

# Cohabitation – Law and Practice

## Part I - Law

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*The law will not enforce an immoral promise, such as a promise between a man and a woman to live together without being married...*

*Fender v St John-Mildmay [1938] AC 1 per Lord Wright.*

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### 1 Introduction

**The law governing cohabitation property disputes applies equally to married couples and disputes involving third parties.**

**However if it is a matrimonial/civil partnership dispute with no third parties or insolvency, stick to matrimonial/civil partnership law!**

It is often thought that this area of law only applies to people who live together as husband and wife or civil partners but who are not married. It does not. The law covers all relationships of that kind. However because of the wide discretions available to the divorce courts in the *Matrimonial Causes Act 1973 Part II* (or *Civil Partnership Act 2004 s.72 and sch. 5*), it is an area not often visited within matrimonial proceedings. However, occasionally one must have recourse to the principles of trusts of land.

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## 1.1 When this area of law is relevant?

Thus this area of law becomes relevant to resolve disputes of the following kind:

- Between man and woman (or a same sex couple) who though not married (or in a civil partnership) lived together as man and wife (or civil partners);
- Where siblings owned the property (e.g. mother and son, brothers etc.): see e.g. *Adekunle and others v Ritchie* August 24, 2007 per HHJ Behrens QC at Leeds County Court;
- Where a third party claims that he has a beneficial interest in the property (e.g. husband and wife buy house with wife's mother, determining mother's share would invoke these principles);
- Where a third party claims he owns the property outright;
- Where a husband or wife has been declared bankrupt (because the trustee in bankruptcy owns the bankrupt's beneficial interest (subject to the conditions imposed by *s.283A Insolvency Act 1986* – this is a topic in its own right so if bankruptcy is possible, beware);
- Where a mortgagee, chargee or someone of a like position is claiming a right in or over a spouse's beneficial interest.

## 1.2 What these notes do not cover?

These notes do not cover

- A situation where a co-owner is about to be declared bankrupt or a petition for his bankruptcy has been presented;

- Applications for the benefit of children under the *Children Act 1989 s.15 and sch. 1*;
- Taxation of and benefits for cohabitants;
- The drafting of a cohabitation agreement, pre-nuptial or post-nuptial agreement;
- Non-molestation orders and occupation orders under the *Family Law Act 1996* or orders under the *Protection from Harassment Act 1997*;
- Cohabitants who are tenants under a tenancy granted under the *Housing Acts* or the *Rent Acts*.

**If there is a bankruptcy on the horizon, tread carefully.**

**Where the co-habitants are tenants under the *Housing Acts* or the *Rent Acts*, then act quickly to prevent termination of the tenancy. If the tenancy ends it cannot be revived.**

### **1.3 The most fundamental question**

**The most fundamental question is:**

**“Is it really a dispute about co-ownership?”**

It is often assumed that because there is often a family feeling to the case, that the key issue is who is entitled to what share of any property. However is that the case?

For example: Algernon and Barbarella may have been in a relationship and owned jointly in law and equity Castle Coch (in South Wales). It may be that they agree that they have a 50% share each. However, Donald (Barbarella’s father) may have lent between them £25,000 for a deposit and to pay for the damp proofing in the

cellar. He wants it back, preferably from the proceeds of sale. No-one intended he should own a share in the property. Is his claim a co-ownership dispute? He did make a contribution to the property after all.

No. His claim is a classic claim in debt for a loan he made. This area of law will not assist.

## 2 A refresher of ownership

**Property is owned in both law and equity. It is the equitable ownership that is fundamental, though the legal ownership is the starting point.**

The key to cohabitation disputes is to establish the beneficial interest, which is also referred to as the equitable interest.

### 2.1 Some basic principles

When starting on an enquiry, it is important to remember 3 things:

- Property can be owned as tenants in common or as joint tenants.
- In law one can only ever own property as joint tenants: *s.36 Law of Property Act 1925 (LPA 1925)*;
- Equity follows the law: *Stack v Dowden* [2007] UKHL 17 [2007] 2 AC 432 – so joint legal owners leads to a presumption of joint beneficial ownership between those legal owners;
- Equity however allows the equitable estate (i.e. the beneficial interest) to be held as tenants in common (in equal shares or otherwise). He who asserts that the legal title does not reflect the equitable title bears the burden of proof: *Stack v Dowden*.

## 2.2 What is the difference between a joint tenancy and a tenancy in common?

The crucial difference between a tenancy in common and a joint tenancy is the right of survivorship. If A and B are in joint tenancy, then if A dies B takes all, irrespective of his will or the law of administration. If A and B are tenants in common however and A dies, then his share becomes part of his estate.

Therefore a former cohabitant may wish to consider early on whether he wishes to sever any joint tenancy.

### 2.2.1 How can a joint tenancy be severed?

A joint tenancy in law cannot be severed: *s.36 LPA 1925*. In equity it can be severed by any of the following:

- By notice in writing to the other joint tenants: *s.36(2) LPA 1925*,

And according to *William v Hensman* (1861) 1 J & H 546 and *Page Wood V-C*:

- By doing an act operating on his own share (e.g. mortgaging or charging his share, selling his share or executing a fraudulent mortgage purporting to be in the name of all beneficial owners (*First National Securities v Hegarty* [1985] QB 850));
- By mutual agreement;
- By a course of dealing sufficient to intimate the interest is severed (e.g. mutual wills);
- By the act of a third party (e.g. bankruptcy, charging order against one co-owner, a charge under the legal aid provisions);
- By acquisition of another estate in land;

- By killing a co-owner (this covers murder, manslaughter and assisted suicide: but see *Forfeiture Act 1982* in cases other than murder).

