

TOLATA CASE UPDATE
19th October 2022

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Common intention constructive trust (CICT)

- The foundation case:
- Lloyds Bank v Rosset [1991] 1 AC 107
- The two principles

Lloyds v Rosset: the first principle:

- ‘...The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been **any agreement, arrangement or understanding** reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be **based on evidence of express discussions** between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that **he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement** in order to give rise to a constructive trust or a proprietary estoppel...’

Lloyds v Rosset: the second principle:

- ‘...In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where **the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention** to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation **direct contributions to the purchase price** by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, **it is at least extremely doubtful whether anything less will do...**’

The modern authorities on CICT:

- Stack v Dowden [2007] 2 AC 432
- Jones v Kernott [2012] 1 AC 776

Stack v Dowden

The starting point is that “equity follows the law” and thus (absent some special circumstance), the parties are to be taken as joint-tenants in equity, with the consequence that severance on relationship breakdown or other circumstance results in equal shares. This is a presumption **not to be lightly dismissed** because it is how both parties are likely to see their relationship developing and because evidence of an agreement as to any other share is likely to be misremembered and tainted by ill-will.

In *Stack*, it was said that departing from the position that equity follows the law was likely to arise only in **exceptional cases**, although it is clear from *Marr v Collie* [2018] AC 631 that it is not so much that the circumstances are themselves exceptional, but that the facts must actually prove a different common intention rather than merely being facts of a certain type

Is this a CICT?

Stack v Dowden:

Some questions left unanswered:

Can the 'Stack presumption' be rebutted simply by establishing a different common intention?

To what extent is 'detrimental reliance' (see Rosset) necessary to establish a CICT?

To what extent does the 'Stack presumption' apply to non-domestic cases?

Jones v Kernott:

If a CICT can be established, then in the absence of agreement about the size of the interest, the court may **impute** an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of the fair share in the light of all the circumstances

Recent cases:

- Amin v Amin [2020] EWHC 2675 (Ch)
- O'Neill v Holland 2020 EWCA Civ 1583
- Oberman v Collins [2020] EWHC 3533 (Ch)
- Rowland v Blades [2021] 2928 (Ch)
- Hudson v Hathway [2022] EWHC 631 (QBD)
- Fattal v Fattal [2022] EWHC 950 (Ch)

Amin v Amin [2020] EWHC 2675 (Ch)

- Sole proprietor case
- M and W not married under UK law
- Property bought by M and W in joint names in 1995 (but they did not move in); sold to W's cousin in 1999 (to raise finance); sold in 2005 by cousin to M and W (and they moved in); W moved out in 2007
- Complicated background but Judge concluded that: (i) W had made no contribution to purchase and (ii) M had paid all mortgage payments and worked on property
- Judge found CICT in favour of M and 2 sons. Appealed by W

Amin v Amin:

- The judge's finding that D did not contribute was upheld
- The criticism that he had not made a finding of **common intention** was dismissed. The appeal Judge said '...at first blush it is surprising that Mrs Amin, who was after all the legal owner, was found to have no beneficial interest in the property at all. One can see that a case might have been made...that the original purchase of the house in joint names in 1995 gave rise to a presumption that they were intended to be joint beneficial owners, and that the subsequent dealings with the house – the transfer to raise money on it, and retransfer to Mrs Amin in 2005 – were not intended to alter the beneficial ownership which remained one of joint ownership throughout. But the Judge could only deal with the case as it was presented to him. As Mr Oakley pointed out, both sides ran an all or nothing case. Mrs Amin's case was that the property was 100% owned by her. The defendants' case was that it belonged 100% to them.

Amin v Amin:

- The finding regarding the sons (?)
- I accept that **detrimental reliance** is a requirement for a common intention constructive trust....
In the present case, the Judge said that the defendants regarded the property as their own and made payments of the mortgage while carrying out construction work (at [88]); that they continued to live in the property regarding it as their own (at [93]); and (again) that they treated the property as their own, carrying out renovation work and paying the mortgage (at [99]). That to my mind is sufficient to demonstrate that the Judge thought that they had acted to their detriment in the belief that the property belonged to them. I do not think any more was required.

O'Neill v Holland 2020 EWCA Civ 1583

- Sole proprietor case
- M and W not married
- Property bought by W's father in his name in 1999 as family home for M and W (and M and W moved in in 2000); transferred in 2008 to M for nil consideration; relationship broke down in 2012 and W moved out. In the interim, the father had died
- The trial judge held that the reason that the Property had been transferred into the sole name of M in 2008, rather than the joint names of M and W as originally envisaged, is that M had misrepresented that W would not be able to obtain a mortgage. The parties' intention (deduced objectively from their conduct) was that from 2008 the beneficial interest in the Property would be held by M and W in equal shares; and that in the circumstances it would be unconscionable for H to deny or renege on the parties' agreement that W would have a beneficial share in the Property. On that basis she held that W was entitled to a 50% beneficial interest by way of common intention constructive trust.
- M appealed, in particular, on the basis that there was no finding that W had acted to her detriment in reliance on any common intention
- On the first appeal, the appeal judge allowed M's appeal on that basis. W appealed.

