

Question

In 2004, after Louis, a plumber, met Karen, a trainee architect, they started a relationship. A year later they decided to live together. In 2005 Louis purchased a house for them to live in. Karen was still training, so Louis paid the deposit and raised the balance of the purchase price from the Ubend Bank by way of a mortgage secured on the house. The house was conveyed into Louis's name and he became the sole registered owner.

In 2006 Karen qualified. She immediately found a job in a firm of architects in London. The couple opened a joint bank account into which they each paid £1,500 from their monthly earnings. They used the joint bank account to meet all of their household and other living expenses, including the monthly mortgage payments to the Ubend Bank.

In May 2007 Karen gave birth to Elliott. She immediately decided to give up her job as an architect in London so that she could stay at home to look after her family. Louis and Karen therefore closed the joint bank account. After that Louis paid the monthly mortgage payments and other household bills from his own bank account. In 2009 they had a second child, Fiona. By this time Louis was working long hours and winning plumbing contracts that took him overseas to work for weeks at a time. Karen was doing all the household tasks, and looking after Elliot and Fiona. She did all the decorating and minor repairs around the house.

In 2012, Louis finished a lucrative plumbing contract in Saudi Arabia that allowed him to repay the outstanding balance of the mortgage loan. Later that year Karen inherited £15,000 when her father died. She used the money to build a loft extension that she designed herself.

A week ago Louis told Karen that he has met somebody else with whom he wants to set up home abroad. Louis therefore wants the house to be sold.

Advise Karen about what, if any, interest she may be able to claim in the house by way of trust law principles.

Introduction

This is an advice for Karen about what, if any, interest she may be able to claim in the house by way of trust law principles. This advice will discuss the different ways in which Karen a cohabitant acquires an interest by way of the law of trusts. This advice will discuss whether there will always be a proprietary interest consisting of a beneficial share in the equitable ownership of the property. This advice will begin by first by showing an express contract or trust; second by establishing a resulting trust on traditional principles based on direct contributions; third by establishing a constructive trust by reference to a discovered "common intention"; and fourth by use of proprietary estoppel, based upon the idea that the cohabitant has acted to their detriment based upon the reasonable belief, induced by the other cohabitant, that they were acquiring a beneficial interest by so acting. Lastly this advice will consider if the court will allow a sale.

Setting the context

Karen and Louis purchase a home together and the legal title only vests in Louis name. (Many older cases involve land being purchased as a home for a man and woman to live in as a couple, but only the man was registered as the legal owner.) It maybe that there has been no discussion about each of their respective shares in the property. There may be some vague discussion about love or their relationship but very little said about their rights to the property. Then over a period of years there is substantial contributions towards the home by the no-legal owner, for example assistance by Karen with mortgage repayments or paying towards the loft extension/substantial improvements or paying the household bills to the extent even so that the home-owner can pay the mortgage. Then on the breakdown of the relationship question arises as to whether the non-legal owner, namely Karen whether she has acquired a share in the property.

Express contract or trust

Karen the cohabitant can acquire an interest if there is an express trust settled by Louis the legal owner of the property. If this happens the creation of the trust must satisfy s.53(1)(b) Law of Property Act ("LPA") 1925, whereby the declaration of the trust must be "*manifested and proved by some writing*". The legal title of the property is usually transferred into the joint names of the parties in accordance with Section 52(1) LPA 1925. In the eventuality there is no express trust, a cohabitant may still be able to assert a share on the basis they have a beneficial interest in the property. This exception is enshrined by virtue of s.53(2) LPA 1925 that excuses resulting and constructive trusts from the formality of having to be in writing. Therefore, equity recognises beneficial owners rights in the property because they have made contributions despite being the legal owner. In the absence of an enforceable express trust over the property, Louis will be the sole beneficial owner unless Karen is able to establish an interest under a common intention constructive trust. This element considers the use of common intention constructive trusts to determine beneficial ownership of homes owned by a sole legal owner, in light of the decision in **Stack v Dowden** [2007] UKHL.

