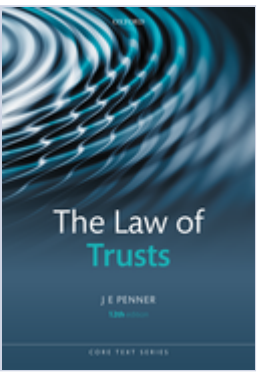

The Law of Trusts (12th edn)
J E Penner

p. 431

17. Constructive trusts

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter focuses on constructive trusts, which are trusts that arise by operation of law. It identifies the variety of circumstances in which a constructive trust may arise, and discusses two important examples of constructive trusts: the vendor-purchaser constructive trust and the common intention constructive trust. More broadly, the chapter considers the role of the common intention constructive trust, equitable accounting, and the proprietary estoppel in determining interests under informal arrangements concerning family property.

Keywords: constructive trusts, operation of law, trusts of the family home, proprietary estoppel, equitable accounting, family property

Summary

Varieties of constructive trust (CTs)

17.1 Constructive trusts arise by operation of law, ie are TABOLs (**2.6**). Indeed, to say that a trust is constructive is, in fact, to say that it arises by 'construction of law', ie by operation of law, so 'constructive trust' and 'TABOL' are, strictly speaking, synonyms. Beyond, however, the fact that they are all TABOLs, there is little that binds the various examples of constructive trust together as a category.

17.2 The following are examples where a CT will arise.

17.3 A CT will arise when equity perfects an imperfect gift. We have already considered this (**6.20** et seq).

17.4 In *Re Neste Oy v Lloyds Bank* (1983) and *Cooper v PRG Powerhouse Ltd* (2008) the defendants received payments that they were contractually obliged to use to discharge obligations the claimants owed to third parties, but they received the payments after they became insolvent, and because of their insolvency were no
p. 432 longer legally able to use the funds to discharge those obligations on the claimants' behalf. They were held to hold the payments on CT, for it would be unconscionable not to return the payments the claimants made to them in those circumstances.

17.5 Where a contract in which the claimant transfers property to the defendant may be rescinded, ie held to be void by a court of equity, on the basis, for example, that the defendant made a fraudulent representation to the claimant, the defendant from that point onward will hold the transferred property on CT (see, eg *National Crime Agency v Robb* (2014)).

17.6 Where A kills B, and A receives a legacy under B's will, if the legacy is paid to A he will, under a doctrine known as 'forfeiture', hold that legacy on CT for B's personal representative, so it can be distributed to the residuary claimants under B's will (Lewin (2020), 8-033).

17.7 In Australia a thief has been held to hold the assets, or at least their traceable proceeds, on trust for his victim (*Black v S Freedman & Co* (1910); *Helou v Nguyen* (2014)). Why this trust arises, however, is in dispute (Tarrant (2009); Chambers (2013a); Crawford (2014)). No case in England has so decided but in *Westdeutsche Landesbank v Islington LBC* (1996) Lord Browne-Wilkinson said obiter (at 716A–D) that a thief would hold what he stole on constructive trust.

17.8 A '*Pallant v Morgan*' (1953) CT arises where A and B have an arrangement or understanding (not necessarily contractually binding) that A will act to acquire property for them jointly, but A then acquires the property for himself, A will be held to hold the property on CT for both of them (see *Banner Homes Group plc v Luff Developments Ltd* (2000)).

17.9 There are many other examples of CTs, and as the foregoing examples suggest, it is not likely that there is any single basis upon which they arise. It would take a book (eg, Liew 2017) to cover them all, so we will restrict our examination to a two which have a good deal of practical and theoretical interest.

The vendor purchaser CT and the maxim 'Equity looks upon that as done which ought to be done'

17.10 The maxim 'Equity looks upon that as done which ought to be done' (**6.17**–**6.18**), reflects the approach of equity when it deals with transfers of land or interests in land when the transferee has provided consideration, typically under a contract. We have already encountered such a case *Oughtred v IRC* (1960) (**9.66**). The underlying idea is something like equity 'anticipates' the completion of the transfer prior to its actual completion at law, just because the transferee has given consideration. It is very unclear *why* equity does this, and what justifies its doing so. Here we shall consider one of the most common examples of equity's anticipation, the vendor-purchaser CT. We have already considered the contract in question (**11.3**). To remind
p. 433 you, under the normal contract for the sale of land, the binding contract is made on one date, but the payment by the purchaser and the transfer of title will occur on a later date, the date of 'completion'. The issue is whether, based upon the maxim, the vendor holds the title to the land on CT for the purchaser.

