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COHABITATION AND PROPERTY: THE END OF THE ROAD FOR THE TRADITIONAL TRUST?

Paul Todd

Abstract

It is generally assumed that financial apportionment between cohabiting parties, when the relationship ends, is determined by the law of property, in which the institution of the trust has a large role to play. Until recently, it has also been assumed that the ordinary law applies, rather than a special law for cohabitants.

The trust developed to deal with fact situations far removed from those of modern cohabitation, and it may not be the most appropriate device for the resolution of what are essentially financial disputes between cohabitants. This article examines the limitations of the trust concept in this regard.

Introduction

A little over a decade ago, I co-authored an article whose main premise was that there was no special law applicable to the property of cohabitants, and this issue being governed by the general law of trusts.¹ This premise was, for the most part, justified by the main authorities at the time.² Nearly all the actual decisions, though not all the statements in the judgments, were consistent with the premise, though even at that time, developments had begun which came eventually to challenge it in a major way.³

Also central to the thesis of that article was that the constructive trust played only a limited role, since over-ready utilisation by the courts of constructive trusts would effectively have destroyed the main premise. Again, it was possible to explain nearly all the actual decisions on this basis, the role of the fraud-based constructive trust

¹ Glover, N., and Todd, P., 'The myth of common intention' (1996) *Legal Studies*, 16, 319-326 at p.325.

² The premise could be inferred from *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886. Express statements can be found in *Gissing v Gissing* [1971] AC 886, 904H (Lord Diplock), *Cowcher v Cowcher* [1972] 1 WLR 425, 429E (Bagnall J), *Cooke v Head* [1972] 1 WLR 518, 520F (Lord Denning MR), and *Grant v Edwards* [1986] 1 Ch 638, 651G (Mustill LJ).

³ In particular the then-recent decision of the Court of Appeal in *Midland Bank plc v Cooke* [1995] 2 FLR 915, later developed in *Oxley v Hiscock* [2005] Fam 211. See further the discussion in section 4.

being limited to avoiding the formality provisions of s 53(1)(b) of the Law of Property Act 1925.⁴

At that time there was, and indeed remains, legislation applying to married couples, which altered the general law in respect of capital improvements to property,⁵ and allowed for the adjustment of property on marriage breakdown.⁶ Given that the state of marriage is voluntarily chosen, to make special provision for those who have made the choice is to pose no particular difficulties of principle. Nor indeed is there any particular difficulty in defining the scope of application of the legislation, compared with unmarried cohabitation, coming as it does in so many and varied types and durations. There was then, and remains now, no legislation applying to unmarried cohabitants.

Now we are over a decade on. Last year saw the publication of the Law Commission report on 'Cohabitation: The Financial Consequences of Relationship Breakdown',⁷ and the decision of the House of Lords in *Stack v Dowden*.⁸ *Stack v Dowden* has itself attracted a flurry of litigation to determine the detail and extent of its application.⁹ The Law Commission recommends treating some cohabitants as special cases (though not necessarily by creating property interests in their favour). Under the existing law the premise that cohabitation is governed by the ordinary law of trusts looks less plausible than it did then. Cohabitation outside marriage in England and Wales has become increasingly common,¹⁰ though whether anything should follow from this is perhaps debateable.¹¹

It has become necessary to update the work that I co-authored just over a decade ago. In general I will conclude that to develop the law of trusts to cater for a special case is a bad idea, and that developments in this direction to date have not been

⁴ See further the discussion in section 4.

⁵ Matrimonial Proceedings and Property Act 1970, s 37.

⁶ Matrimonial Causes Act 1973, ss 24-25.

⁷ Law Commission Report No 307, 'Cohabitation: The Financial Consequences of Relationship Breakdown' (2007).

⁸ [2007] 2 AC 432.

⁹ Eg., *Abbott v Abbott* [2007] UKPC 53; *Fowler v Barron* [2008] EWCA Civ 377; *Laskar v Laskar* [2008] EWCA Civ 347, discussed below, in section 6.

¹⁰ Law Commission 307, paras 1.6 *et seq*.

desirable. That is not to say, however, that the law of trusts resolves cohabitation disputes satisfactorily. It does not, but the answer lies in developments elsewhere in the law, not in the law of trusts.

