



#5sblaw

5 Stone Buildings

JOINT PROPERTY

Issues in Life and Death

19 June 2018

at

**Prince Philip House
3 Carlton Terrace
London SW1 5DG**

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2.5 hours

8.30 am **Registration and breakfast**

9.00 am **Introduction – Henry Legge QC**

9.05 am **Co-ownership of Chattels**

- When joint interests in chattels arise
- Different types of joint interests
- Protecting and executing joint interests

Henry Legge QC and Luke Harris

9.40 am **Recent Developments in Family Property**

Simon Douglas

10.15 am **Coffee Break**

10.45 am **Joint Ownership and Registered Land: Common Problems and Practical Solutions (2 problem questions)**

Louisa Nye

11.20 am **Constructive versus Resulting Trust: Confusion or Clarity?**

Miranda Allardice and William East

12.00 pm **Plenary Session**

12.30 pm **Close**

Henry Legge QC's practice includes a broad range of chancery work but with particular emphasis on cases involving trusts, estates, pension schemes and disputes relating to personal chattels and art. Throughout his career he has acted regularly in trust, estates and probate cases. Notable recent cases include the *Longleat* litigation, the *Trilogy* litigation and *Gorbunova v Berezovsky*. *"One of the brightest stars of the chancery Bar. A brilliant advocate with great technical nous. Fantastically bright."* Chambers HNW 2016

Luke Harris has a commercial chancery practice and has particular expertise in claims involving art and antiquities in claims involving objects of cultural and artistic value. He is currently the only Band 1 listed junior in the field of Art & Cultural Property in Chambers & Partners 2016. Luke's commercial practice t 020 7242 6201 f 020 7831 8102 dx 304 London/Chancery Lane e clerks@5sblaw.com w www5sblaw.com 5 Stone Buildings Lincoln's Inn. London WC2A 3XT Senior Clerk Paul Jennings includes claims involving commercial chattels, the sale of goods, personal and proprietary tracing claims and restitution.

Louisa Nye's practice is property-focused, predominately real property and landlord and tenant. Louisa also t 020 7242 6201 f 020 7831 8102 dx 304 London/Chancery Lane e clerks@5sblaw.com w www5sblaw.com 5 Stone Buildings Lincoln's Inn. London WC2A 3XT Senior Clerk Paul Jennings deals with complex property cases involving a cross-over into trusts, inheritance, insolvency and professional negligence. She deals with cases in the County Court, First-Tier Tribunal (Property Chamber) and High Court. Louisa also regularly advises clients prior to litigation and in relation to non-contentious matters.

Simon Douglas Simon Douglas is an Associate Professor in Law at the University of Oxford, and a tutorial fellow at Jesus College. He teaches and researches in all areas of property law, but with an emphasis on trusts and personal property. His recent works include a book he has edited on defences in equity (Davies, Douglas and Goodkamp, *Equitable Defences*, Hart 2018) and articles on mistake, rectification and rescission in trust law (Douglas, "Misuse of Rectification in the Law of Trusts" (2018) 134 LQR 138; Douglas and Davies, "Tax Mistakes Post-Pitt v Holt" (2018) 32 TLI 3). He also writes about land law, and has a particular interest in the law of easements and restrictive covenants (e.g. Douglas, "Reforming Implied Easements" (2015) 131 LQR 251).

Miranda Allardice undertakes a wide variety of contentious Chancery matters, together with complex matrimonial finance cases. She is experienced in both the Chancery and Family Divisions of the High Court. She has a thriving mediation practice. Miranda is a key contributor to Jordans' Inheritance Act Claims; Law Practice and Procedure. She regularly lectures for Law Society, STEP and ACTAPS, and writes for Elder Law Journal & Private Client Business. She was an Advisory Group Member of the Law Commission for the Intestacy and Family Provision on Death Report.

William East has a general chancery practice in all areas of work undertaken at 5 Stone Buildings. For nine months after completing pupillage he was a judicial assistant in the Supreme Court to Lords Walker and Dyson. He makes regular appearances in the High Court, County Court and the Court of Protection and is listed for the latter as a leading junior in

Chambers UK 2017. In the 2016 directory he was praised for *“his financial and investment expertise alongside his family estate planning experience.”* He is a member of the Bar Pro Bono Unit and also participates in the CLIPS scheme in the High Court giving free representation to litigants in person in the Chancery Division Applications Court. He has written for several professional publications and frequently lectures on areas of his practice.

These notes are intended as an aid to stimulate debate: delegates must take expert advice before taking or refraining from any action on the basis of these notes and the speaker can accept no responsibility or liability for any action or omission taken by delegates based on the information in these notes or the lectures.

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JOINTLY-OWNED CHATTELS

Henry Legge QC and Luke Harris

When will chattels be jointly-owned ? - some initial law

- Important distinction between **legal** joint ownership and **beneficial** joint ownership
- Legal joint ownership in chattels includes **legal** tenancies in common as well as legal joint tenancies
 - Abolished for land by 1925 legislation but still a permissible interest at common law for chattels
 - Difficult (/impossible?) to effect a transfer of a legal joint interest by delivery (*Cochrane v Moore* (1890) 25 QBD 57)
 - Uncertain and sometimes difficult law on rights of legal joint owner

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Legal joint ownership

- Normally created by joint purchase:
 - Eg ships (*Dornoch v Westminster* [2009] 1 CLC 645 at #86), horses (*Cochrane v Moore* above)
 - Sometimes partnership property
 - In commercial context there is often an agreement ancillary to the property interests relating to rights of parties
- Whales !! *Fennings v Lord Grenville* (1808) 1 Taunt 240

"By the custom of the whale fishery among the Galapagos Islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it"

"According to the custom proved for the Plaintiff, the fish belongs to the two parties, and they are tenants in common of the whale" per Mansfield CJ at 246

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<div data-bbox="165 557 298 607">  </div> <div data-bbox="708 568 812 627"> 19 June 2018 Jointly-owned chattels </div> <div data-bbox="175 660 665 694"> <h3>Legal joint ownership - private client examples</h3> </div> <div data-bbox="175 723 818 833"> <ul style="list-style-type: none"> • After the assent of a joint gift under a will or deed (eg <i>Butler v Butler</i> [2016] 4 WLR 133 ?) <ul style="list-style-type: none"> – Rights of possession – Restricted ability to sell • Household contents often treated in IHT accounts as subject to legal joint tenancy - correct ? </div> <div data-bbox="169 1046 248 1064"> www.5blaw.co.uk </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1167 298 1216">  </div> <div data-bbox="708 1178 812 1238"> 19 June 2018 Jointly-owned chattels </div> <div data-bbox="175 1272 451 1305"> <h3>Beneficial joint ownership</h3> </div> <div data-bbox="175 1337 766 1579"> <ul style="list-style-type: none"> • Implies that the chattels were held subject to a trust <ul style="list-style-type: none"> – But why should the chattels be subject to a trust ? • When? <ul style="list-style-type: none"> – If source of funds was beneficial joint ownership <ul style="list-style-type: none"> • But rarely the case where purchase is out of joint account (see below) – If registered in legal joint names ? <ul style="list-style-type: none"> • Cf boat and truck in <i>Marr v Collie</i> – Why otherwise ? • NB that assignment/gift of beneficial interest must be in writing - s.53(1)(c) LPA 1925 </div> <div data-bbox="169 1657 248 1675"> www.5blaw.co.uk </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

Household goods - joint ownership ?



- Strict position at law is that purchaser of goods is owner at date of purchase
- What might change this ?
 - Gift at law by purchaser ?
 - If no deed, then delivery of half share questionable (*Cochrane v Moore*)
 - Purchase out of joint account ? Fact sensitive:
 - *Re Bishop [1965] Ch 450* - item bought out of joint account the property of the purchaser; or
 - Account holder signatories are trustees for themselves ?; or
 - *Heseltine v Heseltine [1971] 1 WLR 342* - beneficial interest in account in fact vested in one of the account holders
 - Common intention trust ? Cf *Marr v Collie [2017] 3 WLR 1507* But the boat and the truck in joint names (para 12)
 - Nb PC does not deal with the art in *Marr v Collie*

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Regulation of interests in trust (1)

- It is possible to create trusts of concurrent ownership (see above) and successive interests
- Generally, it is possible to replicate all such interests in land under a trust - But:
 - There was a historical exception for entailed interests
 - True 'heirlooms' vested with the heir on death
 - Chattels were settled to be enjoyed or held with, or upon trusts corresponding as nearly as may be with the trusts affecting, the settled estate
 - Before 1926:
 - It was impossible to create an estate tail in personalty, so
 - A bequest of chattels by way of such a trust gave life interests in the chattels to those who took life interests in the realty; but the chattels vested absolutely at birth in the first person who became entitled to the real estate for a vested estate of inheritance such as a fee tail
 - From 31 December 1925 to 31 December 1996 entailed interests in personal property could be created by way of trust, whether *inter vivos* or by will, provided that appropriate words were used : Law of Property Act 1925 ss. 60(4), 130(1), (3) (s 130(1), (3) repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4. Interests so created devolved according to the rules applicable to entailed interests in real property : Law of Property Act 1925 ss. 130(4), 176.