17.11 The maxim only applies to cases where the property being sold is unique in the eyes of equity, unique in the sense that a purchaser would be unable to use his money damages to go out into the market and buy the equivalent from another vendor; in such a case equity will allow the buyer specifically to enforce the contractual obligation to transfer title to property in question: if the vendor refuses to comply with his contractual obligation and transfer the title, equity will order the vendor to do so. This is the general position with contracts for the sale of land, because, in the eyes of equity, all land is unique. (Think of the estate agent's slogan, 'Location, location, location!') Properly understood, the rule is that equity will treat the vendor as holding the title to the land on CT for the buyer the moment the time for completion under the contract arrives, so long as the purchaser has paid the purchase price or is ready, willing, and able to do so. From that moment on, the vendor will hold the land on a constructive trust for the buyer until he actually transfers the legal title, but the English courts, in particular, have not explained this particularly well.

17.12 Although judges have understood the maxim to hold that the vendor holds the property on trust for the purchaser as soon as the contract has formed (see *Lysaght v Edwards* (1876), 506 per Sir George Jessel MR) this is incorrect. Prior to the date of completion, when the transfer of legal title is to take place, it is not the case that the vendor holds the legal title on trust for the purchaser. In *Jerome v Kelly (Inspector of Taxes)* (2004) Lord Walker said ([32]):

> *It would … be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full.*

17.13 This 'passing in stages analysis' is, with respect, unsatisfactory. In *Kern Corpn Pty Ltd v Walter Reid Trading Pty Ltd* (1987) Deane J of the High Court of Australia did a much better job of explaining the relationship between the vendor and the purchaser, as follows (at 191–192):

> p. 434 *It is wrong to characterise the position of such a vendor as that of a trustee. True it is that, pending payment of the purchase price, the purchaser has an equitable interest in the* ↵ *land which reflects the extent to which equitable remedies are available to protect his contractual rights and the vendor is under obligations in equity which attach to the land. None the less, the vendor himself maintains a continuing beneficial interest in the land … Pending completion, he is beneficially entitled to possession and use. Pending completion, he is beneficially entitled to the rents and profits. If the purchaser enters upon the land without the vendor's permission and without authority under the contract, the vendor can maintain, for his own benefit, an action for trespass against the purchaser.*

See also *Tanwar Enterprises Pty Ltd v Cauchi* (2003).

17.14 This analysis seems to coincide with what Matthews HHJ said in *Taylor v Taylor* (2017):

> *[46] To the extent that it is properly to be regarded as a trust at all, the constructive trust arising on a contract to purchase land is simply a form of equitable protection for the purchaser. It depends on the availability of specific performance of the contract. Essentially it is a product of the contract. It anticipates the position on completion, on the footing that the purchaser is ready and willing to complete … The vendor's residual rights (which are in fact substantial) are together referred to as his 'lien' [**12.41** et seq]. But this an inapt term, because it is not really a security interest. If the purchaser does not pay the price the vendor may sell elsewhere, free from any claim by the purchaser, and is not liable to account to the purchaser if he sells for more than the purchaser contracted to pay (see Ex p Hunter (1801) 6 Ves Jr 94, 97).*

17.15 Whilst typically the maxim 'equity looks upon that as done …' is applied to contractual obligations, it is apparently not restricted to them. In *Mountney v Treharne* (2002) the CA held that a court order imposing an obligation on a husband to transfer title to the matrimonial home to his wife gave rise to a constructive trust, so that the beneficial interest in the property passed to the wife as soon as the order was made. Laws LJ, while accepting that the result was right as a matter of authority which bound him, was unhappy with the result:

while equitable maxims ought to apply so as to modify what would otherwise be the position at common law, as with vendors and purchasers of land, equitable maxims should not, he reasoned, similarly apply to affect court orders made under statutory powers.

Can the maxim be justified?

17.16 It is not easy to justify the maxim (for a scathing critique, to which your author is indebted, see Swadling (2011)). In the first place, equity does not apply the maxim in every case where a claimant can get a decree from the court of equity ordering the defendant to deal with his title to give effect to the claimant's rights. In *Westdeutsche Landesbank Girozentrale v Islington LBC* (1996), 706, Lord Browne-Wilkinson gave some examples:

> *There are many cases where B enjoys rights which, in equity, are enforceable against the legal owner, A,*
> p. 435 *without A being a trustee, eg, an equitable right to redeem a mortgage,* ↵ *equitable easements, restrictive covenants, the right to rectification, an insurer's right by subrogation to receive damages subsequently recovered by the assured.*

There is nothing in the maxim itself which would restrict its application to specifically enforceable contracts, and there seems no compelling justification for why it should do so. The only reason why equity will specifically enforce a contract for the sale of land is that common law damages are an inadequate remedy. This is equity providing a better remedy, but is not intended to alter the basic contractual relationship between the parties (**1.14**). Why should the mere availability of this award transform the contractual relationship of vendor–purchaser to one of trustee–beneficiary?