1 Does the Solution Lie in the Law of Trusts?

In *Stack v Dowden*, Lord Walker thought 'that the correct approach to this area lies ... in looking for a beneficial interest under a trust of some sort.'¹² It is by no means self-evident, however, that the trust is the ideal mechanism for resolving disputes, (like that in *Stack v Dowden* itself), where the issue is over financial apportionment between the parties, when the cohabitants' relationship ends. Usually no third party is involved, and there was no third party in *Stack v Dowden*. Trusts create property interests which are binding on third parties, as well as the parties to the dispute. In this sense therefore the trust is overkill, providing the parties with more than they need, and it would often be preferable for what are essentially disputes about money to be resolved by means other than the trust. However, at the start of the same paragraph in *Stack v Dowden*, Lord Walker qualified his statement by making 'the assumption that there is not to be some dramatic extension of the law of unjust enrichment,' and he also alluded to both contract law and proprietary estoppel. The problem, in essence, is that none of these concepts is adequate to deal with cohabitants' disputes. If any is to be expanded, though, it should not be the trust, which gives the parties more than they want.

Occasionally a case really will involve a third party, in which case a property interest, and hence a trust, really will be required. Such was the situation in *Lloyds Bank plc v Rosset*,¹³ where the parties were married, but where the matrimonial legislation did not apply, because the relationship had not broken down.¹⁴ Mrs Rosset (unsuccessfully) claimed an overriding interest binding Lloyds Bank as mortgagee, and in order to succeed she had to show not only that she was in actual occupation at the relevant time,¹⁵ but also that she had an equitable interest in land. Given that

¹¹ In *Stack v Dowden*, Lord Neuberger thought that the increase 'does not, in my view, justify a departure from established legal principles,' [2007] 2 AC 432 at para.103.

¹² [2007] 2 AC 432 at para.28.

¹³ [1991] 1 AC 107.

¹⁴ Matrimonial Causes Act 1973, ss 24-25.

¹⁵ To trigger s 70(1)(g) of the Land Registration Act 1925, then the operative provision, this being registered land.

the interest claimed could bind a third party, it is perhaps not surprising that Lord Bridge, whose speech was the only one of substance, was reluctant to allow it easily to be inferred, demanding in essence that all the characteristics of a trust be present.

Lloyds Bank plc v Rosset is rare in that the issue was not one about apportioning shares between the parties at the end of a relationship; indeed, the relationship had not broken down. Mrs Rosset needed a property interest, but most of the cases involve just two parties,¹⁶ where it might be thought desirable to relax the law. One possibility might be thought to be a remedial constructive trust, which creates less than a full beneficial interest. However, after forays by the Court of Appeal into the area thirty or forty years ago, this route has been firmly blocked by the House of Lords,¹⁷ and looks unpromising as a solution to the problem. Nor does it seem that full solutions can be found in contract, estoppel or restitution, though partial solutions can be found in each. Probably the reason why a property interest was thought necessary in *Stack v Dowden* was that the dispute was over division of the proceeds of sale at the end of the relationship, and a share in the property increases or decreases with property values.¹⁸

Suppose we take a case such as *Burns v Burns*,¹⁹ representative perhaps of a fairly typical scenario, at any rate at the time when it was decided. Patrick and Valerie Burns had been living together for many years (in the particular case no fewer than 19), before their relationship ended. The house had been purchased in Patrick's name, and he paid the purchase price. Valerie had made no contribution to the purchase price or the mortgage repayments, but had brought up their two children, performed domestic duties and contributed from her own earnings towards household expenses. She had also bought various fittings, and a washing machine, and redecorated the interior of the house (but importantly, had made no financial contribution towards the house itself). Had the parties been married, their property would have been apportioned under the provisions of the Matrimonial Causes Act

¹⁶ Most but not all; eg, *Midland Bank plc v Cooke* [1995] 2 FLR 915 (where the issue was however quantification only).

¹⁷ Eg, comments in *Westdeutsche v Islington LBC* [1996] AC 669, pp.714-5.

¹⁸ A point made by Lord Walker, [2007] 2 AC 432 at para.37.

¹⁹ [1984] Ch 317.

1973,²⁰ but because they were unmarried the provisions did not apply. When Valerie left Patrick and claimed a beneficial interest in the house, the Court of Appeal held that she had none, a conclusion which under the ordinary law of trusts seems unassailable.

If we consider a case such as *Burns* from a restitutionary viewpoint, Patrick had been enriched by Valerie's financial and other contributions, and if she ended up with nothing in return, arguably unjustly enriched. But even if the law were to allow a restitutionary claim, the most it would require of Patrick would be to disgorge the value of his enrichment, and pay her for the financial contributions and other services provided. A restitutionary claim, even if available, would do nothing to recognise the lengthy relationship, and would give Valerie the value of none of her expectations, nor any share in what she might regard as their joint assets. Restitutionary claims tend instead to unravel, to put the parties, as far as the law can, back to their starting positions.