### 3 Working out the beneficial interests

**While the law says a declaration of trust of land (i.e. a document setting out who owns the beneficial interest and how they own it) should be in writing, unwritten trusts are in fact possible and very common.**

#### 3.1 Trusts to be in manifest and proved in writing...

The rule is that all trusts of land must be manifest and proved by some writing signed by some person able to declare such trust: *s.53(1) LPA 1925*. This includes freehold and leasehold land.

Note the trust itself need not be in writing, merely that there be some signed acknowledgement or declaration in existence, e.g. in the recital of a deed or a letter. However the writing must show what the terms of the trust are. These recitals or letters need not be contemporaneous with the declaration of trust.

#### 3.2 ... but not necessarily

This however does not affect the creation or operation of *implied resulting or constructive trusts*: *s.53(2) LPA 1925*.

Nor can the statute be used to shield a fraud: see *Stickland v Arlidge* (1804) 9 Yes 516.

As to implied resulting or constructive trusts, see section  below.

## 4 The express trust

### 4.1 The words

**If there is a written expressed trust which comprehensively declares beneficial interests, then it is conclusive for all time in the absence of fraud or mistake: see *Goodman v Gallant* [1986] Fam 106 CA and *Pettit v Pettit* [1970] AC 777 per Lord Upjohn; *Goodman* approved obiter by *Stack v Dowden*.**

**You will find an express trust on the conveyancing documents, particularly the TR1 or AP1 and these should always be sought immediately.**

An express trust may be a lengthy document or it may be simply a cross in the box on the TR1 or AP1 (currently box 11). The declaration need not be lengthy or in any special form of words. Examples include

- *The transferees declare that they hold the property on trust for themselves as beneficial joint tenants or tenants in common in equal shares etc.*
- *The transferee declares that he holds the property on trust for himself and Miss X as beneficial joint tenants*

**The express trust or agreement must be for the regulation of interests in the land or personalty (if it covers that also) and must not govern sexual relations, otherwise it will be void on public policy grounds: *Sutton v Mishcon de Reya and Gawor* [2004] 1 FLR 837.**

## 4.2 Receipt of capital monies

**Provisions on the land register about who can give valid receipts for capital monies arising on sale are not evidence of beneficial joint tenancy and are unlikely to be evidence of beneficial tenancy in common.**

### 4.2.1 Beneficial joint tenancy

The following words do **not** evidence a declaration of a beneficial joint tenancy:

*The Purchasers declare that the survivor of them is entitled to give a valid receipt for capital monies arising from a disposition of all or part of the property*

This is because the declaration is not inconsistent with two or more people owning the property on behalf of a third party: *Huntinford v Hobbs* [1993] 1 FLR 736 CA approved *obiter* in *Stack v Dowden*

### 4.2.2 Beneficial tenancy in common

It is my opinion that a declaration that

*The Purchasers declare that the survivor of them is **not** entitled to give a valid receipt for capital monies arising from a disposition of all or part of the property*

do **not** evidence a declaration of a beneficial tenancy in common

This is because *Law of Property Act 1925 s.27(2)* says the payments of capital monies shall be made only trustees or a trust corporation except in certain circumstances. The exemptions are beneficial joint tenants and personal representatives of a deceased sole proprietor. However if the filed TR1 was in fact

silent on whether they are beneficial joint tenants, HM Land Registry enter the above restriction automatically under the *Land Registration Act 2002 s.44(1)* and *Land Registration Rules 2003 r.95(2)(a)*. Therefore the restriction could appear simply because the appropriate box has not been ticked. It is impossible to see how the operation of a procedural rule could sever any beneficial joint tenancy and/or create tenancy in common..

**The first step therefore is to look at the TR1 and obtain the conveyancing file if possible. Even if the TR1 is silent, the file may be useful to show the parties' common intention (see later).**

### **4.3 Variation/discharge of an express trust**

An express trust can be varied. Like the creation of an express trust, the variation it should be manifest and proved by some writing signed by some person able to vary the original trusts. The new trust will then govern the relationship. Only with the consent of the interested parties can the trust and beneficial interests arising under it be changed: *Cowcher v Cowcher* [1972] 1 All ER 943

### **4.4 Setting aside/avoiding an express trust?**

If there is an express trust there is little that can be done to get out of it. The following *may* provide an escape route.

#### *4.4.1 Undue influence*

This is an equitable remedy which, if made out, allows the court to void the trust deed. It is a type of fraud.

**Undue influence is designed to protect a party from his weakness and not from his inability to comprehend: Lord Hobhouse at [111] in *Royal Bank of Scotland v Etridge* [2001] UKHL 44, [2002] 2 AC 773.**

*Etridge* is the key modern case and the following is taken from Lord Nicholls speech.

