

# Co-ownership Trusts in the United Kingdom— The Denning Legacy

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The recent House of Lords decision in *City of London Building Society v. Flegg*<sup>1</sup> and the enactment of the Insolvency Act 1986,<sup>2</sup> have done much to relieve the agony of the law student faced with the complicated dossier of the law relating to co-ownership of property. However, even though a measure of clarity now exists in relation to the effects of co-ownership on the post-ownership rights of the parties, when it comes to analysing the situations in which co-ownership may arise in the first place, the student finds himself surrounded by a mass of conflicting *dicta* and confusing terminology.

Questions concerning the ownership of shared property occur most frequently in proceedings brought by one ex-cohabitee against the other,<sup>3</sup> especially if, as is usually the case, the house represents the parties' only capital asset. As will be seen below, when the equitable interests in the property are expressly declared in writing, there is little room for debate. Unfortunately, however, in many cases of shared occupation, the property deeds are concerned only with legal title. Legal title may reside jointly with the parties, in one partner only, or with one partner and a third person,<sup>4</sup> yet the location of legal ownership may not be decisive of beneficial ownership. It is now axiomatic that a person in whom the legal title is not vested may be entitled to an equitable interest in the property by virtue of a resulting or a constructive trust.<sup>5</sup>

However, whilst this may fairly represent the principle, the practicalities are altogether more complicated. When examining the acquisition of beneficial interests in a co-ownership situation, the student has to find answers to two

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1. [1987] 3 All E.R. 435.

2. Sections 336-338, re-enacting ss.171-173 Insolvency Act 1985.

3 The wide powers of s.24 of the Matrimonial Causes Act 1973 are always available to secure relief for parting spouses. While the greater part of the business of the courts will be to unravel the domestic arrangements of unmarried cohabiting couples, in those cases where the divorce jurisdiction is not available, identical considerations will apply to husband and wife: see, e.g., remarriage of claimant, s.28(3), M.C.A. 1973; moral objection to divorce, *Shinh v. Shinh* [1977] 1 All E.R. 97.

4. *Bernard v. Josephs* [1982] 3 All E.R. 162; *Burns v. Burns* [1984] 1 All E.R. 244; *Grant v. Edwards* [1986] 2 All E.R. 426. Although it would be rare in cases concerning co-habitees, there is no reason why a claimant may not contend that beneficial ownership resides in only one of the joint legal owners.

5. *Burns v. Burns*; *Grant v. Edwards supra*, and cases cited therein.

fundamental questions. First, how are such interests acquired? Secondly, what type of legal mechanisms exist, or are employed, to give effect to these property rights? The first is a “real world” problem – when will Mrs A or Miss X have a proprietary interest, and therefore a right to a cash sum on sale, in the property she once shared with Mr A or Mr Y. It is, crudely, what does the party claiming the interest have to prove in order to establish that interest? The second is primarily a theoretical problem which, as yet, has not had any “real world” implications.<sup>6</sup> Given that the claimant has established the “correct” criteria, what kind of trust arises in his or her favour? Is the claimant to be regarded as a beneficiary under an express, resulting or constructive trust? Does it matter?

Unfortunately, it is not easy to extract an answer to either of these questions from the many reported cases concerning the existence of co-ownership interests. The decisions of the Court of Appeal in *Goodman v. Gallant*<sup>7</sup> and *Burns v. Burns*<sup>8</sup> were thought to have settled the first issue, or at least to have returned the law to its pre-Denning orthodoxy.<sup>9</sup> However, the traditional trust law approach favoured in *Burns* must now be questioned in the light of the decisions in *Midland Bank v. Dobson*<sup>10</sup> and *Grant v. Edwards*.<sup>11</sup>