Estoppel or contract might seem more promising. Estoppels can be more than merely restitutionary. They can give effect to expectations, and in appropriate cases the remedies can be very extensive.²¹ An estoppel would certainly be capable, *in principle*, of giving a cohabitant such as Valerie Burns the interest she claimed. Conversely (unlike the interest under a trust), an estoppel is flexible. It is 'satisfied by the minimum award necessary to do justice, which may sometimes lead to no more than a monetary award.'²² It has been argued that estoppels should play a greater role in this area,²³ but it is the very fact that estoppels satisfy expectations, created by representations, that limits their role. It is difficult to see how an estoppel could *in fact* have helped Valerie Burns, in the absence of any evidence that Patrick had expressly or impliedly represented that she was to have any interest in the home.

²⁰ Matrimonial Causes Act 1973, ss 24-25.

²¹ Eg, *Pascoe v Turner* [1979] 1 WLR 431.

²² [2007] 2 AC 432, para.37 per Lord Walker, citing *Crabb v Arun District Council* [1976] Ch 179, p.198. He is contrasting a monetary award with a property interest. For instances of this flexibility, see *Jennings v Rice* [2002] EWCA Civ 159, *Baker v Baker* (1993) 25 HLR 408, and generally Robertson, A., 'The reliance basis of proprietary estoppel remedies,' (2008) *Conveyancer and Property Lawyer* 72, 295-321.

²³ Eg, Ferguson, P., 'Constructive trusts - a note of caution,' (1993) *Law Quarterly Review*, 114-131.

Contracts, like estoppels, can give effect to expectations, though with less flexibility in the remedies. In very few cases, however, will there be anything like an express contract. Contracts can also be implied from the conduct of the parties, but the courts have expressed great reluctance to do this, except where the facts are consistent *only* with the implication of a contract, a situation which will surely be rare.²⁴

Restitutionary actions, contracts and estoppels are not panaceas, therefore. Nonetheless, it is arguable that if the law has operated too harshly, the solution lies in the expansion of concepts other than the trust, rather than the trust itself, and certainly the trust is not always the ideal mechanism for resolving disputes between cohabitants. It is arguable that the rigorous requirements for a trust, perhaps justified where a full property interest is to be created, create injustices in a case such as *Burns v Burns*, where Valerie ended up with nothing. Conversely, there are cases where trusts have been inferred where they were certainly never intended, and where they have arguably given too much.²⁵ In this latter type of case an estoppel would probably work better. But that is not a ground for rejecting traditional trusts reasoning, where that reasoning is most appropriate. There are times when a trust, on traditional reasoning, is not only justified, but is the only appropriate mechanism for resolving the dispute.²⁶ It would be quite wrong to abandon traditional trusts reasoning in such circumstances. Conversely, devices other than the trust also have their limits; it is not clear that any legal device could significantly have helped Valerie Burns.

Nonetheless, given that the overwhelming majority of disputes are ultimately about money, where third parties are not involved, I would argue that if injustice is perceived, the law would be best served by expansion of concepts other than the trust. Alternatively, recourse may have to be had to legislation, perhaps on the model suggested by the Law Commission.²⁷ The problems with a legislative approach are

²⁴ *Aramis (cargo owners) v Aramis (owners) (The Aramis)* [1989] 1 Lloyd's Rep 213, 244; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep 311 (though both cases arose in a commercial context).

²⁵ Eg., *Eves v Eves* [1975] 1 WLR 1338, *Grant v Edwards* [1986] Ch 638.

²⁶ Eg., *Tinsley v Milligan* [1994] 1 AC 340.

²⁷ Law Commission No 307 (2007).

defining its scope,²⁸ and justifying treating those within its scope differently from everyone else.²⁹

Alternatively, one could take the view that someone who has not chosen the regime of marriage, has contributed nothing directly to the house, and has relied upon no representation, can expect no entitlement other than, at most, return of contributions, with interest.

2 Nature and Limitations of the Trust in a Cohabitation Context

It is clear that the trust is not, on its own, an ideal mechanism for resolving property disputes between cohabitants. The rules for creating trusts developed from, and are much better suited to more formal transactions, where the settlor deliberately sets up a property disposition, with a great deal of deliberation and typically after taking legal advice. The type of trust used by a testator expressly to create a property settlement, or a settlement to avoid taxation, or the commercial trust, as used for example in *Barclays Bank Ltd v Quistclose Investments Ltd*,³⁰ have a number of features which do not work well in a less formalised cohabitation context. There is a moment of commitment, when the trust (which is in principle irrevocable) is created. Trusts are not created gradually, over a period of time, nor are they particularly easy to vary, once created. The terms are known at the creation of the trust, and are determined by the settlor alone. Though the trustees' intention is relevant to the extent that they must undertake trusteeship, common intention is irrelevant to the stereotypical trust, as is the settlor's intention after its creation. The beneficiary's intention, or even knowledge of the trust (since he or she can be unborn) is also irrelevant, though knowledge may be relevant for reliance-based constructive trusts, since it is obviously not possible for a beneficiary to rely on something he or she knows nothing about.³¹ Trusts can be created only of existing, not future property.³²

In the context of unmarried cohabitants these rules for the creation of a trust apply uneasily at best. In many cases the cohabitants do not talk expressly about the

²⁸ *Ibid.* Part 3 (minimum duration requirement).