Resulting trust

A resulting trust is based on the presumption that a person is not likely to advanced monies towards a property altruistically, without wanting to get something back from this. The law in some instances presumes this is an investment thus the 'presumption of resulting trust'. Karen will receive an equitable interest proportionate to her contributions as held in **Tinsley v Milligan**¹. Traditionally, the only contributions that would give rise to the presumption are those that would have been when the property was acquisitioned. The criticism that can be advanced is that the resulting trust analysis applies a '*cold mathematical solution according*

¹ **Tinsley v Milligan** [1994] 1 AC 340

to the size of contributions'.² 'Money-down resulting trusts' are undoubtedly suitable for commercial transactions, but not generally where family homes are bought as part of a joint venture. It is quite likely that Louis and Karen, if they had thought about ownership at all, would have said *at the time of purchase* that they intended joint ownership, with equal shares and if this is recorded then the courts would not look beyond this, as in **Goodman v Gallant**³ (not the outcome this approach leads to).

Moreover the doctrine becomes almost impossibly difficult to operate when property is purchased with the aid of a mortgage. Is it appropriate to treat a mortgage loan as a cash contribution from the legal owner/mortgagor when the reality of the situation is the mortgage repayments come from shared income. In **Huntingford v Hobbs** in which it was always contemplated that one party should make the payments, so this counted as his contribution. However, it could be that this agreement was only reached because the other party was covering other expenses. Nevertheless, the modern reliance on mortgage finance has led to a decline in the importance of the resulting trust.

"Common intention" constructive trust ("CICT")

Generally, a constructive trust arises where it can be shown that it would be unconscionable for Louis (the sole owner of the property) to enjoy the whole beneficial interest without Karen.⁴ The courts have developed the CICT doctrine and the development began in the two big cases **Gissing v Gissing**⁵ and **Pettit v Pettit**⁶ and it was culminated in the case of **Lloyds Bank v Rosset**.⁷ Lord Bridge in **Rosset** contributed to the new doctrine by stating that there are two categories of trust that can arise under this doctrine and they represent the different ways in which condition can be satisfied.

Establishing an interest

The first condition is where there is no evidence of oral statement or discussion between parties about ownership, but the court can infer common intention to share beneficial ownership, from the fact that both parties have made referable contributions.⁸ The second category is where there is an actual oral statement about beneficial ownership, therefore the parties have discussed beneficial ownership or one of them has made a representation or statement and this provides the evidence of common intention. But of course the mere

² Chambers, *Is There a Presumption of Resulting Trust?* in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford 2010), 267-287

³ [1986] 2 WLR 236

⁴ **Rochefoucauld v Boustead** [1897] 1 Ch 196

⁵ [1971] AC 886

⁶ [1970] AC 777

⁷ [1989] Ch 350

⁸ A referable contributions - is contributions to the purchase price of the property. Moreover a referable contribution satisfies both conditions above a referable contribution in itself justifies an inference of common intention and secondly by making a referable contribution at the same time it infers a detrimental reliance.

statement in itself is not detrimental reliance, so in this case a separate detrimental reliance has to be found. The detrimental reliance need not amount to a referable contribution.

In order to establish an equitable interest, the Karen will need to demonstrate common intention for her to acquire an interest in the land. Lady Hale in **Stack v Dowden** indicated that common intention should be ascertained in the light of the whole course of conduct (known as the 'holistic' approach). She produced a non-exhaustive list of factors that may be taken into account. Although the extension of this principle to sole legal owner cases was obiter in Stack itself, it is now very clear that this approach also applies to such cases. What does this mean in practical terms? Below is a list of things that Karen can use to support any argument that there was a common intention:

1. Advice or discussions the parties had which may indicate their intention;
2. The reason legal title was registered in Louis name;
3. The purpose for which the parties acquired the house;
4. The nature of the relationship;
5. Whether the parties have children;
6. How the house was financed; and
7. How the parties arranged other finances and divided responsibility for household expenses.

