Joint Ownership, Subjective Intention and the Common Intention Constructive Trust

By Professor John Mee, Law Faculty, University College Cork

Introduction

This article considers the situation where a home has been purchased in joint names, without any express declaration of the beneficial interests. It is well established that such a declaration, if it were included, would definitively establish the parties' beneficial entitlements.[1] However, in a significant number of cases an express declaration has not been included and this leaves open the possibility that a claimant could establish a common intention constructive trust on the basis that he made the greater contribution to the acquisition of the home.[2] Such a claim was successful in the recent case of *Stack v Dowden*,[3] a Court of Appeal decision which is now under appeal to the House of Lords.[4] As *Stack v Dowden* illustrates, the courts have interpreted the applicable equitable doctrines so as to make it very difficult for a defendant to resist a claim by her partner to a share greater than the joint share indicated by the legal title. The prevailing view, which will be considered in detail later in this article, is that such a claim can only be defeated if the defendant can demonstrate that there was a communicated common intention between the parties that the beneficial ownership would be joint or equal.[5] Thus, the defendant is effectively cast in the role of claimant and required to establish a common intention constructive trust in her own favour (and moreover, one in which there is express

[1] See *Goodman v Gallant* [1986] Fam 106: express declaration conclusive in the absence of grounds for rectification. The inclusion of an express declaration is required where a legal joint tenancy is created over registered land: Land Registration Act 2002, s 44(1); Land Registration Rules 2003, r 95(2)(a), Forms FR1 and TR1; Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (Consultation Paper 179, 2006) pp 44-45. The requirement of an express declaration was introduced in the Land Registration Rules 1997 (which came into force in 1998) but cases involving prior transfers of registered properties continue to come before the courts: *Crossley v Crossley* [2005] EWCA Civ 1581, [5] *per* Sir Peter Gibson.
[2] For convenience, in this article the male pronoun will be used in describing a hypothetical claimant in a joint ownership situation, with the female pronoun being used in relation to the defendant.
[3] [2006] 1 FLR 254.
[4] See [2006] 1 FLR 429 (leave to appeal granted by House of Lords).
[5] In practice, it will normally make no difference to the defendant if she succeeds in resisting the claim on the basis that the beneficial interests should be held in joint tenancy, mirroring the legal ownership, or instead should be held under a tenancy in common in equal shares.

agreement as to quantification), notwithstanding the fact that she holds the legal title as a joint tenant.

In considering a defendant's task in showing the necessary communicated common intention that beneficial ownership be joint/equal, it must be remembered that, unless she has some special knowledge of the law, she may quite reasonably have assumed that joint ownership at law means that she has the same entitlement as her partner.[6] This reduces the likelihood that there will have been any express discussion on the point. Furthermore, it is not clear what type of express discussions would suffice to demonstrate affirmatively the existence of a common intention to share the beneficial ownership jointly or equally. Even if it could be proven that Y had said, "Let's take the ownership in joint names" and that X had replied "Yes, good idea", what would this demonstrate? It might merely show that the parties had agreed to hold the property in joint names at law and the existence of such an agreement already follows more or less automatically from the fact that they have indeed taken the ownership in this way. It may be that something additional is required whereby the discussions between the parties must indicate that they intended to have joint/equal beneficial shares as well as being joint owners at law.[7] Thus, the burden on a defendant in a joint ownership case is difficult to discharge, especially given that couples in an intimate relationship are often reluctant to discuss openly their separate property rights at a time when the relationship is going well.

This article argues that the complexity of this area of the law has led the courts into error and that, on a logical understanding of the relevant law, a more just balance

[6] This understanding of the effect of joint ownership seems to be relatively common. See *Drake v Whipp* [1996] 1 FLR 826, 829; *Re Gorman* [1990] 1 WLR 616, 623 (in each case, one of the parties was unaware that beneficial ownership could be unequal if the property was held in joint names at law).

[7] Interesting in this respect is *Savill v Goodall* [1993] 1 FLR 755, where the parties had, in the context of a discussion of the difficulties in their relationship, agreed on a purchase in joint names. According to Nourse LJ (*ibid*, 760), "[i]f an ordinary, sensible couple, without more, declare an intention to own their home jointly, they can only be taken to intend that they shall own it equally." If this *dictum* were accepted at face value, it would generally suffice for a defendant contending for joint or equal beneficial ownership to show that there had been discussion of putting the home into joint names. However, from a logical point of view, if this is sufficient, it is difficult to see why it would not also be sufficient simply to show that the parties had accepted, without express discussion, the idea of taking the home in joint names (and this latter proposition is clearly not accepted in the cases). In *Savill*, the parties had accepted a social worker's suggestion that if the male partner were to gain a joint share in the ownership, and take on responsibility for a mortgage, it would assist with his problems of 'lack of security and confidence'. In considering joint ownership in the context of such a plan, it seems clear that the parties would have been thinking in terms of joint beneficial ownership, perhaps to a greater extent than in a case where they simply settled on a conveyance into joint names.

exists between claimant and defendant. The central argument will be that no common intention constructive trust should be imposed if the claimant had assumed that ownership would be joint/equal or else simply gave no thought to the matter. It should not be necessary to show that the claimant communicated his beliefs to the defendant. Rather, it must be sufficient if the claimant subsequently admits, most obviously under cross-examination at the trial, that he had not expected to gain more than the joint share indicated by the legal title or if the court is not convinced by his assertions to the contrary. As a matter of basic principle, a claimant should not be able to establish a common intention constructive trust unless he has been led by the defendant "to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."[8] This test is not satisfied by a claimant who assumed that he would get only a joint or equal share. In such cases, no constructive trust should be imposed and, since 'equity follows the law',[9] the beneficial ownership should reflect the legal title, leaving the parties as beneficial joint tenants.

