

Marring the deal

Context is everything when defining the common intention constructive trust. Aidan Casey QC and Tom Poole discuss recent case law

It has been recognised since the decisions of the House of Lords in *Pettitt v Pettitt* [1970] and *Gissing v Gissing* [1971] that common intention constructive trusts are trusts arising by operation of law to give effect to the parties' otherwise unenforceable common intentions, when it would be unconscionable to allow one of them to resile from such intentions – typically when they have been relied upon by the other party such as to produce that result.

The common intention constructive trust

The common intention constructive trust is now well established as a mechanism commonly used by the English courts to resolve disputes about the beneficial ownership of 'family' assets, in the context of which informal and nebulously expressed – and indeed unexpressed – intentions sometimes feature. There has, however, been considerable uncertainty over the relationship between the common intention constructive trust and the resulting trust. Until recently this was thought to have been settled by the Supreme Court in *Jones v Kernott* [2012], approving and clarifying what was said by the House of Lords in *Stack v Dowden* [2007], namely that the common intention constructive trust principles discussed in those cases apply only in cases concerning married or unmarried couples (and others in domestic relationships) who acquire a house or flat for their joint domestic occupation, rather than for business or investment purposes.

In such domestic 'home' situations the starting point was that equity follows the law such that, if the legal title to the property was in the sole name of one of the parties, that party would also be presumed to hold the entire beneficial interest, whereas if they held the legal title jointly, they would be presumed to be jointly entitled to the beneficial interest – unless, of course, there was an express declaration of trust to the contrary. That presumption could, however, be



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rebutted by evidence that the parties had a common intention (relied on by the claimant) that the beneficial interests should be held differently.

The other approach, outside such domestic home circumstances, was based on *Laskar v Laskar* [2008], in which Lord Neuberger (who dissented in *Stack*) held that the traditional approach of looking, in most cases, to financial contributions to the purchase price to determine beneficial interests, relying on the law of resulting trusts, survived in the case of family (or

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like) investments. *Laskar* concerned a dispute as to the beneficial interests held by mother and daughter in the former council house where the family had previously lived for many years, and which had been bought with a view to buy-to-let investment in the joint names of mother and daughter under the statutory 'right to buy'. Lord Neuberger said at paras 17-18:

In this case, the primary purpose of the purchase of the property was as an investment, not as a home. In other words 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 *Stack v Dowden* 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.

Consequently, Lord Neuberger applied a resulting trust analysis, which meant that the parties' respective shares should reflect the size of their contributions to the purchase price (Rimer and Tuckey LJJ agreed), including the payment of mortgages.

However, the latest exposition of the law by the Privy Council in *Marr v Collie* [2017] has suggested that whether the subject of the dispute is a family home or assets bought in a familial context as investments, the informal common intentions of the parties should (if they can be identified) take precedence over any presumption, and the parties' beneficial interests should be determined in accordance with them.

Taken shortly, *Marr* has changed the way courts should approach disputes about the beneficial ownership of family-owned investment property portfolios (and other family-owned investment assets). Following *Marr*, many more such disputes are likely to result in a decision that joint owners have equal interests (and, perhaps, that sole legal owners have the exclusive beneficial interest).

Common intentions in *Marr*

Marr was an appeal from the Court of Appeal of the Commonwealth of the Bahamas to the Privy Council. The facts can be shortly summarised. In the course of an intimate and long-term personal relationship, Mr Marr, a banker, and Mr Collie, a building contractor, purchased a

number of properties conveyed into their joint names; there were no express declarations of trust. All properties except for the couple's family home were purchased for the purpose of investment. This was a key issue in this case, because on it turned the question of whether, in relation to the investment properties, a presumption of resulting trust should apply or whether the case should be treated as falling within the 'domestic/consumer' context, so that the presumption of resulting trust was inappropriate, or at any rate might be trumped by other considerations.

