HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 17

on appeal from: [2005] EWCA Civ 857

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Stack (Appellant)
v.
Dowden (Respondent)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Neuberger of Abbotsbury

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LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond, and for the reasons she gives I too would dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. As my noble and learned friend Baroness Hale of Richmond whose speech I have had the privilege of reading in draft indicates, this case is about the property rights of a cohabiting couple in a house which they occupied together as their home until the breakdown of their relationship. They have an obvious interest in the determination of their respective property rights in such a valuable asset. But the issue between them is a matter of general public interest too. It has become an increasingly pressing social problem, as house prices rise and more and more people are living together without getting married or entering into a civil partnership. The situation is complicated by the fact that there is no single, or paradigm, set of circumstances. The only feature which these cases have in common is that the problem has not been solved by legislation. The legislation which enables the court to reallocate beneficial interests in the home and other assets following a divorce does not apply to cohabiting couples. Otherwise the

circumstances which define relationships between cohabiting couples and their property interests are infinitely various.

3. The key to simplifying the law in this area lies in the identification of the correct starting point. Each case will, of course, turn on its own facts. But law can, and should, provide the right framework. Traditionally, English law has always distinguished between legal ownership in land and its beneficial ownership. The trusts under which the land is held will determine the extent of each party's beneficial ownership. Where the parties have dealt with each other at arms length it makes sense to start from the position that there is a resulting trust according to how much each party contributed. Then there is the question whether the trust is truly a constructive trust. This may be helpful in their case but in others may seem to be a distinctly academic exercise, as my noble and learned friend Lord Walker of Gestingthorpe points out. But cohabiting couples are in a different kind of relationship. The place where they live together is their home. Living together is an exercise in give and take, mutual co-operation and compromise. Who pays for what in regard to the home has to be seen in the wider context of their overall relationship. A more practical, down-to-earth, fact-based approach is called for in their case. The framework which the law provides should be simple, and it should be accessible.

4. The cases can be broken down into those where there is a single legal ownership and those where there is joint legal ownership. There must be consistency of approach between these two cases a point to which my noble and learned friend Lord Neuberger of Abbotsbury has drawn our attention. I think that consistency is to be found by deciding where the onus lies if a party wishes to show that the beneficial ownership is different from the legal ownership. I agree with Baroness Hale that this is achieved by taking sole beneficial ownership as the starting point in the first case and by taking joint beneficial ownership as the starting point in the other. In this context joint beneficial ownership means that the shares are presumed to be divided between the beneficial owners equally. So in a case of sole legal ownership the onus is on the party who wishes to show that he has any beneficial interest at all, and if so what that interest is. In a case of joint legal ownership it is on the party who wishes to show that the beneficial interests are divided other than equally.

5. The advantage of this approach is that everyone will know where they stand with regard to the property when they enter into their relationship. Parties are, of course, free to enter into whatever bargain

they wish and, so long as it is clearly expressed and can be proved, the court will give effect to it. But for the rest the state of the legal title will determine the right starting point. The onus is then on the party who contends that the beneficial interests are divided between them otherwise than as the title shows to demonstrate this on the facts.

6. It is worth noting how the solution which Baroness Hale proposes fits in with how the problem would be addressed in Scotland: had the dwelling which the parties purchased in joint names in 1993 been situated in, say, Eyemouth – a few miles north of Berwick-upon-Tweed. The social problems under which cohabiting couples live together in England and Wales are, in general, no different from those that exist in Scotland. Can it be said that the problem would be solved in much the same way both north and south of the border? I think that it can. The law of property in Scotland is, of course, different and so also are Scots family law and the Scots law of obligations. But in the case of cohabiting couples the facts would be examined from a similar starting point.

7. Scots family law does not provide the answer to how the value of the home of a cohabiting couple is to be divided between them when their relationship terminates. Section 27(3) of the Family Law (Scotland) Act 2006 excludes a residence used by cohabitants as the sole or main residence in which they live (or lived) together from the general rule which that section lays down that, subject to any agreement between them to the contrary, money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes or any property acquired out of such money is to be treated as belonging to each cohabitant in equal shares. So the solution in their case must, in the first instance, be found in Scots property law. Except in cases where it can be shown that a title was held in trust although it is ex facie absolute, Scots property law does not distinguish between the legal and the beneficial interests in heritable property.

8. Where the title to a dwelling house is taken in one name only, the presumption is that there is sole ownership in the named proprietor. Where it is taken in joint names those named are common owners and, if the grant does not indicate otherwise, there is a presumption of equality of shares: Kenneth G C Reid, *The Law of Property in Scotland* (1996), para 22. The rights that are thus divided from the outset between those named in the title in the Land Register are rights of ownership. There are no intervening equitable interests. The presumption that the common owners are entitled to share the value of the property equally is

however capable of being displaced by evidence to the contrary. The analysis now moves from the law of property to the law of obligations. This opens the door to evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement during their relationship: *Galloway v Galloway*, 1929 SC 160; *Wissenbruch v Wissenbruch*, 1961 SC 340; *Denvir v Denvir*, 1969 SLT 301. Proof of these matters has been made easier by the abolition of the requirement of proof by writ or oath by section 11 of the Requirements of Writing (Scotland) Act 1995. But cases where this exercise is attempted are rare, in view of the weight that is attached to the state of the title as evidence of the beneficial ownership of the property.

9. More recently resort has been had to restitutionary remedies. In *McKenzie v Nutter*, 2007 SLT (Sh Ct) 17 the title was taken in joint names. The intention of the cohabiting couple was that they would live together as a couple in the property, and that they would both sell their own separate houses and apply the proceeds towards the purchase of their new home. In the event only one party contributed the proceeds of his house towards its purchase and paid the costs associated with maintaining and improving the property. The other party continued to reside in her own house, which due to her bad faith she did not sell. She then insisted on a division and sale of the property. Following the state of the title, the expectation was that when the property was sold the proceeds would be paid to the parties equally. But an order was made that the party who had contributed everything towards its purchase and upkeep was to be entitled to recover the other party's share of the proceeds. As Sheriff Principal Lockhart explained in his judgment, this was on the ground that she had been unjustly enriched because the condition on which the enrichment was given, due to her bad faith, did not materialise.

10. The law of unjust enrichment has also been invoked where the title was taken in the name of one of the co-habitants only and they subsequently separated. It was held that the other co-habitant was entitled to the return of sums which he contributed to the purchase of the house and its refurbishment while the parties were living there: *Satchwell v McIntosh*, 2006 SLT (Sh Ct) 117. The problems which these very unusual cases create are for the most part problems of fact. The law that is to be applied, now that the former restrictions on the mode of proof have been abolished, is relatively uncomplicated.

11. In a case such as this, where the parties had already been living together for about 18 years and had four children when 114 Chatsworth Road was purchased in joint names and payments on the mortgage secured on that property were in effect contributed to by each of them equally, there would have been much to be said for adhering to the presumption of English law that the beneficial interests were divided between them equally. But I do not think that it is possible to ignore the fact that the contributions which they made to the purchase of that property were not equal. The relative extent of those contributions provides the best guide as to where their beneficial interests lay, in the absence of compelling evidence that by the end of their relationship they did indeed intend to share the beneficial interests equally. The evidence does not go that far. On the contrary, while they pooled their resources in the running of the household, in larger matters they maintained their financial independence from each other throughout their relationship.

12. The result might have been different if greater weight could have been given to the inclusion in the transfer of the standard-form receipt clause. But English property law does not permit this, for the reasons explained in *Mortgage Corporation v Shaire* [2001] Ch 743, 753. I think that indirect contributions, such as making improvements which added significant value to the property, or a complete pooling of resources in both time and money so that it did not matter who paid for what during their relationship, ought to be taken into account as well as financial contributions made directly towards the purchase of the property. I would endorse Chadwick LJ's view in *Oxley v Hiscock* [2005] Fam 211, para 69 that regard should be had to the whole course of dealing between them in relation to the property. But the evidence in this case shows that there never was a stage when both parties intended that their beneficial interests in the property should be shared equally. Taking a broad view of the matter, therefore, I agree that the order that the Court of Appeal provides the fairest result that can be achieved in the circumstances.

13. For these reasons, and those given by Baroness Hale with which I am in full agreement, I would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

14. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. Having done so I have set aside as redundant most of the opinion which I had prepared. I cannot usefully add to, still less improve upon, her account of the human and social issues involved, the practicalities of registered conveyancing, and the particular (and in some ways unusual) facts that have led to this appeal reaching your Lordships' House. I am in full agreement with the observation in paragraph 68 of Lady Hale's opinion, which I take to be of central importance to her reasoning and conclusions, that in cases where a house or flat has been registered in the joint names of a married or cohabiting couple (but with no express declaration of trust) there will be a considerable burden on whichever of them asserts that their beneficial interests are unequal, and do not follow the law.

15. I am not sure that I can usefully add anything at all to Lady Hale's opinion. But it may be worth saying something, as a sort of extended footnote, about the theoretical underpinning of this area of the law, and its development since those issues were considered by this House in *Pettitt v Pettitt* [1970] AC 777, *Gissing v Gissing* [1971] AC 886 and *Lloyds Bank v Rosset* [1991] 1 AC 107. Those cases shared three features not present in this case: the dispute was between a husband (or his secured creditor) and a wife; the property in question was in single legal ownership; and the matter relied on by the non-owner claimant was no more than relatively trivial work and expenditure on the property. This last feature made them (as Lord MacDermott LCJ said of the first two in *McFarlane v McFarlane* [1972] N1 59, 66) "not such as to facilitate or encourage a comprehensive statement of this vexed branch of the law."

16. Until the end of the 1960s most of the reported cases are concerned with disputes between married couples, and many of them focus on the issue of whether section 17 of the Married Women's Property Act 1882 was purely procedural, or gave the court a discretion to vary the parties' beneficial interests to accord with the court's view of what was fair. The controversy is well illustrated by *Bedson v Bedson* [1965] 2 QB 666, in which Russell LJ differed from Lord Denning MR. That section 17 is only procedural, and does not confer any wide discretion, was finally and unanimously settled by this House in *Pettitt v*

Pettitt [1970] AC 777. The House was also unanimous in the view that the actual disposal of the appeal (absent a wide discretion under section 17) presented few difficulties. It was almost unanimous in rejecting any general doctrine of "family assets" and in the view that (at least as between husband and wife) the presumption of advancement was no longer appropriate for determining property disputes.

17. There was however little else on which the House agreed, either in *Pettitt v Pettitt* or in *Gissing v Gissing*. Revisiting these cases with hindsight derived from a further thirty-five years or so of reported decisions, we can discern that of all the questions to be asked about "common intention" trusts as they emerge from *Pettitt v Pettitt* and *Gissing v Gissing*, the most crucial is whether the court must find a real bargain between the parties, or whether it can (in the absence of any sufficient evidence as to their real intentions) infer or impute a bargain.

18. In seeking to answer that question we must, I think, focus on the two speeches of Lord Diplock, since these (and especially his later speech in *Gissing v Gissing*) have been hugely influential in the later development of the law. In *Pettitt v Pettitt* [1970] AC 777 Lord Diplock (at p 822E) saw the court's task as being to ascertain the "common intention" of the parties. He saw this as a task to be carried out, not by reference to the old presumptions of advancement and resulting trust, but by examining the facts and imputing an intention to the parties. He saw this as a "familiar legal technique," comparable to finding an implied term in a contract. Lord Diplock used the word "impute" (in various parts of speech) at least eight times in the crucial passage between pp 822H and 825E.

19. *Pettitt v Pettitt* was decided in April 1969. It was followed by *Gissing v Gissing* [1971] AC 886, decided in July 1970. Three of the Appellate Committee—Lord Reid, Lord Morris of Borth-y-Gest and Lord Diplock—had sat on *Pettitt v Pettitt*. In his speech Lord Diplock acknowledged (at p 904E-F) that he had been in a minority in *Pettitt v Pettitt* and that "I must now accept the majority decision that, put in this form at any rate, this is not the law." But then having in *Pettitt v Pettitt* dismissed the resulting trust as old-fashioned and inappropriate, in *Gissing v Gissing* Lord Diplock apparently equated it (at p 905B-C) to a constructive trust:

> "A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between

> these three classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

20. Lord Diplock then proceeded to explain the circumstances in which the Court would find a "resulting, implied or constructive trust", and in particular when the Court would "infer [the parties'] common intention from their conduct" ([1971] AC 886 at p 906B). The very important passage which follows (pp 906B-910A) uses the word "infer" (in various parts of speech) at least 23 times. But for the substitution of the word "infer" for "impute" the substance of the reasoning is, it seems to me, essentially the same (although worked out in a good deal more detail) as Lord Diplock's reasoning in *Pettitt v Pettitt*, when he was in the minority.

