

'Co-ownership disputes: recent cases and developments in the law of constructive and resulting trusts'

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Context

A co-ownership dispute can arise where:

- an unmarried couple purchase a house in joint-names, intending it to be their family home, e.g. ***Jones v Kernott*** [2011];
- two friends purchase a flat together, e.g. ***Gallarotti v Sebastianelli*** [2012];
- a family member has directly contributed to the purchase price of a residential or commercial property (initially or by payment of mortgage instalments), and legal title has been registered in the sole name of another family member, e.g. ***Pankhania v Chandegra*** [2012]; and ***Agarwala v Agarwala*** [2013]; and
- where interests, for example in shares in a private company are registered in the name of one family member and held for the benefit of other family members e.g. ***Singh v Singh*** [2014].

In the absence of express intention to the contrary, a property conveyed into joint names is presumed to be held in equal shares.

'The burden is on the party asserting a different share to show that the couple did not intend their beneficial interests to be equal and that they intended the property to be shared in the competing manner asserted.' **Probate Disputes and Remedies.**

Constructive trusts

Where there is a dispute between members of a family about beneficial ownership of property, in the absence of an agreement the court must rely on the conduct of the parties as a basis for inferring the existence of a common intention to share the property beneficially, i.e. a common intention constructive trust.

'[The] claim to a constructive trust is founded on a wider range of circumstances than the mere fact that the husband initially funded the acquisition of the properties – in other words, is founded on an overall assessment of the conduct of the parties from which, it is submitted, one can properly infer a common intention justifying the imposition of such a trust.' **Ben Hashem v Al Sharif** [2009].

'In the case of a constructive trust, the court looks at the conduct of the parties throughout their relationship. It is not restricted, as it would be in the case of a resulting trust, to examining the contributions made to the acquisition. The common intention constructive trust is thus more flexible. It is also more appropriate where the parties have incurred expenditure on the strength of their personal relationship and without expectation of having to account, or to call for an account, of every item as they would have to do in the case of a true legal partnership.' **Gallarotti v Sebastianelli** [2012] (Court of Appeal).

The constructive trust is not a rigid doctrine. Instead it is deliberately built on a flexible, high level principle of good conscience.

'English law provides no clear and all-embracing definition of constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case might demand.' Lord Justice Edmund-Davies in **Carl Zeiss Stiftung v Herbert Smith & Co** [1969].

A common intention constructive trust arises, *'...in connection with the acquisition by one party of a legal title to property whenever that party has so conducted himself that it would be inequitable to allow him to deny another party a beneficial interest in the property acquired. This will be so where (i) there was a common intention that both parties should have a beneficial interest and (ii) the claimant has acted to his detriment in the belief that by doing so he was acquiring a beneficial interest.'* **Lewin.**

'Where there is no evidence of an agreement and the court must rely on the conduct of the parties as a basis on which to infer the existence of a common intention to share the property beneficially, the conduct will usually be that the [Claimant] has incurred expenditure which is referable to the acquisition of property. It is extremely doubtful whether any conduct other than the making of direct contributions to the purchase price, either initially or by payment of mortgage instalments, would be a sufficient basis for the inference.' **Ross.**

Note that in **Clarke v Meadus** [2013] the Judge stated that proprietary estoppel and remedial constructive trust are simply different routes to the same result, and observed,

*'So far as the claim based on constructive trust is concerned, the position is more difficult. That claim seems to rely on a remedial constructive trust, a judicial beast which English case law has set its face against. Perhaps the attitude of the courts is changing; and in that context the speech of Lord Scott in **Thorne** does lend support to the view that such a remedy should be available in cases of this sort...it would be wrong, in my judgment, to strike out [a claim made in the alternative on the grounds of constructive trust] if, as I hold, the claim based on proprietary estoppel should be allowed to proceed...it is to be noted that the Master himself gave permission to appeal in relation to the constructive trust claim. He could only have done so in accordance with the criteria set out in **CPR 52.3**. He must therefore have thought either that an appeal would have a real prospect of success or that there was some other compelling reason to give permission. If he was right in that, it goes to emphasise the appropriateness now of allowing all matters to proceed to trial when the claim based on proprietary estoppel is to do so.'*

Resulting trusts

'Resulting trusts arise in two different contexts. The first form of resulting trust restores the equitable interest in property to its previous beneficial owner where some attempted disposition of the property has failed. The function of this type of resulting trust is either to restore the equitable title to its previous beneficial owner, or to recognise that such title remains with that person in equity. The second form of resulting trust arises in circumstances in which two or more people have contributed to the purchase price of property with an intention that each of those contributors should take some proprietary right in the property. The purpose of this category of resulting trust is to prevent any

such contributor... seeking unconscionably to deny the proprietary rights of the other contributor.’ **Thomas and Hudson**.

‘Where one person, A, transfers the legal title of a property that he owns or purchases to another, B, without receipt of any consideration, the effect will depend upon his intention. If he intends to transfer the beneficial interest in the property to B, the transaction will take effect as a gift and A will lose all interest in the property. If he intends to retain the beneficial interest for himself, B will take the legal interest but will hold the property in trust for A. Normally there will be evidence of the intention with which a transfer is made. Where there is not, the law applies presumptions. Where there is no clear relationship between A and B, there will be a presumption that A does not intend to part with the beneficial interest in the property and B will take the legal title under a resultant trust for A. Where, however, there is a close relationship between A and B, such as father and child, a presumption of advancement will apply. The implication will be that A intended to give the beneficial interest in the property to B and the transaction will take effect accordingly. In these cases equity searches for the subjective intention of the transferor.’ **Lavelle v Lavelle** (2004).

The burden of displacing the presumption falls on the transferee.

‘Under existing law a resulting trust arises in two sets of circumstances: where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested in B alone or in the joint names of A and B there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption which presumption is easily rebutted either by the counter presumption of advancement or by direct

evidence of A's intention to make an outright transfer.' **Westdeutsche Landesbank Girozentrale v Islington LBC** [1996].

'The courts will always strive to work out the real intention of the purchaser and will only give effect to presumptions of resulting trust and advancement where the intention cannot be fathomed and a "long stop" or "default" solution is needed.' **Kyriakides v Pippas** (2004).

'The presumption of resulting trust will not arise where real property is conveyed into joint-names with no express declaration as to the respective shares held for each party.' **Probate Disputes and Remedies.**

Stack v Dowden

In **Stack v Dowden** [2007] (House of Lords), Lord Hope stated,

'Traditionally, English law has always distinguished between legal ownership in land and its beneficial ownership. The trusts under which the land is held will determine the extent of each party's beneficial ownership. Where the parties have dealt with each other at arms length it makes sense to start from the position that there is a resulting trust according to how much each party contributed. Then there is the question whether the trust is truly a constructive trust. This may be helpful in their case but in others may seem to be a distinctly academic exercise... But cohabiting couples are in a different kind of relationship. The place where they live together is their home. Living together is an exercise in give and take, mutual co-operation and compromise. Who pays for what in regard to the home has to be seen in the wider context of their overall relationship... The cases can be broken down into those where there is a single legal ownership and those where there is joint legal ownership. There must be consistency of approach between these two cases... I think that

consistency is to be found by deciding where the onus lies if a party wishes to show that the beneficial ownership is different from the legal ownership. I agree with Baroness Hale that this is achieved by taking sole beneficial ownership as the starting point in the first case and by taking joint beneficial ownership as the starting point in the other. In this context joint beneficial ownership means that the shares are presumed to be divided between the beneficial owners equally. So in a case of sole legal ownership the onus is on the party who wishes to show that he has any beneficial interest at all, and if so what that interest is. In a case of joint legal ownership it is on the party who wishes to show that the beneficial interests are divided other than equally... Parties are, of course, free to enter into whatever bargain they wish and, so long as it is clearly expressed and can be proved, the court will give effect to it. But for the rest the state of the legal title will determine the right starting point. The onus is then on the party who contends that the beneficial interests are divided between them otherwise than as the title shows to demonstrate this on the facts.'

