COMMON INTENTIONS AND CONSTRUCTIVE TRUSTS: UNORTHODOXY IN TRUSTS OF LAND

LORENZO MANISCALCO[1]

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Introduction

Section 53 (1) (b) of the Law of Property Act (LPA) 1925[2] requies a settlor's intention to be evidenced in signed writing for a trust of land to be enforceable. However, as every property lawyer knows, intentions either informally expressed or merely inferred from conduct have maintained an extremely important role in trusts of land, in particular in circumstances when two or more parties acquire land sharing a common intention as to how their beneficial shares in it should be distributed. In these circumstances, informal evidence of such a common intention may support a claim under a common intention constructive trust (CICT).

Academic literature in this area has focussed mostly on the process of identification of informal common intentions.[3] My object in this article is, assuming they are identified, the role that common intentions play in setting up a CICT. CICTs have their origins in a line of cases decided under section 17 of the Married Women's Property Act (MWPA) 1882,[4] and it was historically ambiguous whether these were trusts established by the parties' common intentions themselves or under some other doctrine of property law. It has been recognised since the decision of the House of Lords in *Gissing v Gissing* that CICTs are trusts arising by operation of law to enforce the parties' otherwise unenforceable common intentions when they have been detrimentally relied upon by one of them.[5] CICTs respond to the fact that the circumstances make it unconscionable for the defendant to insist that the parties failed to comply with the applicable formalities, they are not trusts established by the parties' common intentions themselves. Unfortunately, the historical ambiguity about the relationship between CICTs and common intentions has not been entirely dispelled, and in some areas the law has continued to develop under the mistaken assumption that CICTs are trusts of the latter type.

Two lines of cases are currently particularly problematic for this reason. On the one hand are the familiar cases in which two or more parties jointly acquiring land have failed to declare any trust over it – the law in this area has seen its most recent exposition in the Privy Council decision in *Marr v Collie*.[6] This decision revisited the very well known judgments in *Stack v Dowden* and *Jones v Kernott*, finding that presumptions about the parties' intentions ought to be irrelevant to determine their beneficial interest in land unless no evidence of an informal common intention between them can be found. On the other hand are cases in which the parties have validly declared an express

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[1] Fixed-Term Lecturer in Private Law, Faculty of Law, University of Cambridge; Fellow and Director of Studies in Law, Clare College, University of Cambridge. I am indebted to Andreas Televantos for his comments on a draft of this article. All errors and omissions are my own.

[2] *Law of Property Act* 1925, c 20, s 53 (1) (b).

[3] The literature on this point is vast, see e.g. M Mills, 'Single name family home constructive trusts: is Lloyds Bank v Rosset still good law?', [2018] *Conv* 350-66; A Hayward, 'Common intention constructive trusts and the role of imputation in theory and practice', [2016] *Conv* 233-42; M Pawlowski, 'Imputed Intention and Joint Ownership—A Return to Common Sense: Jones v Kernott' [2012] *Conv* 149; M Yip, 'The Rules Applying to Unmarried Cohabitants' Family Home: Jones v Kernott' [2012] *Conv* 159; J Mee, 'Jones v Kernott: Inferring and Imputing in Essex' [2012] *Conv* 167; J Lee, "'And the Waters Began to Subside': Imputing Intention Under Jones v Kernott" [2012] *Conv* 421.

[4] *Married Women's Property Act* 1882, c 75, s 17.

[5] J McGhee (ed), *Snell's Equity*, 34th ed (London: Sweet & Maxwell, 2019), [24-056]; B McFarlane and C Mitchell, *Hayton and Mithell on the Law of Trusts & Equitable Remedies*, 14th ed (London: Sweet & Maxwell, 2015), [15-132]; L Tucker, N Le Poidevin, J Brightwell, *Lewin on Trusts*, 19th ed (London: Sweet & Maxwell, 2020), [9-062]; E Cooke, S Bridge, M Dixon, *Megarry & Wade: The Law of Real Property*, 9th ed (London: Sweet & Maxwell, 2019), [10-027]. Cf S Gardner, 'The ongoing evolution of family property constructive trusts', [2016] LQR 373-77.