Although this point may not be quite as clear-cut, logically the same considerations apply to a claimant who simply gave no thought to the possibility that he might acquire a share which differed from the legal title. Once more, a claimant in this position cannot argue that he has been led to act to his detriment, since he had no expectation that he would get more than the share indicated by the legal title. In any case, it is arguable that there will rarely be a case in the joint ownership context where the defendant can plausibly argue that he gave no thought to the question of ownership. Unless he was unusually sophisticated and understood that beneficial ownership can differ from legal ownership (in which case his argument of a blissful lack of concern with the question of ownership would probably seem unconvincing), a claimant who is aware that the property is in joint names must normally believe that he has a joint or equal share even if he did not dwell on the point or regard it as being of practical importance in light of the relationship between the parties.[10]

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[8] *Gissing v Gissing* [1971] AC 886, 905 *per* Lord Diplock.
[9] *Pettitt v Pettitt* [1970] AC 777, 813H-814A *per* Lord Upjohn. See also *Walker v Hall* [1984] FLR 126, 133E-F *per* Dillon LJ.
[10] See also the discussion in note 34 below.

The structure of the article is as follows. The next section elaborates on the argument of principle that a claim can be defeated by evidence that the subjective intention of the claimant was inconsistent with his obtaining a share greater than that indicated by the legal title. This section also addresses a possible counter-argument based on the proposition that the test for intention in this context is invariably an objective one. Once the arguments of principle have been ventilated, attention is turned to the case law and to an examination of the two main sources of support for the current unsatisfactory position. First to be considered is *Springette v Defoe*.[11] It will be argued that the failure of the Court of Appeal in *Springette* to take account of the subjective intention of the claimant is explicable on the basis of the manner in which the case was argued by counsel for the defendant. Secondly, the article will address *Stack v Dowden*,[12] a case where Chadwick LJ attempted to transpose his influential analysis in *Oxley v Hiscock*[13] to the joint ownership situation.[14] It will be argued that, in doing so, Chadwick LJ made a logical error which led to a conclusion on the relevant issue similar to that following from *Springette v Defoe*. Essentially, the criticism of *Stack* will be that Chadwick LJ's heavy emphasis on the issue of quantification obscured the simple point that a basis for imposing a common intention constructive trust must exist before one can move on to consider the issue of quantifying the shares under such a trust. Since *Stack* is under appeal to the House of Lords, there should be an opportunity for the House of Lords to correct the relevant error in Chadwick LJ's statement of the applicable principles.[15]

[11] [1992] 2 FLR 388.
[12] [2006] 1 FLR 254.
[13] [2005] Fam 211.
[14] The other judges in *Stack* concurred with the approach of Chadwick LJ. Smith LJ simply agreed with Chadwick LJ, while Carnwath LJ adopted "the whole of the reasoning of Chadwick LJ" (*ibid*, 281) and added some comments of his own, relating in particular to law reform.
[15] Various specific issues arose in *Stack* which are beyond the scope of this article but which may be aired in the House of Lords. For example, the transfer deed in the case contained a declaration that the survivor of the purchasers would be able to give a valid receipt for capital money arising from a disposition of all or part of the property. Following existing authority, Chadwick LJ concluded that the inclusion of this clause did not constitute an express declaration by the parties that they held the property on trust for themselves as joint tenants. Furthermore, it did not provide evidence of their common intention as to ownership since there was no evidence that the parties were aware of the significance of the clause.

The Argument at the Level of Principle

If the claimant has admitted that he did not expect to get more than a joint share in the property or the court is not convinced by his assertion to the contrary, it is submitted that there can be no common intention to form the basis of a constructive trust. It may be that, *prima facie*, a particular claimant's conduct (in terms of making financial contributions) makes it plausible to infer as a matter of fact that he would not have acted as he did unless there had been a prior common intention that he would get a share. If, however, he gives direct evidence that he lacked the relevant intention, then the otherwise plausible inference from his conduct is negated.[16] This question may be obscured somewhat by the fact that the whole process of inferring common intention from conduct is a rather artificial one but the point is surely not open to doubt. It is well established that the common intention constructive trust doctrine proceeds on the basis of an actual, rather than a fictional, common intention[17] and an actual common intention cannot be found to exist by a process of inference from conduct if other evidence proves that it does not exist.[18] At the heart of a common intention constructive trust claim is the proposition that the legal owner has led the claimant to act to his detriment and this is confirmed by the increasing emphasis in the case law on the parallels between the common intention doctrine and proprietary estoppel.[19] If the claimant's assumption is demonstrated to be that the beneficial ownership would reflect the legal title, how is he to frame an explanation of the underlying justice of his claim? It is not at all convincing for him to say: "I expected that the ownership would be joint and now the defendant is arguing for

[16] As Lord Reid pointed out in *Gissing v Gissing* [1971] AC 886, 897, "[i]f the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement." See also *ibid*, 900E-F *per* Viscount Dilhorne.

