

TOLATA and Common Intention Constructive Trusts:

The Basics

Paul Fuller: Hello everyone, and a very warm welcome to 42 Bedford Row Barristers' mini podcast series entitled '*Trust Issues - the Law and Practice of Trust*', where the members of 42 Bedford Row's Business and Property team consider the purpose, application, and features of the Trusts of Land and Appointment of the Trustees Act 1996.

My name is Paul Fuller and I'm a Barrister here at 42BR Barristers, and I specialise predominantly in business and property matters.

Tom Gilchrist: Hi, I'm Tom Gilchrist. I specialise both in financial remedies, so money on divorce, as well as cohabitees, trusts, wills and estates, that kind of thing.

PF: And today, Tom and I are going to be discussing Common Intention Constructive Trusts, which in very simple terms are a species of trust, which are established and developed by common law principles where trusts of land are created on the basis of parties common intention.

What kinds of cases do we often see issues relating to Common Intention Constructive Trusts arising?

TG: Well, the two main situations tend to be cohabitees and romantic relationships, not always, but usually when at the end of the relationship there's a dispute over ownership or shares in the property and since they're not married, divorce law can't help them. And the second one also appears to be in family situations, whether it's siblings, cousins, parents, and their children, sometimes there are situations where you have multiple members of the family investing in one or more properties and issues arise out of that when someone wants to sell or quantify their interest in those properties.

PF: Thanks for that, Tom. So, absolutely, and as you touched on there, there's broadly two types of dispute that can arise out of any of those contexts in relation to the property.

The first question is, isn't it, very often whether the parties have a beneficial interest in the property, and separate to that, but also obviously intrinsically linked to that, to the extent that the parties do have a beneficial interest in the

property, the extent of their respective beneficial shares in the property, what is the test that the courts will apply in considering and answering those questions in these types of cases?

TG: The starting point essentially is that equity follows the law. The idea behind that is whatever it says on the title documents, usually known as the TR1, what that says is assumed to be what the actual, or the beneficial, interest in the properties are, but sometimes that presumption can be rebutted if you can show that there is a Common Intention between the alleged beneficial owners that the actual or the beneficial property, the share of that is different to what that document says.

Paul, what kind of situations do you think arise mainly in relation to this Common Intention? In the form of sometimes multiple people are on the property, the TR1, but sometimes it's only one person.

PF: One person that's on the TR1? Well, so that's what I guess we would describe as a sole ownership case.

So as you say, the starting position is always that equity follows the law. So where the parties are, or there is more than one party that is noted as a registered proprietor of the property, then equity will follow the law and unless it can be rebutted, then the position will be that the parties that are legally noted as having an interest in the property will have a beneficial interest in the property, and unless there's some express declaration, otherwise, then their beneficial interest in the property will be equal.

But, in the case of a sole ownership case, that's where just one party has the legal interest, the legal registered estate in the property, another party can come along and assert that they, notwithstanding that it's a sole ownership case, that they have a beneficial interest in the property. And the way that they can do that is by arguing that there is a Common Intention Constructive Trust.

TG: And how do they argue that there's Common Intention between a person who's not on the title deeds, not the registered owner and the registered owner?

PF: Well, broadly in, in one of two ways, either they will argue that there was some express agreement between the legal owner and themselves that they should have a beneficial interest in the property, notwithstanding the fact that they're not

registered on the title, or in the absence of some express agreement, that having regard to the whole course of dealings between the parties that the court should find that there was subjectively a Common Intention that they should have a beneficial interest in the property.

So Tom, having regard to the ways in which parties could argue that there is a Common Intention Constructive Trust, either by express agreement, whether or otherwise, between the parties or in the absence of an express agreement having regard to the whole course of conduct between the parties, giving rise to an inference that there was a Common Intention, what should practitioners look to when trying to evidence and plead cases in support of a Common Intention Constructive Trust as regards to establishing that there was a Common Intention that the parties should each have a beneficial interest in the property as opposed to terminating their respective shares?

TG: In the single property owner case where another person is trying to argue that they have a beneficial interest, lots of different ways to evidence it, when looking into pleading it in court documents, often probably the easiest one to track, usually with primary documents is that of money. If the party was not on the registration document of the property, if they're spending money on the mortgage, if they're spending money, on improvements, repairs, et cetera, contributing financially, also, in terms of the express agreement, often, I've certainly seen cases where there are emails and texts and WhatsApps in this day and age relating to references to **our** house, **our** property, it's just things like that that shows that it's not just one person's house and the other person is living in it. It's some kind of joint enterprise, but joint contribution not necessarily always has to be equal in the contribution, but something that you are showing that both of you are treating this property as if it is **both** yours.