17.17 Put aside this theoretical problem. The real problem is that the application of the maxim interferes with basic contractual principles. Consider two examples, first where V breaches the contract and sells the land to a third party for a higher price than P was to pay. Because V is regarded as a trustee, P can claim that V holds the proceeds of the sale on trust for him, just as V would if he were an express trustee and sold a trust asset (*Lake v Bayliss* (1974)). In this way, P captures V's *profits* from his breach of trust. But this violates the contract principle that a claimant is only entitled to damages for loss (either on the 'substitutive' or 'consequential loss' basis (**11.16**–**11.17**), not to damages representing the breaching party's gain or profit. Indeed, the claim for a breaching party's profit or gain was not established in English law until the landmark judgment in *Attorney-General v Blake* (2001), in which the court emphasised that the remedy is not generally available to all contracting parties, and is limited to very particular circumstances. But treating V as a trustee seems to provide this remedy to P just because the contract is for a sale of land which can be specifically enforced. Why on earth?

17.18 The second example raises the case of third-party recipients. In breach of trust V transfers the property to 3PR, who knows the transfer to her was in breach of contract. Because V is treated as a trustee, 3PR will be treated as a third-party recipient of property transferred in breach of trust, giving P all the remedies of a beneficiary in that circumstance. But the common law way of dealing with this is through the application of the tort of inducing breach of contract, for which 3PR will be liable to P to pay damages, but *only if* the requirements for liability under that tort are met. But this is all effectively bypassed if the contract is for the

sale of land, just because of the application of the maxim such that V is treated as a trustee. But again, why on earth? As Swadling emphasises (2011), we will never achieve a rational explanation of private law rights if problems such as these are obscured because of the application of fictions like the maxim.

Trusts of family property: the common intention constructive trust (CICT)

17.19 Broadly speaking, what concerns us here are the circumstances under which it is just for the law to vary the property rights between individuals in what is usually the most significant asset either one of them owns
p. 436 (or both of them co-own), because of their relationship to and past dealings with each other. Whilst traditionally the typical relationship was that between husband and wife, where the husband was the sole legal owner of the matrimonial home, in principle and practice the relationship or dealings can be between any two or more individuals: between unmarried cohabitees, whether straight or gay, parents and (adult) children, or any others (*Cooke v Head* (1972)). Indeed, the significance of this law is now much less for married couples and civil partners than for others, because disputes over beneficial ownership typically arise on the breakdown of a relationship and the courts are empowered to vary the property rights of spouses and civil partners upon divorce (Matrimonial Causes Act 1973, s 24; Matrimonial Property and Proceedings Act 1970, s 37; Civil Partnerships Act, 2004, s 65). The court has no similar jurisdiction to vary the property rights of other cohabitees. Nevertheless, determining the beneficial interests in the family home under these rules remains important even for married couples in cases where third parties are involved. For example, if one of the couple becomes bankrupt, only that person's share will be available to his trustee in bankruptcy for distribution to creditors; therefore, regardless of the situation between the cohabitees themselves, if an informal arrangement gives rise to ownership shares not easily detected by third parties dealing with one or both cohabitees, this can have important effects on those third parties' rights.

17.20 Different common law jurisdictions have taken different theoretical approaches to the basis upon which equitable property rights arise in these circumstances. In New Zealand the courts have emphasised the reasonable expectations of the party claiming an equitable share in the property; thus a wife who in all the circumstances can reasonably claim to have expected a share in the family home given the parties' conduct, and who has relied upon those expectations, will be successful (*Gillies v Keogh* (1989)). In Canada the courts have emphasised the unjust enrichment that the defendant would obtain if the claimant were to receive no share in the property; thus, for example, a husband who has benefited throughout the marriage by his wife's raising their children and domestic work will hold the legal title upon constructive trust for himself and his wife in appropriate shares (*Pettkus v Becker* (1980); *Sorochan v Sorochan* (1986); *Peter v Beblow* (1993)). In England the foundational HL decisions in *Pettitt v Pettitt* (1970) and *Gissing v Gissing* (1971) laid down the 'common intention' approach.

