Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

Rosalind Malcolm

10. Trusts of the Family Home

Rosalind Malcolm, Barrister, Professor of Law, University of Surrey

https://doi.org/10.1093/he/9780198853213.003.0010

Published in print: 06 August 2020

Published online: September 2020

Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on trusts of the family home.

Keywords: constructive trusts, proprietary estoppel, detrimental conduct, express agreement, common intention, equitable interest, beneficial interest

Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Common intention constructive trusts
- Presumption of resulting trusts

Key Debates

Debate: constructive trusts cover some of the 'high growth' areas such as family property. For example, the 'new model constructive trust' of property owned by cohabitees was developed by Lord Denning MR in the 1960s and 1970s. Although the post-Denning Court of Appeal rejected his new model, a crucial idea underpinning it—that a constructive trust might be treated as a remedy—was approved by Lord Browne-Wilkinson in ***Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669***, and so could be the subject of future development. Further development occurred in the House of Lords' decision in ***Stack v Dowden [2007] UKHL 17, [2007] 2 WLR 831***, which also considered the Law Commission papers on the principles relating to the property rights of cohabitees in a shared home. (See *Cohabitation: the Financial Consequences of Relationship Breakdown—A Consultation Paper* (Law Com Consultation Paper No. 179, Part 2, 2006) and *Sharing Homes: A Discussion Paper* (Law Com No. 278, 2002).) A further report followed: *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No. 307, 2007) which proposed a statutory scheme for cohabitees provided they satisfy certain eligibility criteria.) Further decisions include the Privy Council decision in ***Abbott v Abbott [2008] 1 FLR 1451***, and the Supreme Court decision in ***Jones v Kernott*** but it remains to be seen whether Parliament will see fit to adopt this scheme which represents a radical approach to the determination of property issues between cohabitees in the light of similar developments in other jurisdictions.

p. 148

Question 1

Angela was the council tenant of a house when Bertram, a married man, went to live with her there ten years ago. A year later, the council offered to sell the house to Angela at a discounted price, being 40 per cent less than the market price of £50,000, and Angela discussed this with Bertram. They agreed that the house should be conveyed into Angela's name alone as she was the tenant with the right to buy and Bertram was involved in divorce proceedings and property claims from his wife. Of the £30,000 discounted price, £5,000 was contributed by Bertram and the remaining £25,000 was raised by means of a loan to Angela from the Quicklend Bank plc, which it secured by a legal mortgage; Bertram acted as Angela's guarantor.

Angela and Bertram contributed equally to the mortgage repayments until Angela had a baby about a year later, after which they were paid by Bertram alone. Angela and Bertram decided to modernise the kitchen, and Bertram, being a qualified carpenter, made all the fitments and did most of the work. Six months ago Bertram left Angela and is now claiming half the beneficial interest in the house.

Advise Angela.

Caution!

■ There has been much litigation surrounding this area of constructive trusts, of which ***Stack v Dowden [2007] 2 AC 432***, in the House of Lords, and ***Jones v Kernott [2012] 1 AC 776***, in the Supreme Court, are the most important. But bear in mind there are different routes to resolving this problem, namely—the acquisition of an equitable interest by proprietary estoppel.

Diagram Answer Plan

p. 149

Suggested Answer

For Bertram to succeed, he would have to show that he had acquired a beneficial interest in the house by one of the ways recognised by law, under either a resulting or a constructive trust.[1]

[1] Establishes the key issue.

