

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

Mark Pawlowski* James Brown**

ABSTRACT

The aim of this article is to review and critically analyse the English law relating to common intention constructive trusts in the context of the family home. In particular, it seeks to show how the English courts have addressed the question of establishing and quantifying the parties' beneficial shares in both sole and joint ownership cases. The writers also seek to compare the English approach with the way in which such questions have been answered by the Australian courts. The primary purpose of this comparison is to consider what lessons (if any) can be learnt from the Australian model.

Keywords: family home, constructive trust, beneficial ownership, common intention, presumption of equality, single regime, composite enquiry

INTRODUCTION

Much of English law regarding the imposition of a constructive trust in relation to the family home has developed in the context of sole ownership cases where legal title to the property is vested in one of the parties. In these cases, considerable confusion has persisted amongst the judiciary regarding the correct test to be applied in establishing beneficial entitlement (the acquisition question) and the method by which such entitlement should be assessed (the quantification question). In terms of acquiring a beneficial share, the House of Lords, in two landmark cases¹ decided in the early 1970s, clarified the previous law by adopting a test based on common intention and detrimental reliance. These cases have provided the foundations for determining beneficial entitlement in single ownership cases under English law.

What followed, however, was Lord Denning's brief foray into the realms of the 'new model' constructive trust where an attempt was made to steer the law in a new direction by rejecting the requirement of a common intention in favour of a more

* Barrister, Professor of Property Law, School of Law, University of Greenwich, E-mail: M.Pawlowski@greenwich.ac.uk

** Barrister, Reader in Law, Aston University, E-mail: J.P.BROWN1@aston.ac.uk

¹ *Pettit v Pettit* [1970] AC 777 (HL) and *Gissing v Gissing* [1971] AC 886 (HL).

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE
STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

robust notion of ‘doing justice’ between the parties.² The ‘new model’ was ultimately abandoned with the English courts returning to orthodoxy and the common intention constructive trust culminating in another landmark House of Lords’ ruling³ in which the two categories of constructive trust (express and inferred) were firmly resurrected together with the requirement of detrimental reliance in the form of financial contributions referable to acquisition of the property.

The approach to assessment of the parties’ respective shares also met with a divergence of judicial views with the English courts favouring initially an ‘arithmetical’⁴ and later a ‘fairness’⁵ approach to the calculation of beneficial interests. Ultimately, the House of Lords⁶ opted for a ‘holistic’ test requiring an outcome which reflects what the parties must have intended based on a wide range of factors relating to their ownership and occupation of the property. The decision in *Stack v Dowden*⁷ was the first of its kind addressing specifically the question of a beneficial claim in the context of joint ownership. The House of Lords essentially adopted the approach taken in the single ownership cases in addressing both the question as to when an altered common intention comes into existence following initial acquisition of the property and how that altered intention should be quantified.

Commonwealth jurisdictions, on the other hand, such as Australia, Canada and New Zealand have taken a more robust approach and moved away from the juristic confines of the express or inferred common intention. In New Zealand, beneficial entitlement has been dependent on the parties’ ‘reasonable expectations’. In formulating these expectations, the courts have considered the degree of sacrifice by the claimant, the value of his/her contributions compared to the value of the benefits received and any property arrangements the parties may have made themselves.⁸ The Canadian courts, on the other hand, have adopted the concept of ‘unjust enrichment’ to justify intervening with property rights. Under the doctrine, a constructive trust will be imposed where the defendant has acquired an enrichment, the claimant has suffered a corresponding deprivation and there is no justifiable reason permitting the enrichment. In order for the doctrine to apply, however, the circumstances of the case must indicate that it would be unjust for the defendant to retain the benefit of the enrichment.

² See, *Eves v Eves* [1975] 1 WLR 1338, 1341; *Binions v Evans* [1972] Ch 359; *Cook v Head (No 1)* [1972] 1 WLR 518; *Hussey v Palmer* [1972] 1 WLR 1286.

³ *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL).

⁴ See, *Springette v Defoe* [1992] 2 FLR 388, where a strict mathematical calculation of the parties’ respective financial contributions was adopted as the basis for a resulting trust.

⁵ See, *Oxley v Hiscock* [2004] 2 FLR 669 (CA).

⁶ *Stack v Dowden* [2007] 2 AC 432 (HL).

⁷ [2007] 2 AC 432.

⁸ See *Gillies v Keogh* [1989] 2 NZLR 327.

Whilst both these doctrines offer credible alternatives to the common intention constructive trust, they are not, for the purpose of this article, a useful comparison with the English approach. The English courts have consistently rejected the notion of unjust enrichment as an overarching doctrine in family ownership cases which makes the likelihood of its adoption (as an alternative to the common intention constructive trust) highly unlikely. The New Zealand's notion of 'reasonable expectations' is also far removed from the English concept of common intention and there is also no suggestion that the English courts would adopt such a model. It is apparent also that New Zealand legislation now provides for a presumption of equal entitlement between parties disputing beneficial entitlement to the family home.⁹

What follows, therefore, is a comparative analysis of the English and Australian approach by reference to case law in both jurisdictions. It should be noted, however, that, like the New Zealand case law, the Australian decisions relevant to determining the beneficial entitlement of a de facto partner have been superseded by legislation in the form of the introduction of a new Part VIIIAB to the Family Law Act 1975 in 2008.¹⁰ The new Part VIIIAB now deals with de facto property disputes between heterosexual and same sex partners in all states and territories (other than Western and South Australia) from 1 March 2009. The legislation has, therefore, substantially changed the Australian court's approach to such disputes, particularly by introducing broader provisions for property division and maintenance along identical lines for married couples already in existence under Part VIII of the 1975 Act. However, the doctrine of unconscionability, which pervades the Australian case law, continues to apply to family relationships (for example, parents and children) other than married or de facto couples. The doctrine also remains relevant in cases where a family court is determining property rights as between such parties and a third party under its current jurisdiction.

THE ENGLISH CONTEXT

(1) Single Ownership Cases

The Acquisition Hurdle

In *Lloyds Bank plc v Rosset*,¹¹ Lord Bridge identified two routes by which a non-legal owner may acquire an equitable interest in the property on the basis of a

⁹ See ss.11–15 of the Property (Relationships) Act 1976, as amended (with effect from February 2002) by the Property (Relationships) Amendment Act 2001. In effect, unmarried couples (including same-sex partners) are treated in the same way as married couples upon the breakdown of their relationship.

