

TOLATA

Trusts of Land – Where are we now?

by

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TRUSTS OF LAND

Wherever two or more people have a legal or a beneficial interest in real property there will be a trust for land. It follows that a large proportion of residential property accommodating families or friends is subject to a trust for land. Inevitably since such arrangements are often entered into upon the assumption that the family members/friends understand what they all intend without expressly saying it, have and will continue to share the same interests and aspirations and that they can trust each other. The result is frequently a failure to address expressly, clearly or formally the nature of each party's entitlement or obligation. This paper examines a number of aspects of the legal framework that these varied and often unclear arrangements tend to be fitted into.

SECTION 1

1.0 The Trusts of Land and Appointment of Trustees Act 1996

The Main Elements of the Act

- 1.1.0 With the introduction of the Trust of Land and Appointment of Trustees Act 1996 ("the Act") on 24.7.96
 - 1.1.0.1 trusts for sale vanished¹;
 - 1.1.0.2 strict settlements could no longer be created²;
 - 1.1.0.3 any trust where the trust property consists of or includes land is now a trust for land, even if the trust was created before the Act;
 - 1.1.0.4 all property which is co-owned, or subject to successive interests falls within one scheme being held by the legal owner subject to a trust for land;
 - 1.1.0.5 the doctrine of conversion was abolished by the Act³; and

¹ Although express trusts for sale may still be created there will nevertheless be an implied power to postpone the sale and protection for trustees from liability for any postponement – s 1, 3 and 4 of the Act.

² s. 1(2) and s.2 of the Act

³ s. 3 of the Act

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- 1.1.0.6 the predominant *duty* to sell the trust property and realise the proceeds of sale that was the essence of trusts for sale was removed, and the shift is made to an evenly balanced *power to sell* and *power to retain*⁴ for trusts of land.
- 1.1.1 The Act defines and in some respects enhances the rights and powers of trustee(s) and beneficiaries and the powers of the court in relation to trusts of land
 - 1.1.1.1 trustees can delegate their powers to *any* beneficiary of full age and entitled to *an* interest in possession⁵;
 - 1.1.1.2 the trustees have the powers of absolute owners⁶;
 - 1.1.1.3 beneficiaries have enlarged statutory rights to be consulted⁷;
 - 1.1.1.4 the rights of occupation of beneficiaries who are beneficially entitled in possession⁸ are given statutory teeth;
 - 1.1.1.5 the trustee's powers to exclude or restrict the beneficiaries rights, even by the imposition of conditions such as the payment of compensation or occupation are set out⁹;
 - 1.1.1.6 the court has power to make orders in respect of the exercise any of the trustees powers (except appointment or removal of trustees) and to relieve the trustees of some of their obligations to consult and the like;
 - 1.1.1.7 the court has jurisdiction to declare the nature and extend of a person's interest; and
 - 1.1.1.8 the court's powers may be exercised upon application by anyone who has "an interest in property subject to a trust for sale".

Thoughts for Drafting

- 1.2.0 Areas for consideration when drafting, include whether
 - 1.2.1 an express trust for sale be imposed - Is it desirable to have the power to sell to predominate over the inviolate power to postpone sale?
 - 1.2.2 the intentions of the parties creating the trust should be expressly recorded with a view to establishing the beneficiaries' rights of occupation (s 12 of the Act) or the exercise of discretion if an order for sale is sought (under s14 of the Act)?
 - 1.2.3 any of the powers of an absolute owner should be negated or restricted?

⁴ s. 5 , s. 6 and Schedule 2 of the Act

⁵ s. 9 of the Act – Interest in possession is not directly defined in the Act but would appear to mean a interest presently enjoyed ie a current right to occupy and/or to the income from the property

⁶ s. 6(1) of the Act

⁷ s. 11 of the Act

⁸ s. 12 of the Act

⁹ s. 13 of the Act – Rodway v Landy [2001] Ch 703

- 1.2.4 an intention to delegate any of the trustee's powers to any of the beneficiaries should be recorded?
- 1.2.5 any of the duties to consult should be negated or restricted?
- 1.2.6 the powers of the beneficiaries to direct the appointment or retirement of trustees should be negated or restricted?

All trusts where the trust property is or includes land are "trust of land"
Power of trustees to delegate power to beneficiaries of full age entitled to an interest in possession set out
Beneficiaries' entitlement to consultation and occupation set out
Trustees' power to exclude, restrict or charge compensation for occupation
Power to the Court to order the exercise of any powers of the trustees on the application of a person interested – s14.

SECTION 2

2.0 Resulting Trusts – What role remains for them

The interests of family members and/or friends in properties occupied as homes always generated significant number of often particularly bitter, hard fought disputes. Until **Stack v Dowden**¹⁰ resulting trusts were commonly a feature of those disputes. Whilst it was relatively rare for a resulting trust to be the only basis on which a claim was advanced it would often be an important part of one party's armoury, particularly where the claimant was not a registered owner or there was a registered owner who did not contribute financially. This section considers to what extent they should continue to be relied upon as a basis for claiming an interest in such disputes.

2.1.1 Express, Constructive & Resulting Trusts – The Context

2.1.1 Generally the concepts of express, constructive and resulting trusts in the context of co-ownership are explained explicitly or implicitly by reference to a hierarchy. If there is an express trust it rules out any question of constructive or resulting trust and the existence of a constructive trust rules out a resulting trust.

2.1.2 The simplest explanation of the three types of trust and their relationship to each other is as follows. A resulting trust arises by virtue of a presumption about the intention of the

¹⁰ [2007] 2 AC 432

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parties by the operation of equity where someone contributes to the purchase of land in the name of another. A constructive trust arises where there is an agreement, bargain or common intention and a party acts to the detriment in reliance on that such that it is unconscionable for the other party not to be held to the agreement/bargain or common intention. Where the ingredients for a constructive trust arise there will be no resulting trust, the agreement of the parties being given priority over a presumption about their intentions. An express trust is created by an express declaration of trust being clear written words by the settlor. The existence of a valid express trust defeats any suggestion of a resulting or constructive trust. The legally binding expression of the parties' intentions being dominant.

