

## CHAPTER 9

## TRUSTS ARISING IN RELATION TO THE ACQUISITION OF PROPERTY

### 2. RESULTING TRUSTS ON GRATUITOUS LIFETIME TRANSFERS

#### Presumption of resulting trust and presumption of advancement

**9–03** NOTE 6. AT THE END ADD: The rationale for the presumption of advancement was originally said to be the natural consideration of blood and affection: *Grey v Grey* (1677) 2 Sw. 594. Later, the court relied on the presumption that the donor intended to fulfil a “moral legal” obligation to maintain by making the transfer of property: see *Bennet v Bennet* (1879) 10 Ch.D. 474, *per* Jessel M.R. In relation to the problems in ascertaining the nature of the advancement relationship, see Mitchell (ed.), *Constructive and Resulting Trusts*, (Glister), pp.289–314.

AFTER § 9–03 INSERT THE FOLLOWING NEW PARAGRAPHS AND HEADINGS:

#### *Abolition of the presumption of advancement*

**9–03A** When section 199 of the Equality Act 2010 comes into force, the presumption of advancement will be abolished. No date has yet been appointed for the coming into force of this provision. Section 199(1) gives as an example the case where a husband is presumed to be making a gift to his wife if he transfers property to her, or purchases property in her name. It is clear from the terms of the section, however, that the presumption is to be abolished in all circumstances, and not only in relation to property purchased by a man in the name of his wife or fiancée. The abolition of the presumption of advancement, when it comes into operation, will not apply to anything done before that date and will have no effect in relation to any obligation incurred before the commencement of section 199.<sup>6a</sup> In relation to such

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<sup>6a</sup> Equality Act 2010, s.199(2). See Glister (2010) 73 M.L.R. 807, questioning the need for this subsection. If the presumption is merely a rule of evidence, there is no reason in principle to limit the repeal to future transfers. Furthermore, it is unclear whether the rule will be amenable to judicial development once it has been repealed, or whether the issue of which ‘obligations’ may found an advancement relationship will be frozen when section 199 is brought into force.

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cases the position will remain as set out in the following sections of this chapter. It is not clear whether the reference to “obligation” includes only legal obligations, or also moral obligations incurred by a husband, parent or other person in respect of gifts by whom the presumption of advancement has until now applied.<sup>6b</sup>

*Presumption of resulting trust unaffected*

**9-03B** The abolition of the presumption of advancement will not affect the application of the presumption of resulting trust. In those circumstances in which the presumption of advancement has hitherto applied, there will now be a presumption of resulting trust. So, where a husband transfers property to his wife it will now be presumed that she is to hold the property on trust for him unless there is evidence that a gift was intended.<sup>6c</sup> In practice, this presumption of resulting trust in the case of husband and wife may well, in many cases, be as weak as the existing presumption of advancement,<sup>6d</sup> with each case in fact usually determined by evidence of the actual intention of the transferor or provider of the purchase moneys.<sup>6e</sup> It should be remembered that the presumption of resulting trust has always been the general rule subject, hitherto, to an exception where the purchaser was under a species of natural obligation to provide for the nominee.<sup>6f</sup>

**Significance of the presumption of resulting trust**

**9-05** NOTE 15. AT THE END ADD: The burden of adducing evidence to rebut the presumption of resulting trust is an evidential burden. If the donee succeeds in discharging that burden, the claimant will fail unless he can discharge the legal burden of proof by showing an express trust: *Fong v Sun* [2008] HKCFI 385; (2007-08) 10 I.T.E.L.R. 1093 at [26].

<sup>6b</sup> As to the court’s recognition of the validity and effect of moral obligations in the context of the Inheritance (Provision for Family and Dependants) Act 1975, see *Re Goodchild* [1997] 1 W.L.R. 1216 at 1227-1228, CA.

<sup>6c</sup> Explanatory note to the Equality Act 2010 at [633].

<sup>6d</sup> See §§ 9-05, n.18, 9-25.

<sup>6e</sup> See § 9-30.