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<div data-bbox="167 627 298 674">  </div> <div data-bbox="710 638 812 696"> 19 June 2018 Jointly-owned chattels </div> <div data-bbox="177 730 531 763"> <h3>Regulation of interests in trust (2)</h3> </div> <div data-bbox="177 795 831 1041"> <ul style="list-style-type: none"> • TLATA 1996 does not apply to trusts of personalty alone • A trust of land may include personalty but most of the powers of the Act are applicable to land only • But the court's jurisdiction under s. 14 to review the Trustees' discretion is applicable to functions relating to all forms of assets • In trusts of pure personalty the beneficiaries can control the trustees' powers in the usual ways • Trustees' powers to dispose of or acquire chattels must be identified carefully? For example: <ul style="list-style-type: none"> – Trustee Act 2000, s. 37 – Settled Land Act 1925, s. 67? </div> <div data-bbox="169 1115 248 1131"> www.5stone.co.uk </div>	<div data-bbox="922 680 1516 1093"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div>
<div data-bbox="167 1238 298 1285">  </div> <div data-bbox="710 1249 812 1308"> 19 June 2018 Jointly-owned chattels </div> <div data-bbox="177 1341 552 1375"> <h3>Legal co-ownership : JTs vs. TICs (1)</h3> </div> <div data-bbox="177 1404 826 1680"> <ul style="list-style-type: none"> • A TIC can exist in unequal shares • Possession of co-owned chattels: <ul style="list-style-type: none"> – With a JT there is a single right to possess - TICs have several rights of possession – No co-owner has an exclusive right of possession against his co-owners (but cf the position if unequal shares?) – A co-owner in possession may exercise full ownership rights against the wishes of another co-owner • Disposal of an interest in a co-owned chattel: <ul style="list-style-type: none"> – A TIC may sell or otherwise dispose of his legal share in a chattel – A JT who sells or otherwise disposes of his 'interest' will sever the JT, with the assignee becoming a tenant in common with the other co-owners (as JTs) • Disposal of a co-owned chattel: <ul style="list-style-type: none"> – If both co-owners agree to and join in a disposal to a third party, they will convey good title to the chattel – If one co-owner purports to sell or dispose of the whole chattel, the nemo dat rule applies and (in the case of a JT) effects a severance </div> <div data-bbox="169 1727 248 1742"> www.5stone.co.uk </div>	<div data-bbox="922 1290 1516 1702"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div>

Legal co-ownership : JT's vs. TICs (2)

- Severance:
 - The principles of severance for realty and personalty are the same
 - Severance of a legal joint tenancy must follow the legal rules of severance (breaking the unities)
 - *Williams v Hensman* (1861) 1 John & H 546, per Page-Wood VC:
 - "an act of any one of the persons operating upon his own share"
 - "by mutual consent"
 - "by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common"
 - Notice in writing under s. 36(2) of the Law of Property Act 1925 does not apply to personal property
 - Bankruptcy of co-owner effects a severance
- Death of a co-owner:
 - A share of a chattel behaves like a share of land
 - With a JT the right of survivorship applies to the legal interest
 - With a TIC the undivided legal share of the deceased passes into the estate

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Rights and remedies between joint owners (1)

- The Torts (Interference with Goods) Act 1977 s. 1 creates the concept of 'wrongful interference with goods' which includes:
 - Conversion
 - Trespass
 - Negligence
- Conversion consists of unlawful interference with possession or right to possession; trespass is a direct interference with possession
- As each co-owner had a right to possession, conversion was limited at common law to:
 - Deliberate steps taken by one co-owner having the effect of excluding the other e.g. destruction
 - An effective transfer by one co-owner to a third party, so extinguishing the rights of another co-owner (i.e. by way of an exception to the nemo dat rule)
- The Torts (Interference with Goods) Act 1977, s. 10: Co-ownership is no defence to conversion or trespass where the defendant without the authority of the other co-owner:
 - Destroys the goods, or disposes of the goods in a way giving a good title to the entire property in the goods, or otherwise does anything equivalent to the destruction of the other's interest in the goods, or
 - Purports to dispose of the goods in a way which would give a good title to the entire property in the goods if he was acting with the authority of all co-owners of the goods
- Remedies under the 1977 Act:
 - Damages: The co-owner could claim only in respect of his interest (not for the full value of the chattel)
 - Delivery up (questionable)
- No claim by one co-owner against another in negligence

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Rights and remedies between joint owners (2)

- The Law of Property Act 1925, s.188 provides:

"Where any chattels belong to persons in undivided shares, the persons interested in a moiety or upwards may apply to the court for an order for division of the chattels or any of them, according to a valuation or otherwise, and the court may make such order and give any consequential directions as it thinks fit."
- *Butler v Butler* [2016] 4 WLR 133:
 - A "moiety" means a undivided half share
 - A power of sale?
 - "division" of a single chattel?
- If a potential claimant cannot establish jurisdiction under s. 188 are there any alternatives:
 - An interest under a trust?
 - Partnership property?
 - A fund?

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Rights and remedies against third parties

- At common law a co-owner could bring a tort claim:
 - A co-owner with possession could sue for conversion or trespass based on possession
 - Otherwise, a co-owner relying upon a right of possession could only recover damages limited to the value of his co-ownership interest plus consequential damages: *Bloxham v Hubbard* (1804) 5 East 407
- The position is now governed by the Torts (Interference with Goods) Act 1977
- Now a co-owner can:
 - Recover the full value of the goods (but subject to the mechanism in ss. 7-8 of the 1977 Act to precluding double liable on the defendant's part, including a liability of the claimant to account over to his co-owners)
 - Obtain an order for delivery up of the chattel - but only if the claimant has the written authority of every other part owner to make the claim on their behalf as well: CPR 40.14

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Conditional and successive interests

- Successive legal interests in chattels would appear to be precluded by the following fundamental ideas:
 - Ownership is the only absolute proprietary interest
 - No doctrine of tenure or estates
 - Ownership is indivisible
 - Bailee's interest is the only limited legal interest
- Conditional gifts seem to offend against these doctrines. Consider: a gift of my painting to A unless she fails to perform a condition, in which case the gift is to B - who is the owner of the painting, what is the nature of B's interest etc?
- Most conditional and successive gifts take effect behind a trust
- The law nevertheless allows successive testamentary bequests of chattels
- A gift to A for life, thereafter to B apparently grants ownership to A but an executory gift (chose in action) to B: *Re Tritton* (1889) 61 LT 301 (but note, the law of perpetuities must be considered)

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**Recent Developments
In Family Property**

Simon Douglas

Co-owning Land

- At Law
 - Pre-1925: Joint Tenancy or Tenancy in Common
 - Post-1925: Joint Tenancy only
- In Equity
 - Express Trust
 - declaration must be evidenced in writing (s. 53(1)(b), Law of Property Act 1925)
 - Interest can be joint or separate, and is governed by TOLATA
 - Constructive Trust
 - Like an Express Trusts, interest can be joint or separate and is governed by TOLATA
 - Resulting Trust
 - Favoured by Lord Neuberger in *Stack v Dowden*, but not appropriate in family homes

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Common Intention Constructive Trusts

- Like an Express Trust, a CICT is based upon the intention of the parties; however, there is no need for writing as it can be established by parol evidence (s. 53(2), Law of Property Act 1925).
- Where relevant:
 - Death of spouse or partner
 - Insolvency of spouse or partner
 - Mortgage fraud by spouse or partner
 - Breakdown of unmarried co-habiting couples' relationship

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Old Approach to CICTs: *Lloyds Bank Ltd v Rosset* [1991] 1 AC 107

- A CICT can be established either by:
 - (1) Express agreement plus detrimental reliance
 - Has there been “any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners ...” If satisfied, must then show “... that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.” (p. 132, per Lord Bridge); or
 - (2) Direct financial contribution
 - “where there is no evidence to support a finding of an agreement or arrangement to share ... direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will.” (p. 132-33, per Lord Bridge)

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New Approach: *Stack v Dowden* [2007] UKHL 17

- “Equity follows the law”:
 - “It should only be expected that joint transferees would have spelt out their beneficial interests when they intended them to be different from their legal interests. Otherwise, it should be assumed that equity follows the law and that the beneficial interests reflect the legal interests in the property.” (per B Hale, [54])
 - As such:
 - Where title is in joint names at law, presumed to be joint tenants of equitable estate;
 - Where title is in single name, legal owner presumed to be sole owner in equity.
- Rebutting the presumption:
 - Was there a common intention that their beneficial interests be different from their legal interests? and if so,
 - In what proportion did they intend to share?

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1st stage: Establishing a common intention

- A genuine common intention must be objectively inferred from evidence. Not possible to impute an intention at the first stage:
 - "At the first stage, an actual agreement has to be found to have been made, which may be inferred from conduct in an appropriate case. At the second stage, the court is entitled to impute an intention that each person is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property. A court is not entitled to impute an intention to the parties at the first stage in the analysis." (*Capehorn v Harris* [2015] EWCA Civ 955, [17] per Sales LJ)
- In absence of express agreement, no longer limited to direct financial contribution; can look to a long list of factors identified by Baroness Hale (at para [69]), including:
 - the purpose for which the home was acquired;
 - the nature of the parties' relationship;
 - whether there were children;
 - how the purchase was financed;
 - how the parties arranged their finances;
 - their individual characters and personalities.

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2nd stage: Quantification

- *Jones v Kernott* [2012] 1 AC 776 - quantum is determined by the intentions of the parties, inferred from factors identified by Baroness Hale in *Stack v Dowden*. However, where impossible to ascertain intention of the parties as to quantum, it is possible to impute intention:
 - "... the search is primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct. ... [However] where it is clear that the beneficial interests are to be shared, but it is impossible to divine a common intention as to the proportions in which they are to be shared ... the court is driven to impute an intention to the parties which they may never have had." [31]
- Basis of imputation unclear:
 - *Graham-York v York* [2015] EWCA Civ 72 - the court does not have the power to re-arrange beneficial interests in order to effect redistributive justice; it has a more limited jurisdiction to decide what is 'fair' with regard to the whole course of dealing in respect of the property.
 - In absence of financial contribution, apportionment likely to be limited: *Graham-York v York* [2015] EWCA Civ 72 and *Thompson v Hurst* [2012] EWCA Civ 1752.

