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**COHABITATION AND
CONSTRUCTIVE TRUSTS: SOME
RECENT DEVELOPMENTS**

**COHABITANTS AND THE
INHERITANCE ACT**



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COHABITATION AND CONSTRUCTIVE TRUSTS: SOME RECENT DEVELOPMENTS

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Introduction

1. The 2001 Census recorded just over 2 million “cohabiting” couples (including those in same-sex relationships) in England and Wales: an increase of 67% on the figures from the 1991 Census. In 1986, 11% of non-married men and 13% of non-married women in Great Britain aged 16 to 59 were cohabiting, whilst by 2004 those figures had risen to 24% and 25% respectively. Beyond that, in 1970 fewer than 10% of births occurred outside marriage, whereas by 2004 42% of all births occurred outside marriage. The 2001 Census recorded that as many as 1,278,455 children in England and Wales were dependent on a cohabiting couple.

2. For these reasons, the law relating to co-ownership of the “family” home must be regarded as being of wider significance than ever before. Yet in **Stack v. Dowden** [2005] EWCA Civ 857, [2006] 1 FLR 254 Carnwath LJ said (at [75]) that to the detached observer, the existing law as it has developed over the years

“may seem like a witch’s brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust, ... proprietary estoppel, unjust enrichment, and so forth. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them.”

3. Such judicial pessimism would appear to be justified: 56% of respondents to the **British Social Attitudes Survey** in 2000 thought that English law recognised cohabitants as “common law spouses” once they had lived together for some period of time, and this misconception was even more common amongst cohabitants as a group (of whom 59% held this belief).

4. Against this background, it is, perhaps, no wonder that the law in this area has in recent years been the subject of scrutiny by the Law Commission in a Discussion Paper entitled **Sharing Homes** (Law Com No. 278, November 2002) and a Consultation Paper entitled **Cohabitation: The Financial Consequences of Relationship Breakdown** (Law Com No. 179, May 2006) and by the Department of Constitutional Affairs in a Research Report entitled **Separating from Cohabitation: making arrangements for finances and parenting** (DCA

Research Series 7/06, October 2006). (In its 2002 Discussion Paper, the Law Commission concluded that it was impossible to devise a statutory scheme for the ascertainment and quantification of beneficial interests which would operate fairly and evenly across the diversity of domestic circumstances which are now encountered. Instead, it proposed certain modifications to the “common intention” constructive trust which were intended to widen the circumstances in which the requisite common intention would be inferred so as to include indirect financial contributions to the purchase of the property. So far as quantifying the parties’ respective interests was concerned, the Law Commission recommended adopting a “holistic approach” which would involve “undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended”. These proposals have not yet been implemented by way of legislation, although, as explained below, strong echoes of that approach to quantification are to be found in recent decision of the Court of Appeal in **Oxley v. Hiscock** [2004] EWCA Civ 546, [2005] Fam 211.)

The “common intention” constructive trust: an overview

Express common intention

5. In the absence of any express declaration of trust – which will generally be conclusive as to the parties’ respective beneficial interests – Lord Bridge of Harwich explained in **Lloyds Bank plc v. Rosset** [1991] 1 AC 107, 132 that:

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

the agreement in order to give rise to a constructive trust or a proprietary estoppel.”

6. In relation to this question, as Waite J explained in ***Hammond v. Mitchell*** [1991] 1 WLR 1127, CA at 1139:

“the tenderest exchanges of a common law courtship may assume an unforeseen significance many years later when they are brought under equity’s microscope and subjected to an analysis under which many thousands of pounds of value may be liable to turn on fine questions as to whether the relevant words were spoken in earnest or in dalliance and with or without representational intent. This requires that the express discussions ... should be pleaded in the greatest detail, both as to language and as to circumstance.”

Inferred common intention

7. As Lord Bridge of Harwich went on to explain in ***Lloyds Bank plc v. Rosset*** at 132-133:

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

8. In the light of this, as the editors of ***Lewin on Trusts*** (17th Edition, 2000) observe at paragraph 9-67 (p 251):

“it must now be taken to be extremely doubtful whether financial contributions towards joint living expenses before or after the time of purchase; or contributions in money or money’s worth towards even substantial improvements or repairs (as opposed to mere redecoration or do-it-yourself work) after the time of purchase; or hard physical labour in such improvement can of themselves raise an inference of the requisite common intention, even though such contributions are of substantial amounts. The earlier authorities indicating that such conduct may suffice can no longer, it would appear, be relied on.”

See, also, **Grant v. Edwards** [1986] Ch 638, CA at 653 *per* Mustill LJ; *cf* **Le Foe v. Le Foe** [2001] 2 FLR 970, 980. (Thus payments made towards the household bills, and hence only indirectly towards repayment of the mortgage, will not be enough to “justify the inference necessary to the creation of a constructive trust”: see, also, **Mollo v. Mollo** [1999] All ER (D) 1084 at [23], [25], [26].)

9. It should also be noted that as Lord Diplock explained in **Gissing v. Gissing** [1971] AC 886, 906:

“what spouses said and did which led up to the acquisition of a matrimonial home and what they said and did while the acquisition was being carried through is on a different footing from what they said and did after the acquisition was completed. Unless it is alleged that there was some fresh subsequent agreement, acted upon by the parties, to vary the original beneficial interests created when the matrimonial home was acquired, what they said and did after the acquisition was completed is relevant if it is explicable only upon the basis of their having manifested to one another at the time of the acquisition some particular common intention as to how the beneficial interests should be held.”

10. And as Mr Robert Hildyard QC (sitting as a Deputy Judge of the Chancery Division) explained in **McKenzie v. McKenzie** [2003] All ER (D) 155 at [82]:

“payments made towards mortgage instalments on an occasional basis, or commenced some time after the original acquisition, would not have the requisite direct nexus with the purchase to be treated as a contribution to the purchase price such as to result in the contributor acquiring a commensurate beneficial interest”.

(See, also, **Carlton v. Goodman** [2002] EWCA Civ 545, [2002] 2 FLR 259 at [22(vii)] *per* Mummery LJ.)

11. The nature of the parties’ relationship may be of significance in ascertaining their common intention (if any) as to the beneficial ownership of the property. In the words of Griffiths LJ in **Bernard v. Josephs** [1982] 1 Ch 391, 402, 403:

“The legal principles to be applied are the same whether the disputed is between married or unmarried couples, but the nature of the relationship between the parties is a very important factor when considering what inferences should be drawn from the way they have conducted their affairs. There are many reasons why a man and a woman may decide to live together without marrying, and one of them is that each values his independence and does not wish to

make the commitment of marriage; in such a case it will be misleading to make the same assumptions and to draw the same inferences from their behaviour as in the case of a married couple. The judge must look most carefully at the nature of the relationship, and only if satisfied that it was intended to involve the same degree of commitment as marriage will it be legitimate to regard them as no different from a married couple. ... Each case will depend on its own facts, and I only warn against a blithe assumption that all couples living together are to be regarded as no different from a married couple.”

Quantifying the parties' shares

12. In *Mortgage Corporation v. Shaire* [2001] Ch 743, 750-751 Neuberger J said as follows:

“When determining the respective beneficial interests of two persons who are living in a house together, either as man and wife or in a close relationship, the law appears to be as follows.