¹⁰ See, the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008.

¹¹ [1991] 1 AC 107 (HL).

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE
STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

constructive trust. The first requires evidence of some express understanding between the parties ‘however imperfectly remembered and however imprecise their terms may have been’.¹² If that is established, the next stage is for the claimant to show that he (or she) acted to their detriment in reliance upon this understanding. The second route identified by Lord Bridge applies to situations where there is no express understanding as to the parties’ common intention so that the court ‘must rely entirely on the conduct of the parties both as the basis from which to *infer* a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust’.¹³ In this situation, Lord Bridge concluded that direct contributions to the purchase price (whether initially or by payment of mortgage instalments) would readily justify the inference necessary for the creation of a constructive trust and that ‘anything less’ would be insufficient. Despite these observations, the High Court in *Le Foe v Le Foe*¹⁴ subsequently ruled that indirect financial contributions can give rise to an inferred common intention – the wife’s payments for general outgoings, which enabled the husband to pay the mortgage instalments, were held to warrant a half-share in the property. Indeed, in *Abbott v Abbott*,¹⁵ Baroness Hale confirmed that the law had ‘moved on’ since *Rosset* and reiterated the principle that ‘the parties’ whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership.’¹⁶ The point was also confirmed subsequently in *Stack*, where Lord Walker expressly doubted whether Lord Bridge’s observation ‘took full account of the views . . . expressed in *Gissing*’.¹⁷ His Lordship noted that this observation had ‘attracted some trenchant criticism’ from academics as potentially productive of injustice. Significantly, his Lordship felt that, regardless of whether Lord Bridge’s observation was justified in 1990, the law had now moved on.

The Quantification Question

In *Midland Bank plc v Cooke*,¹⁸ Waite LJ dealt specifically with the issue of how beneficial entitlement should be quantified in single ownership cases. His Lordship concluded that when determining what proportions the parties must be

¹² *Lloyds Bank plc v Rosset* [1991] 1 AC 107, 132, *per* Lord Bridge.

¹³ *Ibid* 133.

¹⁴ [2002] 2 FLR 970.

¹⁵ [2007] UKPC 53 (PC).

¹⁶ [2007] UKPC 53, at [19], *per* Baroness Hale.

¹⁷ [2007] 2 AC 432, at [26].

¹⁸ [1995] 4 All ER 562, (CA).

assumed to have intended for their beneficial ownership, ‘the duty of the judge is to undertake a survey of the whole course of dealing between the parties’.¹⁹ This enabled his Lordship to consider a number of factors relevant to the parties’ ownership and occupation of the property apart from just financial contributions to the purchase price or the payment of mortgage instalments – in particular, the fact that the claimant undertook several and joint liability to repay a charge which was taken out for the benefit of her husband’s business, caring for the children and paying household bills, and the maintenance and improvement contributions she made to the property. In the light of all these factors, his Lordship concluded that ‘one could hardly have a clearer example of a couple who had agreed to share everything equally’.²⁰

This holistic approach to quantification was followed in *Drake v Whipp*,²¹ where the Court of Appeal again looked at the parties’ entire course of conduct in determining their respective shares in the property. Peter Gibson LJ concluded²² that the court should not be limited to considering only the direct financial contributions made by the parties, but should also take into account the reason for acquiring the property, the parties’ labour, and that they had financed the property’s conversion out of a joint bank account. The ensuing decision in *Oxley v Hiscock*²³ took things one step further. Here, Chadwick LJ held that the correct test for determining the quantum of each party’s share was what the court considered ‘fair’ having regard to the parties’ whole course of conduct. In this sense, his Lordship side-stepped the fiction of inferring a common intention as to the quantification of shares, adopting instead a judicial determination based on fairness. Such an approach, however, has not been without its critics and the notion that the court is free to impose its own sense of fairness on the parties (whatever their common intention) has not met with subsequent judicial approval.²⁴

(2) Joint Ownership Cases

The Presumption of Equality

The landmark decision in *Stack* concerned the property interests of an unmarried couple who had purchased a property in joint names. Because the parties held the

¹⁹ Ibid 574.

²⁰ Ibid 576.

²¹ [1996] 1 FLR 826, (CA).

²² Ibid 831.

²³ [2004] 3 WLR 715.

²⁴ See *Stack v Dowden* [2007] 2 AC 432, (HL).

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE
STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

legal title in joint names, the first stage in establishing a constructive trust, namely, the requirement of an express or inferred common intention had been satisfied. What, therefore, needed to be determined was the *extent* of Mr Stack's interest in the property. In the Court of Appeal,²⁵ Chadwick LJ awarded Mr Stack a 35 per cent share and Ms Dowden a 65 percent share of the property. In reaching this conclusion, his Lordship referred to his previous ruling in *Oxley v Hiscock*,²⁶ where he had applied a test of 'fairness' in quantifying the parties' respective shares. The House of Lords, however, disagreed with this approach adopting instead a 'holistic approach' to quantification which involved a 'search . . . to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to [the property]'.²⁷ In other words, the search was still for the result which reflected what the parties must, in the light of their conduct, be taken to have intended and not what the court itself considered a fair or just outcome. In order to determine whether the parties intended their beneficial interests to be different from their legal ownership, Baroness Hale provided a non-exhaustive and wide-ranging list of factors relevant to determining the parties' common intention. In the result, however, the House of Lords agreed that Ms Dowden's equitable share should remain at 65 per cent.

In several cases following *Stack*, however, the courts have upheld the presumption of equality. In *Fowler v Barron*,²⁸ for example, the judge at first instance quantified the parties' beneficial interests in accordance with resulting trust doctrine. By concentrating solely on the parties' financial contributions, the judge held that the property belonged beneficially to Mr Barron. The Court of Appeal, however, disagreed reiterating that *Stack* had clearly stated that, in the case of joint owners, the parties' respective shares ought to be quantified in accordance with constructive trust principles. The fact that Miss Fowler had made no financial contribution to the purchase of the property did not disentitle her to an equal beneficial share. Moreover, the trial judge's decision to focus solely on the parties' financial contributions went wholly against the guidance laid down in *Stack* – where the legal title is held in joint names, the starting point is always that the parties intended to own the beneficial interest jointly in line with the principle that equity follows the law. Any secret intention that Mr Barron may have had in not wishing to share equitable ownership with his partner did not provide the evidential basis for rebutting the presumption of equality. A common intention, in

²⁵ [2004] EWCA Civ 546.