Although the majority of the House of Lords in ***Stack v Dowden [2007] 2 AC 432***, said that the resulting trust has no role in the domestic consumer context, ***Stack*** itself was a case where the property had been put into joint names.[2] The majority view was that, in such circumstances, there was a strong presumption, based on the maxim that equity follows the law, that the parties also hold the equitable interest as joint tenants. Where property is vested in a single name, as it is in the problem, the application of such maxim would result in there being a strong presumption that he or she is solely beneficially entitled. This would mean that, in a single name ↵ case, it would make it more difficult for a non-legal owner, such as Bertram, to establish a beneficial interest, and it is unlikely that this is what the House of Lords intended. As their Lordships did not express that they were departing from the House's earlier (sole-name) decisions in ***Pettitt v Pettitt [1970] AC 777*** and ***Gissing v Gissing [1971] AC 886, HL***, those cases remain binding where, as in the problem, the property is transferred into the name of one party only. Those decisions recognised that, in the absence of an express declaration of trust evidenced in writing and signed as required by the **Law of Property Act 1925, s. 53(1)(b)**, where the non-legal owner has made a financial contribution to the purchase price, the starting point is the presumptions of advancement and of resulting trust.

p. 150

[2] Some students miss this point and discuss the case as though it was a decision where the legal title was in one name only.

There being no evidence of any express declaration of trust in the problem,[3] and as Angela is not Bertram's wife (where the presumption of advancement would apply), the starting point is that Angela and Bertram acquired, upon purchase, beneficial interests under a resulting trust in proportion to the size of their contributions. In ***Springette v Defoe (1993) 65 P & CR 1, CA***, the discount on the market price on a sale to a council tenant was credited to the tenant statutorily entitled to buy, and this was followed in ***Oxley v Hiscock [2004] 2 FLR 669***; so Angela is treated as having made a contribution of £20,000 by means of the discount. Angela also acquires a beneficial interest through the £25,000 advanced by the first mortgagee, as Angela was the borrower, and the loan would have been paid to the purchaser on her behalf. At the time the house was acquired, therefore, the beneficial interests under a resulting trust would have been: Angela 90 per cent (based on her total

contributions of £45,000), and Bertram 10 per cent (based on his initial contribution of £5,000). Neither Bertram's acting as a guarantor nor his making contributions to the mortgage payments acquires for him a beneficial interest under a resulting trust, although these factors may be relevant in determining the size of his share under a constructive trust.

[3] Start with the resulting trust scenario.

Bertram may also acquire an equitable interest in property under a constructive trust[4] if he satisfies the requirements set out in ***Gissing v Gissing [1971] AC 886, HL***, and the constructive trust effectively supplants the resulting trust. For a constructive trust, there must be evidence of an (informal) agreement (express or inferred) or a common intention (as in ***Drake v Whipp [1996] 1 FLR 826***) that he was to have a beneficial interest in the property at the time of its acquisition, and he must have acted on this understanding to his detriment. In ***Lloyds Bank Ltd v Rosset [1991] AC 107, HL***, Lord Bridge said
p. 151
that, in the case of an express (informal) agreement, the ↵ detriment could be some material alteration in a party's position, but that, in the case of an inferred agreement, some direct contributions to the purchase price of the property, either initially or by way of contribution to the mortgage instalments, were necessary. Baroness Hale in ***Stack v Dowden*** suggested obiter that Lord Bridge's approach may have been too narrow. In any event, as Bertram contributed to the initial purchase price, he has surmounted this first hurdle.

[4] Continue with the constructive trust scenario.

It is also possible to acquire a beneficial interest under a constructive trust if there is evidence of an informal express agreement and the non-legal owner acts to his detriment in reliance on it.[5] Excuses for not putting a woman's name on the title jointly with the man's were held to evidence an express agreement in ***Eves v Eves [1975] 1 WLR 1338, CA*** (the excuse being that she was too young to be a legal owner), and in ***Grant v Edwards [1986] Ch 638*** (the excuse being that her divorce settlement would be prejudiced). In both cases, the reasons given for omitting the woman's name indicated that her name would otherwise have been included on the legal title, from which it could be concluded that she was intended to have a share of the beneficial interest in the property. ***Curran v Collins [2015] EWCA Civ 404*** makes clear though that the converse is not true. That is, where there is a denial of an interest at the outset with an explanation then that signifies the express absence of a common intention to share in the beneficial interest. Something like a 'but for' test, the point is that if Angela says to Bertram that he would have had an interest but for his divorce proceedings then the court will imply an intention. If she says that he is not getting an interest because of his court proceedings then that operates as a denial of an intention for him to have an interest. So, the basis on which the decision to vest the legal title in Angela's name alone will be critical.