17.21 *Pettitt* can in one sense be regarded as the negative side of the coin, and *Gissing* the positive. In *Pettitt* their Lordships were unanimously concerned to refute the proposition that the courts had a general jurisdiction to rearrange the property rights of cohabitees on the breakdown of their relationship in whatever way seemed 'fair and just in all the circumstances'. They revealed, however, a variety of opinions as to the circumstances in which the court could find that one party had acquired a beneficial equitable interest in the property of another. *Gissing*, in particular the speech by Lord Diplock, provided that basis: where the parties had a common intention that the beneficial interest in the property was to be shared, the best evidence of

which being an actual agreement, and that common intention was acted upon by the claimant to his detriment, then the defendant would hold the property on constructive trust for them both in the intended shares.

p. 437

Are common intention trusts of the family home really intentional trusts rather than TABOLs?

17.22 CICTs arise where A has made informal representations to B, or entered into an informal agreement with B, that they will have ownership shares in the property different than those held under the legal title. So, to borrow from *Paul v Constance* (**5.4**), A, who is the sole legal titleholder of Blackacre, might say to B, 'Blackacre is as much yours as it is mine.' This might be regarded as an informal declaration by A that he holds his title to Blackacre on trust for A and B in equal shares. B can enforce that trust against A where B has detrimentally relied upon A's declaration, although, as we shall see, it is not clear how stringent the requirement of detrimental reliance is. If this is the right way to interpret what has happened, then s 53(1)(b) LPA prima facie applies, and B will be unable to prove A's declaration of trust, subject of course to the application of the *Rochefoucauld* doctrine (**9.14** et seq). On this view, the requirement that B rely upon A's declaration to her detriment, for example by making improvements to Blackacre, or by paying A's mortgage loan instalments, informs the court's decision to apply the *Rochefoucauld* doctrine, as helping to show that A's relying upon s 53(1)(b) would be fraudulent. If this is correct, then the common intention trust of the family home is not, as it has so far been labelled, a constructive trust, a TABOL at all, because B is merely proving and enforcing an informal *express* trust of land.

17.23 The contrary, prevailing view is that the common intention trust is a constructive trust, a TABOL, which is why it is discussed in this chapter. This is so for a number of reasons. The first is, that while the parties' intentions have a clear role to play in establishing the CICT, these intentions by themselves do not amount to effective declarations of trust. Notice, this point of view has nothing to do with the s 53(1)(b) requirement; that section concerns proof of a declaration of trust in court, not whether an expression actually amounts to a declaration of trust. Secondly, if the trusts are express trusts enforced by the court, then the court could not depart from the actual terms of this trust, however ill-expressed. Whereas it seems that the parties' intentions are one, but only one, factor to be taken in determining the character of the trust, in particular the size of the claiming party's beneficial share of the ownership; in that case, the trust must be constructive since it differs from the 'declared' trust. It is for you to judge, after reading the cases, whether in some cases, the very trust informally agreed upon by the parties is the one enforced, whereas in others such intentions only form one part of the picture, so that only the constructive trust perspective is explanatory.

Determining the parties' intentions

17.24 Evidence of a common intention is to be read objectively, as a reasonable person would do, from the statements or conduct of the parties. In particular, a dishonest actual intention of the legal owner will not defeat an agreement or understanding objectively viewed, as, for instance, where the legal owner makes an

p. 438 excuse for putting the title in his name alone, as in *Eves v Eves* (1975), where the excuse was that the female partner was too young to own property, or in *Grant v Edwards* (1986), where the legal owner said placing the female partner's name on the title would prejudice her in her divorce proceedings.

17.25 The HL canvassed the issues in *Stack v Dowden* (2007). Writing the majority opinion, Baroness Hale held that the starting point of any inquiry was the legal title to the property. If, for example, the property had been conveyed into joint names, prima facie the beneficial title was a joint tenancy as well. The party claiming otherwise had to lead evidence that the beneficial interest was intended to be different from the legal title, and that he had relied on this intention to his detriment. Quite surprisingly, and with nothing like a thorough discussion, Baroness Hale essentially abolished the operation of presumed resulting trusts in this area. Many claimants of interests in family homes in the past had established such interests even though they were not on the title because they proved they had contributed to the cost of its acquisition. But Baroness Hale dismissed the application of PRT principles, saying that ([60]):

> *the law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred, or imputed, with respect to the property in light of their whole course of conduct in relation to it.*

17.26 Apparently, the only relevance now of contributions to the purchase price of a house is that they may indicate that the parties intended different beneficial shares than those otherwise indicated by the legal title. 'How the purchase was financed' now falls within a litany of factors that may indicate the parties' intentions. To quote again from Baroness Hale's judgment:

> *[69] In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the*
> p. 439 *cohabitation context, mercenary considerations may be more to the fore than ↵ they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.*
>
> *[70] This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.*

17.27 As will be noted from the first quotation from Baroness Hale's judgment, above, she uses the word 'impute' as well as 'infer' in respect to the court's reckoning of the parties' intentions. These are not the same thing: to infer is to deduce or determine from evidence, whereas to impute is to ascribe or attribute. In this context, to impute an intention is not to discern what the parties actually intended, but to attribute an intention, based on the court's views about what is fair or on something else, an intention that the parties themselves never had. The most one can say about Baroness Hale's decision is that it is not very clear whether she thinks the court may impute intentions or not (see further Swadling (2007)).

17.28 Although not dissenting in the result, in his separate opinion Lord Neuberger would not have abolished the operation of resulting trusts in the way the majority did. In the later CA decision in *Laskar v Laskar* (2008) resulting trust principles were applied in a case where residential property was purchased by a mother and daughter not as a home for themselves, but as an investment. Lord Neuberger would also not have accepted that intentions could be 'imputed' to the parties. Any intentions needed to be the actual intentions of the parties; otherwise the court could simply impose whatever division of the interests in the house that it felt was fair. Two decisions of the CA (*James v Thomas* (2007); *Morris v Morris* (2008)) likewise highlight the passage in Baroness Hale's speech emphasised above, affirming the view that the court is not free to impose its own view of what would be fair, but must try to discern the parties' actual intentions. These decisions also

express the view that where the defendant already owned land before entering into the relationship with the claimant, 'in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition' (*James v Thomas* per Sir John Chadwick, [24]).

17.29 The UKSC revisited the issues again in *Jones v Kernott* (2011). Lord Walker and Baroness Hale both reaffirmed their view that the presumption of resulting trust should not apply in family homes cases, but the other three judges on the panel chose not to speak on this issue. All of the judges, however, accepted that where there was evidence of a common intention that both parties would have an interest in the family home, but there was insufficient evidence as to the shares in which the property was intended to be held, the court could not throw up its hands and do nothing. Lord Walker, Baroness Hale, and Lord Collins found that the
p. 440 distinction between inferring and imputing an intention to the parties was, in practice, more theoretical than real. As Lord Collins put it ([65]), 'what is one person's inference will be another person's imputation.'

17.30 Lord Kerr and Lord Wilson insisted that there was a distinction between inferring an intention and imputing one which would matter in practice: to determine what was a fair share of the beneficial interest in all the circumstances would not be to infer, but to impute an intention to the parties. Lord Wilson also stated ([84]) that the facts of *Jones* did not require the court to determine whether a court could impute an intention not only as to the shares of the beneficial interest in the family home, but in respect of the 'first question', ie whether there was an intention in the first place that the parties' beneficial interest in the family home would be different from that under the legal title. That question was a matter for future cases, and would 'merit careful thought'.

17.31 In *O'Kelly v Davies* (2014) the CA affirmed the decision of a trial judge who held that, though there was no evidence of an express or implied agreement, he was able to find a common intention to share the beneficial interest in a residential property equally in view of the course of dealing between the parties. The following factors were taken into account by the judge ([29]):

> *I find that … the claimant lived at number 42 when not working away from home; that a relationship continued between the parties; that by 1996 they had a child together; that the claimant worked consistently and that the defendant did not work; that the claimant provided the family income other than the benefits which were being obtained fraudulently, and that the claimant's income paid the mortgage payments. This continued for 15 years. Although the defendant disputes much of this, I note that it was conceded on her behalf that when she cashed in the endowment policy to which I have referred and paid the money in reduction of the mortgage, that must have involved a direct contribution to the mortgage by the claimant and the defendant equally.*

The benefits fraud mentioned by the judge in this passage gave rise to the issue of illegality, which we have already discussed (**3.80** et seq).

The requirement that the claimant act to his detriment

17.32 The extent and quality of reliance should match what was expected under the parties' common understanding, but in many cases this is unclear. In *Grant v Edwards* (1986) Browne-Wilkinson VC said (at 657A–C, emphasis added):

> *In many cases of the present sort, it is impossible to say whether or not the claimant would have done the acts relied on as a detriment even if she thought she had no interest in the house. Setting up a house together, having a baby, making payments to general housekeeping expenses … may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house. As at present advised, once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done* ↵ *by her to her detriment* relating to the joint lives of the parties *is, in my judgment, sufficient detriment to qualify …* Accordingly, in the absence of evidence to the contrary, the right inference is that the claimant acted in reliance [on the common intention] and the burden lies on the legal owner to show that she did not do so.