Baroness Hale, with whom the other Law Lords agreed, stated,

'The issue before us is the effect of a conveyance into the joint names of a cohabiting couple, but without an explicit declaration of their respective beneficial interests, of a dwelling house which was to become their home. This is, so far as I am aware, the first time that this issue has come before the House, whether the couple be married or, as in this case, unmarried. The principles of law are the same, whether or not the couple are married, although the inferences to be drawn from their conduct may be different.

... Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint

beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

...The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a prime facie case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated, 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.

...The question is, how, if at all, is the contrary to be proved? Is the starting point the presumption of resulting trust, under which shares are held in proportion to the parties' financial contributions to the acquisition of the property, unless the contributor or contributors can be shown to have had a contrary intention? Or is it that the contrary can be proved by looking at all the relevant circumstances in order to discern the parties' common intention?

*... The presumption of resulting trust is not a rule of law. According to Lord Diplock in *Pettitt v Pettitt* [\[1970\] AC 777](#), at 823H, the equitable presumptions of intention are "no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of any evidence to the contrary". Equity, being concerned with commercial realities, presumed against gifts and other windfalls (such as survivorship). But even equity was prepared to presume a gift where the*

recipient was the provider's wife or child. These days, the importance to be attached to who paid for what in a domestic context may be very different from its importance in other contexts or long ago. As K Gray and S F Gray, in Elements of Land Law, 4th edition 2005, point out at p 864, para 10.21:

"In recent decades a new pragmatism has become apparent in the law of trusts. English courts have eventually conceded that the classical theory of resulting trusts, with its fixation on intentions presumed to have been formulated contemporaneously with the acquisition of title, has substantially broken down. . . . Simultaneously the balance of emphasis in the law of trusts has transferred from crude factors of money contribution (which are pre-eminent in the resulting trust) towards more subtle factors of intentional bargain (which are the foundational premise of the constructive trust). . . . But the undoubted consequence is that the doctrine of resulting trust has conceded much of its field of application to the constructive trust, which is nowadays fast becoming the primary phenomenon in the area of implied trusts."

...the questions in a joint names case are not simply "what is the extent of the parties' beneficial interests?" but "did the parties intend their beneficial interests to be different from their legal interests?" and "if they did, in what way and to what extent?" There are differences between sole and joint names cases when trying to divine the common intentions or understanding between the parties. I know of no case in which a sole legal owner (there being no declaration of trust) has been held to hold the property on a beneficial joint tenancy. But a court may well hold that joint legal owners (there being no declaration of trust) are also beneficial joint tenants. Another difference is that it will almost always have been a conscious decision to put the house into joint

names. Even if the parties have not executed the transfer, they will usually, if not invariably, have executed the contract which precedes it. Committing oneself to spend large sums of money on a place to live is not normally done by accident or without giving it a moment's thought.

... The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way.

...In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties'

individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, 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.

Agarwala v Agarwala [2013] (Court of Appeal) related to beneficial ownership of an investment property registered in the name of Sunil Agarwala's sister-in-law, which had been purchased with a mortgage in her name allegedly financed by Sunil.

Lord Justice Sullivan stated,

'The [trial] judge took as his starting point the proposition that, since the legal title was in Jaci's name, it was for Sunil to establish his claim in accordance with the principles underlying Stack v Dowden. The judge was right to focus on the underlying principles, which commence with the presumption, because this was not a cohabiting couples or joint names case. The property was acquired as a business proposition in Jaci's sole name. Unsurprisingly, because this was a business proposition, it was common ground that there was an oral agreement or understanding between the parties as to the terms on which the property was to be bought, held and used. In these circumstances, if Sunil was able to establish, on the balance of probabilities, that the agreement was that he should be the sole beneficial owner, then provided he could also show that he had acted to his detriment in reliance on that agreement, he would be able to discharge the onus of showing that the beneficial ownership differed from the legal ownership. The weight to be given to the presumption will depend upon

the facts of the particular case. In a conduct case, where no prior agreement is alleged, and where the parties' conduct is ambivalent, the presumption is likely to be decisive. But in a case such as the present, where it is common ground that there was an agreement as to how this business asset was to be bought, held and used, the presumption is only the starting point.'