Express CICT

The current law on CICT's is best expressed in **Rosset**, where Lord Bridge drew a distinction between cases of 'express' and cases of 'inferred' common intention. The finding of a common intention can only be found on evidence of express discussions between the parties. The intention that has to be established is to share beneficial entitlement and not just to share occupation of the property. Identical intentions held by each party, but not communicated, will not suffice. Steyn LJ in **Springette v Defoe**⁹ observed that "*Our trust law does not allow property rights to be affected by telepathy*".¹⁰ Express words indicating ownership include "half yours" **Hammond v Mitchell** [1991] 1 WLR 1127 or 50:50" (**Clough v Killey** [1996] 72 P&CR D22). Words which are insufficient for ownership include: "Family home" (**Lloyds Bank v Rosset**) "benefit...both of us" (**James v Thomas** [2007] EWCA Civ 121) and "You will be looked after" (**Thomson v Humphrey** [2009] EWHC 3576. There does not appear to have been any express discussion about ownership between Louis and Karen.

Inferred CICT

As an alternative to finding an express common intention, the common intention may be inferred from Louis's conduct (as for any declaration of trust in **Paul v Constance**¹¹).

⁹ [1992] 2 FLR 388

¹⁰ [1992] 2 FLR 388, at p.392

¹¹ [1977] 1 WLR 527

However, the case law considering the nature of the conduct required to justify this inference is a legal minefield.

Excuse cases

This often comes to the fore in cases where ‘excuses’ are used. In **Grant v Edwards**¹² at the time of her partner's purchasing of a family home, the claimant was in the process of divorcing her husband; the man put the deeds in his name only, though the reason for not including her as a party to the conveyance was that this might cause problems in the divorce proceedings; it was not difficult to construe conversations about this as an agreement that she should have an interest in the land, albeit that it would be better for her name not to appear on the deeds. Similarly in **Eves v Eves**¹³ decided in the same way as **Grant v Edwards**; here, the legal owner had told the claimant that her name could not appear on the title deeds as she was under 21 years old. This was a complete lie, made with the intention of securing sole interest. These decisions have been criticised on the basis that in neither case was there a true ‘common intention’ – that is, the men did not really wish to share the property beneficially with the women – and that this is yet another factor showing how fictitious the common intention is.¹⁴ Gardener on the other hand argues, it may be that the man is using the excuse as a soft way of saying ‘no’ (since such a pronouncement may endanger the relationship), and he should not be persecuted for wanting to secure his investment.¹⁵

The current state of the law is best expressed by Lord Bridge in **Rosset**, where it was said that a common intention will only be inferred where there is a direct or referable financial contribution to the purchase price by means of an acquisition capital or payment towards mortgage instalments: “*it is at least extremely doubtful whether anything less will do*”.¹⁶ The supposed requirement of a ‘direct financial contribution’ necessarily means that indirect contributions are not recognised. Direct financial contributions mean financial contribution which is referable to the purchase. This includes initial capital payments or payments of mortgage instalments (or where the parties pool their income which is then used for such expenditure. Indirect financial contributions means where the household expenditure is split between the parties so that the legal owner of the home pays the mortgage instalments and the claimant pays other expenses. The contribution is indirect because the claimant does not directly pay towards the mortgage, but makes it easier for the legal owner to do so. In **Rosset** the court said paying for improvements or conducting them oneself is not enough to find a CICT. In **Burns v Burns**¹⁷ the court said fulfilment of domestic duties and looking after the family over the years did not persuade the court to infer a

¹² [1986] Ch 638

¹³ [1975] 1 WLR 1338

¹⁴ N E Glover & P N Todd, “The Myth of Common Intention” (1996) 16 Legal Studies 325

¹⁵ S Gardner, “Rethinking Family Property” (1993) 109 LQR 263, p.265

¹⁶ [1991] 1 A.C. 107 at p. 109

¹⁷ [1984] Ch 317

common intention to share the beneficial interest, nor did the purchase of chattels for the house. One can readily see the attraction of the argument that the parties between them pay the various household bills and it is a matter of convenience as to who actually pays which bill. The Law Commission commented that *“it does not seem satisfactory to us that the way in which the parties sharing the home have agreed to administer their household budget should have a decisive effect on whether the house is to be treated as beneficially owned by one or both of them”*.¹⁸