21. Since then Lord Diplock's speech in *Gissing v Gissing* has dominated this area of the law. It was seized on with particular enthusiasm by Lord Denning MR (see for instance his observations in *Eves v Eves* [1975] 1 WLR 1338, 1341: "Lord Diplock brought it into the world and we have nourished it"). Other judges have been less enthusiastic, being oppressed by the "air of unreality about the whole exercise" (Griffiths LJ in *Bernard v Josephs* [1982] Ch 391, 404). The whole problem is very helpfully discussed in chapter 10 of Gray & Gray, *Elements of Land Law*, 4th ed (2005), especially (as to the lack of reality of the bargain requirement) paras 10.92 to 10.99. Your Lordships may think that only a judge of Lord Diplock's stature could have achieved such a remarkable reversal of the tidal flow of authority as has followed on his speech in *Gissing v Gissing*. But it might have been better for the long-term development of the law if this House's rejection of "imputation" in *Pettitt v Pettitt* had been openly departed from (under the statement as to judicial precedent made by the Lord Chancellor in 1966) rather than being circumvented by the rather ambiguous (and perhaps deliberately ambiguous) language of "inference."

22. In *Pettitt* [1970] AC 777 there was a clear majority as to the need for an actual bargain, however imprecisely expressed: see Lord Morris

of Borth-y-Gest at 804E-G, Lord Hodson at 810E-F and Lord Upjohn at 817G. Only Lord Reid, as I understand his speech (at 795D and 796D) showed some sympathy for Lord Diplock's views on "imputation." In *Gissing* [1971] AC 886 Lord Reid's opinion was again inconclusive, as I understand it but, paradoxically, Lord Reid (at 897F-G) seems to have found "imputation" a more readily acceptable solution than "inference" (which is the recurring theme of Lord Diplock's speech). Lord Morris (at 898C) and Viscount Dilhorne (at 900E-F) considered that the Court could not construct a bargain for the parties if they had not made one. Lord Pearson (at 902G-H), like Lord Reid, favoured imputation, apparently equating it with inference.

23. Lord Diplock's insouciant approach to legal taxonomy in the passage which I have quoted above has attracted a good deal of attention from legal scholars, but relatively little judicial comment. In *Gissing* itself Lord Reid (at 896F) Lord Morris (at 898B) and Viscount Dilhorne (at 901A) simply repeated the formula which appears in section 53(2) of the Law of Property Act 1925, "resulting, implied or constructive trust." Lord Pearson (at 902B) specified a resulting trust as the correct basis. (so had Lord Upjohn in *Pettitt* [1970] AC 777, with great emphasis and at some length, at 813G-815G; he had also referred to estoppel, but only to exclude it). In *Pettitt* Lord Reid had made a passing reference to unjust enrichment (at 795G-H), but found it unhelpful. The law of Scotland has developed the principle of unjust enrichment in this area, as my noble and learned friend Lord Hope of Craighead has explained. So have some Commonwealth jurisdictions. But neither side urged it on your Lordships, and I think it would be unwise for the House to make such a significant change of course in advance of the Law Commission's proposals. A significant judicial comment on the importance of taxonomy in this area was made by Peter Gibson LJ in *Drake v Whipp* [1996] 1 FLR 826, a case which was discussed at length by Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, 242-245. But before coming to that I must refer to the third of the trio of cases in this House, *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

24. In *Lloyds Bank plc v Rosset* [1991] 1 AC 107 the Appellate Committee (no doubt conscious of the widely differing views expressed in *Pettitt* and *Gissing*) concurred in a single speech by the presiding Law Lord, Lord Bridge of Harwich. The wife claimed (against a bank which was her separated husband's secured creditor) an interest in the matrimonial home (which had been purchased ten years after the marriage and was held in the husband's sole name). She relied on a common understanding or intention arising out of her own efforts in arranging for extensive renovation works and herself carrying out some

redecoration (the judge's findings on this are at [1991] 1 AC 107, 129F-131B). At first instance she succeeded on the issue of beneficial interest but failed on a conveyancing issue. She won her appeal ([1989] Ch 350; Purchas and Nicholls LJJ, Mustill LJ dissenting on a conveyancing issue). The House of Lords allowed the bank's appeal on the short ground expressed by Lord Bridge (at 131F):

> "The judge's view that some of this work was work 'upon which she could not reasonably have been expected to embark unless she was to have an interest in the house' seems to me, with respect, quite untenable."

25. Lord Bridge then asked himself whether it was worthwhile to add any general remarks by way of illumination of the law. He limited himself to drawing attention to one "critical distinction." If (at 132E-G) there is to be a finding of an actual "agreement, arrangement, or understanding" between the parties it must

> "be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been."

Lord Bridge continued (132H-133B):

> "In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as to the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

In concurring in this passage the House was unanimously, if unostentiously, agreeing that a "common intention" trust could be inferred even when there was no evidence of an actual agreement. Apart from two bare references to "a constructive trust or a proprietary estoppel" (at 132G and 133F) Lord Bridge did not refer to the elaborate arguments of counsel (at 110G-125C) addressed to him as to the varieties and interaction of these two concepts.

26. Lord Bridge's extreme doubt "whether anything less will do" was certainly consistent with many first-instance and Court of Appeal decisions, but I respectfully doubt whether it took full account of the views (conflicting though they were) expressed in *Gissing* (see especially Lord Reid [1971] AC 886 at 896G – 897B and Lord Diplock at 909 D-H). It has attracted some trenchant criticism from scholars as potentially productive of injustice (see Gray & Gray, op cit, paras 10.132 to 10.137, the last paragraph being headed "A More Optimistic Future"). Whether or not Lord Bridge's observation was justified in 1990, in my opinion 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.

27. Any new legislation is likely to give the Court new statutory discretions comparable to (but probably less far-reaching than) those exercisable under the Matrimonial Causes Act 1973 (as amended). The law would then become more flexible (and so better able to avoid injustice) but at the price of uncertainty and a possible increase in the volume of litigation costs falling on parties with limited resources. But already there is a good deal of uncertainty and the possibility of high litigation costs, as this regrettable case shows. Lady Hale's opinion points the way to making the outcome of this type of case more predictable, so that parties can be advised with more confidence as to appropriate terms of settlement. Of course there will always remain the risk that ill-feeling between a separated couple will cloud the view of one or both of them as to where their best interests lie.

28. On the assumption that there is not to be some dramatic extension of the law of unjust enrichment, it is reasonably clear that the correct approach to this area lies not in contract law but in looking for a beneficial interest under a trust of some sort (or, possibly, an equity of some sort under a form of proprietary estoppel—but I shall put that on one side for a moment). Whether the trust should be regarded as a resulting trust or a constructive trust may seem a distinctly academic

enquiry, especially as there is so much debate as to the true nature of a resulting trust (for a recent summary of the debate see Underhill and Hayton, *Law Relating to Trusts and Trustees*, 17th ed (2007) paras 3.3 to 3.5). But it is of some importance in understanding the significance of direct or indirect contributions to the acquisition of the property in question.

29. In *Drake v Whipp* [1996] 1 FLR 826, 827 (a cohabitation case in which the property was in the man's sole name, though both had made direct contributions both to the purchase of a barn and to its expensive conversion into a home) Peter Gibson LJ observed:

> "A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention."

30. *Drake v Whipp* was an odd case because Mrs Drake's argument was that there was no common intention and that the judge should simply apply the presumption as to a resulting trust by reference to the barn's initial purchase costs (of which she paid just over 40%) and not by reference to the total costs of purchase and conversion (of which her share was just under 20%). But the judge found, at p 829, that there was a common intention:

> "To purchase the property and carry out a conversion in accordance with plans earlier approved and that each should contribute, according to his or her ability, to the ultimate cost."

He treated this as giving rise to a constructive trust in the proportions of about 80% for Mr Whipp and 20% for Mrs Drake.

31. Peter Gibson LJ (with whom Hirst LJ and Forbes J agreed) said, at p 830, that it would

> ". . . be artificial in the extreme to proceed to decide this appeal on the false footing that the parties' shares are to be determined in accordance with the law on resulting trusts."

On the facts of that case, applying the doctrine of a resulting trust in the way that Mrs Drake proposed would have been doubly artificial, as it would have unnaturally split the project into two elements, only one of which was to be taken into account in the resulting trust exercise; and it would have ignored the parties' actual common intention for the project as a whole. Their common intention, as found by the judge, was for beneficial ownership in shares corresponding to their overall contributions. In a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the names of one or two legal owners) the resulting trust should not in my opinion operate as a legal presumption, although it may (in an updated form which takes account of all significant contributions, direct or indirect, in cash or in kind) happen to be reflected in the parties' common intention.

32. I would (at the risk of confusion) add one qualification. The doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and a commercial partnership. The well-known Australian case of *Muschinski v Dodds* (1985) 160 CLR 583 is an example. The High Court of Australia differed in their reasoning, but I find the approach of Deane J persuasive:

> "That property was acquired, in pursuance of the consensual arrangement between the parties, to be held and developed in accordance with that arrangement. The contributions which each party is entitled to have repaid to her or him were made for, or in connexion with, its purchase or development. The collapse of the commercial venture and the failure of the personal relationship jointly combined to lead to a situation in which each party is entitled to insist upon realization of the asset, repayment of her or his contribution and distribution of any surplus."

However, Deane J described this as a constructive trust, and he had earlier (at p 612) treated a resulting trust as excluded by evidence of the parties' common purpose (building and running an arts and crafts centre), even though that purpose had failed. Professor Birks would

have treated this as a resulting trust (see Birks and Rose eds, Restitution and Equity Vol 1 (2000) pp 275-279). Other scholars disagree. *Drake v Whipp* [1996] 1 FLR 826 might have been analysed in this way so as to produce the same result, but only if the whole of each party's contribution had been taken into account in applying the resulting trust.

33. In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case. I agree with Lady Hale that this is, on its facts, an exceptional case.

34. In those cases (it is to be hoped, a diminishing number) in which such an examination is required the Court should in my opinion take a broad view of what contributions are to be taken into account. In (*Gissing v Gissing* [1971] AC 886, 909G, Lord Diplock referred to an adjustment of expenditure "referable to the acquisition of the house." "Referable" is a word of wide and uncertain meaning. It would not assist the development of the law to go back to the sort of difficulties that arose in connection with the doctrine of part performance, where the act of part performance relied on had to be "uniquely referable" to a contract of the sort alleged (see *Steadman v Steadman* [1976] AC 536). Now that almost all houses and flats are bought with mortgage finance, and the average period of ownership of a residence is a great deal shorter than the contractual term of the mortgage secured on it, the process of buying a house does very often continue, in a real sense, throughout the period of its ownership. The law should recognise that by taking a wide view of what is capable of counting as a contribution towards the acquisition of a residence, while remaining sceptical of the value of alleged improvements that are really insignificant, or elaborate arguments (suggestive of creative accounting) as to how the family finances were arranged.

35. That is in my view the way in which the law can be seen developing through a considerable number of decisions of the Court of Appeal, of which I would single out *Grant v Edwards* [1986] Ch 638 (before *Lloyds Bank plc v Rosset*) and then *Stokes v Anderson* [1991] 1 FLR 391, *Midland Bank plc v Cooke* [1995] 2 All ER 562 and *Oxley v Hiscock* [2005] Fam 211. In the last-mentioned case Chadwick LJ

summarised the law as follows (para 69, Lord Bridge's "second category" cases):

> "But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

36. That summary was directed at cases where there is a single legal owner. In relation to such cases the summary, with its wide reference to "the whole course of dealing between them in relation to the property", is in my opinion a correct statement of the law, subject to the qualifications in paras 61 ff of Lady Hale's opinion. I would only add that Chadwick LJ did not refer to contributions in kind in the form of manual labour on improvements, possibly because that was not an issue in that case. For reasons already mentioned, I would include contributions in kind by way of manual labour, provided that they are significant.

37. I add a brief comment as to proprietary estoppel. In paragraphs 70 and 71 of his judgment in *Oxley v Hiscock* Chadwick LJ considered the conceptual basis of the developing law in this area, and briefly discussed proprietary estoppel, a suggestion first put forward by Sir Nicolas Browne-Wilkinson V-C in *Grant v Edwards* [1986] Ch 638, 656. I have myself given some encouragement to this approach (*Yaxley v Gotts* [2000] Ch 162,177) but I have to say that I am now rather less enthusiastic about the notion that proprietary estoppel and "common interest" constructive trusts can or should be completely assimilated. Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the "true" owner. The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice (*Crabb v Arun District Council* [1976] Ch 179, 198), which may

sometimes lead to no more than a monetary award. A "common intention" constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests.