PF: I often think it's useful and there are parallels when pleading a Common Intention Constructive Trust case based on an agreement to consider how you would go about pleading a case in contract, and in particular, as it says in the civil procedural rules under Part 16 when pleading an oral contract.

So it's useful to ask your client to cast their mind back to conversations that may have been had either a single conversation or various conversations. Ask your

clients to try to remember where they were, who else may have been present. Context is everything. If they can't remember words used, and try to remember the gist of words used and so on and so forth and to try to plead this

stuff with as much specificity as one can in terms of if there hasn't been an express agreement, and rather the claimant, the applicant, is inviting to court to infer that there's been subjectively a Common Intention, that there was a Common Intention between the parties that they would each have a beneficial interest in the property based on the whole course of dealings between them.

Baroness Hale in *Stack v Dowden* observed that the context is everything and that many factors can be taken into account other than just financial contributions. And you've touched upon this already, Tom, those include advice or discussions between the parties at the time of the purchase, the reason that the property was acquired, if it was acquired in joint names, in their joint names but in any case, the reason it was acquired, the purpose for which it was acquired, in particular, having regard to the relationship between the parties, whether they had children for whom they both had responsibility to provide a home.

Again, you touched upon this, Tom, how it was financed, contributions towards purchase prices, deposits, and so on and so forth. How the parties arranged their finances at the time of the purchase and afterwards, and how they discharged outgoings in relation to the property.

So those are all factors that one should have regard to when advising and pleading a case in relation to Common Intention Constructive Trust as regards to establishing that there was a Common Intention Constructive Trust, and that both parties, or all parties, had a beneficial interest in the property.

Tom, how would the court then approach the question as to whether, or the extent to which once it's established, that the parties do all have a beneficial interest in the property? The question as to their respective beneficial shares, and the size of their respective, beneficial shares, in the property.

TG: There are different ways the court will evaluate that, and it all depends on essentially what happened between the parties. There's no presumption of joint beneficial ownership. If you do plead and it's accepted that there is some form of beneficial ownership, that doesn't automatically mean it's 50/50, if there are two

people, doesn't automatically mean one third, one third if there are three and so cetera.

And so, when either the original intention has changed or if at the outset they didn't intend the parties to both have beneficial interests, but they now have, then

the court essentially says the parties are entitled to a share, which the court will consider fair, having regard to the whole course of dealings between the parties in relation to the property, and that obviously is a bit of a slightly nebulous idea. What is fair? Paul, in this context, what is fair?

PF: Well, again, the court will have regard, much in the same way as it does to the question as to whether there was a Common Intention Constructive Trust, absent an express agreement between the parties to the whole course of dealings.

The distinction when the courts moved on to the second stage of the test in Common Intention Constructive Trust cases though between inferring that there was a Common Intention Constructive Trust based on the whole course of dealings and imputing what is a fair distribution of the party's beneficial interest in the property is that distinction between what is meant by inferring and imputing.

So in the case of the first stage of the test where the court is inferring that there was Common Intention Constructive Trust the court can look at the whole course of dealings, but ultimately has to arrive at a conclusion that, as a matter of fact, subjectively the parties did intend that they should have a joint beneficial interest in the property.

When then asking the question and 'what are the party's respective shares?' the courts will always start with the question, 'Well, was that agreed?' And if it was agreed, then that really is the end of the matter, and as we've already discussed equity follows the law, so where the parties are both jointly noted on the title of the property, they both have a legal interest in the property, then absent some express declaration of trust, it'd be very difficult to persuade the court that the party's interest in the property, beneficial interest in the property, or otherwise than equal.

But, in sole ownership cases, absent some express declaration of trust, the courts can impute having regard to the whole course of dealings between the parties

proportions, which it considers are fair, and the distinction there between what the court does when it imputes to what the court does when it infers, is the court doesn't have to find that there was actually a Common Intention between the parties.

What the court does in those circumstances is it says, well, the parties clearly didn't turn their minds to this question, so what, having regard to the whole course of dealings do we the court consider is fair? Something else which I think is important to note is that once it's established, in particular with regards to some agreement between the parties or where equity follows the law, so both parties are legally noted on the title to the property, it would be very difficult to persuade the court that the parties respective beneficial interest in the property has shifted since then and in Dowden, Barness Hale noted that the burden is on the person seeking to show that the parties did intend their beneficial interest to be different from their legal interests. And it's not a task that the court will embark on lightly, and that in joint name cases, it's unlikely to lead to a different result than equity follows the law.

