



Equity and Trusts Concentrate: Law Revision and Study Guide (8th edn) Iain McDonald and Anne Street

p. 125 9. Implied trusts

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter deals with the central issues of implied trusts. Implied trusts can be either resulting or constructive. Resulting trusts fall into two categories, automatic or presumed. Constructive trusts are more difficult to define as the scope of their application seems to have been 'left deliberately vague' so that the courts can develop them as needed. There are no formalities for the creation of implied trusts. The law has developed methods of identifying the creation of implied trusts. Implied trusts are particularly important in relation to the family home.

Keywords: resulting trusts, constructive trusts, implied trusts, family home, automatic trust, presumed trust

Key facts

- Implied trusts can be either resulting or constructive.
- There are no formalities for the creation of implied trusts.
- The law has developed methods of identifying the creation of implied trusts.
- Implied trusts are particularly important in relation to the family home.

Introduction

The flexibility of equity to adapt to the changing demands of society and commercial needs is seen nowhere more clearly than in the use and development of implied trusts. This chapter will deal with the central issues of implied trusts and identify where they link to other areas of study. It is important to see trusts as a whole, rather than separate and discrete areas.

An important area for implied trusts is in relation to allocating rights in a family home. Lord Hope in *Stack v Dowden* [2007] noted that this area was of interest not just to the parties but to society in general. The cases reflect changing social attitudes to family roles and are a topic ripe for examination. The law in relation to implied trusts in this area has been dealt with in a separate section to help understand how the law on implied trusts applies.

Implied trusts

Revision tip

Be aware that implied trusts are a huge subject which can be examined in a variety of areas—as a remedy for breach of trust, enforcing property rights, failure of trusts, and protecting business interests. Different courses will place different emphasis on this area of law, so it is important to take the lead from your own course as to detail and depth. It is impossible in a revision guide to deal with all the complexities of this area.

Chapter 2 briefly considered implied trusts—resulting, constructive, and statutory. This chapter looks in a little more depth at resulting and constructive trusts. Implied trusts arise without the express declaration of trust by the settlor. This chapter considers how these trusts are identified by the courts. Resulting trusts fall into two categories: automatic or presumed. Constructive trusts are more difficult to define as the scope of their application seems to have been ‘left deliberately vague’ so that the courts can develop them as needed.

Resulting trusts

Resulting trusts are said to operate independently of the intention of the party, but this is not an absolute. The ‘settlor’ may not intend to create a trust but may still intend to benefit another person with the property. The courts look at the intention to benefit another person rather than the intention to create a trust: *Twinsectra v Yardley* [2002].

Automatic resulting trust

As stated in *Twinsectra v Yardley* [2002], the automatic resulting trust arises *despite* the intentions of the parties. They arise in the following situations:

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1. uncertainty of objects;
2. failure of a contingency;
3. failure to dispose of whole beneficial interest;
4. surplus of funds after a valid purpose trust has completed its purpose;
5. money given for a stated purpose which can no longer be carried out.

Uncertainty of objects

Chapter 3 noted that failure to specify the beneficiaries of a trust means that the trust fails. Equity **abhors a vacuum** and the beneficial interest must be owned by someone and should not exist in suspension. So, the property is said to be held on resulting trust for the settlor: *Vandervell v IRC [1967]*. Additionally, poor drafting may result in failure (*Re Diplock [1948]*) where a purported charitable trust is actually construed as a purpose which does not fall within one of the accepted **anomalous exceptions** (see chapter 7), in which case the property will result back to the settlor or his estate.

Failure of a contingency

Some interests are contingent (conditional); for example, a trust for Iain, should he reach the age of 25. If he fails to reach that age, then the conditions of the settlement have not been fulfilled. A person with a contingent interest has no vested interest in the property; if he or she cannot or does not meet the contingency then the trustee must hold the property for someone. As with the previous situation, this problem is resolved by an automatic resulting trust for the settlor: *Re Ames Settlement [1946]*.

Terminology tip

A vested interest is a *present* right to property. It is owned by the person who has that interest. But a contingent interest is conditional, and the person has no property until the contingency is met.

Failure to dispose of whole beneficial interest

A failure to specify who owns the whole beneficial interest will mean that it is held for the settlor: *Re West [1900]*. For example, Anne leaves her shares to Iain for his lifetime; the trustee is clear that it is for Iain while he lives but who gets the property when Iain dies? The property will result back to Anne's estate.

Surplus of funds after a valid purpose trust has completed its purpose

A valid purpose trust, either charitable or an anomalous exception, may complete the purpose and have money left over. In this situation, the question arises as to what to do with the trust property and/or any donations.

Purpose trust with human objects

Where the purpose is not charitable and there are human objects of the trust, the question arises as to what to do with the donations (see chapter 7). There are two views on this situation:

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- Where there is a pure purpose which is valid and complete, or there is money left at the end of the perpetuity period with no gift over, the money is returned to the donors/settlors: *Re the Trust of the Abbott Fund [1900]*.
- The money is given to the objects of the trust as an outright gift. The purported purpose is seen as no more than a motive for the donation: *Re Osaba [1978]*.

Purpose trust with no human objects

If the purpose has no human beneficiaries but is one of the anomalous exceptions, the property will result back to the estate of the settlor after the completion of the task or the end of the perpetuity period. Different rules will apply to charitable trusts (see chapter 6).