38. Your Lordships have in this case had the benefit of well-focused written and oral submissions from counsel, and helpful citation of relevant academic material. In addition to those mentioned by Lady Hale I have found a good deal of food for thought in Chapter 10 (the divisions of assets on the breakdown of intimate relationships) of Craig Rotherham, Proprietary Remedies in Context (2002).

39. For the reasons given by Lady Hale, to which the above reasons are merely a supplement, I would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

40. The issue before us is the effect of a conveyance into the joint names of a cohabiting couple, but without an explicit declaration of their respective beneficial interests, of a dwelling house which was to become their home. This is, so far as I am aware, the first time that this issue has come before the House, whether the couple be married or, as in this case, unmarried. The principles of law are the same, whether or not the couple are married, although the inferences to be drawn from their conduct may be different: *Bernard v Josephs* [1982] Ch 391, *per* Griffiths LJ at 402.

How does this problem come about?

41. It may be that, in practice, this is a temporary and transitional problem. It has come about because of developments over the last few decades which would not have been foreseen when the applicable principles and presumptions were first devised. The first development is, of course, the huge expansion in home ownership which has taken place since the Second World War and was given a further boost by the 'right to buy' legislation of the 1980s. Coupled with this has been continuing house price inflation, albeit with occasional interruptions such as

occurred at the end of the 1980s. This has meant that it is almost always more advantageous for someone who has contributed to the acquisition of the home to claim a share in its ownership rather than the return of the money contributed, even with interest.

42. Another development has been the recognition in the courts that, to put it at its lowest, the interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men. To put it at its highest, an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between husband and wife or cohabitant and cohabitant. This recognition developed in a series of cases between separating spouses, beginning with *In re Rogers' Question* [1948] 1 All ER 328, *Newgrosh v Newgrosh* (unreported) June 28, 1950, *Jones v Maynard* [1951] Ch 572 and *Rimmer v Rimmer* [1953] 1 QB 63. There was a period during which it was thought that the problem might be solved by resort to the power contained in section 17 of the Married Women's Property Act 1882, in disputes between husband and wife as to the title to or possession of property, to make such order "as it thinks fit". The high-water mark of this approach was *Hine v Hine* [1962] 1 WLR 1124, at 1127-8, in which Lord Denning MR held that this discretion "transcends all rights, legal or equitable". That section 17 conferred any discretion to interfere with established titles was firmly rejected by this House in *Pettitt v Pettitt* [1970] AC 777. Nevertheless, the opinions in that case and in *Gissing v Gissing* [1971] AC 886 contain vivid illustrations of how difficult it is to apply simple assumptions to the complicated, inter-dependent and often-changing arrangements made between married couples. As Lord Reid famously put it in *Gissing v Gissing*, at p 897A, "It cannot surely depend on who signs which cheques".

43. As between married couples, the problem has been addressed (if not solved) by the comprehensive redistributive powers in the Matrimonial Causes Act 1973, if the couple divorce, and in the Inheritance (Provision for Family and Dependants) Act 1975, if one of them dies. The question of who owns what takes second place to the statutory criteria and the approach to those criteria established in cases such as *White v White* [2001] 1 AC 596. The 1975 Act also gives some more limited help to the survivor of an unmarried cohabiting couple. (Neither, of course, is of any assistance in third party challenges, for example from other relatives.)

44. *Inter vivos* disputes between unmarried cohabiting couples are still governed by the ordinary law. These disputes have become increasingly visible in recent years as more and more couples live together without marrying. The full picture has recently been painted by the Law Commission in *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* (2006) Consultation Paper No 179, Part 2, and its *Overview* paper, paras 2.3 to 2.11. For example, the 2001 Census recorded over 10 million married couples in England and Wales, with over 7.5 million dependent children; but it also recorded over two million cohabiting couples, with over one and a quarter million children dependent upon them. This was a 67% increase in cohabitation over the previous 10 years and a doubling of the numbers of such households with dependent children. The Government Actuaries Department predicts that the proportion of couples cohabiting will continue to grow, from the present one in six of all couples to one in four by 2031.

45. Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage – in 2003, 78.7% of spouses gave identical addresses before marriage, and the figures are even higher for second marriages. So many couples are cohabiting with a view to marriage at some later date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000–27, University of Essex. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves "as good as married" anyway (Law Commission, *op cit*, Part 2, para 2.45). There is evidence of a wide-spread myth of the "common law marriage" in which unmarried couples acquire the same rights as married after a period of cohabitation (A Barlow *et al*, "Just a Piece of Paper? Marriage and Cohabitation", in A Park *et al* (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001), pp 29-57). There is also evidence that "the legal implications of marriage are a long way down the list of most couples' considerations when deciding whether to marry" (Law Commission, *op cit*, Part 5, para 5.10).

46. The history of attempts at law reform is another illustration of the complexity of the problem. Under item 1 of its 8th Programme of Law Reform (2001, Law Com No 274), the Law Commission set out to review "the law as it relates to the property rights of those who share a home" (the Commission had in fact been working on the problem for some time). This therefore covered "a broad range of people, including friends and relatives who share a home as well as unmarried couples and married couples (other than on the breakdown of the marriage)". It commented that "It is widely accepted that the present law is unduly complex, arbitrary and uncertain in its application. It is ill-suited to determining the property rights of those who, because of the informal nature of their relationship, may not have considered their respective entitlements". In 2002, however, the Commission published *Sharing Homes, A Discussion Paper* (2002, Law Com No 278). Unlike most Law Commission publications, this did not contain even provisional, let alone final, proposals for reform. Its principal conclusion was that "It is quite simply not possible to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered" (para 1.31). While this conclusion is not surprising, its importance for us is that the evolution of the law of property to take account of changing social and economic circumstances will have to come from the courts rather than Parliament.

47. It may be otherwise with the law of personal relationships. The Law Commission's 9th Programme of Law Reform (2005, Law Com No 293) announced, at Part 3, para 306, a project focussing "on the financial hardship suffered by cohabitants or their children on the termination of the relationship by breakdown or death". Thus it was considering whether defined relationships might give rise to discretionary remedies to make specific capital or income provision on separation or death. Provisional proposals, not unlike those which have been enacted in the Family Law (Scotland) Act 2006, were made in Consultation Paper No 179 (referred to in para 44 above) and the Commission intends to publish its final report by August 2007. As the Commission undertook this project at the invitation of the Government, there may be a real chance that its proposals will be implemented. But, unlike most Law Commission reports, this one will not contain a draft Bill. Implementation will therefore depend, not only upon whether its proposals find favour with Government, but also on whether the resources can be found to translate them into workable legislative form.

48. It is fair to assume, therefore, that the questions with which the courts are confronted in these cases will continue to be with us for some time to come. Nor will the Commission's proposals provide a solution to the precise question which arises in this case – the effect of a conveyance into joint names without express declaration of the beneficial interests. However, there is some reason to hope that, just as this problem may have arisen because of changes in conveyancing practice over recent decades, it may eventually be resolved in the same way.

49. In the olden days, before registration of title on certain events, including a conveyance on sale, became compulsory all over England and Wales, conveyances of unregistered land into joint names would in practice declare the purchasers' beneficial as well as their legal interests. No-one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel: see *Goodman v Gallant* [1986] Fam 106. That case also establishes that severance of a beneficial joint tenancy results in a beneficial tenancy in common in equal shares. Lord Denning's attempt in *Hine v Hine* [1962] 1 WLR 1124, to use section 17 of the Married Women's Property Act 1882 to interfere even with express declarations of trust was firmly rejected by this House in *Pettitt v Pettitt* [1970] AC 777; his suggestion, in *Bedson v Bedson* [1965] 2 QB 666, that severance might not automatically lead to a tenancy in common in equal shares was rightly rejected in *Goodman v Gallant*. The effect of such a conveyance is clear, irrespective of why the property was conveyed into joint names and of the parties' later dealings in relation to it.

50. The question with which we are concerned has become apparent with the spread of registration of title. The formalities required for the transfer of registered land were designed to meet the concerns of the Land Registry rather than the parties. The Land Registry is not concerned with the equities. It is concerned with whether the registered proprietor or proprietors can give a good title to a later transferee. This is entirely consistent with the simplification of conveyancing in the 1925 property legislation, which was designed to allow the legal owners of land to pass a good title to bona fide purchasers for value without notice of the equities existing behind the legal title. But it meant that the form of transfer prescribed by the Land Registry did not require, or even give an obvious opportunity to, the transferees to state their beneficial interests as well as their legal title. When this house was bought in 1993, all that the form required was all that the Land Registry needed to know. This was whether the survivor of joint proprietors was able to give a valid receipt for the capital moneys received on sale (see Form 19(JP)

prescribed under rules 98, 109 or 115 of the Land Registration Rules 1925 (SR & O 1925/1093)) The version of this form in use from 1995 to 1998 did not even require this; indeed, it did not require execution by the transferee(s) at all but only by the transferor(s).

51. The argument that declaring that the survivor "can give a valid receipt for capital money arising on a disposition of the land" in itself amounts to an express declaration of a beneficial joint tenancy was rightly rejected by the Court of Appeal in *Harwood v Harwood* [1991] 2 FLR 274 and again in *Huntingford v Hobbs* [1993] 1 FLR 736; see also *Mortgage Corporation v Shaire* [2001] Ch 743. However appealing the proposition might at first sight appear, choosing "can" rather than "cannot" on the form is consistent with other intentions. The transferees may hold on trust for a third person or they may intend that, while the survivor can give a good title to a third party without appointing a new trustee, the capital moneys received should be subject to different trusts. Whether the declaration (one way or the other) is some indication of what the parties did intend is another matter, to which I must return.

52. The Land Registry form has since changed. Form TR1, in use from 1 April 1998, provides a box for the transferees to declare whether they are to hold the property on trust for themselves as joint tenants, or on trust for themselves as tenants in common in equal shares, or on some other trusts which are inserted on the form. If this is invariably complied with, the problem confronting us here will eventually disappear. Unfortunately, however, the transfer will be valid whether or not this part of the form is completed. The form itself states that the transferees are only required to execute it "if the transfer contains Transferee's covenants or declarations or contains an application by the Transferee (eg for a restriction)". So there may still be transfers of registered land into joint names in which there is no express declaration of the beneficial interests. However desirable such a declaration may be, it is unrealistic, in the consumer context, to expect that it will be executed independently of the forms required to acquire the legal estate. Not only do solicitors and licensed conveyancers compete on price, but more and more people are emboldened to do their own conveyancing. The Land Registry form which has been prescribed since 1998 is to be applauded. If its completion and execution by or on behalf of all joint proprietors were mandatory, the problem we now face would disappear. However, the form might then include an option for those who deliberately preferred not to commit themselves as to the beneficial interests at the outset and to rely on the principles discussed below.

The applicable legal principles

53. I say all this, partly to urge the Land Registry further to review its practice, but mainly to illuminate the factual context in which transfers such as the one with which we are concerned were executed. In what circumstances should it be expected that, independently of the information required by the Land Registry forms, joint transferees would execute a declaration of trust? Is it when they intend that the beneficial interests should be the same as the legal interests or when they intend that they should be different?

54. At first blush, the answer appears obvious. It should only be expected that joint transferees would have spelt out their beneficial interests when they intended them to be different from their legal interests. Otherwise, it should be assumed that equity follows the law and that the beneficial interests reflect the legal interests in the property. I do not think that this proposition is controversial, even in old fashioned unregistered conveyancing. It has even more force in registered conveyancing in the consumer context.

55. Of course, it is something of an over-simplification. All joint legal owners must hold the land on trust (before the Trusts of Land and Appointment of Trustees Act 1996, there was a debate about whether or not this was always a trust for sale, but that is another matter). Section 53(1)(b) of the Law of Property Act 1925 requires that a declaration of trust respecting any land or any interest therein be manifested and proved by signed writing; but section 53(2) provides that this "does not affect the creation or operation of resulting, implied or constructive trusts". The question is, therefore, what are the trusts to be deduced in the circumstances?

56. Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

57. While there is no case in this House establishing this proposition in the consumer context, this is "Situation A" referred to by Lord

Brightman in *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] 1 AC 549, at 559:

> "The lessees at the inception of the lease hold the beneficial interest therein as joint tenants in equity. This will be the case if there are no circumstances which dictate to the contrary."