There are 2 types undue influence:

### **Actual undue influence**

In actual undue influence, the influencing party expressly does something which overbears the other's will. It overlaps with the concept of duress. An example might be a threat of violence. A person alleging actual undue influence must prove it.

### **Presumed undue influence**

In this category, a person alleging undue influence must prove

1. their relationship was such that he placed trust and confidence in the other in relation to the management of his financial affairs, and
2. there is a transaction which calls for an explanation.

If he can prove those 2 elements, the other person must provide an explanation that shows there was, in fact, no undue influence.

*“trust and confidence”*

Lord Nicholls said that trust and confidence is not a fixed test. It includes reliance, exploitation of a vulnerable person, dependence, ascendancy, domination, control.

In certain relationships, the first limb (i.e. the relationship) is presumed to be one of trust and confidence. It includes parent and child, trustee and beneficiary, solicitor and client, medical advisor and patient. It does not include husband and wife. By analogy it does not include cohabitants. It was once suggested that engaged couples fell into this category (*Re Lloyds Bank Ltd* [1931] 1 Ch 289 at 302). It is unlikely that this is still the case. Lord Nicholls did not cite it as such a relationship and it does not sit easy with the modern world.

### *Third Parties*

If the other party to a transaction has constructive knowledge that a third party has exerted actual or presumed undue influence, then the third party is bound by that undue influence:

### *Defences*

As it is an equitable remedy, the equitable maxims apply. Defences of laches, acquiescence and affirmation apply.

Though relevant to the question of whether there was undue influence, it is not an absolute defence to show that the unduly influenced party received independent legal advice, thought up the idea or understood what she was doing or intended to do it.

#### *4.4.2 Unconscionable bargain*

**This equitable remedy protects a weak party from an oppressive bargain where the other side has knowingly taken advantage. It is very difficult to prove.**

This is very similar to undue influence. The key definition comes from *Irvani v Irvani* [2000] 1 Lloyds Report 412 at 423

*The doctrine of unconscionable bargain seems to be limited in three ways:*

*(1) The first is that the bargain must be oppressive to the complainant in overall terms;*

*(2) The second is that it may only apply when the complaint was suffering from certain types of bargaining weakness;*

*(3) And the third that the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant*

#### *Bargaining weakness*

This might be a lack of capacity, but can also include mental decline, eccentric behaviour which mean that an objective observer would question the judgment and understanding of that person *Qutb v Hussain* [2005] EWHC (Ch) 157

The court will not interfere because of regret, foolishness or unreasonableness. There needs to be some moral reprehension and some unconscientious abuse of power.

The same defences as to undue influence apply to unconscionable bargain.

#### *4.4.3 Setting aside gifts*

In *Re Beaney* [1978] 2 All ER 595, the High Court held that the question was whether the person concerned is capable of understanding what he does by

executing the deed in question when its general purport has been fully explained to him.

#### 4.4.4 *Mistake*

This comes in 2 relevant types: common mistake and unilateral mistake

##### *Common mistake*

This applies to those situations where the parties have entered into a written agreement mistakenly believing that it represents their agreement.

Before the court will consider rectification, a party seeking rectification must establish a continuing intention, common to each party, relating to some aspect or provision of the agreement. As a general rule there must also be some outward expression of accord: *Joscelyne v Nissen* [1970] 2 QB 86, though in one (possibly exceptional case) convincing proof was enough: *Mace v Rutland House Textiles Ltd* The Times, 11 January 2000.

##### Examples

- Property conveyed into joint names in law and equity. H had put in more money. W entitled to equal share as beneficial joint tenancy under trust: *Wilson v Wilson* [1963] 1 WLR 601.
- H and W married in 1936. H purchase property Blackacre. Afterwards X transferred to H and W interest in leasehold and business for sum of £2,000. The money was provided by sale of Blackacre. H and W declared beneficial joint tenants. Could not go behind trust: *Re John's Assignment Trusts: Niven v Niven* [1970] 2 All ER 210.

- D wished to buy property. D unable to secure loan. Brother B joined on application. Declared beneficial joint tenants. Not true intention of the parties. B joined merely to obtain loan. D and B did not understand declaration. Rectification granted: *Wilson v Wilson* [1969] 3 All ER 945.

#### *Unilateral mistake*

This is a species of equitable estoppel. The essential requirements are:

- A erroneously believed documents sought to be rectified contained (or did not contain) a particular provision,
- B was aware of inclusion or omission and of A's mistake,
- B has omitted to draw attention of mistake to A,
- The mistake must be one calculated to benefit B.

See *Thomas Bates v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505.

Proving B's awareness requires either actual knowledge or constructive knowledge. It is very difficult to do.

It is an equitable remedy so the usual equitable defences apply.

#### *4.4.5 Non est factum*

A person pleads this defence if he says that the document he executed is not his deed, i.e. his mind did not coincide with what he believed he was doing. It applies to the following circumstances:

- A plea that the signature is not mine: i.e. forgery.
- The person is illiterate, blind or lacking in understanding such that they really did not consent.

- The complainant thought that the document was fundamentally different to the documents he signed. This is very difficult to establish. If the person failed to read it before signing when able to do so or ignored it, for example, then this remedy will not avail him because the courts will not protect people from their own carelessness: *Saunders v Anglia Building Society* [1971] AC 1004.