[17] Note the rejection of the idea of a fictional common intention in *Pettitt v Pettitt* [1970] AC 777, 804F-G *per* Lord Morris; 810F *per* Lord Hodson; 816D-E *per* Lord Upjohn; and in *Gissing v Gissing* [1971] AC 886, 898C-D *per* Lord Morris; 900D-F *per* Viscount Dilhorne; 904E-F *per* Lord Diplock.

[18] If the aim of the court is to discover the actual intentions of the parties at the time of the conveyance, then it clearly makes sense for the law to allow them to be questioned as to those intentions. The willingness of equity to infer a common intention from direct contributions to the purchase price is essentially an outgrowth of the ancient presumption of resulting trust and it has been recognised by the courts that this presumption (and the presumption of advancement) "are readily rebutted by comparatively slight evidence": *Pettitt v Pettitt* [1970] AC 777, 814 *per* Lord Upjohn. The most obvious form of rebutting evidence in this context, and in the similar context of a *prima facie* inference of a common intention from conduct, is direct evidence as to actual intention.

[19] See e.g. *Grant v Edwards* [1986] Ch 638, 657 *per* Browne-Wilkinson V-C; *Stokes v Anderson* [1991] 1 FLR 391, 399 *per* Nourse LJ; *Yaxley v Gotts* [2000] Ch 162, 176 *per* Robert Walker LJ.

just such a result; it's not fair". Essentially, there is no way that the claimant can argue that the legal owner (the defendant) has led him to act to his detriment.

It may be objected at this point that the concept of a 'common' intention is very flexible and that it is possible for a common intention to exist even if both parties do not subjectively share the same understanding. To support this counter-argument, it is possible to cite the view of Lord Diplock in *Gissing v Gissing*[20] that "effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself."[21] It is submitted, however, that these remarks cannot be taken as a comprehensive statement of the position.[22]

Lord Diplock's remarks are certainly authority for two propositions, which are equally relevant to sole and joint ownership cases. First, the defendant cannot rely on a subjective intention to which she gave no expression at the relevant time. Thus, there can still be a 'common intention' if the defendant, while not subjectively sharing the alleged common intention, misled the claimant as to her true intention.[23] Secondly, a subjective intention on the part of the defendant cannot form the basis of a common intention if it was never communicated to the claimant. This is because a claimant cannot claim to have been led to act to his detriment on the basis of an intention of which he was unaware. These two points are entirely consistent with the logic underlying the common intention constructive trust. However, this cannot be said of a third proposition which might appear

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[20] [1971] AC 886.
[21] *Ibid*, 906.
[22] To some extent, the relevant passage reflects a contractual aspect of Lord Diplock's speech which has not found favour in subsequent decisions. For discussion, see Mee *The Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999), pp 164-167. Note also *Mortgage Corporation v Shaire* [2001] Ch 743, which involved a transfer of a house from S and her former husband to herself and her new partner, F. Neuberger J concluded that S became entitled to 75% of the beneficial ownership, with F (who had since died) acquiring 25%. An obstacle in the way of this conclusion was that S had stated in evidence that she imagined that F took over her husband's half share in the house, so that she would have only a 50% share. Neuberger J commented (*ibid*, 755) that "[i]t is trite law that what is locked away in the mind of one party to a contract has no bearing on the terms or effect of the contract." However, the learned judge also felt it necessary to argue that S's comments only indicated her state of mind at the time she made them (rather than at the time of the transfer). Neuberger J described himself (*ibid*) as seeking an "agreement or understanding" between the parties and his reference to the rules applicable to "a contract", coupled with the atypical facts of the case, makes it unclear whether he regarded himself as dealing with the inference of a common intention.
[23] See e.g. *Eves v Eves* [1975] 1 WLR 1338; *Grant v Edwards* [1986] Ch 638.

to follow from a literal interpretation of Lord Diplock's remarks. This is the contention that a common intention can exist where subjectively the *claimant* does not share the common intention. How could this be true when the central thrust of the common intention trust is that the claimant has been led to act to his detriment on the basis of the common intention? A claimant cannot rely on an intention which he does not have.[24]