The issue in that case was whether there were only three quite narrowly defined situations in which the contrary could be found or whether there were other circumstances which could lead to a contrary conclusion. Their Lordships first observed that it was improbable that joint tenancy in equity was intended where joint tenants in law held commercial premises for their separate business purposes. This is a reminder that the parties may not intend survivorship even if they do intend that their shares shall be equal. In many commercial contexts, and no doubt some domestic ones, it will be highly unlikely that the parties intend survivorship with its tontine "winner takes all" effect. Their Lordships went on to point out that there was no fundamental distinction between buying a lease at a premium with a token rent and taking a lease at a rack rent with no premium. In the latter case the rent is equivalent to the purchase money. This is a reminder that property is often acquired over time, so that payment of mortgage instalments is the equivalent of payment of the purchase price. Finally, their Lordships identified, at p 561, the features of the case before them which appeared to them "to point unmistakably towards a tenancy in common in equity, and furthermore towards a tenancy in common in unequal shares". Amongst these were not only that the parties had paid the refundable deposit, stamp duty, survey fees, rent and service charges in unequal shares, but also that those shares were proportionate to the actual square footage which each of them occupied.

58. The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a prime facie case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated, at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.

59. The question is, how, if at all, is the contrary to be proved? Is the starting point the presumption of resulting trust, under which shares are held in proportion to the parties' financial contributions to the acquisition of the property, unless the contributor or contributors can be shown to have had a contrary intention? Or is it that the contrary can be proved by looking at all the relevant circumstances in order to discern the parties' common intention?

60. The presumption of resulting trust is not a rule of law. According to Lord Diplock in *Pettitt v Pettitt* [1970] AC 777, at 823H, the equitable presumptions of intention are "no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of any evidence to the contrary". Equity, being concerned with commercial realities, presumed against gifts and other windfalls (such as survivorship). But even equity was prepared to presume a gift where the recipient was the provider's wife or child. These days, the importance to be attached to who paid for what in a domestic context may be very different from its importance in other contexts or long ago. As K Gray and S F Gray, in *Elements of Land Law*, 4th edition 2005, point out at p 864, para 10.21:

> "In recent decades a new pragmatism has become apparent in the law of trusts. English courts have eventually conceded that the classical theory of resulting trusts, with its fixation on intentions presumed to have been formulated contemporaneously with the acquisition of title, has substantially broken down. . . . Simultaneously the balance of emphasis in the law of trusts has transferred from crude factors of money contribution (which are pre-eminent in the resulting trust) towards more subtle factors of intentional bargain (which are the foundational premise of the constructive trust). . . . But the undoubted consequence is that the doctrine of resulting trust has conceded much of its field of application to the constructive trust, which is nowadays fast becoming the primary phenomenon in the area of implied trusts."

There is no need for me to rehearse all the developments in the case law since *Pettitt v Pettitt* and *Gissing v Gissing*, discussed over more than 70 pages following the quoted passage, by Chadwick LJ in *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, and most importantly by my noble and learned friend, Lord Walker of Gestingthorpe in his opinion, which make good that proposition. The law has indeed moved on in

response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.

61. *Oxley v Hiscock* was, of course, a different case from this. The property had been conveyed into the sole name of one of the cohabitants. The claimant had first to surmount the hurdle of showing that she had any beneficial interest at all, before showing exactly what that interest was. The first could readily be inferred from the fact that each party had made some kind of financial contribution towards the purchase. As to the second, Chadwick LJ said this, at para 69:

> " . . . in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that *each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property*. And in that context, the whole course of dealing between them in relation to the property includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home." (emphasis supplied)

Oxley v Hiscock has been hailed by Gray and Gray as "an important breakthrough" (*op cit,* p 931, para 10.138). The passage quoted is very similar to the view of the Law Commission in *Sharing Homes* (2002, *op cit*, para 4.27) on the quantification of beneficial entitlement:

> "If the question really is one of the parties' 'common intention', we believe that there is much to be said for adopting what has been called a 'holistic approach' to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all

> conduct which throws light on the question what shares were intended."

That may be the preferable way of expressing what is essentially the same thought, for two reasons. First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* [1970] AC 777 without even the fig leaf of section 17 of the 1882 Act.

62. Furthermore, although the parties' intentions may change over the course of time, producing what my noble and learned friend, Lord Hoffmann, referred to in the course of argument as an "ambulatory" constructive trust, at any one time their interests must be the same for all purposes. They cannot at one and the same time intend, for example, a joint tenancy with survivorship should one of them die while they are still together, a tenancy in common in equal shares should they separate on amicable terms after the children have grown up, and a tenancy in common in unequal shares should they separate on acrimonious terms while the children are still with them.

63. We are not in this case concerned with the first hurdle. There is undoubtedly an argument for saying, as did the Law Commission in *Sharing Homes* (2002, *op cit*, para 4.23) that the observations, which were strictly *obiter dicta*, of Lord Bridge of Harwich in *Lloyd's Bank plc v Rosset* [1991] 1 AC 107 have set that hurdle rather too high in certain respects. But that does not concern us now. It is common ground that a conveyance into joint names is sufficient, at least in the vast majority of cases, to surmount the first hurdle. The question is whether, that hurdle surmounted, the approach to quantification should be the same.

64. The majority of cases reported since *Pettitt* and *Gissing* have concerned homes conveyed into the name of one party only and it is in that context that the more flexible approach to quantification identified by Chadwick LJ in *Oxley v Hiscock* has emerged: see, in particular, *Grant v Edwards* [1986] Ch 638, described by Chadwick LJ as "an important turning point" and referred to with "obvious approval" in *Lloyds Bank plc v Rosset* [1991] 1 AC 107, *Stokes v Anderson* [1991] 1

FLR 391, *Midland Bank plc v Cooke* [1995] 4 All ER 562, and *Drake v Whipp* [1996] 1 FLR 826.

65. Curiously, it is in the context of homes conveyed into joint names but without an express declaration of trust that the courts have sometimes reverted to the strict application of the principles of the resulting trust: see *Walker v Hall* [1984] FLR 126 and two cases decided by the same court on the same day, *Springette v Defoe* [1992] 2 FLR 388 and *Huntingford v Hobbs* [1993] 1 FLR 736; but cf *Crossley v Crossley* [2005] EWCA Civ 1581, [2006] 2 FLR 813. However, Chadwick LJ commented in *Oxley v Hiscock* [2005] Fam 211, at 235:

> "47. It is, I think, important to an understanding of the reasoning in the judgments in *Springette v Defoe* that each member of this court seems to have thought that when Lord Bridge referred, in *Lloyds Bank plc v Rosset* [1991] 1 AC 107, 132F, to the need to base a 'finding of an agreement or arrangement to share in this sense' on 'evidence of express discussions between the partners' he was addressing the secondary, or consequential, question – 'what was the common intention of the parties as to the extent of their respective beneficial interests' – rather than the primary, or threshold, question – 'was there a common intention that each should have a beneficial interest in the property?' . . .
>
> 48. For the reasons which I have sought to explain, I think that the better view is that, in the passage in *Rosset's* case [1991] 1 AC 107, 132F, to which both Dillon LJ and Steyn LJ referred in *Springette v Defoe* [see [1992] 2 FLR 388, at 393E-F and 395B, agreed with by Sir Christopher Slade at 397G] Lord Bridge was addressing only the primary question – 'was there a common intention that each should have a beneficial interest in the property?' He was not addressing the secondary question – 'what was the common intention of the parties as to the extent of their respective beneficial interests?' As this court had pointed out in *Grant v Edwards* and *Stokes v Anderson,* the court may well have to supply the answer to that secondary question by inference from their subsequent conduct. . . "

In the case before us, he observed at para 24:

> " . . . I have not altered my view that, properly understood, the authorities before (and after) *Springette v Defoe* do not support the proposition that, absent discussion between the parties as to the *extent* of their respective beneficial interests at the time of purchase, it must follow that the presumption of resulting trust is not displaced and the property is necessarily held in beneficial shares proportionate to the respective contributions to the purchase price."

With these passages I entirely agree. The approach to quantification in cases where the home is conveyed into joint names should certainly be no stricter than the approach to quantification in cases where it has been conveyed into the name of one only. To the extent that *Walker v Hall*, *Springette v Defoe* and *Huntingford v Hobbs* hold otherwise, they should not be followed.

66. However, Chadwick LJ went on to say at para 26, that:

> ". . . there is no reason in principle why the approach to the second question – 'what is the extent of the parties' respective beneficial interests in the property? – should be different, in a case where the property is registered in the joint names of cohabitees, from what it would be if the property were registered in the sole name of one of them; although the fact that it has been registered in joint names is, plainly, to be taken into account when having regard 'to the whole course of dealing between them in relation to the property'."

But the questions in a joint names case are not simply "what is the extent of the parties' beneficial interests?" but "did the parties intend their beneficial interests to be different from their legal interests?" and "if they did, in what way and to what extent?" There are differences between sole and joint names cases when trying to divine the common intentions or understanding between the parties. I know of no case in which a sole legal owner (there being no declaration of trust) has been held to hold the property on a beneficial joint tenancy. But a court may well hold that joint legal owners (there being no declaration of trust) are also beneficial joint tenants. Another difference is that it will almost always have been a conscious decision to put the house into joint names.

Even if the parties have not executed the transfer, they will usually, if not invariably, have executed the contract which precedes it. Committing oneself to spend large sums of money on a place to live is not normally done by accident or without giving it a moment's thought.

67. This is not to say that the parties invariably have a full understanding of the legal effects of their choice: there is recent empirical evidence from a small scale qualitative study to confirm that they do not (see G Douglas, J Pearce and H Woodward, "Dealing with Property Issues on Cohabitation Breakdown" [2007] Fam Law 36). But that is so whether or not there is an express declaration of trust and no-one thinks that such a declaration can be overturned, except in cases of fraud or mistake: see para 49 above. Nor do they always have a completely free choice in the matter. Mortgagees used to insist upon the home being put in the name of the person whom they assumed would be the main breadwinner. Nowadays, they tend to think that it is in their best interests that the home be jointly owned and both parties assume joint and several liability for the mortgage. (It is, of course, a matter of indifference to the mortgagees where the beneficial interests lie.) Here again, this factor does not invalidate the parties' choice if there is an express declaration of trust, nor should it automatically count against it where there is none.

68. The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual. Nor may disputes be confined to the parties themselves. People with an interest in the deceased's estate may well wish to assert that he had a beneficial tenancy in common. It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names using the old forms are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase.

69. In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to

divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

70. This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.

The facts of this case

71. It is difficult to give a full account of the relevant facts in this case because of the way in which the judge approached it. He directed himself by citing paragraphs 61 to 67 from *Oxley v Hiscock* [2005] Fam 211, dealing with "Developments since *Midland Bank plc v Cooke*", but not by citing the crucial "Summary" in paragraphs 68 and 69. This means that he failed to draw a distinction between the first and second questions. He concluded his self directions thus:

> "The real question for the Court in [*Midland Bank plc v Cooke*] was to determine what proportions the parties must have assumed to have intended for their beneficial ownership. I also think it is necessary, as I think was pressed on me by one of the parties, that I should approach the latter more broadly, *looking at the parties' entire course of conduct together*." (emphasis supplied)

He then proceeded to do just that, focussing upon their relationship, rather than upon the factors which were relevant to ascertaining their intentions with respect to the beneficial ownership of their home.

72. The parties' relationship began in 1975, when Mr Stack was aged 19 and Ms Dowden was aged 17. The judge found it more likely than not that they were living together in rented accommodation since then. In fact, the evidence did no more than support a conclusion that they became an "item" then, and later spent four months in the United States together, and that Mr Stack often stayed at Ms Dowden's home. Mr Stack accepted that they did not start cohabiting permanently until 1983. Even after that, Mr Stack retained his father's address for some purposes.

73. In 1983, a house in Purves Road London NW10 was bought and conveyed into Ms Dowden's sole name. It had belonged to someone she called "Uncle Sidney" who had expressed the wish before he died that she be given the opportunity to buy it. The executors therefore offered it to her at what they considered a favourable price of £30,000. The correspondence refers at one point to seeing her and Mr Stack together. The judge commented that "this certainly suggests that there was a partnership as man and mistress between the parties at that time".

74. The price of the Purves Road property was £30,000. £22,000 was raised by way of mortgage, of course in Ms Dowden's name. This was an interest only loan backed by an endowment policy. It was common ground that Ms Dowden made all the payments due under the mortgage and that she paid "all the bills for utilities, council tax and the like". When the property was bought she was in regular employment as a trainee electrical engineer with the London Electricity Board. She has remained in employment with the Board or its successor throughout, working extremely hard and eventually rising to become the most highly qualified woman electrical engineer in the London area. In 1983, Mr Stack was "self-employed" as a builder/decorator, claiming no benefits

but making no tax returns and keeping no records. Ms Dowden's evidence was that he did not want to take responsibility for the mortgage.

