

Resulting and Constructive Trusts

Learning Objectives:

- To understand the distinct facts which may informally give rise to real property rights
- To understand the context in which these claims commonly arise

Key Legislation

Section 53(1)(b) of the Law of Property Act 1925:

“a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will”

But...

Section 53(2) of the LPA 1925 provides

“This section does not affect the creation or operation of resulting, implied or constructive trusts.”

Key Legislation

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989:

- *“A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.”*

Section 2(5):

- *“[...] nothing in this section affects the creation or operation of resulting, implied or constructive trusts.”*

Trusts of Land and Appointment of Trustees Act 1996 (ToLATA)

Allows applications to:

- Order a sale of the property so as to release a party's financial entitlement;
- Determine the right to occupy a property;
- Determine the nature and extent of ownership of a property.

Trusts of Land and Appointment of Trustees Act 1996 (ToLATA)

14. Applications for order.

(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order—

(a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

(b) declaring the nature or extent of a person's interest in property subject to the trust, as the court thinks fit.

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

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

Trusts of Land and Appointment of Trustees Act 1996 (ToLATA)

15 Matters relevant in determining applications.

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d) the interests of any secured creditor of any beneficiary.

Resulting Trusts

Two types:

- Presumed Resulting Trust
- Quistclose trusts (less likely to arise in real property context)

Presumed Intention Resulting Trust

The basic rule is that where monies are provided for the purchase of a property by person A, and yet the legal title to that property is conveyed into the name of person B, person B will hold that property on resulting trust for the benefit of person A.

Gives effect to a default presumption about the intention of the transferor, in circumstances where the express evidence of that intention is uncertain.

Presumed Intention Resulting Trust

Its classic formulation is found in the case of *Dyer v Dyer* (1788) 2 Cox, Eq Cas 92 , 93, 94:

“The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive – results to the man who advances the purchase-money.”

Presumed Intention Resulting Trust

More recently, the rule was restated by Lord Upjohn in Pettitt v Pettitt [1970] A.C. 777:

“in the absence of evidence to the contrary if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money and if the purchase money has been provided by two or more persons the property is held for those persons in proportion to the purchase money that they have provided.”

The latter part of the rule, namely, *“if the purchase money has been provided by two or more persons the property is held for those persons in proportion to the purchase money that they have provided”* reflects the decisions in Re Roger’s Question [1948] 1 All E.R. 328 and Bull v Bull [1955] 1 Q.B. 234.

Presumed Intention Resulting Trust

There is some tension in the authorities as to whether the presumption of a resulting trust is premised upon a common intention as suggested by Lord Browne-Wilkinson in Westdeutsche Landesbank v. Islington LBC [1996] AC 669 at 708C-D, or the absence of a positive intention to confer a benefit on a transferee as suggested by Lord Millett in Twinsectra Limited v. Yardley & Ors [2002] 2 WLR 802 at p. 827 paragraphs 92-95. This is unlikely to make much difference in practice.

Presumed Intention Resulting Trust

The presumption of a resulting trust can be displaced by evidence of a contrary intention. It is also subject to a counter presumption - the Presumption of Advancement - which can itself be rebutted by counter evidence.

The presumption of advancement arises where the donor or purchaser is the husband or parent of the person to whom the property is transferred. In such cases the property is presumed to have been given absolutely, as a gift, rather than on trust. *Snell's Equity*, para 11-026

The traditional position is that a presumption of advancement applies to transfers made by fathers to their children, but not to transfers by mothers to their children. *Bennett v Bennett* (1879) 10 Ch.D. 474 at 478.

However, the modern view seems to be that it applies to both varieties of transfer. *Laskar v Laskar* [2008] EWCA Civ 347 at [20] Lord Neuberger

There has been some suggestion that the presumption is weakened when it involves the transfer of property between a parent and a child who is over 18 and managing his/her own affairs, but this remains the subject of some dispute. *Snell's Equity*, para 11-027

Presumed Intention Resulting Trust

In sum, what is important to note is that:

- The presumption of a resulting trust arises in respect of a property at the time of that property's purchase, and it does so automatically;
- It is a presumption which operates in favour of the party advancing the purchase monies;
- As such, it is a presumption which can be rebutted by parole evidence.
- It is subject to the counter presumption of advancement
- Where there is a direct agreement between the parties this will *a fortiori* be sufficient to confirm or rebut either presumption.

Presumed Intention Resulting Trust

The case of *Jones v Kernott* [2012] 1 All ER 1265 has confirmed that the presumption of resulting trust will not apply in a domestic couple context, where the informal common intention trust will apply instead.