²⁹ *Ibid.* Part 2, and in particular paras.2.59-2.81.

³⁰ [1970] AC 567.

³¹ But detrimental reliance does not imply an express bargain or common intention: *Parris v Williams* [2008] EWCA Civ 1147 (reviewing all relevant previous authority).

division of beneficial interests in their home, should their relationship break down. There is no clear moment of commitment by one party to create a permanent beneficial interest in favour of the other. Relationships ebb and flow, but the traditional law of trusts does not cater for the gradual creation of an interest over a period, nor will it easily allow for gradual change to existing interests. If there are discussions, they will often involve a house or bungalow yet to be purchased. Even where the property has been identified, discussions will often take place before completion of the purchase. In short, the trust assumes a level of formality lacking in most relationships between unmarried cohabitants.

Nonetheless, much of the analysis of trusts in a cohabitation context is (ostensibly at least) in terms of express trusts. The resulting trust also has a role to play in the apportionment of property between cohabitants, a context in which it can work well, especially where money is advanced by one of the parties, to acquire property in the name of the other (or more generally, where the money advanced is in different proportions to the legal titles in the property). If the advancer of the money intends to 'retain' an equitable title to the money advanced,³³ or the property into which it is converted, then a resulting trust can give effect to that intention, leading to shares in the property which are proportional to the relative shares in the purchase money. Since this will often accord with the intention of the parties in reality, the resulting trust has a useful role to play. The problem is that it is too limited, rather than that it is inappropriate in a cohabitation context. To throw out the resulting trust altogether is to throw out the baby with the bathwater.

Resulting trusts have a long history, and in the older cases the intention of the transferor, whether to retain equitable title or to advance it to follow the legal, may not have been made explicit, or easy to determine from the evidence, especially with a testamentary disposition where the transferor was dead. The courts therefore developed presumptions as to intention, the presumption of advancement and the presumption of resulting trust. These presumptions were developed to deal with fact situations very far removed from today's cohabitation context.

³² *Re Ellenborough* [1903] 1 Ch 697.

³³ Quotation marks around 'retain' explained in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at p.706.

Today it seems generally to be accepted that the presumption of advancement, based as it is on a moral duty of husbands to make provision for their wives or fathers for their children, is obsolete and rarely decisive to settle a dispute,³⁴ and in any case will apply as between unmarried cohabitants, only where a father resides with his child or children. The presumption of resulting trust, on the other hand, seems to accord well with the likely intentions of unmarried cohabitants. Bearing in mind that it is rebuttable, it seems not unreasonable to continue to apply it, and indeed it was decisive in the relatively recent decision of the House of Lords in *Tinsley v Milligan*,³⁵ a case which would necessarily have been decided the other way, in the absence of such a presumption.

The problem with the resulting trust is not therefore that it is inappropriate. It is, however, rather too limited in a cohabitation context. Though in general it leads to an apportionment in proportion to the amount of money advanced by each party, it is geared towards the creation and quantification of interests at the start, when the property is first acquired. Today, many houses are purchased on a mortgage to which both parties are likely to contribute. Taking account of the mortgage liabilities incurred by the parties is not particularly problematic, if it is regarded as being simply another method of obtaining cash.³⁶ The courts have also accepted that capital repayments by each party can be relevant to apportionment of interest, though conceptually this is more difficult.³⁷ The same is also true of discounts obtained by one party towards the purchase price.³⁸ However, the presumption of resulting trust does not easily allow account to be taken of capital improvements, and in fact these

³⁴ *McGrath v Wallis* [1995] 2 FLR 114; [2007] 2 AC 432 at para.101 per Lord Neuberger. Also [2007] 2 AC 432 at para.111, where Lord Neuberger observed that it was 'not relevant in the context of cohabitants'; *Laskar v Laskar* [2008] EWCA Civ 347, [20].

³⁵ [1994] 1 AC 340. In the absence of the presumption, Kathleen Milligan would have had to adduce evidence of the collusive fraud to succeed.

³⁶ *Huntingford v Hobbs* [1993] 1 FLR 736. Cf the economic arguments referred to by Lord Neuberger [2007] 2 AC 432, paras 118-120, that incurring liability under a mortgage is not the same as paying cash.