Per Lord Kerr, there should be no difference in the correct approach in domestic and non-domestic cases 'save perhaps where there is no evidence from which the parties' intentions can be identified'.

In each case, the cash element of the purchase price relating to the investment properties was found to have been paid by Mr Marr (along with most, if not all, of the mortgage payments). Mr Collie claimed that it was intended that he would renovate the properties or that he would build on the plots of land acquired, and so, on that footing or in any case, all of the properties were intended to be beneficially equally owned from the outset.

At first instance, the judge adopted the approach thought to have been confirmed by *Jones* and *Laskar*: he dealt with the family home under *Stack* principles (and there was no appeal by either side in relation that part of his judgment). As to the investment properties, he found that, since all of the properties had been bought for non-domestic purposes, resulting trust principles applied and Mr Marr was entitled to the entire beneficial interest in each.

The trial judge's decision was reversed in relation to these properties by the Bahamas Court of Appeal, which also applied *Laskar*, but found that the presumption of resulting trust was rebutted by evidence of an email between Mr Marr and his solicitor indicating that he intended Mr Collie to hold beneficially 50% of the investment properties. Mr Marr appealed.

Privy Council judgment

In the Privy Council, Lord Kerr, delivering the opinion of the board, conducted a thorough review of the authorities and concluded that there should be no difference in the correct approach in domestic and non-domestic cases 'save perhaps where there is no evidence from which the parties' intentions can be identified'. The starting point in all situations, he said, is the intention of the parties.

Lord Kerr noted that in *Laskar*, while the mother/daughter relationship was a familial one, the financial arrangement between them was not one associated with a mutual commitment made to each other for the future. This meant that the investment in *Laskar* could be described as purely financial despite the familial element. Accordingly, Lord Kerr concluded that *Laskar* is not authority for a proposition that the *Stack* approach – that beneficial ownership follows legal ownership unless the contrary is proven – only applies in the domestic context. In other words, it was not the intention of Lord Neuberger in *Laskar* to draw a strict line of separation between

acquiring a 'domestic consumer' asset and acquiring an investment asset, regardless of the circumstances in which that acquisition took place.

Lord Kerr concluded that context in this area of the law is everything and that, generally, the answer is not to be found by one presumption triumphing over another (paras 53-54):

If what Lady Hale described [in *Stack*] as a 'starting point' (that joint legal ownership should signify joint beneficial ownership) is to be regarded as a presumption, is it in conflict with the presumption of a resulting trust where the parties have contributed unequally to the purchase of property in their joint names? A simplistic answer to that question might be that, if the property is purchased in joint names by parties in a domestic relationship the presumption of joint beneficial ownership applies but if bought in a wholly non-domestic situation it does not. In the latter case, it might be said that the resulting trust presumption obtains.

The Board considers that, save perhaps where there is no evidence from which the parties' intentions can be identified, the answer is not to be provided by the triumph of one presumption over another. In this, as in so many areas of law, context counts for, if not everything, a lot. Context here is set by the parties' common intention – or by the lack of it. If it is the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the answer.

The case was remitted for a new trial to allow a full review of the evidence of intention.

The new approach

Following *Marr*, when a claim is made by a person to displace the presumption that the beneficial ownership of any asset follows the legal ownership in a case where there is no express declaration of trust, the following questions must now be addressed:

- Is there evidence of an actual common intention between the parties that the beneficial ownership should not follow the legal ownership, either at the date when the asset was first acquired or at some later date?
- In the absence of such a common intention, can an agreement, arrangement or understanding to this effect be inferred from the parties' conduct? Lady Hale in *Stack* suggested that the following factors may be relevant to divining the parties' common intention:
 - any advice or discussions at the time the asset was initially acquired;
 - the reasons why the asset was acquired in joint names;
 - the purpose for which the asset was acquired;

- the nature of the parties' relationship;
- whether there were children of the relationship, and who had responsibility for them;
- how the acquisition was financed, both initially and subsequently;
- how the parties arranged their finances, whether separately, together or a bit of both; and

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- how the parties discharged their outgoings – ie are outgoings paid from a joint bank account.
- Has the claimant acted to their detriment in reliance upon the common intention? This means that the claimant must have done something which they could not reasonably be expected to have done unless they were to have an interest in the asset. There must also be some link between the common intention and the acts relied upon as detriment, although the detriment need not necessarily consist of expenditure of money or some other quantifiable financial detriment, and it suffices that the claimant has changed their position in some substantial way in reliance on the common intention so that repudiation of the common intention by the defendant would be unconscionable.
- If there is an actual common intention, does it extend, either expressly or by inference, to the shares in which the asset is to be beneficially owned?
- If the common intention does not extend to the shares in which the asset is to be beneficially owned, what is a fair share having regard to the whole course of the parties' dealing in relation to the asset? The factors listed by Lady Hale, as set out above, are relevant at this stage. The search is for what the parties, as reasonable people, would have thought at the relevant time. It is important to bear in mind that in deciding what shares are fair the court is not engaged in an exercise of redistributive justice. Fairness is to be assessed by reference to the parties' dealings in relation to the asset and not otherwise.

The practical effect of *Marr*

The practical effect of *Marr* is that in all familial (and analogous) cases – including disputes over investment properties and investment assets – practitioners, and the courts, will have to make a

more thorough examination at the outset of evidence that might support (or undermine) claims of common intention and should not too readily resort to presumptions about the parties' intentions. Confirmation of this new approach is provided by another recent Privy Council appeal from the British Virgin Islands, *Gany Holdings (PTC) SA v Khan* [2018].

In Gany, insofar as the intentions of the parties were clear, these obviated the need to have recourse to presumptions

Gany

Gany involved a gratuitous transfer of shares in three companies to persons who were at that time trustees of a trust established by the transferor. Lord Briggs, giving the opinion of the Privy Council, rejected a submission that on such facts there was a presumption that the transferred property was to be held on those trusts. Lord Briggs explained that – insofar as the intentions of the parties were clear – these obviated the need to have recourse to presumptions (paras 17-18):

... First, if either the transferor or the transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be decisive, regardless of the subjective intentions of either of them: see for example *Whitlock v Moree* [2017] UKPC 44. Secondly, and in default of any such declaration, the court looks for evidence from which a common intention as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one. Finally, recourse may be had to time-honoured presumptions, such as the presumption of advancement or the presumed resulting trust, where there really is no evidence from which an inference as to common intention may properly be drawn. But these are, in modern times, a last resort, now that historic restrictions on the admissibility of evidence have been removed, and the forensic tools for the ascertainment and weighing of evidence are more readily available to the court.

Gratuitous transfers of property between persons who are, respectively, the settlor and the trustees of a trust previously established are only a sub-set of cases of this kind, but the existence of that relationship of settlor and trustee between them may, and frequently will, form a powerful contextual basis for the drawing of common sense inferences as to mutual intention.

Practice point

Clear evidence of intention is rare, and the many relevant factors, and the need to consider whether intention changed at some point after acquisition, makes it extremely difficult to

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predict the outcome of any particular dispute about the beneficial ownership of family assets.

Marr emphasises the wisdom for those in personal relationships who invest in any asset (whether concerned for their own individual, rather than mutual, benefit) to seek independent legal advice and to make their intentions clear prior to making the investment. ■

Gany Holdings (PTC) SA v Khan & ors

[2018] UKPC 21

Gissing v Gissing

[1971] AC 886

Jones v Kernott

[2012] WTLR 125 SC

Laskar v Laskar

[2008] EWCA Civ 347

Marr v Collie

[2017] UKPC 17

Pettitt v Pettitt

[1970] AC 777

Stack v Dowden

[2007] WTLR 1053 HL

Whitlock v Moree

[2017] UKPC 44