[6] *Marr v Collie* [2018] AC 631.

Lorenzo Maniscalco
lm632@cam.ac.uk

trust, but at the same time shared an informal common intention inconsistent with it. These cases are governed by a related, but separate strand of authority, holding that no CICT based on an informal common intention can be established to supplant the express trust they have declared. In both these areas, the failure to correctly identify the basis of CICTs in unconscionability has led the law to develop on an inconsistent and needlessly uncertain footing.

I begin by rehearsing the basic distinction between the role that evidence of the parties' intentions play in establishing an express trust and rebutting a presumption of resulting trust, and then move on to look at the historically ambiguous role that they have played in relation to CICTs. I then refer back to these basic principles to expose the unorthodox basis of the law on the relationship between CICTs and legal presumptions, on the one hand, and of CICTs with express trusts on the other.

1. Intentions and trusts of land

1.1. Evidence of intentions relevant to prove how parties have dealt with their property rights: express trusts, formalities and presumptions

In property law, evidence of a party's intentions is relevant to prove that they have dealt with their interest in property in a certain way. The intention need not be held in 'common' with anyone else, it is sufficient that a party beneficially entitled to property declare how they wish to deal with their interest. In the case of a trust, where A is the legal owner of some property and B claims a beneficial interest in that property under an express trust, the onus is on B to prove that A intended to hold the property on trust for B.[7] If B cannot establish this, then prima facie there is no reason for a court to burden the legal title with any interest in favour of B, and A will hold title to the property beneficially.

It may be possible for the burden of proof to be reversed by a presumption of resulting trust. Even if there is no evidence of a declaration of trust in B's favour, the court will presume that such a trust exists if there is evidence that B contributed to the purchase of the asset, or transferred it to A gratuitously. In those circumstances, it is A that must adduce evidence that B did not intend to retain an interest under a trust.[8] If A can establish that B's intentions were inconsistent with retaining an interest under a trust, the presumption is 'rebutted' and A will hold their interest (or part of it if the trust is only partially rebutted) beneficially.[9]

Where the property concerned is land, the rules are complicated by the operation of section 53 (1) (b) of the LPA 1925. Any declaration of trust will be unenforceable unless it is evidenced in signed writing – this means that any informal evidence of a party's intention to declare a trust will fail to discharge the burden of proof to establish an express trust.

Section 53 (2) specifically excludes resulting trusts from the operation of section 53 (1) (b).[10] This means that even informal evidence that A contributed to the purchase price of land will be sufficient to raise a presumption of resulting trust.[11] Once a presumption of resulting trust is raised, B may also rely on informal evidence of an inconsistent intention of A to rebut the presumption

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[7] For the requisite intention to declare a trust see Knight v Knight (1840) 3 Beav 148 at 172.
[8] Dyer v Dyer [1788] 30 ER 42. The precise nature of presumed resulting trusts remains disputed, compare e.g. W Swadling, 'Explaining Resulting Trusts' [2008] LQR 72-102 with R Chambers, Resulting Trusts (Oxford: OUP, 1997).
[9] It may also be possible for A to rely on the presumption of advancement to displace the presumption of resulting trust. For the relationship between these two presumptions see J Glister, 'Is There a Presumption of Advancement?' 33 (2011) Sydney Law Review, 39-66.
[10] Law of Property Act 1925, c 20, s 53 (2).
[11] See Fowkes v Pascoe (1875) LR 10 Ch App 343 at 353.

Lorenzo Maniscalco
lm632@cam.ac.uk

of resulting trust – but it is important to understand the difference between relying on an informal intention to rebut a presumption of resulting trust and enforcing a party's intention to establish an express trust.

