

Articles

CONSTRUCTIVE TRUSTS AND IMPROVEMENTS TO PROPERTY

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The principles under which a non-owning cohabitee may acquire a beneficial interest in property which is in the sole legal ownership of his/her partner are well-rehearsed in the landmark cases of *Lloyds Bank plc v Rosset and Another* [1991] 1 AC 107, HL, [1990] 2 FLR 155 and *Oxley v Hiscock* [2004] 2 FLR 669, CA. The twofold requirements of common intention (express or inferred) coupled with detrimental reliance, necessary to support a constructive trust, are now firmly rooted in our law of property. The recent House of Lords' ruling in *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858 has also sought to clarify the relevant principles to be applied in assessing beneficial entitlement in the context of a family home which has been purchased in the joint names of the parties where one joint owner is seeking to establish that he (or she) owns more than a joint beneficial interest.

Although much of the recent case law has focused on the issue of assessment of the parties' beneficial ownership, there is still remarkably little guidance on what detriment is required to support a constructive trust at the initial (or threshold) stage of the court's inquiry into the claimant's claim. This is particularly so when it comes to improvements carried out to the property by either or both of the parties subsequent to acquisition.

SINGLE OWNERSHIP

Express common intention

It is evident that, in the express common intention category, very little detriment is required and a wide range of conduct may qualify to support a constructive trust: *Stokes v Anderson* [1991] 1 FLR 391, at p 400,

CA. In *Grant v Edwards* [1986] 1 Ch 638, at p 657, CA, Sir Nicholas Browne-Wilkinson V-C opined that:

'... 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 to qualify. The acts do not have to be inherently referable to the house.'

This liberal approach to the meaning of detriment in the specific context of an express common constructive trust is echoed in *Rosset* where Lord Bridge referred to the required detriment in this category as being merely a 'significant alteration in position' by the claimant: *ibid*, at p 132. In *Grant*, however, Nourse LJ (taking a stricter approach than that taken by Sir Nicholas Browne-Wilkinson) concluded that the detrimental conduct must be such upon which the non-owning partner could not reasonably have been expected to embark unless he (or she) was to have an interest in the house: *ibid*, at p 648. On either formula, however, it is submitted that expenditure on improvements or undertaking physical labour may count towards establishing a constructive trust in this category. In *Eves v Eves* [1975] 1 WLR 1338, CA, for example, the female partner had done considerable work, some of it very heavy, to the house and garden and was held to have entitled her to a quarter beneficial share despite the absence of any financial contribution by her to the initial purchase price of the property: see also, *Briggs v Rowan* [1991] EGCS 6, where the common intention was that the

deceased would occupy a cottage for the remainder of her life and who had advanced just under £30,000 to enable the legal owner to construct an extension for this purpose.

The post-*Rosset* case of *Drake v Whipp* [1996] 1 FLR 826, CA is in the same category. In this case, there was a common understanding between the parties that they were both to share beneficially despite the property (a barn) being purchased in the sole name of the male partner. The female claimant had contributed to the initial purchase price and also to the later conversion works. Both parties also contributed to the conversion by way of direct labour. Having overcome the initial hurdle of establishing a common intention by evidence of express discussions, the claimant was awarded a one third share in the property based on the court's broader approach to quantification which looked at the parties' entire course of conduct together. This meant taking into account not only direct contributions to the acquisition and conversion costs but also their respective contributions to labour.

A more recent example of the court taking into account a broad range of factors (including improvement works) is to be found in *Cox v Jones* [2004] EWHC 1486, [2004] 2 FLR 1010 where Mann J, applying *Oxley* above, held that the female claimant was entitled to a quarter share of the beneficial ownership. In this case, as in *Drake*, above, the parties had had an express common intention to share the property, but there was no express agreement as to the claimant's actual share.

Inferred common intention

In the absence of any finding of an agreement or arrangement between the parties to share beneficially, the court may alternatively rely on the parties' conduct both as a basis from which to infer a common intention and as the detrimental conduct relied on to give rise to a constructive trust. The relevant conduct, therefore, serves a dual purpose when determining whether the claimant has surmounted the first hurdle of establishing a constructive trust under Lord Bridge's scheme in *Rosset*.

