Chapter 7: supplementary materials

This supplement deals with two issues:

- Difficult aspects of the Privy Council advice in *Marr v Collie* [2017] UKPC 17
- The personal remedy of equitable accounting applicable in disputes between beneficial co-owners.

Making sense of *Marr v Collie* [2017] UKPC 17

On pages 473-4 of the main text, we discuss the Privy Council advice in *Marr v Collie*, in so far as it mandates the use of the common constructive trust in a wider range of situations than had previously been done. As we intimated there, however, the approach of the Privy Council to party intention and the role of presumptions is difficult to follow, and we pick up on this issue here.

Marr and Collie were a couple for 17 years, during which time they acquired a number of properties in joint names for investment / development purposes. There is much factual dispute in the case, but on the appellant Marr's account, all purchases were funded by Marr, on the understanding that Collie would then invest his money in their renovation / development, though it seems that that input failed to materialise, certainly to the extent anticipated. There was also a property held in Marr's sole name, purchased early in the relationship and intended to be the parties' home, which again he had funded. The trial judge found that Marr was sole beneficial owner of all these properties:

- in the case of the joint-name assets, on a resulting trust basis: Marr had made all the financial contributions to acquisition, and there was no evidence to rebut the presumption that he should therefore be regarded as sole beneficial owner;
- as for the sole-name property, there was no evidence that Collie had spent any of his money developing it (as had been intended), nor was there evidence of an agreement that Collie should be responsible for outgoings on it, and so that was held legally and beneficially by Marr alone.

The Court of Appeal allowed Collie's appeal in relation to the joint-name properties. Marr appealed to the PC, largely on the basis of that the CA had improperly admitted new evidence or, if admissible, had given that evidence improper weight. But he also argued that the CA had applied the wrong test, effectively requiring him, Marr, to prove that beneficial ownership of the investment properties was not joint, rather than applying the presumption of resulting trust, which should therefore have subjected Collie to a burden of proving that he, Collie, should have a share despite his lack of financial contribution.

So, we might have thought that this was a helpful way to frame the question:

1. was this a case for the resulting trust presumption, given the parties' unequal financial contribution to what were investment properties, rather than homes for their joint domestic occupation (see *Laskar*) – putting the burden on Collie to rebut that presumption with evidence of an intention by Marr to gift part of the beneficial title to Collie?

or

2. was this case for *Stack*'s presumption of beneficial joint ownership mirroring the joint legal ownership – putting the burden on Marr to rebut that presumption by reference to evidence of a common intention, express or inferred, that the parties held the beneficial title in some other shares?

The answer to 1, which we address in the main text from page 473, was no – because *Stack* has been understood too narrowly.[1] It does not apply *only* to *purely* "domestic" cases, but extends to any context in which "the financial venture on which the parties had embarked was … associated with a mutual commitment to each other for the future", involving an "aspiration for a future equal sharing of proceeds".[2] This could apply equally to investment purchases made by a couple (or other family, presumably[3]) as to the acquisition of a shared home. On its facts, *Laskar* was not such a case, and so was properly decided on a resulting trust basis. But the facts of *Marr v Collie* should have been understood as the sort of joint personal venture to which the common intention constructive trust should be applied.

At the end of the extract set out on page 493 of the main text, the Board abhorred the "imposition" of the resulting trust solution on parties who had other intentions about beneficial ownership. It is doubtful whether anything would be "imposed" on parties in such a case: proof of the parties' contrary intentions can, of course, rebut a resulting trust presumption, where those intentions make clear that the beneficial title should be held other than in proportions reflecting the parties' financial input. But the starting point – resulting trust or common intention constructive trust – in theory nevertheless makes an important difference in terms of where the burden of proof lies. However, this is the point at which the Board's *obiter* remarks become rather opaque. The Board, it seems, would reject the clean set of alternatives we set out above:

Marr v Collie **[2017] UKPC 17**

A clash of presumptions?