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<div data-bbox="165 524 298 573">5 Stone Buildings</div> <div data-bbox="710 535 778 553">12 June, 2018</div> <p>Issue (1): Single-name cases</p> <ul style="list-style-type: none"> Stack v Dowden and Jones v Kernott both involved joint-names; Abbott v Abbott, although a single-name case was a decision of the PC. Recent CA decisions have confirmed that Stack applies to single-name cases (Thomson v Hurst [2012] EWCA Civ 1752; Curran v Collins [2015] EWCA Civ 404; Capehorn v Harris [2015] EWCA Civ 955; Graham-York v York [2015] EWCA Civ 72). However, the principles have been applied in a restrictive way, similar to the Lloyds Bank v Rosset approach: <ul style="list-style-type: none"> First, it has been held that an agreement per se is not sufficient to establish a OICT; that it must be supported by “<u>detrimental reliance</u>”: <ul style="list-style-type: none"> “First, she had to show that she reasonably believed that the parties’ common intention, to be deduced from the whole course of their conduct in relation to the properties, was that she was to have a share of the properties. Second, she had to show that she acted to her detriment on the basis of that common intention ...” (Curran v Collins [2015] EWHC Civ 404 [2] per Arden LJ) Second, in absence of express agreement as to quantum, interest likely to be very limited unless there has been a substantial financial contribution: <ul style="list-style-type: none"> Graham-York v York [2015] EWCA Civ 72 - 23%; Thomson v Hurst [2012] EWCA Civ 1752 - 10%; Gallarotti v Sebastianelli [2012] EWCA Civ 865 - 20%. <div data-bbox="169 1012 271 1030">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1133 298 1182">5 Stone Buildings</div> <div data-bbox="710 1144 778 1162">12 June, 2018</div> <p>Issue (2): Ambulatory intent</p> <ul style="list-style-type: none"> In joint name cases, starting presumption is that parties are joint tenants of equitable interest Intention of the parties may change over time, e.g. when there is a change in relationship, or the level contributions made by each of the parties. The approach in Stack can be used to alter their shares, e.g: <ul style="list-style-type: none"> Jones v Kernott [2012] 1 AC 776; Marr v Collie [2017] UKPC 17. Where does this leave the doctrine of severance? <div data-bbox="169 1624 271 1641">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

Issue (3): Relationship with Proprietary Estoppel

- In single-name cases, the need for a “common intention”, plus “detrimental reliance”, suggests there is overlap with the doctrine of proprietary estoppel. Recent cases support this:
 - *Southern Pacific Mortgages Ltd v Scott* [2014] UKSC 52: “The relationship between constructive trust and proprietary estoppel has been the subject of much discussion ... It is likely that the difference would only be crucial in terms of remedies, but nothing turns on the distinction ...”
 - *Wodzicki v Wodzicki* [2017] EWCA Civ 95 - where both CICT and PE claims were made. Richards LJ held that when the CICT claim failed, the PE necessarily failed as well (at para [31]).
- What is the difference?
 - CICTs involve a present common intention to share the title, e.g. in “excuse” cases (like *Thompson v Hurst*) there is an agreement presently to hold the legal title for both parties;
 - PE usually involves an assurance of a future interest, e.g. a testamentary assurance, where performance lies in the future, might be enough for PE (e.g. *Thorne v Major*), but not for a CICT (e.g. *Curran v Collins* [2015] EWHC Civ 404, [76]).

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Joint Ownership and

Registered Land:

**Common Problems and Practical
Solutions (2 problem questions)**

Louisa Nye

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Joint Ownership and registered land: *Common problems and practical solutions*

Louisa Nye &
Simon Douglas

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Key principles

- Registration - when does it occur?
- Owner's powers - section 23 LRA 2002
- Registrable dispositions
- Priorities - sections 29 and 30 LRA 2002
- Over-reaching
- Restrictions

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2

Priority rules - sections 28 and 29 LRA 2002

28 Basic rule

(1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.

(2) It makes no difference for the purposes of this section whether the interest or disposition is registered.

Priority rules - sections 28 and 29 LRA 2002

29 Effect of registered dispositions: estates

(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected—

(a) in any case, if the interest—

(i) is a registered charge or the subject of a notice in the register,

(ii) falls within any of the paragraphs of Schedule 3, or

(iii) appears from the register to be excepted from the effect of registration, and

(b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.

Persons “in actual occupation” - Para 2 Sch 3 LRA 2002

An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—

- (a) an interest under a settlement under the Settled Land Act 1925 (c. 18);
- (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
- (c) an interest—
 - (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
 - (ii) of which the person to whom the disposition is made does not have actual knowledge at that time;
- (d) a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition.

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“Two trustee” rule

Basic position in relation to over-reaching

- On a sale of property subject to a trust, the proceeds of the sale become subject to the trust;
- The purchaser does not need to be concerned by the trust, and takes free;
- Save that, under section 27(2) LPA 1925, the proceeds must be paid to two trustees

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6

<div data-bbox="165 439 298 488">  </div> <div data-bbox="175 539 617 580"> <h2>The "two trustee" rule post-<i>Haque</i></h2> </div> <div data-bbox="175 604 831 873"> <ul style="list-style-type: none"> • In relation to land that is registered, the registered title and rules in sections 28 and 29 LRA 2002 are paramount; • A beneficiary's interest will be protected under Schedule 3 para 2 if they are in actual occupation; • A restriction in Form A is the only way that a beneficiary can protect their interest if they are not in actual occupation; • If the relevant disposition is a transfer in breach of trust and knowing receipt can be proved then a constructive trust will arise notwithstanding the rules concerning overreaching and land registration. </div> <div data-bbox="167 925 266 945"> <p>www.5sblaw.com</p> </div> <div data-bbox="821 925 837 945"> <p>7</p> </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1043 298 1093">  </div> <div data-bbox="175 1151 331 1187"> <h2>Restrictions</h2> </div> <div data-bbox="175 1220 675 1252"> <h3>Form A (Restriction on dispositions by sole proprietor)</h3> </div> <div data-bbox="175 1258 799 1359"> <p>"No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court."</p> </div> <div data-bbox="167 1536 266 1556"> <p>www.5sblaw.com</p> </div> <div data-bbox="821 1536 837 1556"> <p>8</p> </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

Problem Scenarios - Example 1

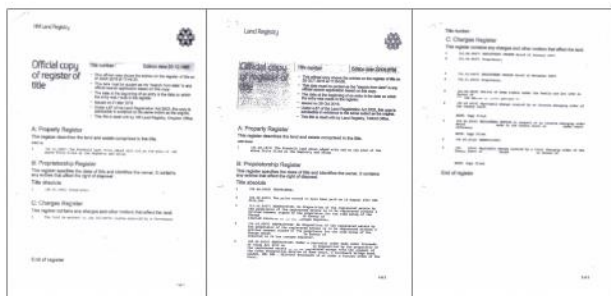
Important points to note

- The lack of impact of registration on the beneficial interests in the Property
- The fact that a change in those beneficial interests cannot be noted
- The limitations created by a restriction in Form A - in relation to an onward sale
- The interaction between registered title and rights pursuant to a will.

Most common errors in practice

- Trying to note beneficial interests other than in the TR1 form (i.e. trying to register a notice)
- Trying to register the Estate as a registered legal proprietor - when survivorship means that the Estate no longer has an interest in the legal title
- Recognising the impact of Form A restrictions

Problem Scenarios - Example 2



Problem Scenarios - Example 2

- Important points to note
 - The postponement of G's rights to the mortgage
 - The importance of the order of registration of interests
 - In cases of matrimonial breakdown or civil partnership breakdown, it is important to register a home rights charge
- Most common errors in practice
 - Advisors become unduly concerned about registering 'something' against the title - think carefully about what is required in all the circumstances
 - Panicking that the ICO will affect G's interest - because it appears on the register
 - Neglecting to understand that an order for sale can still be sought by the Bank or DCH

Thank you,
any questions?

Joint ownership and registered land – Common problems and practical solutions

This briefing note sets out the key principles that arise in the context of joint ownership of land and its interaction with the Land Registration Act 2002 and registered title.

This paper focuses on the implications of the Land Registration Act 2002 which came into force on 13 October 2003, and summarises the key principles to be noted.

This paper addresses the law in force as at 8 June 2018.

Registration

The Land Register contains more than 25 million titles showing evidence of ownership for more than 85% of the land mass of England and Wales.

Any unregistered freehold or leasehold estate in land for a term which (at the time of transfer, grant or creation) has more than 7 years to run must be registered on relevant transfer or grant.¹

Transfer of a freehold includes a transfer for value, a gift, in pursuance of a court order, an assent (including a vesting assent), or giving effect to a partition of land subject to a trust.² Transfers also include deeds appointing a new trustee or vesting orders under section 44 of the Trustee Act 1925.³ It does not include transfers by operation of law.⁴

In relation to leasehold interests grants for a term of years of more than 7 years can be for valuable or other consideration, by way of gift or in pursuance of an order of any court. The compulsory registration provisions also apply to leases granted in pursuant of Part 5 of the Housing Act 1985 (the right to buy).