In this situation, the court has to look for 'expenditure which is referable to the

acquisition of the house': *Grant*, above, at p 647, per Nourse LJ. It is insufficient, therefore, for the claimant to contribute merely towards household expenses simpliciter, purchase chattels for the house, or to do the housework, decorating or gardening, since such conduct does not manifest an intention of assisting the purchase of the house and, therefore, with the aim of acquiring some interest in the property. This stance has been reaffirmed most recently in *Stack*, above, where the House of Lords made clear that mere payments towards household bills and outgoings, or merely living together for a long time, having children, or operating a joint bank account would not by themselves support an intention to alter beneficial entitlement where the parties had purchased the property in joint names. Such matters are only relevant as 'part of the vital background' in the sense of providing the context by reference to which any discussions or actions, subsequent to purchase, fell to be assessed by the court. Do, however, improvements to the property qualify so as to establish the first hurdle under *Rosset*?

(a) Financial contributions and improvements

The decision in *Davis v Vale* [1971] 2 All ER 1021, CA, is illustrative of a case where the court inferred the requisite common intention to share beneficially based on the parties' financial contributions towards acquisition and subsequent improvements to the property. Here, the house was conveyed into the husband's sole name, but the wife had made an initial (direct) financial contribution to the purchase price (out of the parties' joint account which was fed by their joint savings) and a sum of £234 out of her own money for improvements to the house. The husband had paid all the mortgage instalments and did the work of fitting and fixing the improvements. Although the case was decided primarily by the application of s 37 of the Matrimonial Proceedings and Property Act 1970 which applies to married (and engaged) couples, the Court of Appeal emphasised that the provision was merely declaratory of the common law. Apart, therefore, from s 37, in the absence of any express agreement or understanding between the parties to share the house beneficially, the court inferred a trust

(based on the parties' contributions to the purchase price and subsequent improvements) whereby the beneficial interest in the property was to be shared equally. Significantly, Lord Denning referred to the parties' initial contributions to purchase as raising 'the proper inference . . . that, although the house was taken in the husband's name, the wife had a share in it': *ibid*, at 1026. The case, therefore, can be explained on post-*Rosset* principles (see, in particular, *Midland Bank plc v Cooke* [1995] 3 All ER 562, CA, [1995] 2 FLR 915 and *Oxley v Hiscock* [2004] 2 FLR 669, CA) that, in the absence of express agreement, once there is some basis on which a beneficial interest of some size can be justified (by reference, in *Davis*, to the wife's initial direct contribution to the purchase price), this allows a wider range of factors to be taken into account in determining the quantification of the interest including (as in *Davis*) substantial improvements to the property. The decision in *Davis*, therefore, it is submitted, is in line with modern authority which permits the court, once a claimant's interest is established by means of a financial contribution to the purchase price of the property, to undertake 'a survey the whole course of dealing between the parties' relevant to their ownership and occupation of the house in assessing beneficial entitlement: *Oxley*, above, at para [69], per Chadwick LJ. Once the initial *Rosset* hurdle of establishing a common intention is overcome, the court is no longer confined to the limited range of acts of financial contribution needed to support the constructive trust in the first place – it is now free to take into account all conduct (including, it is submitted later improvements to the property) which throw light on the question what shares were intended at the time of acquisition.

The decision in *Cooke v Head* [1972] 1 WLR 518, CA, can also be explained on this reasoning. Here, the parties, an unmarried couple, planned to build a bungalow in which they could live after the defendant's wife had divorced him and they were able to get married. A plot was purchased by the defendant with the aid of a deposit (paid by him) and a mortgage. The claimant's part of the building work involved demolishing some old buildings, removing hardcore and rubble, working the

cement mixer and painting. The work was characterised as being 'quite an unusual amount of work for a woman': *ibid*, at 519, per Lord Denning MR. Significantly, the claimant also helped with the mortgage instalments so, again, under the *Rosset* scheme, this would have entitled the court to infer a common intention on the basis of direct financial contributions. Although the actual decision proceeded on a different basis enunciated by Lord Denning, his Lordship, having found the requisite common intention to share beneficially, was then able to look at the matter 'more broadly' to see what the claimant's equity was worth at the time the parties separated. In assessing the parties' shares, therefore, he was able to consider a wide range of factors, including:

' . . . the statements made to third parties; the method in which they saved, the method of paying the mortgage instalments; the amount of the direct cash contributions of each; the amount of the work each had done on the property; the part each had taken in the planning and the design of the house; and the steps by which the transactions were carried out'.