Furthermore, when there is no express trust on view, the courts have been content to acknowledge that the claimant has established an interest under “a resulting or constructive trust”, or “a resulting implied or constructive trust”. The two recent cases of *Passee v. Passee*<sup>12</sup> and *Turton v. Turton*<sup>13</sup> are just the latest examples of a general failure to differentiate between these two concepts when discussing the basis of the applicants alleged proprietary rights in the disputed property. Moreover, even if this failure is indicative of the fact that the rights and duties of the parties are identical irrespective of the label attached to the trust, this does not mean that the requirements for the establishment of the co-ownership trust are identical for the “resulting” and “constructive” varieties. In other words, the type of trust found by the court may be a reflection of different enabling criteria, and the failure to differentiate between the type of trust, may be a reflection of the failure to distinguish between the various situations in which such trusts may arise. This connection between the practical and conceptual issues is the reason why the student needs answers to both of these fundamental questions.

6. See in a similar vein, *Pettit v. Pettit* [1970] A.C. 777, at pp.794-95 per Lord Reid.

7. [1986] 1 All E.R. 311.

8. [1984] 1 All E.R. 244.

9. See, e.g., *Hazell v. Hazell* [1972] 1 W.L.R. 301; *Eves v. Eves* [1975] 1 W.L.R. 1338; *Hargrave v. Newton* [1971] 3 All E.R. 866.

10. [1985] F.L.R. 314.

11. [1986] 2 All E.R. 426.

12. *The Independent*, 10th July 1987.

13. [1987] 2 All E.R. 641.

### Situation 1: expressly declared trusts

It is now settled beyond doubt that where a conveyance contains an express declaration as to the beneficial interests of the parties, there is no room for the doctrine of resulting or constructive trusts.<sup>14</sup> The expressly declared trust and beneficial interests prevail, irrespective of each party's financial contributions to the acquisition of the property and their conduct in relation to it. The only exception to this principle is where the declaration in the conveyance has been procured by fraud or mistake, and, even then, in order to obtain rectification of the original instrument, the applicant would have to discharge a heavy burden of proof.<sup>15</sup>

It should be noted, however, that in order to exclude the possibility of resulting or constructive trusts, the conveyance must contain a declaration of the beneficial interests subsisting in the property. It is not enough that the conveyance is, without more, "to X and Y as joint tenants" or even "to X and Y as tenants in common", for this operates merely to bring the statutory trusts for sale into play<sup>16</sup> and says nothing of the beneficial interests existing behind those trusts. Indeed, the imposition of statutory trusts has no effect on the court's power to determine the property rights of co-owners. The equitable jurisdiction operates in all situations where no beneficial interests are declared in writing, both when the legal estate is vested in one person only and when vested in two or more persons jointly. Only an express declaration of the beneficial interests will oust the possibility of a resulting or a constructive trust.

Obviously, the exclusion of the resulting and constructive trust doctrine only in those cases where there is an express declaration of the beneficial interests, gives the court freedom to vary the property rights of couples in a large number of cases. To what extent the courts have utilised this freedom, often in the pursuit of social justice, is considered below.

### Situation 2: immediate resulting trust

Where at the time of acquisition of the property each party makes a direct financial contribution to the purchase price, the property will be held on a resulting trust in beneficial interests proportional to the scale of the respective contributions, irrespective of who holds the legal title.<sup>17</sup> There is nothing new or remarkable in this result, it being an application of well settled equitable principles. The resulting trust arises because it is presumed that it is the intention of the parties that they should have an interest in the property commensurate with their investment, even though the property may be transferred to one person only.

14. *Goodman v. Gallant* [1986] 1 All E.R. 311; *Turton v. Turton* [1987] 2 All E.R. 641.

15. *Goodman v. Gallant* [1986] 1 All E.R. 311, at p.319.

16. Sections 34, 36, L.P.A. 1925.

17. *Bull v. Bull* [1955] 1 All E.R. 253; *Cowcher v. Cowcher* [1972] 1 All E.R. 943. See also, [1986] 2 All E.R. 244, at p.431h-j *per* Nourse LJ.