²⁶ [2004] 3 WLR 715, (CA).

²⁷ *Stack v Dowden* [2007] 2 AC 432, at [60], *per* Baroness Hale.

²⁸ [2008] EWCA Civ 377 (CA).

this context, could only mean a *shared* (and communicated) common intention between the parties.

The decision to uphold the presumption of equality in *Fowler* may seem somewhat odd given that Mr Barron had financed the deposit, paid the household bills and the balance of the purchase and acquisition cost, used the proceeds of sale of this own flat to pay the balance and also met the mortgage repayments from his own pension. Indeed, his financial outlay was not far removed from that of Ms Dowden in *Stack*. This apparent inconsistency did not go unnoticed in *Fowler* itself – Arden LJ commented that the decision may be criticised because ‘it may leave Miss Fowler better off than a cohabitee who contributes (say) 20 per cent of the purchase price’.²⁹ What the case demonstrates, therefore, is that the constructive trust model put forward in *Stack* provides women with the opportunity to gain an equal share in the family home even though they have not contributed as much as their male partner in terms of financial contributions. This initial share, however, is still ambulatory and may be subject to change where later evidence is adduced to show a contrary intention by reference to a significant disparity in mortgage repayments or substantial capital improvements to the property. The burden, however, on a person arguing against equality is high and it will only be in exceptional circumstances that the presumption of equality will be rebutted.

Defining the Domestic Context

The courts have also faced a fresh challenge in deciding whether the *Stack* principles apply outside of the domestic context. Thus, where the parties have entered into a commercial venture, the post-*Stack* case law has seen a return to an arithmetical approach to the assessment of the parties’ beneficial shares.

In *Laskar v Laskar*,³⁰ the Court of Appeal was required to resolve a dispute between a mother and daughter. Whilst the facts *prima facie* might have led one to predict that the outcome would have been determined on *Stack* principles, the court proceeded to distinguish the case and applied resulting trust theory instead in order to resolve the extent of the parties’ beneficial ownership. Whilst in *Stack* the parties were a cohabiting couple, they had children together and the property had been purchased with the intention that it was to be the family home, the mother and daughter in *Laskar* did not live in the property together, which had been purchased essentially as an investment. Whilst, no doubt, the relationship between the parties fell within the domestic category because of their familial relationship,

²⁹ *Ibid* at [47].

³⁰ [2008] EWCA Civ 347 (CA).

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE
STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

the purchase of the house was essentially a commercial venture which rendered the *Stack* approach inappropriate. Accordingly, the court reverted to the resulting trust approach and awarded the daughter only 33 percent of the beneficial share. It has been subsequently held, however, by the Privy Council in *Marr v Collie*³¹ that a resulting trust approach will not necessarily apply in all cases involving investment property. Much will still turn on the parties' common intention in deciding whether to apply a resulting trust solution or, alternatively, an approach based on constructive trust principles. Although the decision is only of persuasive force, it is likely to be followed by the English courts as clarifying the scope of the *Stack* presumption in case where investment property is purchased in joint names by parties in a domestic relationship.

Apart from the investment context, it is now also clear that the resulting trust will be the preferred option where there is a lack of close relationship between the parties. Here too the courts have excluded the determination of beneficial ownership under a common intention constructive trust and applied an arithmetical calculation of the parties' respective beneficial shares despite the domestic context of the transaction.³²

Imputing a Common Intention

Another interesting development has been the potential abandonment of the requirement of detrimental reliance in joint ownership cases. The absence of this element in the post-*Stack* judgments is arguably puzzling since the need for a party to have acted to their detriment or to have significantly altered their position in reliance upon a common intention was, as we have seen, a key element in Lord Bridge's two-stage test in *Rosset*.³³ It is apparent that cases decided post-*Stack* make little or no reference to the requirement of detriment and, arguably, this absence may not be unintentional. Since in joint ownership cases the parties do not need to establish a common intention to share the property (because this intention is already presumed at the time of acquisition), it is submitted that the absence of this requirement coupled with the court's omission to consider detriment has, in effect, created a one-stage enquiry into the extent of the parties' respective beneficial interests in the property based simply on an assessment of the parties' respective dealings (financial and otherwise) post-acquisition.

³¹ [2017] UKPC 17 (PC).

³² See, *Wodzicki v Wodzicki* [2017] EWCA Civ 95 (CA); *Gallarotti v Sebastinaelli* [2012] EWCA Civ 865, (CA).

³³ [1991] 1 AC 107 (HL).

In *Jones v Kernott*,³⁴ the Supreme Court (Lord Walker and Lady Hale, giving the leading joint judgment), reiterated the principle, enunciated in *Stack*, that, in the case of a purchase in joint names, the presumption of joint ownership in law and equity will prevail in the absence of contrary intention at the time of purchase or following acquisition of the property. The underlying rationale of the presumption was not so much that ‘equity follows the law’ but that the parties, in acquiring a house in joint names, have indicated an ‘emotional and economic commitment to a joint enterprise’ – there was also the practical difficulty of analysing respective contributions over long periods of cohabitation which favoured a presumption of equality.³⁵ More significantly, however, it was open to a court to *impute* an intention where it was apparent that beneficial ownership was to be shared in *some* proportion, but the parties had given no indication themselves as to how their entitlement was actually to be shared. In these circumstances, the court had no choice but to give effect to the parties’ common intention by determining what would be a fair share in all the circumstances.³⁶ Fairness *per se*, however, was clearly *not* the criterion in assessing entitlement – on the contrary, the task of the court was to deduce what the parties ‘as reasonable people, would have thought at the relevant time’ having regard to the whole course of dealing in relation to the property.³⁷ In other words, the initial task of the court was to seek to identify the parties’ *actual* intentions (to be deduced objectively from their own words and conduct). If that was possible, it would clearly be wrong for the court to disregard those intentions in favour of a solution which the court considered to be fair and just.

The Court of Appeal ruling in *Graham-York v York*,³⁸ however, has suggested that looking at ‘the whole course of dealing’ does not mean looking at everything related to the parties’ relationship (despite the seemingly broad and non-exhaustive range of factors indicated in *Stack*), but just at what is relevant specifically ‘in relation to the property’. This means, of course, that the court’s attention is focused inevitably on financial contributions, whether they be towards the initial purchase, household utilities, mortgage instalments or subsequent capital improvements to the property. In practical terms, therefore, the courts appear to be applying a form of ‘mutated’ resulting trust in these cases and, at the same time, characterising the result as a legitimate consequence of the wider enquiry undertaken under the

³⁴ [2011] UKSC 53 (SC).