- 2.1.3 Some judges and commentators have suggested that the terms resulting and constructive trusts are interchangeable whilst others suggest they are fundamentally different concepts. It is fair to say they differ in the sense that resulting trusts do not involve any need to establish reliance or unconscionability as such. Simple proof of the contribution gives rise to a resulting trust in the absence of an express trust or the ingredients for a constructive trust.
- 2.1.4 In recent years the law concerning constructive trusts has changed significantly, particularly as the courts struggled to apply the House of Lords' ruling in **Stack v Dowden**¹¹. Indeed, with traditional understatement, the Court of Appeal has itself commented that **Stack** could be regarded "*as presenting something of a challenge.*"¹² Despite this, the courts have been slowly working out the extent and detail of the most recent incarnation of constructive trust doctrine and it is now possible to discern practical principles for its application.
- 2.1.5 The aim of this section of these notes is to explain the principles in the post **Stack** landscape and then suggest how they can be applied in practice and the impact on cases where previously resulting trust would have been considered as a possible basis for a claim. In order to understand and apply the practical principles, it is necessary first to understand each of the types of trust and the role the intentions of the parties and presumptions play in establishing them.

¹¹ [2007] 2 AC 432

¹² Kernott v Jones [2010] EWCA Civ 578 at [75] per Rimer LJ

2.2.0 Presumptions – A Refresher

- 2.2.1 There are three types of presumption; irrebuttable presumptions of law, rebuttable presumptions of law and presumptions of fact (which are always rebuttable).
- 2.2.2 Presumptions of law are presumptions that apply as a matter of law once certain facts are established. Examples are the presumptions of sanity, legitimacy and validity of marriage. When a presumption of law applies the evidential burden of proof shifts.
- 2.2.3 By way of contrast presumptions of fact arise as a matter of common sense and/or experience or a pragmatic approach to a reoccurring situation. They describe the readiness of the courts to draw a particular inference from the proof or admission of another fact(s). Presumptions of fact do not result in the shifting of the burden of proof. The strength of a presumption of fact, and therefore the evidence required to rebut it, may vary not just as between types of presumption but from case to case.

2.3.0 Resulting Trust

The Essence of Resulting Trusts

- 2.3.1 Resulting trusts are the consequence of a presumption. Where A contributes to the purchase price of property purchased in the name of B a presumption will arise that B holds the property on trust for the benefit of A and B in proportion to their contribution to the purchase price¹³. Equity gives effect to the parties' presumed common intention, as at the date of acquisition, to share the property beneficially in proportion to their contributions. Put another way the presumption in the absence of anything else is that no one intends to give something for nothing.
- 2.3.2 As the resulting trust is a presumption, it may be rebutted upon proof that the parties' intention was something different. Evidence that contribution was intended as a gift or loan or as rent will defeat a resulting trust: **Bernard v Josephs** and **Walker v Hall**¹⁴. The contribution made must relate to the acquisition of a capital asset. It follows contributions simply to the cost of previous use of the property are insufficient: **Savage v Dunningham**¹⁵.
- 2.3.3 The reference to a resulting trust being a presumption imposed by equity would tend to suggest it is a presumption of law. In the past eminent judges and commentators have

¹³ [1995] 1 FLR 70

¹⁴ [1982] 4 FLR 178 and [1984] FLR 126

¹⁵ [1974] Ch 181

proceeded on that basis.¹⁶ However, others have put forward a credible argument to the contrary. There is persuasive judicial comment favouring its characterisation as a rebuttable presumption of fact¹⁷. If that is right the presumption should not result in a shifting of the burden of proof.

The Relationship to other types of Trust

2.3.4 The existence of an express declaration of trust points to an explicit intention which will rebut the presumed intention and defeat the resulting trust. Similarly constructive trusts, depending as they do on evidence of an agreement or common intention will override/rebut the presumed common intention and so the resulting trust.

2.3.5 As highlighted in the discussion about constructive trusts below the position can be confused by other rebuttable presumptions also arising in the context of constructive trusts. Clarity about the different presumptions and the way they relate to each other are key to navigating through this area of law. The law now recognises the ease with which a presumption may arise or be defeated will be affected by whether the context is domestic or non-domestic.

2.3.6 It is clear that any evidence of what was *actually* intended as between the parties relating to the paying party's acquisition of an interest in the property, even if there was no concluded agreement or common intention as to the share acquired, may be sufficient to rebut the resulting trust presumption and give rise to a constructive trust. The determination of the shares may then be a matter of presumption or inferred and/or imputed intention; **Jones v Kernott**¹⁸.

2.3.7 The presumption of a resulting trust may also be defeated by a presumption of advancement. See below.

Resulting Trusts

- A presumption that where A contributes to B's property the parties' common intention is A acquires an interest equivalent to the contribution
- A rebuttable presumption
- Probably a presumption of fact not law
- As a presumption of fact it would not result in a shift of the burden of proof
- "Rebutted" by an express trust or the establishment of a common intention constructive trust
- What about rebuttal by evidence of a contrary common intention with no evidence for detrimental reliance? That leaves on the legal title to determine the beneficial.

¹⁶ *In re Vandervell's Trusts (No 2)* [1974] Ch 269 Megarry

¹⁷ *Westdeutsche Bank v Islington LBC* [1996] AC 669 @ 708 Lord Browne Wilkinson

¹⁸ [2010] 1 WLR 2401, *Stack v Dowden*

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2.4.2 The term “constructive trust” applies to a number of related but distinct trusts. At least six types of constructive trust are already well established¹⁹ however this paper is only concerned with one: the common intention constructive trust (references to constructive trust in this paper should be read as confined to this type of constructive trust alone). Such a constructive trust arises where B acts to his/her detriment upon a common intention or bargain with A that he/she will acquire an interest in the property.

The Core Elements

2.4.3 The core elements of a constructive trust are well rehearsed and easy to state, although they can be confusing to apply. The building blocks of a constructive trust are:

2.4.3.1.1 a bargain, or common intention/understanding, between A (the existing or potential landowner) and B (the potential beneficiary) that B will have an interest in the property;

2.4.3.1.2 which B relies upon to her detriment; and

2.4.3.1.3 circumstances where it is unconscionable for A to deny B her expected rights in the property²⁰.

2.4.4 These elements, while distinct, interact with one another. For example, the bargain or common intention may be most clearly seen from B’s apparent reliance upon it. It is suggested, however, that the above classification remains the best way to avoid confusion.

The Two Questions/Steps

2.4.5 In addition to the traditional elements of a constructive trust, outlined above, a further vital distinction has been clarified by the recent case law. When addressing a claim potentially involving a constructive trust there are two distinct stages to address:

2.4.5.1.1 did the parties intend to share ownership at all (“Step 1”)?

2.4.5.1.2 if so, what is the intended extent of their respective shares (“Step 2”)?

2.4.6 This two stage analysis achieved real prominence in **Oxley v Hiscock**²¹ and has since been confirmed by the House of Lords and Court of Appeal²². If these stages are kept

¹⁹ See further, *Megarry & Wade, The Law of Real Property (7th ed) (2008) (“Megarry”)* at [11-018] – [11-023].

²⁰ See *Gray and Gray, Elements of Land Law (5th Ed)(2009) (“Gray”)*, [7.3.8] and *Megarry*, [11-025] – [11-026] (where elements two and three are merged together, approved in *Hapeshi v Allnatt* [2010] EWHC 392 at [18] per HHJ Hodge QC.

²¹ [2005] Fam 211 at, for example, [68] – [69] per Chadwick LJ

²² Eg *Stack* at [63] per Baroness Hale, *Kernott* at [25] per Wall LJ

separate, the principles governing the constructive trust can be applied relatively easily. The situation becomes very confusing, however, when they are merged together.²³

- 2.4.7 The remainder of this section of these notes deals with the first stage (ie whether there is any sort of constructive trust). We address the proportions of the parties' interests in detail later in these notes.
- 2.4.8 The concept of a bargain or common intention is central to the constructive trust. Indeed, Gray and Gray go as far as saying that “[f]or present purposes every constructive trust can be said to derive from some bargain which affects the conscience of the party who is eventually made to hold on constructive trust.”²⁴
- 2.4.9 Without a bargain or common intention that the ownership of property or benefit of it is to be shared between two people, there can be no constructive trust, at least of this type. Indeed, it is clear from the recent authorities that absent a common intention between A and B, no amount of activity will generate a trust.²⁵
- 2.4.10 It is essential that there is either an agreement or a common intention that the party claiming an interest should have an interest, but it is not essential that the agreement or common intention quantifies the share to be acquired: **Stokes v Anderson** and **Drake v Whipp**²⁶.

Establishing the “Bargain” or “Common Intention”

- 2.4.11 When addressing Stage 1, it is necessary to persuade the court A and B had a common intention that ownership of the property be shared²⁷. The common intention may well have been expressly communicated between the parties²⁸. In the absence of a finding there was an expressly communicated bargain, the court can still find that a common intention existed by looking at the circumstances and the parties' conduct then asking itself whether that indicates that at a particular time there was a common understanding between them i.e. whether a common intention can be inferred²⁹. Following **Stack** it is now clear presumptions can and, in domestic situations, generally will form part of that exercise.

²³ Indeed, it should be noted that Stack itself dealt mainly with the second stage and not the first: [63] per Baroness Hale

²⁴ Gray, [7.3.20]

²⁵ Morris v Morris [2008] EWCA Civ 257 per Sir Peter Gibson

²⁶ [1991] 1 FLR 392, unreported 30.11.95

²⁷ Oxley at [40]

²⁸ As in Q v Q [2008] EWHC 1874 (Fam)

²⁹ As in Abbott v Abbott [2007] UKPC 53

2.4.12 It should be noted that, although the court can find evidence for a common understanding from the parties' conduct, this is not a mere formality. The party asserting a constructive trust must show that there was a common understanding or bargain and when it arose. The court will reject claims where the conduct pointed to as evidencing a common understanding or agreement is explicable by other means.³⁰

Presumptions and the Commercial/Domestic Distinction

2.4.13 As might be expected, although in principle the law governing constructive trusts in a commercial context is the same as that which applies to a domestic situation, that law is in fact applied differently. As Baroness Hale said in **Stack**:

"To put it at its highest, an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between husband and wife or cohabitant and cohabitant."³¹

2.4.14 Given that the central role of the alleged bargain or common intention to a constructive trust the key question becomes: how can B demonstrate the existence of such a bargain? B can use any evidence that she has available to her so long as it shows directly or by inference that she and A had the common intention that ownership of the property be shared. The authorities contain some more specific, useful guidance as to particular situations.

2.4.15 The key difference between domestic and non-domestic situations is the significance of the legal ownership when seeking to identify a bargain or common intention. Generally the court will expect commercial parties to regulate their affairs and their agreements with greater clarity than families would their domestic arrangements³². In addition their intentions are more likely to reflect the financial or commercial input or responsibilities of each. The distinction impacts at Step 1 and Step 2 i.e. establishing the intention of the parties for the purposes of determining whether the interests in the property are shared as well as for the purpose of quantification of the parties' shares (See below re Step 2).

2.4.16 In a domestic context there is a strong presumption that the parties' beneficial interests follow the legal interests they established. Accordingly where a property was placed into joint ownership at law, it is presumed the beneficial interests follow the legal interest and therefore it is presumed the parties have a joint beneficial interest, unless and until the

³⁰ James v Thomas [2007] EWCA Civ 1212 at [27] per Sir John Chadwick; Morris at [25] per Sir Peter Gibson and [36] per May LJ

³¹ At [42]

³² Eg Stack at [69] per Baroness Hale

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contrary is proved³³. Similarly sole legal ownership will raise a presumption of sole beneficial ownership. The presumption is explicitly referred to in **Stack** as affecting the burden of proof which points to it being a presumption of law.

2.4.17 That presumption can be rebutted by either party establishing a bargain or common intention to the contrary by reference to express words, in writing or orally. Following **Oxley** and **Stack** it is now clear that in a domestic context payment of moneys towards the purchase of a property by both A and B also raises a presumption that the parties intended ownership to be shared, notwithstanding a sole legal title. Other contributions made by B to the mortgage or to family expenses may indicate an intention to share ownership and assist with attacking the starting presumption that the beneficial ownership follows the legal. At this stage of the analysis, a claimant needs to be careful not to rely wholly upon conduct which could be explained by something other than a belief that an interest in the property is being acquired since that will not necessarily be taken to show a common intention or bargain.³⁴

2.4.18 The distinction between commercial and domestic relationships should be born in mind when considering the strength of B's assertion of a constructive trust. The definition of "domestic" in this context includes more than sexual relationships. It also includes other family relationships such as that between a mother and a son.³⁵ The definition of "commercial" or non-domestic extends to properties bought by families primarily for investment purposes as opposed to residential purposes³⁶. The categorization of arrangements as domestic and non-domestic will be fertile ground for dispute where there are dual purposes and/or different participants have different interests/purposes. Family participation in right to buy purchases are likely to provide a context for the distinction to be litigated out.

2.4.19 It should be noted, there can be no bargain or common intention with anyone who is not capable of forming such an agreement, whether as a matter of law or fact. This prevents a common intention with, for example, children.³⁷

³³ **Stack** at [58] per Baroness Hale

³⁴ **James** at [27], **Morris** at [25]

³⁵ **Adekunle v Ritchie** [2007] 2 P. & C.R. DG20, approved in **Laskar** at [16] per Lord Neuberger

³⁶ **Laskar** at [17] per Lord Neuberger

³⁷ This seems obvious but the contrary was argued, unsuccessfully, in **De Bruyne v De Bruyne** [2010] EWCA Civ 519

A rebuttable presumption applies in a domestic context so that the parties intend the beneficial interest follow the legal interests
The burden lies on the party seeking to attack that presumption to demonstrate a different common intention
Domestic refers to a combination of the relationship between the parties and the nature/purposes of the trust

Timing of the Bargain/Common Intention

2.4.20 The common intention to share ownership or acquire interests in a property can exist either before the date the property is purchased³⁸, at the time of the purchase, as in **Stack**, or after it³⁹.

2.4.21 Where it is asserted that a common intention arose after the purchase of the property, however, B faces particular obstacles. The Court of Appeal has recently made it clear that the court will be slow to vary existing beneficial interests, such as those established at the time of acquisition in the absence of an express agreement to do so⁴⁰. Further, it appears that this extends to later variations of the extent of A and B's existing beneficial interests⁴¹.

2.4.22 It is therefore harder to establish common intention that is said to have arisen after the date the property was purchased, or some other arrangement was reached about its ownership, than it is to assert one from the start.

Investigating the existence of a Common Intention

- Identify whether the context is commercial/non-domestic or domestic – family and/or friends or investors – what was the purpose of the purchase for each participant and what are the relationships between them.
- Check when the bargain or common intention is said to have arisen.
- Was anything explicit said about sharing beneficial ownership and/or the shares.
- How and why was the legal title decided upon
- Who contributed what to the purchase price and costs
- Who has contributed what to the property and household since and why
- How have finances and other responsibilities been organized/managed between the parties
- Examine the evidence relied upon at an early stage to evaluate if it shows a common intention or is wholly explicable by other factors.

³⁸ Eg Hapeshi v Allnatt [2010] EWHC 392

³⁹ Eg James v Thomas at [24]

⁴⁰ James at [24]; Morris at [36] per May LJ

⁴¹ Kernott v Jones [2010] EWCA Civ 578 at [57] – [58] per Wall LJ

Detrimental Reliance

2.4.23 For obvious reasons, this aspect of the constructive trust is closely linked to the points set out above in relation to the common intention or bargain. It remains a separate requirement that needs to be addressed. If B cannot show that she relied upon the common intention to her detriment, even the clearest evidence as to the common intention will not be enough to generate a constructive trust. What has not been explicitly explored is whether a common intention resting purely on the legal title arrangements adopted has to be supported by detrimental reliance in order to be determinative of the interests. It would appear from **Stack** and the subsequent cases it does not.

What Type of Reliance is Sufficient?

2.4.24 The nature of the detrimental reliance will necessarily be specific to the particular case. Some principles can be discerned, however. In particular, the editors of *Megarry* point to judicial statements that the acts must include an “*irrevocable change of legal position*”⁴² and that they must be “*of a kind upon which B could not reasonably have been expected to embark unless he or she was to have an interest in the property*”⁴³.

2.4.25 Examples of acts which have been found to constitute detriment include:

- Paying money (such as the assumption of mortgage liability)⁴⁴;
- Paying for improvements to property⁴⁵;
- Devotion of labour to a joint venture⁴⁶; and
- Abandoning a flat and a career⁴⁷.

Causal Link between Detriment and Common Intention

2.4.26 It is important that the detrimental acts relied upon by B be referable to the common intention or bargain. Consequently, B cannot rely upon acts that she would have undertaken irrespective of her belief that she was entitled to a share of the property. This has historically prevented spouses from asserting the domestic chores they would have undertaken anyway as examples of their detrimental reliance.⁴⁸

⁴² *Austin v Keele* (1987) 72 ALR 579 at 588 per Lord Oliver

⁴³ *Megarry*, [11-027]

⁴⁴ *Strickson v Boyd* [2001] EWCA Civ 401 at [11]

⁴⁵ *Stack* at [34] – [36] per Lord Walker

⁴⁶ *Chan Pui Chun v Leung Kam Ho* (1981) 1 FLR 23 at [96] – [97] per Jonathon Parker LJ

⁴⁷ *Ungurian v Lesnoff* [1990] Ch 206

⁴⁸ Eg *Midland Bank v Dobson* [1986] 1 FLR 171

2.4.27 It has been suggested that the trend of the modern law is away from an additional requirement that particular acts be referable to the common intention⁴⁹. There is some indication that this is true, especially in a domestic context. However, it is unsafe to proceed on that basis. Sir John Chadwick has recently stated that:

*“It is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest.”*⁵⁰

2.4.28 Further, Sir Peter Gibson has elaborated on the issue of referability, explaining that

*“the court should be cautious before finding that the activities of a wife or a cohabitant can only be explained on the footing that she believes that she was acquiring an interest in land”*⁵¹.

2.4.29 In light of these statements, it is still sensible for practitioners to assume that they will need to be able to show that the particular acts relied upon were referable to the common intention or bargain asserted.

Unconscionability

2.4.30 Traditionally there was an additional requirement that A act in a way that was unconscionable⁵². However, in most constructive trust cases the unconscionability results from A attempting to derogate from, or act inconsistently with, the rights he has promised B⁵³. For this reason this aspect of the constructive trust analysis does not usually require separate

2.5.0 Express Trusts

2.5.1 Where there is a valid express trust, subject to there being any basis to set it aside such as a fraud, undue influence and the like, it will determine the interest of the trust property. It follows where couples, family members or friends buy or develop property together they should be advised to use express trusts to address deal with their intended beneficial interests.

2.5.2 In registered land the main document of title will often be the TR1. Completion of the TR1 now called for a declaration whether property purchased in joint names is to be held as joint tenants or tenants in common. That is a start but the document is not necessarily

⁴⁹ *Gray*, [7.3.46]

⁵⁰ *James v Thomas* [2007] EWCA Civ 1212 at [36]

⁵¹ *Morris v Morris* [2008] EWCA Civ 257 at [25]

⁵² See *Gray*, [7.3.47] – [7.3.49]

⁵³ Eg *Yaxley v Gotts* [2000] Ch 162

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signed by the purchasers, will not assist where a beneficial owner is not to be a legal owner and does not ask what shares tenants in common are to have.

- 2.5.3 Where both elements: who has a beneficial interest in the property and what are their interests have been expressly considered and decided upon, an express declaration *can* avoid a great deal of difficulty. To be valid, an express declaration of trust must be in writing and signed by the “settlor”.
- 2.5.4 Often, where those with the beneficial interest in a property are to be joint tenants, the only declaration is contained in the TR1. In the absence of evidence of a contrary intention such a declaration will be binding even if the parties did not sign the transfer: **Re Gorman**⁵⁴.
- 2.5.5 However it should be noted that the presence of the standard form statement in a transfer that the survivor of them would be entitled to give a valid receipt in the transfer does not amount to a declaration of that they hold as joint tenants: **Stack v Dowden**⁵⁵.
- 2.5.6 The wording of an express declaration must be clear. A transfer of property from a father to mother expressly provided for in a consent order on the basis it was “for the benefit of the child” did not create a trust or a strict settlement: **In re B (Child: Property Transfer)**⁵⁶.
- 2.5.7 A sufficiently clear express declaration will be conclusive as between the parties to it unless it can be set aside or rectified in accordance with ordinary contractual principles: fraud, undue influence, mistake, etc – **Goodman v Gallant**⁵⁷, **Turton v Turton**⁵⁸.

Express declarations of trust override any constructive or resulting trust

Express declarations must be clear, in writing and signed by the settlor

Essential elements to consider for inclusion are:-

- whether beneficiaries are joint tenants or tenants in common
- if, tenants in common, state their shares or how they are to be ascertained ?
- who will be responsible for any mortgage or other liabilities?
- any adjustments to in the event that any beneficiary ceases to occupy the property or fails to meet his obligations to pay the mortgage or other liabilities?
- what is the purpose of the trust and/or when should it be sold?

⁵⁴ [1990] 2 FLR 284

⁵⁵ [2005] EWCA Civ 8 CA

⁵⁶ The Times 10 May 1999

⁵⁷ [1986] 1 FLR 513

⁵⁸ [1988] 1 FLR 23

2.6.0 Resulting Trusts post Stack

2.6.1 Understanding the use of the presumption that underlies resulting trust may be helped by remembering it is in fact a presumption about the common intention of the parties.

2.6.2 Where property is acquired outside of arrangement between families and friends or between such people purely as an investment for all of them the role of the resulting trust is unaffected. The presumption will arise and in the absence of an express trust or other evidence as to a different common intention combined with detrimental reliance a resulting trust will arise. In those non-domestic cases the simple fact of the legal ownership of itself will not operate as a presumption to displace the resulting trust presumption.

2.6.2 In the domestic context it appears it is not that the resulting trust presumption does not apply rather that it will be displaced by the stronger presumption that the beneficial ownership matches the legal ownership. The question then arises what will happen if the presumption flowing from the legal ownership is displaced in a manner that does not establish any other common intention. It would seem there is the potential for the resulting trust presumption being all that is left.

2.6.3 Further since for the purposes of a constructive trust detrimental reliance is required the question arises could a traditional resulting trust still arise where B fails to establish detriment and/or reliance. It appears that the presumption flowing from the legal title in the domestic context is not a part of establishing a constructive trust rather it operates in the same way as the resulting trust presumption binding the parties without the need to establish detrimental reliance.

Traditional resulting trusts continue in non-domestic situations where there is no express or constructive trust
The non-domestic/domestic divide is not clearly established but it focuses on relationship and purpose of the trust
In a domestic context where the presumption that the beneficial interest follows the legal interests is rebutted by evidence the traditional resulting trust may still be relevant
Is the trust that flows from presumption the beneficial interests follow the legal interests really a constructive trust or is it different form of resulting trust?

SECTION 3

3.0 The Presumption of Advancement

3.1.0 The presumption of advancement is a rebuttable evidential presumption: **Tinsley v Milligan**⁵⁹ and **Bradbury v Hoolin & anr**⁶⁰. The presumption will arise in the absence of any other evidence of the motive or reason for the giving of money or property as between spouses or parent and child. Traditionally the presumption arose against husbands and fathers but not wives and mothers. The presumption arose during a time of different social and economic conditions and before the Human Rights Act 1998⁶¹. Unsurprisingly it seems clear the Courts will apply it equally to wives and mothers: **Close Invoice Finance Ltd v Abaowa and anr**⁶². Such presumptions do not arise in all family relationships, in particular not as between co-habitees.

3.1.1 Whilst the Courts have continued to recognise the existence of presumptions of advancement, they are increasingly treated with caution and regarded as being weak, easily rebutted: see Lord Diplock in **Gissing** at p906-7 and **Close Finance v Abaowa**. Section 199 of the Equality Act 2010 provides for the abolition of the presumption, however it has not as yet been brought into force.

3.1.2 The presumption's role in cases is generally to reverse the effect of the presumption that gives rise to a traditional resulting trust. It follows with the diminished significance of the resulting trust in a domestic context the occasions on which the presumption of advancement can be deployed with any effect will have been reduced.

3.1.3 Further the presumption that arises is at best weak and very easily displaced by any evidence of a different agreement, arrangement or common understanding behind the disposition. The courts have made it clear that evidence of the transferor's subjective intention will be admissible and words or conduct proximate to the transfer will be considered carefully in their context⁶³. Evidence of self serving statements some time after the event will have limited value. Such a presumption will arise in the absence of any other evidence of a contrary motive or intention for the giving of money or property as between

⁵⁹ [1994] 1 AC 355

⁶⁰ unreported 12.5.98

⁶¹ The presumption may be vulnerable to attack on human rights grounds

⁶² [2010] EWHC 1920

⁶³ Close Finance v Abaowa supra

spouses, parents and children or betrothed parties. In practical terms it is unlikely in this day and age that a case would ultimately succeed upon a presumption of advancement.

An outdated and weak presumption
The presumption, if relevant, will operate against both sexes in the same way
Evidence of the transferor's intention, words or conduct at the time will be relevant
Legislation is in place for the abolition of the presumption

SECTION 4

4.0 Ascertainment of the Beneficial Interests

4.1.0 Date for valuation of shares

4.1.1 Previously, arguments have been raised as to whether the value of the beneficial interests under a constructive trust should be ascertained at the date of acquisition, separation or trial. These in turn gave rise to different lines of authority

4.1.1.1.1 the approach taken in **Gissing v Gissing** and **Stokes v Anderson**⁶⁴, where the parties are taken to have agreed at the time of acquisition of the property that their shares are not to be quantified then, but are to be determined when their relationship comes to an end or the property is sold. This is to be done upon consideration of what is fair taking into account the whole course of dealing between them.

4.1.1.1.2 the approach taken in **Midland Bank plc v Cooke and Another**⁶⁵ where the parties intentions at the time of acquisition are to be inferred by what has actually transpired regarding their course of dealings – i.e. from their dealings, it is to be assumed that that was their intention at the date of purchase.

4.1.1.1.3 through principles of estoppel, in which the shares are crystallized at the date of trial, taking into account the parties' whole course of conduct and what would accordingly be considered the minimum equity do justice at that time.

4.1.2 Post **Oxley v Hiscock**⁶⁶, as regards cases in which a constructive trust arises, it appeared the court would deal with determination of the parties shares as follows:

⁶⁴ [1971] AC 886 at 909D and [1991] 1FLR 391 at 400B-C

⁶⁵ [1995] 2 FLR 915 at 926

⁶⁶ [2004] 3 WLR 715

- 4.1.2.1.1 should the parties have discussed not only the fact of their having a beneficial interest, but also the extent of their shares at the time of purchase, their shares will crystallize at that time, unless they discussed a “wait and see” approach.⁶⁷
- 4.1.2.1.2 should the parties have discussed merely the fact of their holding beneficial interests without discussing the shares in which they should hold, the Court will engage in a wider ranging search for fairness and will consider post-acquisition events/contributions even if they were not contemplated at the time of acquisition.
- 4.1.3 Following **Stack** and **Laskar v Laskar** (see below) it seems unlikely the time for assessment of the interest or alternatively crystallisation of the formula for its assessment could be treated as being any time other the time of purchase or creation of the trust.

4.2.0 Constructive Trusts

- 4.2.1 Once a constructive trust is established, the quantification of the shares of beneficial owners will not depend upon their contribution to the purchase price as such, although it may ultimately reflect it.
- 4.2.2 Where a constructive trust is established upon the basis of an actual agreement or common intention that the court concludes extended to the definition of the parties’ shares, that agreement or common intention will determine the beneficial interests. Accordingly the court must first consider whether the agreement or understanding established extends to defining the shares: **Killey & Ors**⁶⁸ and **Hapeshi v Allnatt**⁶⁹. Such an agreement or common intention may be that the beneficial interest in the property be held for them as joint tenants or as tenants in common in defined shares.
- 4.2.3 A determination/declaration that the parties hold the property as beneficial joint tenants has the effect, in the absence of anything else, of attributing to each an identical interest in the whole until severance, with the right of survivorship arising automatically upon the death of a joint tenant⁷⁰. If a property is held on a constructive trust for the beneficial owners as joint tenants, when the joint tenancy is severed they will become tenants in common in equal shares: **Goodman v Gallant**⁷¹.
- 4.2.4 In many instances it is not possible to identify any *actual* agreement or common intention quantifying the parties shares (see para 2.2.5). Indeed it appears to have been accepted

⁶⁷ *Crossley v Crossley* (2006) 1 FCR 655 (CA)
⁶⁸ unreported 7.3.96. See also *Crossley*, above.
⁶⁹ [2010] EWHC 392
⁷⁰ s36(1) LPA 1925
⁷¹ [1986] 1 FLR 513

that the parties could expressly agree to determine their respective shares at a later date:

Gissing v Gissing and **Stokes v Anderson**⁷².

4.2.5 For a long time in order to fill the gap left when the courts conclude the common intention went to the sharing of the property but not determining the shares the courts have sought to *infer* a common intention⁷³. As Lord Diplock urged, in **Gissing** (supra), pp 908F-G, in the absence of an express agreement, the court should,

“do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse”.

4.2.6 The approach to such inferences has been subject of recent consideration and shifts in three decisions: the Court of Appeal’s decision in **Oxley v Hiscock**⁷⁴, the House of Lord’s decision in **Stack v Dowden**⁷⁵ and **Jones v Kernott**⁷⁶.

4.2.7 First, in **Oxley v Hiscock** there was a movement to what has been referred to as a “holistic approach” in which the Court having considered the whole of the parties conduct assumes/infers that the parties’ intention upon purchase was by reference to a notion of what would have been or is “fair”. Chadwick LJ outlined in **Oxley v Hiscock** the position as follows:

“[I]n many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, “the whole course of dealing between them in relation to the property” includes arrangements which they make from time to time in order to meet the outgoings (for example mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home”⁷⁷

4.2.8 The courts struggled with that approach and what was meant by it. The notion of a “holistic approach” as an exercise in inferring what the parties intended from their whole deals is not so problematic. However, the question what to do if it is concluded the

⁷² [1971] AC 886 , [1991] 1 FLR 391

⁷³ *Midland Bank plc v Cooke and Another*, above.

⁷⁴ [2004] 3 WLR 715

⁷⁵ [2007] 2 AC 432

⁷⁶ [2010] 1 WLR 2401

⁷⁷ Paragraph [69]

parties had not in fact formed intentions or at least no shared intention is more troublesome. Should the court simply impose its notion of fairness on the parties in order to fill the void left by the absence of a shared intention or is the court to continue to determine their intentions by “imputing” or “inferring” a shared intention to them.

4.2.9 **Oxley** (a single legal owner case) seemed to move towards a candid recognition the court was to fill the gap with its own assessment of what was fair. However the language adopted by Lady Hale in **Stack v Dowden** (a joint legal owner case) focused on the idea the court was seeking to identify the parties’ intentions albeit by “imputing” the same: **Stack v Dowden, Hapeshi v Allnatt**⁷⁸. There was a suggestion by Lady Hale that greater flexibility might arise in a single legal owner case. The apparent **Stack v Dowden**, Lady Hale approach has been subject to criticism: **Kernott v Jones**⁷⁹. Many prefer Lord Neuberger’s more traditional property law approach. It is likely in many instances there will be no difference between the two.

4.2.10 The second line of thinking, where there was no evidence of an actual agreement or common intention, as set out by Lady Hale in **Stack v Dowden** was a presumption that the parties’ common intention that the beneficial ownership to followed the legal ownership for the purposes of quantifying their shares.

4.2.11 So where a property is purchased in joint names and therefore held as legal joint tenant’s the parties’ presumed intention was that they be joint beneficial tenants unless there was evidence to the contrary. In **Stack** Lord Neuberger dissented from that approach pointing out among other things that if the parties wished to both be legal owners they had no choice but to hold the legal title as joint tenants. It follows an election to hold the legal title as joint tenants does not in fact show a choice between joint tenants and tenants in common or a choice between equal and unequal shares. Lady Hale’s approach was followed in some instances [**Hollis v Rolfe**⁸⁰ and **Fowler v Barron**⁸¹] and distinguished where the transaction involved an element of investment so that it could be said not to be truly domestic: **Laskar v Laskar**⁸².

4.2.12 It seems after **Jones v Kernott**⁸³ the following are guiding principles by which we are currently bound, at least in dual legal ownership domestic cases:-

4.2.12.1 an express declaration as to beneficial interests binds the parties

⁷⁸ [2010] EWHC 392
⁷⁹ [2010] EWCA Civ 1713
⁸⁰ [2008] EWHC 1747
⁸¹ [2008] EWCA Civ 377
⁸² [2008] 1 WLR 2695
⁸³ [2010] 1 WLR 2401

- 4.2.12.2 there is a presumption that the legal ownership of property reflects the beneficial ownership
- 4.2.12.3 the burden lies on a party seeking a different beneficial ownership
- 4.2.12.4 the presumption/burden is heavy, particular where in a domestic context there is an acquisition as joint legal tenants without an express declaration (giving rise to a presumption of joint beneficial tenants or equal tenants in common) unless and until the contrary is proved
- 4.2.12.5 that presumption may be displaced by a finding of a shared intention whether expressed or inferred
- 4.2.12.6 the parties' intentions may change with time and changing circumstances and result in an "ambulatory" constructive trust where the parties shares are different at different points in time
- 4.2.12.7 the court should take the holistic approach, taking account of all the circumstances and all elements of their conduct, when seeking to ascertain the parties' shared intentions
- 4.2.12.8 the court is not to impute an intention which was not there
- 4.2.12.9 in the absence of an express or inferred shared intention the parties shares will be determined by the presumption that the beneficial ownership follows the legal ownership
- 4.2.12.10 any view the court itself has as to what was fair and/or just is not relevant.
- 4.2.13 In practical terms the parties' discussions about their interests are of crucial importance. Their direct contributions to the purchase price of a property or ongoing mortgage payments will still be very relevant but it is clear they are no longer as crucial as they were. The court will also look to the reasons for the joint legal ownership, the purpose the home was acquired for, how the parties arranged their financial affairs relating to the property and the household generally, their characters and the contributions (including non-financial) that each agreed to and made to the household.
- 4.2.14 However, in some instances the Courts have concluded that it was the common intention of the parties that their contribution and therefore their shares would be determined as of the date of separation or sale having regard to the capital paid and the actual contribution by way of mortgage repayments: **Gissing v Gissing**
- 4.2.15 Where the Court concludes that the shares of the parties were fixed by reference to the contributions as at the date of purchase, the fact that subsequently one party has actually paid less than the obligation which he had originally taken on under the mortgage would

not change his share. Although upon separation, a party who has made greater than any agreed contributions to the property could previously seek an equitable account as regards those overpayments post **Jones v Kernott** it is not clear if that is still possible. Certainly **Clarke v Harlowe**, would suggest that absent an initial specific agreement about payment of the outgoings, the court will not seek to perform an accounting exercise regarding payments made whilst the relationship continued.⁸⁴ In the past where the courts have engaged in equitable accounting exercises they have easily be persuaded to take a broad brush approach and treat benefit of having occupation of the whole as being set off against the missing contributions.

An express declaration as to shares binds
In a domestic context the presumption is the parties' common intention was that the beneficial interest follows the legal interest
That presumption amounts to a presumption of equality
That presumption is said to be a heavy/strong presumption
The presumption may be displaced by a contrary express or implied/inferred common intention as to shares
The court cannot impose its own assessment of what is fair or impute to the parties a common intention that was not theirs
The common intention as to shares can be "ambulatory" i.e. flexible over time
There is a mis-match between the legal ownership and the beneficial owners presumed from it since joint legal owners can only be joint tenants i.e. inequality cannot be represented in joint legal ownership.

4.3.0 Resulting Trusts

4.3.1 Although resulting trusts are now less important in the domestic context, in a family arrangement related to investment or in the absence of detrimental reliance they may still be significant. The shares of the beneficial owners under a resulting trust are to be calculated by reference to their contributions to the purchase price. Generally the contributions and so the shares will be determined as at the date the property was acquired. Where the purchase was funded partly by a mortgage and partly by capital the contributions will be assessed on the basis of the capital contributed by each and the extent, as between them, of the obligation under the mortgage assumed by each; **Crisp v Mullings**⁸⁵ and **Huntingford v Hobbs**⁸⁶.

4.3.2 The Court will also take into account payments made towards the cost of purchase (i.e. conveyancing fees), and can, although is not obliged to, consider a tenant's right to buy

⁸⁴ LTL 31/08/2005 (unreported elsewhere). See below regarding equitable accounting generally.

⁸⁵ [2001] Ch 743

⁸⁶ [1993] 1 FLR 736

discount as amounting to a contribution to the purchase price of the value of that discount, **Springette v Defoe**⁸⁷ and **Laskar v Laskar**⁸⁸.

SECTION 5

5.0 Conflicting Interests – Creditor’s & Families

5.1.0 Orders for Sale - Generally

5.1.1 Applications for sale of property subject to a trust of land are now made under s14 of the Act. The County Court has jurisdiction to deal with applications under s14 of the Act⁸⁹. Applications should now be made on standard claim form unless there is likely to be no dispute when the alternative procedure under CPR 8 could be used.

5.1.2 Such an application may be made by a trustee when the trustees cannot agree, a beneficiary or a creditor secured against the property or an interest in the property.

5.1.3 It was quickly appreciated that the approach to applications for orders for sale had undergone substantive change as a result of the introduction of the Act: **Mortgage Corporation v Shaire & ors**⁹⁰. The former predominance of sale and realisation as the purpose of trusts affecting land has been removed. Section 15 of the Act contains a statutory checklist of those matters which a court *must* consider when determining an application under s.14, which includes the intentions of the trust creator(s), the purposes for which it is held, the welfare of any minor who occupies or might reasonably be expected to occupy the trust property as his home, the interests of any secured creditor of any beneficiary and the wishes of all beneficiaries of full age in possession. It follows in addition to the original purposes of the trust which will be considered, in so far as the welfare of a minor is a specific consideration, the purpose may be other than as a family home for the whole family. The Court is required to have regard to all the matters in s15(1) and (3). The Act does not give any individual consideration priority over any other. It therefore appears the previous priority given to creditors has reduced and the Court has a wider discretion to find an answer that is appropriate for the individual case.

5.1.4 The courts have demonstrated a willingness to take account of the health and welfare (including educational needs of minors) of each of the family members potentially

⁸⁷ [1992] 2 FLR 388

⁸⁸ [2008] 1 WLR 2695

⁸⁹ High Court and Country Courts Jurisdiction Order 1991 as amended Clause 2(1)(p)

⁹⁰ [2001] Ch 743

affected by the sale in deciding whether an immediate order for sale is proportionate and just or whether to postpone an order for sale⁹¹ for a time. It would appear there is also some willingness to have regard to whether the creditor obtained security voluntarily (as a result of a consensual transaction) or as a method of enforcement. Given the range of factors to be taken into account the discretion has been considered to be Human Rights compatible. Indeed HHJ Purle QC (sitting as a High Court Judge) stated

“I am quite satisfied that the power to enforce a charging order is compatible with the Convention. Indeed, the contrary is not argued. I am also satisfied, however, that, in applying the court's discretion, it must be applied in a way which gives due respect to the right of all those living in the property, not just the debtors, to have respect for their family life and their home. Against that must be weighed the rights of the chargee under the equitable charge, that is, to say the claimant, not to have to wait indefinitely for payment or to have no means of enforcing its security.”