Unincorporated associations

A trust for an unincorporated association can be seen as a purpose trust (see chapter 7). When the association ceases to exist, there are two main interpretations of how to deal with the property held by the association:

- The property held by the association is held on resulting trust by the association for the individual members and will be divided between them in proportion to their contributions: *Re Printers and Transferrers' Amalgamated Trades Protection Society [1899]*. The problem with this interpretation is that the members and contributors may not be identifiable. So, this analysis can only work where the contributors are ascertainable.
- The property held by the association is held for the members of the association according to the contractual obligations in the association rules: *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2) [1979]*. The advantage of this is the ascertainability of the people entitled to the funds (see chapter 7 for further comments on this matter).

Looking for extra marks?

An interesting view was taken by Goff J in *Re West Sussex Constabulary's Widows, Children and Benevolent Fund (1930) Trusts [1971]*. He differentiated between contributions made by members and funds raised by donations and fundraising raffles. It was suggested that those who donate to street collections have no intention of retaining an interest.

Money given for a stated purpose which can no longer be carried out

p. 129 When money is paid to a person on the understanding that it will be used for a certain purpose then, if that purpose cannot be carried out, then the money will be held on resulting trust for the donor: *Barclays Bank v Quistclose* [1970]. This has been the subject of much academic discussion as Lord Wilberforce, expressing the view of the court, ruled that the money was transferred on trust for the payment of shareholder dividends (the primary trust). When ↵ the primary trust was not exercised, a secondary trust arose (the resulting trust) to return the money to the lender.

There are problems with this analysis; it seems illogical to have two trusts over the same property at the same time, at odds with the requirements of certainty (see chapter 3). Also, if there was a primary trust who were the objects? Not the shareholders, otherwise they should have had property in the money and it should have been paid to them on liquidation. It would also not explain how a *Quistclose Trust* can arise when the purpose of the loan is to buy machinery, as this would mean that the 'primary' trust would fail as a purpose trust (see chapter 7).

In *Twinsectra v Yardley* [2002], Lord Millett has interpreted this situation as a voluntary transfer, creating a trust with a power (see chapter 2) to apply for a specific purpose. This interpretation may be a method to allow the successful enforcement of the purpose as there are no restrictions on a power being for a purpose, whilst enabling the lender to have a proprietary claim over the loaned money. It will, however, require careful drafting to enable the courts to establish that the money was lent on trust (certainty of intention from words creating an express trust?) with the power to use for the stated purpose, buying machinery: *Re EVTR* [1987] or repaying loans: *Twinsectra v Yardley*. If the power is exercised then the lender just becomes a creditor for the loan; if the power is not exercised then the money is held for the lender.

The focus for the courts is in finding the necessary intention when lending the money to the recipient. While holding in a separate account is good evidence, it is not essential: *Re EVTR Ltd*. The courts will also look at the agreement between the parties to ascertain the intention. In *Twinsectra v Yardley*, Lord Millett said that as the agreement indicated that the money was not at the free disposal of the recipient it was held on resulting trust for the settlor if not used for the specified purpose.

Looking for extra marks?

Read the commentaries on *Quistclose* and *Twinsectra*; consider whether the analysis of the primary and secondary trust has any validity. A focus for essays may be in identifying the nature of the trust; the language of the judges appears to reference constructive, while also calling them resulting trusts. There is much to commend them as express trusts with a power.

Also consider that the trust analysis protects the lender in a commercial context on insolvency but disadvantages other creditors. The use of a *Quistclose* trust seems to give a preference to certain creditors, which is contrary to the provisions in the **Insolvency Act 1986**. The litigation in relation to the collapse of Farepak is worth reading to gain an understanding in this area. (See the online resources for further discussion.)

Presumed resulting trusts

There are a number of situations in which the conduct of the parties will create a presumption that a resulting trust was intended. These are:

1. the voluntary conveyance of property to another;
2. the purchase of property in the name of another.

p. 130 ↺ Remember that presumptions are only a starting point for the court and can be rebutted by evidence which indicates a different intention.

Looking for extra marks?

There has been much academic debate, particularly between Professor Swadling and Professor Chambers, about the nature of the intention required to form this presumption. This can form the basis of an essay question: is it the intention to retain a beneficial interest or the absence of an intention to pass the beneficial interest (Lord Millett in *Air Jamaica v Charlton [1999]*)? See the 'Key debates' section at the end of the chapter.

Voluntary conveyance

A voluntary conveyance refers to a transfer of property where the recipient does not provide **valuable consideration**. The maxim that 'equity presumes a bargain and never a gift' holds that a party would never give away property. In this situation, the presumption (the starting evidential point for the court) is that the property is held by the recipient of the legal title (presuming that the legal formalities for transfer are perfect—see chapter 5) for the benefit of the transferor.

Where the property transferred is real property (land) it is not subject to the requirements of writing: **s 53(2) LPA**. Here the presumption of resulting trust is undermined by **s 60(3) LPA**. This states that:

in a voluntary conveyance, a resulting trust for the grantor shall not be implied, merely by reason that the property is not expressed to be for the use or benefit of the grantee.