In the earlier case of **Burns v Burns**, Fox LJ and May LJ indicated support for a common intention where the parties agree that one should pay the household expenses so that the legal owner could pay the mortgage instalments. This argument seems to have been laid to rest by Lord Bridge in **Rosset**. However, just as it appeared that there was light at the end of the tunnel, the waters have been muddied further by the decision in the recent case of **Le Foe v Le Foe**.¹⁹ Here the wife had not made any ‘direct’ contributions. The judge nevertheless noted that *“the family economy depended for its function on W’s earnings; it was an arbitrary allocation of responsibility that H paid the mortgage, service charges and outgoings, whereas W paid for day-to-day domestic expenditure”*. Crucially, the court did recognise a common intention arising from relatively small indirect contributions. This case, if indeed authority for the proposition that indirect financial contributions can lead to an inferred common intention, is clearly wrongly decided and per incuriam – unlikely to be followed.

Although *Stack v Dowden* is the seminal case in this area, the groundwork for the decision was laid by the Court of Appeal in **Oxley v Hiscock** [2004] EWCA Civ546. In this case (which related to sole legal ownership) the court suggested that the court could determine shares of the property based on what it considered fair in light of Louis and Karen’s *“whole course of dealing”* in relation to the property. Lady Hale, drew on this case in her landmark judgment in *Stack*, endorsing Lord Walker’s view that the *“law has moved on”* from a focus on financial contributions. The application of the Stack holistic approach will be used here for Karen to infer intention in sole ownership cases and this was confirmed by the Privy Council in the sole ownership case of **Abbott v Abbott** [2007] UKPC53, in which Lady Hale reiterated that the law had *“substantially moved on”*.

Quantification of Share

As we have seen, once a common intention constructive trust is established, the court is required to quantify the size of the non-legal owner's interest, using the following framework:

¹⁸ Discussion Paper (2002) Law Commission No 278, Para 2.107

¹⁹ [2001] 2 FLR 970

1. If there is evidence of **express** common intention as to the shares this ought to be conclusive;
2. In the absence of such an intention, the same approach is taken as in joint ownership cases; the court ought to strive to **infer** the common intention; and
3. If this is not possible they may **impute** an intention for 'fair shares' in light of the 'whole course of dealing'.

What has puzzled the courts for years is when a person has acquired a share in the family home is what share they are to acquire, i.e. should their share be divided using the resulting trust approach or the common intention trust approach. This was the problem encountered by the judge in the case of **Oxley v Hiscock**.²⁰ The judge reverted back to a similar position taken in **Midland Bank plc v Cooke**,²¹ where Waite LJ concluded that the court should: "*undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages.*" The Law Commission's Discussion Paper *Sharing Homes* favours legislative intervention, although the exact form that such legislation might take is still unclear.²² However, recently in the case of **Jones v Kernott**²³ the Supreme Court decided (in line with the decision in **Stack v Dowden**²⁴), when property is bought in the joint names of a cohabiting couples, who may both be responsible for the mortgage, and in the absence of any express declaration of their beneficial interests, the presumption that the beneficial interests coincided with the legal estate could be rebutted by evidence of a contrary intention. Where that evidence did not show what shares were intended, it was for the court to decide what shares were either intended or fair.

Although early post-*Stack* cases on sole ownership did not clearly differentiate between the acquisition and quantification stages, it is now very clear from cases such as **Capehornv Harris** [2015] EWCA Civ955 that the two stages are distinct. Likewise any uncertainty as to whether and when the court may impute an intention to the parties has been clarified by the Court of Appeal in **Barnesv Phillips** [2015] ECWA Civ1056, confirming that imputation is only permissible at quantification stage.

Analysis

It is established that the courts will first give effect to any express common intention between Karen and Louis (*Establishing beneficial interests in domestic property, Practical Law UK*). This means an actual '*agreement, arrangement or understanding*' that the ownership of the property should be shared beneficially '*however imperfectly remembered and... imprecise their terms*'. Here, we are unaware if Louis' described the house was 'theirs'

²⁰ [2003] EWCA Civ 1902

²¹ [1995] 4 All ER 562

²² Discussion Paper (2002) Law Commission No 278

²³ [2011] UKSC 53

²⁴ [2007] UKHL 17

which could connote an intention that Karen owned some portion of the property. Indeed, in *Hammond v Mitchell* 'half yours' appears similar to 'theirs' or 'ours' – albeit if Louis did not specify Karen's exact proportional ownership. It certainly seems stronger than 'family home' or 'you will be looked after' (*Lloyds Bank v Rosset*; *Thomson v Humphrey*) which Louis could have used to suggest they merely intended Karen to occupy, rather than own, the property with him. From a practical standpoint, full, careful and detailed instructions from Karen should be taken about all discussions with Louis, whether oral or in writing which may substantiate her claim (*Christopher Wagstaffe QC: 'Constructive Trusts'*).

Yet, it remains possible that the court will determine there is insufficient evidence to support this and Karen will need to demonstrate the court can infer their actual intention through conduct. The Supreme Court in *Stack v Dowden* built on the case of *Oxley v Hiscock* to establish that 'the whole course of dealing' should be used as the basis from which to infer a common intention. Lady Hale in *Stack* produced a non-exhaustive list of factors that the court should consider under this 'holistic' approach.

First, the nature of the parties' relationship is long-term and serious. This is evidenced by Karen's substantial investment in the property which indicates their shared intention for her to remain with Louis for a long time, even if Louis's death prevented this. Second, they did share biological children and it appears that they shared the responsibility to raise them. Third, balanced financial outgoings are arguably the strongest indicator of a common intention. Pre-*Stack* cases such as *Lloyds Bank* held that only direct financial contributions to the acquisition of the property are relevant. Indeed, it is possible the court could follow this strict approach after controversial early Post-*Stack* cases such as *Thomson v Humphrey*, *Walsh v Singh* and *Walker v Morris* disregarded indirect financial contributions such as working without pay and domestic contributions which indicate that Karen's substantial contributions to renovations or domestic expenses would be insufficient but contrasted with the loft extension which would serve to increase the overall value of the property.

Yet, it appears more likely that the holistic *Stack* approach as applied in *Abbott v Abbott* will prevail whereby a contribution to the mortgage when combined with joint financial outgoings was sufficient to demonstrate inferred common intention. Indeed, *Aspden v Elvy* also applied the holistic approach which would consider Karen's substantial contributions to improving the property as evidence of an inferred common intention to share it beneficially.

Even if the Court did take a narrower, *Lloyds Bank* view, the Law Commission's *Sharing Homes Discussion Paper* approved Nicholas Mostyn QC's direction in *Le Foe v Le Foe* that the distinction between direct and indirect financial contributions is arbitrary. As such, Karen's financial contributions as part of a 'family economy' would allow Louis to repay the mortgage and count equivalent to Karen discharging the mortgage herself, thus weighing heavily in her favour for establishing an interest in the property. In conclusion, based on Professor Martin Dixon's view in *Modern Land Law* the risk of the Court only considering Karen's financial contributions is low given Lady Hale and Lord Walker's authoritative

guidance in *Stack* that 'the law has moved on' and now 'context is everything'. Thus, Karen's financial contributions to outgoings such as domestic contributions, a new loft extension, in line with the length and seriousness of their relationship appear sufficient to indicate a shared intention for Karen to have a beneficial interest in the Property.

Problems with imputation

The question of when imputation is permissible remains controversial, especially as the lower courts seemed quick to impute shares in the early cases following **Jones v Kernott**. In **Aspdenv Elvy** the High Court considered the contributions of both money and physical labour by Mr Aspden and imputed an intention that he should have a 25% share of the home. Judge Behrens considered that this represented a "*fair return for the investment of £65,000-£70,000 and the work carried out by Mr Aspden*". He acknowledged that the figure was "*somewhat arbitrary*" but said that it was the best he could do with the available material. The willingness of lower courts to impute shares at the quantification stage has given rise to concerns (as expressed by Lord Neuberger in his dissent in **Stack v Dowden**) that the process has become unprincipled, and arguably a smokescreen for judicial discretion. The Court of Appeal dealt with this issue in the sole ownership case of **Graham-York v York** [2015] EWCA Civ72. The couple in this case had a dysfunctional relationship and Mr York was both controlling and violent. The Court of Appeal rejected Miss Graham-York's argument that her interest should have been quantified at 50%, upholding the trial judge's allocation of a 25% share. In imputing an intention for "*fair shares*" the Court of Appeal reiterated that this must be ascertained in light only of the parties' dealings with the property stating that the "*the court is not concerned with some form of redistributive justice*". The Court of Appeal held that it is not the role of the court to reallocate property rights based on other matters (such as the presence of domestic violence in the relationship), which have no link to the acquisition of the property.

Proprietary estoppel

Another way that Karen can argue she has a beneficial interest is through pleading proprietary estoppel. Given equity's flexible nature, the citing of a formula for circumstances under which an equitable remedy may arise is perhaps not advisable. Nevertheless, in order to invoke proprietary estoppel, we can broadly say that the cohabitant would have to establish the following factors:

- That Karen has acted to his/her detriment
- That Karen did so on the faith of a belief that he/she has been (or is going to be) given a right in the property
- That Karen belief was known to and encouraged by the other cohabitant

Sale of House

Louis has found a new relationship and therefore wants the house to be sold. The matters to which a court must have regard on an application under s.14 Trust of Land and Appointment of Trustees Act (TLATA) 1996 (which include: the 'intentions of the person or

persons who created the trust; the purposes for which the property subject to the trust is held; the welfare of any minor who occupies, or might reasonably be expected to occupy any land subject to the trust as their home; and the interests of any secured creditor of any beneficiary'). In May 2007 Karen gave birth to Elliott and 2009 they had a second child, Fiona. As she has two young children the court will be inclined to not order a sale for the welfare of minors. Furthermore, the purpose the house was brought was to provide a family home and this is a continuing collateral purpose. The doctrine that was developed to cover the circumstances in which a sale should not take place was this doctrine of continuing collateral purpose, a good illustration of this is the case called **Re Buchanan-Wollaston's Conveyance**.²⁵

Conclusion

The current requirements for establishing the existence of an interest under a trust are not ideally suited the way in which share homes today and also how they financially input towards this. A clearer system is needed which understands it is catering for the cohabiting relationships. As the Law Commission recognised, *"the [inferred CICT] may work well in giving effect to financial contributions in a more flexible manner than could be achieved by resulting trusts, but this begs the question whether property rights should be determined by a blinkered consideration of financial consideration"*. The use of common intention is generally approved, and it may be in the interests of justice (though probably not in the interests of certainty) that a wider range of contributions (including indirect contributions, as recognised in **Le Foe**) should suffice.

²⁵ [1939] Ch 738

Bibliography

Books

Gray, K and S F (2007) Core Texts, Land Law, Oxford

Mackenzie J and Phillips M (2006) Textbook on Land Law, Oxford

Smith, R (2006) Property Law, Longmans

Thompson, M P (2001) Modern Land Law, Oxford

Journals

Baughten, 'Estoppel over land and third parties. An open question' (1994) 14 LS 147

Burrows, 'Resulting or constructive trusts: proprietary estoppel' [1995] SJ 5 March 332

Chambers, *Is There a Presumption of Resulting Trust?* in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford 2010), 267-287

Clarke, 'The Family Home: Intention and Agreement' [1992] Fam Law 73

Dixon, 'A Case Too Far' [1997] Conv Jan /Feb 66 - 73

Ferguson, 'Constructive Trusts – a note of caution' (1993) 109 LQR 114

Gardner, "Rethinking Family Property" (1993) 109 LQR 263, p.265

Glover & P N Todd, "The Myth of Common Intention" (1996) 16 Legal Studies 325

Lawson, 'The things we do for love: detrimental reliance in the family home' [1996] LS 218