## 5 Implied trusts

### 5.1 What is an implied resulting or constructive trust?

**The terms ‘resulting trust’ and ‘constructive trust’ have been used in different ways over the years, particularly the past 40 years leading to confusion and inconsistency in terminology. What follows is the author’s attempt to try to make the situation clear. It is based on the approaches and terminology used in recent cases, especially *Stack v Dowden*. Beware old cases which may use the terms differently and older lawyers who may be confusing the two!**

#### 5.1.1 Resulting trust

**In short: a resulting trust is one where what you get out is in proportion to what you put in.**

So if A and B own a property and A puts in 10% of the purchase price (and assuming it was not a loan or gift), A will get back 10% of the beneficial interest. Resulting trusts are relatively common where there is a commercial element to the relationship: *Stack v Dowden* per Lord Walker, also *Malayan Credit Limited v Jack Chia MPH* [1986] AC 549.

**In short: a constructive trust is where A and B get what they commonly intended which may or may not reflect the amounts they physically contributed. The court attempts to construct the trust from the circumstances of the case.**

Therefore if A and B agreed that, while A would pay 60% and B 40%, they would both have equal shares, and in reliance on that B put her 40% in, then there would be a constructive trust in B's favour of 50% of the beneficial interest

The word 'implied' appears to have no separate meaning. It seems the draftsmen wanted to make it clear that these trusts do not arise in writing.

## **5.2 What is the starting point?**

As discussed in paragraph 2.1 above, the starting point is that equity follows the law. Therefore if Albert and Brenda are the joint legal owners, they are presumed to be the joint beneficial owners.

It follows that if Caligula is the sole legal owner then, notwithstanding that he cohabits with Desdemona, there is a presumption that Caligula is the sole beneficial owner.

**It is for the person who seeks to show that the equitable ownership differs from the legal ownership to prove it on balance of probabilities: *Stack v Dowden*.**

**It is a heavy burden, particularly if the party is suggesting that, though they are joint legal owners, they are beneficially tenants in common in unequal shares (see *Stack v Dowden*).**

## 5.3 The legal test

### 5.3.1 Background

The law can be traced back to the two seminal cases of the late 60s: *Pettit v Pettit* and *Gissing v Gissing* [1971] AC 886. These acknowledged that it was possible for a non-owning cohabitant to have a beneficial interest in a property.

After that, the law moved forward slowly. Regrettably the courts gave many inconsistent decisions about whether a resulting or constructive trust existed and what had to be proved to establish a trust.

This was clarified in the case of *Lloyds Bank v Rosset* [1990] 1 AC 107. In this case Mr Rosset (H) held the property in his sole name. He charged it to Lloyds Bank (L) to repay his overdraft. L commenced possession proceedings against H and Mrs Rosset (W). W claimed a beneficial interest. W claimed there was an express common intention that she should have a share. This was rejected on the facts. Her claim to have contributed to the renovations was also rejected on the facts.

Lord Bridge delivered the only reasoned opinion (the others simply agreed with him). In what was strictly *obiter*, Lord Bridge said

*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 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.*

It is important to remember (as we shall see) that *Rosset* concerned the case where there was only one legal owner but, on the wife's case, more than one beneficial owner.

Over time, Lord Bridge's dictum was taken as a guide not only how to determine if there were an interest but also how to quantify it.

In short 2 views emerged over time: one that unless the parties had agreed the size of their shares, then on establishing an interest, the trustees would hold on resulting trust, the other that one had to look at the full circumstances of the case and if that did not answer the problem then 'equity being equality' the beneficial interest was divided equally.

There was a significant clarification of the law in *Oxley v Hiscock* [2005] Fam 211 by Chadwick LJ. This was a case of one legal owner and more than one beneficial owner (a typical case). His Lordship carried out a thorough analysis of the case law. He concluded that the court's approach should be to treat it as a constructive trust. He said

*[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. 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.*

Since *Rosset*, Deputy High Court Judge Nicholas Mostyn QC in *Le Foe v Le Foe and Woolwich* [2001] 2 FLR 970 has held that an indirect contribution to the mortgage could be enough. He dealt with the case where, because of W's contributions to household expenses, H was able to afford the mortgage. However this has been heavily criticised. It may be *per incuriam* although it sits relatively easily with *Gissing*, *Pettit* and *obiter* observations in *Stack* and *Abbott* (as to which see below).

The latest major case was *Stack v Dowden*. This concerned a dispute between two people who were not married but were joint legal owners. D and S had purchased the house in their joint names using the then current land registry form, which contained no declaration of trust. The purchase was funded by the sale of their previous property, which had been in D's sole name, plus savings in D's name, and a mortgage held in both names. S paid the mortgage interest and endowment policy premiums, while together they paid off the capital, with D contributing a greater proportion. When they bought the house, D and S had been cohabiting for 18 years and had four children. Nearly all aspects of their respective finances had

been kept separate. 9 years after purchasing the house, their relationship broke down and they agreed a court order that excluded S from the house and required D to pay S for the cost of his alternative accommodation. The House of Lords held that the property should be divided 60%/40% in D's favour. The fact that D and S had lived together for such a long time and had children together, yet had kept their affairs rigidly separate, was strongly indicative that they did not intend their shares, even in the property that was put into their joint names, to be equal, and D had made good her case for a higher share.