It has been suggested that the effect of this section is that a resulting trust will no longer be presumed where the property conveyed is land. In *Lohia v Lohia* [2001] it was said that ‘on a plain reading’ of the section the presumption of resulting trust was abolished. However, other cases maintain that as a matter of basic equitable principle s 60(3) LPA does not prevent a resulting trust being presumed: see *Hodgson v Marks* [1971]. The position is, as Lord Browne-Wilkinson said in *Tinsley v Milligan* [1994], ‘arguable’.

Purchase in the name of another

When one person provides either part or all of the money required to buy property but is not identified as the legal owner of that property, equity will again assume ‘a bargain’ and not a gift. In contrast to the voluntary conveyance of property considered earlier, this presumption applies regardless of whether the purchased property is **personalty** or **realty**, therefore s 60(3) LPA does *not* apply here.

Where two or more parties contribute towards the purchase they will hold the property in proportion to the contribution they made to the purchase price. The contribution must be prior to or at the time of purchase: *Cowcher v Cowcher* [1972].

p. 131 Rebutting the presumption of resulting trust

As with all presumptions in law, it is for the party who is not relying on the presumption to rebut it.

The presumption of advancement

In certain relationships the presumption of a resulting trust is reversed by the presumption of advancement. Where the presumption arises, on a voluntary transfer or purchase in the name of another, the burden of rebuttal will be on the person claiming that there was *no advancement* (gift): *McGrath v Wallis* [1995] (see Table 9.1).

Table 9.1 Summary of the burden of proof

PRESUMPTION RAISED	WHERE THE BURDEN OF PROOF LIES
Resulting trust	On the recipient (donee)
Advancement	On the giver (donor)

Situations where the presumption of advancement applies are as follows:

1. Husband to wife—although in *Pettitt v Pettitt* [1970] Lord Diplock expressed a judicial reluctance to apply ‘inferences of fact ... [from the] intention ... of spouses belonging to the propertied classes of a different social era’. Note that the presumption does not apply:
 - wife to husband: *Abrahams v Trustees of the Property of Abrahams* [1999]; and

- man to mistress, no matter how dependent: *Gavin-Mack v Gavin-Mack* (1993).
- 2. Father to legitimate child: *Shepherd v Cartwright* [1955]. This presumption has been weakened in the modern financial climate: *McGrath v Wallis* [1995]. The presumption does not automatically apply between mother and child: *Ward v Snelling* (1994). However, it would be easier for the child to rebut the presumption of resulting trust because of the relationship of love and affection between the parties: *Bennet v Bennet* (1879).
- 3. Where a person is *in loco parentis* to a person to whom he or she acts as a father, the same presumption of advancement set out previously will apply: *Re Paradise Motor Co* [1968]. *Obiter* comments by Lindsay J in *Re Cameron* [1999] suggest that both parents are assumed to be *in loco parentis* unless the contrary is proved. In *Silverwood v Silverwood* (1997) the Court of Appeal assumed that the presumption of advancement would apply between mother and son.

Other relationships in which this presumption has been recognized include:

- father and illegitimate child: *Beckford v Beckford* (1774);
- stepfather and stepson: *Re Paradise Motor Co* [1968];
- grandfather and grandchild: *Ebrand v Dancer* (1680).

p. 132 ↩ This presumption was to be removed by s 199 Equality Act 2010 as it is outdated in current social situations, but as yet this section remains unenacted.

The transfer was merely a loan

Evidence can be provided that the grantor intended his or her contribution only as a loan and there was no intention of gaining an interest in the property, but merely a contractual right: *Clark v Mandoj* [1998].

The transfer was intended as a gift

Evidence, express or by conduct, which is sufficiently certain as to create the intention to give as a gift will rebut the presumption of a resulting trust: *Fowkes v Pascoe* (1875).

What evidence can be relied upon to rebut these presumptions?

Timing of evidence

Statements made before or at the time of transfer or purchase: acts or statements made before or at the time of transfer can be relied upon by *both parties* in addressing whether a presumption of resulting trust or advancement is to be rebutted. Statements made after transfer or purchase *cannot* be relied upon by the *maker* of those statements: *Shepherd v Cartwright* [1955].

Looking for extra marks?

Shepherd v Cartwright [1955] suggests that acts or declarations which occur ‘so immediately after [the purchase] as to constitute part of the transaction are admissible’ (emphasis added). It will be a question of fact whether later statements made after the transfer are part of the transaction. This may be a point of discussion in an exam.

Nature of evidence

Evidence of illegal purpose: the law in this area has recently been reviewed by the Supreme Court in *Patel v Mirza [2016]*. Although this was not a case related to trusts but to restitution, the principles apply equally to trusts law. Before this case, the situation had been the ‘reliance’ model from the decision in *Tinsley v Milligan [1994]*. In this situation, the person claiming a resulting trust merely had to point to the (primary) fact of a contribution to purchase and had no need to rely on evidence of the intention behind the primary fact. To rebut the presumption of resulting trust, the legal owner (Tinsley) had to rely on the introduction of evidence of their intention behind the primary fact, of carrying out a (joint) illegal purpose. By a majority, the House of Lords held that this evidence was inadmissible, rejecting the Court of Appeal ‘public conscience’ approach. Lord Goff had taken a broader approach, that as both were involved with the illegality then the court of equity should follow the law.

p. 133 ↵ In *Patel v Mirza* by a majority decision, the Supreme Court has introduced a multifactorial approach to introducing the evidence of an illegal purpose. Lord Toulson stated that policy and proportionality should be considered, which may include:

- why the activity was made illegal;
- the centrality of the activity to the claim and its seriousness;
- what would be the policy consequences of denying the claim;
- whether denying the claim would be disproportionate to one party, considering such factors as the nature of the conduct of each party. (Did one party take a greater role in the actions?)