- (1) The judge on the first appeal had been right to hold that detrimental reliance remained an essential ingredient of a claim under a common intention constructive trust, in the class of case where the legal estate is in the sole name of the other party.
- (2) With regard to the nature of the detriment required, once it had been shown that there was a common intention that a person should have an interest in a house, any act done by that person to his or her detriment relating to the joint lives of the parties was sufficient detriment to qualify; and the acts do not have to be inherently referable to the house.
- (3) W could not have acquired any beneficial interest in the Property prior to 2008. There was nothing to rebut that presumption that her father was the sole owner prior to 2008. The Property had been purchased by her father in his sole name and using his own funds. The mere fact that he intended it as a home for W and could not, by itself, have given rise to a constructive trust in her favour. For all practical purposes, she was fully protected while the Property remained vested in her father's sole name and she had continuing permission to occupy it. There may well have been a general intention shared between father and daughter that he would at some future date transfer the Property to her, or to her and H jointly, either by lifetime gift or by will upon his death; but a generalised future intention of that nature cannot begin to ground an immediate beneficial entitlement under a constructive trust.

O'Neill v Holland:

- (1) In connection with 2008, the judge had accepted that the parties' original plan had been that the Property would be transferred into the joint names of W and M, rather than M's sole name. However, M had obtained a mortgage offer in his sole name; and the grant of such a mortgage required the Property to be in M's sole name. He had falsely misled W in believing that she could not get a mortgage. Viewed objectively, that was a position of **clear detriment incurred by W in reliance** on M's misrepresentation. That was sufficient to establish that M held the beneficial interest in the Property on trust for himself and W in equal shares.
- (2) Obiter: The Court also observed it could also have been contended in the alternative that there was an issue as to whether W's father had acted to *his detriment* by transferring the Property into M's sole name, when it was always his intention that his daughter should have at least a 50% beneficial interest in it. The Court suggested that such an analysis would have led to the same result (if the father was alive (?)), ie. the only reasonable inference was that the father would never have agreed to transfer the Property into M's sole name without a clear understanding, shared by all three of them, that W was to have a beneficial interest in the Property. On that analysis, the necessary detriment to the father would then be found in the making of the transfer itself, because he then put it out of his power to deal with the Property as he chose in the future

Oberman v Collins [2020] EWHC 2533 (Ch)

- Sole and joint proprietor case
- M and W not married
- They were involved together in a number of companies and held a portfolio of properties.
- After their relationship ended, the question was whether W was entitled to an interest in the properties

Oberman v Collins:

The Judge found that it was the common intention of the parties that certain categories of properties within the portfolio were to be held on behalf of M and W jointly and equally. In particular, he found that W relied on that common intention to her detriment by:

- (a) her financial commitment,
- (b) working in the business and
- (c) by assuming financial liabilities in relation to the Portfolio and giving control over it to Mr Collins.

This gave rise, as a matter of law, to a common intention constructive trust of the properties in the Portfolio. He emphasised:

'..In *Grant v Edwards*, both Nourse LJ and Mustill LJ considered that the detriment had to be referable to the common intention not the property by the way they formulated the question '

As regards quantification, he said the proportionate way to satisfy the equity was by a 50% interest in the Portfolio (apart from one category of the Properties). M had assured her that she would have such an interest and although it is possible that there was an imbalance between their initial financial contributions, W's evidence (which was accepted) was that: "I gave him all that I had." Moreover, the detrimental reliance which she placed on M's assurances thereafter was lasting and substantial. Finally, it would be unjust now to deny W her full share in the Portfolio when its value reflects the rents and profits which M reinvested in it and which belonged to both parties equally.

Rowland v Blades [2021] 2928 (Ch)

- Joint ownership case
- M and W were not married
- Purchase of a weekend home
- During the conveyancing, they signed a joint ownership form (indicating ownership as joint tenants)
- Panel 10 of the TR1 was initially not filled in; and then filled in as joint tenants
- M paid the whole price (without a mortgage. M and W had no joint bank account and did not pool their resources

Rowland v Blades

- The judge held that the property was held 50/50
- The date of completion was the critical time.
- The parties could have formed a different intention after that but there was no evidence that they had. M could not point to any post- acquisition agreement to this effect and could not claim that expenditure incurred by M was in reliance on any such agreement and to his detriment.
- In the absence of such an agreement, the court should be slow to infer from conduct alone that the parties intended to vary existing beneficial interests established at the time of acquisition: see e.g. *James v Thomas* [2008] 1 FLR 1598 at §24.