However, in a situation where parties are in a domestic arrangement or relationship but purchase a disputed property as part of some form of commercial enterprise or as part of an investment rather than a shared home, the binding authority of *Laskar v Laskar* [2008] EWCA Civ 347 states that resulting trust principles still apply.

Presumed Intention Resulting Trust

A hybrid case

In *Tahir v Faizi* [2019] EWHC 1627 (QB), [2019] All ER (D) 151 (Jun), it had been agreed between the parties that Mr Tahir would secure a mortgage to purchase property on Mr Faizi's behalf and that Mr Faizi would pay the deposit and meet the monthly mortgage payments. Mr Faizi's agreement acted as a contract of indemnity in favour of Mr Tahir such that the initial mortgage sums were treated as being provided by Mr Tahir at the time of purchase such that he was entitled to 100% beneficial interest in the property on the basis of resulting trust principles.

Constructive Trusts

Categories not closed, but for the purposes of property claims, we look at two kinds:

- Constructive trusts under the equity in *Pallant v Morgan* (overlaps with Proprietary Estoppel);

And

- Informal common intention constructive trust (domestic family-home context trusts)

Constructive Trust: *Pallant v Morgan*

1. A agrees with B that A will purchase property for the benefit of both A and B
2. In reliance on A's assurance or B's expectation that B would acquire an interest in the land, B then does something which confers an advantage on A in acquiring the property or which is detrimental to B's ability to acquire it on equal terms, e.g. abstains from bidding on the property in an auction
3. As a result, it would be unconscionable for A to keep the property for himself.

Constructive Trust: *Pallant v Morgan*

- Relationship of a fiduciary nature, e.g. agency, partnership, or something akin, but where formality rules frustrate the undertaking.
- Requires clear and final agreement between the parties at the outset
- Typically arises where two parties agree that one will take steps to acquire a property; and that, if the acquiring party does so, the other party will obtain some interest in it.

Constructive Trust: *Pallant v Morgan*

Clarke v Corless [2009] EWHC 1636 (Ch), Proudman J:

- *“First, although the agreement between the parties requires less than contractual certainty (for otherwise a constructive trust would not be necessary) it is not engaged with anything less than an express accord between the parties. [...]*
- *Secondly, while unconscionable behaviour is a necessary condition for relief by way of constructive trust, it is insufficient by itself. [...] the court should have two aims: one is to recognise and prevent unconscionable conduct, but the other is to protect people from unintended legal consequences resulting from informal relationships [...] What does seem to me to be plain as a matter of law is that in order to be enforced there must be a clear agreement on the basic details of the arrangement without difference of principle.*
- *Thirdly, in order to succeed, the claimants have to show that they relied on the alleged agreement, arrangement or understanding.*

Constructive Trust: *Pallant v Morgan*

Generator Developments Ltd v Lidl

- *“squarely based on the fiduciary obligations owed by an agent towards his principal [...] the agreement could have been analysed in contractual terms: not as a contract about the land, but as a contract of agency”*
- *“An agent is usually entitled to indemnity from his principal against costs incurred within the scope of his agency. It is clear that [the claimant] was not prepared to commit itself to such a liability. The lack of a liability on the part of [the claimant] to indemnify Lidl against any part of the purchase price is a clear signal that no agency was created.”*

Common Intention Constructive Trust

Arises when land is purchased as a joint home but where the registered legal title does not reflect the beneficial shares which the proprietors intended for themselves.

In *Stack v Dowden* [2007] 2 All ER 929 the basic rule was laid down that, in the domestic context, joint tenants who have not expressly declared the extent of their respective beneficial interests are presumed to hold the property in equal shares according to the number of joint tenants. It established the following propositions:

- a conveyance into joint names indicates both a legal and beneficial joint tenancy, unless and until the contrary is proved

Common Intention Constructive Trust

- because a legal and beneficial joint tenancy is only a presumption, it is open to either party to try to establish that a different, ie unequal division, can be inferred or imputed from the parties' conduct in relation to the property over the whole course of their relationship (though Lady Hale stated that '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')
- the burden is on the person propounding an unequal division to show that the parties intended their beneficial interests to be different from their legal interests, and in what way

Common Intention Constructive Trust

Jones v Kernott [2012] 1 All ER 1265

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: “the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party” (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.#

Common Intention Constructive Trust

4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, “the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property”: Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, “the whole course of dealing ... in relation to the property” should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties’ actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

Dr Russell Wilcox

rwilcox@1chancerylane.com

Conor Kennedy

ckennedy@1chancerylane.com