This introduces a more flexible and perhaps fairer method by which the illegal intention of the parties can be used to rebut the presumed intention of the parties.

Looking for extra marks?

The decision in *Tinsley v Milligan* led to difficult decisions such as *Tribe v Tribe [1996]*, when a father was allowed to introduce evidence of an illegal purpose, because that purpose was never carried through to completion. It was unclear from the decision in *Tribe v Tribe* how far the illegal purpose

had to progress before it can be said to be capable of withdrawal. It is uncertain whether the majority decision in *Patel v Mirza* has improved the test; indeed, Lord Sumption in the minority, defended the reliance test, but it does remove the problems that arose from the different burden of proof in a presumed resulting trust and the presumption of advancement. So perhaps the law will be more flexible in the light of *Patel v Mirza*, but is this flexibility desirable?

Constructive trusts

Unlike resulting trusts, the categories of constructive trusts are not clearly defined. They have been left 'perhaps deliberately vague' (per Edmund-Davies LJ in *Carl Zeiss Stiftung v Herbert Smith [1969]*). They have been used as a residuary category of trusts which are imposed by the courts when 'justice ... may require'.

It can be simply stated that the courts 'construct' a trust around the conscience of the legal owner. The institutional constructive trust is then imposed when the relevant facts are found and 'arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past', per Lord Browne-Wilkinson, *Westdeutsche Landesbank Girozentrale v Islington LBC [1996]*.

Looking for extra marks?

Remedial constructive trusts have been used in other jurisdictions such as Australia and New Zealand but has been resisted in the English courts, which have preferred the institutional constructive trust. While there were hints that a remedial trust could eventually develop (see the comments of Lord Scott in *Thorne v Major [2009]*), the current position is that England and Wales do not use a constructive trust as a remedy for a wrong: *Polly Peck International plc (in administration) No 2 [1998]* and has been clearly rejected in *Angove's Pty Ltd v Bailey [2016]*, which involved mistaken payments. Although it is unclear why the mistaken payment was held on trust, the *obiter* comments by Lord Sumption on the issue of remedial constructive trusts are informative.

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Traditional constructive trusts

A breach of a fiduciary obligation will give rise to a constructive trust. Fiduciary relationships generally arise where there is a situation of 'trust and confidence' between the parties. A fiduciary relationship can arise in a variety of situations, such as solicitor/client; accountant/client. Where such a relationship exists, the fiduciary owes an obligation to the principal to carry out his or her fiduciary duties correctly. The following are examples of where a breach of a fiduciary obligation has created a constructive trust:

1. solicitor: *Lipkin Gorman v Karpnale [1991]*;

2. trustee: *Keech v Sandford* (1726);
3. company directors: *Guinness v Saunders* [1990];
4. intermeddlers with a trust: *Mara v Browne* [1896];
5. recipients of trust property: *BCCI v Akindele* [2000];
6. persons who assist in the breach of a trust: *Twinsectra v Yardley* [2002];
7. secret commissions and bribes: *FHR European Ventures LLP v Cedar Capital Partners* [2014];
8. breach of contractual obligations: *Ashburn Anstalt v Arnold* [1989].

Looking for extra marks?

Note that these categories are not closed. Judicial statements indicate that even a thief who obtains property raises the necessary fiduciary relationship to create a constructive trust: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996]. The law in relation to mistaken payments and the creation of a trust was stated in *Chase Manhattan Bank NA v Israel-British Bank* [1981], which created a trust of such payments. In the recent decision of *Angove's Pty Ltd v Bailey* [2016] the Supreme Court confirmed that mistaken payments were held on trust, but sadly the reason is unclear. This may create the opportunity for academic and legal debate.

Categories 1–7 are dealt with in detail in later chapters so are only identified here for you to see the interwoven nature of equitable principles.

p. 135 Contractual obligations giving rise to constructive trusts

A contractual relationship does not necessarily create a fiduciary relationship, so it would be incorrect to say that it is imposed as a fiduciary. However, the constructive trust has been used as a method of giving a remedy for a breach of contractual obligations.

Ashburn Anstalt v Arnold [1989] stated that a constructive trust can be imposed where the court is 'satisfied that the conscience of the owner of the land had been affected so that it would be inequitable to allow him to deny the claimant an interest'. However, this decision is based on its own particular facts and has been doubted in *IDC v Clark* [1992].

Looking for extra marks?

The imposition of a trust for the breach of a personal obligation may be a step too far. See the decision in a commercial context of *Yeoman's Row v Cobbe* [2008], which seemed to shut the door on their imposition, although Lord Scott's later statements in *Thorner v Major* [2009] seemed to reopen it.