Baroness Hale (with whom all others agreed on this point) said

*[63] We are not in this case concerned with the first hurdle [establishing a beneficial interest under Lord Bridge's test in Rosset]. There is undoubtedly an argument for saying ... that the observations, which were strictly obiter dicta, of Lord Bridge of Harwich in Lloyd's Bank plc v Rosset 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. ...*

And on the issue of quantifying the beneficial interest, Baroness Hale said:

*[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*

- Lord Walker observed
  - ◆ constructive trusts are the relevant analysis tool: per Lord Walker at [31];
  - ◆ the resulting trust might be useful if the relationship was both emotional and commercial: per Lord Walker at [35].

The last case of note is *Abbott v Abbott* [2007] UKPC 53 [2008] 1 FLR 1451. They were husband and wife. H was the sole legal owner. There was no issue that W did not have a beneficial interest. The issue was the quantification. In this case the board's opinion was also delivered by Baroness Hale. She said

*[6] Lord Walker, Lord Hoffmann and Lord Hope of Craighead all agreed with my own opinion, in which I summed the matter up thus at para [60]:*

*The law [as set out in *Lloyds Bank v Rosset*] 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.*

*The House also approved a passage from the Law Commission's discussion paper on *Sharing Homes* (2002) Law Com No 278, para 4.27):*

*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.*

### 5.3.2 Conclusions

Therefore the current situation appears to be that

- Constructive trusts are the appropriate tool for analysis except where there is a commercial element.
- In relation to a party who is not a legal owner asserting a beneficial interest the test is still that set out in *Rosset* and *Oxley*. While *Stack* and *Abbott* suggest the test in *Rosset* is set too high, those observations are *obiter*. However it is highly likely that in the near future (absent statutory reform) this test will soon be re-cast.
- When however the party asserting a beneficial interest is also a legal owner, it is almost inevitable that that party will have an interest.
- Under constructive trust principles, once one has established that a party has an interest, the quantification of that interest depends on all the circumstances of the case.
- In the case of joint tenancies, it is most likely the split will be equal shares.

### In summary

- **Constructive trust**
- **Still same test for parties who are not legal owners**
- **Joint legal owners will almost certainly have a beneficial interest that will be equal shares.**

#### 5.4 How to establish a beneficial interest under a trust

It is therefore relevant to look at how someone can go about establishing a beneficial interest.

#### 5.4.1 *Stage 1: is the party claiming an interest a legal owner?*

*Yes?* If so then, absent some special circumstances, move on to 5.4.6 *Stage 3: Establishing the size of the shares* below.

*No?* Move onto stage 2.

#### 5.4.2 *Stage 2: If the party claiming an interest is not a legal owner, can he establish a common intention that he should have a share?*

#### **The test to establish is a non-legal owner has a share is**

- **Did the parties come to some agreement, arrangement or understanding as to ownership, no matter how imprecise its terms or imperfectly remembered?**
- **If yes, then did they act to their detriment in some way in reliance on that agreement? A financial contribution to the purchase price is the obvious example.**
- **If no to either, did the party seeking to assert a share make a direct financial contribution to the purchase price?**

#### 5.4.3 *Examples where one relied on discussions of shares*

It will be immediately appreciated that answering the first 2 questions affirmatively is nigh on impossible as few couples buy a house together and discuss such tedious things as ownership of beneficial interests. Example

- H and W held property. They were divorcing. H's new partner A, said she agreed to advance a total of £12,000 to buy W out. H said the payments were loans. Court found for A and that 'her name would go on the deeds

when it was all sorted out.’ The parties had orally declared themselves in such a way to make plain their common intention that A should have a beneficial interest: *Stokes v Anderson* [1991] 1 FLR 391

**To establish an interest under this limb it can be informative to establish why the party’s name was not put on the title in the first place.**

Examples include

- F was told by M that the property should be purchased in M’s name alone so as not to prejudice her divorce from X. Held that one could infer common intention that F would have beneficial interest: *Grant v Edwards* [1986] Ch 638 CA.
- F was told by M that she was too young to go on the title. She also thus made good with a sledgehammer. Common intention inferred from discussion and F’s conduct: *Eves v Eves* [1975] 1 WLR 1338.

Thus it is not necessary that they agree in terms that they each have a beneficial interest. They must have discussed it however: *B v B* [1988] 2 FLR 490.

#### 5.4.4 *Examples where one relied on direct financial contributions*

The common intention is drawn from the financial contribution made by the party (but see *Le Foe* above).

However in this situation, there must still be some evidence of communication of a common intention: *Lightfoot v Lightfoot-Brown* [2005] 2 P & CR 377 (payments of £65,000 towards mortgage not communicated to other person – no common intention).