For our purposes the latter distinction is most important in cases of joint ownership of land.[12] Say that A and B purchase land jointly without declaring an express trust, A contributing 30% of the purchase price and B 70%. Say, too, that A and B agree informally that A is to be the sole beneficial owner of the land. Applying the principles outlined above, the basic position is that the agreement is unenforceable and, in the absence of any evidence to establish a trust, each party holds their legal interest beneficially – the beneficial interest is therefore held jointly by A and B. If B wishes to get a greater share than a joint one, they may point to the contribution of 70% in order to raise a presumption of resulting trust. A may now rely on the informal agreement with B that A is to be the sole owner to rebut this presumption. The agreement proves B did not intend to retain a 70% interest in the property and the informal evidence is sufficient to rebut the presumption of resulting trust. However, it is not possible for A to rely on the informal agreement in order to obtain the full beneficial interest they were promised by B. Having rebutted the presumption of resulting trust, we are left with the basic position where the parties have failed to declare any enforceable trust – any evidence of their informal intentions is ineffective to prove otherwise. If the law allowed A to obtain a greater interest through the process of 'rebutting' the resulting trust, this would lead to the absurd position under which the presumption raised in B's favour puts A in a better position than A would have been in had B not sought to rely on the presumption at all.

1.2. Common intentions and CICTs

Section 53 (2) also excludes constructive trusts from the operation of section 53 (1) (b) – but just as in the case of resulting trusts, this is not meant to undermine the operation of the main rule. The reason for this is that CICTs, the constructive trusts giving effect to the parties' informal common intentions, are not trusts created by an informal agreement of the parties.

The origins of CICTs are to be sought in the line of cases decided through the 1950s and 60s under section 17 of the MWPA 1882. The cases concerned disputes between husband and wife about title to land held by one or both of them. Section 17 allowed a judge to 'make such order with respect to the property in dispute [...] as he thinks fit.'[13] Courts throughout this period were in agreement that they should exercise this power by giving effect 'to what the parties [...] must be taken to have intended at the time of the transaction itself.'[14] However, there was long-lasting uncertainty as to the basis on which the intentions were being given effect to. What was particularly unclear was whether section 17 gave a discretion to the court, which the court chose to exercise by enforcing the parties' common intentions, or whether in doing so they were simply enforcing whatever rights the parties were entitled to under general property law.[15] As is well known, in Pettitt v Pettitt, the House of Lords put this controversy to rest. Lord Upjohn, with the agreement of all

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[12] See n 31.

[13] Married Women's Property Act 1882, c 75, s 17.

[14] In re Rogers' Question [1948] 1 All ER 328, 328-9.

[15] See arguing for the view favouring the exercise of discretion e.g. Cobb v. Cobb [1955] 1 WLR 731, 734 per Denning LJ; Fribance v. Fribance (No. 2) [1957] 1 WLR 384, 387 per Denning LJ; Hine v Hine , [1962] 1 WLR 1124, 1127-8 per Lord Denning MR; Wilson v. Wilson [1963] 1 WLR 601, 606 per Donovan LJ ; Bedson v Bedson [1965] 2 QB 666 at 677 per Lord Denning MR; Ulrich v Ulrich and Felton [1968] 1 WLR 180, 187 per Lord Denning MR. For decisions hinting at a more limited discretion, see e.g. Newgrosh v Newgrosh (June 28, 1950, unreported) per Buckhill LJ, cited by Evershed MR in Rimmer v Rimmer [1953] 1 QB 63, 68; Cobb v Cobb, [1955] 1 WLR 731, 736-7 per Romer LJ; Silver v Silver [1958] 1 W.L.R. 259, 265 per Parker LJ; Short v Short, [1960] 1 WLR 833,849 per Devlin LJ; Wilson v Wilson, [1963] 1 WLR 601, 608-9 per Russell LJ; National Provincial Bank Ltd v Ainsworth, [1965] AC 1175, 1245 per Lord Wilberforce.