Trusts of the family home

When relationships break up the most common battle is over the ownership of the family home. In this part of the chapter we consider how implied trusts apply to family property. When a home is legally owned by two or more people at law they will own the property as joint tenants. There is a presumption that they will also own the beneficial interest as joint tenants. The burden will be on the person trying to rebut that presumption to prove that the beneficial interest is owned differently: *Stack v Dowden* [2007]. If there is only one legal owner then it is for the claimant to establish a beneficial interest first, before it can be quantified: *Lloyds Bank v Rosset* [1991]. It is clear from recent decisions in cases of single legal ownership that to establish the interest there is a two-stage process: first to establish the beneficial interest and then to quantify the beneficial interest.

Resulting trusts

It has been suggested by the Supreme Court in *Jones v Kernott* [2011] that resulting trusts are no longer applicable to the allocation of beneficial interests in family property. The law on resulting trusts would consider that any contribution made prior to or at the time of purchase of the home (*Curley v Parkes* [2004]) would be used to allocate a beneficial interest in the home. A point to note is that when there is a mortgage over the property, the person who takes the mortgage out is held to make that contribution on his or her own behalf: *Cowcher v Cowcher* [1972].

Quantifying the share of the home under a resulting trust

The share is in direct proportion to the contribution. This is the 'bank balance' approach to allocating shares in the home; if there was a 10 per cent contribution to the purchase this will give rise to a 10 per cent interest in the property.

Looking for extra marks?

Until the decision in *Jones v Kernott* is followed and applied in the courts, the role of resulting trusts is unclear. For a review of the decision, it may be worth looking at *Crossco No 4 Unlimited v Jolan [2011]* to see how courts are responding to the case.

Constructive trusts and the family home

An interest in the family home may be gained when it would be ‘unconscionable’ for the legal owner to deny that another person should have some claim to the ownership of the home. It was accepted in *Gissing v Gissing [1971]* that contributions other than financial can create an interest in the home. Lord Bridge in *Lloyds Bank v Rosset [1991]* stated that this is based upon the common intention of the parties. This can be found in two ways:

1. express common intention constructive trust;
2. inferred (implied) common intention constructive trust.

As stated in *Stack v Dowden [2007]*, it is clear that there is a two-stage procedure:

1. establish a beneficial interest;
2. quantify the beneficial interest.

See Figure 9.1.

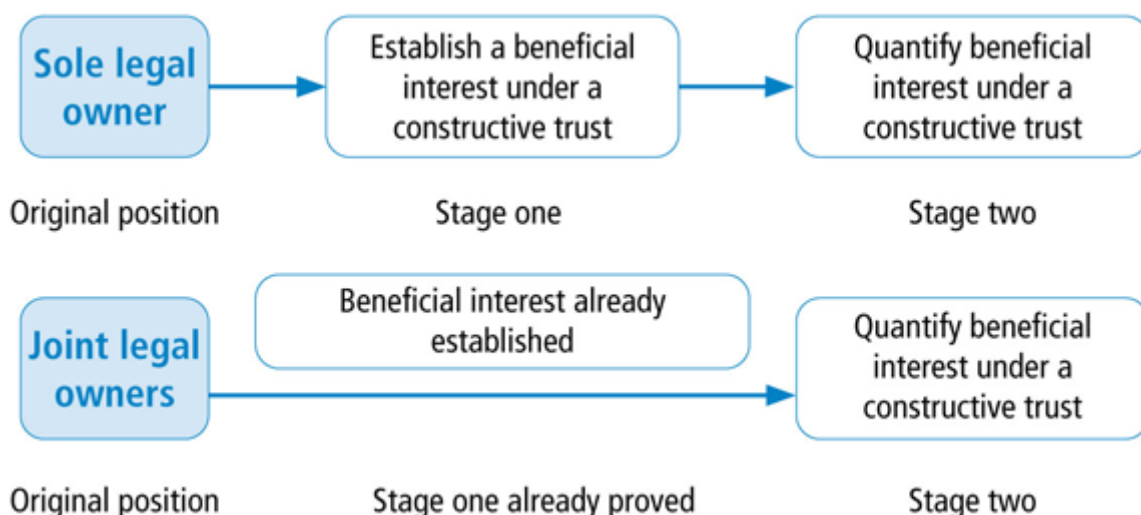


Figure 9.1 Process of constructive trust in the family home

Express common intention trusts

An express common intention constructive trust will arise when, at the time of acquisition (but exceptionally later), the parties have expressed a shared common intention to share the interest in the home:

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1. The intention must be express.
2. The intention must be common.
3. The common intention must relate to the acquisition of a share in the beneficial interest of the family home.

Express

In *Springette v DeFoe* [1992] Dillon LJ said that the interest:

cannot mean an intention which each happened to have in his or her own mind but had never communicated to each other.

The express agreement can be ‘imperfectly or imprecisely remembered’ as Lord Bridge said in *Lloyds Bank v Rosset* [1991]. The courts are not looking for legal language, but language clear enough to form the necessary intention on which to base a proprietary interest.

Common

The intention must be common. It must be shared by both parties and not the view of only one of the parties. In *Springette v DeFoe* [1992] Dillon LJ stated that as the parties’ intention was not expressed it would be difficult to find that their intention was ‘common’.