Transfers or grants of estates which have a negative value are still to be regarded as transferred or granted for valuable or other consideration.⁵

The classes of freehold title which the applicant may be registered with are (a) absolute title (b) qualified title and (c) possessory title.⁶ In the case of leasehold title, there is the additional class of 'good leasehold title'.⁷

¹ Section 4(1) and (2) of the Land Registration Act 2002

² Section 4(1)(a) LRA 2002

³ Section 4(1)(aa) LRA 2002

⁴ Section 4(3) LRA 2002

⁵ Section 4(6) LRA 2002

⁶ Section 9 LRA 2002

⁷ Section 10 LRA 2002

Owner's powers

Section 23 of the 2002 Act provides the "Owner's powers" in relation to a registered estate. These are:

- (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and*
- (b) power to charge the estate at law with the payment of money.*

Section 24 provides that a person is entitled to exercise owner's powers in relation to a registered estate or charge if his is (a) the registered proprietor, or (b) entitled to be registered as the proprietor.

Dispositions

The Land Registration Rules 2003 make provision for the requirements as to form and content that must be complied with in relation to registrable dispositions.

If a disposition of a registered estate or a registered charge is required to be completed by registration, it does not operate at law until the relevant registration requirements are met. The relevant dispositions are set out in section 27(2):

- (a) a transfer,*
- (b) where the registered estate is an estate in land, the grant of a term of years absolute—*
 - (i) for a term of more than seven years from the date of the grant,*
 - (ii) to take effect in possession after the end of the period of three months beginning with the date of the grant,*
 - (iii) under which the right to possession is discontinuous,*
 - (iv) in pursuance of Part 5 of the Housing Act 1985 (c. 68) (the right to buy), or*
 - (v) in circumstances where section 171A of that Act applies (disposal by landlord which leads to a person no longer being a secure tenant),*
- (c) where the registered estate is a franchise or manor, the grant of a lease,*
- (d) the express grant or reservation of an interest of a kind falling within section 1(2)(a) of the Law of Property Act 1925 (c. 20), other than one which is capable of being registered under the Commons Registration Act 1965 (c. 64),*
- (e) the express grant or reservation of an interest of a kind falling within section 1(2)(b) or (c) of the Law of Property Act 1925, and*
- (f) the grant of a legal charge.*

It is helpful to note sub-section 1(1)-(3) of the Law of Property Act 1925:

- (1) The only estates in land which are capable of subsisting or of being conveyed or created at law are—*
 - (a) An estate in fee simple absolute in possession;*
 - (b) A term of years absolute.*
- (2) The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—*
 - (a) An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute;*

- (b) A rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute;*
- (c) A charge by way of legal mortgage;*
- (d) and any other similar charge on land which is not created by an instrument;*
- (e) Rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rentcharge.*
- (3) All other estates, interests, and charges in or over land take effect as equitable interests.*

Section 27(5) of the Land Registration Act 2002 provides that section 27 (the requirement of completion by registration) applies to dispositions by operation of law as it applies to other dispositions, but with the exception of (a) a transfer on the death or bankruptcy of an individual proprietor, (b) a transfer on the dissolution of a corporate proprietor, and (c) the creation of a legal charge which is a local land charge.

Priorities

As well as requiring compulsory registration, the 2002 Act had a significant impact through the priority rules set out in sections 28 and 29.

28 Basic rule

- (1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.*
- (2) It makes no difference for the purposes of this section whether the interest or disposition is registered.*

29 Effect of registered dispositions: estates

- (1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.*
- (2) For the purposes of subsection (1), the priority of an interest is protected—*
 - (a) in any case, if the interest—*
 - (i) is a registered charge or the subject of a notice in the register,*
 - (ii) falls within any of the paragraphs of Schedule 3, or*
 - (iii) appears from the register to be excepted from the effect of registration, and*
 - (b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.*
- (3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.*
- (4) Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has effect as if—*
 - (a) the grant involved such a disposition, and*
 - (b) the disposition were registered at the time of the grant.*

Section 28 provides that the priority order of interests protected on the register will remain the same when the underlying interest is transferred. For example, where a lease for 10 years is noted in the register of the freehold interest, anyone purchasing the freehold interest will take it subject to the lease (as the priority of the lease is protected by registration).

Section 29(1) is a long form of saying that if an interest (A) should have been registered and was not, when the underlying estate (B) is transferred for valuable consideration and that transfer of B is completed by registration, A will no longer be protected by registration.

Section 29(2) goes on to explain how an interest is protected.

The 2 main ways, as a matter of practicality, that an interest is protected are either (a) by notice or (b) as a consequence of falling with Schedule 3 of the 2002 Act.

In relation to notices, section 32(3) provides that the fact that an interest is the subject of a notice does not necessarily mean that the interest is valid, but it does mean that the priority of the interest, if valid, is protected.

Section 33 sets out interests which cannot be the subject of a notice. Importantly this includes an interest under a trust.⁸

Schedule 3 of the 2002 Act provides for those unregistered interests which override registered dispositions (and are not 'postponed' to the interest).

In summary these are:

- a) leases for terms not exceeding 7 years
- b) interests of persons in actual occupation
- c) easements and profits a prendre
- d) customary and public rights
- e) local land charges
- f) mines and mineral rights
- g) franchises
- h) manorial rights
- i) rights to rent reserved to the Crown
- j) a non-statutory right in respect of an embankment or sea or river wall
- k) a right to payment in lieu of tithe
- l) a right in respect of the repair of a church chancel

In relation to the co-ownership of land the most important overriding interest is that of a person in actual occupation.

Paragraph 2 of Schedule 3 (persons in actual occupation) provides:

*An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—
(a) an interest under a settlement under the Settled Land Act 1925 (c. 18);*

⁸ Section 32(3) LRA 2002.

- (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
- (c) an interest—
 - (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
 - (ii) of which the person to whom the disposition is made does not have actual knowledge at that time;
- (d) a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition.

Equitable/beneficial interest and protection on the register

Given the statutory provisions set out above, it will have become clear that protecting equitable or beneficial interests on the register is not straightforward. The reason for this is that the register is intended to be a clear way for a purchaser to see who owns land and what he will be buying.

In *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 503–504, Lord Wilberforce stated as follows:

“The system of land registration, as it exists in England, which long antedates the Land Registration Act 1925, is designed to simplify and to cheapen conveyancing. It is intended to replace the often complicated and voluminous title deeds of property by a single land certificate, on the strength of which land can be dealt with. In place of the lengthy and often technical investigation of title to which a purchaser was committed, all he has to do is to consult the register; from any burden not entered on the register, with one exception, he takes free. Above all, the system is designed to free the purchaser from the hazards of notice – real or constructive – which, in the case of unregistered land, involved him in enquiries, often quite elaborate, failing which he might be bound by equities. The Law of Property Act 1925 contains provisions limiting the effect of the doctrine of notice, but it still remains a potential source of danger to purchasers. By contrast, the only provisions in the Land Registration Act 1925 with regard to notice are provisions which enable a purchaser to take the estate free from equitable interests or equities whether he has notice or not ... The only kind of notice recognised is by entry on the register.

The exception just mentioned consists of “overriding interests” listed in section 70. As to these, all registered land is stated to be deemed to be subject to such of them as may be subsisting in reference to the land, unless the contrary is expressed on the register. The land is so subject regardless of notice actual or constructive. In my opinion therefore, the law as to notice as it may affect purchasers of unregistered land, whether contained in decided cases, or in a statute ... has no application even by analogy to registered land. Whether a particular right is an overriding interest, and whether it affects a purchaser, is to be decided upon the terms of section 70, and other relevant provisions of the Land Registration Act 1925, and upon nothing else.”

This was confirmed by Mr Justice Henderson (as he then was) to apply to the equivalent provisions in the Land Registration Act 2002 in the judgment in *Haque v Raja* [2016] EWHC 1950 (Ch).

A beneficial interest, such as an interest under an express trust, cannot be protected by notice on the register (see notes on section 32 and 33 of the 2002 Act above).

A beneficial interest may be protected by the beneficial owner being in actual occupation. However, there are exceptions to this. If the actual occupation is not obvious on a reasonably careful inspection and the person to whom the disposition is made does not have actual knowledge, then the interest will not bind a purchaser.

Further, those who have beneficial interests in property may not be in occupation of the property. Examples include those who have left a property, those in hospital or care, and those in prisons. Similarly there may be individuals who have interests pursuant to a will trust, but do not yet know of their entitlement.

Over-reaching

The basic position in relation to over-reaching is that on a sale of property subject to a trust, the proceeds of the sale become subject to the trust. The purchaser does not need to be concerned by the trust, and takes free, save that, under section 27(2) of the Law of Property Act 1925 the proceeds must be paid to two trustees.⁹

It was confirmed in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 and *Haque v Raja* [2016] EWHC 1950 (Ch) that the priority rules in the Land Registration Acts operate first, and the rules in relation to over-reaching operate second. This means that where a disposition of registered land subject to a trust takes place, the disposition can occur without reference to the beneficial interests under the trust. The moneys received by a sole trustee will remain subject to the trust, but the purchaser of the property takes free.¹⁰

In *Haque v Raja* at paragraph 44:

*“A purchaser for value of registered land from a sole individual trustee takes the land free from any beneficial interest under a trust of land, unless the equitable owner is in actual occupation and has an overriding interest which falls within Schedule 3. Not only is this the plain effect of the clear language of section 29, but it also accords with the legislative scheme of land registration in England expounded by Lord Wilberforce in *Boland*’s case. Although LRA 2002 made substantial changes from the previous law, I see no reason to doubt that the fundamental policy objective in this area remains the same as before, and a purchaser takes free from unregistered beneficial interests unless they are protected by actual occupation. If it were otherwise, I agree with Ms Williamson that the simplicity and certainty which registered conveyancing is designed to achieve would be absent just when it is most needed, that is to say where there is a beneficial interest in the land which is owned by a non-occupier and which is not overreached. The remedy for a beneficiary in*

⁹ Sections 2 and 27 of the Law of Property Act 1925

¹⁰ The only exception to this appears to be the situation where the third party purchaser has committed fraud or intermeddled in the trust so as to be liable in knowing receipt as a constructive trust. This would operate on the basis that the constructive trust arises post-disposition to affect the purchaser; in practicality replacing the pre-existing trust. This point was conceded in *Haque v Raja* but remains to be tested.

the position of the claimant is to protect his interest by entry of an appropriate restriction on the register. This is a precaution which, for whatever reason, the claimant failed to take.”