53. If what Lady Hale described 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 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.

54. 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

[1] See [40]-[49].
[2] To state in positive terms the Board's converse appraisal of the facts of *Laskar* at [48].
[3] E.g. *Adekunle v Ritchie* [2007] EWMisc 5 (EWCC).

presumption over another. In this, as in so many other 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 had 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. [emphases added]

Para 54 is striking and surprising. Three points can be made:

1. In cases where there is truly *no* evidence about the parties' intentions, then we certainly do need to know which presumption applies – it is in precisely those cases that we need a presumption to give us an answer to fill the vacuum. Patently, whether the presumption is of resulting trust (causing beneficial title to follow the money) or of common intention constructive trust (causing beneficial title to follow the legal title, whether that be joint or sole-name) will make a substantial difference to the outcome. There need be no "clash" between them – we need simply to decide which is the right starting point for this class of case.

2. Moreover, these presumptions do not just fill a vacuum where there is *no* evidence (which may be a rare occurrence). They also provide a *starting point* for any case, and a burden of proof for whichever party seeks an outcome at variance with that starting point to prove on the balance of probabilities the existence of some other intention as to how the beneficial ownership should be held.[4] There will commonly be *some* evidence, but perhaps not enough to satisfy that burden and standard of proof. Cases where evidence of the parties' intentions are "unambiguous" are, of course, easy to decide, and need no presumption at all where the basic legal principle is that beneficial ownership should reflect parties' intentions.[5] Harder are those cases where the evidence is ambiguous, again, making the choice of starting point and so burden of proof important – and finding of fact by the judge on the balance of probabilities essential.

3. The most striking part of para 54 is the suggestion that, if the evidence shows that the parties "had not formed *any* intention as to beneficial ownership" of property put in joint names (emphasis added), then the resulting trust approach might be applied instead. If correct, that is a considerable departure from what *Stack* was thought to have decided: namely, that in joint-names "domestic" cases, equity follows the law and so provides for joint beneficial ownership, absent evidence of a *contrary*

[4] See, for example, *Constandas v Lysandrou* [2018] EWCA Civ 613, *Dobson v Griffey* [2018] EWHC 1117, [27].

[5] Provided their intentions are, absent the usual formalities for land transactions, backed by detrimental reliance by the party who will benefit from the intended division of equitable ownership: see main text on page 477and from page 490.

> (positive) intention about beneficial ownership.[6] These dicta instead suggest that couples who have acquired a property in joint names[7] but did not think about beneficial ownership at all should be consigned to the resulting trust. If correct, that would reverse the progress that *Stack* was widely thought to have made in advancing the cause of partners whose contributions to the parties' relationship were non-financial in nature. Couples in these cases may very well not have given any thought at all to *beneficial ownership*, specifically: see the empirical research that we discuss from page 495 of the main text. It is precisely where parties have no intention of their own that the legal presumptions, in filling the vacuum, effectively serve to impute an intention to them. If that imputed intention is to be one of resulting rather than constructive trust, that will inevitably bring disadvantageous results for economically weaker partners. But if the parties really had no intention at all about beneficial ownership, it is no more obvious that the resulting trust analysis should be applied in default than that the constructive trust joint-names presumption should apply instead. The law is making a critical choice here, with very real ramifications for the individuals concerned.

These dicta also create fresh uncertainty and evidential difficulty for couples seeking to settle these cases, by making inquiry about parties' intentions vital in a broader range of cases and without a clear starting point. On the facts of *Marr v Collie,* the Board was quite clear that proper scrutiny of the parties' intentions was required but had not been undertaken by the Bahamian courts, and so the case was remitted for determination of those factual questions. These remarks in *Marr* have yet to have any impact in the English courts. But we would argue that the so-called "simplistic answer" (as it is dubbed in para 53) has much to commend it.

See further George and Sloan (2017) and Virgo (2018), 296-7; cf the positive appraisal offered by Roche (2017).