75. The down payment of £8000 came from a Halifax Building Society account, also in Ms Dowden's sole name. The judge, however, found that this was "joint savings" although he could not find how much Mr Stack had contributed to it. In the Court of Appeal it was said that there was "no evidence" to support this finding. In fact there was some: Mr Stack's evidence was that he had from time to time paid some of his own money into that account. This was vehemently denied by Ms Dowden. Even if the judge preferred his evidence to hers, it is something of a leap from this to characterise the account as "joint savings".

76. After the house was bought, four children were born to the parties. The first was born in 1986, and although Mr Stack was named as the father, he gave his father's address, which was the address to which most of his post and bank account statements were sent. The judge made little of this fact, but it might be thought to indicate something about the quality of the parties' relationship, at least until their first child was born. Three more children were born, in 1987, 1989 and 1991. Ms Dowden returned to work after each maternity leave and the children were looked after by nannies or child minders. Mr Stack began regular employment with Hammersmith and Fulham London Borough Council in 1987 and has remained with them ever since. Ms Dowden's earnings, however, began to outstrip his and were eventually £42,000 per annum to his £24,000.

77. A great deal of work was done on the Purves Road property, some of it redecoration and repairs, some of it alterations and improvements. There is no doubt that the parties worked on this together, although there was a dispute as to exactly how much work each did and the judge found that Mr Stack probably did "more than Ms Dowden gave him credit for" and eventually concluded that "he had been responsible for making most of these improvements". But he could not put a figure on their value to the sale price.

78. The Purves Road property was sold in May 1993 for £90,000, three times the figure for which it had been bought ten years before. After deduction of the mortgage redemption figure of £22,674, solicitor's disbursements and agent's fees, Ms Dowden received a

cheque for £66,613. The judge asked himself whether, if the relationship had broken down at that point, she could have said that the Purves Road property was all hers. He concluded that she could not, given the length and nature of their relationship, given the work Mr Stack had done on the property, and "given that although their finances were kept separately there had been contributions to their living between the parties". This finding was overturned in the Court of Appeal, on the basis that the judge had not addressed the first question – whether Mr Stack had any beneficial interest at all. The only matter which could be relied upon as evidence of a common intention at the time of the purchase would be a contribution to the £8000 down payment. Because, in the Court's view, there was no evidence of such a contribution, it was wrong to treat Mr Stack as having any interest in the proceeds of sale of the Purves Road property.

79. That conclusion is open to the criticism that there was some evidence of such a contribution, albeit rather slim and unsatisfactory, and that would have been sufficient to answer the first question in Mr Stack's favour. The second question – what was the extent of that beneficial interest - would have been much harder to answer and the judge made no attempt to do so. But he would certainly have taken into account the improvements made to the property in trying to quantify the interest.

80. In 1993, another property, in Chatsworth Road London NW2, was bought as the family home. This time it was conveyed into the joint names of the parties, using the then current land registry form. This contained no declaration of trust, but did contain a declaration that the survivor could give a good receipt for capital moneys arising from a disposition of all or part of the property.

81. The price of Chatsworth Road was £190,000. £128,813 (the balance of the price after deduction of the mortgage loan plus stamp duty and legal fees) came from Ms Dowden's Halifax Building Society account. This already contained £57,179 in April 1993, to which were added the proceeds of sale of Purves Road. £65,025 was provided by a loan to both parties from Barclay's Bank, secured by a mortgage and two endowment policies, one in their joint names and the other in Ms Dowden's sole name. The mortgage interest and joint endowment policy premiums (eventually totalling £33,747) were paid by Mr Stack. As contemplated by the parties, the mortgage loan was repaid by a series of lump sum payments, beginning in 1994. It was agreed that Mr Stack contributed £27,000 and Ms Dowden £38,435 towards these capital

repayments. The utilities bills were all in Ms Dowden's name although Mr Stack claimed to have paid some of these. Improvements were also made, although not on the same scale as those to Purves Road. Throughout this time, they kept separate bank accounts and made a series of separate investments and savings. Ms Dowden paid the premiums on the life policy in her name, which she has retained.

82. The parties separated in October 2002. Mr Stack left the property and Ms Dowden remained there with the children. There were proceedings between them in the Inner London Family Proceedings Court under Part IV of the Family Law Act 1996. On 11 April 2003, Mr Stack gave various undertakings to stay away from the property and Ms Dowden undertook to pay up to £1000 per month to reimburse him the cost of alternative accommodation. That undertaking was to continue until 10 January 2004 and was not renewed on that date. The trial judge ordered that £8,100 be paid to Mr Stack before division of the proceeds of sale of the property in respect of this period and neither party has appealed against that. The trial judge also ordered that the sum of £900 per month from 6 October 2004 be paid to Mr Stack out of the net proceeds of sale. The only reason he gave was that the sale would be in Ms Dowden's hands.

83. Mr Stack's claim for an order for sale and equal division of the proceeds was tried over two days in the Central London County Court. On 6 October 2004, the judge ordered that the property be sold and the net proceeds of sale divided equally between the parties, as should the proceeds of the joint endowment policy. Throughout his judgment, there are numerous references to the "partnership" between the parties. He expressed his conclusion thus:

> "It seems to me, although the Defendant has been the bigger wage-earner over this very long association between the parties, they have both put their all into doing the best for themselves and their family as they could. In these circumstances after such a very long relationship a 50/50 share is . . . an appropriate division of the net proceeds of sale."

On the other hand, he held that all their other savings and investments, including an account in Ms Dowden's name with the Chelsea Building Society (opened in 2000 with the redundancy payment she received from London Electricity before being immediately re-employed with

one of its successors), represented "the ways where the parties have allowed their earnings and their savings to be separately divided", so that all should lie where they were.

84. Ms Dowden appealed. (Mr Stack was refused leave to cross-appeal in respect of the Chelsea Building Society account and so that issue cannot be pursued before us.) On 13 July 2005, the Court of Appeal allowed her appeal and ordered that the net proceeds of sale be divided 65% to 35% in her favour. A major issue had been the effect of the declaration as to the receipt for capital moneys in the transfer document. Following *Huntingford v Hobbs* [1993] 1 FLR 736, this could not be taken as an express declaration of trust. Nor could it be relied upon for the purpose of drawing an inference as to their intentions, unless the parties had understood its significance. If they had done, the inference that they intended a beneficial joint tenancy would have been "irresistible". With that I entirely agree. But in the court's view there was no evidence that they did. Without that, it was impossible to reach the conclusion that their shares should be equal. Ms Dowden was entitled to at least 65% of the proceeds of sale, and she had made it clear that she was not then seeking any greater share than that. The Court also allowed her appeal against the order that she pay Mr Stack £900 per month from 6 October 2004. Mr Stack appeals to this House and asks that we restore the orders of the trial judge.

85. The property was sold in November 2005, with net proceeds of £754,345. If the £8100 has to be deducted from that, the balance is £746,245. 50% amounts to £373,122.50. The extra 15% claimed by the appellant amounts to £111,936.75. This is a not inconsiderable sum, but the costs of pursuing the argument to this House will have been quite disproportionate.

Applying the law to the facts

86. The starting point is that it is for Ms Dowden to show that the common intention, when taking a conveyance of the house into their joint names or thereafter, was that they should hold the property otherwise than as beneficial joint tenants. Unfortunately, we lack precise findings on many of the factors relevant to answering that question, because the judge addressed himself to "looking at the parties' entire course of conduct together". He looked at their relationship rather than the matters which were particularly relevant to their intentions about this property. He founded his conclusion on the length and nature of their

relationship, which he repeatedly referred to as a partnership, despite the fact that they had maintained separate finances throughout their time together. With the best will in the world, and acknowledging the problems of making more precise findings on many issues after this length of time, this is not an adequate answer to the question. It amounts to little more than saying that these people were in a relationship for twenty seven years and had four children together. During this time Mr Stack made unquantifiable indirect contributions to the acquisition and improvement of one house and quantifiable direct contributions to the acquisition of another. Both co-operated in looking after the home and bringing up their children.

87. In some, perhaps many, cases of real domestic partnership, there would be nothing to indicate that a contrary inference should be drawn. However, there are many factors to which Ms Dowden can point to indicate that these parties did have a different common intention. The first, of course, is that on any view she contributed far more to the acquisition of Chatsworth Road than did Mr Stack. There are many different ways of calculating this. The Court of Appeal rejected the judge's view that the Halifax account represented "joint savings", either at the time of the Purves Road purchase or at the time of the Chatsworth Road purchase. Hence they held that the whole of the purchase price, other than the mortgage loan, had been contributed by Ms Dowden. She had also contributed more to the capital repayment of that loan, although Mr Stack had made all the payments necessary to keep it going. It is not surprising that the Court of Appeal reached the conclusion that Ms Dowden was entitled to at least the 65% she claimed.

88. On the other hand, there was some evidence that Mr Stack had made payments into the Halifax account before the Purves Road purchase and that he had made payments thereafter which would have enabled Ms Dowden to save more of her income than would otherwise have been possible. This, together with his contributions towards the substantial improvements made to Purves Road, might suffice to give him some interest in the proceeds of sale, although quantifying that share would be very difficult. It might also suffice to give him some lesser interest in the accumulated Halifax account at the time when Chatsworth Road was bought. Again, quantifying that interest would be very difficult. There was certainly little if anything to support the conclusion that these were truly "joint" savings. But suppose that one apportions the Purves Road proceeds between them in shares of 2 to Ms Dowden and 1 to Mr Stack; the Halifax savings in shares of 3 to her and 1 to him; and shares the mortgage loan equally between them: this would yield total contributions to Chatsworth Road of roughly 64% to

36%. That calculation is, in my view, as generous to Mr Stack as it is possible to be.

89. The fact that it is possible to make two such different calculations on this sort of evidence indicates the pitfalls in an arithmetical approach to ascertaining the parties' intentions. The one thing that can clearly be said is that, when Chatsworth Road was bought, both parties knew that Ms Dowden had contributed far more to the cash paid towards it than had Mr Stack. Furthermore, although they planned that Mr Stack would pay the interest on the loan and premiums on the joint policy, they also planned to reduce the loan as quickly as they could. These are certainly factors which could, in context, support the inference of an intention to share otherwise than equally.

90. The context is supplied by the nature of the parties' conduct and attitudes towards their property and finances. This is not a case in which it can be said that the parties pooled their separate resources, even notionally, for the common good. The only things they ever had in their joint names were Chatsworth Road and the associated endowment policy. Everything else was kept strictly separate. Each made separate savings and investments most of which it was accepted were their own property. It might have been asked, "why then did they make an exception for Chatsworth Road?" This is the obvious question. The obvious answer, which Ms Dowden has never denied, was that this time it was indeed intended that Mr Stack should have some interest in the property. In the light of all the other evidence, it cannot be conclusive as to what that interest was.

91. There are other aspects to their financial relationship which tell against joint ownership. Chatsworth Road was, of course, to be a home for the parties and their four children. But they undertook separate responsibility for that part of the expenditure which each had agreed to pay. The only regular expenditure to which it is clear that Mr Stack committed himself was the interest and premiums on Chatsworth Road. All other regular commitments in both houses were undertaken by Ms Dowden. Had it been clear that he had undertaken to pay for consumables and child minding, it might have been possible to deduce some sort of commitment that each would do what they could. But Mr Stack's evidence did not even go as far as that.

92. This is, therefore, a very unusual case. There cannot be many unmarried couples who have lived together for as long as this, who have

had four children together, and whose affairs have been kept as rigidly separate as this couple's affairs were kept. This is all strongly indicative that they did not intend their shares, even in the property which was put into both their names, to be equal (still less that they intended a beneficial joint tenancy with the right of survivorship should one of them die before it was severed). Before the Court of Appeal, Ms Dowden contended for a 65% share and in my view she has made good her case for that.

93. There remains the question of the payment for Mr Stack's alternative accommodation. This matter is governed by the Trusts of Land and Appointment of Trustees Act 1996. Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation. Thus both these parties have a right of occupation. Section 13(1) gives the trustees the power to exclude or restrict that entitlement, but under section 13(2) this power must be exercised reasonably. The trustees also have power under section 13(3) to impose conditions upon the occupier. These include, under section 13(5), paying any outgoings or expenses in respect of the land and under section 13(6) paying compensation to a person whose right to occupy has been excluded or restricted. Under section 14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions. Under section 15(1), the matters to which the court must have regard in making its order include (a) the intentions of the person or person who created the trust, (b) the purposes for which the property subject to the trust is held, (c) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home, and (d) the interests of any secured creditor of any beneficiary. Under section 15(2), in a case such as this, the court must also have regard to the circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property.