Its saved for very unusual cases, but Barness Hale went on to say that there may though be reasons to conclude that whatever the party's intentions were at the outset that they've changed. And she cited one example where one party has financed or indeed constructed themselves an extensive and substantial improvement to the property so that what the parties must have intended at the outset, or rather they did intend at the outset must have changed as a result of that substantial development and improvement to the property. But the burden is really very high on the party seeking to persuade the court that those intentions have shifted over the course of time.

TG: We've also got the issue of detriment, detrimental reliance.

So I think it was Hudson v Hathaway from 2022, which somewhat changed the landscape or, arguably, made the landscape more clear. Essentially saying that, well, we've got all these shares, we've got all these Common Intentions, we've got a court either imputing or inferring the degree of the share, but there still needs to be some kind of detrimental reliance to get the case home.

PF: Yes, you are quite right, Tom. For some time there was a debate around whether detrimental reliance is a necessary ingredient to succeed in any claim founded on the basis of an alleged Common Intention Constructive Trust, it's now settled that detrimental reliance is indeed a requisite element, an absent, detrimental reliance a claimant will not succeed in their actions. So again, this is a really important point for practitioners to turn their mind to when considering client's cases, advising clients, and ultimately pleading clients cases.

How has the claimant, who is asserting a Common Intention Constructive Trust giving rise to an alleged beneficial interest in a property, whether that's an express, Common Intention Constructive Trust, or the claimant is inviting the court to infer a Common Intention based on the party's whole course of dealings.

How has that claimant relied upon that Common Intention Constructive Trust to their detriment? Make sure that you ask that question, make sure that you proof your client's evidence and make sure that that requisite element is clearly and specifically pleaded within any claim for a declaration under the Trust of Land and Appointment of Trustees Act 1996 that your client has a beneficial interest in the property arising out of the Common Intention Constructive Trust ensure that detrimental reliance is properly addressed because absent that and an application to amend, then the claim will be in some difficulty or indeed arguably bound to fail.

TG: One of the questions asked is, what is an example of a detrimental reliance? I always think the most common and obvious one, but not the only one, is for example, investing money into the property. Whether it's for the mortgage deposit, whether it's for an extension, that tends to be the most obvious example, essentially, the argument being there, 'well, I could have used that money somewhere else, invested it, and therefore I've lost interest in a term deposit somewhere, and therefore I've detrimentally relied on this by giving you my money'. Have you seen any other examples of detrimental reliance?

PF: I have, so I had a case recently where my client cohabited with their partner, they had children together and my client took on more work. They took on more work to fund renovations and developments, substantial renovations and developments, to the property and my client's partner stayed behind, worked less and carried out the work on the property. So each was contributing, and it could be argued that my client's contribution was still a financial contribution in the

sense that she was carrying out or taking on more work in her career than she otherwise intended to.

And indeed it was the case that that was a firm and settled decision to take on more work. They had young children and in an ideal world, my client wanted to spend more time with her young children, but she took a promotion, she took on more hours, she travelled more as a result of that and that was as a result of an agreement with her former partner that they would carry out the renovations and the extension to the property and that that would need to be funded and the work would need to be done, and that's how it would be done.

So in that case, financial contribution was pleaded but so too was the fact that she had taken a promotion, that she was traveling more for work, that she was at home less, she was spending less time with her children and that's a slightly different species, a slightly different creature of detrimental reliance, but nonetheless was detrimental reliance.

TG: I've seen an example certainly being argued that one party gave up their secure council tenancy to move in with the other party and contribute to the house. And so while it wasn't financial, that's obviously a detrimental reliance to lose one's secure council tenancy.

So it does come really in different shapes and forms, doesn't necessarily have to be just pure money.

PF: Quite, and that's a very common scenario that we see where cohabitants often in a romantic relationship, will move into the trust property as the first home that they live in together.

TG: Thank you all very much for listening, and thank you, Paul Fuller, for joining me to discuss Common Intention Constructive Trusts.

Please do join us for the next episode of *Trust Issues*, which hopefully will be released next month.

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Thank you very much.

PF: Thank you, Tom. Thank you everyone. Goodbye.