Rowland v Blades:

- The judge said:
- ' In one sense, the outcome is a harsh one for Dr Rowland who contributed the whole of the purchase price in acquiring a country house to be used as a weekend and holiday retreat by a couple who each had their own properties and who never saw fit to pool their resources. Before Stack v Dowden , the result may have been a different one and I have not overlooked the fact that in Stack v Dowden the Court actually departed from the presumption of joint beneficial tenancy principally on the basis that the contributions to the purchase were unequal and the parties had never pooled their resources. However, that was a case where the Court had to fill the void left by the complete absence of any indication of what the parties intended. In the present case, there was very clear evidence as to the advice given to the parties at the time of the transfer and what they did in response to that advice.....Whatever I may think about the fairness of the result is irrelevant; Stack v Dowden and Jones v Kernott marked a decisive break and move away from the presumed resulting trust in this context and as Baroness Hale famously said in Stack v Dowden.'

Hudson v Hathway [2022] EWHC 631 (QBD)

- Joint ownership case
- Property purchased as a home for M and W (unmarried) in 2007, with no declaration of trust
- M and W split up
- Since 2011, the parties had sporadic email discussions about their post separation financial arrangements.
- In 2013, M and W agreed terms set out in emails under which she would have the house. The agreement, however, did not satisfy the relevant formalities for transferring legal title, making a valid declaration of a trust of land or creating a valid contract for the sale or disposition of an interest in land. But, these formality rules would not affect a change of beneficial ownership which arose by CICT (or proprietary estoppel).
- Mr Hudson sought an order for the sale of Picnic House, with equal division of the proceeds.

Hudson v Hathway:

- The lower court found that there was a clear agreement and common intention that W would have the entire equity in the property. The judge considered that W had to show detriment and that she had done so by desisting from making claims against assets in the sole name of M.
- The sole ground of M's appeal was that the judge had been wrong to decide that sufficient detrimental reliance or change of position was made out.

Hudson v Hathway:

- On the issue of detriment, the appeal held emphasised the manner in which a constructive trust is established, and the kind of evidence that the court will require for it to be established, was not necessarily the same in a sole name case and a joint names case.
- Following a survey of the authorities, the judge concluded that the notion of detriment had played no part in the rebuttal of the Stack presumption. Hence, in the domestic consumer context an express agreement as to beneficial shares would suffice without the need to establish separately that the beneficiary had changed position in reliance on the promise.
- If detrimental reliance or change of position had been adjudged necessary, the appeal judge considered whether the defendant had sufficiently acted to her detriment or changed her position in reliance on the agreement.

Fattal v Fattal [2022] EWHC 950 (Ch)

- Sole ownership case involving 2 brothers
- Property bought in 1972 by B1, in his sole name, as a home for the 2 brothers. B1 moved out in 1990
- The brothers conducted various businesses together and had complicated financial arrangements (often directed at minimizing tax)
- Property transferred to B2 in 2014 'not for money or anything of value'
- B1 claimed that he mistakenly thought B2 had paid £400,000 for the flat
- B2 claimed that he had in fact paid £400,000 for the flat

Fattal v Fattal:

- The parties agreed that the applicable law in relation to constructive trusts was to be found, primarily, in *Stack v Dowden* [2007] 2 A.C. 432 and *Jones v Kernott* [2012] 1 A.C. 776 .
- The starting point, where there is sole legal ownership, is sole beneficial ownership.
- The onus was, therefore, upon B2 to show that the beneficial ownership was different from the legal ownership. This could be done by showing that the parties had a different common intention when the property was first acquired or at a later date. This was not a task to be lightly embarked upon and did not succeed on the present facts.
- B1 had paid for the property and its subsequent refurbishment. The mortgage was in B1's sole name and there was no evidence that anyone other than B1 had paid the mortgage instalments. He also had redeemed the mortgage with his own money. There was not a shred of credible evidence to suggest that B2 had made any contribution to the costs of acquisition or refurbishment.
- There was no common intention to share the property beneficially whether from the outset or at any stage subsequently and there was nothing in the whole course of dealing between them that would warrant any such inference. The fact that William was content to treat the property as a home for himself and Elias could not, without more, give rise to a constructive trust. There was no common intention and no detrimental reliance on the strength of any common intention.
- B2 did not acquire a beneficial interest at the time of acquisition or, indeed, subsequently.

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Jeremy Hall & Desmond Kilcoyne

TOLATA CASE UPDATE

OCCUPATION RENT

- Bailey v Dixon. [2021] EWHC 2971 (QB)

Murphy v Gooch [2007] EWCA Civ 693

- Ali v Khatib [2022] EWCA Civ 481

French v Barcham [2008] EWHC 1505 (ch)

- Rowland v Blades [2021] EWHC 1672 (Ch)

TOLATA UPDATE 2

Rectification

- Ralph v Ralph [2021] EWCA Civ 1106

Evidence of Agreement / Assurance

- Pickering v Hughes [2021] EWHC 1672