**Any payment must relate to the acquisition of the property.**5.4.5 *What amounts to a financial contribution?*

The following almost certainly will be sufficient financial contributions:

- *Payment of the deposit: Gissing v Gissing;*
- *Payment of the deposit by a third party if one can treat it (or part of it) as a contribution from the non-owning party e.g. a wedding gift: Midland Bank v Cooke [1995] 2 FLR 915 CA;*
- *Payment of mortgage instalments (repayment mortgage): Lloyds Bank v Rosset.* However occasional payments where the other side usually pays the mortgage are not likely to be enough: *Cowcher v Cowcher* [1972] 1 WLR 425. Repayments must be distinguished from lodger's licence fee. Also draw the distinction between repayment mortgages and interest only mortgages;
- A (owner) says he will pay the mortgage but B says he will pay later from an inheritance: common intention to share interest: see e.g. *Re Nicholson* [1974] 1 WLR 476;
- *Assumption of liability under a mortgage.* It can be a contribution: *Crisp v Mullings* (1976) 239 E.G. 119. If however A is merely a nominee for B, then A will not be able to establish an interest: *Re Share* [2002] 2 FLR 88..

The following *might well be* contributions depending on the circumstances

- *Some sort of discount earned by the party* (e.g. a discount under the right-to-buy legislation): *Springette v Defoe* [1992] 2 FLR 388. However be aware that under right to buy legislation the purchasing tenant cannot

transfer his interest to a third party within a set time (3 years) without penalty. If the person putting the money in is not the tenant then a penalty will arise;

- *Discounts secured in negotiation may be a contribution (Marsh v Von Sternberg [1986] 1 FLR 526. However it may be they are not a contribution, but instead evidence discussion that the person should have a beneficial interest: Evans v Hayward [1995] 2 FLR 511;*
- *Funding improvements might be enough (Thomas v Fuller Brown [1988] 1 FLR 237 where the argument failed on the facts) provided pursuant to common intention and not because one wanted a nicer property. See also Bernard v Josephs [1982] Ch 391 per Griffiths LJ*

*the mere fact that one party has spent time and money on improving the property will not normally be sufficient to draw such an inference [of a common intention].*

- *Indirect payments. This is where but for A's contribution to the usual household expenses, B could not pay the mortgage. Rosset appears to say no. However that appears to be inconsistent with Gissing and Pettit and obiter statements in Stack and Abbott and the high Court decision of Le Foe v Le Foe and Woolwich [2001] 2 FLR 970;*

The following are *highly unlikely* to be contributions:

- *Payment of purchase costs. Rosset appears to say no, however Lord Diplock in Gissing talked of contributions to cash deposit and legal*

charges. However on their own, they are likely to be *de minimis* and disregarded: *Young v Young* [1984] FLR 375 CA;

- *Doing the housework or gardening*. Ordinary DIY will not suffice: *Pettit*;
- *Payment for a lawn and some furniture and house equipment*: *Gissing*.
- *Supervision of building works*: *Winder v Whitehall* [1990] 2 FLR 505.

The following are *unknown quantities* with arguments either way

- *Payments towards the endowment policy or some offset mortgage arrangement* (also offset mortgages and the like). The higher courts have never considered this type of mortgage. On the one part, the property is not purchased until the endowment pays out. On the other it is rather arbitrary and, in the case of an offset, the provision of capital to set off against interest is surely a contribution;
- *Payments towards an interest only mortgage*. There are no proper authorities on the topic. *Leake v Bruzzi* [1974] 1 WLR 1528 suggests no but common sense suggests otherwise.

### *Detrimental reliance*

Having established the common intention either based on discussion or by contribution, the non-owning party must rely on it to his detriment. Financial contribution is obviously a detriment. However it need not be so: e.g. *Cox v Jones* [2004] 2 FLR 1010 where the detrimental reliance was supervising an extensive programme of improvements and by reducing her practice at the Bar. The detrimental reliance must be explained by the intention that he had a beneficial interest.

#### 5.4.6 *Stage 3: Establishing the size of the shares*

The court, at this stage, must consider the whole course of dealing. If the parties reached an agreement, arrangement or understanding that is fairly conclusive. At this stage, things which are not relevant to establish an entitlement to a share are relevant to quantifying it.

Criteria to consider include (taken from *Oxley* and *Stack*):

- 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.
- 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;

- the parties' individual characters and personalities;
- mutual wills and their terms;
- Whether the parties' intentions have now changed e.g. where a 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 above represent standard areas to explore when determining the size of any interest.**

## **6 Engaged and married couples**

There is a little known and underused statutory provision that benefits couples who were engaged or married at the material time.

*The Matrimonial Proceedings and Property Act 1970* (which also applies to engaged couples by *s.2(2) Law Reform (Miscellaneous Provisions) Act 1970*) enables a party in an engagement or marriage to acquire an interest if he made a substantial contribution in money or money's worth.

It reads

*It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her*

*contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings).*

**Therefore a former fiancé(e) can claim an interest if (s)he has made a substantial contribution.**

**The improvement need not be substantial however.**

**The interest is whatever is just and fair.**

## **7 Accounting and totting up**

**This applies to both express and implied trusts.**

### **7.1 Accounting**

Traditionally a chancery court would take an account to compensate the excluded person for the remaining person's continued occupation by way of occupation charge or would compensate the person who has paid the other party's share of the mortgage. The key case was *Re Pavlou* [1993] 1 WLR 1046.