The point may be demonstrated in a number of ways. Consider a sole ownership case where the defendant makes a remark which could objectively have been interpreted by the claimant as a promise of a share in the beneficial interest in the home. However, the claimant does not believe the defendant. In this instance, there is clearly no common intention and no basis for the subsequent creation of a constructive trust. Or consider a case where the claimant made direct contributions to the acquisition of a home in the sole name of his partner, thus potentially creating a common intention trust in his favour. However, at the time of the acquisition, the claimant told friends (but not his partner) that he did not expect any share in the property and that his contributions were intended as a gift. Imagine that the claimant admits under cross-examination that he made these statements and that they reflected his intention at the relevant time. Can he be permitted to establish a common intention trust on the basis that, since his subjective intention was not made manifest to the defendant, he must be judged on the basis of the intention (to gain a share) which the defendant could reasonably have gleaned from his conduct in making the direct contributions to the purchase price? The answer is that it would clearly be unjust to entertain such an argument. It makes no difference if the example is modified so that the claimant never spoke to his friends about his intention but admitted it subsequently in his evidence. The conversations with friends have no effect on the defendant's perception of the claimant's intention but are merely evidence of the

[24] In *Midland Bank v Cooke* [1995] 4 All ER 562, 575, Waite LJ argued that "it would be anomalous … to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it". This *dictum* might be read to suggest that a claimant could succeed if he had never given any thought to the question of ownership (although it has no relevance to the scenario where he believed that ownership would reflect the legal title). However, Waite LJ's judgment, which is focused on the question of quantification, does not expressly address the question of whether or not the claimant in *Cooke* had subjectively intended to obtain some share in the ownership of the disputed property (which was in the sole name of her husband). Therefore, the result of the case was not necessarily in conflict with the argument advanced in this article. The present author's previous criticism of this aspect of *Cooke* (see Mee note 22 above, pp 132-133) should have been directed more specifically against the *dictum* of Waite LJ quoted above.

claimant's subjective intention, which intention can equally be proven by his direct evidence at the time of the litigation. These arguments are equally applicable in the context of joint ownership.

Thus, it is submitted that, as a matter of principle, it is fatal to a claim for a common intention trust if it can be established, by any form of admissible evidence, that subjectively the claimant did not share the alleged common intention.[25] The discussion now turns to the authorities, focusing in turn on *Springette v Defoe*[26] and *Stack v Dowden*.[27]

Springette v Defoe

The disputed property in *Springette* had been conveyed into the joint names of the parties, with no express declaration of the beneficial interests. Ms Springette had contributed three-quarters of the purchase price and Mr Defoe had contributed one-quarter. Ms Springette sought to establish that she was entitled to three-quarters of the beneficial ownership. The approach of the Court of Appeal was to assume that, unless a communicated common intention could be demonstrated which pointed to a different quantification, there would be a resulting trust in the proportions of the parties' contributions. The evidence in *Springette* showed that both parties had assumed that they would be equal beneficial owners.[28] However, since this intention had not been communicated between the parties, it was regarded as irrelevant. The court concluded that the presumption of resulting trust had not been rebutted and the property was held under a resulting trust in the proportions of the parties' contributions. Thus, the claimant

[25] There is, in fact, an interesting parallel with the law of contract. An objective test applies to the determination of the intentions of the parties in relation to the formation of a contract. However, "[a] subjective element … qualifies the objective principle". A contract can be formed on the basis of a reasonable interpretation of the words of A but only if B subjectively interpreted them in the relevant way. "[T]here will be no contract if (in spite of the objective appearance of agreement) B *actually knows* that A in fact has *no* intention to contract with him …" See Treitel *The Law of Contract* (London: Sweet and Maxwell, 10th edn, 1999) p.1 (original emphasis). See further *ibid*, pp 8-9.
[26] [1992] 2 FLR 388.
[27] [2006] 1 FLR 254.
[28] Evidence of the claimant's belief in this respect had been "extracted by skilful cross-examination … at the trial" ([1992] 2 FLR 388, 391 *per* Dillon LJ).

in *Springette* succeeded despite the fact that, at the time of the transfer, his subjective intention was to share equally with his partner.

In considering *Springette* in the present context, it must be noted at the outset that one aspect of the reasoning in the case was decisively rejected in the later Court of Appeal case of *Oxley v Hiscock*.[29] As has been mentioned, it was assumed in *Springette* that, in the absence of a communicated common intention between the parties which included agreement as to the respective shares which the parties would take, there would be a purchase money resulting trust in the proportions of the parties' contributions to the purchase price.[30] Rejecting this approach after a detailed review of the authorities, Chadwick LJ reasoned in *Oxley* that, if the parties had had a common intention to share the beneficial ownership but without any express understanding as to quantification, then there would be a common intention constructive trust with the shares being quantified on the basis of what would be "fair having regard to the whole course of dealing between them in relation to the property".[31]

The approach in *Springette* to issues associated with quantification, now overtaken by *Oxley*, is crucial to understanding what was actually held in *Springette*. It is important to emphasise that all three judges in *Springette* were emphatic in holding that no common intention could be established[32] and that therefore no common intention constructive trust arose. In other words, what was held in *Springette* in relation to the common intention constructive trust was that there can be no such trust based solely on an intention privately held by the defendant. As has already been commented, this is a perfectly logical approach because it cannot be said that the claimant has been led to act

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[29] [2005] Fam 211, noted by Gardner (2004) 120 LQR 541; Thompson [2004] Conv 496.