5.1.5 It follows applications for orders for sale will now often involve a detailed analysis of the personal circumstances of each family member with details of any health or welfare issues and the aspects of their life that will be affected by the loss of their home and potentially the need to move to another area.

5.2.0 Orders for Sale Where the Debtor is Insolvent

5.2.1 The Act may be invoked by a trustee in bankruptcy, when a spouse is declared bankrupt and his share of property, which is vested in the joint names of the bankrupt and his spouse, is sought to be realised for creditors. The application must be made to a court having jurisdiction in bankruptcy⁹² and the court must take into account the considerations under the Insolvency Act 1986 and not the Act.⁹³

5.3.0 Orders for Sale where there are or will be Ancillary Relief Proceedings

5.3.1 When determining an application for an order for sale under the Matrimonial Causes Act 1973 upon the breakdown of a marriage, the Court is required to:

5.3.1.1 give a third party beneficiary an opportunity to make representations with respect to such an order; and

⁹¹ Close Invoice Finance Ltd v Pile [2008] EWHC 1580, National Westminster Bank plc v Rushmer [2010] EWGHC 554

⁹² s.335A(1) Insolvency Act 1986, inserted by s.25(1) and sch.3 para.23 TOLATA

⁹³ s.335A(2) Insolvency Act 1986

5.3.1.2 take any such representations made into account within the discretionary exercise under s.25 of that Act ⁹⁴.

5.3.2 The consequence of this is that it is unnecessary to apply under s.14 of the Trusts of Land Act 1996 if the dispute as to sale arises within the context of a marriage breakdown. Indeed in **Laird v Laird**⁹⁵ the Court of Appeal described an application under s.14 of the Trusts of Land Act 1996 against both her former husband and a co-owner of the former matrimonial home by a woman with an existing application for ancillary relief as “superfluous”. The correct procedure would be for the third party beneficiary to seek to intervene within the ancillary relief proceedings and make representations as a party within that application.

⁹⁴ s.24A(6) MCA 1973.

⁹⁵ [1999] 1 FLR 791

CASE STUDY

Harry comes to see you. He and Beatrice are in dispute over their respective interests in Hogwart's House, Hill Top Lane, Windermere, Cumbria. The property was purchased in joint names in 1995 for £200,000 with the aid of a £100,000 mortgage. Harry has made almost all the mortgage repayments 1990 and there is now only £20,000 outstanding. The Property has been renovated and improved during the intervening period. He believes the property is now worth £1M. Beatrice claims she is entitled to 75% of the value of the property on sale and she wants the property sold.

What further information do you need from Harry?

In light of his responses (which will be given in response to questions in the session)

- What is the largest interest Harry can claim
- What interest do you think he is likely to secure
- What are his prospects of preventing an order for sale?

What difference would it make to your responses if the property and mortgage were in Beatrice's sole name?

THE POTTERS OF HOGWART'S HOUSE

ADDITIONAL INFORMATION & NOTES

Further Information Harry could give you:-

The Relationship

- They met in 1990
- They lived together from 1992
- Prior to the purchase of Hogwart's they lived in Beatrice's flat, purchased by her in 1984
- Beatrice had a repayment mortgage on that flat
- When Harry moved in they agreed he should pay "rent"
- The figure was decided on the basis that it was half the interest on the mortgage and approximately half the utility bills
- They split the telephone bill roughly by reference to their usage – after the first 2 quarters the bill had increased by a factor of 3 so Harry paid 2/3 of the bill from then on
- They both agreed they didn't want to get married
 - o Beatrice because she had been married before and it ended horribly
 - o Harry because he wished to retain his independence and control of his affairs, he doesn't like the fact your spouse is automatically your next of kin and has rights over you and your assets
- The relationship broke down because as he got older Harry did want to marry and Beatrice was not prepared to make that commitment

The decision making related to the property

- They both agreed they needed a bigger place
- They looked for the property and made the decision about which one to buy together
- They decided together what improvements to do
- They always talked about it as home and never discussed selling until the relationship broke down

The funding

- Beatrice had £100,000 by way of inheritance that she put into the purchase
- Harry had significant debts around this time and Beatrice was worried about his creditors looking to the house so she lent him the £20,000 he needed on “an indefinite loan”, she has not mentioned that
- The mortgage was a repayment mortgage in joint names
- They agreed they would contribute to the mortgage repayment as they could afford to from time to time
- Beatrice paid a one off premium for life cover for them both which would pay of the mortgage if either died
- Beatrice’s health failed one year after the purchase and she was unable to contribute very much towards the mortgage after that

The conveyancing

- A solicitor was used
- No trust deed or declaration was discussed, drafted or signed
- The solicitor made no mention of joint tenancies, tenancies in common etc
- They had no discussion about what shares they had in the property, they were both so in love with the house and excited about the move they didn’t really focus on what would happen later if they moved or separated

Financial & Non-financial contributions to the household

- They continued to split the utilities & telephone bill as they had before
- They do not have a joint bank account
- Beatrice did all the gardening and DIY
- Harry did all the cooking and shopping & they had a cleaner that he paid for
- The improvements done in the first year were paid for by Beatrice – approx £30k
- The subsequent work has all been paid for or done by Harry because Beatrice was unfit and her capital gone. He believes he must have spent around £60k on the conversion of a stable block into a granny annex, the rest has not greatly increased in the value of the house

Value of the Property

- Current Value £1m
- Current Value if the granny annex had not been converted £930k

Current Circumstances

- Harry has just started a college course very near to Hogwart's for 3 years
- He has no mortgage capacity whilst on the course
- Smaller properties in the immediate area rarely come on the market
- Harry would like a period of at least 18 months to find something appropriate
- Beatrice's illness has progressed and she needs accommodation that is adapted for her
 - Harry has suggested the necessary adaptations could be made to Hogwart's
- Beatrice finds living together very stressful and that impacts adversely on her health

Advice

Property In Joint Names

- Good prospect of presumption of beneficial joint tenancy being defeated
- In order to secure more than 25% Harry will have to persuade the Court the common intention was not for specified shares at the outset but for ambulatory shares – prospects 50:50
- If successful in that respect Harry has a good argument for a share of up to 45%, although it may be reduced to about 35%
- If the shares were determined at the outset Beatrice's claim for 75% is likely to succeed

Property & Mortgage in Beatrice's sole name

- There is a real risk as at date of acquisition Harry had no interest
- Need to look for evidence of any new agreement/common understanding following Beatrice's illness

Order for sale

- It is very unlikely any sale will be proposed for a period that reflects Harry's wishes unless he can identify a much greater need to stay put in the short or medium term.