bitter and intense litigation must be closed to the maximum extent possible, subject only to variation of maintenance, as I have described. It is quite extraordinarily destructive. It is phenomenally expensive. Mrs Welch, on top of all her other debts, now owes a costs debt to Mr Welch which has been billed at around £70,000, although it may be assessed as less. The very idea that she should now be permitted to start collateral litigation against him in the Queen's Bench Division is, in my view, beyond contemplation. I wish to make absolutely clear that I do not in any way whatsoever make a general civil restraint order. I say nothing whatsoever about any civil proceedings that she may wish to bring against any other person or body, for any reason, except Denis William Welch.

[59] I make plain also that I intend specifically to exclude from the ambit of an extended civil restraint order the making of an application to His Honour Judge Hess to vary the current level of periodical payments, and/or for the discharge of the suspension imposed by para 16 of the order of 5 June. Subject to that, however, there will be an extended civil restraint order. Mrs Welch strongly submitted that I should make a lesser "limited civil restraint order", but the effect of that is only to prevent further applications within the proceedings in which the order is made. What she is threatening here is not merely further applications within these family proceedings, but applications against Mr Welch in the Queen's Bench Division.

[60] For those reasons, there will be an extended civil restraint order in terms that have been drafted, and the draft of which has been discussed today, but the essential part will provide as follows:

> "(i) Subject to subparagraph (ii) below, the Applicant, Vivien Rosalind Welch, is restrained from making any further application against Denis William Welch in any civil court concerning any matter involving, or relating to, or touching upon, or leading to proceedings under case number GU13D00045, without first obtaining permission from His Honour Judge Hess sitting in the single Family Court at Portsmouth;
>
> (ii) Nothing in subparagraph (i) above shall prevent the Applicant from making a further application to His Honour Judge Hess for a variation in the level of periodical payments and/or the discharge of the suspension imposed by him in paragraph 16 of the order dated 5 June 2015, based on the grounds that in July 2015 Job Centre Plus determined that the Applicant is not capable of working, and awarded her 'extra money'."

[61] Mrs Welch has also made plain that she would like to engage the police or other prosecuting authorities in an investigation of whether or not Mr Welch has committed perjury or other crimes. I do not of course in any way whatsoever prevent her from doing that, but, consistent with the making of the extended civil restraint order, I will refuse, or dismiss the application that she made for permission to rely upon documents disclosed in these proceedings in support of an action to commit Mr Welch to prison for contempt of court, false imprisonment, non-disclosure and any associated damages claim in the Queen's Bench Division, but that order will contain the following important words:

> "For the avoidance of doubt, nothing in this paragraph of this order shall prevent either party, if he or she so wishes, from disclosing any document prepared of filed in these proceedings to the police and/or the CPS, and/or the Attorney General in support of any information he or she may wish to supply to them that a criminal offence has been committed by any person, or in defence thereof."

[62] That, I think, now rules upon all the applications that are before me by each of Mrs Welch and Mr Welch, save only the application by Mr Bates that I should make some order against Mrs Welch as to the costs of and incidental to this hearing, yesterday and today. I have already indicated that I refuse to do that. It may be that that decision of mine is not entirely in accordance with principle, this being an appellate stage, and ordinarily costs at an appellate stage follow the event. However, it is a decision sometimes necessary in family proceedings of this kind which reflects realities. The fact of the matter is that this lady has absolutely no funds and no assets. Currently, the only income available to her is £123 a week, payable by way of benefits. She already has phenomenal debts. She owes £441,000 to Withers, which she has not the slightest prospect of paying. She owes, it is said, £70,000 already to the husband under costs orders made to date. To my mind it is simply futile, and in the circumstances of this case, purely punitive, to add to that a yet further costs order for the costs of and incidental to this hearing, yesterday and today.

[63] Further, there is an acute problem which now arises in these situations since the virtual total withdrawal of legal aid in private family law litigation. Formerly, a lady with absolutely no means such as Mrs Welch would most probably have been eligible for legal aid. That would have had two effects. One effect is that she would have been protected by provisions of the legal aid legislation against enforceable costs orders being made against her. The other effect was that people in the position of Mrs Welch were able at any rate to benefit from objective legal advice. It is, I am afraid, a problem which is increasingly faced now that litigants in person are denied any publicly-funded legal advice. They do their very best, and undoubtedly Mrs Welch has become a very proficient lawyer herself, but they are denied the advantage of objective legal advice. That has the effect that far too often we are now faced with days like yesterday and today in court. It is largely the responsibility of Mrs Welch, and in the words of District Judge Hess, her obsessive and irrational approach to these proceedings, but it may also be in part due to the denial to her of any publicly-funded legal advice.

[64] Therefore, for all those reasons, albeit that it may be more merciful than principled, I refuse to make any order as to the costs of and incidental to the hearing, yesterday and today. I now record that it is 7.15pm, and on that note, I draw this hearing to an end.

Judgment accordingly.