94. These statutory powers replaced the old doctrines of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property. The criteria laid down in the statute should be applied, rather than in the cases decided under the old law, although the results may often be the same. In this case, the judge applied neither. The property had been bought as a home for the parties and their children. By October 2004, three of the children were still minors. Both parties had the responsibility of providing them with a home. Ms Dowden remained responsible for the upkeep and outgoings on the home until it was sold. Mr Stack had to provide himself with alternative

accommodation but had nothing to pay in respect of the upkeep of the family's home until he was able to realise his share in it upon sale. While, therefore, a case could be made for compensating him for his exclusion, it has to be borne in mind that he had agreed to go in the course of proceedings under the Family Law Act 1996. The reason given by the judge took no account, as he was required to do, of the statutory criteria. The fact that the house was to be sold as soon as possible, so that Mr Stack would not be kept out his money for long, was if anything a factor telling against the exercise of this discretion. I would therefore agree with the Court of Appeal on this point.

95. In the result, therefore, I would dismiss this appeal. But the route by which I, and as I understand it the majority of your Lordships, have arrived at that result is different, both in principle and on the facts, from that taken by the Court of Appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

96. I have had the great benefit of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Baroness Hale of Richmond.

97. I gratefully adopt the exposition of the facts of this case in paragraphs 71 to 85 of Baroness Hale's opinion. I shall first consider the extent of Mr Stack's ownership of the beneficial interest in 114 Chatsworth Road ("the house"), and then turn to whether Ms Dowden should have been ordered to pay him in respect of his exclusion from the house.

Beneficial ownership: some general points

98. Where freehold or leasehold property is acquired in the name of two parties, the effect of sections 1, 34, and 36 of the Law of Property Act 1925 is that they must be joint owners of the legal estate: they enjoy equal rights in respect of an undivided title, and survivorship applies. The rules relating to the ownership of the beneficial interest are much

less constrained. In general, the parties are free to agree what they want (and if they are joint owners, it is open to either to sever it). If there is a valid declaration of trust, then (subject to any statutory provisions to the contrary) that determines the beneficial ownership. If not, then, in the absence of agreement, the court has to decide the issue.

99. In that connection, the present type of case, where the parties were an unmarried cohabiting couple, whose relationship has ended, and both of whom claim to have contributed to the acquisition or value of the property, gives rise to particular difficulties, as can be seen from the analysis in paragraphs 15 to 26 of Lord Walker's opinion. This is not surprising. The context is lucidly explained in paragraphs 41 to 52 of Baroness Hale's opinion. Different judges may have different reactions to a particular case, and to the relative importance of, and the proper inferences to be drawn from, particular facts. The task of the judge is normally made no easier by bad feeling between the parties, conflicts of fact, the need to examine finances discussions and actions, the number and incommensurability of relevant factors, and the welter of Court of Appeal authority (not all of which is consistent in approach or result).

100. The room for confusion is reinforced by the fact that the outcome will normally differ from that in a similar but crucially different sort of case, namely where the parties were married. The Matrimonial Causes Act 1973 gives the court wide powers to redistribute assets on divorce. Unlike the Inheritance (Provision for Family and Dependants) Act 1975, the 1973 Act does not extend to unmarried cohabitants, even where (as here) the relationship has lasted longer and produced more children than the average marriage. Accordingly, in such cases, judges have to apply the law in accordance with principles developed by the courts.

101. The determination of the ownership of the beneficial interest in a property held in joint names primarily engages the law of contract, land and equity. The relevant principles in those areas of law have been established and applied over hundreds of years, and have had to be applied in all sorts of circumstances. While both the nature and the characteristics of the particular relationship must be taken into account when applying the principles, the court should be very careful before altering those principles when it comes to a particular type of relationship. After all, these principles are not static and develop as the needs and values of Society change. Thus, the presumption of advancement, as between man and wife, which was so important in the 18th and 19th centuries, has now become much weakened, although not quite to the point of disappearance.

102. However, that does not mean that a change in the principles should be easy or frequent. A change in the law, however sensible and just it seems, always carries a real risk of new and unforeseen uncertainties and unfairnesses. That is a particular danger when the change is effected by the court rather than the legislature, as the change is influenced by, indeed normally based on, the facts of a particular case, there is little room for public consultation, and there is no input from the democratically elected legislature.

103. In the present type of case, while the number of unmarried cohabitants has increased very substantially over the past fifty (and even more over the past twenty) years, the change has been one of degree, and does not, in my view, justify a departure from established legal principles. I agree with Griffiths LJ (see *Bernard v Josephs* [1982] Ch 391 at 402) that the applicable principles are the same whether the parties are married or not, although the nature of the relationship will bear on the inferences to be drawn from their discussions and actions.

104. The Law Commission has considered this topic in the excellent Discussion and Consultation Papers described by Baroness Hale in paragraphs 44 to 47 of her opinion. The fact that the Law Commission has characterised the present state of the law as "unduly complex, arbitrary and uncertain", does not, in my opinion, justify our changing it. The Discussion Paper refers to the impossibility of devising a scheme "which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered". This is a warning shot against the courts (as opposed to the legislature) refashioning the law. All the more so bearing in mind that, as Lord Walker says, the Law Commission may soon make specific proposals for change in this area.

105. In other words, the Law Commission's analysis may well justify the legislature changing the law in this field, but it does not support similar intervention by the courts, other than for the purpose of clarification and simplification. Similarly, the fact that the law of Scotland on this topic may differ from that of England and Wales, as explained by Lord Hope, does not justify the courts changing the law here (or indeed in Scotland), although it may well be another reason for changing and unifying the law on this topic throughout the United Kingdom

106. In my judgment, it is therefore inappropriate for the law when applied to cases of this sort to depart from the well-established

principles laid down over the years. It also seems to me that the law of resulting and constructive trusts is flexible enough to deal with problems such as those thrown up by cases such as this, and it would be a disservice to the important causes of certainty and consistency if we were to hold otherwise. I note that the Court of Appeal's recent decisions in this case and in *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 (both of which were rightly decided) produced an outcome which would be dictated by a resulting trust solution.

107. Accordingly, while the domestic context can give rise to very different factual considerations from the commercial context, I am unconvinced that this justifies a different approach in principle to the issue of the ownership of the beneficial interest in property held in joint names. In the absence of statutory provisions to the contrary, the same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship. In each type of case, one is concerned with the issue of the ownership of the beneficial interest in property held in the names of two people, who have contributed to its acquisition, retention or value.

108. It appears to me helpful for present purposes to consider the issue in a structured way. First, to consider how the beneficial interest is owned at the date of acquisition, which involves identifying the nature and effect of the relevant features of what transpired between the parties up to, and at, the date of acquisition of the property. Then to consider the position at the date of the hearing, which involves identifying the relevant features of what subsequently transpired between the parties, and deciding whether they justify a change in the way in which the beneficial ownership is held. As already explained, I believe that the proper approach to these highly fact-sensitive enquiries should be in accordance with established legal principles and, as far as is consistent with those principles, as simple as possible.

Beneficial ownership on acquisition: where there is no evidence

109. In the absence of any relevant evidence other than the fact that the property, whether a house or a flat, acquired as a home for the legal co-owners is in joint names, the beneficial ownership will also be joint, so that it is held in equal shares. This can be said to result from the maxims that equity follows the law and equality is equity. On a less technical, and some might say more practical, approach, it can also be

justified on the basis that any other solution would be arbitrary or capricious.

Beneficial ownership on acquisition: differential contributions

110. Where the only additional relevant evidence to the fact that the property has been acquired in joint names is the extent of each party's contribution to the purchase price, the beneficial ownership at the time of acquisition will be held, in my view, in the same proportions as the contributions to the purchase price. That is the resulting trust solution. The only realistic alternative in such a case would be to adhere to the joint ownership solution. There is an argument to support the view that equal shares should still be the rule in cohabitation cases, on the basis that it may be what many parties may expect if they purchase a home in joint names, even with different contributions. However, I consider that the resulting trust solution is correct in such circumstances.

111. It is the answer which equity has always favoured (save where the presumption of advancement, not relevant in the context of cohabitants, applied) both historically and more recently. Eyre CB described it as a "general proposition supported by all the cases" in a passage in *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, quoted with approval in *Pettitt v Pettitt* [1970] AC 777 at 814B-G by Lord Upjohn, whose views on this topic were in turn cited with approval by Lord Pearson in *Gissing v Gissing* [1971] AC 886 at 902G-H. Lord Brightman in *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] 1 AC 549 at 559G-H approved the view that a joint tenancy in equity is rebutted where the legal owners "have provided the purchase money in unequal shares". Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708A said that the circumstances in which "a resulting trust arises" included:

> "[W]here A … pays (wholly or in part) for the purchase of property which is vested … in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the … property is held … in shares proportionate to their contributions".

112. By contrast, while Lord Reid's suggestion in *Gissing* at 897B that the notion that equality is equity is no more than a "high-sounding brocard" may be a little extreme, the invocation of such a notion as

between cohabitants, who have contributed unequally to the acquisition of a home, appears to me to be inconsistent with principle. It is almost a resurrection of the "family assets" hypothesis disposed of in *Pettitt* – see at 795B, 809H-810H, and 816G-817H. It involves invoking a presumption of advancement between unmarried cohabitants, where such a presumption has never applied, and at a time when, as I have mentioned, the court is increasingly unenthusiastic about the presumption, even in relationships where it does apply.

113. There are also practical reasons for rejecting equality and supporting the resulting trust solution. The property may be bought in joint names for reasons which cast no light on the parties' intentions with regard to beneficial ownership. It may be the solicitor's decision or assumption, the lender's preference for the security of two borrowers, or the happenstance of how the initial contact with the solicitor was made. As the survey mentioned by Baroness Hale in paragraph 45 of her opinion indicates, parties in a loving relationship are often not anxious to discuss how they should divide the beneficial interest in the home they are about to buy. They would have to debate what should happen if their relationship broke down (the most likely circumstance, albeit not the only one, in which the question would arise). While in some cases they may assume equal ownership, in others they may not. In many cases the point may not even occur to them, and if it does, they may be happy to rely on the law to provide the answer if the need arises. If they are happy with an equal split at the beginning, one might expect them to say so. The fact that they do not do so may be more consistent with the view that they (or at any rate the bigger contributor) would not be happy with that outcome for the very reason that their contributions differed.

114. There is also an important point about consistency of approach with a case where the purchase of a home is in the name of one of the parties. As Baroness Hale observes, where there is no evidence of contributions, joint legal ownership is reflected in a presumption of joint beneficial ownership just as sole legal ownership is reflected in a presumption of sole beneficial ownership. Where there is evidence of the parties' respective contributions to the purchase price (and no other relevant evidence) and one of the parties has contributed X%, the fact that the purchase is in the sole name of the other does not prevent the former owning X% of the beneficial interest on a resulting trust basis. Indeed, it is because of the resulting trust presumption that such ownership arises. It seems to me that consistency suggests that the party who contributed X% of the purchase price should be entitled to X% (no more and no less) of the beneficial interest in the same way if he is a co-purchaser. The resulting trust presumption arises because it is assumed

that neither party intended a gift of any part of his own contribution to the other party. That would seem to me to apply to contributions irrespective of the name or names in which the property concerned is acquired and held, as a matter of both principle and logic.

115. It may be asked why the bigger contributor agreed to the property being taken in joint names, unless he intended joint beneficial ownership. There are four answers to that. The first is that the question sets out to justify what it assumes, namely that, in the absence of any discussion, the parties must have assumed an equal split. Secondly, if the other party was a contributor, he would often want to be a co-owner, and the only way real property can be held in law by two persons is as joint owners. Thirdly, the converse point can be made where a property is acquired in the name of one party: if the other party has contributed to the purchase, his absence from the title is not evidence that he was not intended to have an interest. (In this connection, it seems to me that, where a home is taken in the name of only one party, this is almost as likely to have been a conscious decision as where it is acquired in joint names: where both have contributed to the purchase, it is unlikely that either will have been unaware of the fact that the home was being acquired in the name of only one of them). Fourthly, there are the practical considerations to which I have already alluded.