1. Where parties have expressly agreed the shares in which they hold, that is normally conclusive: see *Lloyds Bank Plc v. Rosset* [1991] 1 AC 107, 132F and *Goodman v. Gallant* [1986] Fam 106.
2. Such an agreement can be in writing or oral: see *Rosset's* case [1991] 1 AC 107, 132F.
3. Where the parties have reached such an agreement, it is open to the court to depart from that agreement only if there is very good reason for doing so, for instance, a subsequent renegotiation or subsequent actions which are so inconsistent with what was agreed as to lead to the conclusion that there must have been a variation or cancellation of the agreement.
4. Where there is no express agreement the court must rely on the contemporary and subsequent conduct of the parties: see *Rosset's* case [1991] 1 AC 107, 132H and *Midland Bank Plc v. Cooke* [1995] 4 All ER 562.
5. In this connection one is not confined to the conduct of the parties at the time of the acquisition or the time of the alleged creation of the alleged interest. The court can look at subsequent actions: see *Stokes v. Anderson* [1991] 1 FLR 391, 399G.
6. The extent of the respective financial contributions can be, and normally is, a relevant factor although it is by no means decisive: see for instance *Cooke's* case, where the wife's contribution was 7% and yet she was held to have a 50% interest.
7. Further, the extent of the financial contribution is perhaps not as important an aspect as it was once thought to be. It may well carry more weight in a case where the parties are

unmarried than where they were married: see **Cooke's** case [1995] 4 All ER 562, 576B and the closing part of **Stokes's** case [1991] 1 FLR 391, 401.

8. None the less, subject to other factors, relevant payments of money should, or at least can, be "treated as illuminating the common intention as to the extent of the beneficial interest": per Nourse LJ in **Stokes's** case, at p 400.
 9. As the same case demonstrates, at p 400C, where there is no evidence of a specific agreement "The court must supply the common intention by reference to that which all the material circumstances have shown to be fair".
 10. Only at the last resort should the court resort to the maxim that equality is equity: see **Cooke's** case [1995] 4 All ER 562, 574E.
 11. It may well be of significance whether the property is in joint names (as here) or in the name of one party, as in **Rosset's** case [1991] 1 AC 107 and **Cooke's** case [1995] 4 All ER 562, and as appears to have been in **Stokes's** case [1991] 1 FLR 391, 394D-E. In this connection see the discussion in **Rosset's** case [1991] 1 AC 107, 128D and 133C-H, which is not directly in point but tends to support that view."
13. The manner in which the parties' respective beneficial interests are to be determined was, however, the subject of a detailed review by the Court of Appeal in **Oxley v. Hiscock**.

Oxley v. Hiscock

14. The claimant, who was divorced from her husband, was living in a council house with her children when she began a relationship with the defendant, who owned his own home. In September 1987 she exercised her right to buy her council house at the discounted price of £25,200 using funds provided by the defendant from the sale of his property. In 1991 the parties purchased a bigger property to accommodate themselves and the claimant's children. The purchase price of £127,000 was funded by:
- (1) the net proceeds of sale of the former council house at £61,500 (of which £25,200 was attributable to the defendant's original contribution and £36,300 to the claimant);
 - (2) £35,500 from the defendant's own savings; and
 - (3) a mortgage loan of £30,000.

The property was registered in the sole name of the defendant with the consent of the claimant, which was given in spite of her solicitor's advice that she should protect her interest by joint registration: the trial judge found that discussions had taken place between the parties in which Mrs Oxley had mentioned the possibility of her former husband making a claim against her share of the property in the event of her death, and it was in the light of this that the property was purchased in Mr Hiscock's sole name. After the purchase both parties contributed towards the maintenance and improvement of the property from pooled resources in the belief that each had a beneficial interest. By 2001 the mortgage had been paid off. The relationship between the parties having broken down, the property was then sold and the parties, having separated, purchased separate houses. The claimant applied under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 for a declaration that the proceeds of sale of the property were held on trust for both parties in equal shares.

15. At first instance the judge concluded that, in the absence of any express agreement, both parties had evinced an intention to share the benefit and the burden of the property jointly and equally, and declared that the claimant was entitled to a half share in the proceeds of sale. The defendant appealed, contending that since there had been no discussion between the parties as to the extent of their respective beneficial shares at the time of purchase, the presumption of a resulting trust was not displaced and the property was held on trust for both parties in beneficial shares proportionate to their respective contributions to the purchase price.
16. The first question which the Court of Appeal had to decide was whether the trial judge had been required by the decision of Court of Appeal in **Springette v. Defoe** [1992] 1 FLR 388 to find that, in the absence of some shared intention as to the proportions in which they should be entitled to the property communicated between them at the time of the purchase, the property was held on a resulting trust for Mr Hiscock and Mrs Oxley in beneficial shares proportionate to their respective financial contributions to the cost of its

acquisition. As to this, Chadwick LJ (with whom Mance and Scott Baker LJ agreed) said at [60]:

“In my view the judge was not so required. For my part, I doubt whether the observations in *Springette v. Defoe* upon which the defendant relies did, in truth, reflect the state of the law at the time when that appeal was decided. Be that as it may, they have not done so since the decision of this court in *Midland Bank plc v. Cooke* [1995] 4 All ER 562. I reject the submission, in so far as it was pursued in argument, that *Midland Bank plc v. Cooke* was wrongly decided. But I think that the law has moved on since that decision.”

17. Having conducted an exhaustive review of the relevant authorities, Chadwick LJ stated his conclusions in the following terms:

“[68] I have referred, in the immediately preceding paragraphs, to “cases of this nature”. By that, I mean cases in which the common features are: (i) the property is bought as a home for a couple who, although not married, intend to live together as man and wife; (ii) each of them makes some financial contribution to the purchase; (iii) the property is purchased in the sole name of one of them; and (iv) there is no express declaration of trust. In those circumstances the first question is whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property. In many such cases—of which the present is an example—there will have been some discussion between the parties at the time of the purchase which provides the answer to that question. Those are cases within the first of Lord Bridge’s categories in *Lloyds Bank plc v Rosset* [1991] 1 AC 107. In other cases—where the evidence is that the matter was not discussed at all—an affirmative answer will readily be inferred from the fact that each has made a financial contribution. Those are cases within Lord Bridge’s second category. And, if the answer to the first question is that there was a common intention, communicated to each other, that each should have a beneficial share in the property, then the party who does not become the legal owner will be held to have acted to his or her detriment in making a financial contribution to the purchase in reliance on the common intention.

[69] In those circumstances, the second question to be answered in cases of this nature is: “what is the extent of the parties’ respective beneficial interests in the property?” Again, in 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 the 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."

(Emphasis added.)

18. The trial judge's finding that Mrs Oxley was entitled to a half share was overturned, since as Chadwick LJ explained at [74]:

"... to declare that the parties were entitled in equal shares would be unfair to Mr Hiscock. It would give insufficient weight to the fact that his direct contribution to the purchase price (£60,700) was substantially greater than that of Mrs Oxley (£36,300). On the basis of the judge's finding that there was in this case "a classic pooling of resources" and conduct consistent with an intention to share the burden of the property (by which she must, I think, have meant the outgoings referable to ownership and cohabitation), it would be fair to treat them as having made approximately equal contributions to the balance of the purchase price (£30,000). Taking that into account with their direct contributions at the time of the purchase, I would hold that a fair division of the proceeds of sale of the property would be 60% to Mr Hiscock and 40% to Mrs Oxley."

19. **Oxley v. Hiscock** is also noteworthy for what Chadwick LJ had to say regarding the convergence of the principles of constructive trusts and proprietary estoppel:

"[66] Once it is recognised that what the court is doing, in cases of this nature, is to supply or impute a common intention as to the parties' respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition), is shown to be fair, it seems to me very difficult to avoid the conclusion that an analysis in terms of proprietary estoppel will, necessarily, lead to the same result; and that it may be more satisfactory to accept that there is no difference, in cases of this nature, between constructive trust and proprietary estoppel. It is clear that Sir Nicolas Browne-Wilkinson V-C in **Grant v. Edwards** ([1986] Ch 638) thought that there was much to be said for that view. In **Stokes v. Anderson**, Nourse LJ seems to have thought the same. More recently, in **Yaxley v. Gotts** [2000] Ch 162, 176 Robert Walker LJ observed that "in the area of a joint enterprise for the acquisition of land (which may be, but is not

necessarily, the matrimonial home) the two concepts [estoppel and constructive trust] coincide"; and, at p 180, that "the species of constructive trust based on 'common intention' ... is closely akin to, if not indistinguishable from, proprietary estoppel". He found support for those observations in the three cases to which much reference has been made in this judgment: **Gissing v. Gissing**, **Grant v. Edwards** and **Lloyds Bank plc v Rosset**."