**However in *Stack*, Baroness Hale reminded the courts that old doctrines had been replaced by a statutory code and that the statutory code must be applied.**

**The relevant provisions are contained in Trusts of Land and Appointment of Trustees Act 1996 Part I (TOLATA).**

This reads so far as relevant:

*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).*

This section gives the court a very wide discretion as to what should be taken into account and how any sums payable should be calculated. It is far wider than traditional equitable accounting.

It should be noted the list of relevant criteria is not exhaustive: *Stack* and so any other relevant factors may be taken into account.

Judges at first instance have been known for example to refuse to order a mother with care of the child to pay compensation to the father, especially where the father pays little or no maintenance (whether justified under CSA arrangements or otherwise).

## **7.2 Sale**

The parties can agree to sell the property or can ask the court to order its sale..

**If you represent a party who claims to have an interest not apparent on the papers, and the other is threatening to sell the property but will not undertake not to dispose of the proceeds or to pay them into a joint account, then you should consider a freezing orders to preserve the proceeds. These are highly specialised, can only be dealt with by the High Court and, because of potential costs consequences, must be sought with care.**

## 8 The court's power

The court is empowered to make any orders declaring the interests held in the land and orders as to sale: *s.14 TOLATA*.

**TOLATA allows the court to declare the interests in a trust and make consequential orders. It does not empower the court to vary the trusts. Nor does it allow the court to add a person as a trustee: that can be done under the *Trustee Act 1925*.**

s.14 reads

*(1) Any person who is a trustee of land or has an interest in 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.*

*(3) The court may not under this section make any order as to the appointment or removal of trustees.*

*(4) The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this Act.*

In relation to the order for sale, the court can make any of the following orders:

- Sale now
- Sale later on meeting certain conditions (*cf. Martin or Mesher* order in family proceedings)
- No sale

## 8.1 Considerations for making an order for sale

**The criteria to consider differ depending on whether the applicant is the trustee in bankruptcy of a former owner and when it is made by someone else.**

### 8.1.1 Where the application is not made by a trustee in bankruptcy

Where a court is considering exercising any power under *s.14*, it must consider the circumstances in *s.15*. This is a non-exhaustive list: *Mortgage Corporation v Shaire* [2001] Ch. 743.

Unlike the previous law, there is no presumption of sale, nor is any one factor presumed to be more important than any other. It reads

*(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.*

*(2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13, the matters to which the court is to have regard also include 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.*

...

*(4) This section does not apply to an application if section 335A of the Insolvency Act 1986 (which is inserted by Schedule 3 and relates to applications by a trustee of a bankrupt) applies to it.*

## Examples

- J and C beneficial joint tenants. Divorced. J wanted money out. Order for sale as purpose for holding property (matrimonial home) ended (decided under law where presumption of sale): *Jones v Challenger* [1961] 1 QB 176.
- Steps should be taken to preserve home (if bought as such) as home for remaining partner and children: *Williams v Williams* [1976] 1 Ch 278.

### 8.1.2 *Application by the trustee in bankruptcy*

Where the application is made by a trustee in bankruptcy, s.15 does not apply.

Instead one must refer to s.335A of the *Insolvency Act 1986*. It reads

*(1) Any application by a trustee of a bankrupt's estate under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (powers of court in relation to trusts of land) for an order under that section for the sale of land shall be made to the court having jurisdiction in relation to the bankruptcy.*

*(2) On such an application the court shall make such order as it thinks just and reasonable having regard to—*

*(a) the interests of the bankrupt's creditors;*

*(b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt's spouse or former spouse—*

*(i) the conduct of the spouse or former spouse, so far as contributing to the bankruptcy,*

*(ii) the needs and financial resources of the spouse or former spouse, and*

*(iii) the needs of any children; and*

*(c) all the circumstances of the case other than the needs of the bankrupt.*

*(3) Where such an application is made after the end of the period of one year beginning with the first vesting under Chapter IV of this Part of the bankrupt's estate in a trustee, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.*

*(4) The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this section.*

**The most important thing to note is that a bankrupt's interests are irrelevant, and after 1 year of the vesting of the property in the trustee, the creditor's interests are paramount unless exceptional circumstances exist.**

#### Examples

- D failed to prevent an immediate order for sale. She was a co-owner and lived in the family home with her and the bankrupt's 4 children. D proposed postponing the sale for 11 years until the children had grown up. The High Court (Stuart Isaacs QC) held that the fact creditors are likely to be paid in full is not an exceptional circumstance. Further, even if Article 8 (respect for family life) of the European Convention on Human Rights 1950 required s.335A to be interpreted in a manner which afforded greater weight to the needs of the bankrupt's partner and children, the circumstances were not exceptional: *Donohoe v Ingram* [2006] EWHC 282 (Ch), [2006] 2 F.L.R. 1084.