[5] Deal here with the detrimental conduct cases.

The parties' reasons for not making Bertram a joint legal owner might similarly be evidence of a common intention that he should have a share of the beneficial interest.[6] His initial contribution of £5,000 and his guarantee of the mortgage (as in ***Falconer v Falconer [1970] 1 WLR 1333, CA***) would be conduct from which a common intention could be inferred. The Court of Appeal in ***Midland Bank v Cooke [1995] 4 All ER 562***, adopted a more liberal approach than Lord Bridge in ***Rosset*** as to circumstances which might give rise to an inference of common intention, and indicated that the court may consider all the dealings between the parties with regard to the property.

[6] Deal here with the common intention cases.

p. 152 ↵ Assuming there is sufficient evidence of a common intention, Bertram would then have to show that he subsequently acted to his detriment in reliance upon this. He paid a deposit, contributed substantially to the mortgage repayments, and modernised the kitchen. These might all be regarded as sufficient conduct to his detriment to enable him to acquire an interest under a constructive trust. Once the existence of a beneficial interest under a constructive trust has been established, it is necessary to determine the size of the interest so acquired. It was said by the Court of Appeal in ***Oxley v Hiscock [2004] 3 WLR 715***, that the court should have regard to the whole course of dealing between the parties in relation to the property in deciding their respective shares. This view was largely confirmed by the House of Lords in ***Stack v Dowden***, although Baroness Hale emphasised (at para. 61) that 'the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended' and 'that did not enable the court to abandon that search in favour of the result which the court itself considers fair'. Conduct may, of course, include financial contributions as well as discussions between the parties. Baroness Hale (at para. 69), in emphasising that 'context is everything', set out a non-exhaustive list of other factors which may lead to evidence of intention such as: the nature of the parties' relationship; the responsibility for children; the arrangement of finances; the discharge of outgoings and household expenses. The intention of the parties may also be deduced from their individual characters and personalities.

Thus, at the outset, a relevant factor in determining the respective shares under a constructive trust would include the fact that Angela and Bertram contributed equally to the mortgage repayments at first. The parties' intentions might, however, change, and with it the respective size of their beneficial interests: ***Jones v Kernott [2012] 1 AC 776***. It might be argued that the birth of the baby one year after the purchase of the property together with the change in their financial arrangements, whereby Bertram assumes responsibility for the mortgage payments, could affect the relative shares. Bertram's modernisation of the kitchen, if substantial, might also be an indicator of their intentions.

There being so many factors to take in account under ***Stack v Dowden*** in determining the size of the parties' respective shares, it is difficult to advise Angela what beneficial interest Bertram might have.[7] As in ***Marr v Collie*** where the determination of these issues was remitted back to the court of first instance this will be an inquiry of fact.

[7] Not defeatist—just realistic!

p. 153

Looking For Extra Marks?

■ Further reference to Law Commission reports and secondary material could be made for extra points. Incorporating some of the academic debate into your answer is usually an excellent way to gain extra marks. Take a look, for example, at the discussion of the decision in ***Lloyds Bank v Rosset*** in Mills (2018) (see 'Taking Things Further').

Question 2

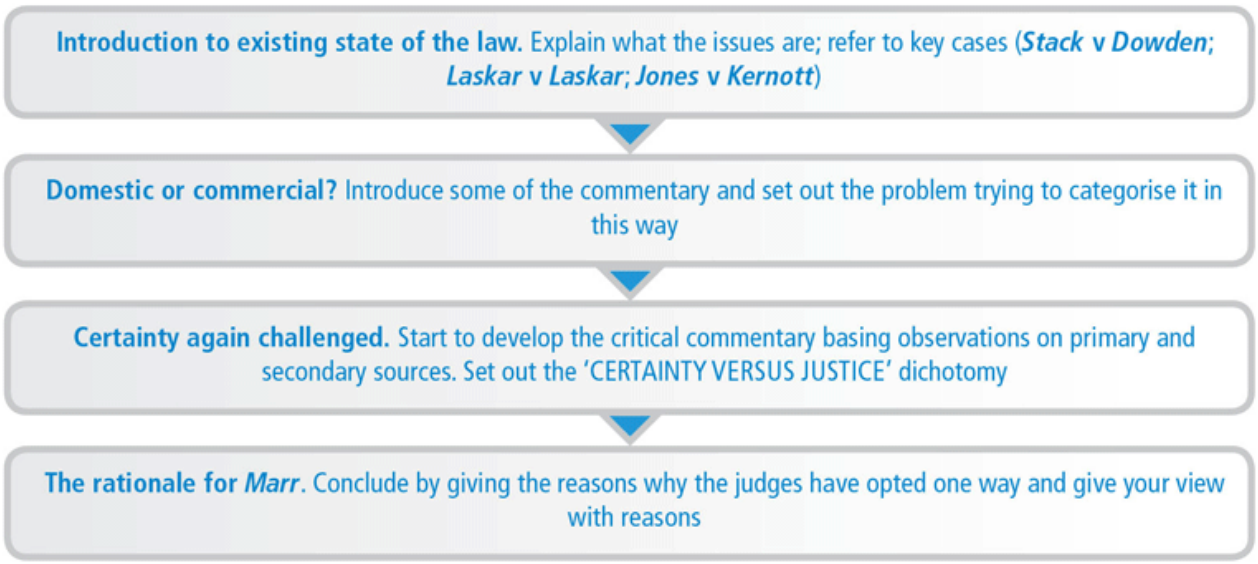
> Context here is set by the parties' common intention—or by the lack of it. If it is the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the answer.
>
> (Lord Kerr in ***Marr v Collie [2017] UKPC 17***)

Discuss.

Caution!

■ The expectation with many tutors now is that you need to focus on secondary sources to do well. So, if your tutor falls into this camp, then only tackle this question if you are familiar with the commentary on the case.

Diagram Answer Plan



p. 154

Suggested Answer

Introduction to existing state of the law

The problem of deciding ownership on relationship breakdown where unmarried parties have acquired co-owned property during the course of their relationship continues to produce much judicial activity.[1] Unsurprisingly, in such a situation the parties may well find themselves to be at odds over who owns what and in what shares. The possibility presented by the courts in recent cases opens up the chance to increase respective shares and potential litigants in such febrile circumstances may be willing to risk all (or a great deal) on fighting for what they consider is their right where their relationship has broken down. But after ***Stack v Dowden [2007] UKHL 17***, ***Laskar v Laskar [2008] EWCA Civ 347***, and ***Jones v Kernott [2011] UKSC 53***,[2] there did at least seem to be some clarity in that a distinction had been drawn between property bought as a family home, on the one hand, and investment properties, on the other. In relation to family homes, it seemed that a 'holistic' common

intention constructive trust approach applied whereas in relation to investment properties, a resulting trust analysis focused on financial contributions applied. This was the case even where the co-owners were in a relationship or simply members of the same family. But the Privy Council's decision[3] in ***Marr v Collie*** suggests that that blue line is not as clearly drawn as previously supposed.

[1] This starting sentence shows you have spotted the underlying issue of law.

[2] Bring in the leading cases.

[3] The status of Privy Council decisions in English law's system of precedent was clarified by the Supreme Court in ***Willers v Joyce (No. 2) [2016] UKSC 44***.

The Privy Council in ***Marr v Collie***[4] has decided that the correct basis for determining the beneficial ownership of a jointly-held asset, even one acquired as an investment, rather than as a home for the legal co-owners, is that established in ***Stack v Dowden*** rather than on the basis of an initial presumption of a resulting trust.

[4] Give a succinct analysis of ***Marr***.

Marr and Collie[5] began a personal relationship in 1991 and over the following years before their relationship broke down in 2008, acquired in their joint names, 11 investment properties. These were not subject to any express declaration of trust. They also bought a vehicle and a motor boat in their joint names and other various items including art. Marr contributed the cash element of the purchase price for these items and most, if not all, mortgage payments relating to the investment properties. Collie, who was a builder, claimed that it was intended that he would renovate the properties or build on the land and that all the items including the property they had purchased were intended to be equally owned.

[5] The following paragraph sets out all the facts you need to set the scene.

The case brought into focus the approach of Lady Hale in ***Stack v Dowden [2007] 2 AC 432***, that a conveyance into joint names creates a presumption of equal beneficial ownership, and, in contrast
p. 155 ↵ to that of Lord Neuberger[6] in ***Laskar v Laskar [2008] EWCA Civ 347*** that the ***Stack*** principle was confined to domestic cases: i.e. trusts of the family home. Thus, where the cohabitees purchased a commercial property by way of investment then the traditional presumption of resulting trust applied, such presumption being capable of being rebutted by contrary evidence.

[6] You could make much more of this point about the dissenting reason of Lord Neuberger in ***Stack*** if you have time in the exam (see 'Looking for Extra Marks?').

The case came to the Privy Council where Lord Kerr, giving the lead opinion, decided that the ***Stack*** approach was not to be confined to purely domestic cases and that where the parties are involved only in a personal relationship then, when they jointly acquire commercial property, their intention is a significant factor. It is noteworthy that the decision relates to all assets (not just land). Lord Kerr set out the principles to be considered when such circumstances arise. First, the 'context' should be considered. This approach reflects Lady Hale's approach in ***Stack*** which looked at all the circumstances of the relationship. So, context implies that an inquiry is made as to whether it is intended to be a purely commercial transaction—that then falls outside ***Stack*** and is subject to the traditional resulting trust approach. If context tells us it is not purely commercial then, again following ***Stack***, joint legal ownership suggests equal beneficial ownership (equity follows the law). If any evidence of contrary intention is found at any point from the date of the purchase throughout the whole course of dealings between the parties, then that may rebut the presumption of equal beneficial ownership. Again that follows Lady Hale's list of factors relevant to determining the respective shares in the family home which she set out in ***Stack*** (para. 69). In the absence of any such intention, then the court may fall back on the presumption of the resulting trust.

Domestic or commercial?

So, when is a case domestic or commercial? Some cases are clearly domestic only as in ***Stack***. But others may involve family members and yet concern property bought as an investment as in ***Laskar***. Others, like the decision in ***Marr***, can be a mixture of family home and commercial investments. The difficulty is clear when it involves those individuals as in ***Marr*** who are in a personal relationship and then together embark on a business investment. Is that a new adventure in their joint lives or the continuation of their relationship with its unwritten and probably even unexpressed sentiments about ownership as part of their joint future? Piska[7] (writing before the decision in ***Marr***) suggested that it would be problematic for a court, in those circumstances, having to fit the case into the appropriate rule for domestic or commercial situations when the same factors are relevant to the
p. 156 determination of a common intention or a resulting trust. Indeed, ↵ the question of whether it is at all desirable to apply trust law to commercial contexts has been queried by Yip and Lee.[8] Similar

problems have arisen in ***Erlam v Rahman [2016] EWHC 111 (Ch)*** (which is clearly now in conflict with ***Marr***) and ***Wodzicki v Wodzicki [2017] EWCA Civ 95*** where commercial property was involved or the family members who were parties to the case were at arm's length. The possibility of mixed purposes was indeed recognised in ***Stack*** and it is clear now, post-***Marr***, that the ***Laskar*** attempt to confine ***Stack*** to the domestic context is wrong.