Restrictions

As noted by Henderson J, the appropriate way to protect a beneficial interest is through entering a restriction against dealing with the registered title. This is the only real way in which a beneficial interest of a person not in actual occupation can be protected.

A restriction is an entry in the register regulating the circumstances in which a disposition of a registered estate or registered charge may be the subject of an entry.¹¹

A restriction is entered either because 2002 Act or other legislation requires that it be entered, or for the purpose of (i) preventing invalidity or unlawfulness in relation to dispositions, (ii) ensuring that over-reachable interests are over-reached, or (iii) protecting a right or claim in relation to a registered estate or charge.¹²

No restriction may be entered for the purposes of protecting the priority of an interest which is, or could be, the subject of a notice.¹³

Such restrictions are usually in standard form, which can be found in the Land Registration Rules 2003.

The most common form used is Form A:

Form A (Restriction on dispositions by sole proprietor)

“No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court.”

Other restrictions which may arise in the co-ownership context are:

Form B (Dispositions by trustees—certificate required)

No [disposition or specify type of disposition] by the proprietors of the registered estate is to be registered unless one or more of them makes a statutory declaration or statement of truth, or their conveyancer gives a certificate, that the [disposition or specify type of disposition] is in accordance with [specify the disposition creating the trust] or some variation thereof referred to in the declaration, statement or certificate.

¹¹ Section 40 LRA 2002

¹² Section 42(1)(a) LRA 2002

¹³ Section 42(2) LRA 2002

Form C (Dispositions by personal representatives—certificate required)

No disposition by the personal representative of [name] deceased, other than a transfer by way of assent, is to be registered unless such personal representative makes a statutory declaration or statement of truth, or their conveyancer gives a certificate, that the disposition is in accordance with the terms of [choose whichever bulleted clause is appropriate]

- *the will of the deceased [as varied by [specify date of, and parties to, deed of variation or other appropriate details]]*
- *the law relating to intestacy as varied by [specify date of, and parties to, deed of variation or other appropriate details]*

or some [further] variation thereof referred to in the declaration, statement or certificate, or is necessary for the purposes of administration.

For the purposes of entering a restriction to protect a right or claim in relation to a registered estate or charge, a person entitled to the benefit of a charging order on a beneficial interest under a trust of land is treated as having a right or claim in relation to the trust property and can apply for a Form K restriction. This form of restriction requires the applicant for registration to certify that notice of the disposition has been given to the person with the benefit of the charging order, allowing that person an opportunity to pursue the capital money arising from the disposition. It does not interfere with the mechanism of overreaching.

Form K (Charging order affecting beneficial interest—certificate required)

No disposition of the [choose whichever bulleted clause is appropriate]

- *registered estate, other than a disposition by the proprietor of any registered charge registered before the entry of this restriction,*
- *registered charge dated [date] referred to above, other than a disposition by the proprietor of any registered sub-charge of that charge registered before the entry of this restriction,*

is to be registered without a certificate signed by the applicant for registration or their conveyancer that written notice of the disposition was given to [name of person with the benefit of the charging order] at [address for service], being the person with the benefit of [an interim or a final] charging order on the beneficial interest of [name of judgment debtor] made by the [name of court] on [date] (Court reference [insert reference]).

There are over 40 forms of standard restriction that can be used. An application can be made to HM Land Registry for a 'non-standard' form restriction, but from experience these are seldom granted.

It can be noted that none of the standard form restrictions refers to matrimonial proceedings.

Concluding remarks

There are ways to ensure that client's equitable and beneficial interests are protected, but this will often involve advisers and conveyancers approaching the registered title system in a practical way.

While a beneficial interest cannot be registered or noted against the register, it can be protected by a combination of ensuring that all persons entitled to be registered are registered, and also by ensuring that the appropriate restrictions are placed on the register. This is more important in the case of trusts where the beneficiaries are not in actual occupation.

Finally, it is important to review the registered title when there is any substantial change in the circumstances surrounding the ownership of the property. This is most notable on (i) death or (ii) relationship breakdown (whether marriage or partnership).

© Louisa Nye

Joint ownership and registered land – Common problems and practical solutions

Problem Scenarios

Example 1¹

Elinor and Marianne are sisters. Elinor and Marianne jointly own Barton Cottage (“**the Property**”).

The Property was purchased by both sisters together, using money they had inherited from their father’s estate. The sisters put in equal sums of money at purchase.

Elinor and Marianne are both registered legal proprietors of the Property, and this is recorded on the official copy entry of legal title to the Property.

2 years later the sisters agreed that as Elinor had been paying all of the utility bills she should have a larger share in the beneficial interest of the Property. The sisters wrote the following on a piece of paper:

“We, Elinor and Marianne Dashwood, being the legal owners of Barton Cottage, agree that we own the Property as follows: 60% Elinor and 40% Marianne.”

The sisters signed the paper and dated it. They gave a copy to their solicitor, Mr Willoughby, and asked him to do whatever he needed to do with it to make it legal. Mr Willoughby put a copy of the note on the file with the other papers related to the purchase. He did nothing else. A few months later Mr Willoughby ran away taking all the money from the firm’s client account.

Meanwhile Elinor met Edward. In due course they decided to get married and Elinor moved out of the Property. Elinor and Edward had 3 children.

Marianne remained living in the Property. Marianne never married nor had children. The sisters did not think to do anything with the title to the Property.

Last year Elinor died. She had made a will. Edward was her sole executor and beneficiary, save that there are some monetary gifts for the children. Edward has asked to see all the papers to do with the Property.

¹ With apologies to Jane Austen

Marianne is very concerned as to what her position is and seeks your advice.

In particular she wants to know:

1. Whether Edward can take the Property away from her.
2. Whether she would have to allow Edward and the children to live with her.
3. Whether she can simply sell the Property and move on.

Example 2¹

You act for Gwyneth. She has been married to Chris for 12 years. They have 2 children (both under 18 years old).

Gwyneth and Chris are in the process of divorcing. They have a decree nisi but no final property adjustment order has been made.

The Property is valued at £1,000,000.00 (£1 million) and there is a mortgage of £500,000.00. The Property was purchased shortly before they were married. For reasons unknown, only Chris was registered as legal proprietor of the Property. The mortgage was taken out in Chris's name but has always been paid by payments from their joint bank account. There is a Form A restriction on the registered title.

Chris had previously been using a solicitors firm, Douwe Cheatham & Howe LLP ("DCH"), to handle the divorce. Chris became dissatisfied with DCH's work and has recently appointed Next Best Solicitors to act for him. DCH have, however, pursued Chris for fees totalling £20,000.00. DCH obtained a default judgment against Chris, and they have registered an interim charging order against the title to the Property.

Gwyneth is very concerned about these developments. She wants to get rid of the Property. She is willing to agree to an amicable split of the Property 50:50 and she and Chris have already agreed on a division as to the contents of the Property. You have been told by the solicitors handling the divorce that as the parties have agreed to a 50:50 split a consent order will be sent to the Family Court asking that the Judge approved a consent order in those terms regarding the Property. (There are other matters in relation to bank accounts which you have not seen, but you are instructed these will all be divided 50:50.)

Gwyneth seeks your advice on the following:

1. What is her interest in the Property?
2. Is it properly protected, or should something more be done to protect her interests on the registered title?



1 This problem question is a work of fiction. Names, characters, businesses, places, events, locales, and incidents are either the products of the author's imagination or used in a fictitious manner. Any resemblance to actual persons, living or dead, or actual events is purely coincidental.

3. She is particularly concerned about the interim charging order that DCH has obtained. Can this affect her interest? Should you be instructing counsel to attend at the final charging order hearing?
4. She is also worried that Chris will panic and seek to sell the Property before all the orders are finalised, so that he can cover his bills. Can Chris do this?