[30] Perhaps because it was more likely in this context that the parties would both have made direct contributions to the purchase price, there has over the years been a tendency for courts in joint ownership cases to put the emphasis on the resulting trust doctrine, rather than on the common intention trust analysis. See e.g. *Crisp v Mullings* (1974) 233 EG 511; *Bernards v Josephs* [1982] Ch 391; *Walker v Hall* [1984] FLR 126; *Young v Young* [1984] FLR 375; *Re Gorman* [1990] 1 WLR 616; *Harwood v Harwood* [1991] 2 FLR 274; *Savill v Goodall* [1993] 1 FLR 715; *Huntingford v Hobbs* [1993] 1 FLR 736; *Carlton v Goodman* [2002] EWCA Civ 545.

[31] [2005] Fam 211, 246. *Oxley* is particularly significant for its impact on our understanding of the relationship between the common intention constructive trust and the purchase money resulting trust. Essentially, the message of *Oxley* is that the resulting trust doctrine, at least in the context of disputes over family homes, has little or no independent significance. Unfortunately, it is not possible in the present article to analyse in detail the complex relationship between the common intention constructive trust and the purchase money resulting trust.

[32] [1992] 2 FLR 388, 393F-G *per* Dillon LJ; *ibid*, 395F *per* Steyn LJ; 397D *per* Sir Christopher Slade.

to his detriment if he was unaware of the defendant's intention in respect of the ownership. However, the Court of Appeal in *Springette* did not at any stage support, or indeed discuss, the proposition that there can be a common intention constructive trust even if the claimant subjectively did not share the relevant intention. The ultimate holding of the court in *Springette* was that a different type of trust – the 'age-old' purchase money resulting trust[33] – arose in favour of the claimant. It is submitted that, in fact, this conclusion was clearly contrary to resulting trust principles. The presumption of resulting trust which arises from the making of contributions to the purchase price of property is rebuttable by evidence of a contrary intention and if the contributor believed he was getting no more than an equal share, he could not have made his contribution with the intention of gaining a three-quarters share.[34]

Curiously, the possible relevance of the subjective intention of the claimant to his attempt to establish a resulting trust was never explicitly considered by the court in *Springette*. On closer inspection, this was because the court saw it as "common ground" between the parties that they took the property as beneficial tenants in common rather than as beneficial joint tenants.[35] Thus, the way in which the case for the defendant was argued involved a concession which blocked the defendant's route to success – this route being simply to rely on his joint tenancy at law and on the well-established principle that equity follows the law. The evidence of the claimant's subjective intention should have been enough to derail the claimant's attempt to establish either a resulting or constructive

[33] *Ibid*, 391 *per* Dillon LJ.

[34] See also Mee note 22 above, pp 40-41. In relation to the possible creation of a purchase money resulting trust, the position is less clear where the claimant asserts that he simply gave no thought to the question of ownership. Such a claimant could argue that the presumption of resulting trust is in his favour and that evidence of his 'neutral' state of mind is not sufficient to rebut the presumption. (For further consideration of this issue, see Mee *ibid*, pp 43-45). Although the question is a difficult one, the better view may be that no resulting trust can arise in this type of case. While it is not possible in the present context to develop the point fully, this position seems to be bolstered by the manner in which *Oxley v Hiscock* [2005] Fam 211 effectively subsumes the purchase money resulting trust within the common intention trust analysis. It would be contrary to the essential project of *Oxley* to recognise circumstances in which a resulting trust, quantified crudely on the basis of financial contributions to the purchase, would be imposed instead of a common intention constructive trust quantified on the more sophisticated "fair in light of all the parties' dealings with the property" approach. Therefore, if (as is argued in this article) no common intention trust can arise in favour of a claimant with a merely "neutral" intention, then it would follow that no resulting trust could arise either. In considering the issue discussed in this footnote, it should in any case be remembered that, as pointed out in the paragraph of text to note 10 above, it will normally be very difficult for a claimant in the joint ownership situation to argue credibly that he had a truly neutral intention on the question of ownership.

[35] See *ibid*, 396E *per* Sir Christopher Slade.

trust in her favour, leaving the parties holding as joint tenants in equity as well as at law. Instead of taking this approach, the defendant staked everything on being able to establish a constructive trust in his own favour based on a common intention that the parties would be beneficial tenants in common in equal shares.[36] When this attempt failed, on the basis that the alleged common intention had not been communicated between the parties, the court assumed that there must be a resulting trust in the proportions of the parties' contributions. Unfortunately, the court did not give any attention to the point that the subjective intention of the claimant, although not sufficient to establish a common intention constructive trust in favour of the defendant, was sufficient to rebut the presumption of resulting trust in favour of the claimant. It is not surprising that the Court did not take this point, since the conclusion which was dictated by considerations of principle – that the parties held as beneficial joint tenants – was inconsistent with the case made on behalf of the defendant that the parties held as beneficial tenants in common.