In **Pankhania v Chandegra** [2013] the Court of Appeal held that where there is an express declaration of trust of the beneficial title and no valid legal grounds for going behind it, that reliance on **Stack v Dowden** and **Jones v Kernott** for inferring or imputing a different trust, is misplaced. Lord Justice Patten stated, '*...For whatever reason, the parties (both of them of full age) had executed an express declaration of trust over the property in favour of themselves as tenants in common in equal shares and had therefore set out their respective beneficial entitlement as part of the purchase itself. In these circumstances, there was no need for the imposition of a constructive or common intention trust of the kind discussed in Stack v Dowden nor any possibility of inferring one because, as Baroness Hale recognised in paragraph 4 of her speech in that case, such a declaration of trust is regarded as conclusive unless varied by subsequent agreement or affected by proprietary estoppel.*

... The authority she refers to in this context is the decision of this Court in Goodman v Gallant. A couple purchased what had been the claimant's former matrimonial home in which she believed she had enjoyed a 50% beneficial interest. The property was conveyed to them jointly but the conveyance also contained a declaration that they held the property upon trust for sale to hold the net proceeds of sale upon trust for themselves as joint tenants: i.e. that they were to be joint tenants in equity. The claimant severed the legal joint tenancy and sought a declaration that she owned three-quarters of the

property beneficially. Both the judge and the Court of Appeal held that the express declaration of trust governed the parties' respective entitlement to the property. Slade LJ (at page 517) said:

"In a case where the legal estate in property is conveyed to two or more persons as joint tenants, but neither the conveyance nor any other written document contains any express declaration of trust concerning the beneficial interests in the property (as would be required for an express declaration of this nature by virtue of s. 53(1)(b) of the Law of Property Act 1925), the way is open for persons claiming a beneficial interest in it or its proceeds of sale to rely on the doctrine of "resulting, implied or constructive trusts": see s. 53(2) of the Law of Property Act 1925. In particular, in a case such as that, a person who claims to have contributed to the purchase price of property which stands in the name of himself and another can rely on the well known presumption of equity that a person who has contributed a share of the purchase price of property is entitled to a corresponding proportionate beneficial interest in the property by way of implied or resulting trust: see, for example, [Pettitt v. Pettitt \[1970\] A.C. 777](#), 813-814, per Lord Upjohn. If, however, the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself.

We have prefaced any consideration of the decided cases with these observations because in the light of certain judicial observations we seek to make two points clear. First, in our judgment, ss. 34 to 36 of the Law of Property Act 1925 do not enable or assist a person to establish a beneficial

interest in land or its proceeds of sale greater than or different in nature from the interest which he would have enjoyed if those sections had not been enacted; beyond transferring the beneficial interests of tenants in common and joint tenants from the land to its proceeds of sale, they have no effect on the nature or extent of such interests. Secondly, the many decisions which deal with the situation where the legal estate in land has been conveyed to persons as joint tenants without any declaration of the beneficial interest are, in our opinion, clearly distinguishable from cases where an express declaration of the beneficial interests has been made."

... In the passage referred to from his speech in [Pettitt v. Pettitt \[1970\] A.C. 777](#) (at page 813) Lord Upjohn said:

"... the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest that necessarily concludes the question of title as between the spouses for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage."

...The judge's imposition of a constructive trust in favour of the defendant was therefore impermissible unless the defendant could establish some ground upon which she was entitled to set aside the declaration of trust contained in the transfer. He seems (in paragraph 2) to have misunderstood the significance of the transfer which not only made both claimant and defendant legal owners of the property but also spelt out their beneficial interests. The whole of his

judgment proceeds upon the footing that he had a free hand to decide what was the common intention of the parties at the relevant time but that inquiry was simply not open to him unless the defendant had established a case for setting the declaration of trust aside.

A declaration of trust can be set aside for fraud, mistake or undue influence but nothing of that kind is alleged in this case.'

Jones v Kernott

In **Jones v Kernott** [2012], Lord Walker and Lady Hale set out the principles which apply to the determination of beneficial interests where a family home is bought in the joint names of a co-habiting 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) 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.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).'