Sharing the home

The parties’ intention must be to share the home, not just to share their lives. Thus, an agreement to pay rent would not help to establish an interest in the family home: *Thomas v Fuller-Brown* [1988]. It must concern gaining an interest in the family home. In *Eves v Eves* [1975], lies to the young claimant about why she was not to be registered on the legal title gave the courts enough evidence that there had been a discussion about owning the house and not just sharing a life together.

Looking for extra marks?

It could be suggested that the fact that one party lies is explicit evidence that there is no intention to share. See ‘Key debates’ at the end of the chapter.

Detrimental reliance

Once an express common intention is found, the person seeking to establish the existence of a constructive trust must prove that he or she relied on that agreement to his or her detriment. The reliance must be subsequent to the express intention, and not something that was being done before and as part of the normal tasks of a couple: *Lloyds Bank v Rosset* [1991]. The conduct from which reliance can be found is broad in *this* category of constructive trust. In cases such as *Eves v Eves* [1975] and *Grant v Edwards* [1986] the courts look for some action that the other would not have done ‘but for’ believing he or she had an interest in the home (see Table 9.2).

Table 9.2 Conduct following an express agreement

CASE	CONDUCT WHICH HAS SUFFICED TO CREATE AN INTEREST FOLLOWING AN EXPRESS AGREEMENT
<i>Eves v Eves</i> [1975]	Had children, cleaned, and decorated home. It seemed significant to the court that she undertook heavy manual work on home.
<i>Grant v Edwards</i> [1986]	‘Made a very substantial contribution to the housekeeping and the feeding and bringing up of the children ... [using] her earnings in that way.’

p. 138 ↵ In considering whether there has been detrimental reliance, the courts try to distinguish between actions which are ‘truly’ detrimental and those which are merely demonstrations of ‘love and affection’. In *Lloyds Bank v Rosset* [1991] the actions of Mrs Rosset were no more than would be expected from a wife. See also *Pettitt v Pettitt* [1970].

Revision tip

A common mistake for students in exams is to leap straight into the discussion of detrimental reliance, using the cases explained earlier. Students will then note that there has been no express agreement. To an examiner this indicates a poorly thought-out answer and perhaps a misunderstanding. If there is no agreement, then the relevance of contributions other than directly financial may only be relevant *to the quantification* of the interest. See the section ‘Quantifying the share under a constructive trust’, p.

Inferred common intention constructive trusts

In the absence of an express agreement, the common intention is to be inferred from the conduct of the parties. This area has been the subject of much judicial and academic discussion. As a matter of precedent, the House of Lords’ decision in *Lloyds Bank v Rosset* [1991] states that there is only one type of conduct which

allows the courts to infer that the parties intended to share the beneficial interest in the family home—direct financial contributions (see Figure 9.2). This has been cast into doubt by later persuasive authority on the point.

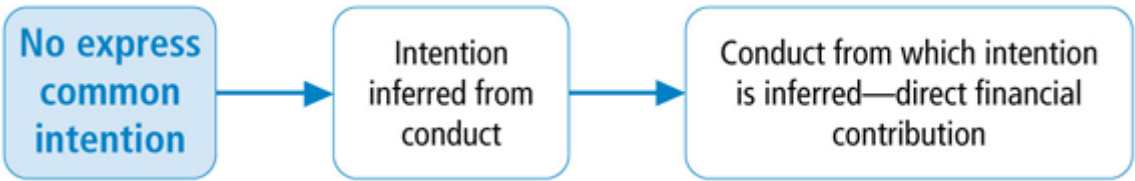


Figure 9.2 Inferred common intention

Gissing v Gissing [1971] stated that in the absence of express statements, the question of the parties’ intention was an objective one. Lord Bridge went further in *Lloyds Bank v Rosset [1991]*, where he ‘doubted anything else’ but contributions which are referable to the acquisition of the property would be sufficient to infer the common intention. Thus, payments at the time of acquisition will apply, such as paying a deposit, but the difference between this and a resulting trust is that later payments to the mortgage will also be sufficient. If there is no such payment, then this category of trust will fail (see Table 9.3).

Table 9.3 Illustrative cases

CASE	CONDUCT THAT HAS NOT GIVEN AN INTEREST UNDER AN INFERRED CONSTRUCTIVE TRUST
<i>Pettitt v Pettitt [1970]</i>	Husband had laid out the garden, built walls, and done substantial work in the home
<i>Thomas v Fuller-Brown [1988]</i>	Designing and building a two-storey extension to home inferred just work in lieu of rent
<i>Gissing v Gissing [1971]</i>	Contributions to children’s clothes, her own clothes, and laid the lawn
<i>Hussey v Palmer [1972]</i>	Claimant paid for an extension which increased the value of the house; she gained an interest in the home

Looking for extra marks?