³⁵ [2011] UKSC 53, at [19]–[22].

³⁶ *Ibid* at [32].

³⁷ *Ibid* at [33].

³⁸ [2015] EWCA Civ 72, (CA). See further M Pawlowski, ‘Imputation, Fairness and the Family Home’ (2015) 79 *Conv.* 512.

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

Stack principles. In *Graham-York* itself, a single ownership case, the parties cohabited for over 33 years until the male partner's death, during which time the female claimant brought up the couple's daughter, made financial contributions to the household expenditure and a small contribution to the payment of the mortgage debt on the property. Despite this, the Court of Appeal declined to impute to the parties a common intention of equal beneficial ownership preferring instead to focus on financial contributions as governing the assessment of the claimant's interest in the family home. The result was a modest award of only a 25 per cent share in the net proceeds of sale after discharge of the mortgage debt affecting the property.

(3) A Composite Enquiry?

The wider significance, however, of imputing what the parties intended by reference to all the circumstances suggests that the whole exercise of determining beneficial entitlement (at least so far as joint ownership cases are concerned) condenses essentially into just one fundamental question focusing on the parties' shared intentions by reference to an examination of all the relevant circumstances. Significantly, according to Baroness Hale in *Stack*, these circumstances include any advice or discussions at the time of transfer (i.e., the equivalent of express discussions pertinent to finding an express common intention in Lord Bridge's first category constructive trust in *Rosset*) as well as how the purchase was financed both initially and subsequently (i.e., the equivalent of financial contributions relevant in determining whether an inferred common intention exists in Lord Bridge's second category).

Such a composite enquiry, therefore, subsumes not only all aspects of the acquisition question (including the issue of detriment), but also resolve the question of quantification because the same list of specific factors used to address entitlement would also appear to dictate (and ultimately resolve) the extent of the beneficial shares. Such an approach would, of course, mark a significant move away from the *Rosset* scheme in favour of a much simplified composite test for the determination of the parties' common intention regarding ownership of their home (either at time of purchase or subsequently) by reference to a broad range of factors which was not limited to just their financial contributions. The intriguing question, therefore, is whether the English courts will be prepared to go down this route in the future and put aside Lord Bridge's two-stage enquiry in preference for a composite enquiry as to the parties' common intention as providing the answer to both whether the claimant has established an entitlement to share beneficially in the property and also (at the same time) as a means of identifying the precise extent (or quantum) of each party's respective shares.

Until recently, the courts have continued to determine beneficial entitlement in single ownership cases in the traditional way by reference to the dual *Rosset* hurdle of (1) showing that there was a common intention that the claimant should have some share in the property; and (2) assessing the actual extent or quantum of that share.³⁹ Significantly, however, a recent High Court decision involving single ownership appears to have shifted away from this traditional approach in favour of a more composite analysis in determining beneficial ownership in line with the cases where the property is purchased in joint names. In *Amin v Amin*,⁴⁰ Nugee LJ, whilst acknowledging that there is no presumption of joint beneficial ownership where the family home is put into the name of one party only, accepted that the parties' common intention had to be deduced objectively from their conduct. His Lordship stated:⁴¹

... it seems to me that that the exercise ... envisaged is similar in a sole name case to that in a joint names case. In each case what needs to be found to displace the presumption that equity follows the law is a common intention that beneficial ownership should be something different from legal ownership; and (save for the case where there is evidence of express discussions as referred to by Lord Bridge in *Lloyds Bank v Rosset*) that is to be deduced objectively from their conduct.

And more significantly:⁴²

I accept that in strict theory one can distinguish between two different questions, namely (i) was there a common intention that the beneficial ownership should be something different from the legal ownership and (ii) if so, what is the appropriate quantification. ... But I do not think the two stages can always be neatly distinguished. ... Lord Walker and Lady Hale [in *Jones v Kernott*] say that examples of the sort of evidence that might be relevant to the drawing of inferences on the first question can be found in *Stack v Dowden* at [69]. There Lady Hale said: 'Many more factors than financial contributions may be relevant to divining the parties' true intentions.

³⁹ See, for example, *Morris v Morris* [2008] EWCA Civ 257; *Thompson v Humphrey* [2009] EWHC 3576 (Ch); *Geary v Rankine* [2012] EWCA Civ 555; *Aspden v Elvy* [2012] EWHC 1387 (Ch); *CPS v Piper* [2011] EWHC 3570 (Admin); *Capethorn v Harris* [2015] EWCA Civ 955; *Dobson v Griffey* [2018] EWHC 1117.

⁴⁰ [2020] EWHC 2675 (Ch).

⁴¹ *Ibid* at [32].

⁴² *Ibid* at [33].

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

His Lordship concluded that ‘if one stands back from the detail, the broad question is always: what did the parties intend?’ In his Lordship’s words:⁴³

Once one allows the parties’ intention to be inferred from their conduct, it seems to me to make no sense to try and make a sharp divide between evidence that enables an inference to be made as to their common intention that the beneficial interests should not follow the legal ownership, and evidence that enables an inference to be made as to what they intended those beneficial interests to be. Those questions are necessarily bound up together. In my judgment the [trial judge] was right to say that financial contributions and many other factors could enable the court to decide not only what shares the parties intended, but also whether there was a common intention at all that the sole legal owner should not be the sole beneficial owner.

It remains to be seen, however, whether this approach finds universal favour at appellate level.

THE AUSTRALIAN CONTEXT

(1) The Baumgartner Decision

In essence, the unconscionability doctrine, which applied in Australia to de facto partners prior to the introduction of Part VIIIAB to the Family Law Act 1975, operates to impose a constructive trust where the legal owner makes an ‘unconscionable attempt . . . to retain the benefits of the other party’s contributions to the relationship’.⁴⁴ Unlike the common intention constructive trust, the doctrine operates regardless of the parties’ intentions:

Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement of intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principles.⁴⁵

⁴³ Ibid at [34]–[35].

⁴⁴ L Young and G Monahan, *Family Law in Australia* (7th edn, LexisNexis Butterworths 2009) 703.