Thus, in relation to the central proposition advanced in this article – that a common intention constructive trust cannot exist if the claimant's subjective intention was inconsistent with this result – *Springette* has nothing direct to say. The practical effect of the Court of Appeal's decision was that a purchase money resulting trust was upheld notwithstanding the claimant's inconsistent subjective intention. However, because of the way the case was argued, this conclusion was reached without any consideration of the relevant argument of principle.[37]

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[36] In fact, given that both parties were still alive, there would have been no particular advantage for the defendant in establishing a beneficial tenancy in common in equal shares as opposed to a beneficial joint tenancy.

[37] It may be possible to discern a lack of enthusiasm for the *Springette* approach in the later Court of Appeal decision in *Carlton v Goodman* [2002] EWCA Civ 545. The practical impact of the holding in *Springette* is that the presumption of resulting trust can only be rebutted by evidence of a communicated common intention between the parties but all three judges in *Carlton* (*ibid*, [25]-[26] *per* Mummery LJ; *ibid*, [28] *per* Laws LJ; *ibid*, [40]-[42] *per* Ward LJ) appear to have left open the question of whether it is necessary to look at the intention of each contributor rather than at the common intention of the parties. See also *Re Gorman* [1990] 1 WLR 616, 623, where one part of the basis for Vinelott J's rejection of the claim was that the claimant had admitted in her evidence that she had understood that the parties would hold as beneficial joint tenants rather than as beneficial tenants in common in unequal shares.

Stack v Dowden

In *Stack v Dowden*,[38] decided not long after *Oxley*, Chadwick LJ had the opportunity to consider the position where the disputed property is held in joint names at law but with no express declaration of the beneficial interests. Chadwick LJ's approach in *Stack* dictates that, in the absence of a communicated common intention between the parties as to the quantum of their beneficial interests, they will (as in the sole ownership situation) be entitled to the shares which the court considers fair in light of all their dealings with the property. The claimant in *Stack* had made a greater financial contribution to the acquisition of the disputed property and, on the basis of Chadwick LJ's method of quantification, was held to be entitled to a 65% share in the beneficial ownership. The report does not give any clear indication as to the subjective intention of the claimant in terms of gaining more than the joint share indicated by the legal title. According to her, there had been no discussion about ownership and "[i]t just happened that both our names were put forward to the agents as purchasers and the purchase went through in joint names".[39] Thus, the issue of the subjective intention of the claimant on the facts of *Stack* was not considered in any detail,[40] so that the importance of the case for present purposes lies with the statement of the applicable equitable principles by Chadwick LJ.

In *Stack*, Chadwick LJ transposed into the joint ownership context the reasoning he had developed in the sole ownership context in *Oxley*. To identify the problem which arose in this transposition, it is necessary to look more closely at the reasoning process in each situation. In *Oxley*, Chadwick LJ explained that there were two questions to be asked. The first question was whether there was "a common intention, communicated by each [party] to the other, that each shall have a beneficial share in the property."[41] The second question, which would only fall to be answered if there was an affirmative answer

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[38] [2006] 1 FLR 254, noted by Cooke [2005] Conv 555.
[39] *Ibid*, 268.
[40] Interestingly, there is no mention in the report of an assertion by the claimant that, at the time of the transfer, she believed that she was obtaining a greater share in the beneficial interest than her partner. On the view of the law advanced in this article, it would have made sense for this issue to be tested in cross-examination. If the claimant argued that she had intended at the relevant time to obtain a greater share, it could have been put to her that an ordinary person would have understood that taking the property in joint names would have meant joint or equal beneficial ownership and that, if she was expecting something greater than that, it was curious that she did not find it necessary to mention this to her partner or to clarify with him what precise share she would obtain.
[41] [2005] Fam 211, 246.

to the first question, was "what is the extent of the parties' respective beneficial interests in the property?"[42] The way the inquiry works is illustrated by a consideration of a sole ownership case where the claimant has made direct financial contributions but there have been no express discussions as to the quantum of the beneficial interests in the property. In such cases, following *Oxley*, the courts will reason as follows:

> Question 1. *Is there a common intention?* Yes, the claimant's direct contributions justify the inference of a common intention that the claimant will get some share or, to put it in Chadwick LJ's terms, "that each shall have a beneficial share in the property".[43]
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> Question 2. *What is the extent of the parties' respective beneficial interests*? Although there was no express agreement or understanding on this point, it would be wrong to allow the claim to be defeated by the fact that there was no agreement as to the amount of the claimant's share. Therefore, the claimant should get a fair share based on all the parties' dealings with the property.

Where the property is jointly owned, the reasoning suggested by *Stack v Dowden* runs along identical lines, except that it was explained by Chadwick LJ that in the joint ownership context the focus will essentially be on the second question, that relating to quantification. He believed that:

> "[T]he answer to [the first] question is unlikely to present any difficulty. It can usually be taken for granted that each was intended to have some beneficial

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[42] *Ibid*.