[6] E.g. *Fowler v Barron* [2008] EWCA Civ 377, [34].

[7] The position is, we would say properly, different in the case of property registered in the sole name of one party, where proof of a common intention to confer a beneficial share on the claimant is essential to get the case off the ground at all: *Midland Bank v Cooke* [1995] 4 All ER 562, 575.

Equitable accounting, or quantification of beneficial shares?

Equitable accounting

This account draws heavily on Cooke (1995) and Bright (2009), to which readers are directed for full discussion and case references for the law described here.

Imagine a couple who bought a house together expressly as beneficial joint tenants. The relationship breaks down and one party, A, moves out. The party who stays behind, B, continues to make all the payments on the mortgage and does a loft conversion. A applies to the court under the Trusts of Land and Appointment of Trustees Act 1996 for the property to be sold and the proceeds of sale divided in accordance with the parties' beneficial interests – here, 50:50. So far, so straightforward. But what, if anything, is the relevance of the facts that since the parties separated, (1) B has been able to occupy the entire property 'for free' while A had to find property to rent, but that (2) B has been paying all the outgoings on the property, in particular the mortgage, since A left and has also spent money on the property which has increased its value? Since the parties have an express declaration of trust,[8] it is unlikely that these events could have altered the parties' beneficial shares.[9] What remedy, if any, is available to A or B in relation to these events? The answer lies in the personal remedy[10] of 'equitable accounting' and (possibly) the provision of 'compensation' in relation to exclusion from occupation under TOLATA 1996.

Note: as a personal remedy, rather than a proprietary right that takes the form of an adjusted share in the beneficial interest, it involves a simple (re)payment of money due; cf an increased beneficial share, which would see the claimant benefit from any inflation in the value of the property.

Equitable accounting has been described in the following terms:

Bernard v Josephs [1982] 1 Ch 391, 405

GRIFFITHS LJ:

When the proceeds of sale are realised there will have to be equitable accounting between the parties before the money is distributed. If the woman has left, she is entitled to receive an occupation rent, but if the man has kept up all the mortgage payments, he is entitled to credit for her share of the payments; if he has spent money on recent redecoration which results in a much better sale price, he should have credit for that, not as an altered share, but by repayment of the whole or a part of the money he has spent. These are but examples of the way in which the balance is to be struck.

[8] Contrast the willingness of the Supreme Court in *Jones v Kernott* [2011] UKSC 53 – an *implied* trust case – to find an ambulatory common intention constructive trust to reflect a finding that the parties' intentions regarding beneficial ownership had changed post-separation.
[9] That would require the claimant to make out a case in proprietary estoppel or common intention constructive trust superseding the express declaration of trust: see p 132 n 45 of the main text.
[10] As a personal rather than proprietary remedy, equitable accounting does not reflect a property right capable of having priority over third party creditors of the defendant, and so its enforcement against the defendant depends on that party having the means to pay; it cannot simply be enforced against the property in question in priority over other unsecured creditors.

Lizzie Cooke puts it this way: 'equitable accounting is a way of calculating the balancing payments that should be made between joint owners of land who may have borne an unfair share of the costs of ownership, or have enjoyed an unfair share of its benefits.'[11]

There are four main issues in relation to which equitable accounting might operate:

(1) expenditure by one party on improvements to the property which have not increased the improver's beneficial share;[12]
(2) occupation of the property by one co-owner to the exclusion of the other;
(3) payment of mortgage and other joint debts by one party without contribution from the other; and
(4) receipt of rents and other profits from the property by one co-owner alone.[13]

In several cases concerning cohabitants, the courts have held that accounting for these sorts of payments will usually only be made in relation to payments made during the period after the parties have separated. While parties are living together, it is assumed – in the absence of express evidence to the contrary – that they do not mind who pays for what: that it can be taken to have been 'thrown into one pot' as a matter of joint benefit.[14] It will often be the case (or be assumed) where A is owed occupation rent by B but B has been paying the mortgage that the two claims just cancel each other out. But it is possible that the value of each claim will be different so that a balancing payment should be made by one party.[15]