⁴⁵ *Muschinski v Muschinski* (1985) 160 CLR 583, at [6], *per* Deane J.

Whilst the origins of the doctrine can be found in *Muschinski v Dodds*,⁴⁶ it is the case of *Baumgartner v Baumgartner*⁴⁷ which developed its applicability. The case concerned the division of property between an unmarried couple. From the beginning of their relationship, the appellant had given her earnings to the respondent. In effect, the parties 'regarded this as a pooling of resources'.⁴⁸ The pooled fund was used to pay the mortgage instalments on a property which had been purchased by the respondent in his sole name, as well as other outgoings and the parties' living expenses. Following the termination of the relationship, the appellant claimed that she was entitled to a beneficial interest in the property under a common intention constructive trust. The High Court of Australia, however, rejected the need for a common intention⁴⁹ and allowed equitable relief on the basis of unconscionability.

On the facts, the High Court regarded the parties' arrangement to pool their earnings as 'one which was designed to ensure that their earnings would be expended for the purpose of their joint relationship and for their mutual security and benefit'.⁵⁰ In those circumstances, the appellant's exclusive claim to the property amounted to unconscionable conduct that attracted the imposition of a constructive trust. On the issue of quantification, the High Court's starting point was the equitable maxim that 'equity favours equality'. Mason CJ (with whom Wilson and Deane JJ agreed) observed that 'in circumstances where parties have lived together for years and pooled their resources, there was much to be said for the view that they should share beneficial ownership equally, subject to an adjustment to avoid any injustice'.⁵¹ Significantly, Gaudron J opined that 'other considerations may also be relevant'⁵² in determining the extent of the parties' shares, in particular, 'non-financial contributions should be taken into account'⁵³ – a reference, no doubt, to domestic and home care services. In the result, the High Court felt obliged to adjust the parties' initial equal shares so as to give rise to a

⁴⁶ (1985) 160 CLR 583.

⁴⁷ (1987) 164 CLR 137.

⁴⁸ *Ibid* at [14], *per* Mason CJ, Wilson and Deane JJ.

⁴⁹ Australian courts previously favoured the common intention constructive trust: see, *Allen v Snyder* [1977] 2 NSWLR 685. It was still, however, appropriate to argue common intention and unconscionability in the alternative as a means of establishing equitable relief: see, for example, *Carruthers v Manning* [2001] NSWSC 1130, (Supreme Court of New South Wales).

⁵⁰ (1987) 164 CLR 137, at [35], *per* Mason CJ, Wilson and Deane JJ.

⁵¹ *Ibid* at [37], *per* Mason CJ, Wilson and Deane JJ.

⁵² *Ibid* at [8], *per* Gaudron J.

⁵³ *Ibid* at [6].

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE
STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

55/45 split in favour of the respondent. Although 'practical equality' was to be favoured, some adjustment was unavoidable where the parties' respective contributions were significantly different.

(2) Non-Financial Contributions

A number of early cases⁵⁴ following *Baumgartner* demonstrated a marked reluctance to accept non-financial contributions as playing any significant role in determining the imposition of a constructive trust in the context of a de facto relationship. Such contributions were taken into account only when combined with contributions of a strictly financial nature.

The first notable case to widen the principles laid down in *Baumgartner* was *Parij v Parij*.⁵⁵ The parties were unmarried and had been together in a de facto relationship for 17 years. At first instance, the woman's claim to various assets (including two houses, a boat and car) owned by her male partner failed.⁵⁶ The trial court held that, as she had made no direct financial contribution to the acquisition of these assets, she was not entitled to any interest in them. On appeal, the Supreme Court of South Australia held that the court had erred in applying a too narrow test in rejecting the claimant's argument for a constructive trust. In line with *Baumgartner* that 'other considerations may also be relevant',⁵⁷ the Supreme Court ruled that the claimant's role as homemaker and caregiver should be seen as an indirect contribution to the acquisition of the assets.

In contrast to *Baumgartner*, 'the parties did not pool their resources in any formal sense'⁵⁸ nor did they operate a joint bank account. Nevertheless, the parties contributed to and discharged different aspects of family expenditure throughout their relationship. The absence, therefore, of any formally pooled resources did not prevent the court from finding that the claimant had established a beneficial interest

⁵⁴ See, for example, *Green v Green* (1989) 17 NSWLR 343, *Bennett v Tairua* (1992) 15 Fam LR 317, (Supreme Court of Western Australia); *Bryson v Bryant* (1992) 29 NSWLR 188, (New South Wales Court of Appeal); *Harmer v Pearson* (1993) 16 Fam LR 596; *Booth v Beresford* (1994) 17 Fam LR 147, (Supreme Court of South Australia) and *W v G* (1996) 20 Fam LR 49, (Supreme Court of New South Wales).

⁵⁵ [1997] 72 SASR 153, (Supreme Court of South Australia).

⁵⁶ By contrast, her claim to the property which had been purchased in joint names succeeded, giving her an equal share regardless of the unequal contributions made by the parties.

⁵⁷ (1987) 164 CLR 137 at [8], *per* Gaudron J.

⁵⁸ [1997] 72 SASR 153, *per* Debelle J.

in the disputed assets⁵⁹ – ‘it would be unconscionable now to deny her such an interest in those assets as represent the worth of her substantial indirect contribution to them’.⁶⁰ The court’s departure from recognising only pooled financial resources (in the formal sense) demonstrates an obvious willingness to broaden the range of financial arrangements as determinative of a party’s beneficial entitlement.

This was not, however, the case in *Carruthers v Manning*,⁶¹ where the claimant sought a beneficial share in property purchased by the defendant prior to the commencement of the parties’ cohabitation. The claimant alleged that she had made unquantifiable non-financial contributions to the parties’ relationship in her role as de facto wife and homemaker. With regard to financial contributions, she maintained that she had deposited some of her earnings in the defendant’s bank account. At first glance, the decision in *Parij* may have led one to predict that the claimant would have acquired an interest in the property (albeit a small one, given that the parties’ relationship lasted only 17 months) based on a pooling of resources. However, the significant disparity in the parties’ financial contributions led the Supreme Court of New South Wales to conclude that it was *not* unconscionable for the defendant to retain the sole equitable ownership of the property.⁶² As to non-financial contributions, these had to be given proper weight in the circumstances of the particular case. Indeed, the short duration of the parties’ relationship proved fatal to the claimant’s claim – her domestic contributions were characterised as being made ‘purely for reasons of love and affection’ – a reason ‘the courts have been reluctant to recognise as being sufficient to give rise to a constructive trust’.⁶³

(3) Proof of a Joint Endeavour

The decision in *Lloyd v Tedesco*⁶⁴ marked another significant development in the evolution of the *Baumgartner* ruling. In the Supreme Court of Western Australia,⁶⁵ Miller J opined that ‘proof of the joint endeavour requires proof of an actual

⁵⁹ The pooling of resources was not an absolute requirement in every case: see, *Hibberson v George* (1989) 12 Fam LR 725 (New South Wales Court of Appeal) and *Miller v Sutherland* (1991) 14 Fam LR 416.