Stack v. Dowden

20. An express declaration of the parties' respective beneficial interests will be conclusive, subject only to challenge on grounds such as fraud, mistake and undue influence: see **Lloyds Bank Plc v. Rosset** [1991] 1 AC 107, 132; **Goodman v. Gallant** [1986] Fam 106. It is for this reason that judges have for a many years encouraged conveyancing solicitors to take instructions from their clients regarding their respective intended beneficial interests in the property to be purchased as a routine part of the conveyancing process: see, for example, **Cowcher v. Cowcher** [1972] 1 WLR 425, 442 *per* Bagnall J and the more recent case of **Carlton v. Goodman** [2002] EWCA Civ 545, [2002] 2 FLR 259 where Ward LJ said at [44]:

"I ask in despair how often this court has to remind conveyancers that they would save their clients a great deal of later difficulty if only they would sit the purchasers down, explain the difference between a joint tenancy and tenancy in common, ascertain what they want and then expressly declare in the conveyance or transfer how the beneficial interest is to be held because that will be conclusive and save all argument. When are conveyancers going to do this as a matter of invariable standard practice? This court has urged that time after time. Perhaps conveyancers do not read the law reports. I will try one more time: ALWAYS TRY TO AGREE ON AND THEN RECORD HOW THE BENEFICIAL INTEREST IS TO BE HELD. It is not very difficult to do."

21. However, one of the issues considered in the recent case of **Stack v. Dowden** concerned what exactly amounted to an express declaration of the parties' respective beneficial interests.
22. In 1993, Miss Dowden and Mr Stack purchased a house at 114 Chatsworth Road,

Willesden Green, London N2 in their joint names. Miss Dowden and Mr Stack had been living together as man and wife since 1975, and by the date of purchase had four children. The deposit was paid from a savings account in Miss Dowden's sole name. The balance payable on completion had been funded partly by the proceeds of sale of a property at 160 Purves Road, London NW10 which had also been in Miss Dowden's sole name, and partly by way of a mortgage advance in the joint names of Miss Dowden and Mr Stack.

23. The transfer deed had included a declaration that the survivor of them was entitled to give a valid receipt for capital money arising from a disposition of all or part of the property. However, it was unclear whether the parties had discussed how they wished to own the property.
24. Miss Dowden and Mr Stack eventually separated. At first instance, Mr Stack obtained a declaration that the house had been held on trust by him and Miss Dowden as tenants in common in equal shares. He was also awarded an occupation rent of £900 per month as recompense for his cost of renting alternative accommodation.
25. Miss Dowden appealed. Mr Stack filed and served a Respondent's Notice, in which he contended that the court should uphold the order directing payment out of the proceeds of sale to the parties in equal shares on the grounds that the property had been transferred subject to an express trust declared in the transfer deed, that the beneficial interests of the parties under that express trust were as joint tenants and that the beneficial joint tenancy under that express trust had then been converted into a beneficial tenancy in common in equal shares by severance.
26. That argument was rejected. Chadwick LJ (with whom Carnwath and Smith LJ agreed) said as follows:

“[3] The property was transferred to Miss Dowden and Mr Stack, as purchasers, by a transfer dated 27 August 1993. The transfer contains no words of trust. But it does contain a declaration by the

purchasers that the survivor of them is entitled to give a valid receipt for capital money. Paragraph 2 is in these terms:

"The Purchasers declare that the survivor of them is entitled to give a valid receipt for capital money arising from a disposition of all or part of the property."

[4] It was Mr Stack's primary submission at the trial that the property had been transferred to the parties subject to the express trust that they held the beneficial interest as joint tenants in equity. In November 2002 Miss Dowden served notice of severance. It is common ground that, if there were a joint tenancy in equity, it was then severed and the parties held the property thereafter as beneficial tenants in common in equal shares.

[5] A declaration in the form of that in paragraph 2 of the transfer deed in this case is consistent with the right of survivorship, inherent in a joint tenancy, extending to the beneficial interests in the proceeds of sale – section 36(2) of the Law of Property Act 1925. It is not apt in a case where there is a beneficial tenancy in common – section 27(2) of that Act. The appropriate (and usual) declaration in a case where the parties intend from the outset that their beneficial interests shall be as tenants in common in equity – whether in equal or unequal shares – is that a valid receipt for capital monies cannot be obtained from the survivor alone. A declaration in that form will lead to a restriction on the register to that effect under section 58(3) of the Land Registration Act 1925.

[6] The judge did not accept that the declaration contained in paragraph 2 of the transfer deed was sufficient, of itself, to lead to the conclusion that the property had been transferred subject to an express trust for the parties as beneficial joint tenants in equity. He addressed the point, shortly, in the opening sentence of paragraph 19 of his judgment:

"The second paragraph of that transfer certainly suggests that there was to be a joint tenancy of the Property, but it is not sufficient by itself for there to be an express declaration of trust, as was found in one of the cases to which [counsel] had referred me."

The case which the judge had in mind as authority for that proposition was, I think, *Huntingford v Hobbs* [1993] 1 FLR 736.

[7] The submission advanced on behalf of Mr Stack in the court below - but rejected by the judge - is pursued in this Court by a respondent's notice. Mr Stack invites this Court to uphold the judge's order directing payment out of the proceeds of sale to the parties in equal shares on the grounds that this is a case in which the property was transferred subject to an express trust declared in the transfer deed, that the beneficial interests of the parties under that express trust were as joint tenants and that the beneficial joint tenancy under that express trust has been converted into a beneficial tenancy in common in equal shares by severance.

[8] It is, I think, common ground – and, if it is not common ground, it is not open to serious dispute – that, if there were an express trust from the outset, there would be no need to consider, as the judge did, what interests might have arisen (in the absence of an express trust) under resulting or constructive trusts. The express trust would be determinative of the present interests. It is appropriate, therefore, to address that issue first.

[9] That can be done shortly. **Huntingford v. Hobbs** (*supra*) was a decision of this Court. The facts in that case (so far as material in the present context) are indistinguishable from those in this case. The property had been transferred into the joint names of the parties by a transfer which contained no declaration of trust in express terms, but which did include a declaration as to the power of the survivor to give a receipt for capital money arising on a disposition of the land. The primary submission advanced on the appeal was that a transfer in that form was to be construed as a declaration by the parties that they held the property for themselves as joint tenants (*ibid.* 740E). As Sir Christopher Slade observed (*ibid.* 740 F-G), if that submission were correct, it would follow from the decision in **Goodman v. Gallant** [1986] Fam 106 that, in the absence of any claim for rectification or rescission, the declaration of trust in the transfer conclusively defined the parties beneficial interests, and the effect of the notice of severance (which had been served in that case, as in this) would be to leave the two parties entitled to the proceeds of sale in equal shares.

[10] The Court was divided on the point. Sir Christopher Slade, following the earlier decision of this Court in **Harwood v. Harwood** [1991] 2 FLR 274, held that – on a fair reading of the words of the declaration as to the power of the survivor to give a valid receipt – they did not constitute a declaration of trust. Lord Justice Dillon took the opposite view. He distinguished *Harwood* and indicated that he would have preferred to adopt the approach in **Re Gorman** [1990] 2 FLR 284; a decision of the Divisional Court in Bankruptcy which had, itself, been distinguished in **Harwood**. The third member of the Court, Lord Justice Steyn, held that this Court was bound by the reasoning in **Harwood**; but that, in any event, he found the reasoning in **Harwood** "wholly persuasive". He said that he would follow it even if precedent did not compel that course.

[11] Whatever view I might have taken of the effect of a receipt clause in the form of that contained in the transfer deed in the present case if I had been required to consider the matter without the benefit of authority, I have no doubt that it is not open to this Court to depart from the position established by its earlier decisions in **Harwood v. Harwood** and **Huntingford v. Hobbs**. This must be seen as a case in which the transfer of the property into the joint names of the parties contained no declaration of the trusts upon which they were to hold the proceeds of sale."