116. Having said that, the fact that a property is taken in joint names is some evidence that both parties were intended to have some beneficial interest. In that connection, the facts of the present case are not without interest. The parties' previous home in Purves Road was acquired in Ms Dowden's name alone. On the face of it at least, Purves Road was acquired solely with money from Ms Dowden's account or borrowed by her alone (although a small amount may have come indirectly from Mr Stack), so it is not surprising that it was acquired in her sole name. When the house at Chatsworth Road was acquired, Mr Stack directly (and through liability for the mortgage) contributed to its purchase, and it is therefore unsurprising that his name was included on the title. However, for reasons already discussed, as he contributed far less to the purchase than Ms Dowden, it seems wrong to deduce from those bare facts that the parties intended that he should have 50% of the beneficial interest.

117. There are two other aspects of the resulting trust analysis which I should like to mention. First, there is the effect of liability under a mortgage. This will normally be a relevant, often a very important, factor, because, as Lord Walker points out, the overwhelming majority

of houses and flats are acquired with the assistance of secured borrowing. There is attraction in the notion that liability under a mortgage should be equivalent to a cash contribution. On that basis, if a property is acquired for £300,000, which is made up of one party's contribution of £100,000, and both parties taking on joint liability for a £200,000 mortgage, the beneficial interest would be two-thirds owned by the party who made the contribution, and one-third by the other. If one party then repays more of the mortgage advance, equitable accounting might be invoked to adjust the beneficial ownerships at least in a suitable case. Such an adjustment would be consistent with the resulting trust analysis, as repayments of mortgage capital may be seen as retrospective contributions towards the cost of acquisition, or as payments which increase the value of the equity of redemption.

118. However, there is an argument that taking on liability under a mortgage should not be equivalent to a cash payment. The cash contribution is effectively equity, whereas the mortgage liability arises in relation to a secured loan. If the value of the property in the example just given had fallen by 25% when it came to be sold, the party who made the cash contribution would lose £75,000 of his £100,000, whereas the other party would lose nothing (unless he would be liable to pay £25,000 to the former, which seems intuitively improbable).

119. In *Ulrich v Ulrich and Felton* [1968] 1 WLR 180, an engaged couple (who subsequently married) had bought a house, she paying one-sixth of the acquisition cost in cash, and he raising the balance by a mortgage in his name. In passages at 186 and 189 (approved in *Pettitt* at 816A), Lord Denning MR and Diplock LJ held it was wrong to treat a mortgage contribution as equivalent to a cash contribution.

120. Desirable though it is to give as much guidance as possible, this is not an appropriate case in which to express a view as to whether liability under a mortgage should be treated as the equivalent of a cash contribution for the purpose of assessing the shares in which the beneficial interest is held. Certainty, simplicity and first impression suggest a positive answer, perhaps particularly where a home is bought almost exclusively by means of a mortgage. More sophisticated economic and legal analysis may suggest otherwise, especially where the cash contributions are very different and, at least in the case of one party, substantial. The point has not been fully canvassed here, because, however one treats the mortgage, the outcome of the appeal is the same.

121. The final aspect I wish to deal with in relation to the resulting trust analysis is where the evidence is so unsatisfactory that it is impossible to reach a clear conclusion as to the parties' respective contributions to the purchase price. In many such cases, the evidence may be so hopeless or may suggest contributions of the same sort of order, and equality would be the appropriate outcome (as in *Rimmer v Rimmer* [1953] 1 QB 63 at 72, approved in *Pettitt* at 804A-B, 810H and 815H). However, in other cases (as here, in my opinion), the court may conclude that, while it is impossible to be precise as to the relative contributions, one party cannot have contributed more (or less) than Y%. In such cases, where Y is clearly below (or above) 50, to decide that the party concerned had more (or less) than Y% of the beneficial interest would be wrong.

122. So, in the absence of any relevant evidence other than the parties' respective contributions, I would favour the resulting trust solution as at the date of acquisition (in agreement with Chadwick LJ as quoted in paragraph 65 of Baroness Hale's opinion). Application of the resulting trust approach in the present case would justify Mr Stack's appeal being dismissed. On the figures summarised by Baroness Hale, Mr Stack could not possibly establish more than a 36% interest in the house as a result of all his contributions. Indeed, on the basis of the evidence, I would put his contribution at around 30%, but, as Ms Dowden is prepared to concede 35%, it is unnecessary to consider that aspect further. Thus, on a resulting trust basis, Mr Stack had no more than a 35% share of the beneficial interest at the date of acquisition.

Beneficial ownership on acquisition: constructive trust

123. Accordingly, in my judgment, where there are unequal contributions, the resulting trust solution is the one to be adopted. However, it is no more than a presumption, albeit an important one. Lord Nicholls of Birkenhead said in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at paragraph 16 that the "use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact", and that the "use … of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position". Although said in the context of undue influence, those words apply equally to the resulting trust presumption, in my opinion.

124. In many cases, there will, in addition to the contributions, be other relevant evidence as at the time of acquisition. Such evidence

would often enable the court to deduce an agreement or understanding amounting to an intention as to the basis on which the beneficial interests would be held. Such an intention may be express (although not complying with the requisite formalities) or inferred, and must normally be supported by some detriment, to justify intervention by equity. It would be in this way that the resulting trust would become rebutted and replaced, or (conceivably) supplemented, by a constructive trust.

125. While an intention may be inferred as well as express, it may not, at least in my opinion, be imputed. That appears to me to be consistent both with normal principles and with the majority view of this House in *Pettitt*, as accepted by all but Lord Reid in *Gissing* (see at 897H, 898B-D, 900E-G, 901B-D, and 904E-F), and reiterated by the Court of Appeal in *Grant v Edwards* [1986] Ch 638 at 651F-653A. The distinction between inference and imputation may appear a fine one (and in *Gissing* at 902G-H, Lord Pearson, who, on a fair reading I think rejected imputation, seems to have equated it with inference), but it is important.

126. An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.

127. To impute an intention would not only be wrong in principle and a departure from two decisions of your Lordships' House in this very area, but it also would involve a judge in an exercise which was difficult, subjective and uncertain. (Hence the advantage of the resulting trust presumption). It would be difficult because the judge would be constructing an intention where none existed at the time, and where the parties may well not have been able to agree. It would be subjective for obvious reasons. It would be uncertain because it is unclear whether one considers a hypothetical negotiation between the actual parties, or what reasonable parties would have agreed. The former is more logical, but would redound to the advantage of an unreasonable party. The latter is more attractive, but is inconsistent with the principle, identified by Baroness Hale at paragraph 61, that the court's view of fairness is not the correct yardstick for determining the parties' shares (and see *Pettitt* at 801C-F, 809C-G and 826C).

128. A constructive trust does not only arise from an express or implied agreement or understanding. It can also arise in a number of circumstances in which it can be said that the conscience of the legal owner is affected. For instance, it may well be that facts which justified a proprietary estoppel against one of the parties in favour of the other would give rise to a constructive trust. However, in agreement with Lord Walker, I do not consider it necessary or appropriate to discuss proprietary estoppel further in this case.

129. It is hard to identify, particularly in the abstract, the factors which can be taken into account to infer an agreement or understanding, and the effect of such factors. Each case will be highly fact-sensitive, and what is relevant, and how, may be contentious, whether one is considering actions, discussions or statements, even where there is no dispute as to what was done or said.

130. In the present case, for instance, there is a disagreement as to the effect of the declaration in the transfer of the house to the parties that the survivor "can give a valid receipt for capital money arising on the disposition of the land". At any rate in the absence of any evidence that the effect of this provision was explained to the parties, I would reject the contention that it has the effect of operating as a declaration of joint beneficial ownership. That contention is based on inference, and the legal basis of that inference is open to argument. Indeed, at the time the home was acquired, any well-informed solicitor would have advised that the law was that such a declaration probably would not give rise to such an inference, in the light of the Court of Appeal's decision in *Huntingford v Hobbs* [1993] 1 FLR 736. Quite apart from that, it seems to me that, in the absence of any evidence of contemporaneous advice to the parties as to the effect of the declaration, the alleged inference would simply be too technical, sophisticated, and subtle to be sustainable, at least in the context of the purchase of a home by two lay people.

131. Any assessment of the parties' intentions with regard to the ownership of the beneficial interest by reference to what they said and did must take into account all the circumstances of their relationship, in the same way as the interpretation of a contract must be effected by reference to all the surrounding circumstances. However, that does not mean that all the circumstances of the relationship are of primary or equal relevance to the issue.

132. I am unimpressed, for instance, by the argument that, merely because they have already lived together for a long time sharing all regular outgoings, including those in respect of the previous property they occupied, the parties must intend that the beneficial interest in the home they are acquiring, with differently sized contributions, should be held in equal shares. Particularly where the parties have chosen not to marry, their close and loving relationship does not by any means necessarily imply an intention to share all their assets equally. There is a large difference between sharing outgoings and making a gift of a valuable share in property; outgoings are relatively small regular sums arising out of day-to-day living, but an interest in the home is a capital asset, with a substantial value. I am similarly unconvinced that the ownership of the beneficial interest in a home acquired in joint names is much affected by whether the parties have children at the time of acquisition. While it justifies the obvious inference that it is to be used for the children as well as the parties, it says nothing on its own as to the intended ownership of the beneficial interest.

133. The fact that the parties operated their day-to-day financial affairs through a joint bank account, into which both their wages were paid and from which all family outgoings were paid, could fairly be said to be strong evidence that they intended the sums in that account to be owned equally. Accordingly, it would normally be easy to justify the contention that a home acquired with money from that account (often together with a mortgage in joint names) should be treated as acquired with jointly owned money and therefore as beneficially owned jointly. However, I am unhappy with the suggestion that, because parties share or pool their regular income and outgoings, it can be assumed that they intended that the beneficial interest in their home, acquired in joint names but with significantly different contributions, should be shared equally. There is a substantial difference, in law, in commercial terms, in practice, and almost always in terms of value and importance, between the ownership of a home and the ownership of a bank account or, indeed, furniture, furnishings and other chattels.

134. The fact that the parties keep assets such as bank accounts and financial investments separate and in separate names could be said to indicate that the parties do not intend to pool their resources. But it could equally be said that the fact that they choose, exceptionally, to acquire the home in joint names indicates that it is to be treated differently from their other assets, namely that it is to be jointly owned beneficially. In my view, however, such evidence is again of little value on its own, as it relates to a very different category of assets, in terms of nature and value, from the home they are buying.

135. The factors I have been discussing in the previous three paragraphs will often, however, have some significance. If there is other, possibly contested, evidence which is said to support the contention that the parties intended a different result from that indicated by a resulting trust analysis, those factors may make it easier for the court to accept, or even to interpret, that evidence as justifying such a different result.

136. For instance, the fact that the parties are in a close and loving relationship would render it easier, than in a normal contractual context, to displace the resulting trust solution with, say, an equal division of the beneficial ownership. That is because a departure from the resulting trust solution normally involves a gratuitous transfer of value from one party to the other. Thus, in the present case, if the outcome for which Mr Stack contends applied at the date of acquisition of the property, it would have involved an effectively gratuitous transfer of value equal to at least 15% of the purchase price of the house to him from Ms Dowden. Such a transfer is less unlikely between two parties in a long-term loving relationship than between two commercial entities or even two friends, but that does not mean that the nature of the relationship of itself justifies the inference of such a transfer.

137. In the present case, I consider that there was simply no evidence to justify departing in Mr Stack's favour from the apportionment of the beneficial interest in the house at the date of acquisition indicated by the resulting trust presumption. None of the facts recited in the opinion of Baroness Hale justify such a departure. It is fair to record that Mr Stack did appear to suggest at one point in his evidence that there was some discussion as to the ownership of the house at the time it was acquired, but the Judge expressly made no finding in his favour about that, and the Court of Appeal was not invited to do so or to remit it for the Judge to make such a finding.

Beneficial ownership: events after the acquisition of the house

138. The fact that the ownership of the beneficial interest in a home is determined at the date of acquisition does not mean that it cannot alter thereafter. My noble and learned friend Lord Hoffmann suggested during argument that the trust which arises at the date of acquisition, whether resulting or constructive, is of an ambulatory nature. That elegant characterisation does not justify a departure from the application of established legal principles any more than such a departure is justified at the time of acquisition. It seems to me that "compelling evidence", to

use Lord Hope's expression in paragraph 11, is required before one can infer that, subsequent to the acquisition of the home, the parties intended a change in the shares in which the beneficial ownership is held. Such evidence would normally involve discussions, statements or actions, subsequent to the acquisition, from which an agreement or common understanding as to such a change can properly be inferred. I have already discussed some of the issues arising in this connection, partly because Ms Dowden and Mr Stack had lived together in Purves Road before they acquired the house at Chatsworth Road.