- H declared bankrupt in 2000. Order for possession and sale of H's matrimonial home was made in 2004. The subject property had been purchased by H and his brother (C). C had also been made bankrupt. C's trustee in bankruptcy agreed to the sale. The subject property was occupied by D and her children. D had contributed to the purchase price of the property and had made mortgage payments. Lawrence Collins J upheld the District Judge's order of an immediate order for sale. **He further held that typically, exceptional circumstances related to the personal circumstances of one of the owners such as a medical or mental condition, though there were no categories as such.** The court was to make a value judgment after looking at the circumstances. In particular he held that it was not uncommon for a wife with children to be faced with eviction in circumstances where the realisation of her beneficial interest would not produce enough to buy a comparable home, but such circumstances were not exceptional (applying *Re Citro (Domenico) (A Bankrupt)*, [1991] Ch. 142; *Dean v Stout* [2004] EWHC 3315 (Ch);

### 8.1.3 *What happens if former spouse declared bankrupt after ancillary relief*

It is important to note that, as the law is currently understood, if H is ordered in ancillary relief to convey a property to W, and then H is declared bankrupt, the trustee cannot generally enforce against W. An ancillary relief order might be susceptible to relief under *Insolvency Act 1986 s.339* (power to set aside transaction at undervalue) despite the existence of a court order if there had been collusion between the parties to prejudice the bankrupt's creditors, or some other vitiating factor such as fraud, mistake or misrepresentation, but it would be

contrary to Parliament's intention and the objectives of the 1973 Act if every ancillary relief order was automatically subject to nullification at the suit of the trustee in bankruptcy of a party who had become bankrupt after the order had been made: *Hill and another v Haines* [2007] EWCA Civ 1284, [2008] 2 All ER 901.

## 9 Estoppel

There are two possibly relevant estoppels: proprietary estoppel and *Pallant v Morgan* equity.

An estoppel can arise in both express and implied trusts.

### 9.1 Proprietary estoppel

While it was thought recently that proprietary estoppel and constructive trusts would lead to the same thing, this is not necessarily so. As Lord Walker said in *Stack*, if an estoppel arises and a lump sum is enough to satisfy the equity, then a lump sum payment is all that should be ordered. Under a trust, that route is not appropriate since, by definition, the beneficiary under a trust has an interest.

When one determines whether there is a proprietary estoppel, the overriding factor is unconscionability: *Gillett v Holt* [2001] Ch 210 per Robert Walker LJ. It is better explained by Oliver J in *Taylor's Fashions v Liverpool Victoria Trustees* [1982] QB 133. He said proprietary estoppel

*requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which,*

*knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick of unconscionable behaviour.*

However, traditionally the court has had to refer to 5 principles (known for some reason as the five probanda). These are

- A must be mistaken as to his legal right;
- A must have acted to detriment based on his mistake as to his legal right;
- B must know of his own legal right which must be inconsistent with A's;
- B must know of A's mistaken belief as to his legal right;
- B must have encouraged A in expense or some other act.

See *Crabb v Arun District Council* [1976] Ch 179 CA at 194B-195B approving Fry J in *Wilmott v Barber* (1880) ChD 96.

Estoppel is an equitable remedy and therefore the usual equitable maxims and defences apply.

## **9.2 The *Pallant v Morgan* equity**

This equity arises where the pre-acquisition conduct colours the post-acquisition conduct, e.g. where Fred promises to buy a house jointly with Georgette, so Georgette does not bid for the house, Fred will be estopped from denying Georgette a share. The principles were set out in *Banner Homes Group v Luff Developments* [2000] 2 All ER 117.

*(1) A *Pallant v Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the*

*relevant property by one of those parties to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it. Where the arrangement or understanding is reached in relation to property already owned by one of the parties, he may (if the arrangement is of sufficient certainty to be enforced specifically) thereby constitute himself trustee on the basis that “equity looks on that as done which ought to be done”; or an equity may arise under the principles developed in the proprietary estoppel cases. ...*

*(2) It is unnecessary that the arrangement or understanding should be contractually enforceable....*

*(3) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party (“the acquiring party”) will take steps to acquire the relevant property; and that, if he does so, the other party (“the non-acquiring party”) will obtain some interest in that property. Further it is necessary, that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, at the least, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding.*

*(4) It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do)*

*something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. ...*

*(5) That leads, I think, to the further conclusions: (i) that, although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that, although there will usually be advantage to the one and co-relative disadvantage to the other, the existence of both advantage and detriment is not essential – either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted.*

This estoppel is an equitable remedy and therefore the usual equitable maxims and defences apply.

## **10 Other types of property**

### **10.1 Endowment policies**

There is no fundamental difference in approach between interests in endowment policies and property ownership.

## 10.2 Bank accounts – sole name

The presumption is it belongs to the account holder but again it is a question of fact. Access to the account is not enough to give rise to a beneficial interest.

## 10.3 Joint accounts

It is again a question of fact as to what the parties intended.

For example, in *Jones v Maynard* [1951] 1 Ch 572, Vaisey J held that person property purchased from a joint account belonged to the purchaser personally and he refused to embark on an account. However he held that investments in a party's sole name were joint investments. In *Re Bishop* [1965] 1 Ch 450 however all investments purchased from the joint account were personal property of the purchaser even though from joint funds.

## 10.4 Household contents

Again it is really a question of fact, while there are 'interesting' arguments about whether there is a difference between payments made by withdrawn cash, debit cards and the like and who made the purchase.

The reality is that the courts will not want to argue about chattels, particularly in light of the CPR and proportionality of litigation. In *Hammond v Mitchell* [1991] 1 WLR 1127, Waite J suggested the courts should adopt a robust allegiance to the maxim 'equity is equality'.

### 11 Flowchart for thought processes