⁶⁰ *Parij v Parij* [1997] 72 SASR 153, per Cox J.

⁶¹ [2001] NSWSC 1130, (Supreme Court of New South Wales).

⁶² The claimant’s argument based on a common intention constructive trust also failed.

⁶³ *Ibid* at [118], per Einstein J citing *Bryson v Bryant* (1992) 29 NSWLR 188, at 229. Notably, however, Kirby P in *Bryson v Bryant*, at 204, stated: ‘Love and affection are all very well. By inference, they existed in this relationship for a very long time. But, in the past, such emotions have often been used as a cloak to hide the proper claims of women upon the assets of men or of the weak of either sex upon the property of the strong.’

⁶⁴ [2002] WAR 360. See also *Waterhouse v Power* [2003] QCA 155.

⁶⁵ [2001] WASC 99.

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE
STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

intention to pool resources for the purpose of that endeavour'.⁶⁶ On appeal, the Court of Appeal of Western Australia substantially agreed with Miller J's reasoning:

. . . there must be more than simply the performance by the plaintiff of the valuable role of the provision of love, care and support. The provision of such a contribution will be sufficient only if it is related in some factual way to the generation of wealth as part of a joint effort or endeavour to provide for the parties' mutual material welfare and security . . . it is right to say that a joint endeavour must be intentionally or deliberately entered into for the purpose of advancing the parties material wealth. Only if it bears that character will it be unconscionable for the defendant to retain the entirety of the beneficial interest in that wealth.⁶⁷

The Court of Appeal went on to conclude that proof of the existence of a joint intention would necessarily lead to questions of whether the parties expressly agreed to embark upon such a joint enterprise or whether that intention could be inferred from all the circumstances. In so far as *Parij* above had suggested otherwise (i.e., that the mere existence of the *de facto* relationship and the provision of home-maker duties were enough to ground a claim for a constructive trust), it could not be supported.

The intention to pool was also a central issue in *Fathers v Cook*,⁶⁸ where the Supreme Court of Western Australia accepted that 'both parties had made significant contributions to their living expenses in relation to the . . . property, including contributions by both to the costs of ownership, as well as other living expenses and expenses of other sorts'.⁶⁹ At first glance, such contributions may be considered indicative of an intention to pool resources – after all, the respondent's financial contributions, coupled with his arrangements for work to be carried out on the property, went beyond that of merely providing love, care and support and related to the generation of wealth as part of a joint endeavour. However, Simmonds J took a different view and held that the contributions were insufficient evidence of a pooling of resources – on the contrary, the parties' arrangement was purely contractual whereby the claimant agreed to be jointly responsible for the mortgage solely on the understanding that the respondent would pay all the mortgage instalments.⁷⁰

⁶⁶ *Ibid* at [10], cited on appeal in *Lloyd v Tedesco* [2002] WAR 360, at 368, *per* Murray J.

⁶⁷ *Lloyd v Tedesco* [2002] WAR 360, at 368–369, *per* Murray J.

⁶⁸ [2006] WASC 129, (Supreme Court of Western Australia).

⁶⁹ *Ibid* at [138], *per* Simmonds J.

⁷⁰ *Ibid* at [140].

The insistence on a joint intention to pool resources is also evident in *Lamers v The State of Western Australia*,⁷¹ where the Supreme Court of Western Australia rejected Ms Willis' claim to a beneficial interest in the property because it could not be inferred that the parties intended to pool their resources for the purpose of a joint endeavour. Her partner (Mr Lamers) had purchased the house two years before the parties' relationship commenced, and three years before Ms Willis moved in. Until that time, there could have been no doubt that Mr Lamers was both the sole legal and equitable owner of the property. Templeman J accepted that the purpose of the cohabitation was to provide security for the parties and their child, but this did not justify the inference that Ms Willis's contributions to the mortgage and payment of bills (whilst Mr Lamers was absent) should give rise to an 'implied agreement that Mr Lamers would either make a gift or allow Ms Willis to acquire an interest'.⁷² He concluded that 'the pooling of resources . . . was more probably a matter of practical convenience of ensuring that essential bills were met, rather than for the purpose of some joint endeavour'.⁷³ Significantly, he also re-affirmed the principle in *Lloyd* that:

. . . proof of the joint endeavour requires proof of an actual intention to pool resources for the purpose of that endeavour. Such intention need not, of course, be proven by direct evidence of the declaration by both parties of such an intention. It can, in an appropriate case, be inferred from all the facts and circumstances of the case.⁷⁴

The decision in *Lamers* is particularly interesting. The search for an intention to pool resources clearly mirrors the search for an intention to share beneficial ownership under the English common intention constructive trust. Indeed, it is arguable that, by requiring proof of actual intention, the Australian courts had, in effect, taken the law full circle, reaching a position not too dissimilar from that actually rejected in *Baumgartner*. The reference to an inferred intention in *Lamers* is also reminiscent of the Lord Bridge's two stage test in *Rosset* requiring proof of either an express or inferred common intention in order to support a constructive trust. In this sense, the doctrine of unconscionability appears to have been no more than a reformulated version of the *Rosset* criteria with one notable difference, notably, that the former attached greater weight to indirect and non-financial contributions. However, this weighting was still limited as non-financial

⁷¹ [2009] WASC 3, (Supreme Court of Western Australia).

⁷² *Ibid* at [36].

⁷³ *Ibid* at [46].

⁷⁴ *Ibid* at [33].

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

contributions had to be attributable to increasing the parties' wealth,⁷⁵ rather than being provided purely out of natural love, care or family support. This additional requirement may be questioned in the domestic context but may be readily explained in so far as its roots may have originated in pre-*Baumgartner* case law, in particular, *Muschinski*, which was a partly commercial case. Whilst most parties enter into commercial dealings with the plain intention of increasing their wealth,⁷⁶ the same may not be so obvious in the context of a family arrangement.

(4) Quantifying Beneficial Interests

In *Baumgartner*, the High Court expressed the view that 'there is something to be said for declaring an equality of interests even though the earnings of the parties were not equal'.⁷⁷ This suggests that the doctrine of unconscionability is not concerned with strict calculations as to how much each party has contributed during the course of their relationship:

The Court should, where possible, strive to give effect to the notion of practical equality, rather than pursue complicated factual inquiries which will result in relatively insignificant differences in contributions and consequential beneficial interest.⁷⁸

This approach, however, has not always been followed. In *Parij*, Debelles J held that, even in relatively long relationships, there was no presumption that equality is equity – whilst an 'examination [of the facts] may lead to a determination that there should be equality, equality is not the starting point'. The case did, however, provide some optimism for 'homemaker' claimants since the decision required that 'substantial [and] not token regard should be had to the contribution of the partner who is the homemaker and care giver'.⁷⁹

The decision in *Read v Nicholls*⁸⁰ is more illustrative of the *Baumgartner* approach. Here, the claimant had made no direct financial contributions to the

⁷⁵ See, for example, *Cressy v Johnson (No 3)* [2009] VSC 52, (Supreme Court of Victoria); *Albert v Hill* [2005] WASC 291, (Supreme Court of Western Australia) and *Branding v Weir* [2003] NSWSC 723, (Supreme Court of New South Wales).

⁷⁶ See, *Crafter & Crafter and Others* [2011] FamCA 122, at [82], where the Family Court of Australia concluded that the joint venture can be expected to be less nebulous requiring greater clarity of intention in the commercial context.

⁷⁷ (1987) 164 CLR 137, at [12], per Toohey J.

⁷⁸ *Ibid*, per Mason CJ, Wilson and Deane JJ.

⁷⁹ [1997] SASC 6771, per Debelles J.

⁸⁰ [2004] VSC 66, (Supreme Court of Victoria).

acquisition of the disputed properties and there was little evidence of indirect financial contributions. She had, however, made non-monetary contributions as homemaker and caregiver to her de facto husband for over 40 years – ‘[she] shouldered the bulk of the burden of cooking and cleaning for the household.’⁸¹ In quantifying the shares, Nettle J held that ‘the starting point [was] in one sense equality’.⁸² In line with *Parij*, he attached significant weight to the non-financial contributions made by the claimant – ‘the support and comfort that she is likely to have given to him for the period of its duration were so significant that [her] contribution should be regarded as equal to the financial contributions made by [him] out of his income.’⁸³ However, in accordance with *Baumgartner*, the financial contributions made by the defendant also had to be taken into account. Accordingly, Nettle J deducted from the purchase price of the properties the financial contributions made by the husband from other sources. The parties’ equal shares were calculated on the basis of the remaining balance.

The decision in *Read* is particularly significant because the successful claim was based almost entirely on non-financial contributions. This departs radically from the approach taken by the English courts, most notably, in *Burns v Burns*,⁸⁴ where the contributions made by the party as homemaker and care giver did not give rise to any beneficial interest, let alone a half share, in the family home. The disparity between *Read* and the English cases demonstrates the Australian doctrine’s ability to recognise such contributions notwithstanding the absence of any financial outlay towards the acquisition of, or subsequent capital improvement to, the property.

Apart from these differences, however, the method of quantifying shares under the unconscionability doctrine was not too dissimilar from the approach adopted by the English courts. It will be remembered that, under English Law, a presumption of equal beneficial entitlement exists where property is held in joint names.⁸⁵ This is analogous with the *Baumgartner* principle whereby ‘equality is equity’. Moreover, both the Australian and English methods of assessment require adjustments to equal shares where a party has made greater contributions than the other. In sole ownership cases, the English approach is to allow the court to take into account other factors including spousal and domestic services (in addition to financial contributions) in assessing beneficial entitlement. This is comparable to the Australian approach where other considerations have been relevant (either

⁸¹ Ibid at [53], *per* Nettle J.

⁸² Ibid at [58].

⁸³ Ibid at [63].

⁸⁴ [1984] Ch 317, (CA).

⁸⁵ See *Stack v Dowden* [2007] 2 AC 432[60], *per* Baroness Hale.

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE
STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

alone or in conjunction with financial contributions) in quantifying the parties' respective shares. However, under the Australian approach, the courts have been prepared to give more substantial weight to non-financial contributions when quantifying shares.

(5) Comparisons with the English approach

The Australian case law is illustrative in showing that the mere existence of a *de facto* relationship did not of itself establish the requisite joint endeavour in order to support a constructive trust. In particular, the mere fact that the claimant had acted as homemaker and carer did not entitle her to seek equitable relief. This, of course, reflects the current English approach. Under the Australian doctrine of unconscionability, what was required,⁸⁶ as we have seen, was: (1) the existence of a joint endeavour between the parties (requiring proof of an actual intention either by direct evidence of discussions or inferred from all the circumstances) for the purpose of providing mutual financial security and benefits; (2) valuable financial or non-financial contributions by the claimant to the joint endeavour; (3) an increment in wealth accruing to the other partner as a result of the joint endeavour and (4) the unconscionability of the retention of that wealth by the other partner to the exclusion of the claimant.

These key elements, it is submitted, accord to a large extent with the English approach. First, there is the obvious requirement of intention necessary to support a constructive trust, which can be either express (derived from the parties' discussions) or inferred from their conduct. After all, *Baumgartner* itself was essentially an express common intention case based on evidence of direct/indirect financial contributions towards acquisition (i.e., the claimant pooled her income into a common fund from which the mortgage and other outgoings were paid out). To this extent, the outcome would have been the same under English law.⁸⁷ Although the requisite common intention under English law does not, strictly speaking, require a 'joint endeavour', the emphasis on a common 'arrangement, agreement or understanding'⁸⁸ to share beneficial ownership does provide a close analogy, given that the Australian courts looked to a pooling of resources aimed at providing mutual financial benefits and security.

⁸⁶ See *Lloyd v Tedesco* [2001] WASC 99, at [9]–[10], *per* Miller J, (Supreme Court of Western Australia), approved on appeal, [2002] WASC 63, at [27]–[29], *per* Murray J, (Court of Appeal of Western Australia). See also, *Albert v Hill* [2005] WASC 291, at [146], *per* Jenkins J, (Supreme Court of Western Australia).

