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Resulting trusts and common intention

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ABSTRACT

Although the resulting trust has played a lessening role as an appropriate mechanism for determining beneficial ownership of the family home, recent case law has seen a re-emergence of the doctrine in cases involving the purchase of property as a business venture or investment. Significantly, in these cases, the courts have ruled out a holistic or broad brush approach (taking into account a range of factors) in assessing the parties equitable shares in favour of a purely mathematical calculation based on the parties' respective financial contributions towards the purchase price. This approach, however, will not necessarily apply in all cases involving investment property as the Privy Council decision in Marr v Collie [2018] AC 631 has demonstrated. Much will still turn on the parties' common intention in deciding whether to apply a resulting trust solution or, alternatively, an approach based on constructive trust principles. Apart from the investment context, it is now also clear that the resulting trust will be the preferred option where there is a lack of close relationship between the parties. Here too, the courts have excluded the determination of beneficial ownership under a common intention constructive trust and applied an arithmetical calculation of the parties' respective beneficial shares despite the domestic context of the transaction.

PARTIES AS INVESTORS

In the leading case of *Laskar v Laskar*,[1] the mother was the tenant of a council house, which she purchased, under the right to buy scheme contained in the Housing Act 1985, at a considerable discount using partly her own money and a mortgage. The daughter also contributed a small amount towards the purchase price. In order to secure the mortgage, however, the mother transferred the property into the joint names of herself and her daughter so that both became jointly liable under the loan.

The property was purchased primarily as an investment and, shortly after completing the purchase, both the mother and the daughter moved out and began renting it out to tenants. Throughout this period, the mother was solely responsible for the outgoings and mortgage repayments, which were funded from the rent on the property. Later, the parties fell out and the daughter brought proceedings contending that she had an equal beneficial interest in the property. In particular, she claimed that there was a presumption, following *Stack v Dowden*,[2] that the beneficial interest mirrored the legal title so that joint tenants at law were entitled to equal beneficial ownership.

The Court of Appeal rejected the daughter's claim. Where property was purchased as an investment (as opposed to a family home), the presumption of joint ownership did not apply. In the present case, it was apparent that the purchase of the property was a business venture and that the daughter had been brought into the transaction solely in order to add her name as joint tenant to secure the necessary mortgage. In reality, therefore, the parties (despite their family ties) were simply investors who had always led separate lives and maintained separate and distinct finances. The appropriate approach, therefore, was to apply the mechanism of the resulting trust in order to determine their respective shares based on their financial contributions. Since both mother and daughter were made jointly liable under the mortgage, it was appropriate to treat the mortgage as representing equal contributions to the purchase price—the mortgage repayments had been funded by the rent on the property (which fell to be treated as joint income) and not by the parties' own personal finances.

OTHER CASES INVOLVING INVESTMENT PROPERTY

There have been other cases where the constructive trust has been held to be inappropriate in the investment context. In

1 [2008] EWCA Civ 347.
2 [2007] 2 AC 432.

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Geary v Rankine,[3] for example, the parties had been in a relationship from 1990 to 2009. In 1996, Mr Rankine purchased a guest house with his own savings. At the time of the purchase, the parties had not intended to live in the property or run it themselves—instead, the guest house would be run by a manager. Due to difficulties with the manager, however, Mr Rankine began to run the business himself and later, Mrs Geary also became involved with it, cleaning, cooking, looking after guests and doing the paperwork. After the parties' relationship broke down, Mrs Geary claimed an interest in the guest house based, inter alia, on a constructive trust. Her claim failed. It was apparent that, at the time of purchase, the guest house was intended as an investment rather than as a home. Moreover, although the parties had a common intention to run the business together, it was not possible to infer from that that they had a common intention that the *property* in which the business had been run (and which had been purchased by only one of them) would now belong to both of them. Interestingly, Lewison LJ, in the course of his judgment,[4] suggested that the presumption of a resulting trust may arise "where the partners are business partners as well as domestic partners". However, on the facts, if such a presumption were to apply, it would have worked entirely in Mr Rakine's favour since he had provided all the purchase money.

In *Favor Easy Management Ltd v Wu*,[5] the dispute over the beneficial ownership of two properties concerned two parties who had been in a culturally Chinese style of sexual relationship involving a personal but not familial nexus. The difficulty here was that there were both commercial and domestic aspects to the purchase of the properties which made it unclear whether a common intention constructive trust or a resulting trust approach should apply. In the result, it would appear that a resulting trust approach was adopted, but there is little discussion of the applicable legal principles in either the first instance or Court of Appeal judgments. Undoubtedly, the distinction between the domestic and commercial purpose of the transaction, adopted in *Laskar*, may not be easy to apply in some cases, especially where two people have lived and worked together in what amounts to "both an emotional and a commercial partnership".[6]

More recently, in *Erlam v Ahmed*,[7] the property had been bought as a rental investment and not as a family home. Chief Master Marsh observed that a resulting trust analysis was now rarely employed in the family home context, but could still arise where domestic partners were also business partners. In the case before him, therefore, involving a property purchased as an investment for rental income and capital appreciation, a strict resulting trust analysis, following *Laskar*, was applicable. On the facts, however, the claimant was unable to show that she had made any contribution to the purchase price of the property and so, therefore, could not establish a resulting trust.

PROPERTY ACQUIRED FOR BUSINESS PURPOSES

Where property is purchased in joint names by an unmarried couple who intend it to be their family home "a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved".[8] Similarly, in *Jones* v *Kernott*,[9] Lord Walker and Lady Hale JJSC stated that, in the domestic context involving cohabiting couples in an intimate relationship: "the presumption is that the parties intended a joint tenancy both in law and in equity … [unless] rebutted by evidence of a contrary intention". That approach, however, will not apply in the very different context where a purchase of property is a commercial decision made by partners for the benefit of their partnership business.

In *Williams v Williams*,[10] a brother brought proceedings against two of his siblings and the executors of his father's estate relating to the ownership of a farm. The father had initially worked the farm as a tenant. In 1985, the brother and his parents formed a partnership to take over the farming business. The freehold was bought in 1986. The transfer transferred the land into the joint names of the brother and his parents. It did not, however, contain any express declaration of trust as to whether the land was to be held by them in equity as joint tenants or tenants in common. The brother argued that if joint transferees did not expressly declare what the beneficial ownership was, then equity followed the law and the onus was on the person seeking to show that the beneficial ownership was different from the legal ownership.

Not surprisingly, this argument was rejected by the Court of Appeal. Whilst, in general, the legal owner of any property was prima facie also the beneficial owner, where land was transferred into joint names, there would always be a background to the purchase that shed light on the context in which it took place. In *Williams*, although the farm had provided a home for the family, it had primarily been a business which provided their livelihood. The relationship between the brother and his parents could not be equated to that between a married or an unmarried couple. They had been business partners. Unlike a couple, they had been obliged by the partnership deed to account to each other meticulously. Moreover, the purchase of the freehold had been a commercial decision made by the partners for the benefit of the partnership business. The upshot was that the farm had been acquired by the parties as beneficial tenants in common in equal shares. In the words of Nugee LJ:[11]

> Cefn Coed was a farm. It did of course provide a home for Mr and Mrs Williams and their family, but it was also, and primarily, a business which provided their livelihood. If Mr and Mrs Williams alone had been partners and had bought Cefn Coed in their names, this would, therefore, have been an example of what was referred to by Lord Walker in *Stack v Dowden* at

3 [2012] EWCA Civ 555.
4 [2012] EWCA Civ 555, at [17]-[18].
5 [2012] EWCA Civ 1464.
6 See, *Stack v Dowden*, [2007] 2 AC 432, at [32], per Lord Walker.
7 [2016] EWHC 111 (Ch).
8 *Stack v Dowden* [2007] 2 AC 432, at [58], per Lady Hale.
9 [2012] 1 AC 776, at [25].
10 [2024] EWCA Civ 42. See also, *Rowland v Bates* [2021] EWHC 426 (Ch); *P v Q* [2024] EWFC 164 (B).
11 [2024] EWCA Civ 42, at [54] and [55].

> [32] as 'both an emotional and commercial partnership', and by him and Lady Hale in *Jones v Kernott* at [31] as a case where 'domestic partners were also business partners'. As they there say, that might have constituted a reason for adopting a 'classic resulting trust' analysis …
>
> But it is not necessary to speculate further as Cefn Coed was not acquired in the names of Mr and Mrs Williams alone. It was acquired in the names of them and Dorian. However close they were as a family, the relationship between Dorian and his parents cannot be equated to that between a married or unmarried couple. They were, and on the Judge's findings had been for almost a year, business partners. Unlike a married (or unmarried) couple they were obliged by the partnership deed to account to each other meticulously …

Interestingly, in *Williams*, there was no dispute that Mr and Mrs Williams and Dorian were intended to be equal co-owners. The sole issue was whether they should also be taken as intending that their co-ownership should be joint, with the right in particular of survivorship, or a tenancy in common in equal shares. On this point, the Court of Appeal stressed that neither the House of Lords in *Stack* nor the Supreme Court in *Jones* had intended to cast any doubt on the long-standing principle of equity that property acquired in joint names for business purposes would be presumed to be held beneficially as tenants in common rather than as joint tenants with the accidents of survivorship.

THE SIGNIFICANCE OF THE PARTIES' COMMON INTENTION

The Privy Council in *Marr v Collie*[12] has held that, where property is purchased in the joint names of the parties in a domestic relationship as an investment (as opposed to a home), a resulting trust solution may not be the inevitable answer to how beneficial ownership is to be determined. The presumption of joint beneficial ownership in joint legal ownership cases could apply equally to property purchased by a couple in an enterprise reflecting their joint commercial, as well as personal and domestic commitment. The intention of the parties remained the crucial factor.

Thus, if the evidence points to a mutual wish, despite contributing in unequal shares to the purchase of the property, that joint beneficial ownership should reflect the parties' joint legal ownership, then the presumption in *Stack* will apply. If, on the other hand, that is not their wish (or they have not formed any intention as to beneficial ownership, or they were unaware of the legal consequences of the property being acquired in joint names), a resulting trust will provide the more appropriate solution. Moreover, if the parties' initial common intention (or lack of it) at the time of purchase had changed, it would become relevant to examine the parties' course of conduct over the years in which they were dealing with the property in order to identify their altered intentions.

LACK OF CLOSE RELATIONSHIP BETWEEN THE PARTIES

In *Wodzicki v Wodzicki*,[13] the property was registered in the joint names of the appellant's father and his second wife, but had been occupied exclusively by the appellant since its purchase in 1988. Throughout this time, the father and his wife lived in France. In 2010, the father died intestate and his wife wrote to the appellant suggesting that she would gift her the property if the appellant gave up any entitlement under French inheritance law. The appellant did not, however, pursue the suggestion and the wife later brought proceedings for possession of the property. At first instance, the trial judge held that the parties had intended the property to be the appellant's long-term home and that she (the appellant) and the father's wife were entitled to beneficial ownership in the proportions to which they contributed to its purchase, maintenance, and outgoings on the basis of a resulting trust. Significantly, the Court of Appeal agreed with this approach. The trial judge had been correct to reject the daughter's claim that she was the sole beneficial owner under a common intention constructive trust as there was nothing close about the appellant's relationship with his father's wife. The approach taken in *Stack*, which was applicable to cohabiting couples, was not, therefore, appropriate in this context.

In *Secretary of State for Work and Pensions v Tower Hamlets LBC*,[14] the Upper Tribunal concluded that a constructive trust analysis applied where a couple in an intimate relationship, or two or more people who were friends, decided to buy a house or flat in which to live together in circumstances where the relationship was built on trust and it was unlikely that the parties intended to hold each other to a detailed financial account. However, outside that category of case, it was permissible to take a resulting trust approach, applying a presumption that the property was held on trust in shares proportionate to the money advanced by each part. In the instant case, the property was intended as an investment, not a home. Accordingly, the presumption of a resulting trust applied.

The degree of closeness of the parties' relationship will, of course, depend on all the circumstances. In *Gallarotti v Sebastianelli*,[15] the parties were friends who had bought a flat together. The flat was transferred into the sole name of one of the friends who also took out a mortgage for the balance of the purchase price. The friendship terminated and the non-owning friend was excluded from the flat, who then brought a claim that he had a beneficial interest in the flat relying on a common intention constructive trust. The claim succeeded. Significantly, in this case, the parties' relationship had lasted over many years and was strong, albeit platonic. In the light of their close relationship, the analysis was to be seen "more in the domestic than the commercial context".[16]

CONCLUSION

Undoubtedly, the decision in *Marr* has sought to move away from the difficulties associated with trying to force a case into

[12] [2018] AC 631. See also, *Passi v Hansrani* [2024] EWHC 2062 (Ch); *AW v RH* [2024] EWFC 54 (B); *Heslop v Heslop* [2023] EWHC 544 (Ch); *Krawczynska v Rozuk* [2020] 1 WLUK 473.

[13] [2017] EWCA Civ 95. See also, *Wade v Singh* [2024] EWHC 1203 (Ch).

[14] [2018] UKUT 25 (AAC).

[15] [2012] EWCA Civ 865. See also, *Kleinhentz v Harrison* [2020] EWHC 3439 (Ch).

[16] [2012] EWCA Civ 865, at [6], per Arden LJ.

either the domestic or commercial category. As Yip and Lee have observed:[17]

> Based on the *Stack* and *Kernott* line of developments, the court has to first decide whether the case is in the domestic consumer context or the commercial context, in order to determine whether the presumed resulting trust or the common intention constructive trust applies. But this distinction appears too rigid to be able to deal with the myriad of human relationships and dealings. The courts will have to engage in a difficult exercise of forcing the case into one of the two categories in hard cases.

It is not entirely clear, however, how the resulting trust and *Stack* presumptions interact with each other given that some basic reference to the parties' intentions in relation to the property is necessary in order to decide whether the case is domestic or commercial. Whilst both presumptions are capable of being displaced by evidence of contrary intention, their very purpose is to provide a starting point where such evidence is not clear. That function is lost, it has been argued, "if both presumptions depend on an analysis of the parties' common intention *before they arise in the first place*, even after a case has been categorised". The commentators, George and Sloane,[18] point out that this leads to an inherent flaw in the interaction between the two types of trust:

> … how can the displacement [of the presumption of a resulting trust] happen if the presumption … is not applied by default to any purchase in joint names where [the parties] have contributed unequally to the purchase price, prior to adducing evidence regarding the parties' intentions?

George and Sloane also make the interesting point that the approach taken in *Marr* may lead to difficulties in practice.[19] They put the matter this way:

> Suppose the evidence is adduced that A and B did not wish their joint legal ownership of the property to be reflected as joint beneficial ownership. According to Lord Kerr, a resulting trust solution may provide the answer in these cases, but that could also constitute one of the factors to rebut the presumption of joint beneficial ownership under a constructive trust. That wish, in other words, does not of itself tell a court which trust path to take in the absence of a prior presumption about which framework is more appropriate to apply to the dispute between A and B.

Despite these concerns, the contextual approach in *Marr* is to be welcomed as recognising that the application of either the resulting or constructive trust cannot be isolated from the parties' common intention. The potential for conflict between the two presumptions was expressly addressed by Lord Kerr in *Marr*, who dismissed the notion of "a clash of presumptions" as over simplistic. In his Lordship's view, it could not be right that a property purchased in joint names by the parties in a domestic relationship necessarily gave rise automatically to a presumption of joint beneficial ownership. Conversely, that if the property is bought in a wholly non-domestic situation, the resulting trust must prevail. The answer could "not to be provided by the triumph of one presumption over another", but it was context which counted "for, if not everything, a lot" and that context, in cases of this kind, could only mean "the parties' common intention or … lack of it".[20]

In the writer's view, the Privy Council has correctly interpreted *Stack* and *Laskar* as not intending to confine the presumption of joint beneficial ownership exclusively to the domestic setting. Lady Hale in *Stack*[21] made clear that the "search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it". Lord Neuberger, who dissented, also acknowledged the importance of context and, in particular, that "additional relevant evidence" may rebut the presumption of resulting trust.[22] Moreover, in *Laskar*, there is no suggestion that Lord Neuberger had intended to draw a strict line between the purchase of a family home and the acquisition of investment property in whatever circumstances that took place.[23] In his Lordship's view, it did not matter whether starting with the *Stack* presumption produced the same result as starting with the presumption of a resulting trust, so long as the end result reflected the parties' actual intentions. In *Jones v Kernott*,[24] there is also the suggestion by Lord Walker and Lady Hale, in their joint judgment, that a resulting trust would be "rare in a domestic context, but might perhaps arise where domestic partners were also business partners". These judicial observations have prompted another commentator[25] to conclude that:

> … the presumption arising from joint names and the presumption of resulting trust are merely different starting points for the same process—namely working towards an evidence-based conclusion as to the intentions of these particular parties regarding this particular property.

Although the Privy Council decision is only of persuasive force, it is likely to be followed by the English courts as clarifying the earlier case law on the scope of the *Stack* presumption in cases where investment property is purchased in joint names by parties in a domestic relationship.

[17] See, M Yip and J Lee, "Less Than Straightforward People, Facts and Trusts: Reflections on Context: Favor Easy Management Ltd v Wu", [2013] Conv 431, at 435.
[18] See, M George and B Sloane, "Presuming Too Little About Resulting and Constructive Trusts", (2017) Conv. 303, at 308.
[19] See, M George and B Sloane, "Presuming Too Little About Resulting and Constructive Trusts", (2017) Conv. 303, at 310.
[20] See, *Marr v Collie* [2018] AC 631, at [54].
[21] [2007] 2 AC 432, at [60].
[22] [2007] 2 AC 432, at [109].
[23] See, *Laskar v Laskar* [2008] EWCA Civ 347, at [18]-21].
[24] [2012] 1 AC 776, at [31].
[25] see, J Roche, "Returning to Clarity and Principle: The Privy Council on Stack v Dowden", (2017) 76 CLJ 493, at 494.

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Mark Pawlowski studied law at Warwick and Oxford Universities before being called to the Bar where he practised for many years from Chancery Chambers at 5, New Square, Lincoln's Inn, London. In 1999, he was made Professor of Property Law at the University of Greenwich. He has published extensively in the fields of equity & trusts, land law and landlord and tenant law. He has also been General Editor of Landlord and Tenant Review, published by Sweet & Maxwell, since its inception in 1997.

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