Lorenzo Maniscalco
lm632@cam.ac.uk

the other Law Lords, ruled that section 17 was procedural only, it gave no discretion to the court to vary property rights.[16]

The decision in Pettitt confirmed that the long line of cases that had enforced trusts on the basis of the common intentions of spouses were simply giving effect to the rights that the parties were entitled to under general property law. This meant either that the parties' common intentions in these cases were effective in setting up a trust, or that they were being enforced under some other doctrine of property law. In Pettitt itself the court could not identify a common intention between the litigants, but Lord Upjohn explained that, in principle, where the written document declaring the beneficial title of the parties is silent, 'parol evidence is admissible as to the beneficial ownership that was intended' by the spouses, and that the court should identify a trust on that basis.[17] This suggests that when it comes to proving the trust declared by the parties, the source of the evidence would be any available written document in the first instance, but may also be informal where such a document is unavailable. Lord Morris similarly found that if 'there was a clear agreement between husband and wife in regard to ownership [the judge] must give his adjudication accordingly.'[18] The difficulty with this approach to common intentions is that it runs plainly against section 53 (1) (b), and neither Lord Upjohn nor Lord Morris provided any further explanation for why the formality rule should be side-stepped.

Lord Diplock in the same case adopted a more nuanced approach. He stated that 'proprietary interests in the family asset [...] depend upon [the parties'] common intention as to what those interests should be', but added that any promises between the parties would only crystallise into rights if they had been acted upon: 'So long as [the promises between the parties] are executory they do not give rise to any chose in action'.[19] This statement foreshadowed his establishment of the modern basis for CICTs shortly afterwards in Gissing v Gissing.

In Gissing a matrimonial home was purchased by and registered in the name of a husband, the wife contributing to the expenses of the family.[20] The couple separated and, upon leaving the home, the husband told the wife that the house was hers. The wife sought a beneficial interest in the family home. The House of Lords found that no common intention between the parties sufficient to support a trust could be identified. This time, although Lords Reid, Morris, Pearson and Viscount Dilhorne all thought that the court should enforce the common intention of the parties, none of them explained why the promise by the husband to the wife that the house was 'hers' - which the judge at first instance accepted was in fact made – could not create an enforceable trust.[21] Lord Diplock was the only judge providing an explanation on this point: the promise had not been relied upon by the wife to her detriment. He explained, in a very well known passage, that the common intentions of the parties were relevant to establishing a trust of land only where they provided evidence that the trustee '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.'[22] Lord Diplock was also at pains to explain that this was the basis on which common intentions had

[16] Pettitt v Pettitt [1970] AC 777, 812 per Lord Upjohn.
[17] Ibid., at 813.
[18] Ibid., at 799.
[19] Ibid., 821-2 per Lord Diplock.
[20] Gissing v Gissing [1971] AC 886. The background to Gissing has been considered – albeit in the context of the basis on which common intentions are identified, in J Mee, 'Pettitt v Pettitt (1970) and Gissing v Gissing (1971)' in Landmark Cases in Equity (Oxford: Hart, 2012).
[21] Ibid., 900-1 per Viscount Dilhorne.
[22] [1971] AC 886, 904-5 per Lord Diplock.

Lorenzo Maniscalco
lm632@cam.ac.uk

always been given effect to in this area, saying that previous authorities, in which this requirement went unmentioned, had 'assumed sub silentio' that detrimental reliance was essential.[23]

The principles recognised by Lord Diplock in Gissing were extremely influential, and by the 1990s CICTs had become a well-recognised branch of institutional constructive trusts, mostly applied to cases involving family homes, but later extended to commercial cases.[24] The clearest confirmation of the role that common intentions played in establishing CICTs was given by Lord Bridge in Lloyds Bank v Rosset. He explained clearly that '[e]ven if there had been the clearest oral agreement between [A] and [B] that [A] was to hold the property in trust [...] this would, of course, have been ineffective since a valid declaration of trust by way of gift of a beneficial interest in land is required by section 53(1) of the Law of Property Act 1925 to be in writing. But if [B] had, as pleaded, altered her position in reliance on the agreement this could have given rise to an enforceable interest in her favour by way either of a constructive trust or of a proprietary estoppel.'[25] The trigger for CICTs has also been explained, consistently with other similar equitable interventions to enforce otherwise unenforceable agreements, on the basis that, in these circumstances, it would be 'unconscionable' for A to insist on the lack of formality.[26]

Unfortunately, as I show in the two following sections, despite the clear statements in Gissing and the cases that followed, the historical ambiguity about the role of common intentions in setting up CICTs has continued to disrupt the development of the law in this area.