³⁷ *Stack v Dowden* [2007] 2 AC 432, [117] (see also below, section 6). Also *Burns v Burns* [1984] Ch 317, p.327D per Fox LJ.

³⁸ Taken into account in *Springette v Defoe* [1992] 2 FCR 561 (never disapproved in this context) and *Marsh v Von Sternberg* [1986] 1 FLR 526, the juristic basis being explained by Staughton LJ in *Evans v Hayward* [1995] 2 FCR 313, 319D. Also *Laskar v Laskar* [2008] EWCA Civ 347 [24], where the earlier authorities are reviewed.

are by no means always taken into account, under a traditional trusts model.³⁹ The most significant omission is of contributions, whether financial or not, which are not directly related to the property; on a resulting trust analysis these will not give rise to any interest.⁴⁰

So the resulting trust is too narrow to resolve all the issues in this area. Nonetheless, the presumption of resulting trust will often accord with what may be presumed to be the actual intentions of the parties. It would be a mistake to throw out the resulting trust altogether, merely because it is too narrow to cater for all situations.

3 The House of Lords Trilogy: *Pettitt*, *Gissing* and *Rosset*

The premise of the 1996 article I co-authored in *Legal Studies* was that the ordinary law of trusts applies; there is not some special law that applies just to this situation.⁴¹ This premise, we felt, followed from the House of Lords trilogy of *Pettitt v Pettitt*, *Gissing v Gissing* and (most clearly perhaps) *Lloyds Bank plc v Rosset*.⁴² All these cases concerned married couples, to which today legislation applies to apportion property on breakdown,⁴³ but the matrimonial legislation did not apply, in *Pettitt* and *Gissing* because it was enacted only in response to those decisions,⁴⁴ and in *Lloyds Bank plc v Rosset* because the marriage had not broken down. The legislation never applies in cases of unmarried cohabitants.

It also became clear from *Gissing v Gissing* and *Lloyds Bank plc v Rosset* that the discretionary role of constructive trust was limited to avoidance of the formality requirements of s 53(1)(b) of the Law of Property Act 1925.⁴⁵ The courts had no

³⁹ *Pettitt v Pettitt* [1970] AC 777; *Thomas v Fuller-Brown* [1988] 1 FLR 237. Where they are taken into account, for a juristic basis, see *Stack v Dowden* [2007] 2 AC 432 at para.139 per Lord Neuberger, and see also paras.140-141.

⁴⁰ The problem in *Burns v Burns* [1984] Ch 317, discussed above, but *Gissing v Gissing* [1971] AC 886 is the leading case. See also *Stack v Dowden* [2007] 2 AC 432, para.143 per Lord Neuberger.

⁴¹ Glover and Todd, 'The myth of common intention,' p.325.

⁴² Respectively [1970] AC 777; [1971] AC 886, esp pp.904-5; [1991] 1 AC 107.

⁴³ Matrimonial Proceedings and Property Act 1970, s 37; Matrimonial Causes Act 1973, ss 24-25.

⁴⁴ The Matrimonial Proceedings and Property Act 1970 was a legislative response to *Pettitt v Pettitt*, the Matrimonial Causes Act 1973 to *Gissing v Gissing*.

⁴⁵ [1971] AC 886, at p. 905B per Lord Diplock; [1991] 1 AC 107, paras.131-132. The earlier cases are discussed fully in *Stack v Dowden* [2007] 2 AC 432, eg, paras.16-26 per Lord Walker.

general discretion to impose constructive trusts because it seemed fair to do so, and intentions were to be inferred rather than imputed. Nor was it sufficient to invoke a loose concept, such as 'family assets'.⁴⁶ This might have seemed harsh on the wives in these two cases, but is easier to justify, once it is remembered that trusts bind third parties as well. In any case, the actual decision in *Gissing* was reversed by legislation, applying on the breakdown of marriages (legislation which merely apportions between the parties, and does not affect prior claims of third parties).

In the light of subsequent developments it should perhaps be observed that in all three of the trilogy, the properties had been conveyed into the name of one of the parties alone, respectively Mrs Pettitt, Mr Gissing and Mr Rosset, and that in each case the other party failed to obtain any interest at all. None of the cases involved quantification of an interest, there being in each case no interest to quantify. Nonetheless, the principles from these cases could have been extended without difficulty to quantification, and to cases where legal title was vested in more than one of the cohabitants.