5 Stone Buildings

**Constructive versus Resulting
Trust:
Confusion or Clarity?**

Miranda Allardice and William East

<div data-bbox="165 613 298 665">  </div> <div data-bbox="708 642 799 676"> <p>Joint Property Conference 2018</p> </div> <h2 data-bbox="177 719 352 757">Introduction</h2> <ul data-bbox="177 784 826 1050" style="list-style-type: none"> • The purpose of this presentation is to consider the UKPC decision of <i>Marr v Collie</i> [2017] UKPC 17. • Where the Privy Council held that when determining joint ownership of commercial property purchased by parties in a domestic partnership, the presumption of constructive trust should apply in preference to the resulting trust presumption. • This decision marks something of a departure from the domestic appellate cases of <i>Stack v Dowden</i> [2007] UKHL 17, <i>Lasker v Lasker</i> [2008] EWCA Civ 347, and <i>Jones v Kernott</i> [2011] UKSC 53, which held where the context of the ownership was a domestic partnership the constructive trust approach was to be preferred. • In contrast if the purchase was for commercial purposes then the resulting trust presumption was the more appropriate. <div data-bbox="169 1102 272 1122"> <p>www.5sblaw.co.uk</p> </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1223 298 1274">  </div> <div data-bbox="708 1254 799 1288"> <p>Joint Property Conference 2018</p> </div> <h2 data-bbox="177 1330 424 1368">Who it matters to</h2> <ul data-bbox="177 1395 823 1671" style="list-style-type: none"> • According to ONS Statistics in 2017 there were 3.3m cohabiting couple families . • Whilst married families number 12.9m, the model of the cohabiting couple family is the fastest growing type of family. • Unlike the Matrimonial Causes Act 1973, which governs the distribution of finances upon family breakdown, the cohabitee faces a plethora of legislation, in respect of support for children: Schedule 1 of the Children Act 1989, and the Child Support Act 1991. But no legislative regime for the adult cohabitee. • The position for the adult cohabitee comprises a baffling set of legal principles relating to the ownership of property, as opposed to having regard to the impact of relationship breakdown. <div data-bbox="169 1713 272 1733"> <p>www.5sblaw.co.uk</p> </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>3</p> <p>5 Stone Buildings</p> <p>Joint Property Conference</p> <h2>Lack of legislative engagement</h2> <ul style="list-style-type: none"> • The latest Bill seeking to address the financial consequences of cohabitation breakdown is the Cohabitation Rights Bill introduced by Lord Marks in the House of Lords. • After a first reading in 2017 it is languishing, with no second reading timetabled. • <i>Post Iott v Mitson</i> [2017] UKSC 17 Lord Hughes emphasised that for maintenance cohabitants the provision for housing will often be confined to an award of a life interest, so less prospect of an outright award of housing. • All conveyancers, family, private client and litigation lawyers need to grapple with the problem of joint ownership of property. <p>www.5sblaw.co.uk</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>5 Stone Buildings</p> <p>Joint Property Conference 2018</p> <h2>The doctrine of precedent</h2> <ul style="list-style-type: none"> • What is the relevance of the <i>Marr v Collie</i> guidance emanating from the Privy Council? • Judicial Committee Act 1833 established the Privy Council • Functions as the final appellate court of 14 British Overseas Territories, Channel Isle & Isle of Man, panel membership normally made up from our Supreme Court Judges • Not a court of any of the part of the UK, so how does the doctrine of precedent work? • Reviewed in the case of <i>Willers v Joyce</i> [2016] UKSC 43 Lord Neuberger • A PC decision is not binding on an English Court as a matter of precedent BUT a PC decision will be “of great weight and persuasive value” • An English Court should not follow a decision of the PC if the same is inconsistent with a “domestic” decision that would be binding under the normal system of precedent. <p>www.5sblaw.co.uk</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

What if PC concludes it is right!

- If the PC decides that an earlier decision of the HL or Supreme Court is wrong it can take an exceptional course, as follows:
- The PC can direct that the earlier "domestic" ruling is wrong and that the PC decision should be treated as representing the law of England & Wales.
- JCPC Practice Directions provides that where an appeal involves deciding on the correctness of an earlier House of Lords, Supreme Court or Court of Appeal decision, then the PC can; *"if they think it appropriate, not only decide that the earlier decision of [the above tribunals], was wrong but also can expressly direct that domestic courts should treat the decision of the JCPC as representing the law of England & Wales."*
- How did the PC grapple with their apparent substantially difference of approach from *Stack* ?

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The Facts

- Mr Marr, "M" (the Appellant), was a Canadian working in finance in the Bahamas. Mr Collie, "C" (the Respondent) was a building contractor and a citizen of the Bahamas. They had a 15 year intimate relationship. There were 11 properties/development sites held in joint names, purchased over a number of years. Their joint home was held in sole name of C.
- First Instance Issac J concluded that Lady Hale's dicta in *Stack* to the effect that a conveyance into joint names indicated a beneficial joint tenancy unless the contrary is proved, was confined to *"the domestic consumer context"*, citing *Lasker* in support.
- The relevant presumption was that of a resulting trust, where the primary purpose of the purchase was investment even if the parties were in a domestic relation. He found C had failed to rebut the resulting trust presumption.
- The solely owned home was purchased to enhance M's claim to residency and he owned both the legal and beneficial title.

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<div data-bbox="167 607 298 656">5 Stone Buildings</div> <div data-bbox="710 636 799 667">Joint Property Conference 2018</div> <h2 data-bbox="177 723 580 763">The Bahamas Court of Appeal</h2> <ul data-bbox="177 775 826 1079" style="list-style-type: none"> • C successfully appealed. The single judgment relied upon Australian cases in respect of the jointly owned investment properties, including <i>Muschinski v Dodds</i> [1985] HCA 78, all the cases pre date <i>Stack</i>. • The fact of joint legal ownership led to the application of the maxim that “equity follows the law”, as a presumption. • BUT where the money was unequally provided then presumption of a resulting trust arose in accordance with the proportions of purchase money provided • BUT that resulting trust presumption was itself displaced if evidence of intention that M intended C to have an equal share in the investment properties. • Evidence of that intention provided by; conveyances, joint mortgages and an email about 1 of the properties; “meaning that we would have a 50% interest”. <div data-bbox="170 1097 271 1113">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="167 1216 298 1265">5 Stone Buildings</div> <div data-bbox="710 1247 799 1279">Joint Property Conference 2018</div> <h2 data-bbox="177 1326 539 1366">Court of Appeal continued</h2> <ul data-bbox="177 1391 826 1635" style="list-style-type: none"> • The CA ordered the sale of the jointly owned properties. Further that the case should be remitted for rehearing of as to the intentions of the parties, and the precise quantification of their interests. • In respect of their home C’s appeal failed on the basis he had failed to demonstrate any common intention to share the beneficial interest. • Of the valuable chattels comprising paintings, truck and boat. The truck was registered in joint names and therefore there was evidence of common intention. As to the boat in the sole name of M on the basis of their contributions upon sale 70% was to pass to M and 30% to C. The paintings were the sole property of M. <div data-bbox="170 1709 271 1724">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<div data-bbox="165 607 298 656">5 Stone Buildings</div> <div data-bbox="708 636 799 667">Joint Property Conference 2018</div> <h2 data-bbox="177 712 557 750">Where we thought we were</h2> <ul data-bbox="177 779 828 1079" style="list-style-type: none"> • In <i>Stack v Dowden</i> at [para 68] having reviewed the features specific to cohabitation and the family property held: “In law context is everything and the domestic context is very different from the commercial world” • This difference in context led her to conclude at [para 58] “<i>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</i>”. • In a joint names case while the court was still searching for the “parties shared intentions, actual inferred [imputed], with respect to the property in the light of their whole course of conduct in relation to it” • BUT CLEAR warning a finding of a different intention to the legal interests will be <u>very unusual</u> <div data-bbox="169 1095 271 1113">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1220 298 1270">5 Stone Buildings</div> <div data-bbox="708 1249 799 1281">Joint Property Conference 2018</div> <h2 data-bbox="177 1326 392 1364">Laskar v Laskar</h2> <ul data-bbox="177 1391 828 1653" style="list-style-type: none"> • <i>Laskar v Laskar</i> [2008] EWCA Civ 347 Neuberger LJ (as he then was) gave the lead judgment. He was also on the PC panel in <i>Marr v Collie</i>. • Mother had a right to buy her council house, but lacked the ability to raise the funds & enlisted the help of her daughter, who was able to raise the mortgage. The purchase was in joint names. It was to be a buy to let property. At first instance on a resulting trust basis the daughter's beneficial interest was found to be 4.28%. This was upheld on appeal. • [Para 17] “this was a purchase which at, least primarily, was not in the “domestic consumer” context but in a commercial context. To my mind it would not be right to apply the reasoning in <i>Stack v Dowden</i> to such a case as this, where the parties primarily purchased the property as an investment for rental income and capital appreciation, even where their relationship is a familial one”. <div data-bbox="169 1709 271 1727">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<div data-bbox="165 607 298 656">5 Stone Buildings</div> <div data-bbox="708 618 778 638">12 June, 2018</div> <h2 data-bbox="177 712 384 748">Jones v Kernot</h2> <ul data-bbox="177 779 823 994" style="list-style-type: none"> • <i>Jones v Kernot</i> [2011] UKSC 53 was another joint ownership domestic cohabiting couple case. • [19] when endorsing the presumption of a beneficial joint tenancy, from <i>Stack</i>, cites 2 reasons why a challenge to the presumption is not to be “<i>lightly embarked upon</i>”. (i) the fact of purchase of home to live in together (ii) heavy burden in establishing any intention to keep a balance sheet approach • Suggests that a court should not readily embark upon the detailed examination of parties relationship and finances over many years. <div data-bbox="165 1095 272 1113">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1220 298 1267">5 Stone Buildings</div> <div data-bbox="708 1249 799 1281">Joint Property Conference 2018</div> <h2 data-bbox="177 1328 580 1364">Privy Council - M's arguments</h2> <ul data-bbox="177 1391 826 1657" style="list-style-type: none"> • Sole Judgment Lord Kerr, but panel included Lady Hale, Lords Neuberger, Wilson (all previously involved in developing our domestic joint ownership case law) • M argued: <ul data-bbox="220 1514 826 1657" style="list-style-type: none"> • Email re ‘50% interest’ had not been put to M during cross examination at first instance, nor indeed had it been mentioned in the C of A hearing or even put in the agreed bundles! • C of A wrong to invest email with significance it had - was not sent at time of acquisition of properties <div data-bbox="165 1709 272 1727">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

Privy Council - M's arguments (cont.)