In ***Quaintance v Tandan*** [2014] (Chancery Division), referring to the judgments of Lord Walker and Lady Hale in ***Jones v Kernott*** [2012], Judge Waksman QC further stated that,

'The question of fairness is one which is critically fact-sensitive...In a case where two partners purchase a new house with the aim of living there for the foreseeable future but where the only capital sum is paid by the claimant at the outset, where the defendant effectively makes no contributions, where the defendant has renounced any interest in it, and where the claimant's inability to pay results out of the circumstances of the breakdown and not because of

any abandonment on her part, I find it quite impossible to say how the fair outcome is anything other than I have described’.

The Judge held that there were no grounds for challenging the finding of the trial judge that an actual change of intention had occurred. The appellant, who had made no financial contribution to the purchase price, by his behaviour (in moving out permanently to live elsewhere following the breakdown of the relationship), had demonstrated that he no longer wished to be subject to the trust and had abandoned his interest in the property.

Singh v Singh

In **Singh v Singh & Anor** [2014] Sir William Blackburne stated,

*‘... The Mitakshara principles are one thing; their applicability to property amassed by members of the Singh family in this country is quite another. As pleaded... the basis of Father's claim was that those principles provide the content of a constructive trust whereby it was the common intention of Father, Mother and their children throughout the period when their property was being acquired that they all had beneficial interests in that property in accordance with those principles. It was contended on Father's behalf that there was no reason why the law on common intention constructive trusts as it had been settled in *Stack v Dowden* [\[2007\] UKHL 17](#); [\[2007\] 2 AC 432](#) and *Jones v Kernott* [\[2011\] UKSC 53](#); [\[2012\] 1 AC 776](#) should not be applied where it can be shown that a succession of family homes have been acquired and a family business has been created subject to a common understanding and intention shared by parents and their children. It was submitted that the trust sought to be established is not contrary to public policy, does not offend any English trust*

principles and is not perpetuous since it can be brought to an end by any of the coparceners at any time.

*...Mr McDonnell took me at length through *Stack v Dowden* and *Jones v Kernott* and referred also to *Abbott v Abbott* [\[2007\] UKPC 53](#); [\[2008\] 1 FLR 1451](#). In *Jones v Kernott*, as in *Stack v Dowden*, the property in question was in the joint names of the parties. The question was not whether the claimant had any beneficial share but what that share was. In the present case, by contrast, none of the property in question (in so far as it has been identified) was or is held other than in the sole name of one or other of the members of the Singh family. The family's shares in EHL, other than those held in trust (as to which no claim is made), are all held, so far as material, either by Jasminder in his sole name, or by Herinder in his sole name or in the sole names of either Father or Mother. The same is true of the various homes in which the family has lived in this country... The practical issue therefore is whether Father is able to displace the presumption that the assets held by Jasminder in his sole name, in particular Tetworth Hall and his 5.28% shareholding in EGL, are beneficially his and his alone (or, in the case of the shares held by Herinder, beneficially Herinder's alone, as I did not understand the claim to exclude them) and demonstrate instead that the beneficial interest in them was at all times held by the nominal owner to give effect to a common intention constructive trust that they should be held, and at all material times have been and are still held, as joint family property in accordance with the relevant principles of the Mitakshara as I have tried to set them out.*

...In a case where the disputed property is held in the sole name of one of the parties then, as shown by those authorities and notwithstanding differences of view on the vexed topic of imputation and the role of the presumption of a

resulting trust, the starting point is different: it is to decide whether the claimant has any beneficial interest in the property held exclusively in the name of the other person. The burden is on the claimant to establish that he has.