It is an example of the “presumed resulting trust” identified by Megarry J in *Re Vandervell No. 2*,<sup>18</sup> and can be rebutted by evidence that the money was paid by way of gift or loan.<sup>19</sup> In order to distinguish this from Situation 3 below, it can also be known as the immediate resulting trust – because it operates immediately on acquisition of the property, for that is when the claimant makes the financial contribution, and that is when the beneficial interest results to him or her.

It must be remembered that this is one of the less complicated situations with which the court has to deal, and would not normally present much difficulty. In most cases coming before the court, however, the claimant will not have made any contribution to the initial purchase price, but will be claiming an interest by virtue of subsequent events. Indeed, the latter is all the more likely, now that the great majority of domestic properties are purchased by way of instalment mortgages.

### Situation 3: common intention – a cumulative resulting trust

When the legal title to property is vested solely in one person, the presumption is that the proprietor is also the sole beneficial owner. We have seen above how this can be displaced in favour of a person contributing directly to the cost of the property at the time of purchase. However, sole beneficial ownership of property can also be displaced if the claimant can establish that it was the common intention of the parties that he, or more usually she, was to have an interest.<sup>20</sup> An express oral declaration of this common intention is dealt with in Situation 4 (ii) below. The more frequent plea is that the claimant is to have a beneficial interest in the property by virtue of a common intention which can be inferred from the conduct of the parties over a number of years. What type of conduct may give rise to this common intention, and what type of trust arises if it is successfully established, is a matter of some debate. The leading authorities of *Pettitt v. Pettitt*<sup>21</sup> and *Gissing v. Gissing*<sup>22</sup> are well known and would seem to suggest that the answer is to be found by an application of traditional property law principles. However, this merely begs the question. The core of the dispute is whether “traditional property law principles” authorise the court to alter the property rights of couples in order to achieve a solution that is fair and just in all the circumstances, or whether they restrict the court to well worn equitable paths.<sup>23</sup>

In *Burns v. Burns*,<sup>24</sup> the unmarried Ms Burns claimed a beneficial interest in the family home she had shared with the defendant for seventeen years, but which had been acquired by the defendant in his name only. There was no express oral

18. [1974] Ch.269.

19. *Tinker v. Tinker* [1970] P.136; *Hussey v. Palmer* [1972] 3 All E.R. 744. But see also, *Barclays Bank Ltd. v. Quistclose Investments Ltd.* [1970] A.C. 567.

20. *Pettitt v. Pettitt* [1970] A.C. 777; *Gissing v. Gissing* [1971] A.C. 886.

21. [1970] A.C. 777.

22. [1971] A.C. 886.

23. The Court of Appeal under the leadership of Lord Denning MR were certainly of the former opinion: see, *supra* n.9.

24. [1984] 1 All E.R. 244.

declaration that the plaintiff was to have an interest in the property, and she had made no contribution to the initial purchase price or to subsequent mortgage repayments. She did perform routine domestic duties and did contribute to household expenses, though the defendant did not require her to do so. The Court of Appeal refused her application. In their judgments, Fox and May LJ concluded as follows:<sup>25</sup>

(i) A common intention that the claimant is to have a beneficial interest can be inferred when the claimant has made substantial financial contributions which are referable to the acquisition of the property. These financial contributions may be “direct” – payment of mortgage instalments – or “indirect” – payment of other household expenses so that the partner’s income is free to pay mortgage instalments. However, the contributions must be referable to the acquisition, so that routine domestic expenditure is not sufficient to found an interest.<sup>26</sup> It may be enough to pay the water rates, but not to pay the milkman.