[43] Even on the terms of his own approach to the relevant principles, Chadwick LJ's formulation of this crucial requirement was not felicitous. His reference to a common intention "that *each* shall have a beneficial share in the property" fails to cover the case where the common intention is that the claimant should have all of the beneficial interest and the defendant none. What matters on Chadwick LJ's reasoning is that there is a common intention that the claimant should obtain some share in the ownership, albeit one which may not have been quantified. Whether or not the *defendant* was intended to have any interest is not crucial to Chadwick LJ's approach. The problems are increased when this formulation is transferred into the joint ownership context. One obvious possibility in this context is a common intention whereby one legal joint tenant was intended to be a mere nominee, with no beneficial interest. In such a situation, there is no common intention that each should have a share but there can clearly be a common intention trust.

interest in the property. Why else was the property transferred into their joint names?"[44]

In fact, in a joint ownership case, the party claiming a greater share for himself will invariably have made *some* direct contribution to the purchase price, thus allowing the inference of a common intention that the contributor would have *some* share in the beneficial ownership. This will ensure an affirmative answer to Question 1 even without having resort to Chadwick LJ's argument based on the fact that the parties have chosen joint legal ownership.

Effectively, then, under Chadwick LJ's approach there will invariably be a common intention constructive trust where the legal title is held in joint names without an express declaration of the beneficial interests. The existence of a common intention follows from the claimant's having made some direct contribution to the purchase price (and, according to Chadwick LJ, from the very fact that joint legal ownership has been chosen). There are then two possibilities: either there was an express common intention as to quantification, in which case the shares under the common intention trust will reflect this or (b) there was no express common intention as to quantification, in which case there will still be a common intention trust but it will be quantified on the basis of what is fair having regard to all the parties' dealings with the property. There is no scope for an application of the principle that "equity follows the law"[45] – a defendant will only be able to establish that equitable ownership mirrors the legal title if, under Question 2 in the inquiry (relating to quantification), she can show a communicated common intention that the parties will be equitable joint tenants.[46]

[44] [2006] 1 FLR 254, 266.

[45] Interestingly, Sir Peter Gibson invoked the "equity follows the law" maxim at one point in the post-*Stack* authority of *Crossley v Crossley* [2005] EWCA Civ 1581, [33]. However, the approach in *Crossley* was not inconsistent with *Stack* because the claim in *Crossley* was refused on the basis that there had been a *communicated* common intention that the parties would take as beneficial joint tenants.

[46] The logic of Chadwick LJ's approach would suggest that, as well as demonstrating a communicated common intention in favour of joint ownership, the defendant would also have to show detrimental reliance on her part in order to establish a common intention constructive trust in her favour. That this untenable proposition should follow exposes the problems with Chadwick LJ's approach. A moment's thought makes it obvious that where the property is conveyed into the joint names of the parties at law and (while there was no express declaration of the beneficial interests) at the time both parties explicitly agreed to joint beneficial ownership, there can be no question of one party making a successful claim to a greater share under a resulting or constructive trust. It does not matter if the defendant made no contribution and incurred

It is submitted, however, that the simple transposition of the *Oxley* reasoning into the joint ownership situation conceals a logical error. It should not be sufficient for the claimant to show a common intention "that each shall have a beneficial share in the property". There will obviously have been a common intention that the claimant would have *some* share in the ownership but this is fully consistent with the defendant's position that the beneficial ownership should reflect the legal title. A more precise statement of the Question 1 stage of the argument in the sole ownership context is that there must be a common intention that the beneficial ownership will differ from the legal title. In the sole ownership context, this is the same as saying that each party is intended to get a share.[47] In the context of joint ownership, however, it is necessary to adopt the more precise formulation. The claimant must be able to show that he was intended to gain a share which differs from the joint share indicated by the legal title – in other words, a *greater* share than that indicated by the legal title.[48] Following the normal principles in terms of establishing a common intention laid down in *Lloyds Bank v Rosset*,[49] this type of common intention could be proven by evidence of express discussions between the parties or on the basis of an inference from the conduct of the claimant. It is only if the claimant has acted to his detriment on the basis of the relevant type of common intention that equity should intervene to impose a constructive trust on the basis that it is unconscionable for the defendant to rely on the legal title to claim joint ownership. Chadwick LJ's mistaken characterisation of the common intention which must be demonstrated in joint ownership cases effectively leads to court to skip over the primary question (has a common intention trust been created?) and moves the inquiry prematurely to the secondary question (how should the shares under such a trust be quantified?)

no detriment whatsoever – she has no need to establish an implied trust in her own favour and can simply rely on her legal joint tenancy and the fact that the claimant cannot provide any basis for departing from the principle that equity follows the law.

[47] Subject to the defect in Chadwick LJ's formulation, discussed in note 43 above.

[48] Although this will only be of practical relevance in cases where one or other of the parties has since died, a common intention trust could logically be established if there was a communicated common intention (on which the claimant had acted to his detriment) that the parties would hold as beneficial tenants in common in equal shares rather than as beneficial joint tenants. Thus, strictly speaking, it is most accurate to express the requisite common intention in terms of an intention to obtain a share which differs from the legal ownership.

[49] [1991] 1 AC 107.