*...None of this was in dispute before me: Mr McDonnell accepted that the burden lay on Father to demonstrate that he and Mother and their children shared a common intention that in accordance with those principles they all shared beneficial interests (in the sense in which, under the Mitakshara, the male members of the joint family have any beneficial interest in the property as distinct from an expectation of a share in the event of a partition) in the property that each was acquiring. As a matter of analysis the first issue therefore is whether Father can demonstrate that he and the other (male) members of the family should have any beneficial interest at all in the property in question. It is worth mentioning, however, that in *Geary v Rankine* [\[2012\] EWCA Civ 555](#); [2012] 2 FLR 1409 to which Mr Croxford drew my attention (it was a dispute between a couple, who had previously lived together, over the ownership of a property held in the name of one of them and of the business that had been run from it), Lewison LJ pointed out (at [18]) that where the claim related to a property which had been bought as an investment rather than as a home, "the burden is all the more difficult to discharge." That observation applies with particular force to Father's claim insofar as it relates to the shares in EGL held by Jasminder or Herinder (or, for that matter, by any of the other members of the Singh family).*

... Stack v Dowden and Jones v Kernott both now put beyond doubt that, failing some express declaration or agreement in which the intention is articulated (and none is asserted in this case), the requisite common intention is to be deduced objectively from the conduct of the parties who are said to be parties

to it. There is no scope for any imputation of such a common intention at this stage of the analysis. That will only arise, as Jones v Kernott made clear, if it is established (or is common ground) that both parties should share the beneficial interest in the property in question but the court cannot make a finding about what their common intention was as to the proportions in which the property is to be shared. (See also what was said in Geary v Rankine at [19].) That second stage of the analysis is not a problem in the instant case in the sense that once Father establishes, if he can, that there was a common intention that the property should be held as joint family property, the terms on which it is held (and therefore the shares to which each member of the family is entitled in the event of a partition) follow from the application of the relevant Mitakshara principles. That assumes either that the parties to the common intention had a clear understanding of what those principles were (so far as relevant to the property in question) or were content to accept that those principles should apply whatever those principles were even though they could not recite them.

...At paragraph [51(3)] of Jones v Kernott the relevant approach to determining the existence of the common intention which the claimant alleges was described thus (quoting from Lord Diplock in Gissing v Gissing [\[1971\] AC 886](#) at 906): "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 other intention which he did not communicate to the other." That was explained by Baroness Hale in Stack v Dowden (at [60] to [61]) as involving a "search...to ascertain the parties' shared intentions with respect to the property in the light of their whole course of conduct in relation to it". She adopted what had been stated in a Discussion Paper published by the Law Commission, namely that the approach

*was to be "holistic" involving "a survey of the whole course of dealing between the parties and taking account of all conduct which throws a light on the question of what shares were intended." Although spoken by reference to the second question, namely what are the shares (as distinct from whether the claimant has any beneficial interest), it is clear that in seeking to deduce whether there is a common intention that the claimant should have any interest at all in the property in a case where the property is held in the sole name of the other person the court is no less entitled to have regard to the whole course of dealing between the parties in relation to the property. That is implicit in the reasoning of both *Stack v Dowden* and *Jones v Kernott* and clear I think from the way in which Lady Hale summarised the law (at [6]) in *Abbott v Abbott* (a case where the house in question was in the sole name of the husband). The common intention can be established by showing either what the parties' intention was when the property was acquired or that they later formed an intention as to how it should be beneficially owned. As it happens, however, Mr McDonnell concentrated on the events which occurred in between late 1975 when the possibility of purchase of the Edwardian Hotel by EHL (as Surena Ltd became) first arose and the acquisition in late January 1980 by Patentgrade (as EGL was then still called) of the Vohra family's shares in EHL.*

*...I should also add that there was some debate as to whether those principles apply to the creation of a family-controlled business such as EGL was and has remained. In this context I was referred to comments made by Etherton LJ in *Crossco No 4 Unlimited v Jolan Ltd* [\[2011\] EWCA Civ 1619](#); [2012] 2 All ER 754 at [85] and [86] to the effect that the common intention constructive trust expounded in *Stack v Dowden* and *Jones v Kernott* (and similar cases) does not apply in a commercial context. I do not propose to go into that question beyond saying that some of the considerations which have led the courts to approach*

the question whether there exists a common intention with regard to the beneficial ownership of a matrimonial or similarly owned property in the manner set out in the authorities to which I have referred apply with force to a family-type claim of the kind here. The matter was not argued. It was simply assumed that the same principles apply. I consider that it was right to do so.'

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