(ii) The Court cannot infer a common intention simply on the basis of normal household and family duties performed by either party. Conduct of this nature is not sufficient. In this respect *Hall v. Hall*<sup>27</sup> must be regarded as wrongly decided. The Court has no power to alter the property rights of unmarried couples outside the scope of the law of trusts. However harsh this may be, the remedy lies with Parliament.<sup>28</sup>

The court in *Burns v. Burns*<sup>29</sup> expressed a desire to return to the spirit of *Pettitt* and *Gissing* and to what they perceived to be traditional trust law principles. In so far as the judgments place great emphasis on financial contributions referable to the acquisition of the property, the interest of the claimant would appear to exist behind a cumulative resulting trust – the claimant gains an interest proportional to the financial contributions over those years during which the property was purchased. The situation is very similar to Situation 2 above. In this case, however, acquisitive payments are deferred and accumulate over a period of time.

#### **Situation 4: common intention – constructive trusts**

In *Grant v. Edwards*,<sup>30</sup> the court was of the opinion that all beneficial interests established by virtue of a common intention existed behind a constructive trust,

25. Waller LJ was less enthusiastic about both the reasoning and the result. He preferred the approach of Lords Reid and Diplock in *Pettitt*, whereby the court is able to impute or deem a common intention to the parties, even if there was none, if fair and reasonable people would have formed such had they directed their minds to it. Although this would enable the court to adjust property rights more freely, this method was rejected by the majority in *Pettitt*, and retracted by Lord Diplock in *Gissing*. Waller LJ reluctantly accepted that the claim of Mrs Burns must fail.

26. [1984] 1 All E.R. 244, at pp.252-253, 256-258.

27. [1981] 3 F.L.R. 379.

28. [1984] All E.R. 244, at pp.255, 265.

29. *Ibid.*

30. [1986] 2 All E.R. 426.

because, “equity will not allow the defendant to deny that interest and will construct a trust to give effect to it.”<sup>31</sup> In order to establish the constructive trust, the claimant must prove a common intention that she was to have an interest and must have relied to her detriment upon it. The requirement of detriment is vital, given that the court cannot act upon an unsupported common intention. Equity will not assist a volunteer. The nature of the detriment may be, and often is, financial contributions, but once the common intention is established it can be satisfied by any conduct “on which [the claimant] could not reasonably be expected to embark unless she was to have an interest in the house.”<sup>32</sup> In all cases, the detriment must be referable to the common intention; but, once the latter has been established, any act done by the claimant to her detriment relating to the joint lives of the parties, will be taken by the court to be so referable.<sup>33</sup>

The requirements that the claimant must act to her detriment in order to establish an interest seems first to have arisen in *Midland Bank v. Dobson*.<sup>34</sup> In that case, Fox LJ reluctantly accepted the trial judge’s conclusion that there was a common intention that Mrs Dobson should have an interest, but refused to give effect to it by way of resulting or constructive trust because there had been no detrimental reliance.<sup>35</sup> However, two further points are worthy of consideration.

First, *Dobson* is not a case involving financial contributions and should not be regarded as authority for the view that a constructive trust arises in such circumstances. Secondly, *Dobson* is far from being a typical case. Mrs Dobson was not attempting to enforce an interest against her husband, but rather, with his support, to deny possession of the property to the bank to whom it had been mortgaged by Mr Dobson. Once the Court of Appeal had been hamstrung by the trial judge’s finding of common intention, albeit on uncorroborated evidence,<sup>36</sup> a literal reading of *Pettitt* and *Gissing* would have ensured that Mrs Dobson had gained an interest. However, this would have been an entirely unwarranted application of co-ownership principles, and it would have enabled the parties to defeat<sup>37</sup> the bank’s claim merely by asserting that they had had a common intention that the property be co-owned beneficially. However, Fox LJ found a way to avoid the wife’s claim by accepting the bank’s submission that detriment was required in order to establish an equitable interest. Once this had been

31. *Ibid.*, at p.431.

32. *Ibid.*, at p.433.

33. *Ibid.*, at p.439. The preceding analysis is very similar to the “interest consensus” identified by Goff J in *Re Densham* as giving rise to a constructive trust: [1975] 3 All E.R. 726.