To sum up, the argument of this section is that the emphasis on quantification in *Stack v Dowden* led Chadwick LJ to an error in his statement of the principles applicable to joint ownership cases. This error crept in when Chadwick LJ attempted to transfer his reasoning in the sole ownership context in *Oxley* over to the joint ownership context in *Stack*. Chadwick LJ wrongly assumed that, where the property is in joint names, there must always be a common intention trust and that the only question was as to how the shares under this common intention trust would be quantified. However, this overlooks the fact that a vital ingredient in the establishment of a common intention trust is that the claimant was led to act to his detriment on the basis on the basis of a common intention that the beneficial ownership would differ from the legal ownership. If evidence of the claimant's subjective intention indicates that no such common intention exists, then (even if the claimant made the greater financial contribution) there can be no common intention trust and the issue of quantification never arises.

Finally, it is worth addressing one possible objection to the above argument. It could be suggested that the *Oxley v Hiscock* method of quantification is by definition 'fair', so that the interests of justice are served by giving it the greatest possible scope. However, despite the alluring quality of the word 'fair', the *Oxley* approach does not guarantee a result which is 'fair' in any broad sense and, indeed, may often translate into saying that the claimant will succeed if he has made the greater financial contribution.[50] Furthermore, the reference to fairness in *Oxley* must be understood in context; it presupposes a prior decision to impose a constructive trust. If the facts of a particular case do not justify the imposition of a constructive trust, then it is unjust to impose such a trust even if one claims to quantify it on a basis which is 'fair'. It is worth recalling that, where the conveyance contains an express declaration of the beneficial interests in the property, this is decisive[51] and there is no question of substituting the result which appears "fair" on the basis of *Oxley*. Similarly, when the claimant had no expectation of obtaining a share greater than that indicated by the legal ownership, and has therefore not been led to act to his detriment, there can be no justification for the creation of a constructive trust, irrespective of how one might wish to quantify it.

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[50] See e.g. the outcome in the joint ownership cases of *Stack v Dowden* [2006] 1 FLR 254 and *Norton v Hudson* [2005] EWHC 2934 (QB).
[51] See note 1 above and accompanying text.

Conclusion

In 1881 in *Standing v Bowring*,[52] Lindley LJ insisted that:

> Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied.[53]

This article has suggested how the law in relation to common intention trusts over jointly owned property might be understood so as to give better effect to the 'true intentions, expressed or implied' of the parties.

It has been argued that a common intention cannot be inferred from conduct if, at the time when the common intention is alleged to have existed, the claimant did not subjectively share the relevant common intention, even if this was never communicated to the defendant. If the claimant did not share the alleged common intention, then he could not have been led to act to his detriment and, therefore, it would not be appropriate for equity to impose a common intention constructive trust which is premised on detrimental reliance. Building on this point, it has been suggested that, in the joint ownership situation, the requisite common intention should be that the claimant would gain a greater share in the beneficial ownership than the joint share indicated by the legal title, rather than, as Chadwick LJ suggested in *Stack v Dowden*,[54] that he would merely obtain *some* share in the beneficial ownership. While Chadwick LJ's version of the required common intention will invariably be present, it would be much easier for a defendant to show by cross-examination that the claimant did not intend to obtain a greater share than that which is indicated by the legal title.

[52] (1881) 31 Ch D 282.
[53] *Ibid*, 289.
[54] [2006] 1 FLR 254.

In terms of authority, this argument requires the rejection of certain *obiter* comments in *Stack* and the distinguishing of *Springette v Defoe*[55] as addressing the role of subjective intention in relation to the purchase money resulting trust rather than the common intention trust and, furthermore, as turning in the relevant respect on a concession by counsel for the defendant. The forthcoming appeal in *Stack v Dowden* should provide a convenient opportunity for the House of Lords to clarify the requirements for establishing a beneficial interest in the context of joint ownership. It is already possible to discern some signs of judicial unease with the current approach, exemplified for example by the comment of Carnwath LJ in *Stack v Dowden*[56] that, if the courts had been starting afresh, it might have been preferable to adopt an approach which gave more weight to the fact that the parties had agreed to take the legal title in joint names.[57] This article has worked through an approach which would indeed allow the courts somewhat more scope, in cases where the property is held in joint names but without an express declaration of the beneficial interests, to reach results which reflect the impulse towards sharing which is often present in intimate cohabitations.[58]

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[55] [1992] 2 FLR 388.
[56] [2006] 1 FLR 254, 281.
[57] Note also the interesting observations of Mr Micheal Briggs QC, sitting as a deputy High Court judge, in *Supperstone v Hurst* [2005] EWHC 1309 (Ch), [11]-[12].
[58] The proposed approach would also impact on sole ownership cases in that a claimant would fail if his subjective intention was inconsistent with the alleged common intention either because he believed that he would not obtain any share in the ownership or had given no thought to the question of obtaining a share. However, given the likely expectations of those in intimate cohabitations, it would normally be more plausible for a sole ownership claimant to assert that he had a subjective expectation of getting some share in the ownership than it would be for a joint ownership claimant to assert that he subjectively expected more than a joint share.