

PROPERTY LAW

Determining the nature of co-ownership in property acquired for a commercial venture

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Introduction

Modern property law has seen a significant development in the case law concerning the nature of co-ownership and the quantification of beneficial interests in property. The development has been primarily in the context of co-ownership and co-habitation of the domestic family home.¹ It is fair to say that the law has developed in a clear and defined way allowing the courts to determine, on any given set of facts, the nature and extent of the beneficial interests of co-owners of property in the family context. Typically, the courts have had to decide on several matters such as the nature of the co-ownership, for example, is the legal title held as joint tenants or tenants in common. In other situations, where the title is held in the sole name of one of the co-owners, the courts have had to determine whether any other person has a beneficial interest in the disputed property and the extent of that beneficial interest. In answering these questions, the courts have used the common intention constructive trust to determine the nature and extent of the rights of the co-owners of the disputed property.

More recently, the question has arisen as to how, if at all, the cases decided in the context of the family home apply to the co-ownership of business assets. In particular, do the well-defined presumptions on shared ownership in the context of domestic settings apply to commercial settings? This article considers some of the more recent cases in the context of a commercial setting, which displace traditional rules applied in a family context. It is arguable that the principles on shared ownership developed in the context of domestic family setting simply do not apply to shared ownership in the context of commercial settings. This article makes the case that the principles decided in the domestic family context are not inconsistent or in contradiction to the principles decided in commercial disputes concerning co-owned property. Those principles squarely apply to the commercial context, the difference being their application produces rather different outcomes because of the context in which the disputes have arisen. In *Jones v Kernott*,² Lord Kerr explained that context is all-important in deciding matters over disputed property.³

The Nature of Co-ownership and the Common Intention Constructive Trust

It is not intended to rehearse the principles governing the co-ownership of property save to say that where property is conveyed into the names of two or more individuals, the co-ownership will take the form of either a joint tenancy or a tenancy in common. In the context of a joint tenancy, no individual co-owner has a share in the property. Collectively the co-owners in a joint tenancy own the entire property. Unless the joint tenancy has been severed, on the death of one joint tenant, the property vests collectively in the remaining joint tenants. This is otherwise known as the right of survivorship, which we will see later, can be an attractive argument in the context of property held for business purposes as from a commercial perspective the remaining joint owners take control and ownership of the property. The problem with this finding in a commercial context is that it does not take into consideration the context of the business and actual intentions of the parties to the business. A tenancy in common, on the other hand, treats each co-owner as having a separate share in the co-owned property, which can

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¹ See, for example, the leading statements of the law in *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53. See also academic commentary by R. Probert, "Co-habitation and Joint Ownership: The Implications of *Stack v Dowden*" (2007), 37 Fam. Law 924, and S. Gardner & K. Davidson QC, "The Supreme Court on Family Homes" (2012) 128 L.Q.R. 178.

² [2011] UKSC 53.

³ [2011] UKSC 53, 66.

devolve to his or her successors in title on their decease. The right of survivorship does not apply in such situations.

In so far as the common intention constructive trust, when applied in the context of the co-ownership of land, allows the courts to determine the actual size of each co-owner's beneficial interest based on their actual or inferred common intentions. A common intention constructive trust is not concerned with the pattern of money contributions *per se*. Rather, the common intention constructive trust is imposed to give effect to the common intention of the parties. The quantification of a beneficial interest under a constructive trust can give a claimant significantly more than what he or she may have initially contributed to the purchase price. At the heart of the common intention, constructive trust is the element of a common intention or bargain. Typically, the common intention or bargain will have been made at the time of the acquisition of the property. However, it is possible for the common intention or bargain to have been made after the acquisition of the property. Equally important is the element of detriment or change of position. This requires the claimant to have acted upon or relied on the common intention to his detriment. The importance of the common intention constructive trust lies in the fact that, whether the title is conveyed in joint names or in the sole name of one of the co-owners, provided the requisite criteria is met; it can alter the extent of the beneficial interest in the property.

It is not possible to have a detailed discussion of the law relating to the common intention constructive trust, but for the purposes of this article the landmark decision of the House of Lords in *Lloyds Bank plc v Rosset*⁴ detail the precise circumstances giving rise to a common intention and detrimental reliance in English law. The facts of the case involved Mr. and Mrs. Rosset who married in 1972. In 1982, Mr. Rosset became entitled to money under a trust fund, which had been created, in his favour by his grandmother. Mr. Rosset decided to use the trust money to purchase a derelict house and renovate it. The house was conveyed in the name of Mr. Rosset, this primarily as a result of a request by the trustees of the trust fund who were advancing the trust money to Mr. Rosset. Mrs. Rosset helped with the renovation works on the property and supervised the builders. Mr. Rosset then managed to acquire a mortgage on the property without telling Mrs. Rosset. When the relationship broke down, Mr. Rosset left the house without paying the mortgage instalments. Lloyds Bank attempted to enforce their security by seeking vacant possession of the land with a view to selling it. Mrs. Rosset, however, argued that she had acquired a beneficial interest in the house and, as a result, the bank was bound by her interest, on the grounds that it was an overriding interest under s. 70(1)(g) of the Land Registration Act 1925.⁵ The House of Lords, however, held that Mrs. Rosset has no interest in the house.

The leading judgment in *Rosset* was delivered by Lord Bridge, who explained the grounds for the imposition of a common intention constructive trust. In the course of his judgment, Lord Bridge explained when a common intention would be found on any given set of facts. His Lordship explained that the fundamental question was whether a common intention between the parties had arisen; and that a common intention could arise in one of two situations. Firstly, the parties may well have discussed the matter as to the ownership of the disputed property, in which case they were deemed to have had an express common intention. In the absence of an express common intention, the court could infer a common intention from their conduct. As to the nature of the conduct giving rise to the trust, Lord Bridge explained that anything short of direct contributions to the purchase price would be insufficient for the finding of an implied common intention.

Decided Principles in the Context of the Family Home

In *Jones v Kernott* Lord Walker and Lady Hale summarised the law relating to the quantification of beneficial interests in the family law as follows. His Lordship and her Ladyship explained that “in summary, therefore, the following are the principles applicable in a case such as this, where a family

⁴ [1991] 1 AC 107.

⁵ Overriding interests in land bind purchasers and third parties irrespective of notice. See Schedule 3 paragraph 2 of the Land Registration Act 2002 that replaced s. 70(1)(g) of the Land Registration Act 1925.

home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

- (1) The starting point is that equity follows the law, and they are joint tenants both in law and in equity.
- (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.
- (3) Their common intention is to be deduced objectively from their conduct: ‘the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party’ (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence, which might be relevant to drawing such inferences, are given in *Stack v Dowden*, at para. 69.
- (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) that the parties had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, ‘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’: Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para. 69. In our judgment, ‘the whole course of dealing . . . in relation to the property’ should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties’ actual intentions.”⁶

There have been a series of cases post *Jones v Kernott* which have continued to emphasize the need to examine the whole course of dealings when quantifying a beneficial interest under a common intention constructive trust. Furthermore, these subsequent cases confirm that the decisions in *Stack v Dowden* and *Jones v Kernott* are now firmly the bedrock of the existing law on common intention constructive trusts.

Joint tenancy, tenancy in common and the right of survivorship in commercial settings

Where title to property is taken in joint names in a commercial setting, does the right of survivorship apply on the basis that the title is held as joint tenants? The matter fell to be decided in the recent decision of the Court of Appeal in *Williams v Williams* where the Court of Appeal had to determine whether the right of survivorship applied in the context of the joint ownership of a farm as a business venture.⁷ The facts concerned the joint ownership of a farm between a father (Mr. Williams), a mother (Mrs. Williams) and a son called Dorian. Although Mr. Williams had been farming on the disputed land since the 1940’s, the farm was conveyed into the joint names of himself, his wife Mrs. Williams and their son, Dorian. The facts revealed that all three of them would farm and run the land in partnership as a business. There was no express declaration in the conveyance that the land was conveyed to the three of them as beneficial joint tenants. A few years later, more land adjoining the farm was acquired by a mortgage by the three of them and was included in the assets belonging to the partnership. Indeed, the farm and the adjoining land, which had been taken in the joint names of Mr. and Mrs. Williams and Dorian, formed part of the partnership assets for accounting and tax purposes. Over the course of the years Mr. and Mrs. Williams had made several wills leaving the farm and the adjoining land to all of

⁶ [2011] UKSC 53 at para.51.

⁷ [2024] EWCA Civ. 42.

their three children in different shares, the last surviving will leaving the disputed lands to Dorian, his brother and sister.

In the context of the above facts, Dorian claimed that both pieces of land belonged to him absolutely. The claim was based on two grounds, Firstly; the disputed pieces of land were held jointly in a partnership and belonged to that partnership. On the basis that this was a joint ownership of the land, the right of survivorship operated to vest absolute beneficial title to the land in him alone. Secondly, that by the operation of the equitable doctrine of proprietary estoppel, Dorian had been promised that the disputed properties would be his and he had worked on the land for several years as a result of this assurance. At first instance, the trial judge found that the ownership of the disputed pieces of land were held as beneficial tenants in common. As a consequence, no right of survivorship applied, and Mr. and Mrs. Williams could transfer their interests in the disputed lands to their three children in the way that they did in their respective wills.

The grounds for the appeal were that the judge at first instance had erred in applying the law as laid down in cases such as *Jones v Kernott*,⁸ and *Stack v Dowden*.⁹ Judgement in the Court of Appeal was given by Nugee L.J. who started with a review of the existing law on the question of how land is owned beneficially when it is conveyed in joint names but without express declaration of trust. Nugee L.J. started with reference to the judgment of Lady Hale in *Stack v Dowden*¹⁰ where her Ladyship explained that in the context of a domestic setting, where land was conveyed in the joint names of two or more persons, the presumption was that the legal and beneficial ownership was held as a joint tenancy. Her Ladyship held that this presumption could only be rebutted by either a resulting trust pointing to the pattern of financial contribution or more appropriately the application of the common intention constructive trust which allowed the court to infer a different beneficial interest based on the inferred common intention of the parties.¹¹ In the course of her judgment in *Stack v Dowden*, Lady Hale explained that there were a whole host of factors the court would like into and “in the cohabitation context. Thus, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.”¹²

Nugee L.J then reviewed the decision of the Supreme Court in *Jones v Kernott*.¹³ This case was heavily relied by counsel for Dorian as conclusive of the fact that Dorian was entitled to the disputed land absolutely and beneficially on the basis of the right of survivorship. In *Jones v Kernott*. Lord Walker and Lady Hale (JJSC) were at pains to make it clear that ‘the time has come to make it clear, in line with *Stack v Dowden* [2007] 2 AC 432 (see also *Abbott v Abbott* [2008] 1 FLR 1451), that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares. The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources.’¹⁴

In the face of the overwhelming statement of the law in the decided cases to the effect that a conveyance of real or personal property in the joint names of two or more owners, the position in both law and equity is that the co-owners are beneficial joint tenants. The Court of Appeal in *Williams v Williams*¹⁵ sought to address the appeal on a number of grounds including the importance of the context in which

⁸ [2011] UKSC 53.

⁹ [2007] 2 AC 432.

¹⁰ [2007] 2 AC 432.

¹¹ [2007] 2 AC 432 at para.60.

¹² [2007] 2 AC 432 at para.69.

¹³ [2011] UKSC 53.

¹⁴ [2001] UKSC 53 at para.25.

¹⁵ [2024] EWCA Civ. 47.

the co-ownership had arisen as well at reference to academic commentary. In relation to the question of context, the Nugee LJ explained that ‘legal disputes never take place in a vacuum. They are always rooted in the real world. Where land is bought and transferred into joint names, there will always be a background to the purchase and other surrounding circumstances that shed light on the context in which the purchase took place. In addition, in this area of law "context is everything.’¹⁶ With this in mind, his Lordship was at pains to explain that even in the decided cases in the context of a domestic setting those cases made it very clear that the outcome in a commercial setting would be rather different. His Lordship referred to a passage of the judgment of Lady Hale in *Stack v Dowden* where her Ladyship explained that ‘another development has been the recognition in the courts that, to put it at its lowest, the interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men. 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.’¹⁷

With the commercial context in mind, Nugee L.J. proceeded to explain that the present context in *Williams v Williams*¹⁸ was very different to a situation where land had been purchased for a domestic family setting usually in the context of a marriage. Both the farm and the adjoining land were purchased for a business venture and was conveyed not just in the names of Mr. and Mrs. Williams as a married couple, but also in the name of Dorian. Although they lived on the land, the real and effective reason for the purchase was to run a business and not to establish a family home. On this basis Nugee L.J. held that ‘there is a very longstanding and well-established principle that equity will usually assume that co-owners acquiring property for business purposes do not intend survivorship.’¹⁹ To further support this finding Nugee L.J. referred to leading academic commentary, citing the view expressed in *Megarry & Wade* where the editors of the 9th edition comment at that ‘Where partners acquire land as part of their partnership assets, they are presumed to hold it as beneficial tenants in common. It was an ancient rule that the right of survivorship had no place in business. The rule extends to any joint undertaking carried on with a view to profit, even if there is no formal partnership between the parties, and even if the property has not been purchased but acquired by inheritance by the persons who use it for business.’²⁰

Common intention constructive trusts in commercial settings

A further question that has arisen in more recent times is whether a common intention constructive trust can be applied in a commercial setting. For example, where properties have been conveyed in the joint names of two parties for the purposes of investments, rather than for the purposes of a family home. The matter fell to be decided by the Privy Council in *Marr v Collie*.²¹ The facts concerned the appellant and respondent who had been in a relationship for some seventeen years. During that relationship, they had acquired a number of properties in the Bahamas by way of investments, as well as a collection of art works and a boat. The properties were conveyed in their joint names. When the relationship between the parties had broken down, the question arose as to the beneficial ownership of the properties that had been conveyed in their joint names. The appellant argued that since he had provided the purchase price for properties, he was the sole beneficial owner of the properties. The trial judge in the Bahamas held that since the appellant had provided the purchase price for the properties, a presumed resulting trust arose in his favour that had not been rebutted by the respondent.²² Further, the Supreme Court of the Bahamas held that the principle that a conveyance into the joint names of parties indicated a legal and beneficial joint tenancy only applied in the context of a domestic family setting and not to a commercial one.

¹⁶ [2024] EWCA Civ. 47 at para. 46.

¹⁷ [2007] 2 AC 432 at para. 42.

¹⁸ [2024] EWCA Civ. 47.

¹⁹ [2024] EWCA Civ. 47 at para. 58.

²⁰ Megarry & Wade, *The Law of Real Property* (2019) 9th edn (Sweet & Maxwell), 21-29.

²¹ [2017] UKPC 17. See also, J. Roche, “Returning to Clarity and Principle: The Privy Council on *Stack v Dowden*” (2017) 76(3) C.L.J., 493-496.

²² See *Laskar v Laskar* [2008] 1 WLR 2695.

In allowing the appeal, the Privy Council held that the principle of a common intention constructive trust was not confined to a domestic setting. Lord Kerr was clearly of the opinion that the principle in *Stack v Dowden*,²³ while principally applied in the context of a domestic setting also extended to properties that had been purchased for a commercial venture. In the course of his judgment, Lord Kerr referred to the judgment of Baroness Hale in *Stack v Dowden*.²⁴ Lord Kerr explained that:

At para 56 of her opinion in *Stack v Dowden* [2007] 2 AC 432 Baroness Hale expressed the fundamental principle in commendably clear and simple terms: ‘the starting point where there is joint legal ownership is joint beneficial ownership’. Although that statement was made in a case where the dispute between the parties was in relation to property which was a family home, there is no reason to doubt its possible applicability to property purchased by a couple in an enterprise reflecting their joint commercial, as well as their personal, commitment. When Baroness Hale said, in para 58, that, ‘at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved’, it is clear that she did not intend that the principle should be confined exclusively to the domestic setting. Of course, when the conveyance occurs in circumstances where the parties are involved only in a personal relationship, the fact that they have elected to have the property in their joint names may make it easier to infer an intention that they should share the beneficial ownership. But that does not mean that where there is a commercial dimension to the acquisition of the property, the decision to have the legal ownership declared to be jointly shared is bereft of significance. The intention of the parties will still be a crucial factor.²⁵

Having decided that the principle of a common intention constructive trust was not confined to a purely domestic setting, the Privy Council referred the case back to the Supreme Court of the Bahamas - to determine whether on the facts a common intention to share the properties 50 per cent each existed, and failing that, the matter to be decided on the principles of a resulting trust. Lord Kerr referred to the judgment of Lord Walker in *Stack v Dowden* where Lord Walker explained that:

The doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and a commercial partnership. The well-known Australian case of *Muschinski v Dodds* (1985) 160 CLR 583 is an example. The High Court of Australia differed in their reasoning, but I find the approach of Deane J, at p 623, persuasive: ‘That property was acquired, in pursuance of the consensual arrangement between the parties, to be held and developed in accordance with that arrangement. The contributions which each party is entitled to have repaid to her or him were made for, or in connection with, its purchase or development. The collapse of the commercial venture and the failure of the personal relationship jointly combined to lead to a situation [*643] in which each party is entitled to insist upon realisation of the asset, repayment of her or his contribution and distribution of any surplus.’²⁶

Conclusions

The principles relating to the determination of the beneficial ownership where title is conveyed in joint names without express declaration are now well cemented in the common law of England and Wales. It is clear that, at least in the context of domestic family situations, a conveyance of property in the joint names of two or more persons creates a joint tenancy at law and in equity. That ownership structure is only departed from where the courts can infer a common intention amongst the co-owners that they intended a rather different quantification to their shareholding, and this is found by the application of the common intention constructive trust as discussed in this article. It has often been said that the principles that have been decided in the domestic context do not apply to a commercial setting where the property is acquired for a commercial venture. For example, post the Court of Appeal decision in *Williams v Williams*²⁷: it has often been said that those rules do not apply to a commercial setting. This article argues that one should err on the side of caution before suggesting that they do not apply and that a different set of principles govern co-ownership disputes relating to business property.

²³ [2007] UKHL 17.

²⁴ [2017] UKHL 17.

²⁵ [2018] AC 631 at para. 40.

²⁶ [2017] UKHL 17 at para. 32.

²⁷ [2024] EWCA Civ. 47.

The argument advanced here is that they squarely apply and remain good law in the context of business property, but in applying them to the facts of disputed cases such as *Williams v Williams* and *Marr v Collie*²⁸ the outcomes are rather different because of the importance of context and the relevant inferred intentions that are applied in that context. Unlike in domestic family settings where the context is very much one of affection between the co-owners and in general an understanding to collectively own property, the same cannot be said for a commercial setting. In a commercial setting, even where the property is purchased and co-owned for the purposes of running a business, it cannot be said that the property is co-owned for the mutual benefit of each other, rather the property is co-owned by each individual in the furtherance of the business.

²⁸ [2017] UKPC 17. See also, J. Roche, “Returning to Clarity and Principle: The Privy Council on *Stack v Dowden*” (2017) C.L.J. 76(3) at 493-496.