34. [1985] F.L.R. 314.

35. *Ibid.*, at pp.320-321.

36. “I think that assertions made by a husband and wife as to a common intention formed 30 years ago regarding joint ownership, of which there is no contemporary evidence and which happens to accommodate their current need to defeat the claims of a creditor, must be received by the courts with caution”: *per* Fox LJ, *ibid.*, pp.317-318.

37. The wife had signed a letter of consent postponing any interest she may have had in the house, but alleged that this had been procured by undue influence. The Court of Appeal did not go on to consider this point.

acknowledged, the case could be disposed of with ease. Mrs Dobson had never relied, to her detriment, on the common intention.

The danger of using *Midland Bank v. Dobson*<sup>38</sup> as authority for a general restructuring of the principles behind the existence of co-ownership rights should be apparent. However, “detriment” was seized upon in *Grant v. Edwards*,<sup>39</sup> with the result that the law relating to the acquisition of co-ownership rights was reassigned to the liquid world of the constructive trust in the following manner:

(i) A common intention that a person who is not the legal owner is to have a beneficial interest may be inferred from direct or indirect financial contributions to the purchase price (*Burns v. Burns*). Moreover, the payment of these financial contributions by the claimant is also to be regarded as the detriment which is necessary to establish the constructive trust in his or her favour. The requirement of detriment has not been a live issue in earlier cases because no distinction had been drawn between conduct necessary to raise the common intention, and conduct in reliance on it. In financial contribution cases, payment satisfies both criteria; it both indicates the common intention and constitutes the required detriment. The emphasis on the search for a common intention should not obscure this fact.<sup>40</sup>

(ii) A common intention that a person who is not the legal owner is to have a beneficial interest may take the form of an express oral assurance given by the legal owner to that effect. If this is established to the satisfaction of the court, the claimant must go on to establish detriment. That detriment may be, but need not be, financial contributions.<sup>41</sup> *Eves v. Eves*<sup>42</sup> is of this class. In *Grant* itself, there was such an oral undertaking and the detriment was financial. In *Eves* the detriment consisted of the physical labour exerted by the claimant in relation to the construction of the property, after the defendant had assured her that she was joint owner.

(iii) It is open to debate whether a common intention may be inferred from conduct other than the payment of financial contributions. The analyses of Nourse and Mustill LJJ would certainly accommodate such an approach,<sup>43</sup> and Brown-Wilkinson VC seems to regard this as a distinct possibility.<sup>44</sup> The claimant would, of course, still be required to establish that she had suffered a referable detriment. *Burns v. Burns*<sup>45</sup> would appear to weigh against this possibility.<sup>46</sup>

38. [1985] F.L.R. 314.

39. [1986] 2 All E.R. 426.

40. [1986] 2 All E.R. 426, at p.437.

41. *Ibid.*, at p.439

42. [1975] 3 All E.R. 768.

43. [1986] 2 All E.R. 426, at pp.434, 435.

44. *Ibid.*, at p.437.

45. [1984] 1 All E.R. 244.

46. *Ibid.*, at p.254.

This then, is the framework provided by *Grant v. Edwards*.<sup>47</sup> All cases of common intention give rise to a constructive trust in favour of the person acting to his or her detriment on it. The matter is, indeed, very much tied to the recent explosion in the use of proprietary estoppel.<sup>48</sup> However, this result is not surprising when we consider that *Grant* involved an *express* promise of a beneficial interest. It is well settled that equity will intervene in analogous cases,<sup>49</sup> and where co-ownership is concerned, the appropriate mechanism is the conscience-binding constructive trust. On the other hand, it is equally clear that the court in *Burns* regarded the financial contribution scenario as a matter of resulting trust. The emphasis on financial contributions in that case would seem to have guaranteed this. This perhaps is the key. The court in *Burns* was of the opinion that a common intention inferred from conduct could only be raised on the back of referable financial contributions. In other words, where there were no express assurances financial contributions were the only way for a party to gain an interest in property – traditional trust law. That being so, there is no need and no desirability to bring the constructive trust into play. Financial contributions give rise to a resulting trust. However, it would be wrong to ignore an express oral assurance given by the legal owner to his or her co-habitee that the latter was to have an interest in the property. Indeed, courts of equity have not been slow to protect the promisee in related cases. Therefore, express assurances, when relied upon, give rise to a constructive trust in favour of the claimant (*Grant v. Edwards*, *Eves v. Eves*). It is only when we presume that all co-ownership cases are of the same genus, that the authorities conflict and the student becomes confused.