Quantification of the sum due depends on which of the four issues the case concerns. (In the examples here, we assume the parties hold the beneficial interest 50:50; where the beneficial interest is held in unequal shares, the accounting will instead reflect that ratio.) In relation to (1) improvements, the courts tend to award the lower of half the value of the expenditure or of any consequent increase in the value of the property. In relation to (3) mortgage payments etc, the other party must pay over his share of debt – so on our example half of the sum paid. (4) Rental receipts are likewise shared equally.

We consider occupation rent (2) last because there is now a competing statutory jurisdiction under which compensation for occupation rent might be ordered, under ss 13-15 of TOLATA 1996. The reach of TOLATA in this area is not entirely clear,[16] but in at least some cases it will instead be used to provide 'compensation' for

[11] Cooke (2007).
[12] Here, the fact that the remedy is personal not proprietary may be particularly significant: no proportionate share in any resulting increase in value of the property: Smith (2017), 211.
[13] See generally Cooke (1995).
[14] E.g.*Young v Lauretani* [2007] EWHC 1244 (re contributions to mortgage and occupation rent); see also *Clarke v Harlowe* [2005] EWHC 3062 (re improvement to property), *Wilcox v Tait* [2006] EWCA Civ 1867 (re receipt of rental income), *Begum v Issa* (5 November 2014, Judge Behrens, Leeds County Court, unreported).
[15] Cooke (1995), (2007).
[16] See generally Bright (2009), considering in particular *Stack v Dowden* [2007] UKHL 17 and *Murphy v Gooch* [2007] EWCA Civ 603. *Lewin on Trusts* argues that TOLATA applies instead of equitable accounting wherever there is a statutory right of occupation under TOLATA s 12: at [9-080], n 384. See also *Davis v Jackson* [2017] EWHC 698, from [41].

a co-owner whose occupation is 'excluded or restricted' by the trustees.[17] Technically, Bright argues, it would seem that TOLATA should *not* apply where the trustees (often the couple in question) have not agreed that one of them should be excluded from the property – in that case, we should revert instead to equitable accounting. But the courts have seemed to use TOLATA in family breakdown cases regardless of this technical point.[18]

The significance of applying TOLATA to the question of occupation rent is that a court considering whether to order compensation to the excluded party under the Act, and if so in what amount, has a discretion exercisable having regard to the checklist in s 15. Under ordinary principle of equitable accounting, the sum payable by way of occupation rent will tend to be the relevant proportion (in our example, half) of the market rental value of the property. By contrast, the factors in the s 15 TOLATA checklist – the intentions of those who created the trust, purpose for which the land is held, the circumstances and wishes of each beneficiary entitled to occupy, and the welfare of minor children who occupy or who might be expected to occupy the property as their home – take the court well beyond the simple matter of market rental value. For example, the majority of the House of Lords in *Stack v Dowden* in *not* requiring Ms Dowden to pay an occupation rent to Mr Stack attached significance to the fact that she remained in the property with their three children whom both parties had a responsibility to house.[19]

Or quantification under the constructive trust?

Jones v Kernott[20] might have been another candidate for equitable accounting to help balance the books between separated cohabitants. Here the parties (it has been conceded) had owned the property as beneficial joint tenants under a common intention constructive trust. The parties then separated, and for the twelve years that followed Ms Jones paid all the outgoings alone while Mr Kernott occupied a new property bought by him in his sole name and made no child support payments for the couple's children. He then sought to realize his half-share in the previously shared home. As we discuss in chapter 7 of the main text (at p 484), the Supreme Court held that, in light of her post-separation mortgage payments etc., the parties' common intention had altered – a finding of a so-called 'ambulatory' common intention constructive trust – such that the parties' beneficial shares changed in favour of Ms Jones. So Ms Jones emerged with a 90 per cent share of the equity. Had the Supreme Court upheld the Court of Appeal's decision that the original intention of beneficial joint tenancy remained unaltered, Ms Jones's most obvious alternative remedy to recognize her solo payment of the mortgage would have lain in equitable accounting.