27. In relation to the parties' respective shares on a constructive trust basis, Chadwick LJ said:

"[52]... if, on a true analysis, the whole of the purchase price for 114 Chatsworth Road other than the mortgage advance was provided by Miss Dowden from her own funds, then - subject to the question whether an inference as to intention should be drawn from the declaration in paragraph 2 of the transfer deed – it is impossible to reach the conclusion that it is fair, having regard to the whole course of dealing between the parties in relation to that property, that their beneficial shares should be equal. That conclusion fails to give proper weight to Miss Dowden's financial contribution to the acquisition of the property.

[53] I return, therefore, to the question whether an inference as to the parties' common intention should be drawn from the declaration in paragraph 2 of the transfer deed. The point is not pursued in the respondent's notice, which invites the Court to uphold the judge's order by finding an express trust – a finding which, as I have said, is not open to this Court in the light of its earlier decisions in **Harwood v. Harwood** [1991] 1 FLR 274 and **Huntingford v. Hobbs** [1993] 1 FLR 736. The point is not pursued (as an alternative to express trust) in the respondent's skeleton argument; and it was not pursued in oral argument. Nevertheless, the point was pleaded in paragraph 9 of the particulars of claim; it is some importance; and I think it right to address it.

[54] A declaration that the survivor should be entitled to give a good receipt for capital money is consistent with a beneficial joint tenancy and (prima facie, at least) inconsistent with a beneficial tenancy in common (whether in equal or unequal shares). Should that lead the court to conclude that the inclusion of such a declaration in the transfer of property to persons as joint tenants in law is indicative of the parties' common intention that they should hold the property transferred as joint tenants in equity? Sir Christopher Slade addressed the point directly in **Huntingford v. Hobbs** [1993] 1 FLR 736, 744A-B:

"[Counsel] submitted that, even if the declaration at the end of the transfer did not constitute an actual declaration of trust, nevertheless, having regard in particular to the form of the transfer and the statements in Mrs Hobbs' first affidavit, there was compelling evidence that the parties intended that Mr Huntingford should take an interest as beneficial joint tenant in the property or its proceeds of sale. I do not, for my part, accept that there was any such compelling evidence. However, this point as to the parties' intentions was not taken in the court below. If it had been, its validity could have been, and no doubt would have been, tested by cross-examination of Mr Huntingford [by] Mrs Hobbs'

counsel. As the case was argued at the trial, she had no occasion to put questions to him on this point, or to call evidence on it. In the circumstances, I do not think it right to allow this point to be taken and I put it on one side."

Lord Justice Dillon did not treat the point as distinct from the submission that (as a matter of construction) the transfer contained an express trust (a point on which he was in the minority). Lord Justice Steyn did not address the point in express terms; but, had he thought it a good point, the decision in *Huntingford v. Hobbs* would have gone the other way.

[55] For my part, I have little doubt that if it had been established in evidence that the parties understood the significance of the declaration in paragraph 2 of the transfer deed – and, in particular, understood that (in the circumstances of this case, where there was no other person who could have a claim to a beneficial interest) a paragraph in those terms was consistent only with an intention that the whole property should pass to the survivor on the death of the first of them to die – the inference that they intended a beneficial joint tenancy would have been irresistible. But what if, as in the present case, there is no finding of fact (and no independent evidence) that both parties did understand the significance of the declaration?

[56] I accept, of course, that – as Lord Justice Dillon observed in *Huntingford v Hobbs* (ibid, 754G-H) – ". . . a party who signs a document is bound by the terms of that document even if he or she did not trouble to read it". But the question – in the present context - is not whether Miss Dowden is bound by the declaration. Plainly, she is – at least vis à vis a purchaser. The question is whether the court should draw an inference in respect of her intention as to beneficial ownership – a matter in relation to which the declaration in paragraph 2 of the transfer deed cannot, of itself, be determinative. In that context the declaration points in one direction rather than another if, but only if, the parties understand its significance. If they do not understand why the declaration is in the transfer deed, it seems to me impossible to rely upon it for the purpose of drawing an inference as their intentions; other than as indicative of a common intention that they should be bound by it in respect of the matter (the power of a survivor to give a receipt for capital monies) for which it actually provides.

[57] It follows that I would allow the appeal from the judge's conclusion that the parties were entitled beneficially to equal shares in 114 Chatsworth Road. By her appellant's notice Miss Dowden sought a declaration that the respective beneficial interests of the parties in that property were 65/35 in her favour "or such other shares as the Court of Appeal finds just and fair according to the evidence". But it is clear from her skeleton argument – and was confirmed in oral argument – that she was not seeking a greater

share than 65%. We did not hear argument on the question whether – adopting the approach indicated in **Oxley v. Hiscock** [2005] Fam 211 – she would have been entitled to a share greater than 65%. For my part, I have no doubt that she is entitled to at least 65% of the proceeds of sale of 114 Chatsworth Road. It is unnecessary – and, in the absence of argument, would be inappropriate – to decide whether a claim for a greater share (and, if so, in what amount) would have succeeded.”

28. In relation to the award of an occupation rent¹, Chadwick LJ said this:

“[58] The parties lived together at 114 Chatsworth Road as a family with their four children from September 1993 until October 2002. By that date the relationship had broken down. Mr Stack moved out of the former home. Miss Dowden commenced proceedings in the Inner London and City Family Proceedings Court, seeking an order to restrain Mr Stack from molesting her or the children. On 11 April 2003 the parties gave mutual undertakings in those proceedings. Mr Stack undertook to leave 114 Chatsworth Road by 25 April 2003 and not to return (save for specified periods which, during the school holidays, were limited to one in each week with not less than 2 days notice through solicitors). He undertook, also, not to use or threaten violence against Miss Dowden or the children. Miss Dowden undertook that, subject to documentary proof being provided, Mr Stack should be reimbursed the cost of renting alternative accommodation (to be capped at £1,000 per month) until the sale of 114 Chatsworth Road, such reimbursement to be paid from the proceeds of sale of that property before division. Those undertakings were given over until 10 January 2004. Fresh undertakings were given on that day; but (of importance in the present context) Miss Dowden's undertaking to reimburse to Mr Stack the cost of renting alternative accommodation was not renewed. He, however, gave an undertaking not to return to 114 Chatsworth Road save for a period of 2 hours on the first Sunday of each month.

¹ In relation to the payment of an occupation rent generally, see **Re Pavlou (a bankrupt)** [1993] 1 WLR 1046, where Millett J said (at 1050): “I take the law to be to the following effect. First, a court of equity will order an inquiry and payment of an occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forceful exclusion therefore is far from conclusive. Secondly, where it is a matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded as excluded from the family home, so that an occupation rent should be paid by the co-owner who remains. But that is not a rule of law; that is merely a statement of the prima facie conclusion to be drawn from the facts. The true position is that if a tenant in common leaves the property voluntarily, but would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with an occupation rent which he or she never expected to pay.” See, also, **Dennis v. McDonald** [1982] Fam 63, 70-71; **Bernard v. Josephs** (ante) at 400 per Lord Denning MR, 405 per Griffiths LJ; **Byford v. Butler** [2003] EWHC 1267 (Ch), [2004] 1 FLR 56 at [40] (see further below).

[59] Paragraph 1(c) of the order of 6 October 2004 provides for payment to Mr Stack out of the proceeds of sale of 114 Chatsworth Road before division between the parties of (iii) the sum of £8,100 and (iv) a sum equal to £900 per month from that date until completion of the sale of the property. The basis upon which the judge made that order appears from paragraph 42 of his judgment:

"One further issue arises for decision. . . . [A]fter the parties split [Mr Stack] moved out of the house and there was an undertaking given to the Magistrates' Court that . . . an allowance of [£900] should be made to him from the net proceeds of sale before division. In January of this year . . . [Mr Stack's] undertaking for that allowance to continue (sic) was refused. There was an application to this Court when an order might have been made where the undertaking was continued. That undertaking was not signed by [Miss Dowden]. It is not clear to me that there was any consideration by the Court of the decision by the Magistrates' Court, so in those circumstances there should, in my judgment, be no deduction for the period from the time of the Magistrates' Court order to now from the sum to be mutually shared. It seems to me, though, that as the sale is very much, I suspect, going to be in [Miss Dowden's] hands, it would be fair to both parties if there should be such an allowance from the month of October until there is a sale of the Property."

[60] It is, I think, reasonably clear that the sum of £8,100 which the judge allowed to Mr Stack out of the proceeds of sale before division represents the amount due (at the rate of £900 per month) in respect of the nine months (April 2003 to January 2004) during which the undertaking given by Miss Dowden to the Inner London and City Family Proceedings Court was in place. Miss Dowden does not appeal from that part of the judge's order. But she does appeal from the order that Mr Stack be allowed a sum equal to £900 per month from 6 October 2004 until completion of the sale of the property.

[61] In my view she is entitled to succeed on that point. The only reason which the judge gave for the order which he made was that "the sale is very much, I suspect, going to be in [Miss Dowden's] hands". But that, as it seems to me, was to overlook the fact that he had ordered a sale of 114 Chatsworth Road on the open market for the best price reasonably obtainable; that there was nothing in the order which had the effect of postponing that sale; and that his order named the agents who were to have conduct of the sale and provided that the solicitors to act in the sale were not to be the solicitors for either party. It is impossible to say that Miss Dowden has control of the timing of the sale; and it was no part of Mr Stack's case before this Court that she had been the cause of any (or any unreasonable) delay. It seemed to be common ground that neither

party was anxious to press for a sale at a time (October 2004 to April 2005) when the market was perceived to be slack.

[62] The judge seems to have overlooked, also, that (until sale) a home must be provided for the four children of the couple; and that (in the order of 6 October 2004 itself) Mr Stack continued his undertaking not to intimidate, harass or pester the children. It is clear, therefore, that the order was made on the basis that the children would continue to live at 114 Chatsworth Road with their mother until that property was sold. Absent any allegation that she was delaying a sale, there was no basis upon which to make an order that she should pay an occupation rent for 114 Chatsworth Road; no basis upon which that rent could be assessed at £900 per month or any other figure; and no basis upon which to order that she should pay Mr Stack's accommodation costs (whatever they might be).

[63] The jurisdiction to make an order that a beneficiary under a trust of land who is in occupation of that land make payments to a beneficiary whose own entitlement to occupy the land has been excluded or restricted is not in doubt – section 13(3) and (5) and section 14(2)(a) of the Trusts of Land and Appointment of Trustees Act 1996. But that power must be exercised with regard to the intentions of the persons who created the trust, the purposes for which the land is held and the circumstances of each of the beneficiaries – section 13(4) and (8). It is not at all clear that, in making the order that he did, the judge was purporting to exercise a power under the 1996 Act. But, if he were, he was required to take account of the obligations of both parents towards their children; and, in particular, the need for the children to remain in their home, under the care of their mother, until the house was sold. He failed to give any consideration to those matters.”

29. Mr Stack has been granted leave to appeal to the House of Lords. As things stand, his appeal is expected to be heard early next year.

Some other recent cases of which you should be aware

Cox v. Jones [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010

30. This was an unedifying dispute between two practising barristers. They met in 1997 and were engaged to be married in February 1998. Shortly after their engagement, Miss Cox moved in with Mr Jones. However, their relationship was a stormy one and three months later Miss Cox moved out, although the parties' relationship continued. Miss Cox claimed that the engagement also continued,

although Mr Jones denied this (maintaining instead that their engagement had ended after a particularly heated argument in March 1998, which had led to him pretending to throw the engagement ring out of the window, although in fact he kept it and put it in his pocket). The relationship itself lasted until May 2001, when it broke down permanently. Miss Cox claimed that the engagement had continued until May 2001.

31. After the breakdown of the relationship. Miss Cox claimed that:

- (1) Mr Jones had purchased a flat in Islington (situated above her own flat) as a nominee for her, and held it on trust for her absolutely.
- (2) A country house, The Mill, which had been purchased in Mr Jones's sole name, was held on trust for Miss Cox and Mr Jones in equal shares.
- (3) A Fiat Barchetta car which Miss Cox had owned, and which she had then given to Mr Jones in April 2001, should be returned to her.
- (4) Certain chattels of limited value which she had left at The Mill at the end of her relationship with Mr Jones should be delivered up to her.

32. Mr Jones, by contrast, claimed:

- (1) That an engagement ring worth £10,000 or more which he had given to Miss Cox in February 1998 should be returned to him, as there was an arrangement between the parties that, should the relationship come to an end, he would be entitled to have it returned to him.
- (2) An account of moneys which he said Miss Cox wrongfully took and dissipated on a spending spree in New York.

33. Mann J's judgment certainly makes extremely interesting reading. So far as Miss Cox's claims to a beneficial interest in the flat and The Mill are concerned:

(1) Miss Cox was found to be entitled to a declaration that she owned 100% of the beneficial interest in the flat. Mr Jones had bought the flat as a nominee for Miss Cox and not in his own right. Miss Cox had aborted her attempt to find alternative means of funding the purchase, agreed to a purchase to joint names, and then acquiesced in a purchase in Mr Jones' sole name, and thereafter managed the flat. It was, therefore, inequitable for Mr Jones to seek to claim the flat for himself, and accordingly he held it on constructive trust for Miss Cox absolutely. As Mann J put it at [45]:

“... Miss Cox's belief that she would have an interest in the property was entirely reasonable – indeed, on my findings, it was the whole purpose of the acquisition. In addition she suffered some detriment in assuming a liability for the utility bills (which, in the circumstances of the case was slight), and in managing the lettings (which was more significant), and in providing part of the purchase price from her own resources (which is also significant). However, I do not think that the answer to this case lies in the line of cases principally relied upon by Mr Roberts [counsel for Miss Cox], which are the familiar cases which rely principally on some form of contribution by a cohabitee towards the acquisition or improvement of property. The answer lies in the slightly different, though probably conceptually related, line of cases involving one person standing aside from purchasing a property on the understanding that another purchaser would take the property and provide an interest to the former. The cases are identified and discussed in **Banner Homes Group plc v. Luff Developments Ltd** [2000] Ch 372. One of the cases cited was **Holiday Inns v. Broadhead** 232 EG 951. During an unreported interlocutory hearing Megarry J is recorded as saying the following (as appears from the judgment in **Banner Homes** at p 391, where it is cited with apparent approval):

"It seems to me that if A and B agree that A shall acquire some specific property for the joint benefit of A and B on terms yet to be agreed, and B, in reliance on A's agreement, is thereby induced to refrain from attempting to acquire the property, equity ought not to permit A, when he acquires the property, to insist on retaining the whole benefit for himself to the exclusion of B."

(See, further, **Pallant v. Morgan** [1953] Ch 43.)

(2) There was found to be an arrangement or common intention that The Mill was to be owned jointly, but not as to the parties' respective beneficial

interests. Following **Oxley v. Hiscock**, Miss Cox's interest had to be such as the court regarded as “fair having regard to the whole course of dealing between the parties in relation to the property”. Miss Cox had made a significant contribution to the extensive works carried out at The Mill, had given up work in order to do so, and was entitled to a 25% share.

Lightfoot v. Lightfoot-Brown [2005] EWCA Civ 201, LTL 8/2/2005

34. Arden LJ (with whom Wilson J and Auld LJ both agreed) said of **Oxley v. Hiscock** at [27]:

“It is in my judgment quite clear that Chadwick LJ did not dispense with the requirement for communication of the common intention when determining whether a common intention constructive trust had arisen. Indeed, the concept of communication of common intention has much in common with the manifestation of intention. An intention to share a beneficial interest in property has to be manifested to give rise to a rival obligation. ... In other words, the need for communication was only held to be unnecessary in the **Oxley** case in respect of the size of the parties’ respective beneficial interest[s].”

35. To this extent, at least, the words of Steyn LJ in **Springette v. Defoe** [1992] 2 FLR 388, 394 therefore hold good:

“Our trust law does not allow property rights to be affected by telepathy.”

Byford v. Butler [2003] EWHC 1267 (Ch), [2004] 1 FLR 56

36. Mr and Mrs Byford bought a house in Dagenham in July 1986. They took out an endowment mortgage in 1989, on which at the date of the hearing before Lawrence Collins J about £47,500 remained outstanding.
37. Mr Byford was adjudicated bankrupt on 5 June 1991. He died in December 2000. The Official Receiver took no steps to realise Mr Byford’s interest in the house during the intervening period.

38. Mrs Byford acquired from the Official Receiver her late husband's interest in the endowment policy.
39. Mr Butler was appointed Mr Byrford's trustee in bankruptcy in place of the Official Receiver in April 2001. In July 2002 he applied for a declaration that he was beneficially entitled to half the equity in the house and an order for sale (if Mrs Byford did not "buy out" his share in the house).
40. Mrs Byford contended that she was entitled to be repaid out of Mr Byford's share of the proceeds of sale half of the mortgage payments which she had made since the date of his bankruptcy, and that she was further entitled to credit for repairs and improvements. The trustee in bankruptcy maintained that if Mrs Byford was entitled to credit for mortgage interest payments (which he denied), then there should be set off against such credit an occupation rent. The matter came before a District Judge who held that Mrs Byford was entitled to credit for the improvements she had made to the house; that she was further entitled to credit of the mortgage interest payments; but that the trustee in bankruptcy was entitled to a set off in respect of an occupation rent without further enquiry.
41. Mrs Byford's appeal to the High Court was dismissed. Having reviewed the relevant authorities, and having noted at [30] that "[i]n the typical case an occupation rent has been charged where the party in occupation has actually or constructively excluded the other party from occupation", Lawrence Collins J nonetheless went on to find that Mrs Byford was liable to pay or give credit for an occupation rent , saying at [40]:

“What the court is endeavouring to do is broad justice or equity as between co-owners. As Millet J said in **Re Pavlou**, the fact that there has not been an ouster or forcible exclusion is not conclusive. The trustee cannot reside in the property nor can he derive any financial enjoyment from the property while the bankrupt's spouse resides in it, and the bankrupt spouse's creditors can derive no benefit from it until he exercises his remedies. I do not consider that the policy expressed in the new section 283A of the Insolvency Act 1986 is of any assistance (even if it had been in force). It is true that the trustee could have exercised his remedies earlier, but Mrs Byford benefited to a considerable degree by his inaction, while Mr

Byford enjoyed the use of the property with Mrs Byford, without any benefit to his creditors.”

Clarke v. Harlowe [2005] EWHC 820 (Ch), LTL 31/8/2005

42. The parties were joint tenants. Before they separated, the defendant (a successful solicitor) paid for extensive refurbishment works, at a cost of about £90,000. HH Judge Behrens, sitting as an additional judge of the Chancery Division, was not persuaded that an account should be taken of the cost of those works. In general, the relevant period for the purposes of equitable accounting will start on the date of separation, because that is the event which supersedes (or amounts to a breach or failure to honour) the earlier arrangements between the parties. Indeed, in this case it was clearly understood that the works would be paid for by Mr Harlowe. As the learned Judge put it at [39]:

“... in the ordinary case there are sound reasons for holding that equitable accounting commences at the date of the separation. In general payment for outgoings or improvements prior to the date of separation is in accordance with the arrangements between the parties and the common purpose of the implied trust. There is no breach or failure to honour those arrangements and thus no room for equitable accounting.”

43. However, he went on to say that:

“There may however be exceptional cases where it can clearly be shown that one or other of the parties is in breach of the arrangements to pay for specified improvements or outgoings. In such a case I do not see why there should not be equitable accounting even though the parties are not separated.”

Sutton v. Mishcon de Reya [2003] EWHC 3166 (Ch), [2004] 1 FLR 837

44. This case makes **Cox v. Jones** seem utterly conventional.

45. Prior to September 1996, Mr Sutton was an air steward. He “moonlighted” as an “escort” or male prostitute, and it was in that context that he met a Swedish national, Mr Staal. As Hart J described:

“[2] It is evident that Mr Staal found the particular services offered by the claimant gratifying. Those services consisted of the claimant acting as master to Mr Staal’s role as slave.

[3] The first meeting between the pair seems to have been a great success from Mr Staal's point of view. He wrote that he would "like to become a real slave" and floated the possibility of doing so by moving to the UK, surrendering his income of £6,000 a month to the claimant, and making the claimant heir to his fortune of £600,000 or so. In return the claimant was to treat him as a slave, i.e. "keep me in a firm grip, taking away all my personal belongings, and leaving me totally in your mercy". Use of the whip and the cane was invited ..."

46. In 1997 Mr Sutton and Mr Staal jointly instructed Mishcon de Reya in connection with the drafting of a Deed of Cohabitation designed, according to the deed, to "create legally binding arrangements as to financial and other matters" for the duration of their cohabitation and in the event of termination of the arrangement. Both Mr Sutton and Mr Staal accepted liability for repayment of a bridging loan for an apartment bought in Mr Sutton's name. They had intended to live there together, but in the events that happened Mr Stall never went to live with Mr Sutton and the relationship broke down.
47. Mr Sutton instructed Gawor & Co. in relation to negotiations with Mr Staal's solicitors. The parties entered into a separation deed whereby Mr Sutton agreed to transfer the apartment to Mr Staal but was entitled to continue living there until a certain date. In addition, Mr Sutton was released from all liability in connection with the bridging loan and was to retain the benefit of all gifts made to him during the course of the relationship.
48. Mr Sutton claimed that Mishcon de Reya were in breach of duty by reason of having failed to advise that they could only act for Mr Sutton; negligently drafted the cohabitation deed; and failed to ensure that Mr Staal provided certification of the fact that he had obtained independent legal advice before entering into the cohabitation deed. As against Gawor & Co., Mr Sutton alleged that they had failed to advise him properly as to the claims of the bank providing the bridging loan and had failed to explore or exploit in negotiations the argument that he had beneficial ownership of the apartment. On behalf of Mishcon de Reya and Gawor & Co. it was submitted that the cohabitation deed was unenforceable because there was no intention to create legal relations and/or if there was a contract it

was illegal on the ground of public policy or was liable to be set aside for duress, undue influence, unconscionability and/or misrepresentation.

49. The defendants applied for summary judgment and/or to strike out the claim. Their arguments were in each case based on the proposition that the Deed of Cohabitation was void by reason of one or more of the following grounds:

- (1) there was no intention to create legal relations;
- (2) the contract – if there was one – was illegal, being a contract for sexual services and/or a contract of slavery; and/or
- (3) the contract was liable to be set aside on the grounds of duress, undue influence, unconscionability and/or misrepresentation.

50. The judgment makes interesting reading for a number of reasons, although it is probably only necessary, for present purposes, to note what Hart J had to say in relation to the validity of cohabitation agreements:

“[22] I accept the submission that there is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults to intend to cohabit or who are cohabiting for the purposes of a sexual relationship. I accept also that this may also be so whatever is planned to take place in the bedroom provided that the criminal law is not infringed.”²

² The learned judge considered that the Deed of Cohabitation (whose material provisions are set out at [11]) was “itself an attempt to express the sexual relationship in the property relations contained in the contract ... It was an attempt to reify an unlawful ideal.” Apart from that, he took the view that: “[24] In the final analysis, however, I do not think that what I have to decide in this case deserves at all to be dignified by theorising at this level. ... I accept the submissions ... that it is difficult to suppose that this particular Cohabitation Deed (with or without its alleged shortcomings) could ever [have] withstood an attack on one or more of the grounds of lack of intention to create legal relations, undue influence or misrepresentation. I do not find it necessary to decide this question but will sketch out the nature of the difficulty. [25] The essence of the difficulty lies in the need to distinguish the “fantasy” elements of the relationship from the “real” elements. Mr Staal’s correspondence (which is voluminous) is eloquent in its protestations from an early stage that he wants to be a “real” slave in the sense of totally subordinating himself to the will of the claimant. If that was really how he felt, it is clear that from the beginning he was doing all he could to subject himself to the domination of his chosen master. ... The extent of the claimant’s actual domination over Mr Staal would have been apparent to the claimant. If that was the relationship it is difficult to see how the court could ever enforce such a contract against Mr Staal, however much independent legal advice he might have had. [26] If, on the other hand, it is said (as it is now said on behalf of the claimant) that there was no real relationship of dominance, that must be because everything that was passing between the two men was just an act or a role-play. But if that is right, the financial provisions of the Cohabitation Deed have themselves to be seen as part of the role-play, or at least there is no good reason for not so viewing them. If the court were to come to that conclusion, the necessary intention to create legal relations, despite their protestations to the contrary, would be absent.”

Curley v. Parkes [2004] EWCA Civ 1515, LTL 25/10/2004

51. The claimant failed to establish an interest in certain property under a constructive trust. He appealed to the Court of Appeal on the ground that the trial judge had refused to consider his claim by reference to resulting trust principles. However, the claimant had made no direct contribution to the purchase price of the property, and instead relied on (amongst other things) contributions which he claimed to have made towards the legal costs of acquisition and removal costs. Peter Gibson LJ (with whom Sir William Aldous agreed) said at [21], [23] that such payments (if made) were “no part of the purchase price”, and at [22] said that:

“No authority was drawn to our attention on this point, save for the cautious statement in **Underhill & Hayton (Law of Trusts & Trustees** (16th Edition, 2003) at page 352, that it seems that such a payment of legal fees and stamp duties should be treated as part of the purchase cost. The only English authority cited for that is **Huntingford v. Hobbs** [1993] 1 FLR 736. In that case the court did its own calculation of the respective beneficial shares in a property on the footing that £610 of costs incurred on top of the actual purchase price of £63,250 were to be treated as part of the purchase cost. But there was no discussion by any member of this court of that point. It is not an authority on resulting trusts. It was a constructive trust case. I am not persuaded that this claimed contribution is relevant to be taken into account in the present case in all the circumstances.”

(Emphasis added.) That conclusion was, it is suggested, expressed in rather diffident terms (“...in the present case in all the circumstances”). Quite apart from that, it will often be possible to distinguish the decision in **Curley v. Parkes** on the basis that, unlike Mr Curley, the party claiming an interest made a direct contribution to the purchase price *stricto sensu* as well as making a contribution towards legal or other costs associated with the purchase. (Indeed, the writer is aware, anecdotally, that in at least one recent County Court case **Curley v. Parkes** has been distinguished in this way.)

52. This case, in which it was argued on behalf of a bankrupt solicitor and his wife that she had an 85% beneficial interest in their home rather than a 50% share, is worthy of note for a number of observations made by Mr Michael Briggs QC (sitting as a Deputy Judge of the Chancery Division).

53. First of all, as the learned Deputy Judge remarked at [11]-[12]:

“... the line of authorities of which **Oxley v. Hiscock** is the latest (albeit probably not the last) do tend to by-pass an additional relevant question which lies between a conclusion that the parties had an actual or presumed intention to share the beneficial ownership of a matrimonial home and a quantification of their respective shares, namely whether they had or should have imputed to them an intention to share as beneficial joint tenants, rather than tenants in common. Beneficial joint tenants cannot, of course, hold in unequal shares. The very concept is repugnant to the notion of a beneficial joint tenancy. Furthermore, if their joint tenancy is severed, the consequence is that they hold thereafter as tenants in common in equal shares. It is therefore only in cases where the basis of co-ownership of property is that of tenants in common that any question of quantifying respective shares even arises.

[12] It may be that the apparent lack of reference to this question in the line of authorities concluding with **Oxley v. Hiscock** is because of equity's traditional dislike of joint tenancy, due to the injustice frequently caused by the principle of survivorship. But joint tenancy is not obviously either unjust or inappropriate as between husband and wife in relation to their matrimonial home, and in such cases it seems to me that a too-ready assumption of a tenancy in common begs an important prior question.”

54. Secondly, both Mr and Mrs Hurst had made statements in connection with Mr Hurst's unsuccessful IVA in which they had asserted that each of them had a 50% beneficial interest in the property in question. The learned Deputy Judge found that these did not amount to an express declaration of trust satisfying the formalities requirements of section 53(1)(b) of the Law of Property Act 1925, since as he explained at [50]:

“Neither of them purported to create a trust where either no trust or some different trust had existed before. They were merely statements made for the purpose of informing Mr Hurst's creditors as to the nature and extent of his assets and as to his wife's

readiness to co-operate in the sale of the property and the realisation of his beneficial interest for the benefit of those creditors.”

That is not to say, however, that they were irrelevant to the issue of whether the parties shared a common intention that the property would belong to them beneficially in equal shares. But it must be remembered that the relevant date, so far as establishing a common intention is concerned, is the date when the property was acquired, although later conduct may be relevant to proving what had been intended at that date. Thus as the learned Deputy Judge went on to say at [55]-[56]:

“[55] I do not consider that it would be satisfactory to infer purely from the statements made by Mr and Mrs Hurst in 2001 that they had a shared common intention of equal beneficial ownership at the time of the purchase of the property. There are some other indications that Mr Hurst had that intention, or rather that he imagined that he and Mrs Hurst were beneficial joint tenants. The form of the transfer of the property, containing a declaration that the survivor of Mr and Mrs Hurst could give a good receipt for capital monies arising on a sale, and the content of some of Mr Hurst's correspondence with Miss Dixon of Penningtons all point in that direction, but none of those indications say anything significant about Mrs Hurst's intention at the time of the purchase. In particular the form of the Transfer of the property does not, because it was common ground and accepted by the learned registrar that there was no discussion or agreement between Mr and Mrs Hurst as to the nature or size of their beneficial shares in the property, and the conveyancing was done by a colleague of Mr Hurst's in all probability without the taking of specific instructions from Mrs Hurst. It seems to me inconceivable that she would have so instructed Mr Hurst's colleague, namely that they were to be beneficial joint tenants, without any discussion of the matter with her husband.

[56] My principal reason for declining to make the inference that Mr and Mrs Hurst had a common intention as to equal beneficial ownership at the time of the purchase of the property, apart from the very substantial lapse of time between the purchase and the statements in 2001, is precisely that given by Chadwick LJ in the following passage in paragraph 71 of his judgment in **Oxley v. Hiscock**:

"It seems to me artificial – and an unnecessary fiction – to attribute to the parties a common intention that the extent of their respective beneficial interests in the property should be fixed as from the time of the acquisition, in circumstances in which all the

evidence points to the conclusion that, at the time of the acquisition, they had given no thought to the matter."

It seems to me unreal to suppose that, without any discussion between each other, Mr and Mrs Hurst came simultaneously, at the time of the purchase of the property, to have the same intention as to its beneficial ownership. This therefore is a case, in my judgment, in which the size of the parties' respective beneficial interests fall to be determined on the basis of what appears to the court now to be fair, having regard to all the parties' conduct with reference to the property, both at the time of and subsequent to its purchase."

55. Thirdly, as he observed at [60]:

"[Counsel for Mrs Hurst] submitted that a decision as to beneficial shares in property based on the fairness test enunciated in **Oxley v. Hiscock** was in substance a discretionary matter, so that, on appeal, the learned registrar's judgment should not be reversed merely because the appellate court would have given different weight to the various relevant factors than did the learned registrar. I do not consider that the ascertainment of the respective beneficial shares of co-owners of real property has yet, outside the confines of the court's special powers on divorce, reached the stage where it is truly a matter of discretion."