[7] N. Piska, 'Two recent reflections on the resulting trust' [2008] Conv 441 at p. 446.

[8] M. Yip and J. Lee, 'The commercialisation of equity' (2017) 37 LS 647.

Certainty again challenged

The problem with this decision is that it yet again challenges that lawyer's hoped-for degree of certainty in resolving disputes in a post-breakup relationship. As George and Sloan point out:[9] presumptions give a degree of certainty in the uncertain and litigious world of relationship breakdowns. A resulting trust presumption gives a degree of certainty—where money is contributed then a resulting trust is presumed to arise in relation to that contributory money and was a starting point for Lord Bridge in ***Lloyds Bank plc v Rosset [1991] 1 AC 107***. Inserting as a mechanism to dispute resolution an approach which requires a trot through all the circumstances of the relationship over the years leads to uncertainty and the likelihood of increased litigation which, in Dickensian terms, is likely to lead to more anxiety and financial gloom. What is worse is that ***Marr*** extends the uncertainty introduced by ***Stack***, affirmed in ***Laskar v Laskar*** and ***Jones v Kernott*** to *all jointly acquired assets.* Further, as George and Sloan[10] suggest, an unintended consequence of ***Marr*** may be for one of the parties, in what is clearly a purely commercial transaction, to attempt to argue that the context of their commercial relationship gives rise to a common intention constructive trust. In other words, the clarity of the presumption of the resulting trust may now be blurred.

[9] M. George and B. Sloan, 'Presuming too little about resulting and constructive trusts?' [2017] Conv 303.

[10] See note 9.

The rationale for *Marr*

While bemoaning the uncertainty introduced by ***Marr*** which compounds the messy approach of ***Stack*** to determining the extent of the beneficial interest in such familial breakdown situations, it does nevertheless attempt to reflect the reality of life. There is often a grey area between property which is acquired as a purely domestic venture and property acquired for commercial purposes. A couple in a relationship may well invest their money jointly. They often view this as part of their future and part of the 'family'. It is not approached in a straightforward contribution of money but is the classic joint venture with a 'what is yours is mine' approach underpinning it. In such circumstances, ***Marr*** is struggling to engage with reality and produce ↵ the result which reflects the intention of the parties, albeit that intention may be vague, unthought, and unformulated. It is the age old dichotomy of 'justice versus certainty' although one may question the chance of judges, years after the events in question, really succeeding in finding justice in any particular case.

p. 157

Looking For Extra Marks?

■ Lord Neuberger's speech in ***Stack***, while coming to the same conclusion, dissented as to the reasoning. This question (because of the publisher's word limit) does not have space to deal with that other than in a brief reference but, if you have time in the exam, this would be worthy of inclusion for extra marks.

■ Again, reference to the Law Commission Report is often felt desirable by tutors (even though the chance of it ever being implemented is so remote as to be on the other side of the solar system), so drop that in too (*Cohabitation: Financial Consequences of Relationship Breakdown*, Law Com No. 307, 2007) for extra marks.

Taking Things Further

The following three articles provide commentary on the topics of trusts of the family home and the way in which the courts are considering their application to commercial contexts.

■ George, M. and Sloan, B., 'Presuming too little about resulting and constructive trusts?' [2017] Conv 303.

■ Piska, N., 'Two recent reflections on the resulting trust' [2008] Conv 441.

■ Yip, M. and Lee, J., 'The commercialisation of equity' (2017) 37 LS 647.

This article discusses what it says on the tin:

■ Mills, M., 'Single name family home constructive trusts: is *Lloyds Bank* v *Rosset* still good law?' [2018] Conv 350–366.

Online Resources

www.oup.com/uk/qanda/ *<http://www.oup.com/uk/qanda/>*

For extra essay and problem questions on this topic and guidance on how to approach them, please visit the online resources.

Related Books

View the Essential Cases in equity & trusts

Related Links

Visit the online resources for this title *<https://oup-arc.com/access/equity-qanda3e>*

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780198853213>*