- C of A had erroneously held that M was fixed with the burden of proving that the beneficial ownership of the investment properties differed from their legal ownership. Presumption of resulting trust ought to have applied, per *Laskar*. In fact, C needed to show that M had intended to give him more than the percentage implied by his financial contributions, Isaacs J right to say that C had failed to do so.
- C of A had wrongly followed the common intention constructive trust route in determining the beneficial ownership in the truck and boat.
- C of A had failed to give sufficient weight to Isaacs J's findings of fact, had wrongly interfered with them.

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Privy Council Approach

- To confine the reasoning in *Stack* to the 'purely domestic setting' would be 'wrong' [39]; the *Stack* approach could possibly apply to property purchased by a couple in an enterprise reflecting their joint commercial, as well as personal, commitment [40].
- *Laskar* is explained: the reason why the resulting trust presumption applied in that case was not because the property was an investment property and not intended as a family home [49], but rather because the 'financial venture on which the parties had embarked was not associated with a mutual commitment to each other for the future' [48]. Hence mother and daughter relationship key.

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Privy Council Approach (cont.)

- ‘*Simplistic answer*’: if property is purchased in joint names by parties in a domestic relationship, presumption of joint beneficial ownership applies, but if bought in wholly non-domestic situation, it does not [53].
- However, except where there is no evidence from which the parties’ intentions can be identified, the answer is not to be provided by a clash of presumptions [54].

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Privy Council Approach (cont.)

- Importance of looking to context [54]:
 - If it is the unambiguous wish of the parties who contribute in unequal shares that that equitable interests should follow legal interests, effect should be given to that wish
 - If that is not their wish, or they have not formed any intention as to beneficial ownership but have (e.g.) accepted advice that property be put in joint names without considering the consequences, the resulting trust solution might provide the answer.
- Looking at the course of conduct of parties over the years in which they dealt with the property is relevant, and there should be an ‘*intense examination*’ of why the properties acquired were purchased in joint names [55].

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<div data-bbox="165 607 298 656">5 Stone Buildings</div> <div data-bbox="708 636 799 667">Joint Property Conference 2018</div> <h2 data-bbox="177 712 738 752">Privy Council: Applying approach to facts</h2> <ul data-bbox="177 779 815 1055" style="list-style-type: none"> • Neither the approach of the C of A nor Isaacs J had been appropriate; • Isaacs J had failed (1) to examine why M continued to agree that properties purchased should be put in his and C's joint names when anticipated financial contributions from C had not materialised and (2) to consider email re beneficial ownership. • Court of Appeal had failed (1) to address a number of factual findings made by Isaacs J, e.g. that evidence of M was more credible than C on issue of whether he had intended to confer an equal beneficial interest on C and (2) had placed significance on the email, when M and his counsel had not been given a chance to comment upon it. • Case remitted back to Supreme Court (court of first instance) for further fact-finding on the intention of the parties regarding beneficial ownership. <div data-bbox="169 1095 271 1113">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1216 298 1265">5 Stone Buildings</div> <div data-bbox="708 1245 799 1276">Joint Property Conference 2018</div> <h2 data-bbox="177 1323 544 1361"><i>Marr v Collie</i> - conclusions</h2> <ul data-bbox="177 1391 828 1514" style="list-style-type: none"> • Case represents an important milestone in this area • No longer a bright dividing line between 'investment' properties for cohabiting couples and 'domestic' properties, although that is likely still to exist for other types of co-owners (e.g. parent and child); <div data-bbox="169 1706 271 1724">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>


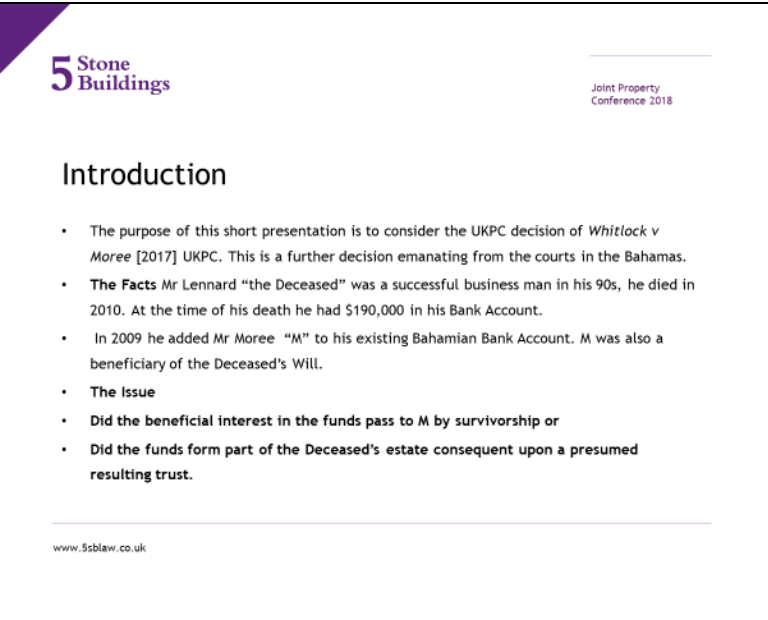
<div data-bbox="165 607 298 656">5 Stone Buildings</div> <div data-bbox="708 636 799 667">Joint Property Conference 2018</div> <h2 data-bbox="177 712 644 750">Marr v Collie - conclusions (cont.)</h2> <ul data-bbox="177 779 828 1025" style="list-style-type: none"> • However, starting point with a cohabiting couple is not to see whether <i>Stack</i> presumption can be rebutted. Process: (1) conduct an '<i>intense examination</i>' of history re property and see why it is that was purchased in joint names. That can then lead you either to equal sharing or division based on contributions • (2) Only if no evidence re intention should the presumption in <i>Stack</i> apply • Conflict here with principle that it is difficult to depart from the <i>Stack</i> presumption that equity follows the law? Odd way to apply concept of presumptions? <div data-bbox="169 1095 271 1113">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1216 298 1265">5 Stone Buildings</div> <div data-bbox="708 1245 799 1276">Joint Property Conference 2018</div> <h2 data-bbox="177 1323 691 1361">Marr v Collie - three major outcomes</h2> <ul data-bbox="177 1391 817 1621" style="list-style-type: none"> • Privy Council opens door to wider applicability of <i>Stack</i> - opens door for more equal division of investment assets acquired during relationship. However, is this an appropriate policy outcome? • On other hand, the decision seems to undermine the value of the <i>Stack</i> presumption by inviting an '<i>intense examination</i>' of parties' intentions. Problem - huge cost resulting from that shift in emphasis. <i>Stack</i> aimed to reduce the need for costly litigation! • The presumption in joint ownership cases was expressly designed to discourage litigants from spending "<i>more on the legal battle than is warranted by the sums actually at stake</i>" [68] • The problem now is that the PC directs exhaustive enquiry into inferred intentions, before the presumption can arise, which exercise undermines the whole rationale of the <i>Stack</i> approach. <div data-bbox="169 1709 271 1727">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



<div data-bbox="165 607 298 656">5 Stone Buildings</div> <div data-bbox="708 636 799 667">Joint Property Conference 2018</div> <h2 data-bbox="186 712 469 752">Pity the poor lawyer</h2> <ul data-bbox="180 779 829 999" style="list-style-type: none"> • Lack of clarity. <i>Laskar</i> provided a bright dividing line between domestic and commercial properties. Line is now blurred. • Any hope for the lawyer explaining the potential for different outcomes to the layman? • There was a simple argument to the effect that the home occupied a special importance in the lives of a cohabiting couple and this justified a different approach that was not wholly related to financial contribution. • A commercial investment was just that, and the return on the investment might more logically mirror the contribution, adopting the resulting trust. <div data-bbox="169 1095 272 1113">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1216 298 1265">5 Stone Buildings</div> <div data-bbox="708 1245 799 1276">Joint Property Conference 2018</div> <h2 data-bbox="180 1323 379 1364">Quantification</h2> <ul data-bbox="180 1391 826 1666" style="list-style-type: none"> • We are left with the tantalizing position that the PC remitted the determination of the quantification of the couple's respective beneficial interests in the investment properties. • On the facts it appears that M contended that he had provided the bulk of the purchase monies, and that C was to undertake developmental work on the same. • In the absence of direct evidence of discussions, the court will be driven to divining the parties true intentions. <i>Stack</i> [69] lists a number of factors that might be relevant. These factors are wider than financial and encompassed such things as whether they were housing children. • Where the asset is an investment it is likely that a central consideration will be; "<i>how the property was financed both initially and subsequently</i>". <div data-bbox="169 1706 272 1724">www.5sblaw.co.uk</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

Quantification continued

- *Kernot* [51] provides that in default of being able to draw any inference then the court's default position is that *"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"*. Taken from LJ Chadwick in *Oxley v Hiscock* [2005] Fam 211 [69].
- This mention of what is fair is not to be read as palm tree justice. Rather at [33]. *"Chadwick... was saying that the court might have to impute an intention to the parties as to the proportions in which the property would be shared"*.
- [51(5)] *"Financial contributions are relevant but there are many other factors..."*
- Where the asset represents an investment it is submitted that the level of each party's respective contribution will still be a dominant factor.