In *Gissing v Gissing [1971]*, although there was a later express agreement the court held that this did not reflect the parties’ intention at the time of acquisition of the home. It may be worth considering whether there is a gender stereotype in cases such as *Pettitt v Pettitt [1970]*. Be prepared to comment on cases in essays. Also, the case of *Burns v Burns [1984]* can be seen as the high point of the inferred constructive trust concept in the consideration of indirect, and perhaps non-financial, contributions being considered in establishing a constructive trust in the home. *Lloyds Bank v Rosset [1991]* has

firmly rejected this move. However, obiter comments in *Stack v Dowden* [2007] and *Jones v Kernott* [2011] suggest that the intention to create a beneficial interest can be inferred (or imputed) based on non-financial or indirect financial contributions to the home. In *Geary v Rankine* [2012] the Court of Appeal referred favourably to the judgments in *Stack v Dowden* and *Jones v Kernott*, confirming it as a two-stage test, the first part as to the acquisition of a beneficial interest to be ‘deduced objectively from their conduct’ (para 20). Here the courts were not convinced that there was a shared intention. More recently, the Court of Appeal confirmed the approach of the ‘whole circumstances’ in seeking the common intention in *O’Kelly v Davies* [2014]. It appears that the courts are taking the stance that the test is not now as narrow as the decision in *Lloyds Bank v Rosset*. This area will remain in confusion until a case clearly on this point is decided by the Supreme Court.

Revision tip

It is important to note that the statements in the cases mentioned do not change the ruling in *Lloyds Bank v Rosset*, on the issue of *establishing* an equitable interest. As it was not an issue in *Stack v Dowden* the comments of the Lords there are *obiter*. Also, the decisions in cases such as *Geary v Rankine* [2012] which applied the principles of *Jones v Kernott* to the creation of a trust and *Thompson v Hurst* [2012], which followed the principles of *Lloyds Bank v Rosset*, are of the lower court. You should take guidance from how your institution deals with this issue as there is not space to fully discuss the debate here.

p. 140 Quantifying the share under a constructive trust

Having established the property interest under a constructive trust the courts will then quantify the interest. Unlike the ‘bank balance’ approach of resulting trusts, the issue of quantification in respect of constructive trusts of the family home is more problematic. As the trust is based upon the conscience of the party, the ‘equity required to do justice’ will vary. A recent decision where the creation of a trust was based on the comments in *Stack v Dowden* was *O’Kelly v Davies* [2014]. So, it may be that the law in this area is changing to a more flexible approach.

Starting point

If the parties are joint legal owners, the starting position for the courts will be that ‘equity follows the law’ and they share the beneficial ownership: *Stack v Dowden* [2007]. Where there is sole legal ownership the law presumes that it is owned solely by the legal owner. The person trying to rebut these presumptions can produce evidence to the contrary.

Evidence

While parties may agree to share their home they rarely, in the flush of romance, discuss just how the home will be divided should they separate. If such an agreement is made, then the courts will give effect to that express agreement: *Springette v DeFoe* [1992]. This will apply regardless of actual contributions: *Clough v Killey* [1996].

In an inferred common intention constructive trust, the evidence will be based upon the contributions made by the beneficial claimant: *Gissing v Gissing* [1971]. However, for both types of constructive trust these are starting positions for allocating interests.

The courts take what has been called a ‘broad-brush approach’ to quantifying the share and will look at the whole course of dealing between the parties to allocate interests. Cases such as *Midland Bank v Cooke* [1995] and *Drake v Whipp* [1996] have suggested that ‘the whole course of dealing’ between the parties should be considered which ‘should not be confined to acts of direct contributions’. In *Oxley v Hiscock* [2004], Chadwick LJ suggested quantifying interests in the family home based on principles of ‘fairness’ at the end of the relationship or based on principles of proprietary estoppel: *Yaxley v Gotts* [2000].

Stack v Dowden [2007] reviewed this area, while calling for changes in how to establish a beneficial interest; it rejected decisions based on fairness (see Lord Neuberger at 144), but Baroness Hale set out very clearly in her judgment what factors may be considered. The approach taken in *Oxley v Hiscock* was approved by the Supreme Court in *Jones v Kernott* [2011].

Looking for extra marks?

There is currently a Cohabitation Rights Bill before Parliament and it may be worth considering if the prospective legislation, which may never be enacted, would improve the situation for cohabitants.

p. 141

Revision tip

In explaining this area, it is essential that students are very clear that a two-stage approach is taken when there is a sole legal owner. First, it is necessary to establish a beneficial interest, using the principles in *Lloyds Bank v Rosset*. The second step, which also applies when there are joint legal owners, is to establish the beneficial share: *Stack v Dowden*.

Proprietary estoppel

If the intention to create a trust cannot be found, the courts retain the ability to find an estoppel (see recently *Southwell v Blackburn* [2014]). It is important to note that proprietary estoppel can be the basis of an action (therefore a sword and a shield). The courts look for:

- an assurance, which can be a unilateral statement; and
- reliance of the claimant: see *Pascoe v Turner* [1979].

Detriment which makes conduct unconscionable

Assurance can be active or passive, such as allowing another to work on your property, knowing that he or she believes by such actions he or she will gain an interest in the home. The reliance can be not seeking alternative arrangements for accommodation or work: *Gillett v Holt* [2001]. This area was reviewed in a commercial context in *Yeoman's Row v Cobbe* [2008] and in a family situation in *Thorne v Major* [2009].

Remedies

The remedies available for estoppel are the 'minimum equity to do justice': *Jennings v Rice* [2002]. This can be the payment of financial compensation, as in *Dodsworth v Dodsworth* (1973) to a transfer of full ownership: *Thorne v Major* [2009].

Conclusion

The imposition of implied trusts has a varied and complex basis. A resulting and constructive trust can be applied to any property but has particular practical relevance in relation to the family home.