<sup>6f</sup> *Murless v Franklin* (1818) 1 Sw. 17; *Fong v Sun* [2008] HKCFI 385; (2007-08) 10 I.T.E.L.R. 1093. See § 9-03 (including online supplement).

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**Gratuitous dispositions in favour of strangers which raise a presumption of resulting trust***Assurances of land*

- 9–09** NOTE 35. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 25–017. DELETE (in contrast to the view expressed in earlier editions) AND REPLACE BY: (in contrast to the view expressed in the 29th and earlier editions).

*Transfer of personalty*

- 9–10** NOTE 40. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 25–019.

**3. PURCHASE IN THE NAME OF ANOTHER****Generally**

- 9–16** DELETE FINAL SENTENCE AND REPLACE BY: Hitherto, where a purchase has been made in the name of a person who is not in equity a stranger to the real purchaser, such as his wife or child, then a presumption of gift, called the presumption of advancement, has arisen in favour of the nominal purchaser. Where this presumption has applied,<sup>57</sup> the real purchaser has been able to establish a resulting trust in his favour only by evidence of his actual intention rebutting the presumption of advancement. When section 199 of the Equality Act 2010 comes into force, the presumption of advancement will be abolished, except in relation to anything done before, or in relation to any obligation incurred before, that date.<sup>57a</sup> The remainder of this section should be read subject to these remarks.

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<sup>57</sup> For the circumstances in which, until now, the presumption of advancement has applied, see §§ 9–22 to 9–33.

<sup>57a</sup> See §§ 9–03A and 9–03B (online supplement).

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**Presumption of resulting trust***Personalty*

- 9–20 NOTE 69. AT THE END ADD: *Merlo v Duffy* [2009] EWHC 313 Ch; [2009] All E.R. (D) 91 (Feb) at [134].

**Presumption of advancement on a purchase by a father in the name of his child**

- 9–22 AT THE END OF THE TEXT ADD: It has recently been suggested that the presumption should not apply where the evidence does not indicate that the parent is under an obligation to provide for the child.<sup>77a</sup>

NOTE 76. AT THE END ADD: This presumption is to be abolished when the Equality Act 2010 comes into force. See § 9–03A (online supplement).

**Presumption of advancement in favour of a wife or fiancée**

- 9–25 NOTE 82. AT THE END ADD: This presumption is to be abolished when the Equality Act 2010 comes into force. See § 9–03A (online supplement).

NOTE 87. AT THE END ADD: Cf. *Cheung v Worldcup Investments Inc* [2008] HKCFA 78; (2008–09) 11 I.T.E.L.R. 449 at [7].

**Presumption of advancement in other cases**

- 9–26 ADD NOTE 87A: This presumption is to be abolished when the Equality Act 2010 comes into force. See § 9–03A.

*Stepchildren and children-in-law*

- 9–29 NOTE 98. AT THE END ADD: As to children-in-law, see *Fong v Sun* [2008] HKCFI 385; (2007–08) 10 I.T.E.L.R. 1093.

- 9–30 IN THE SECOND SENTENCE DELETE THE FIRST FIVE WORDS AND REPLACE WITH: It has until recently been an unresolved question.

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<sup>77a</sup> *Musson v Bonner* [2010] W.T.L.R. 1369, Ch D at [28], relying on *Pecore v Pecore* [2007] SCC 17; (2006–07) 9 I.T.E.L.R. 873.

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NOTE 1. AT THE END OF THE FIRST SENTENCE ADD: *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB); [2010] All E.R. (D) 314 (Jul) at [92]–[96]. AT THE END OF THE SECOND SENTENCE ADD: Equality Act 2010, Explanatory Notes, para.625. AFTER THE FOURTH SENTENCE ADD: In *Musson v Bonner* [2010] W.T.L.R. 1369, Ch D, it was considered at [19] that the presumption of advancement can now apply equally to a mother as it did previously to a father, but held at [28] that the presumption of advancement does not operate in cases where the evidence does not establish that the parent is under an obligation to provide for the child.

*Purchase in the name of partner*

- 9–31 NOTE 4. AT THE END ADD: *Cf. Cheung v Worldcup Investments Inc* [2008] HKCFA 78; (2008–09) 11 I.T.E.L.R. 449 at [9].