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 <p>5 Stone Buildings</p> <p>Joint Bank Accounts Read the small print!</p> <p>June 2018 www.5sblaw.co.uk</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
 <p>5 Stone Buildings</p> <p>Joint Property Conference 2018</p> <h2>Introduction</h2> <ul style="list-style-type: none"> • The purpose of this short presentation is to consider the UKPC decision of <i>Whitlock v Moree</i> [2017] UKPC. This is a further decision emanating from the courts in the Bahamas. • The Facts Mr Lennard “the Deceased” was a successful business man in his 90s, he died in 2010. At the time of his death he had \$190,000 in his Bank Account. • In 2009 he added Mr Moree “M” to his existing Bahamian Bank Account. M was also a beneficiary of the Deceased’s Will. • The Issue • Did the beneficial interest in the funds pass to M by survivorship or • Did the funds form part of the Deceased’s estate consequent upon a presumed resulting trust. <p>www.5sblaw.co.uk</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<div data-bbox="165 481 298 530">  </div> <div data-bbox="708 510 799 542" style="text-align: right;"> <small>Joint Property Conference 2018</small> </div> <div data-bbox="175 586 368 622" style="margin-top: 20px;"> <h2>The evidence</h2> </div> <div data-bbox="175 651 826 954" style="margin-top: 10px;"> <ul style="list-style-type: none"> • The documents • Bank's standard form: <i>JOINT TENANCY Unless otherwise agreed in writing, all money which is now or may later be credited to the Account ... is our joint property with the right of survivorship. That means that if one of us dies, all the money in the Account automatically becomes the property of the other account holder(s)</i>". The form was signed by both. • State purpose of Account: <i>"to pay utilities"</i> was recorded in a manuscript note by a bank official. • M's oral evidence that they <i>"understood that it was explained to us that we were converting his personal account to a joint account between us, so that upon his death the amounts held on that account became my property"</i>. </div> <div data-bbox="169 969 272 985" style="margin-top: 10px;"> <small>www.5sblaw.co.uk</small> </div>	<div data-bbox="922 533 1517 949" style="border-top: 1px dashed black; border-bottom: 1px dashed black; height: 186px;"></div>
<div data-bbox="282 1052 298 1070" style="text-align: center;"> <small>3</small> </div> <div data-bbox="165 1090 298 1140">  </div> <div data-bbox="708 1122 786 1151" style="text-align: right;"> <small>Joint Property Conference</small> </div> <div data-bbox="175 1196 421 1234" style="margin-top: 20px;"> <h2>The Lower courts</h2> </div> <div data-bbox="175 1261 826 1536" style="margin-top: 10px;"> <ul style="list-style-type: none"> • Both the 1st instance court and the appeal court dealt with the issue as follows: • That there was a presumption of a resulting trust in respect of the money in the account • UNLESS M could rebut that presumption and discharge the burden of prove to demonstrate that the Deceased intended to make a beneficial gift of the money to him. • The 1st instance judge concluded that M could not rebut the presumption. • The CA reviewed all the same evidence but concluded that he had discharged the burden by having regard to: • The close relationship between the two • The terms of the Form • The testamentary gifts to M </div> <div data-bbox="169 1581 272 1599" style="margin-top: 10px;"> <small>www.5sblaw.co.uk</small> </div>	<div data-bbox="922 1142 1517 1559" style="border-top: 1px dashed black; border-bottom: 1px dashed black; height: 186px;"></div>

The Privy Council

- The majority judgment given by Lord Briggs (with whom Lady Hale & Lord Sumption agreed).
- Strong dissenting judgment from Lord Carnwath (with whom Lord Wilson agreed).
- Lord Briggs (i) Legal title in co-ownership can only be joint title passes to survivor BUT (ii) Joint tenancy with a right of survivorship is one of many ways in which property may be co-owned beneficially.
- Held [29] *"Where two or more holders of a joint account all sign an account opening document.. which [documents] on their true construction, declare or set out their respective beneficial interests in the property constituted by the account, (loosely, the money in the account), then those are the interests of the account holders, pending any subsequent variation of them by agreement or otherwise, and an examination of the subjective intentions of the account holder is neither relevant or permissible"*.

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Examination of authority

- Lord Briggs acknowledged a large number of authorities in the common law world on the topic but not easy to reconcile, and so determined to go back to *"first principles"*.
- Lord Carnwath describes Lord Briggs stated aim to be *"to provide a plain man's guide to the law of co-ownership, so that the common law of the Bahamas and England may be set on the true path"*. He however rejects the guidance.
- Lord Briggs adopts the real property *"equitable toolkit"*. So that if a written instrument does address the beneficial ownership of property; *"a statement as to the beneficial ownership of the property in that instrument is usually conclusive"*. *Goodman v Gallant* [1986] Fam 106.
- Here the property is rather a contractual chose in action enjoyed by the account holders against the bank.

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Lord Briggs cont'd

- In relation to a funds in a joint bank account what documents are relevant; *"by way of analogy with co-ownership of land"*
- [27] *"the obvious answer lies in the account opening document"*.
- Does the signed document address the issue of beneficial ownership as it did in the Bank's Form? IF SO it is dispositive of those beneficial interests.
- Binding unless mistake, fraud, undue influence etc
- No room for application of presumed resulting trust
- Where the beneficial interest is addressed, it is a question of law (not fact) as to how to construe the same.

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Surprise at common law authorities

- Lord Briggs at [45] acknowledged that from the common law authorities; *"there emerges a general impression that, where the deceased account holder is the contributor of the money"*, an approach that was widely adopted, *"require[d] the survivor to discharge the burden of proving an intent to benefit him"* and in which the opening documents play ONLY an evidential role in the search for subjective intention.
- The Form contained a *"pellucidly clear declaration that the survivor .. was to have the beneficial interest in the joint account"*.
- Therefore the document opening the account may be the beginning and end of the enquiry.

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Lord Carnwath's dissent

- [55] Lord Carnwath disagrees that the use of other property context in particular of real property is a useful analogy. Rather it is misleading.
- Bank Accounts have special characteristics: *"The ordinary expectation is that, rather than being intended to effect a permanent transfer of value from one customer to the other, it is intended as no more than a convenient vehicle for their co-operation (for whatever reasons) in handling funds from the time being"*.
- The issues of construction of bank documents should be approached against that background.

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Text book review

- Lord Carnwath examines *Ellinger's Modern Banking Law* 5th edition (Oxford 2011) p320 onwards, where there is an review of the case law.
- Survivorship: the issue is not the ownership of the funds (which remain with the bank) but the right to: *"the chose in action that entitled the deceased account holder to draw upon the credit balance"*.
- The case law draws a distinction between the legal and equitable title to this chose in action. Problem as between the survivor and the deceased's estate, where the deceased has provided the funds
- *Ellinger* commentary to the effect that the beneficial interests depend upon the deceased's account holder's intention: for convenience for the intention to make a gift.
NOT so post *Whitlock v Moree*.

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Banking documents

- Lord Carnwath: No dissent from the principle as stated in *Arso v Coutts* [2002] AER (Comm)241. Collins J:
- *"If as a matter of construction of the document making or directing the transfer it is possible to discern the intentions of the transferor that is an end of the matter and no extraneous evidence is admissible to correct and qualify his intentions so ascertained."*
- Note a material difference in *Arso* as the survivorship clause referred to funds *"in our beneficial ownership"*.
- BUT a clear difference in approach to Lord Briggs, as to the context in which the standard banking form is to be read. Lord Carnwath primarily governing the relationship between the bank and the account holders.
- *Niles v Lake* [1947] SCR 294 was not cited to any of the lower *Whitlock* courts, only in the UKPC. The Canadian Supreme Court held the particular banking document did not determine the beneficial interest in the account. So that while the legal title passed to the survivor, it did not effect a transfer of the beneficial interest.

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Carnwath review cont'd

- He endorses Rand J's approach in *Niles* that the document in question did not rebut the presumption of a resulting trust:
- *"To hold otherwise would, as a result of the bank's requirement, deny to a depositor the privilege of opening a joint account for the purpose of convenience... the bank would dictate the terms of beneficial ownership, irrelevant to its protection, as a condition of that form of accommodation". The common sense of the situation is confirmed by the language of the agreement in negating such a construction.*
- The confusion arises between whether the bank documents are to be treated as evidence of the deceased's subjective intention and so relevant to resulting trust OR an objective intention as an aspect of contractual interpretation.

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Limited Consensus then dissent

- Lord Carnwath agreed with the majority that the approach should be to examine whether the particular banking document is a binding contractual commitment which is dispositive of the beneficial interest. If it is demonstrated to be so, applying objective principles of construction, then this approach determines the matter. There is no room for the presumption of resulting trust and the subjective intention outwith a challenge for fraud etc.
- BUT as to the Clause in *Whitlock* he concluded:
- (i) the Clause did not indicate that it was to deal with beneficial interests, rather than “*simply spell out the consequences of holding a legal estate in a joint bank account*”
- (ii) Reasoning as to the importance of context in addition to the absence of particular wording re beneficial interest etc

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Context

- The purpose of the agreement as understood by a reasonable observer:
- ? Simply to designed by the bank as a mechanism to settle the legal relationship between customer and bank
- ? Or intended to constitute a substantial gift from one customer to the other
- Lord Carnwath concluded not the sort of form used to make a generous gift (of ½ share of \$190,000) to a friend.
- PLUS the purpose of the arrangement was stated to be for a mundane purpose: “*to pay utilities*”.
- Handwritten amendments to a standard form should bear added weight, see *Chitty on Contracts* para 13-072.

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Conclusion

- The impact of the majority judgment raises a number of concerns:
- Often the fragile elderly do put another person on their original bank account
- They may indeed open bank accounts for “convenience”
- Whereas with respect to real property there is a solicitor involved there is no such protection when signing a bank mandate.
- Individual banks have different forms, so no one guidance fits all.
- *Whitlock* means that the starting point is the banking mandate document to be construed objectively, not as a subjective pointer to intention.
- This needs to be more widely known & discussed!.

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**Thank you,
any questions?**

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