2. Where the parties have failed to declare a trust expressly: common intentions and presumptions

2.1. Presumptions and common intentions – Springette v Defoe

Stack v Dowden and Jones v Kernott are the highest authorities governing cases in which parties have registered title to land jointly but failed to declare an express trust.[27] This area of the law is also, however, one in which the role of the parties' intentions in determining their shares in a trust of land has been developed most problematically. In particular, the latest exposition of the law in Marr v Collie has suggested that, if they can be identified, the informal common intentions of the parties should take precedence over any applicable presumption and the beneficial shares of the parties should be determined in accordance with them.[28] This unorthodox position seems to derive from a misunderstanding both of how the intentions of the parties interact with presumptions and with the basis on which they may support CICTs.

The first authority encouraging this departure from orthodoxy in joint ownership cases was the decision of the Court of Appeal in Springette v Defoe.[29] This was a case concerning land conveyed in the joint names of A and B, who contributed unequally to the purchase price and failed to declare an express trust. The decision concerned whether A, who had contributed the greater share, was

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[23] Ibid., 905, 910 per Lord Diplock.
[24] Eves v Eves [1975] 1 WLR 1338; Grant v Edwards [1986] Ch 638; Lloyds Bank v Rosset [1991] 1 AC 107.
[25] [1991] 1 AC 107, 129.
[26] See Grant (n 24), 656-7 and more recently Culliford v Thorpe [2018] EWHC 426 (Ch) at [69]. For the broader role of unconscionability in constructive trusts see Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400, 408 per Millett LJ.
[27] Stack v Dowden [2007] 2 AC 432; Jones v Kernott [2012] 1 AC 776.
[28] See n 50.
[29] Springette v Defoe (1993) 65 P & CR 1.

Lorenzo Maniscalco
lm632@cam.ac.uk

entitled to an interest corresponding to her contribution under a resulting trust. It was found at first instance that A had formed the intention to share the property with B equally. However, Dillon LJ and Sir Christopher Slade (Steyn LJ agreeing with both) held that the presumption could not be displaced, because it would have to be rebutted by an inconsistent intention held in common by both parties, not by A alone. The court thought that a 'resulting, implied or constructive' trust could only arise to give effect to a shared intention, not to 'any subjective intention' of the parties, citing *Gissing v Gissing* in support.[30]

The judgment in *Springette* effectively failed to distinguish the very different roles that intentions play within the doctrine of resulting trusts and CICTs. Neither Sir Christopher Slade nor Dillon LJ seem to have noted that in a case concerning a presumed resulting trust there would be no need for any inconsistent intention to be common to both parties in order to rebut the presumption – the evidence of A's intention to benefit B identified at first instance should have sufficed to rebut the presumption. Further, the Court of Appeal in *Springette* seemed to assume that if an informal common intention of the parties could be found, it should be enforced because it rebutted the otherwise applicable presumption of resulting trust. As discussed earlier, it is one thing to refer to the intention of the transferor to rebut a presumption of resulting trust, and quite another, and impermissible one, to enforce the informal common intention of the parties on that basis.[31]

2.2. Stack v Dowden - 'Equity follows the law' and common intentions

Springette v Defoe was one of the last cases involving a matrimonial home in which presumed resulting trusts would have been relevant. In *Stack v Dowden* the House of Lords held that the presumption would no longer be available to a party claiming a beneficial interest in a case falling within what is now known as the 'domestic/consumer' context,[32] and the role of presumed resulting trusts has since been confined to cases involving acquisitions for commercial purposes.[33] However, the conceptual error in *Springette* took a new form in *Stack*. This is because, rather than simply acknowledging the abolition of the presumption of resulting trust (and with it, of any scope for its 'rebuttal' by reference to the transferor's intention), the court in *Stack* misleadingly described the law as having replaced it with a different presumption, the presumption that 'equity follows the law'.[34] Most problematically, it described the role of common intentions as that of rebutting this so-called presumption. The law in this area was famously summarised in the joint judgment of Lady Hale and Lord Walker in the *Jones* case. Their Lordships said that, in cases of domestic/consumer joint acquisitions of land '[t]he presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention'.[35]