The same comment may be made in respect of *Barnes v Phillips*,[21] where the Court of Appeal similarly used an imputed approach to the quantification stage that brought into account both uneven mortgage repayment patterns and unpaid child maintenance, rather than equitable accounting or other personal remedies / enforcement actions (re

[17] TOLATA 1996, s 13(6).
[18] Bright (2009).
[19] See Bright (2009), 392.
[20] [2011] UKSC 53.
[21] [2015] EWCA Civ 1056.

the child maintenance). Bright had previously suggested that the courts should look at the parties' wider economic situation at this quantification stage and take into account, for example, whether the non-resident parent is paying child support to the parent from whom he is now seeking an occupation rent. However, it must be questioned whether clearly *personal* claims ought to be rolled into the beneficial interest in this fashion. The Court of Appeal was rightly concerned about the risk of double-counting – as the child support debt would in theory remain enforceable by the statutory agency. Bringing such matters into account in quantifying the beneficial interests also has the effect of giving the would-be personal remedy claimant what some would see as unwarranted priority in respect of that debt over third parties with an interest secured only on the defendant's (reduced) share and any unsecured creditors of the defendant.[22] It would be peculiar if the approach to quantification of a *property* interest should vary depending on whether there are any third parties on the scene, and so it is suggested that truly personal claims should be deployed (and child support enforcement sought) in the conventional manner in all cases.[23]

It might equally be said that the whole approach to quantification of beneficial interests in these cases, bringing into account the full range of circumstances canvassed by Baroness Hale in para 69 of *Stack*, is problematic from the perspective of any third parties. They are left waiting for a somewhat uncertain answer on quantification that will determine the extent of security that they enjoy in whichever party's assets they have an interest. Though in response to that, it has been noted that third parties commonly enjoy several mechanisms for ensuring that they will take in priority to beneficial owners.[24]

Additional bibliography for this supplement

Bright, S. (2009). 'Occupation rents and the Trusts of Land and Appointment of Trustees Act 1996: from property to welfare?'. *Conveyancer and Property Lawyer* 378.

Cooke, E. (1995). 'Equitable accounting'. *Conveyancer and Property Lawyer* 391.
Cooke, E. (2007). 'Accounting Payments: please can we get the maths right?'. *Family Law* 37: 1024.

George, M. and Sloan, B. (2017). 'Marr v Collie: Presuming too little about resulting and constructive trusts?'. Conveyancer and Property Lawyer 303.

Lewin on Trusts (2015), 19th edn by Tucker et al. London: Sweet & Maxwell, with Third Supplement.

[22] See *Davis v Jackson* [2017] EWHC 698 on why that can matter. Contrast *Mountney v Treharne* [2002] EWCA Civ 1174 in the MCA jurisdiction, where the wife's unexecuted property transfer had priority over the bankruptcy that was declared *after* the MCA property adjustment order had been made: had the bankruptcy occurred first, it would have taken precedence.
[23] See also *Wilcox v Tait* [2016] EWCA Civ 1867, [64] on the related point that quantification and equitable accounting must be kept distinct on the basis that the extent of the account required turns on the extent of the beneficial interests.
[24] See Fox O'Mahony (2014), Miles (2003), and generally McFarlane et al (2015) Part D.

Roche, J. (2017). 'Returning to clarity and principle: the Privy Council on Stack v Dowden'. Cambridge Law Journal 76: 493.

Virgo, G. (2018). *The Principles of Equity and Trusts*, 3rd edn. Oxford: OUP.