*Purchase in the name of husband*

- 9–32 NOTE 5. AT THE END OF THE FIRST SENTENCE ADD: *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB); [2010] All E.R. (D) 314 (Jul) at [97]–[98].

**Evidence admissible to rebut the presumptions***Subsequent acts and declarations*

- 9–36 NOTE 24. AT THE END OF THE SECOND SENTENCE ADD: *Fulton v Gunn* [2008] BCSC 1159; (2008) 296 D.L.R. (4th) 1.

*Improper purposes*

- 9–37 NOTE 29. AT THE END ADD: *Barrett v Barrett* [2008] EWHC 1061 (Ch); [2008] B.P.I.R. 817 (purpose to defeat claim of a party's trustee in bankruptcy).

AFTER THE FIRST SENTENCE ADD NEW N.32A: The court should consider of its own motion whether these principles apply, even if they are unpleaded and neither party wishes to rely on them: *Knowlden v Tehrani* [2008] EWHC 54 (Ch); [2008] All E.R. (D) 148 (Jan) at [88].

NOTE 33. AFTER THE SECOND SENTENCE ADD: The Law Commission now proposes the abolition of the reliance principle established by *Tinsley v Milligan* [1994] 1 A.C. 340, HL

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and its replacement by provisions conferring a statutory discretion on the court. See § 5–30 (online supplement).

NOTE 34. AT THE END ADD: *Anzal v Ellahi*, July 21, 1999, CA, unreported; *Wu Wai Sum v Man Ting Chu* [2010] HKCA 284; [2010] 5 H.K.L.R.D. 125. Likewise, the fact that the purchase moneys have been acquired in a disreputable way or through a prior illegal transaction does not, in itself, prevent the provider of the purchaser moneys from establishing a beneficial interest in the property concerned: *Mortgage Express Ltd v Robson* [2001] EWCA Civ 887; [2001] All E.R. (Comm) 886 at [21]–[22].

NOTE 41. AT THE END ADD: *Q v Q* [2008] EWHC 1874 (Fam); [2009] 1 F.L.R. 935 at [123]–[130].

**Provision of purchase money***Provision as purchaser*

**9–47** AT THE END ADD: Cases where a property is acquired on mortgage are considered in § 9–61 (including online supplement).

**4. BENEFICIAL INTERESTS OF TWO OR MORE PERSONS****Introduction**

**9–48** AFTER THE THIRD SENTENCE ADD NEW NOTE 75A: For an application of these principles to a claim concerning the acquisition of shares, see *Webster v Webster* [2008] EWHC 31 (Ch); [2009] 1 F.L.R. 1240.

**Claims to a beneficial interest under the law of trusts**

**9–51** NOTE 1. AT THE END ADD: It would seem, however, that these principles cannot be used by shareholders to acquire an interest in property owned by a company, for the company is not a party to the common intention: see *Luo Xing Juan v Estate of Hui Shui See* [2008] HKCFA 48; (2008–09) 11 I.T.E.L.R. 218.

NOTE 2. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 12–016 *et seq.*

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**Express trusts***The general principle*

9–53 NOTE 9. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), Chap.15.

NOTE 10. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), Chap.16.

NOTE 11. AT THE END OF THE FIRST SENTENCE ADD: *Knowlden v Tehrani* [2008] EWHC 54 (Ch); [2008] All E.R. (D) 148 (Jan) at [71].

AT THE END OF THE FIRST SENTENCE ADD: though there may be room for a claim based on proprietary estoppel relying on events taking place after the declaration.<sup>11a</sup>

*Credits for payment of mortgage instalments*

9–54 NOTE 31. AT THE END ADD: Principles of equitable accounting do still apply, however, where the co-owner not in occupation has no right to occupy pursuant to the 1996 Act: *Re Barcham* [2008] EWHC 1505 (Ch); [2009] 1 W.L.R. 1124, see § 37–62 (including online supplement).

**Resulting trusts founded on contributions to the purchase money***Circumstances where a resulting trust arises*

9–57 NOTE 38. AT THE BEGINNING INSERT: *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432; *Jones v Kernott* [2011] UKSC 53; [2011] 3 W.L.R. 1121.

*Purchase in joint names—both parties contribute to purchase money*

9–58 DELETE THE FIRST SENTENCE AND N.44 AND REPLACE BY: The House of Lords considered in *Stack v Dowden*<sup>44</sup> and the Supreme Court considered in *Jones v Kernott*<sup>44a</sup> the case where a property is acquired by an unmarried couple as a home and registered in joint names, but where there is no express declaration of trust.

<sup>11a</sup> *Clarke v Meadus* [2010] EWHC 3117 (Ch); [2010] All E.R. (D) 08 (Dec).

<sup>44</sup> [2007] UKHL 17; [2007] 2 A.C. 432.

<sup>44a</sup> [2011] UKSC 53; [2011] 3 W.L.R. 1121.

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NOTE 45. DELETE AND REPLACE BY: *Stack v Dowden*, above, at [56], per Lady Hale, and at [109] *per* Lord Neuberger; Lord Hoffmann agreed with Lady Hale and Lords Hope and Walker did not expressly address this issue; *Jones v Kernott*, above, at [15], [51], [60] and [68]. This is consistent with the views of Lord Upjohn in *Pettitt v Pettitt* [1970] A.C. 777 at 813-814, HL.

NOTE 46. DELETE AND REPLACE BY: *Stack v Dowden*, above, at [56] and [68].

NOTE 47. DELETE THE SECOND SENTENCE AND REPLACE BY: See *Stack v Dowden*, above, at [58]. AT THE END ADD: For an application of the principles of common intention constructive trusts to a claim concerning the acquisition of shares, see *Webster v Webster* [2008] EWHC 31 (Ch); [2009] 1 F.L.R. 1240. Where shareholders purchase property in the name of a company, the resulting trust analysis is likely to apply: *Rakunas v Scenic Associates Ltd* [2008] BCSC 444; (2008–09) 11 I.T.E.L.R. 31.

AFTER THE TEXT TO N.47 ADD: In this context a challenge to the presumption of a beneficial joint tenancy is not to be lightly embarked upon, in part because the decision to buy a house or flat in which to live together is a strong indication of an emotional and economic commitment to a joint enterprise, and in part because of the practical difficulty of taking an account of financial contributions over the potentially lengthy duration of the relationship.<sup>47a</sup>

NOTE 48. DELETE THE FIRST SENTENCE AND REPLACE BY: *Stack v Dowden*, above, at [68] and [69]. AT THE END ADD: By contrast in *Jones v Kernott*, above, the presumption of beneficial joint tenancy applied at the time of purchase but was displaced by subsequent events which had the effect of varying the beneficial shares to a 90%–10% split.

DELETE THE LAST THREE SENTENCES AND REPLACE BY: The presumption of beneficial joint tenancy, rather than presumption of resulting trust by reference to contributions to the purchase price, applies in all cases where a house or flat is bought in joint names for joint occupation by a married or unmarried couple who are both responsible for any mortgage.<sup>50a</sup> But in other contexts, there may still be scope for a presumption of resulting trust. And so

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<sup>47a</sup> *Jones v Kernott*, above, at [19]–[22], *per* Lord Walker and Lady Hale. The reasons given explain why the presumption is not to be lightly departed from but not why a presumption of beneficial joint tenancy arises in joint names cases as distinct from single names cases.

<sup>50a</sup> *Jones v Kernott*, above, at [25].

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where a purchase in the commercial, as opposed to the domestic consumer, context is concerned, the principles in *Stack v Dowden*<sup>50b</sup> and *Jones v Kernott*<sup>50c</sup> do not apply and there is therefore no initial presumption that the beneficial ownership of property follows the legal ownership. Lord Neuberger has said that, “it would not be right to apply the reasoning in *Stack* to ... a case ... where the parties primarily purchased the property as an investment for rental income and capital appreciation, even where their relationship is a familial one”.<sup>50d</sup> It has therefore now been established that there remains scope for the application of the resulting trust approach in certain cases, and that it has not been completely emasculated by the common intention principles laid down in *Stack v Dowden* and *Jones v Kernott*.

*Quantification where resulting trust analysis applies*

**9–60** NOTE 61. ADD: *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695 at [24].

*Mortgage payments*

**9–61** NOTE 71. AT THE END ADD: It is the incurring of the obligation to make payments to the mortgagee which leads to the analysis that the money borrowed is treated as a contribution to the purchase price. A third party who undertakes to the mortgagor to discharge his borrowing does not take by resulting trust, although he may acquire an interest by virtue of a common intention constructive trust: *Samad v Thompson* [2008] EWHC 2809 (Ch); [2008] All E.R. (D) 165 Nov at [122]; *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB); [2010] All E.R. (D) 314 (Jul) at [100]–[116].

NOTE 72. AT THE END ADD: The view that payments by someone other than a mortgagee should be treated as contributions to the purchase price for the purpose of a purchase money resulting trust was rejected in *Barrett v Barrett* [2008] EWHC 1633 (Ch); [2008] B.P.I.R. 817 at [7], where it was said that no support for it could be derived from the speech of Lord Walker in *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432. In a case where property is purchased in the name of a person who raises the purchase money by mortgage for which he is liable, save for a deposit which is contributed by another who acquires by way of resulting trust a share in the property corresponding to the proportion which the deposit bears to the

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<sup>50b</sup> Above.

<sup>50c</sup> Above.

<sup>50d</sup> *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695 at [17].

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purchase money, and the parties contribute to the mortgage instalments and the redemption of the mortgage in amounts which do not correspond to their beneficial shares, principles of equitable accounting (see § 9–54) apply in relation to those contributions: *Close Invoice Finance Ltd v Abaowa*, above, at [118]–[122].

**Trusts founded on a common intention***The general principle*

**9–66** NOTE 88. AT THE END ADD: Gardner and Davidson (2007) 123 L.Q.R. 13; Etherton (2008) 67 C.L.J. 265; Gardner (2008) 124 L.Q.R. 422; Hopkins (2009) 125 L.Q.R. 310.

DELETE THE THIRD SENTENCE AND N.89 AND REPLACE BY: The requisite common intention may be shown by virtue of an express agreement between the parties<sup>89</sup> or by inference.<sup>89a</sup> An inferred intention is in the case of each party the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party.<sup>89b</sup> If the requisite common intention cannot be inferred in this way, the existence of a common intention that beneficial ownership is to be shared, as distinct from the determination of the proportionate shares of the parties, cannot be imputed to the parties on the basis of what the parties would have intended had they addressed the issue of beneficial ownership.<sup>89c</sup>

NOTE 90. AT THE END ADD: Where the common intention is based upon an agreement between the parties, and that agreement follows upon an innocent misrepresentation by one of them, the starting point is to consider what would be the position in equity if an application were made to rescind the agreement upon which the constructive trust was said to be founded.

<sup>89</sup> *Lloyds Bank plc v Rosset* [1991] 1 A.C. 107, HL.

<sup>89a</sup> *Jones v Kernott* [2011] UKSC 53; [2011] 3 W.L.R. 1121 at [31], [51] and [64]. This was the view of the majority, namely Lord Walker and Lady Hale with whom Lord Collins agreed, who sought to resolve apparent ambiguities in *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432, e.g. at [60].

<sup>89b</sup> *Jones v Kernott*, above, at [51], citing *Gissing v Gissing* [1971] A.C. 886 at 906, HL. For conduct which is relevant to the inference of common intention, see *Stack v Dowden*, above, at [69], quoted in § 9–71.

<sup>89c</sup> *Jones v Kernott*, above, at [31] and [64]. Lord Walker, Lady Hale and Lord Collins took a broader view of what might be inferred, see at [34] and [65], than did Lord Kerr and Lord Wilson, see at [67], [70]–[77] and [89], who considered that imputation had a significant role, at least as regards the determination of the proportionate shares of the parties.

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Where rescission would have been refused, it will be an unusual case in which the misrepresentation will be held to have prevented the creation of a common intention constructive trust: *Hameed v Qayyum* [2009] EWCA Civ 352; [2009] 2 F.L.R. 962 at [41].

*Common intention from initial discussions*

- 9–67** AT THE END OF THE TEXT ADD: It is, however, necessary that it is possible to discern precisely who the beneficiaries of the trust are intended to be.<sup>97a</sup>

*Common intention inferred from conduct*

- 9–69** NOTE 10. ADD: And see *Jones v Kernott* [2011] UKSC 53; [2011] 3 W.L.R. 1121.

*The detriment*

- 9–70** NOTE 16. AT THE END ADD: But there is no requirement that, in a case where the parties have reached an express agreement as to the shares each will hold in the property, the agreement should also prescribe what it is that the claimant has to do: *Parris v Williams* [2008] EWCA Civ 257; [2009] 1 P. & C.R. 169 at [36]–[44].

NOTE 17. AT THE END ADD: *Thomson v Humphrey* [2009] EWHC 3576 (Ch); [2010] Fam. Law 351 at [95].

*Relevant factors where property held in joint names*

- 9–71** NOTE 22. AT THE END OF THE FIRST SENTENCE ADD: applied *Jones v Kernott* [2011] UKSC 53; [2011] 3 W.L.R. 1121 at [51]. AT THE END ADD: For a case where it was not shown that the beneficial ownership did not follow the legal ownership in such a case, and where there was accordingly a beneficial joint tenancy, see *Edwards v Edwards* [2008] All E.R. (D) 79 (Mar).

*Express agreement as to shares*

- 9–72** NOTE 26. AT THE END ADD: *Bindra v Chopra* [2009] EWCA Civ 203; (2008–09) 11 I.T.E.L.R. 975.

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<sup>97a</sup> *Tackaberry v Hollis* [2007] EWHC 2633 (Ch); [2008] W.T.L.R. 279.

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NOTE 27. AT THE END ADD: In *Samad v Thompson* [2008] EWHC 2809 (Ch); [2008] All E.R. (D) 165 Nov, the claimant was also awarded the entire beneficial interest in the property on the basis of an express agreement. See *Levi v Levi* [2008] 2 P. & C.R. D2 at [56], relying on the text in this paragraph.

AT THE END OF THE TEXT ADD: Evidence of matters postdating the acquisition of the property is unlikely to assist in determining whether there was an express agreement at the outset that each party should have a defined share and should be viewed with caution.<sup>27a</sup>

*Quantifying the shares where no express agreement*

- 9–73** AT THE END OF THE FOURTH SENTENCE ADD NEW N.29a: *Fowler v Barron* [2008] EWCA Civ 377; (2008–09) 11 I.T.E.L.R. 198 at [56].

NOTE 37. IN THE FIRST SENTENCE ADD: *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695 at [24].

*Property in joint names*

- 9–74** NOTE 41. AT THE END ADD: *Edwards v Edwards* [2008] All E.R. (D) 79 (Mar).

*Joint tenancy or tenancy in common*

- 9–76** NOTE 46. AT THE END ADD: *HSBC Bank Plc v Dyche* [2009] EWHC 2954 (Ch); [2010] B.P.I.R. 138 at [27].

*Acquiring a share after the time of purchase*

- 9–77** NOTE 50. AT THE END ADD: Where there is a change in common intention after the date of acquisition of the property, it is necessary to analyse whether there has been a disposition of a beneficial interest, or the enlargement of the extent of an indeterminate existing beneficial interest: *Chan Chui Mee v Mak Cho Chui* [2008] HKCFI 810; [2009] 1 H.K.L.R.D. 343 at [38]. This may be important in determining the effect of the change of common intention on any third parties with whom a beneficial owner has dealt.

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<sup>27a</sup> See *Holman v Howes* [2007] EWCA Civ 877; (2008–09) 10 I.T.E.L.R. 492 at [30]–[31].

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NOTE 50. AT THE END ADD: In *Jones v Kernott* [2011] UKSC 53; [2011] 3 W.L.R. 1121, however, such an intention was inferred.

AT THE END OF THE TEXT ADD: In the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition.<sup>54a</sup> Nevertheless, such an intention may be inferred, as where one party departs and acquires alternative accommodation and the party remaining in the property pays all the outgoings thereafter.<sup>54b</sup>

**Relationship with the doctrine of proprietary estoppel**

**9–79** NOTE 57. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), §§ 12–016 *et seq.*

*Alignment with the common intention principle*

**9–80** NOTE 66. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 30.45 to 30.49. ADD: *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776 at [20]; Etherton [2009] Conv. 104.

*The need for a separate doctrine*

**9–81** NOTE 69. AT THE END ADD: But in such a case of agreement, especially in a commercial transaction, there must be certainty as to the interest that is to be acquired for the principles of constructive trusts or of proprietary estoppel to arise: *Herbert v Doyle* [2010] EWCA Civ 1095; [2010] All E.R. (D) 126 (Oct) at [56]–[57].

AT THE END OF THE TEXT ADD: In *Thorner v Major*, Lord Scott of Foscote suggested the following distinction:<sup>78a</sup>

<sup>54a</sup> *James v Thomas* [2007] EWCA Civ 1212; [2008] 1 F.L.R. 1598 at [24], *per* Sir John Chadwick; *Mirza v Mirza* [2009] EWHC 3 (Ch); [2009] 2 F.L.R. 115; *Williams v Lawrence* [2011] EWHC 2001 (Ch); [2011] W.T.L.R. 1455. The question to be asked is whether the person who acted to his detriment must have done so in the belief that he was acquiring an interest in the property: *Morris v Morris* [2008] EWCA Civ 257; [2008] Fam. Law 521 at [25]–[26] (where such a case was described, at [20], as a “rare bird”).

<sup>54b</sup> *Jones v Kernott* [2011] UKSC 53; [2011] 3 W.L.R. 1121.

<sup>78a</sup> [2009] UKHL 18; [2009] 1 W.L.R. 776 at [20]. See § 7–23A.

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“For my part I would prefer to keep proprietary estoppel and constructive trust as distinct and separate remedies, to confine proprietary estoppel to cases where the representation, whether express or implied, on which the claimant has acted is unconditional and to address the cases where the representations are of future benefits, and subject to qualification on account of unforeseen future events, via the principles of remedial constructive trusts.”

**Other jurisdictions**

- 9–82** NOTE 79. AT THE END ADD: See now *Kerr v Babanow* [2011] SCC 10 at [12]–[29], holding that the common intention approach no longer has a useful role to play, in Canada, in resolving property and financial disputes in domestic cases.

**Improvements to property**

- 9–83** NOTE 86. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), §§ 12–016 *et seq.*

AT THE END OF TEXT ADD: It also applies in the case of engaged couples.<sup>90a</sup>

**Joint venture arrangements**

- 9–84** NOTE 92. AT THE END ADD: *Cobbe v Yeoman’s Row Management Ltd* [2006] EWCA Civ 1139; [2006] 1 W.L.R. 2964 was reversed on appeal, *sub nom. Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 W.L.R. 1752, on which see below in the text to 9–84 (online supplement). AT THE END OF THE SECOND SENTENCE ADD: *Button v Phelps* [2006] EWHC 53 (Ch); [2006] All E.R. (D) 33 (Feb); *Baynes Clarke v Corless* [2010] EWCA Civ 338; [2010] W.T.L.R. 751; *White City Tennis Club Ltd v John Alexander’s Clubs Pty Ltd* [2010] HCA 19; (2010–11) 13 I.T.E.L.R. 85 at [64]–[74]. AT THE END OF THE NOTE ADD: For a case where a claimant failed to invoke the equity, where an acquisition agreement was entered into which precluded a claim based on an alleged prior understanding, see *Benedetti v Sawaris* [2009] EWHC 1330 (Ch); [2009] All E.R. (D) 281 (Jun) at [504]–[526].

AT THE END OF THE TEXT ADD: It has been said that when such a constructive trust does arise, “[the defendant’s] possession of the property is coloured from the first by the trust and

<sup>90a</sup> Law Reform (Miscellaneous Provisions) Act 1970, s.2(1). In *Dibble v Pfluger* [2010] EWCA Civ 1005; [2011] 1 F.L.R. 659, at first instance, this provision “did not cross the radar”. See § 9–25.

## TRUSTS ARISING ON THE ACQUISITION OF PROPERTY

confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust.”<sup>92a</sup> An equity may arise in relation to a proposed joint venture over property already owned by one party, but in such a case the arrangement or understanding must be sufficiently certain to be capable of specific performance and reliance on the principles discussed in this paragraph is not required.<sup>92b</sup> In *Yeoman’s Row Management Ltd v Cobbe*,<sup>92c</sup> the House of Lords refused to extend the scope of the principle, affirming that the unconscionable withdrawal from an inchoate agreement was not an adequate basis, by itself, to impose a constructive trust over property already owned by the defendant in order to give effect to the claimant’s disappointed expectation. Therefore, where the claimant’s acts were carried out in the knowledge that the defendant was not legally bound, no constructive trust arose to give effect to a *Pallant v Morgan* equity.<sup>92d</sup> In some cases, the claim may be framed as a claim based both on a common intention constructive trust and on the principle set out in this paragraph.<sup>92e</sup> The principles set out in this paragraph have long been seen to be analogous to those concerning proprietary estoppel.<sup>92f</sup> Following the decision of the House of Lords in *Yeoman’s Row Management Ltd v Cobbe*,<sup>92g</sup> they should perhaps be viewed as assimilated. In considering whether a constructive trust should be imposed it is relevant for the court to take into account the impact of the imposition of such a trust on third parties, and it may be appropriate for a third party adversely affected by the remedy sought to be joined as a party.<sup>92h</sup>

<sup>92a</sup> *Paragon Finance plc v D.B. Thakerar & Co.* [1999] 1 All E.R. 400 at 408–409, per Millett L.J.

<sup>92b</sup> *London and Regional Investments Ltd v TBI Ltd* [2002] EWCA Civ 355; [2002] All E.R. (D) 360 (Mar) at [48]; *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2004] EWHC 2547 (Ch); [2005] 2 P. & C.R. 105 at [225], [230] (affirmed at [2005] EWCA Civ 1355; [2006] 1 P. & C.R. D55).

<sup>92c</sup> [2008] UKHL 55; [2008] 1 W.L.R. 1752 at [36].

<sup>92d</sup> *Yeoman’s Row Management Ltd v Cobbe*, above, at [36]. The claimant was, however, awarded a quantum meruit in respect of the money and services he had provided.

<sup>92e</sup> As in *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2005] EWCA Civ 1355; [2006] 1 P. & C.R. D55 at [24], where the claim failed on the facts, on both bases.

<sup>92f</sup> *Holiday Inns Inc v Broadhead* (1974) 232 E.G. 951; *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch. 372, CA. See §§ 9–79 to 9–81.

<sup>92g</sup> Above, at [78].

<sup>92h</sup> *White City Tennis Club Ltd v John Alexander’s Clubs Pty Ltd*, above, at [126]–[138].

## TRUSTS ARISING ON THE ACQUISITION OF PROPERTY

**5. JOINT BANK ACCOUNTS****Joint bank accounts**

*One source of payments into the account*

**9–86** NOTE 94. AT THE END ADD: *Sillett v Meek* [2007] EWHC 1169 (Ch); (2008–09) 10 I.T.E.L.R. 617; *Northall v Northall* [2010] EWHC 1448 (Ch) at [8].

NOTE 96. AT THE END ADD: This presumption is to be abolished when the Equality Act 2010 comes into force. See § 9–03A (online supplement).

**9–87** AT THE END OF THE TEXT ADD: Bank documents signed by the parties may, after an assessment of the totality of the evidence, be strong evidence of a party’s intention when considering whether the presumptions of resulting trust and advancement are rebutted, but should not be assigned presumptive value in themselves.<sup>6a</sup>

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<sup>6a</sup> *Saylor v Madsen Estate* (2005) 261 D.L.R. (4th) 597 at [27], Ont CA (affirmed [2007] SCC 18; [2007] 1 S.C.R. 838).