This statement of the law presents two difficulties. The first is that the so-called presumption that equity follows the law, is not a presumption in the technical sense at all. As mentioned earlier, in the case of trusts, a legal presumption reverses the burden of proof from the claimant to the defendant in circumstances where the claimant is unable to prove the trust by direct evidence. 'Equity follows the law' instead simply describes the initial location of the burden of proof.[36] That

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[30] Ibid., 5 per Dillon LJ, 9-10 per Sir Christopher Slade.
[31] See n 12.
[32] *Stack* (n 23), [37] (per Lord Walker), [62] per Lady Hale.
[33] *Laskar v Laskar* [2008] 1 WLR 2695.
[34] *Stack* (n 23), [33].
[35] Ibid., [25].
[36] This is sometimes referred to as a 'false' presumption. See Swadling (n 8), 74-7, drawing on C Tapper, *Cross on Evidence*, 11th ed (Oxford: OUP, 2007), 144.

Lorenzo Maniscalco
lm632@cam.ac.uk

is, the parties will hold their legal interests beneficially unless one can prove that the other intended to hold theirs on trust for them. An intention which must be evidenced in signed writing to be enforceable. In no sense may an informal common intention of the parties rebut the so-called presumption that 'equity follows the law'. Problematically, neither the Stack, nor the Jones case referred to section 53 (1) (b) or to the need for detrimental reliance, simply saying that the presumption that equity follows the law was displaced by the parties' common intention. This approach was also taken in other joint ownership cases immediately after the decision in Stack,[37] and those that followed the decision in Jones.[38]

The requirement for detrimental reliance and unconscionability has since been reiterated many times in the Court of Appeal and High Court in so-called 'single ownership' cases[39] - that is, those in which the property is not held in the joint names of defendant and claimant - and in cases involving commercial parties.[40] This has led the majority of commentators to conclude that, in Stack, Jones and other 'joint ownership' cases, the requirement for detrimental reliance has simply been taken for granted by the court,[41] a view supported by some recent High Court decisions.[42] It has also been recognised, however, that the consistent failure to focus on the requirement for detrimental reliance in the highest authorities in this area is problematic, and that it remains ambiguous whether Stack and Jones were meant to drive a divide between sole ownership and joint ownership cases.[43]

Unfortunately, the latest interpretation of this line of authority by the Privy Council in Marr v Collie has brought further confusion in this area - the judgment, is a particularly significant one, as all but one of the judges sitting on it had already sat on either one or both of Stack v Dowden and Jones v Kernott.[44]

2.3. Common intentions in Marr v Collie

Marr v Collie was an appeal from the Court of Appeal of the Commonwealth of the Bahamas to the Privy Council.[45] The facts are rather straightforward. In the course of an intimate relationship, A and B purchased a number of properties conveyed in their joint names without declaring a trust in writing in compliance with section 53 (1) (b) of the LPA 1925 which, in Bahamian Law, takes effect through section 7 of the Statute of Frauds 1677.[46] All properties except for the couple's family home were purchased for the purpose of investment. This was a key issue in this case,

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[37] See Fowler v Barron [2008] EWCA Civ 377 (CA) at [34]-[37] per Arden LJ who talked about the common intentions providing 'the evidential basis for rebutting the presumption'. The same approach can be found adopted in Hollis v Rolfe [2008] EWHC 1747 (Ch), at [158]-[159] and Shah v Baverstock [2008] 1 P & CR DG3 (unreported).

[38] See Barnes v Phillips [2015] EWCA Civ 1056 at [21]; Aspden v Ely [2012] EWHC 1387 (Ch) at [93].

[39] See e.g. Gallarotti v Sebastianelli [2012] EWCA Civ 865 at [5] per Arden LJ. See also Curran v Collins [2015] EWCA Civ 404 at [78] per Arden LJ.

[40] See e.g. Herbert v Doyle [2010] EWCA Civ 1095; Matchmove v Dowding [2017] WLR 749.

[41] See e.g. J Roche, 'Kernott, