

3 STONE BUILDINGS SEMINAR

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COHABITEES AND PROPERTY

DECISIONS SINCE LLOYDS BANK V ROSSET

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Introduction

- Many couples cohabit, either prior to an intended marriage or instead of any marriage.
- Many such couples will cohabit in a property that is owned in the name of just one of them and where there is no express declaration of trust.
- With low interest rates and sharp increases in property prices, even a purchase funded by a small deposit and a large mortgage can, in a very short time, produce a substantial equity for the lucky owner.
- What of the non-owner? He or she may have contributed directly to the deposit and/or directly to the mortgage payments and/or directly to the other household expenses and/or directly to food, clothing and holidays and/or in non-financial ways, such as raising a family or running a household. If the relationship ends, what share of this property, if any, can the non-owner expect to receive? Will it make a difference if the cohabitees each pay £1,000 per month into a kitty from which all their bills are paid or if one spends £1,000 each month paying the mortgage, utility and council tax bills while the other spends £1,000 each month paying the food, clothing, transport, telephone and holiday bills?
- Claims by such non-owners are coming before the courts in increasing numbers. But since they involve cohabitees, not married couples, they are not coming before courts exercising a family jurisdiction where property adjustment orders can be made. Instead they are coming before courts exercising a chancery jurisdiction, where the court must do justice within the parameters allowed by equitable principles of constructive trust and proprietary estoppel.
- How are the courts dealing with such cases? To what extent are non-financial contributions being taken into account?

Constructive Trust and Proprietary Estoppel

1. The Principles

The relevant principles were authoritatively laid down by the House of Lords in:

Lloyd Bank v Rosset [1991] 1 AC 107

Husband and wife. House purchased in sole name of husband. Mortgagee bank sought possession and wife claimed a beneficial interest.

Per Lord Bridge at page 132:

“The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been **any agreement, arrangement or understanding reached between them that the property is to be shared beneficially**. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of **express discussions** between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting 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.

“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 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.**”

2. Conditions for Establishing an Interest

The three-part test formulated by Lord Bridge can be expressed as follows:

- Were there express discussions leading to an agreement, arrangement or understanding being reached between the parties that the property was to be shared beneficially?
- If so, then can a party claiming a beneficial interest show that he has acted to his detriment in reliance on the agreement arrangement or understanding? If so, then it will give rise to constructive trust or a proprietary estoppel.
- If not, then has there been conduct by the parties (a) from which the court can infer a common intention to share the property beneficially and (b) that demonstrates a detriment as a result of relying and acting upon such common intention? If so, then it will give rise to constructive trust or a proprietary estoppel.

3. The First Situation

Lord Bridge's first situation is where there were express discussions. He explained the leading cases as follows:

"Outstanding examples on the other hand of cases giving rise to situations in the first category are [Eves v. Eves](#) [1975] 1 W.L.R. 1338 and [Grant v. Edwards](#) [1986] Ch. 638. In both these cases, where the parties who had cohabited were unmarried, the female partner had been clearly led by the male partner to believe, when they set up home together, that the property would belong to them jointly. In [Eves v. Eves](#) the male partner had told the female partner that the only reason why the property was to be acquired in his name alone was because she was under 21 and that, but for her age, he would have had the house put into their joint names. He admitted in evidence that this was simply an "excuse." Similarly in [Grant v. Edwards](#) the female partner was told by the male partner that the only reason for not acquiring the property in joint names was because she was involved in divorce proceedings and that, if the property were acquired jointly, this might operate to her prejudice in those proceedings. The subsequent conduct of the female partner in each of these cases, which the court rightly held sufficient to give rise to a constructive trust or proprietary estoppel supporting her claim to an interest in the property, fell far short of such conduct as would by itself have supported the claim in the absence of an express representation by the male partner that she was to have such an interest. It is significant to note that the share to which the female partners in [Eves v. Eves](#) and [Grant v. Edwards](#) were held entitled were one quarter and one half respectively. In no sense could these shares have been regarded as proportionate to what the judge in the instant case described as a "qualifying contribution" in terms of the indirect contributions to the acquisition or enhancement of the value of the houses made by the female partners." (page 133)

Note that in both [Eves](#) and [Grant](#), a reason had been given as to why the property could not be held in joint names.

4. The Second Situation

Lord Bridge's second situation is where there were no express discussions. He explained the leading cases as follows:

"The leading cases in your Lordships' House are [Pettitt v. Pettitt](#) [1970] A.C. 777 and [Gissing v. Gissing](#) [1971] A.C. 886. Both demonstrate situations in the second category to which I have referred and their Lordships discuss at great length the difficulties to which these situations give rise. The effect of these two decisions is very helpfully analysed in the judgment of Lord MacDermott L.C.J. in [McFarlane v. McFarlane](#) [1972] N.I. 59." (page 133)

5. Decisions following [Lloyds v Rosset](#) – The First Situation

Since the decision in [Lloyds Bank v Rosset](#), the Courts have had to consider the following issues where there were express discussions:

1. Is it necessary that the beneficial shares or interests should have been agreed in these discussions?
2. What acts can be relied on as detriment? Specifically, are they limited to contributions to the purchase price of the property or its mortgage?

Hammond v Mitchell [1991] 1 WLR 1127

Facts

Mr Hammond and Ms Mitchell began living together in 1977 and both worked. After the birth of the first of their two children in 1979, H bought a bungalow in his sole name with about half of the funds coming from the sale of his former flat and the balance from a mortgage. H financed extensions to the bungalow and the purchase of surrounding land by replacing the mortgage with a bank loan on his account. M confirmed to the bank that any interest she had in the bungalow as occupier was postponed to its claim. M supported H in his business adventures and he encouraged her part-time trading. H entered successfully into a number of speculative business ventures using the bungalow as security, including a business in Spain. In 1988 their relationship broke down and the final separation was in 1989.

Per Waite J, at page 1137

"It will involve asking this question first: is there any, and if so which, property which has been the subject of some agreement, arrangement or understanding reached between the parties on the basis of express discussion to the effect that such property is to be shared beneficially; and (if there is) has Miss Mitchell shown herself to have acted to her detriment or significantly altered her position in reliance on the agreement so as to give rise to a constructive trust or proprietary estoppel?"

The answer to that question should, in my judgment, in both its parts be "Yes." **In relation to the bungalow there was express discussion on the occasions I have already described which, although not directed with any precision as to proprietary interests, was sufficient to amount to an understanding at least that the bungalow was to be shared beneficially.....** I am satisfied in the present case that the parties intended the bungalow, as it became successively enlarged by addition to its own original structure and by the purchase of the adjoining parcels of land and barns, to be subject to the same understanding as governed the original property. **Miss Mitchell, by her participation wholeheartedly in what may loosely be called the commercial activities based on the bungalow, not only acted consistently with that view of the situation but also acted to her detriment in that she gave her full support on two occasions to speculative ventures which, had they turned out unfavourably, might have involved the entire bungalow property being sold up to repay the bank an indebtedness to which the house and land were all committed up to the hilt.**

There remains the question in relation to the bungalow of what the proportion of Miss Mitchell's beneficial interest should be held to be. This is not an area where the maxim that "equality is equity" falls to be applied unthinkingly. That is plain from the lesser proportions awarded in both [Grant v. Edwards](#) [1986] Ch. 638 and in [Eves v. Eves](#) [1975] 1 W.L.R. 1338. Nevertheless, when account is taken of the full circumstances of this unusual case, and **when Miss Mitchell's contribution as mother/helper/unpaid assistant and at times financial supporter to the family prosperity generated by Mr. Hammond's dealing activities is judged for its proper effect**, it seems right to me that her beneficial interest in the bungalow should be held to be one half."

Comment:

- This is an example of Lord Bridge's first situation.
- It was not necessary for the size of the share or interest to have been discussed or agreed.
- The claimant had not contributed directly either to the purchase price of the property or to repayment of the mortgage instalments. However, her contributions as mother/helper/unpaid assistant and as financial supporter to the family prosperity, her support for the defendant in his business adventures and her agreement that any interest she had in the property as occupier was postponed to the

claim of the bank, were sufficient to give the claimant a one-half share of the property.

Drake v Whipp [1996] 1 FLR 826 (CA)

Facts

Mrs Drake and Mr Whipp decided to buy a barn suitable for conversion to a family home in which to live. W bought it in his sole name for £61,254. D provided £25,000 and W the remainder. D provided £13,000 of the conversion costs and W £116,000. They also contributed direct labour: W 70% and D 30%. W added D's name to his current bank account. He paid his salary into this account and she paid her capital contributions into it. She worked and paid for food and household expenses. The couple having parted, she sued for a declaration that he held the barn on trust for them both. The barn was now worth £225,000. The judge held that D was entitled to a 19.4% share of that £225,000, viz. £43,650. He ordered that W either pay this share to her or sell the property. D appealed.

Held (Headnote)

(1) Mr Whipp held the property under **a constructive trust for himself and Mrs Drake in the proportions two thirds to himself and one third to Mrs Drake**. Unless Mr Whipp paid £75,000 to Mrs Drake, the property must be sold. The task of a judge in this circumstance was set out by Lord Bridge in *Lloyds Bank v Rosset* [1991] 1 AC 107 at 132-3. There could not be a resulting trust in this case because there had been a common intention to share the property beneficially and Mrs Drake had acted to her detriment in reliance upon it. **It was not correct to say that, in order for there to be a constructive trust, there must be a common understanding or intention as to the respective shares to be taken** (see *Gissing v Gissing* [1971] AC 886 at pp 907-9). All that is required is that there should be a common intention that the person who is not the legal owner should have some beneficial interest and that that party should act to his detriment in reliance thereon.

(2) Mrs Drake was entitled to a one third share in the property (£75,000). Mrs Drake's counsel had argued for a resulting trust on the basis that the contributions to the conversion costs (Mrs Drake having contributed relatively little) would not then be taken into account. However, in determining respective shares in constructive trust cases, the court could approach the matter broadly, looking at the parties' entire course of conduct together. **The following were taken into account: the parties' direct contributions; that they intended that the property should be their home; that they contributed their labour in 70%:30% proportions; that they had a joint account out of which the cost of conversion was met; and that Mrs Drake paid for the food and some other household expenses and took care of the housekeeping for both of them.**

Comment:

- This is an example of Lord Bridge's first situation.
- It was not necessary for the size of the share or interest to have been discussed or agreed.
- Although Mrs Drake had provided 40% of the purchase costs and 19.4% of the combined purchase and construction costs (about £38,000 out of £190,000) she received a 33.3% interest after her contributions to labour, food, household expenses and housekeeping were also taken into account.

Hyett v Stanley [2003] EWCA Civ 942

The Facts

Mr and Mrs Freeman married in October 1979. In 1984 Mr F purchased land in his sole name. The cost was £59,800, of which £39,000 was advanced on a mortgage and the balance was provided by Mr and Mrs F out of their own resources. A farmhouse was built on the land. In August 1988 Mr and Mrs F separated and in 1990 the marriage was dissolved. Mrs F made no application for a share in the house on the understanding that it would pass to their two sons on Mr F's death. Meanwhile, in 1986, Mr F had begun a relationship with Miss Hyett and from late 1988 they lived together as husband and wife. In 1989 Mr F made his last will in which he gave the whole of his net estate to his sons. Two days earlier he had effected a life assurance policy which was written in trust for H. It guaranteed a death benefit of £300,000 for the first ten years and a reducing amount thereafter. The judge found that Mr F effected the life policy at H's suggestion and expressly because, on his death, she would not benefit from his estate. From 1988 Mr F and H pooled their resources. All H's earnings from her various jobs and the businesses she carried on at the farm were paid into a bank account in Mr F's sole name. Payment for some transactions was made in cash. All these funds, whether in the bank account or in hand, were used by Mr F and H as necessary for living and business expenses and to pay the premiums on the assurance policy. By 1992 financial pressures on the couple had become acute. An approach was made to the bank, which was only prepared to lend the amount needed on the security of a mortgage on the farmhouse if H became a joint borrower with Mr F. That was because Mr F's income on its own was regarded as insufficient. At that time H had an annual salary of £16,000 from the Clerical Medical. H was concerned about security for this debt and asked Mr F to put her name on the title deeds. He refused but said that she would be safe anyway, 'with your name on the mortgage, you have a right to the property; you can prove it.' She accepted this and in 1992 they both executed a legal charge in favour of the bank. In 1993 and 1995 there were further problems and further loans and Miss Hyett signed as a joint borrower. In 1999 Mr F died suddenly following a hunting accident. H received £292,000 from the life policy and claimed a half-share in the farmhouse in which they resided. The trial judge rejected her claim and declared that the property belonged wholly to the deceased's estate. She appealed.

Per Sir Martin Nourse

"10. Before 1992 Miss Hyett's claim, if any, to a beneficial interest in the farm would have fallen within Lord Bridge's second category. It is unnecessary to decide whether such a claim would have succeeded and I do not propose to do so. **In 1992 there occurred events which have led to the claim being advanced as one falling within the first category. It is on that basis that it must be considered.**

"19. In considering the question of detriment (para 66) the judge concluded that Miss Hyett did undertake a real risk in becoming jointly liable for a substantial sum. She said that, if it had been necessary, she would have concluded that Miss Hyett had established that she did act to her detriment by undertaking liability on the mortgage. That finding was clearly correct, and it has not been questioned in this court. In the language of the authorities, Miss Hyett could not reasonably have been expected to incur liability under the mortgages unless she was to have an interest in the farm.

21. Mr Cousins, QC, for Miss Hyett, has submitted that this case falls squarely within Lord Bridge's first category. He has relied mainly on Grant v Edwards, comparing Mr Edwards's statement to Miss Grant that her name was not going onto the title because it would cause some prejudice in the matrimonial proceedings between her and her husband with Mr Freeman's statement to Miss Hyett that she did not need her name on the deeds because, with her name on the mortgage, she would have a right to the farm. Mr Cousins submits that, just as in Grant v Edwards, Mr Freeman's statement raises a clear inference that there was an understanding between him and Miss Hyett, or a common intention, that she was to have a beneficial interest in the farm. He adds that, when Mr Freeman told Miss Hyett that she would have a "right" to the farm, he could only reasonably have intended to mean, and have been understood by Miss Hyett to mean, that she was to have an immediate and absolute beneficial interest in it. Mr Cousins submits that there was no, or no sufficient, evidence on which the judge could find that Miss Hyett was only to have a beneficial interest in the event that she and Mr Freeman fell out while he was alive and, further, that she was to have no interest on his death.

“26. In the circumstances, essentially for the reasons advanced by Mr Cousins as I have stated them, **I conclude that on the execution of the legal charge in favour of Barclays Bank on 6th March 1992 Miss Hyett became entitled to an immediate and absolute beneficial interest in the farm by way of a constructive trust.**”

“27. As an alternative to his submissions on that question, Mr Quirke, relying on the decisions of this court in Yaxley v Gotts [2000] Ch 162 and Jennings v Rice [2002] EWCA Civ 159 [2003] 1 FCR 501, has submitted that this case ought properly to be treated as one of proprietary estoppel. His object in this is to take advantage of the discretionary nature of the relief available to the court in such a case. He submits that, since Miss Hyett became entitled to the proceeds of the Alba policy (£292,000) on Mr Freeman's death, it would be unconscionable for her to take a beneficial interest in the farm (which was worth about £280,000 on Mr Freeman's death) as well. I reject those submissions. Although it has been suggested more than once, in particular by Sir Nicolas Browne-Wilkinson VC in Grant v Edwards [1986] Ch, at pp. 656G and 657H, that the principles underlying the law of proprietary estoppel might provide useful guidance both in regard to the conduct necessary to constitute an acting upon the common intention by the claimant and in regard to the quantification of his or her beneficial interest in the property, the two doctrines have not been assimilated, and in my view we in this court must continue to regard cases such as the present as being governed by the principles of Gissing v Gissing; see Stokes v Anderson [1991] 1 FLR 391, 399. I would in any event hold, in all the circumstances of the case, that it would not be unconscionable for Miss Hyett to take an interest in the farm while retaining the proceeds of the Alba policy.

“28. Finally under Gissing v Gissing, **it is necessary to determine the extent of Miss Hyett's beneficial interest in the farm, which prima facie will be that which she and Mr Freeman intended**; see [1991] AC, at p 908G; see also Grant v Edwards [1986] Ch., at p 657G. The judge found (para 49) that it was likely that there was very little, if any, equity in the farm in 1992. Mr Cousins relies on that finding and also on Mrs Freeman's evidence at the trial that in 1990 or thereabouts Mr Freeman had told her that the farm was "mortgaged to the hilt" or words to that effect. Mr Cousins submits that if, in 1992, there was very little, if any, equity in the farm, it can only have been the common intention of Mr Freeman and Miss Hyett that they were each to have a half share of the beneficial interest.

“30. The evidence is not in my view sufficiently clear to allow us to go behind the judge's finding. In any event, I do not think that the value of Mr Freeman's beneficial interest before 6th March 1992 is of decisive significance. The shares of the parties are to be determined by their common intention which, if not expressed, must be inferred from all the circumstances. Here, although there are other circumstances which might be relied on, there is one feature of the case which stands out from the others. **Bearing in mind that Mr Freeman and Miss Hyett rendered themselves jointly and severally liable to Barclays Bank by entering into the legal charge dated 6th March 1992, the very transaction by which Miss Hyett acquired her beneficial interest, I conclude that they can only reasonably have intended that they should each take a half share.**”

Comment:

- This is an example of Lord Bridge's first situation.
- The detriment here was that Miss Hyett signed the bank charge and made herself jointly and severally liable for a substantial debt. It was not that she was actually called upon to repay that debt.
- Although the evidence was that Miss Hyett's earnings went into a bank account from which most expenses (including servicing the bank debt) were paid, this was not the basis of the decision.

6. Decisions following *Lloyds v Rosset* – The Second Situation

In Lord Bridge's second situation, the court has to examine the conduct of the parties to see if it can infer a common intention to share the property beneficially. What conduct is relevant? Can the court look beyond direct contributions to the purchase of the property?

Midland Bank plc v Cooke 1995 4 All ER 562 (CA)

Facts

On the marriage of Mr and Mrs Cooke, Mr Cook bought a house for £8,500 in his sole name. The purchase price was provided by a gift of £1,100 from Mr Cook's father to the couple, by Mr Cook's savings and by a mortgage, which was paid entirely from Mr Cook's bank account. Mrs Cooke went to work and made other contributions to the family expenses. The evidence before the judge was that the parties had not discussed the question of beneficial ownership. A dispute arose over the mortgage and the interests of the Bank.

Per Waite LJ, at page 569

"The judge accordingly proceeded to announce his concluded finding in regard to the proportions of beneficial entitlement. He held that Mrs Cooke was entitled to a beneficial interest of 6.47% of the property, that being the proportion born by her half of the wedding present (£550) to the total cost (£8,500). It is implicit in that finding (though the judge did not spell it out in so many words) that he did not regard any other aspect of the course of dealing between the parties - whether it be the maintenance and improvement contribution, or the assumption of mortgage liability, or the sharing of household expenses or any other factor - as capable of having any influence at all upon the quantification of the current interests of husband and wife.

At page 570:

"Is the proportion of Mrs Cooke's beneficial interest to be fixed solely by reference to the percentage of the purchase price which she contributed directly, so as to make all other conduct irrelevant?"

At page 574

"The general principle to be derived from *Gissing v Gissing* and *Grant v Edwards* can in my judgment be summarised in this way. **When the court is proceeding, in cases like the present where the partner without legal title has successfully asserted an equitable interest through direct contribution, to determine (in the absence of express evidence of intention) what proportions the parties must be assumed to have intended for their beneficial ownership, the duty of the judge is to 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. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that "equality is equity".**

“The court is not bound to deal with the matter on the strict basis of the trust resulting from the cash contribution to the purchase price, and is free to attribute to the parties an intention to share the beneficial interest in some different proportions.

“Can an agreement be attributed by inference of law to parties who have expressly stated that they reached no agreement?

“The entire jurisdiction rests upon the very limited exception provided by Parliament to the general requirement in S.53 of the Law of Property Act 1925 that trusts must be evidenced in writing. It is an exception in favour of trusts that are "resulting, implied or constructive". Mr Bergin then submits that the resulting trust is that which results from a contribution to the purchase price, and prima facie that fixes the proportion of the beneficial interest. Any implied or constructive trust relied on to alter or enlarge that prima facie entitlement must rest upon an imputed agreement inferred from conduct by equity. If the parties themselves testify on oath that they made no agreement, there is no scope for equity to make one for them.

“That is a submission which, if it fell to be considered without assistance from authority, I would reject instinctively on the ground that it runs counter to the very system of law - equity - on which it seeks to rely. 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.

“I would therefore hold that positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general equitable principles, from inferring one.”

At page 576

“When the proper approach ... is applied to the present case, I have little doubt as to what the answer should be. **Mrs Cooke is a wife who in addition to bringing up three children (one of whom is still only 11) was working full or part time as a teacher and paying out her earnings in relief of household bills. When a second charge was taken out on the property within a few months after the marriage, she undertook joint and several liability to repay it. When her husband wanted her to sign the consent form in respect of the mortgage to the Bank for the benefit of his business, she did so, despite the anxiety and distress which provided part of the grounds for the judge's ruling that it had been obtained by undue influence. Thereafter she again undertook liability under a second charge on the property for the benefit of his business. One could hardly have a clearer example of a couple who had agreed to share everything equally: the profits of his business while it prospered, and the risks of indebtedness suffered through its failure; the upbringing of their children; the rewards of her own career as a teacher; and, most relevantly, a home into which he had put his savings and to which she was to give over the years the benefit of the maintenance and improvement contribution. When to all that there is added the fact (still an important one) that this was a couple who had chosen to introduce into their relationship the additional commitment which marriage involves, the conclusion becomes inescapable that their presumed intention was to share the beneficial interest in the property in equal shares.** I reach this result without the need to rely on any equitable maxim as to equality. It is reinforced by the subsequent terms of their compromise of the Married Womens Property Act proceedings.

For all these reasons I would allow the appeal, dismiss the cross-appeal, and substitute for the declaration granted by the judge a declaration that Mrs Cooke has a beneficial one half interest in the property.”

Comment:

- This is an example of Lord Bridge's second situation.
- The Court of Appeal considered whether there was conduct by the wife from which it could infer a common intention to share the property beneficially. It found that there was because of the joint gift by the husband's father, which operated as a direct contribution by the wife to the purchase cost.
- When it came to quantifying the wife's share in the property, the Court of Appeal expressly rejected the trial judge's approach of taking into account only the wife's contribution to the purchase cost. In order to ascertain what the parties' common intention as to their shares in the beneficial interest had been, the court took into account that the wife was bringing up three children, that she was working full or part time as a teacher and paying out her earnings to meet household bills, that a few months after the marriage, she undertook joint and several liability to repay a second mortgage, that she signed a consent form for a mortgage for the benefit of her husband's business, that she gave their home the benefit of her maintenance and improvement contributions and that she had shown a commitment by marrying.

7. Decisions following Lloyds v Rosset – The size of the share

In May this year, the Court of Appeal had to consider a case which was an example of Lord Bridge's first situation. There had been discussions between the parties at the time of purchase from which one could infer a common intention that both should have a beneficial share in the property. However, the parties had not discussed what size that share should be. Chadwick LJ gave the only judgement and he analysed what principles the courts were applying when they determined what size that share should be.

Oxley v Hiscock [2004] EWCA Civ 546

Facts

In 1991, a cohabiting man (H) and woman (O) purchased a house in the sole name of H. The price of £127,000 was funded (i) by a mortgage advance of £30,000 (ii) by £61,500 from the net proceeds of sale of another house of which £36,500 belonged to O and £25,500 belonged to H and (iii) by £35,500 provided by H from his own savings. After the purchase both parties contributed towards the maintenance and improvement of the property from pooled resources in the belief that each had a beneficial interest. By 2001 the mortgage had been paid off. The relationship between the parties having broken down, O sought a declaration that she and H had an equal half share in the property. The judge held that, in the absence of any express agreement, both parties had evinced an intention to share the benefit and the burden of the property jointly and equally and declared that O had a half share. H appealed, contending that since there had been no discussion between the parties as to the extent of their respective beneficial shares at the time of purchase, the presumption of a resulting trust was not displaced and the property was held on trust for both parties in beneficial shares proportionate to their contributions.

Per Chadwick LJ

“60. ... I reject the submission ... that [Midland Bank plc v Cooke](#) was wrongly decided. But **I think that the law has moved on since that decision.**

“61 The judgments of this court in [Midland Bank plc v Cooke](#) were handed down in July 1995. Within a few months the familiar question-"what is the interest of one unmarried cohabitee in the house purchased in the name of the other as a home in which they intend to live as man and wife?"- was before this court, again, in [Drake v Whipp](#) [1996] 1 FLR 826.

“65 It is very difficult, if not impossible, to find anything in the facts in [Drake v Whipp](#) [1996] 1 FLR 826 to suggest that either of the parties ever gave thought to an arrangement under which the property should be shared in the proportions two-thirds and one-third; let alone that that was ever their common intention. Nor do I think that Peter Gibson LJ approached the matter on that basis. As he said, at p 830, "in constructive trust cases, the court can adopt a broad brush approach to determining the parties' respective shares". And that is what he did,

“68 I have referred, in the immediately preceding paragraphs, to "cases of this nature". By that, **I mean cases in which the common features are: (i) the property is bought as a home for a couple who, although not married, intend to live together as man and wife; (ii) each of them makes some financial contribution to the purchase; (iii) the property is purchased in the sole name of one of them; and (iv) there is no express declaration of trust. In those circumstances the first question is 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 many such cases - of which the present is an example - there will have been some discussion between the parties at the time of the purchase which provides the answer to that question. Those are cases within the first of Lord Bridge's categories in [Lloyds Bank plc v Rosset](#) [1991] 1 AC 107. In other cases - where the evidence is that the matter was not discussed at all - an affirmative answer will readily be inferred from the fact that each has made a financial contribution. Those are cases within Lord Bridge's second category. And, 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.**

“69 In those circumstances, the second question to be answered in cases of this nature is: "what is the extent of the parties' respective beneficial interests in the property?" Again, 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.

“70 As the cases show, the courts have not found it easy to reconcile that final step with a traditional, property-based, approach. It was rejected, in unequivocal terms, by Dillon LJ in [Springette v Defoe](#) [1992] 2 FLR 388, 393 when he said: "The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair." Three strands of reasoning can be identified

(1) That suggested by Lord Diplock in [Gissing v Gissing](#) [1971] AC 886, 909D and adopted by Nourse LJ in [Stokes v Anderson](#) [1991] 1 FLR 391, 399G, 400B-C. The parties are taken to have agreed at the time of the acquisition of the property that their respective shares are not

to be quantified then, but are left to be determined when their relationship comes to an end or the property is sold on the basis of what is then fair having regard to the whole course of dealing between them. The court steps in to determine what is fair because, when the time came for that determination, the parties were unable to agree

(2) That suggested by Waite LJ in [Midland Bank plc v Cooke](#) [1995] 4 All ER 562, 574D-G. The court undertakes 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" in order to determine "what proportions the parties must be assumed to have intended [from the outset] for their beneficial ownership". On that basis the court treats what has taken place while the parties have been living together in the property as evidence of what they intended at the time of the acquisition

(3) That suggested by Sir Nicolas Browne-Wilkinson V-C in [Grant v Edwards](#) [1986] Ch 638, 656G-H, 657H and approved by Robert Walker LJ in [Yaxley v Gotts](#) [2000] Ch 162, 177C-E. The court makes such order as the circumstances require in order to give effect to the beneficial interest in the property of the one party, the existence of which the other party (having the legal title) is estopped from denying. That, I think, is the analysis which underlies the decision of this court in [Drake v Whipp](#) [1996] 1 FLR 826, 831E-G

"71 For my part, I find the reasoning adopted by this court in [Midland Bank plc v Cooke](#) to be the least satisfactory of the three strands. It seems to me artificial-and an unnecessary fiction-to attribute to the parties a common intention that the extent of their respective beneficial interests in the property should be fixed as from the time of the acquisition, in circumstances in which all the evidence points to the conclusion that, at the time of the acquisition, they had given no thought to the matter. The same point can be made-although with less force-in relation to the reasoning that, at the time of the acquisition, their common intention was that the amount of the respective shares should be left for later determination. But it can be said that, if it were their common intention that each should have some beneficial interest in the property-which is the hypothesis upon which it becomes necessary to answer the second question-then, in the absence of evidence that they gave any thought to the amount of their respective shares, the necessary inference is that they must have intended that question would be answered later on the basis of what was then seen to be fair. But, as I have said, I think that the time has come to accept that there is no difference in outcome, in cases of this nature, whether the true analysis lies in constructive trust or in proprietary estoppel.

"73 If the judge had found, as was alleged by Mrs Oxley in para 8 of her particulars of claim, that "it was expressly the joint intention of the claimant and the defendant at the time of [35 Dickens Close] that they should share the beneficial ownership of that property equally" I would take the view that it would be wrong for this court to go behind that finding of fact. But, as I have said, she did not make that finding of fact; and we have seen no evidence upon which she could have done so. This must, I think, be seen as a case where there is no evidence of any discussion between the parties as to the amount of the share which each was to have. And, on that basis, the judge asked herself the wrong question. She should not have sought, by reference to the conduct of the parties while they were living together at 35 Dickens Close, to determine what intention both were then "evincing"-unless, by that, she was able to find a common intention, communicated to each other, to determine, definitively, the shares which had been left undetermined at the time of acquisition. She might have asked herself whether their subsequent conduct, while living together at 35 Dickens Close, was consistent only with a common intention, at the time of the acquisition, that their shares should be equal; but she did not. The right question, in the circumstances of this case, was: "what would be a fair share for each party having regard to the whole course of dealing between them in relation to the property?"

"74 I think that that is a question to which this court can, and should, give an answer. I do not think it necessary to remit the matter to the county court. In my view to declare that the parties were entitled in equal shares would be unfair to Mr Hiscock. It would give insufficient weight to the fact that his direct contribution to the purchase price (£60,700) was substantially greater than that of Mrs Oxley (£36,300). On the basis of the judge's finding that there was in this

case "a classic pooling of resources" and conduct consistent with an intention to share the burden of the property (by which she must, I think, have meant the outgoings referable to ownership and cohabitation), it would be fair to treat them as having made approximately equal contributions to the balance of the purchase price (£30,000). Taking that into account with their direct contributions at the time of the purchase, I would hold that a fair division of the proceeds of sale of the property would be 60% to Mr Hiscock and 40% to Mrs Oxley.

Comment:

- This is an example of Lord Bridge's first situation.
- However the principles being considered apply equally to Lord Bridge's second situation once a common intention has been inferred by conduct.
- In both these situations, where the party who does not become the legal owner acted to his detriment in reliance on the agreed or inferred common intention and where there were no discussions between the parties as to the amount of the share which each was to have, what should their share be? Their share is what the court considers fair having regard to the whole course of dealing between the parties in relation to the property, including 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.
- The constructive trust approach to determining that fair share required that it be established at the time of the purchase. Hence, the court was forced into the artificial exercise of inferring what the parties would then have agreed from an investigation of their subsequent dealings and conduct. Chadwick LJ criticised this approach and preferred to apply a proprietary estoppel approach. Where at the time of purchase, one party contributed to the cost and therefore the other was estopped from denying that the first had a share in the property, the amount of that share will be determined later on the basis of what is seen to be fair.

8. Difference between constructive trust and proprietary estoppel

Lord Justice Chadwick's judgement leads one to ask what is the difference between constructive trust and proprietary estoppel.

A constructive trust is imposed where one person has acted to his detriment in reliance on a common agreement, arrangement, understanding or intention.

A proprietary estoppel arises where one person has acted to his detriment in reliance on a representation made by the other.

These remedies are compared in Megarry & Wade, *The Law of Real Property*, 6th Edition para. 10-030. It states:

".. the two doctrines at present remain distinct, though the differences between them are not now substantial."

“Where a constructive trust arises, the claimant acquires a beneficial interest in the property at the time when he acts to his detriment. In a case of proprietary estoppel, the claimant’s detrimental reliance raises only an inchoate ‘equity’ in his favour. The precise nature of the claimant’s right remains in limbo until the court determines how best to give effect to it. Although the court will often grant the claimant the interest that he was intended to have, it is not bound to do so and has a discretion as to how the equity should be satisfied. The circumstances may make it inappropriate for the claimant to be granted any interest in the property. An interest arising under a constructive trust is undoubtedly a proprietary right which is capable of binding a third party. Although an equity arising by estoppel probably enjoys the same status, the point cannot be regarded as finally settled. It is however clear in relation both to constructive trusts arising out of common intention and to proprietary estoppel that B’s claim may be defeated if it is tainted by unlawful or inequitable conduct.”

9. A reformulation of Lord Bridge’s Test

Express common intention

- 1.1 Were there express discussions leading to a common agreement, arrangement, understanding or intention being reached between the parties that the property was to be shared beneficially?
- 1.2 These express discussions will normally have taken place prior to the time the property was acquired. However, they may take place later, for example on a remortgage (Hyett).
- 1.3 These express discussions need not deal with or lead to any understanding regarding the size of the parties’ respective beneficial shares. (Hammond, Drake)
- 1.4 A typical example of this situation would arise where the woman asks for the property to be held in their joint names and the man gives a reason why this is not possible, say, a divorce, or the source of finance or her age. (Eves, Grant)

Implied common intention

- 2.1 If there were no such express discussions, then has there been conduct by the parties from which the court can infer a common intention to share the property beneficially?
- 2.2 Such conduct will probably be limited to direct contributions to the acquisition of the property, either initially or by payment of the mortgage. (Lloyds v Rosset, Midland v Cooke)

Acting in reliance to one’s detriment

- 3.1 Can the party claiming a beneficial interest show that he has acted to his detriment in reliance on the express or implied common intention?
- 3.2 Detriment is not limited to direct financial investment in the property but can include supporting speculative ventures or giving a bank priority over one’s interest in the property. (Hammond)

Nature and size of share

- 4.1 If the party has acted to his detriment in reliance on the express or implied common intention, then will his conduct give rise to a constructive trust or a proprietary estoppel?
- 4.2 If the express or implied common intention included a common intention as to the size of that party's share in the property, then that should give rise to a constructive trust (rather than a proprietary estoppel). (Oxley)
- 4.3 If the express or implied common intention did not include a common intention as to the size of that party's share in the property, so that such share has to be determined by reference to the parties' future conduct, then that should give rise to a proprietary estoppel (rather than a constructive trust). (Oxley)
- 4.4 The conduct to be taken into account should be the full circumstances of the case, including for example, contributions as mother/helper/unpaid assistant and as financial supporter to the family prosperity and as supporter of the other party's business adventures; an agreement to postpone one's interest to the claim of a bank; direct financial contributions to the purchase and improvement of the property; labour in carrying out improvements; payments for food and household expenses; accepting direct liability to a mortgagee bank and sharing the outgoings referable to ownership of the property and cohabitation. (Hammond, Drake, Hyett, Midland v Cooke, Oxley)

10. Questionnaire for Clients

To assist solicitors instructed on a purchase for an unmarried couple (of any gender) to ascertain who will own the property and what should happen to it on death or if the relationship ends, I have drafted a form of Questionnaire. This Questionnaire, which also contains Explanatory Notes, should be given to and completed by the couple at the time of purchase.

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