56. But fourthly, as he went on to say in the same paragraph:

"Nonetheless, different judges may reach different views as to what is fair without reaching the conclusion that the first instance judge was wrong in the sense of having made an error of law."

Day v. Day [2006] EWCA Civ 415, LTL 14/3/2006, *Law Society Gazette* 30 March 2006, [2006] All ER (D) 184 (Mar)

57. The appellant, Mrs Lilian Day, appealed against the costs order made in proceedings (see LTL 1/7/2005) in which she had claimed a beneficial interest in the proceeds of sale of a property previously owned by her mother-in-law, Mrs Elsie Day, and left to her son, the respondent Mr Philip Day, in Mrs Elsie Day's will. Mrs Elsie Day had occupied the property as a council tenant and purchased it at a discount of 60% pursuant to her right to buy. Mrs Lilian Day's late husband, Mr John Day, provided the remaining 40%. On that basis, Mrs Lilian Day claimed a beneficial interest in the property. It was her case that Mrs Elsie Day had held the property on constructive trust for herself and Mr John Day and that

she was therefore entitled to a share of the proceeds of sale. By his defence, Mr Philip Day claimed that his father's contribution to the purchase price was a gift and that, accordingly, Mrs Elsie Day had been entitled to leave the whole of the property to him.

58. At trial, both parties advanced an alternative, "fallback" argument (which they also agreed was logically a starting-point as much as a "fallback" position, because of the presumption of resulting trust) that Mrs Elsie Day had held the property on a resulting trust for herself and Mr John Day in the ratio of 60:40.
59. The trial judge rejected both parties' primary arguments (*i.e.* either common intention constructive trust or gift) and held that their (identical) "fallback" arguments based on resulting trust principles were correct. On the issue of costs the judge held that the result had effectively been a draw, and noted that neither party had sought to settle the matter based upon their "fallback" arguments. He accordingly made no order for costs after a date shortly after witness statements had been exchanged.
60. On appeal, Mrs Lilian Day argued that the trial judge's decision on costs was wrong. She contended that the judge was wrong to have reached a conclusion that the result of the proceedings was effectively a draw, and that he was wrong to base his decision in part on the fact that no relevant offer to settle had been made by her.
61. Her appeal was allowed. So far as the outcome of the proceedings was concerned, Ward LJ (with whom Sir Martin Nourse agreed) rejected the notion that it was a "no-score draw" and said:

"[17]... in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the day; and there is absolutely no doubt at all that the person who has to put his hand in his pocket was Philip. He failed; his mother succeeded. ... So I am in no doubt at all that this case did not end in a draw, but ended in victory for mother. Therefore the ordinary rule should apply ..."

62. He went on to say that it was not incumbent on the claimant to offer to accept 40%, although if she had done so she might have been in a position to seek costs on the indemnity basis rather than the standard basis. As he put it at [20]:

“In my judgment the valuable use of payments into court and Part 36 offers to settle place an onus, in the first place, on the defendant. He had the ability to pay his fallback position into court and could, if he took the view, have done so, confident that his greedy mother backed by his horrible brother Kevin would not have taken that money but would have fought him to the bitter end for the whole of the proceeds of sale, but that was his means of protecting his position. He failed to avail of it, and it seems to me that loses him the protection of the rules.”

Change in Land Registry practice

63. Finally, it should be noted that where title to land is to be registered in persons as joint proprietors, the Land Registry now requires (in accordance with section 44(1) of the Land Registration Act 2002 and rule 95(2)(a) of the Land Registration Rules 2003) them to execute a declaration of trust (on Form FRI in the case of an application for first registration and on Form TRI in the case of a transfer of registered land). This requirement may go some way towards reducing the risk of dispute between co-owners.

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INHERITANCE ACT CLAIMS BY COHABITANTS

1. Principally governed by the **Inheritance (Provision for Family and Dependants) Act 1975**.

- Section 1 of the Act sets out the class of persons entitled to bring a claim under the act. By section 1(1)(ba) and 1(A) a cohabitant is included in those entitled to bring a claim.
 - Section 1 provides that where a person dies domiciled in England and Wales and is survived by any of the following persons:
(including) any person (not being a person included in paragraph (a) and (b) (namely a spouse or former spouse) to whom subsection 1(A) applies.
 - Section 1(A) applies to persons who for the whole of the period during two years immediately before the date when the deceased dies, the person was living:
 - (a) in the same household as the deceased, and
 - (b) as the husband or wife of the deceased.
2. The **Civil Partnership Act 2004** has extended the meaning of cohabitant to cover persons who have entered civil partnership or in colloquial terms a gay marriage. It does not cover same sex relationships where the couple are living together without entering a civil partnership and no doubt that will be subject to human rights litigation in the future.
3. Apart from the requirement that the couple must have lived in the same household as the deceased, it will be necessary to show some sort of relationship akin to marriage.

4. It will not cover the situation where two people live in the same household for example a lodger and landlord or nurse and patient. Section 1(3) covers provides that where a claim is brought on the grounds that the applicant was dependant on the deceased, “a person shall be treated as being maintained by the deceased, either wholly or partly.. if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards the reasonable needs of that person.”
5. The fact that both parties contribute towards the household expenses will not defeat a claim provided there is more to the relationship than the payment of money in return for example lodgings. A claim by a dependant child was allowed in Re Coventry on account of the fact rent free lodging in the Deceased’s home.
6. In order to come within the terms of the act, the cohabitant must show that the “disposition of the deceased’s estate effected by his will or the law of intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.”

In making an award, the Court must take account of the following matters under section 3 of the Act.

- Financial resources and needs that the applicant has or is likely to have in the foreseeable future;
- The financial resources and needs of any other applicant under the act has or is likely to have in the foreseeable future;

- The financial resources and needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
- Any obligations and responsibilities which the deceased had towards any applicant for an order ... or towards any beneficiary of the estate of the deceased;
- The size and nature of the estate;
- Any physical or mental disability of any applicant for an order...
- Any other matter including the conduct of the applicant or any other person which in the circumstances of the case the court may consider relevant.

7. The treatment of spouses and cohabitants is fundamentally different under the Act. In the case of spouses, the court is bound to have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died, the marriage, instead of being terminated on death, had been terminated by a decree of divorce. (section 3(2).

Further, section 1(2)(a) provides that that in the case of a spouse “reasonable financial provision” is defined as such financial provision as would be reasonable in all the circumstances for the husband or wife to receive, whether or not that provision is required for his or her maintenance.

8. In the case of a cohabitant, the Court is merely obliged to have regard to –
- (a) the age of the applicant and the length of the period during which the applicant lived as the husband or wife of the deceased and in the same household as the deceased;
 - (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looker after the home or caring for the family.
9. The fact that unmarried and married claimants are treated differently under the act would not be breach of the Human Rights Act. See **Re Guidera's Estate** [2001] NI 71.

10. **What is reasonable financial provision?**

- See **Francis on Inheritance Tax Claims** and **Re Coventry** [1980] 1 Ch 461.

11. **Living together**

- The court will take a broad brush approach to living together. The case of **Gully v. Dix** [2004] 1 FLR 918 is particularly helpful on the point as is **Re Watson** [1999] 1 FLR 878.

12. **Illegality**

- It was argued in a recent case in which I appeared that a person who was illegally in this country was not entitled to bring a claim under the Act as they would be profiting from their own illegal act.

- I argued firstly under the principle of **Tinsley v Milligan** [1994] 1 AC 340. That involved a case where two lesbians lived together. They purchased a property together which was put into the name of the Claimant primarily to enable the Defendant to be in a position to claim housing benefit in respect of her occupation of the property. The Court held that Defendant was entitled to rely of the agreement that the property should be jointly owned on the normal constructive trust principles as the fraud was collateral to the trust agreement.
- Of particular relevance is the case of **Mark v. Mark** [2005] 3WLR 111.
- Also consider the case of **Witkoska v Kaminski** [2006] EWHC 1940 (Ch).

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27 NOVEMBER 2006