This neat division is upset, however, as soon as the possibility exists that other kinds of conduct – such as building the house – may be evidence of the common intention necessary to support a beneficial interest. By analysing co-ownership as common intention plus detriment giving rise to a constructive trust, we are accepting and accommodating this possibility. The court in *Grant* was prepared to allow for this, whereas the court in *Burns* was not. There is no necessary contradiction between the reasoning in *Burns v. Burns* and *Grant v. Edwards*. In essence, they desire the same goal – the protection of a potential co-owner of property against inequitable conduct on the part of the legal owner.<sup>50</sup> They utilise different concepts because they concern essentially different situations. An express oral assurance that X is to have a beneficial interest in property can never give rise to a resulting trust, and equity will be satisfied by the imposition of a constructive

47. [1986] 2 All E.R. 426.

48. [1986] 2 All E.R. 426, at p.439 *per* Brown-Wilkinson VC. See also the combination of constructive trust and proprietary estoppel in the startling decision *Re Basham* [1987] 1 All E.R. 405.

49. See, *e.g.*, the principle of promissory estoppel where the promisor agrees to forgo existing rights: *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] KB 130; *Crabb v. Arun District Council* [1975] 3 All E.R. 865.

50. Such was not the case in *Midland Bank v. Dobson*, and is a powerful argument against a wholesale adoption of its reasoning.

trust. Likewise, when the parties have made a financial contribution to the cost of the property, the claimant's interest arises under a resulting trust, and even though it is possible to analyse this situation as one of constructive trust, to do so obscures the true factual basis of the claimant's rights, *viz.* that he or she has helped to purchase the property.

It is only if we wish to expand the courts ability to award beneficial interests that we need adopt the constructive trust approach. For once we reach the stage that any conduct may be evidence of a common intention, we have the power to make any award which seems just in all the circumstances, and the flexible constructive trust is the best weapon available.<sup>51</sup>

On the facts of the case, *Grant v. Edwards*<sup>52</sup> was rightly decided, yet the expansion of the equitable jurisdiction which the reasoning would encourage was rejected in *Pettitt, Gissing and Burns*. To allow interference with the paper title to any greater extent than is at present permissible, would be to reduce the security of a legal owner to a mere sham. If there is a serious injustice being perpetrated against non-married co-habitees, surely that is a matter for Parliament to remedy. As Lord Reid himself said in *Pettitt v. Pettitt*, "where we are dealing with matters which directly affect the lives and interests of large sections of the community and on which laymen are as well able to decide as lawyers . . . it is not for the courts to proceed on their view of public policy for that would be to encroach on the province of Parliament."<sup>53</sup> It is not that an unmarried co-habitee should be denied property adjustment on the break up of a stable relationship. It is rather that the law of trusts should not be manipulated to achieve it.

51. "Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust . . . was more in the nature of a constructive trust; but that is more a matter of words than anything else . . . It is a trust imposed by law whenever justice and good conscience require it. It is a liberal process founded on large principles of equity": *Hussey v. Palmer* [1972] 3 All E.R. 744 *per* Lord Denning MR.

52. [1986] 2 All E.R. 426.

53. [1970] A.C. 777, at p.795.