However, be aware that implied trusts is a huge topic, which can be examined in a variety of areas: as a remedy for breach of trust, enforcing property rights, failure of trusts, and protecting business interests.

p. 142 Key cases

CASE	FACTS	PRINCIPLE
<i>Barclays Bank v Quistclose</i> [1970] AC 567	Money was lent for the payment of dividends. The payments were not made, and the company went into liquidation.	The money given to pay dividends was held on a primary trust to pay dividends and when that failed the secondary trust (resulting) was to repay the lender.
<i>Jones v Kernott</i> [2011] UKSC 53	Property was bought in joint names and the parties later separated. On the allocation of property rights, the courts had to determine how the share could be determined.	As the parties already had a beneficial interest as legal joint tenants the only issue was to consider the size of the beneficial interest. The courts considered that resulting trusts were not the suitable approach to take in family situations such as this, and approved the approach taken in <i>Oxley v Hiscock</i> [2004].

9. Implied trusts

CASE	FACTS	PRINCIPLE
<i>Lloyds Bank v Rosset [1991] AC 107</i>	Property was purchased with a mortgage in the name of Mr Rosset only. Extensive renovation work was supervised by Mrs Rosset. The bank claimed possession of the home when the mortgage was defaulted. Mrs Rosset tried to establish an equitable interest in the home by way of constructive trust.	To establish an interest under a constructive trust it must be proved that there was: <ul style="list-style-type: none">• an express declaration that the beneficial interest would arise, followed by detrimental reliance; or• financial contributions to the purchase of the home, which could be post-acquisition, from which the courts could infer a common intention as to beneficial ownership.
<i>Shepherd v Cartwright [1955] AC 431</i>	Property was purchased by a father for his legitimate child.	The court presumes that this is a gift and no equitable interest arises for the father unless he can prove a contrary intention.
<i>Patel v Mirza [2016] UKSC 42</i>	The case involved insider dealing, so was based outside the issues of equity. Why it is important is in discussing the use of illegality as evidence.	The reliance model of illegality in <i>Tinsley v Milligan</i> was no longer the correct test but should be one based on the broader issues of policy, proportionality, and public interest.

Key debates

Topic	Constructive trusts and common intention
Academic/author	Lawson
Viewpoint	That the cases where one party lies to another about his or her interest, such as <i>Eves v Eves</i> , suggest that the intention is anything but to share beneficially.
Source	Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) 16(2) LS 218. See also Gardner, 'Rethinking Family Property' (1993) 109 LQR 263.
← Topic	Reform of trusts in the family home
Academic/author	Hughes et al
Viewpoint	Excellent summary of the proposals for reform.
Source	Hughes et al, 'Come Live with Me and Be My Love' [2008] Conv 197.
Topic	Quantification of share in the family home

9. Implied trusts

Topic	Constructive trusts and common intention
Academic/ author	Dixon
Viewpoint	Does <i>Stack v Dowden</i> change anything in the imputation or inference of how the beneficial interest should be shared? Also considers the subsequent Privy Council decision.
Source	Dixon, 'Never Ending Story—Co-ownership after <i>Stack v Dowden</i> ' [2007] Conv 456.
Topic	Commonwealth approaches to sharing the family home
Academic/ author	Moffat
Viewpoint	A summary of the approach in other jurisdictions which will form a base for comparative essays.
Source	Moffat, <i>Trusts Law</i> , 6th edn (2015), pp 647–60.
Topic	The basis of resulting trust and the role of intention
Academic/ author	Swadling
Viewpoint	The ongoing debate between Professor Swadling and Professor Chambers in relation to the function of intention as a basis for a resulting trust.
Source	Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72.
Topic	The <i>Quistclose</i>-type trust in commercial context
Academic/ author	Goodhart and Jones
Viewpoint	The <i>Quistclose</i> trust raises questions as to how property is held. The development of the trust is an essential development in commerce.
Source	Goodhart and Jones (1980) 43 MLR 489. Generally, see Moffat, <i>Trusts Law</i> , 6th edn (2015), pp 760–74 for an excellent summary of the issues.

Exam questions

Problem question

Anne and Iain buy a house for £100,000. Anne takes out a mortgage for £80,000 in her name. Anne pays £18,000, while Iain pays the remaining £2,000. When they move in Iain tells Anne that he thinks couples should share everything. Anne replies, 'That is a lovely idea'. Iain later wins £18,000 on the lottery and gives this to Anne to buy a car.

Iain takes on all the household duties so that Anne can pursue her career. While Anne is pregnant Iain takes over paying the mortgage. Iain agrees to be the primary carer of their child so that Anne can continue her work.

After ten years Anne now wants to sell the house and travel the world, without Iain.

Advise Iain on his interest in the home.

See the Outline answers section in the end matter for help with this question.

Essay question

The imposition of a resulting trust for a settlor may be contrary to their every intention. Discuss the situations when a resulting trust can arise and if they are justified.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer <https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-9-outline-answers-to-essay-questions?options=showName> to the essay question
- Bonus material <https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-9-bonus-material?options=showName>
- Further reading <https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-9-further-reading?options=showName>
- Interactive key cases <https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-9-interactive-key-cases?options=showName>
- Looking for extra marks quiz <https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-9-looking-for-extra-marks?options=showName>
- Multiple choice questions <https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-9-multiple-choice-questions?options=showName>

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