139. There are, however, one or two aspects I should like to mention. I agree with Lord Walker that, subject of course to other relevant facts justifying a different conclusion, the fact that one party carries out significant improvements to the home will justify an adjustment of the apportionment of the beneficial interest in his favour. In such a case, the cost could be seen as capital expenditure which differs from regular outgoings relating to the use of the home, and is not dissimilar in financial effect, from the cost of acquiring the home in the first place. To qualify, any work must be substantial: decoration or repairs (at least unless they were very significant) would not do.

140. There is also the question of repayments of the mortgage, and payments of other outgoings. I have already discussed the effect of the parties taking a mortgage in joint names, and suggested that, in some cases, repayments of capital could have the effect of adjusting the shares in the beneficial interest. (It is conceivable that that could apply to payments of interest as well). In many cases, the repayments of capital, even if effected wholly by one party, should not be interpreted as indicating an intention to alter the way in which the beneficial interest is apportioned. Thus, the fact that one party is the home-maker (and, often, child-carer) and the other is the wage-earner would probably not justify the former having his share decreased simply because the other party repays the mortgage by instalments, but it may be different where both parties earn and share the home-making, but one of them repays the mortgage by a single capital sum.

141. Consistently with what has already been discussed, I am unconvinced that the original ownership of the beneficial interest could normally be altered merely by the way in which the parties conduct their personal and day-to-day financial affairs. I do not see how the facts that they have lived together for a long time, have been in a loving relationship, have children, operated a joint bank account, and shared the outgoings of the household, including in respect of use and

occupation of the home, can, of themselves, indicate an intention to equalise their originally unequal shares any more than they would indicate an intention to equalise their shares on acquisition, as discussed earlier. So, too, the facts that they both earn and share the home-making, or that one party has a well-paid job and the other is the home-maker, seem to me to be irrelevant at least on their own. Even the fact that one party pays all the outgoings and the other does nothing would not seem to me to justify any adjustment to the original ownership of the beneficial interest (subject to the possible exception of mortgage repayments).

142. In many cases, these points may result in an outcome which would seem unfair at least to some people. However (unless and until the legislature decides otherwise) fairness is not the guiding principle as Baroness Hale says, and, at least without legislative directions, it would be a very subjective and uncertain guide. Further, it is always important to bear in mind the need for clarity and certainty.

143. It is worth repeating that one is concerned with the ownership of what will normally be the most important and valuable asset of the parties, and the way they conduct their day-to-day living and finances is, in my view, at least of itself, not a reliable guide to their intentions in relation to that ownership. Even payments on decoration, repairs, utilities and Council tax, although related to the home, are concerned with its use and enjoyment, as opposed to its ownership as a capital asset. It is also worth repeating that these factors are not irrelevant to the issue of whether there has been a change in the shares in which the beneficial interest in the home is held. They provide part of the vital background against which any alleged discussion, statement or action said to give rise to a change in the beneficial ownership is to be assessed, in relation to both whether it occurred and what its effect was.

144. I am unhappy with the formulation of Chadwick LJ in *Oxley* at paragraph 69, quoted by Baroness Hale at paragraph 61 of her opinion, namely that the beneficial ownership should be apportioned by reference to what is "fair having regard to the whole course of dealing between [the parties] in relation to the property". First, fairness is not the appropriate yardstick. Secondly, the formulation appears to contemplate an imputed intention. Thirdly, "the whole course of dealing … in relation to the property" is too imprecise, as it gives insufficient guidance as to what is primarily relevant, namely dealings which cast light on the beneficial ownership of the property, and too limited, as all aspects of the relationship could be relevant in providing the context .by

reference to which any alleged discussion, statement and actions must be assessed. As already explained, I also disagree with Chadwick LJ's implicit suggestion in the same paragraph that "the arrangements which [the parties] make with regard to the outgoings" (other than mortgage repayments) are likely to be of primary relevance to the issue of the ownership of the beneficial interest in the home.

145. I am rather more comfortable with the formulation of Gray and Gray, also quoted in paragraph 61 of Baroness Hale's opinion, that the court should "undertak[e] a survey of the whole course of dealing between the parties … taking account of all conduct which throws light on the question what shares were intended". It is perhaps inevitable that this formulation begs the difficult questions of what conduct throws light, and what light it throws, as those questions are so fact-sensitive. "Undertaking a survey of the whole course of dealings between the parties" should not, I think, at least normally, require much detailed or controversial evidence. That is not merely for reasons of practicality and certainty. As already indicated, I would expect almost all of "the whole course of dealing" to be relevant only as background: it is with actions discussions and statements which relate to the parties' agreement and understanding as to the ownership of the beneficial interest in the home with which the court should, at least normally, primarily be concerned. Otherwise, the enquiry is likely to be trespassing into what I regard as the forbidden territories of imputed intention and fairness.

146. In other words, where the resulting trust presumption (or indeed any other basis of apportionment) applies at the date of acquisition, I am unpersuaded that (save perhaps in a most unusual case) anything other than subsequent discussions, statements or actions, which can fairly be said to imply a positive intention to depart from that apportionment, will do to justify a change in the way in which the beneficial interest is owned. To say that factors such as a long relationship, children, a joint bank account, and sharing daily outgoings of themselves are enough, or even of potential central importance, appears to me not merely wrong in principle, but a recipe for uncertainty, subjectivity, and a long and expensive examination of facts. It could also be said to be arbitrary, as, if such factors of themselves justify a departure from the original apportionment, I find it hard to see how it could be to anything other than equality. If a departure from the original apportionment was solely based on such factors, it seems to me that the judge would almost always have to reach an "all or nothing" decision. Thus, in this case, he would have to ask whether, viewed in the round, the personal and financial characteristics of the relationship between Mr Stack and Ms Dowden, after they acquired the house, justified a change in

ownership of the beneficial interest from 35-65 to 50-50, even though nothing they did or said related to the ownership of that interest (save, perhaps, the repayments of the mortgage). In my view, that involves approaching the question in the wrong way. Subject, perhaps, to exceptional cases, whose possibility it would be unrealistic not to acknowledge, an argument for an alteration in the way in which the beneficial interest is held cannot, in my opinion, succeed, unless it can be shown that there was a discussion, statement or action which, viewed in its context, namely the parties' relationship, implied an actual agreement or understanding to effect such an alteration.

147. Turning to the present case, I consider that there are no grounds for varying the split of the beneficial ownership, which arose in 1993 on the acquisition of the house, as a result of any events which occurred subsequently, at any rate to an extent more favourable to Mr Stack than the 35% accepted by the Court of Appeal. Subject to one exception, there was nothing said or done by the parties which could justify a change from that which arose at the date of acquisition. As to the exception, I accept that, as a result of his repaying some of the mortgage, Mr Stack has an arguable case for slightly increasing his share of the beneficial interest. However, his share cannot thereby be increased above 36%, assuming all the facts in his favour, and, in my view, his share would remain less than 35%.

The payment issue

148. The parties each had the right to occupy the house and the concomitant expectation of having to share occupation. After some nine years of living together, Ms Dowden excluded Mr Stack against his wishes. On 11 April 2003, the parties agreed a time-limited order in the Family Proceedings Court, which excluded Mr Stack from the house, and required Ms Dowden to pay him (or to credit him against her share of the proceeds of sale of the house) a sum which reflected the cost of his alternative accommodation, later agreed at £900 per month. After that order expired on 10 January 2004, Mr Stack effectively accepted Ms Dowden's decision to exclude him. As a result, Ms Dowden continued in exclusive occupation (with their four children), and Mr Stack had to continue to pay for other accommodation.

149. At the hearing, an order for the sale of the house was sought and granted, and Mr Stack sought a further order that he be paid (or credited) in the meantime at £900 per month. The Judge made that order, after

brief argument, on the sole stated ground that Ms Dowden had control over the marketing and sale of the house. The Court of Appeal thought this reason unsatisfactory, and reversed his decision, on the grounds that the house was soon to be sold, the four children were living there, and there was no basis for assessing the compensation at £900 per month.

150. The court's power to order payment to a beneficiary, excluded from property he would otherwise be entitled to occupy, by the beneficiary who retains occupation, is now governed by sections 12 to 15 of the Trusts of Land and Appointment of Trustees Act 1996, having been formerly equitable in origin. However, I think that it would be a rare case where the statutory principles would produce a different result from that which would have resulted from the equitable principles.

151. The 1996 Act appears to me to apply here in this way. The trustees, Ms Dowden and Mr Stack, agreed pursuant to section 13(1) of the 1996 Act (through the consent order of 11 April 2003 and not seeking to disturb the status quo after it expired) that Mr Stack would be excluded from the house. Accordingly, they could have agreed pursuant to section 13(3) and (6)(a) that Ms Dowden would pay "compensation" to Mr Stack for his exclusion. They initially agreed that in the order of 11 April 2003, but, once it expired, they could not agree whether to exercise that power. Accordingly, the decision whether to require compensation was a matter for the court under section 14.

152. In my view the proper exercise of the court's power in the present case would have been to order compensation. First, both parties had the right in principle to occupy it, Ms Dowden was living there on her own as she wanted, she had excluded Mr Stack against his will, and he was incurring the cost of alternative accommodation: accordingly, such a payment seems appropriate in the absence of any good reason to the contrary. Secondly, the parties plainly thought it was right, when agreeing the order of 11 April 2003, that, as a quid pro quo for his exclusion from the house, Mr Stack should be paid (or credited) at the rate of £900 per month. The circumstances of the parties do not appear to have changed by (or after) 10 January 2004, when they effectively accepted that Mr Stack would remain excluded from the house.

153. Thirdly, when exercising its power under section 14, the court is required to take into account four specific matters set out in section 15(1). In my view, those factors either favour ordering a payment in favour of Mr Stack, or they are neutral or irrelevant. Thus, paragraphs

(a) and (b), the purpose for which the house was bought and the purpose for which it was held, favour the conclusion, as the house was bought as a home for Mr Stack (as well as Ms Dowden and the children), and , at any rate as far as he was concerned, that remained the position. Paragraph (c), the welfare of minors residing in the house, is neutral as there is no suggestion of prejudice to the four children whether or not he was paid. Paragraph (d), the interests of any secured creditor, is irrelevant for present purposes.

154. It is true Ms Dowden had to pay all the outgoings in respect of the house, but Mr Stack had to pay all the outgoings, as well as the rent, in respect of his alternative accommodation. Further, if the compensation was calculated (as it often is) on the basis of the rental value of the trust property concerned, the outgoings would be taken into account when assessing its rental value.

155. I accept that the Judge's reason for ordering payment was weak, no doubt at least in part because of the brevity of the argument and because he was not referred to the 1996 Act. (However, it is only fair to the Judge to say that, as the actual occupier of the house, Ms Dowden did have some control over the progress of its marketing and sale.) I also accept that the Court of Appeal was consequently entitled to reconsider the matter afresh. Nonetheless, I consider that the Court of Appeal went wrong in reversing the Judge's decision on the point. The fact that the children needed a home is not in point. First, it does not meet the main ground for making a payment order, namely Mr Stack's exclusion from the house and having to find and pay for alternative accommodation. Secondly, Mr Stack was paying towards the children's maintenance, and, through his share of the beneficial ownership of the house, helping to house them. Thirdly, there was no evidence to suggest that ordering a payment to Mr Stack would have in any way harmed the children's interests. That Ms Dowden had agreed to pay £900 per month under the order of 11 April 2003 suggests that it would not have had that effect.

156. The fact that the house might have been expected to be sold fairly soon after the hearing is a point which, in my view, is either irrelevant or cuts both ways. It did not alter the position: it merely rendered it more likely to come to an end sooner rather than later. Nor is it as if any wrongful act by Mr Stack caused his exclusion: it was simply due to the relationship breaking down. The fact that, after the order of 11 April 2003 expired, Mr Stack accepted his exclusion should not count against him. To hold that a reasonable acceptance of exclusion would make it

more difficult to claim compensation would put a premium on unreasonableness and encourage litigation.

157. I also disagree with the Court of Appeal on quantum. I can see no reason to depart from the figure which the parties originally agreed, and was not challenged before the Judge, namely £900 per month. It is a figure which had a rational basis (namely the cost of Mr Stack's alternative accommodation). There is, in my view, a strong argument for saying that, on the basis of an analogy with trespass damages, that the court should be able to award compensation based either on the notional rental value of the house or the cost of the alternative accommodation.

Conclusion

158. Accordingly, I agree that Mr Stack's appeal against the Court of Appeal's determination as to the extent of his ownership of the beneficial interest in Chatsworth Road should be dismissed, but I would have allowed his appeal against the Court of Appeal's refusal to order Ms Dowden to pay him £900 per month in respect of his exclusion.