Lloyds Bank plc v Rosset clarified a distinction that had been made at Court of Appeal level in the years preceding the decision,⁴⁷ between cases where beneficial interests had been discussed between the parties, and those where they had not.⁴⁸ In the first category, statements made by the legal owner could amount to a declaration of trust. Normally writing is required for a declaration of a trust of land, but not if the trust is constructive. Reliance by the representee could make it fraudulent for the representor to renege on his or her promise; a constructive trust would be imposed, avoiding the writing requirements.⁴⁹ In the second category, inferences about intention could be drawn from contributions to the purchase price, but probably very little else.⁵⁰ Though for the second category Lord Bridge did not make clear in *Lloyds Bank plc v Rosset* whether resulting or constructive trust reasoning would apply, in *Tinsley v Milligan* a few years later, the presumption of

⁴⁶ [1971] AC 886, pp.899-891 per Viscount Dilhorne.

⁴⁷ *Burns v Burns* [1984] Ch 317; *Grant v Edwards* [1986] Ch 638.

⁴⁸ 'The first and fundamental distinction ...' [1991] 1 AC 107, pp.132-3.

⁴⁹ [1991] 1 AC 107, p.133, approving in this context *Eves v Eves* [1975] 1 WLR 1338 and *Grant v Edwards* [1986] Ch 638.

⁵⁰ [1991] 1 AC 107, 133.

resulting trust was used decisively, in determining that an unmarried cohabitant was entitled to a half share.⁵¹ A different result would have been reached, had constructive trust reasoning been adopted.

Though *Lloyds Bank plc v Rosset* was a welcome clarification of the law, the emphasis on contributions to the purchase price could operate harshly on the party whose main contributions were not financial.⁵² Moreover, the distinction between the two categories could have an enormous effect in reality, as quickly became clear in the Court of Appeal in *Springette v Defoe*.⁵³ It was also starkly apparent from a comparison of the fortunes of Linda Grant, who got a half share, and Valerie Burns, who got nothing, though it is by no means obvious that Linda Grant's case was any more deserving.⁵⁴ Any discussions are likely to occur at, or near the start of the relationship, which will often be many years before the case is heard. In *Ungurian v Lesnoff*, a life interest depended on discussions that had taken place long ago, and were only dimly recollected.⁵⁵ The law might well have been clear, but it was by no means entirely satisfactory.

It has already been observed that trusts can only be declared of existing property,⁵⁶ whereas any discussions between the parties will often occur before the property is purchased, or even identified. Yet it is clear that such discussions can nevertheless form the basis of an interest.⁵⁷ A possible explanation is that constructive trusts avoid certainty of subject matter, as well as formality requirements.

⁵¹ [1994] 1 AC 340, the presumption being clearly applied at p.371, Lord Browne-Wilkinson: 'in accordance with the principles exemplified in *Gissing v Gissing* [1971] AC 886 ... and *Lloyds Bank plc v Rosset* [1991] 1 AC 107.'

⁵² No cases were overruled, and thus *Burns v Burns* [1984] Ch 317, for example, remained good law.

⁵³ (1992) 24 HLR 552, [1992] 2 FLR 388. A quarter share depended on whether there had been discussion of beneficial interests. There had not: 'Our trust law does not allow property rights to be affected by telepathy': (1992) 24 HLR 552, p.558 per Steyn LJ. In *Stack v Dowden*, the approach taken to quantification in *Springette v Defoe* (1992) 24 HLR 552, and also *Huntingford v Hobbs* [1993] 1 FLR 736 was disapproved: [2007] 2 AC 432, [65].

⁵⁴ *Grant v Edwards* [1986] Ch 638; cf *Burns v Burns* [1984] Ch 317, both cases being cited with approval in *Lloyds Bank plc v Rosset* [1991] 1 AC 107, 133. In many first category cases the claimant seems to be over-compensated, and these might perhaps have been better dealt with as estoppels.

⁵⁵ [1990] Ch 206, p.221 per Vinelott J.

⁵⁶ *Re Ellenborough* [1903] 1 Ch 697. See the discussion above, in section 3.

⁵⁷ *Ungurian v Lesnoff* [1990] Ch 206; *Stokes v Anderson* [1991] 1 FLR 391.

4 Developments Since *Lloyds Bank PLC v Rosset*

In the last ten to fifteen years, the courts, at least up to Court of Appeal level, have retreated from the rigours of *Lloyds Bank plc v Rosset*, at least to the extent of the quantification, as opposed to the initial creation of an interest. The trend first became apparent in *Midland Bank plc v Cooke*, but was developed in *Drake v Whipp* and *Oxley v Hiscock*,⁵⁸ and it is now fairly certain that the courts will assert a considerable degree of discretion in this area. In *Oxley v Hiscock* the Court of Appeal expressly distinguished between quantification and creation.⁵⁹ Given that there is an interest already in existence, this is arguably less problematic for third parties than a general discretion exercised on the initial creation of an interest. However, it leaves the law on initial creation as unsatisfactory as ever. It also challenges the premise that the law in this area is governed by the ordinary law of trusts, *Midland Bank plc v Cooke* in particular being impossible to explain in terms of the general law.⁶⁰

5 *Stack v Dowden*

The issue returned to the House of Lords in *Stack v Dowden*.⁶¹ It seems likely that the courts are moving away from an analysis based on the law of trusts, as generally applied, but it remains uncertain how far the decision extends. Like *Oxley v Hiscock* it was a dispute about quantification alone, and the reasoning may arguably not apply to initial creation.