p. 441

17.33 Detrimental reliance was not discussed in terms either in *Stack* or in *Jones*; the courts seem to be willing to give effect to the parties' common intention, whether inferred or imputed, without an explicit finding that the claimant relied to his detriment on the basis of that common intention. This is a departure from what was, prior to *Stack*, considered orthodoxy. The courts' failure to discuss a requirement to prove detrimental reliance may be explained on the basis that in the circumstances there would be little point in doing so; it is difficult to conceive of cohabiting couples not changing their position in all sorts of ways (arranging their finances, contributing to mortgage payments and household expenses, and so on) if they shared an intention to co-own the beneficial interest in the only significant asset to which either or both of them had legal title, as seems to be Lord Browne-Wilkinson's thinking in *Grant*. In *Curran v Collins* (2015), [78]–[79], Lewison LJ stated that the requirement of establishing detrimental reliance had not been abolished by Stack and Jones.

17.34 CICT cases continue to litter the law reports. In *Kahrmann v Harrison-Morgan* (2019) Henderson LJ held ([94]–[99]) that the CICT could arise between non-cohabitee commercial parties, based on their expressed common intentions and the subsequent detrimental reliance of the claimant. In *Archibald v Alexander* (2020) a CICT reflected a clear oral agreement between the parties.

The constructive trustee is a bare trustee

17.35 The legal owner holding the family home under a constructive trust is just a bare trustee vis-à-vis a partner having an equitable ownership share of the property, as are joint tenants of the legal title vis-à-vis themselves as owners of shares as tenants in common in equity (Penner (2014d)). There are no other 'terms' of the trust with which he or they have any obligation to comply. The claimant and defendant are merely co-owners in equity to the extent of their respective shares, and co-owners do not have trustee or fiduciary duties to one another.

Third parties and insolvency

17.36 The claimant's equitable proprietary interest under a CICT will bind third parties who deal with the legal title-holding defendant (eg *Williams & Glyn's Bank Ltd v Boland* (1981) HL; *Kingsnorth Trust Ltd v Tizard* (1986)). For example, a wife who acquires an equitable share of the property under a CICT will take the value of that share free of the claims of her husband's creditors. Where the legal title holder goes bankrupt, and the title holder's creditors seek the sale of the property, the court must take into account different factors before making such an order, in particular if the person interested in the land under a CICT is in residence, and especially if children are resident (see Lewin (2020), 37-071).

p. 442

Proprietary estoppel

17.37 While proprietary estoppel in its various forms is a much older doctrine than the CICT, they are similar. Both require some indication by the titleholder that the claimant has or will receive some entitlement to the property in question, and in both cases the claimant will have to show some detrimental reliance on that indication if she is to have an entitlement. What chiefly distinguishes the CICT from proprietary estoppels is that, prior to the court's award of a remedy in a case of proprietary estoppel, the claimant will have no interest in the titleholder's property, whereas in the case of the CICT, following the claimant's detrimental reliance, the titleholder's knowledge of the circumstances is such as to bind his conscience. At that point, then, he should understand that he can no longer deal with the title to the property as if it were his own. So the finding of a CICT always results in an ownership interest in equity, simply because the claimant's acquiring beneficial interest is what the common intention purports to establish, whereas, as we shall see, where a proprietary estoppel is established the court has access to a range of remedies.

17.38 Proprietary estoppel is usually described in this way: where a defendant represents by his words or conduct that the claimant will acquire some entitlement to his land, and the claimant acts to his detriment in reliance upon the representation, the defendant may be 'estopped', ie stopped, from standing on his strict legal rights to the land in order not to give effect to that entitlement. The leading case is HL's decision in *Thorner v Major* (2009), in which the titleholder to a farm represented that if his cousin's son worked the farm until his death, he would leave the farm to him in his will. The titleholder left no will and the court held that his personal representative was bound to transfer the farm to his cousin's son. Notice here that in this case, the proprietary estoppel gives effect to a promise to do something in the future, to leave property by will, rather than giving rise to an interest in the title once the claimant has detrimentally relied, as in the CICT.

17.39 In general, in the case of a proprietary estoppel the claimant will acquire the 'minimum equity to do justice' (*Crabb v Arun District Council* (1976); *Pascoe v Turner* (1979)): the court *may* award an equitable interest in the property, but also lesser interests where appropriate, such as a licence to occupy or a charge on the property for money expended. In this respect, proprietary estoppel is a more flexible doctrine. A full examination of proprietary estoppel and a comparison with the CICT is beyond our purposes, but even the brief comparison above is suggestive—how different in most cases will an informal 'common' understanding be from an informal representation by the defendant legal owner that is reasonably acted upon by the claimant? In *Yaxley v Gotts* (2000), the CA held that a builder who converted the defendant's house into flats on

the assurance that in return he would acquire the ground-floor flat was entitled to a 99-year lease of the ground floor rent-free equally under a common intention constructive trust and by way of proprietary estoppel (see also *Banner Homes Group plc v Luff Developments Ltd* (2000)). For a recent, thorough review of the case law by HHJ Matthews, see *Smith-Tyrrell v Bowden* (2018) at [65]–[81].

p. 443

Equitable accounting

17.40 What happens where two parties buy a house together, usually with the aid of a mortgage, and the relationship subsequently breaks down? Based on what you have read above, you already have the tools to analyse the main issue, that is, what the respective ownership shares of the parties will be. However, there are usually two other issues that crop up. The first is whether there ought to be a court-ordered sale of the property, and if so, when this sale is to occur. The second issue is whether what is called 'equitable accounting' ought to take place between the co-owners.

17.41 The starting point is to understand that co-owners of land, as between themselves, are all entitled to possession of the whole. Therefore, there generally is no action in trespass against another co-owner. However, co-owners can, through their actions, become liable to one another. This is known as the taking of accounts between co-owners, or equitable accounting.

17.42 Equitable accounting has been described as the process by which the financial burdens and benefits of land shared by co-owners are adjusted between them, as in the recent Singapore case (*Su Emmanuel v Emmanuel Priya Ethel Anne* (2016)). Historically, it finds its origins in the Partition Acts of 1868 and 1876. These statutes empowered the English courts to order a sale in lieu of partition. In these partition actions, it was the practice of the Court of Chancery to direct an inquiry into the financial position as between co-owners at the time of sale, and make appropriate adjustments to the proceeds each party would receive upon sale.

17.43 A classic statement of this principle can be traced back to *Leigh v Dickeson* (1884), where Cotton LJ said (at 67):

> *... [I]n a suit for a partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition.*

17.44 Equitable accounting has been applied to various things. These include mortgage repayments, improvements and repairs to the property, as well as rents and profits derived. Specifically, in England, the concept of equitable accounting has been applied to mortgage payments in cases involving a property dispute

after a breakdown of a relationship (*Bernard v Josephs* (1982); *Re Pavlou (a Bankrupt)* (1993); *Cowcher v Cowcher* (1972)).

p. 444 **17.45** Take the following hypothetical provided by Bagnall J in *Cowcher* (at 432H–433B):

> *Suppose land be conveyed to A for £24,000 B providing in cash £8,000 and A raising on mortgage of the property the remaining £16,000; suppose A has paid off £5,000 of the mortgage and B (though under no obligation) has paid off a further £2,000 leaving £9,000 outstanding: finally, suppose the property to be sold for £60,000. The shares under the resulting trust are one-third to B and two-thirds to A; but A must account for the outstanding mortgage of £9,000 and B is entitled to be reimbursed the £2,000 paid by him in part discharge of the mortgage. Thus out of £60,000 realised £9,000 goes to the mortgagee, B takes £22,000, his one-third share of £20,000 together with £2,000 paid off the mortgage, and A takes £29,000, that is his two-thirds share of £40,000 less £9,000 outstanding on the mortgage and £2,000 repayable to B.*

17.46 Commenting on the theoretical basis of equitable accounting, Bagnall J noted that he who discharges another's secured obligation is entitled to be repaid out of the sale proceeds the amount paid by him. This is not the only basis for equitable accounting that has been articulated in the cases—Millett J in *Re Pavlou* preferred to see it as resting on the basis that (at 1048G) 'neither party could take the benefit of an increase in the value of the property without making an allowance for what had been expended by the other in order to obtain it'. For Millett J, things like mortgage payments increase the value of the equity of redemption, which enures to the benefit of both co-owners. This debate over the theoretical basis of equitable accounting does have some practical significance—the court in *Su Emmanuel* noted that if Millett J is right, then the interest element of mortgage repayments may not be accounted for, as they do not directly enhance the equity of redemption. However, if Bagnall J is right, and equitable accounting is justified on the right of contribution, then the interest element may be properly taken account of.

17.47 In *Su Emmanuel*, the SCA held ([103]) that 'no distinction should be drawn between payments of capital and of interest because both these payments ultimately preserve or enhance the equity of redemption and accordingly there will generally be a right of contribution as between co-owners.' This can be read as a preference of Bagnall J's explanation, or perhaps more accurately, a rejection of the idea that only capital payments increase the value of the equity of redemption. Ultimately, the respondent in *Su Emmanuel* was entitled to call in aid the doctrine of equitable accounting, to take account of the mortgage repayments she had made that constituted a material departure from the common understanding at the time the loan was obtained. The remedy of equitable accounting was especially important here, as the respondent could not point to an agreement at the time of the loan that would have enabled her to classify the repayments as a 'direct contribution' to the purchase price, and thus claim a presumed resulting trust interest in the property, and neither was she successful in showing a CICT.

17.48 It is worth noting that in England, *Stack v Dowden* (2008) has made it clear that the common law principles applicable to one party seeking an occupation rent from another have been superceded by statute (the Trusts of Land and Appointment of Trustees Act 1996).

p. 445

‘Institutional’ and ‘remedial’ constructive trusts

17.49 A ‘remedial constructive trust’ as opposed to what has been called an ‘institutional’ one, is one that is awarded by a court following the trial of a legal action; such a trust does not pre-exist the court award. It is equivalent to a court ordering that the defendant transfer a specific asset in which the claimant had no interest, legal or equitable, prior to the court’s order. The term ‘institutional’ is unhelpful. All it means is that the trust in question, such as a CICT, arose on certain facts (**17.22**–**17.23**), and is not dependent upon a court order, unlike the remedy in a proprietary estoppel action (**17.39**).

17.50 The power of the courts to declare a trust over a defendant’s assets as a form of remedial relief appears to be accepted at least theoretically in other jurisdictions (USA (American Law Institute (1937), para 60); Canada (*Rawluk v Rawluk* (1990) and see Chambers (2001–2)); Singapore (*Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* (2013); *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* (2020)); Australia *(Muschinski v Dodds* (1985))).

17.51 As for England, although the possibility has been considered obiter in England (per Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996)), as a matter of authority, in *Polly Peck International plc (No 2)* (1998), the CA declined to admit the remedial constructive trust into English law following a thorough review of the cases and the academic literature. As Nourse LJ put it (at 831D): ‘It is not that you need an Act of Parliament to prohibit a variation of proprietary rights. You need one to permit it: see the Variation of Trusts Act 1958 [**8.69**] and the Matrimonial Causes Act 1973 [**17.19**].’ A similar thought was expressed in the UKSC case *Angove Pty Ltd v Bailey* (2016) at [27] per Lord Sumption. In *RCT London Allied Holdings Ltd v Lee and others* (2007) Etherton J said ([274]):

> *[I]t seems realistic to assume that an English Court will be very slow indeed to adopt the US and Canadian model [of the remedial constructive trust]. On the other hand, there still seems scope for real debate about a model more suited to English jurisprudence, borrowing from proprietary estoppel: namely, a constructive trust by way of discretionary restitutionary relief, the right to which is a [mere equitable right] prior to judgment, but which will have priority over the intervening rights of third parties on established principles, such as those relating to notice, volunteers and the unconscionability (on the facts) of a claim by the third party to priority.*

We must wait and see whether any such development occurs.

Further reading

Birks (ed) (1994b, Vol II, Part IV)

Birks (2000b)

Chambers (2001–2, 2005a, 2013a)

p. 446 ↵ Piska (2008)

Rickett (1999)

Swadling (2005b, 2007, 2011)

Turner (2012)

Must-read cases: *Pettitt v Pettitt* (1969); *Gissing v Gissing* (1970); *Stack v Dowden* (2007); *Jones v Kernott* (2011)

Self-test questions

1. What are some examples of constructive trusts? Do they have any common features?
2. Phillippa and Paul, a young unmarried couple with two small children, purchased Whiteacre together for £150,000 in 1999. They were registered on the land certificates as joint tenants. Phillippa contributed £10,000, Paul £5,000, to the purchase price, and the remainder was raised by way of a mortgage loan. In 2001 Paul lost his job and since that time Phillippa has paid all the mortgage instalments. From 2002 Paul stayed at home and was the primary carer of their children, and also made several DIY improvements to the property. In 2005 he started a small gardening business which he ran from Whiteacre. In the summer of 2010 the business was failing and both Paul and Phillipa agree that Paul said more than once 'you've done it all; I regard this house as yours and the kids.' Paul has been declared bankrupt. The house is now worth £850,000. Discuss.
3. On your reading of the cases, does the 'intentional trust enforced despite s 53(1)(b)' interpretation or the 'constructive trust' interpretation better account for the court's recognition of the common intention trust of the family home?
4. What is the difference between 'remedial' and 'institutional' constructive trusts?