⁸⁷ See *Grant v Edwards* [1986] Ch. 465, (CA).

⁸⁸ See *Lloyds Bank plc v Rosset* [1991] 1 AC 107, 132, *per* Lord Bridge.

Secondly, under English law, both financial and non-financial contributions may be taken into account in assessing shares, although in Australia, as we have seen, there was scope for saying that non-financial contributions would alone suffice so long as there was proof of a joint endeavour. Although the additional requirement of an ‘increment in wealth’ coupled with the ‘unconscionable retention of that wealth’ is a vital component of the unconscionability doctrine, this too reflects broadly the English position. If the claimant establishes a common intention to share beneficial ownership, coupled with valuable contributions, the English court will recognise his/her equity by declaring a beneficial share. In so doing, it is giving effect to the shared intentions of the parties by producing a ‘fair and just’ result based on the evidence of what the parties themselves must have intended and not what the court itself may consider an equitable outcome. The essential ingredient, it is submitted, in both jurisdictions is the element of mutual intention which demonstrates that the relevant contributions were made with a view to either advancing the parties’ material wealth (*Baumgartner*) or acquiring an interest in the property (*Rosset*). Indeed, this ingredient will, no doubt, continue to govern cases in the Australian context outside the strict parameters of the Family Law Act 1975, namely, where the dispute is between family members other than married couples or those in a de facto relationship.

CONCLUSION

In line with the Australian experience, the time has come, in the writers’ view, to abandon the *Rosset* scheme under English law altogether in favour of a more simplified enquiry, in both single and joint ownership cases, involving an examination of the parties’ ‘shared intentions’ (actual, inferred or imputed) by reference to all the relevant circumstances. Such an enquiry would subsume all aspects of the acquisition question as well as the question of quantification because the factors used to address entitlement would also dictate (and resolve) the extent of the beneficial shares.

The notion that non-financial contributions (on their own) may give rise to beneficial ownership has received recognition in the Australian courts and there is much to be said for adopting a similar approach under English law. Although domestic and home care services may inevitably be provided out of motives of natural love and affection, this should not deny a claimant relief where such services are directed, pursuant to the parties’ system of money management, to the acquisition and maintenance of property where one party meets mortgage instalments and the other pays for general outgoings and living expenses. The list of factors, therefore, currently employed by the English courts in determining and assessing entitlement should be expanded to include non-financial contributions so

BENEFICIAL OWNERSHIP OF THE FAMILY HOME: A COMPARATIVE
STUDY OF ENGLISH AND AUSTRALIAN CONSTRUCTIVE TRUSTS

that equal, not token weight, should be attributed to such contributions. Unfortunately, recent cases, most notably, *Graham-York v York*, referred to earlier, have chosen to largely ignore these wider factors in the interests of a simple and formulaic solution.

There has been much academic criticism of the English approach in perpetuating gender bias within the law, which is undoubtedly convincing. In her influential article,⁸⁹ Simone Wong submits that, because women are more likely to be the primary homemaker or care giver, they are, therefore, less likely to be able to make financial contributions and, consequently, find it more difficult to meet the current requirements of the common intention constructive trust. In order to address this imbalance, she argues **that** the English courts should recognise that non-financial contributions have just an important role to play in determining beneficial ownership as purely financial contributions. This would not, however, mean a return to the uncertainties and unpredictability of Lord Denning's 'new model' constructive trust. The key feature of Denning's new model was that it did not depend upon proof of any common intention between the parties that the claimant should acquire a beneficial interest in the property. It simply required the court to do justice between the parties – an approach which (as we have seen) was emphatically rejected by the House of Lords in *Stack*.

Interestingly, Lord Walker and Lady Hale in the Supreme Court in *Jones* alluded to the possibility of a 'single regime'⁹⁰ governing single and joint ownership cases, although they also openly recognised the inevitable different starting points for a claimant seeking to establish a beneficial share where the property is purchased in a single name and where it is purchased jointly. In the former case, the onus is on the claimant to establish initially a common intention to share beneficial ownership (i.e., the acquisition hurdle) whereas, in the latter case, the claimant already starts with the assumption of a beneficial joint tenancy. In the latter case, therefore, the enquiry is focused on the assessment of the parties' respective beneficial shares either at the time of or following acquisition in the light of any significant circumstances pointing to a contrary intention. In the writers' view, however, the essential enquiry boils down to the same thing in both cases, namely, 'to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct.'⁹¹ In particular, in a single ownership case, the evidence must establish a common intention to share beneficial entitlement

⁸⁹ See generally S Wong, 'Constructive Trusts over the Family Home: Lessons to Be Learned from Other Commonwealth Jurisdictions' (1998) 18(3) *LSJ*, 369–390.

⁹⁰ See for example, S Gardner and K Davidson, 'The Future of *Stack v Dowden*' (2011) 127 *LQR* 13, 15.

⁹¹ *Jones v Kernott* [2011] UKSC 53, at [31] and [52], *per* Lord Walker.

which, as we have seen, will be inferred from the parties' conduct in the absence of express agreement. Such conduct need not, however, be limited to direct financial contributions but may include a wider range of factors including indirect financial contributions relevant to the parties' ownership and occupation of the property. Moreover, if it is not clear what shares were actually intended, the court will proceed in the same way as in a joint ownership case by seeking to deduce a common intention as to quantum either objectively from the parties' conduct (i.e., presumably the same conduct which establishes the common intention to share beneficially in the first place) or, as the Supreme Court has now confirmed, in a way which the court considers fair having regard to whole course of dealing between the parties.⁹² This suggests that, at both the first and second stage of the enquiry, the essential process is the same based on the court drawing appropriate inferences (or imputations), in the absence of actual intentions, as to the parties' common intention by reference to all the circumstances of the case.⁹³

The emergence of a composite inquiry for determining the parties' intentions, based on a 'multifactorial' examination of the circumstances (allowing equal weight to be placed on both financial and non-financial contributions), would, in the writers' view, provide a welcome development in the English law on constructive trusts in both single and joint ownership cases in line with what has already been the Australian experience.

⁹² Ibid at [52].

⁹³ See further, Pawlowski, M, 'Imputing a Common Intention in Single Ownership Cases' (2015) 29 *TLI* 3. See also, most recently, *Amin v Amin* [2020] EWHC 2675 (Ch).