Stack v Dowden also differed from most of the earlier cases in that legal title was vested jointly in the couple, a situation which may nowadays be more common than before, at any rate where (as in the case itself) the relationship is of a long-term nature. Ms Dowden provided most of purchase price, taking into account the

⁵⁸ Respectively [1995] 2 FLR 915, [1996] 1 FLR 826, [2005] Fam 211.

⁵⁹ [2005] Fam 211, paras.48, 52.

⁶⁰ [1995] 2 FLR 915, there being no discussion or representation, Mrs Cooke should have been limited to the share dictated by her contributions. Conversely, *Drake v Whipp* [1996] 1 FLR 826 is just about explicable on conventional first category *Lloyds Bank plc v Rosset* terms (see Glover, and Todd, 'The myth of common intention' (1996) LS 325, n 74; and the result in *Oxley v Hiscock* is consistent with normal resulting trusts reasoning: *Stack v Dowden* [2007] 2 AC 432, para.106, comments by Lord Neuberger.

⁶¹ [2007] 2 AC 432, noted Swadling, W., 'The common intention constructive trust in the House of Lords: an opportunity missed' (2007) *Law Quarterly Review*, 511; Wee, P.,

proceeds of sale of her previous house, the mortgage and endowment policy, which was in joint names (though Stack paid interest on both), an endowment policy of her own (on which Ms Dowden paid interest), and 60 per cent of the lump sum payments towards the mortgage. The relationship was unusual in that the financial affairs of the parties were kept entirely separate, and the issue before the House was division of proceeds on sale. Ms Dowden ended up with a 65/35 division in her favour. This was very similar to her share of the purchase price, and Lord Neuberger reached the result on conventional resulting trusts reasoning.⁶² He was however alone in this, all their other Lordships rejecting the conventional approach.⁶³

Baroness Hale, with whose reasoning all but Lord Neuberger agreed, but to whose views Lords Hope and Walker added their own observations, began with the presumption that equity follows the law, meaning in this context that equitable title should follow legal, which in the case of a joint tenancy is a 50:50 division. She expressly refused to start with the resulting trust presumption, on the grounds that the law has moved on;⁶⁴ in similar vein, Lord Walker felt that 'the law has moved on, and your Lordships should move it a little more in the same direction, while bearing in mind that the Law Commission may soon come forward with proposals which, if enacted by Parliament, may recast the law in this area'.⁶⁵ It is perhaps ironic that the presumption Baroness Hale used as her starting point amounted effectively to the long-discredited presumption of advancement,⁶⁶ albeit operating in this context not from husband to wife, but from Ms Dowden in favour of Mr Stack, to whom one would have thought she owed no particular moral duties. Division in proportion to legal title is however only a starting point. The courts can vary this, taking into account all the circumstances of the relationship, as evidence of a common intention to share property in a different proportion.⁶⁷

'Distribution of assets on relationship breakdown' [2007] *Lloyd's Maritime and Commercial Law Quarterly*, 455-459.

⁶² [2007] 2 AC 432, [110] - [122].

⁶³ The headnote in the Weekly Law Reports wrongly suggests that he dissented: [2007] 2 WLR 831. In the official reports this has been corrected, but the moral is, do not trust headnotes.

⁶⁴ [2007] 2 AC 432, [60].

⁶⁵ *Ibid.* para.26.

⁶⁶ *Ibid.* para.112, Lord Neuberger, commented on by Wee, P., 'Distribution of assets on relationship breakdown' [2007] *Lloyd's Maritime and Commercial Law Quarterly*, 455, p.458.