Taking all those matters into account, the claimant's share in the property was held to be one third of the net proceeds of sale: see also, *Re Nicholson (deceased)*; *Nicholson v Perks* [1974] 1 WLR 476, where the wife had made an initial financial contribution towards the purchase price and later mortgage instalments together with various payments for the installation of a central heating system – the latter was held to give the wife an enlarged share in her beneficial interest.

(b) Improvements alone

There is also case law which suggests that a subsequent improvement by one of the parties may qualify on its own to create a beneficial share even in the absence of any financial contributions to the initial purchase or subsequent mortgage instalments. In *Bernard v Josephs* [1982] 1 Ch 391, CA, Griffiths LJ said (at p 404):

'It might in exceptional circumstances be inferred that the parties agreed to alter their beneficial interests after the house was bought; an example would

be if the man bought the house in the first place and the woman years later used a legacy to build an extra floor to make more room for the children. In such circumstances, the obvious inference would be that the parties agreed that the woman should acquire a share in the greatly increased value of the house produced by her money'.

The point is also addressed by Fox LJ in *Burns v Burns* [1984] FLR 216, CA:

'... while, initially, there was no intention that the claimant should have any interest in the property, circumstances may subsequently arise from which the intention to confer an equitable interest upon the claimant may arise (e.g. the discharge of a mortgage or the effecting of capital improvements to the house at his or her expense)'.

In *Passee v Passee* [1988] 1 FLR 263, CA, for example, the claimant's share was increased to take into account his expenditure on subsequent capital improvements to the property. There are also suggestions in *Pettit v Pettit* [1970] AC 777, HL, that later improvements to the property will give rise to an inferred common intention provided they are substantial in nature. Thus, in Lord Reid's view (at 796):

'If a spouse provides, with the assent of the spouse who owns the house, improvements of a capital or non-recurring nature, I do not think that it is necessary to prove an agreement before that spouse can acquire any right.'

Unfortunately, a different conclusion was reached by Lord Hodson, who found himself unable to agree with Lord Reid's observation notwithstanding the latter's open acknowledgment that there is a fine distinction between financial contributions to purchase and improvements subsequently made to the property which increase its value: *ibid*, at p 811. In *Pettit* itself, the husband's claim failed largely because the improvements comprised merely redecoration to the house and, therefore, was characterised as having been done for the benefit of the family without altering the wife's title or interest in the

property which had been registered in her sole name. In the words of Lord Diplock (at p 826):

'It is common enough nowadays for husbands and wives to decorate and to make improvements in the family home themselves, with no other intention than to indulge in what is now a popular hobby, and to make the home pleasanter for their common use and enjoyment. If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bathroom while the wife does the shopping, cooks the family dinner or bathes the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home on which they are undertaken.'

The earlier case of *Button v Button* [1968] 1 WLR 457, CA, is also illustrative. The house had been purchased in the husband's name with no discussions about beneficial ownership. The wife had worked hard in decorating and improving their former home (a cottage) which was later sold and the proceeds used to fund the purchase of the house together with the help of a mortgage. The Court of Appeal refused to award any interest to the wife based on her work to the cottage. Lord Denning summarised the position in these terms (at p 462):

'This is the first case, I think, to come about before us where the wife has done work on the husband's house but has made no financial contribution... The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interests in, the property.'

In *Gissing v Gissing* [1971] AC 886, HL, the wife's improvements to the house comprised the purchase of some furnishings and the laying of a lawn. Again, the claim failed. Similarly, the work done in *Appleton v Appleton* [1965] 1 WLR

25 was characterised in *Pettit* as 'not going beyond what a reasonable husband might be expected to do': *ibid*, at p 806, per Lord Morris. Indeed, *Appleton* was overruled in *Pettit* on this ground. In *Thomas v Fuller-Brown* [1988] 1 FLR 237, CA, the male partner's claim also failed, despite significant works of improvement to the house, because there was no evidence from which to infer a common intention that he should have a beneficial interest in the property. On the contrary, the female owner had made no offer of an interest in the property and the work had been carried out in return for meals, lodgings on site, pocket-money and cohabitation.

By contrast, in *Jansen v Jansen* [1965] 3 WLR 875, CA, approved in *Pettit* by Reid and Diplock LJJ, the relevant works of conversion carried out by the husband were held to have significantly enhanced the value of the house (which had been bought by the wife alone). Lord Denning, who viewed the case as being akin to a joint partnership, said (at p 882):

'The wife supplied the capital in the shape of the house. The husband supplied the labour. By means of their joint efforts a profit was made. If these two were not husband and wife, the law would readily infer a provision that he should have some part of the profit. So should equity say today, seeing that the marriage has broken up.'

Interestingly, in *Ungurian v Lesnoff* [1990] Ch 206, [1990] 2 FLR 299, a case involving a house registered in the male partner's sole name, the female claimant's works of improvement (involving the installation of central heating, rewiring and replumbing) were held to give rise to an inferred intention that she would have the right to reside in the house for life. In this case, as in *Jansen*, above, the claimant had not provided any financial contribution towards the initial cost of acquisition.

A more striking example, perhaps, of a successful claim to a beneficial interest based on improvements alone is to be found in the well-known case of *Hussey v Palmer* [1972] 1 WLR 1286, CA, where a mother-in-law was awarded a beneficial interest in her son-in-law's house proportionate to the £607 which she had paid to build an extension onto the

property which it was intended she would occupy as a home for the rest of her life. In the words of Lord Denning MR (at p 1290):

'Just as a person, who pays part of the purchase price, acquires an equitable interest in the house, so also he does when he pays for an extension to be added to it.'

The obvious conclusion here is that mere improvements to property may rank as an equivalent financial contribution to the cost of acquisition and, therefore, be capable of supporting an inferred common intention constructive trust. (Contrast, however, *Spence v Brown* (1988) 18 Fam Law 291, CA, where the mother-in-law's payment to her daughter and son-in-law for various home improvements were clearly considered as loans and not as supporting a constructive trust).

JOINT OWNERSHIP

This recognition of improvements in single ownership cases is also, it is submitted, consistent with the House of Lords' approach to subsequent improvements in *Stack* involving, as indicated earlier, a house purchase where the legal title was conveyed into joint names. Indeed, on a liberal reading of the speeches on this point, there is considerable scope for arguing (in line with earlier case law referred to above) that improvements to property rank not only as factors in assessing the quantum of the parties' beneficial interests but as financial contributions referable to the initial (or threshold) question as to whether there is the requisite detriment to support a constructive trust in the first place. Lord Hope opined that 'indirect contributions, such as making improvements which added significant value to the property . . . ought to be taken into account as well as financial contributions made directly towards the purchase of the property': *ibid*, at para [12]. It is not entirely clear, however, whether his Lordship was addressing these remarks to the issue of quantification or, more significantly, to the initial hurdle of establishing a common intention within the *Rosset* scheme. Lord Walker is equally ambiguous, although he does make specific reference to Lord Bridge's speech in *Rosset* stating that 'the law has [since] moved on':

ibid, at para [26]. His reference, however, to 'contributions in kind in the form of manual labour or improvements' (at para [36]) was made in the specific context of the factors relevant to the question of the quantification of the parties' respective beneficial shares and not with reference to Lord Bridge's second category of constructive trust in *Rosset*. Baroness Hale, after recognising that 'we are not in this case concerned with the first hurdle', acknowledges that 'there is undoubtedly an argument for saying . . . that the observations, which were strictly obiter dicta, of Lord Bridge . . . have set the hurdle rather too high in certain respects': ibid, at para [63]. In her view, however, the point did not arise for consideration because a conveyance into joint names was sufficient in the majority of cases to surmount the first hurdle.

Lord Neuberger, on the other hand, although recognising that it may be difficult in the abstract to identify the factors which can be taken into account to infer a common intention under the first hurdle, specifically refers to events occurring after the acquisition of the house which may alter the beneficial interests under the trust arising initially at the date of acquisition. In this connection, a significant improvement to the home (the cost being seen as a capital expenditure) would, in his Lordship's view, justify an adjustment of the parties' beneficial shares. To qualify, however, the work would need to be substantial so that decoration or minor repairs would not suffice for this purpose. Baroness Hale gives the example of a party financing (or constructing) an extension to the property so that what the parties have now is significantly different from what they had taken originally at the time of acquisition: ibid, at para [70].

QUANTIFICATION OF IMPROVEMENTS

It is not easy to discern from the authorities what approach should be taken in assessing the amount of the claimant's share in the beneficial interest attributable to significant improvements. In *Griffiths v Griffiths* [1973] 1 WLR 1454, Arnold J took a pragmatic approach concluding that it would not be just simply to award the cost of an improvement which had added

nothing to the value of the house when it came to be realised – conversely, it would be wrong that the claimant should be denied more than the cost of an improvement which had contributed greatly to the overall worth of the property and, in some cases, even beyond its ultimate sale price. Looking, therefore, at the position in the round, his Lordship was content to see what had been achieved by the improvement in the realisation of the property or (if no sale was contemplated) its current value.

A similar 'added-value' approach was adopted in *Re Nicholson (deceased); Nicholson v Perks* [1974] 1 WLR 476, where Pennycuik VC held that the proper way in which to work out the improvements (falling within s 37 of the Matrimonial Proceedings and Property Act 1970) was to ascertain the value of the property at the date immediately before the making of the improvement and then to identify what addition to the value of the property was due to the improvement. The share of the party who made the improvement should then be treated as enlarged by a proportionate amount corresponding to the increase in value represented by the improvement. Thus (at p 483):

'If the property before the improvement is worth £6,000 and the parties are entitled to it in equal shares, that is to say, £3,000 each, and if the improvement increases the value of the property by £1,000 then the respective shares instead of being three-sixths and three-sixths will become four-sevenths and three-sevenths.'

The difficulty, however, as observed by Millett J in *Re Pavlou* [1993] 2 FLR 751, at p 753 is that 'most expenditure on property results in a much smaller increase in value than the amount expended' or is simply not reflected in any increase in value at all. In *Pavlou* itself, his Lordship resolved the difficulty by ordering that the wife would be entitled to credit only for half of the lesser of the actual expenditure and any increase in the value realised thereby. The question, therefore, whether to award the cost of the improvement or the added-value to the property will depend very much on the facts of each individual case.

CONCLUSION

The following principles, it is submitted, emerge from the case law:

- (1) Where there is evidence of an express agreement, arrangement or understanding between the parties, a significant contribution in the form of physical labour towards improvements to the property will give rise to a beneficial interest: *Eves v Eves* and *Briggs v Rowan*. Where the parties have contributed both towards the cost of the improvements and provided physical labour, this will also merit a beneficial share in the property: *Drake v Whipp*.
- (2) In the absence of any express agreement, arrangement or understanding, the court may infer a common intention to share beneficially based on the parties' financial contributions towards acquisition and subsequent improvements to the property: *Davis v Vale*; *Re Nicholson (deceased)*; *Nicholson v Perks*; *Cooke v Head* and *Passee v Passee*. Subsequent improvements on their own may also qualify even in the absence of any financial contribution to the purchase price: *Stack v Dowden*, per Lord Neuberger of Abbotsbury and Baroness Hale of Richmond; *Bernard v Josephs*, per Griffiths LJ; *Pettit v Pettit*, per Lord Reid.
- (3) In order to qualify, the improvements must be significant in nature so that mere decoration, minor repairs, gardening, DIY jobs, etc will not suffice: *Pettit v Pettit*, per Lord Diplock; *Appleton v Appleton*; *Button v Button*; *Jansen v Jansen*; *Ungurian v Lesnoff* and *Hussey v Palmer*.
- (4) If the improvements are carried out or paid for by way of loan or in return for cohabitation or other motive, they will not qualify: *Spence v Brown* and *Thomas v Fuller-Brown*.
- (5) The improvements will normally be quantified by taking an added-value approach: *Griffiths v Griffiths*; *Re Nicholson (deceased)*; *Nicholson v Perks* and *Re Pavlou*.
- (6) Where the parties are married or engaged to be married, s 37 of the Matrimonial Proceedings and Property Act 1970 (as amended by s 2(1) of the Law Reform (Miscellaneous Provisions) Act 2004) allows the court to take into account substantial improvements to property as giving rise to a share (or enlarged share) in the beneficial interest without any express or inferred common intention: *Samuels (WA)'s Trustee v Samuels* (1973) 233 EG 145; *Kowalczyk v Kowalczyk* [1973] 2 All ER 1042, CA; *Griffiths v Griffiths* and *Re Nicholson (deceased)*; *Nicholson v Perks*. An identical provision applies to civil partners: s 65 of the Civil Partnership Act 2004.