Lord Neuberger would have reached the same result on a traditional resulting trust analysis, adjusted to take account of Ms Dowden's later mortgage payments.⁶⁸ He saw no reason to alter established property law principles. The fact that Lord Neuberger reached an identical result implies that the majority reasoning does not form part of the *ratio decidendi*, but of course the *ratio* of any case can often be determined only in the light of later authorities. Indications so far suggest that the courts will, *in similar cases*, follow Baroness Hale, in preference to the traditional reasoning adopted by Lord Neuberger, but do not go so far as to suggest that Baroness Hale's view will apply generally, in cohabitation cases.⁶⁹

It would certainly be possible to argue for a limited scope for the decision. The issue was one of quantification alone, and indeed, the conveyance being in joint names, there could be no doubt that both parties had an interest of some sort. Baroness Hale was prepared to draw inferences, as to intention, from the deliberate conveyance into joint names (though Lord Neuberger cast doubt on the validity of these inferences).⁷⁰ If this is really a case based on presumed intention then it does not challenge traditional thinking.⁷¹ Nor, of course, does it create issues of principle, if Lord Neuberger's analysis is correct. In policy terms, for a third party to be bound by an interest of which at least the existence is clear creates less injustice, even where its extent is unclear, than where its very existence is difficult to determine, as would have been the case, for example, had *Lloyds Bank plc v Rosset* been decided the other way. In short, if the decision is limited to quantification issues where the conveyance is in joint names, it is relatively unproblematic.

It seems more likely, however, that the decision signals a move away from traditional analysis, at least for quantification. Baroness Hale's reasoning has been extended to a conveyance in the name of one of the parties alone,⁷² though it has not yet been

⁶⁷ Factors were listed [2007] 2 AC 432, at para. 69.

⁶⁸ In Lord Neuberger's view these payments could shed light on initial intention or maybe could evidence a trust of the equity of redemption: see the discussion above, in section 3.

⁶⁹ Eg., *Abbott v Abbott* [2007] UKPC 53; *Fowler v Barron* [2008] EWCA Civ 377; cf *Laskar v Laskar* [2008] EWCA Civ 347.

⁷⁰ [2007] 2 AC 432, paras.66-67 Baroness Hale; cf para.115 Lord Neuberger.

⁷¹ On inferences from intention from conveyance into joint names, see *Fowler v Barron* [2008] EWCA Civ 377 at para.33.

⁷² *Abbott v Abbott* [2007] UKPC 53, the advice to Her Majesty being delivered by Baroness Hale.

applied to the creation (as opposed to quantification) of an interest, nor very far outside traditional sexual cohabitation.⁷³ To the extent that the case extends trusts, rather than other concepts, it represents a lost opportunity.⁷⁴ Unlike Mrs Rosset's in *Lloyds Bank v Rosset*, there was no question of Ms Dowden's interest in *Stack v Dowden* binding a third party. It is a pity the House did not take the opportunity to examine ways of protecting her, other than the trust. The requirements of the traditional trust can be something of a straightjacket for the courts, and *Stack v Dowden* signals the way to greater creativity, but how unfortunate that the House did not consider the possibilities of extending non-proprietary actions.

Conclusions

Sometimes the parties might want to create interests, with all the attributes of traditional property, and capable of taking priority to the interests of third parties. It is difficult to see why the law should prevent this, and if they do the traditional law of trusts allows them that flexibility. There will also be situations where the resulting trust presumption accords with the likely intentions of the parties, and where only a resulting trust can protect the interests of the party providing the money, or providing more than half the money in the case of a joint tenancy. The resulting trust presumption is not all bad. The problem is more that it is too limited, than that it exists at all.

Whatever Baroness Hale says in *Stack v Dowden*, the presumption of resulting trust is not dead. No doubt was cast on *Tinsley v Milligan*, a case which must have been decided on the basis of that presumption, nor indeed was the earlier decision even mentioned in the later.⁷⁵

⁷³ *Laskar v Laskar* [2008] EWCA Civ 347, though Neuberger LJ, making (according to Pisca) 'a nuisance of himself in the Court of Appeal', accepted that her reasoning would apply to cohabitation 'at least where the property is purchased as a home for two (or indeed more than two) people who are the legal owners': [16]. He went on to distinguish *Stack v Dowden*, where 'the primary purpose of the purchase of the property was as an investment, not as a home': [2008] EWCA Civ 347, [17]. In such a case, the resulting trust presumption remained appropriate. Also Pisca, N., 'Revisiting resulting trusts' [2008] *Conveyancer and Property Lawyer* 441-463.

⁷⁴ See the discussion in section 2, above.

⁷⁵ [1994] 1 AC 340, discussed above, section 3. The resulting trust presumption was also applied in *Laskar v Laskar* [2008] EWCA Civ 347.

Where the issue is to whether there is an interest at all, and a third party is involved, it surely remains appropriate to be cautious. Where, however, the issue is simply about division of proceeds of sale, a more flexible approach may well be appropriate. Lord Walker thought that the issue in *Stack v Dowden* was necessarily one of apportionment of property, but need it be?⁷⁶ Estoppels and restitutionary actions influence may well provide the courts with the flexibility they need, without all the third party consequences of property interests.

⁷⁶ See above, section 2.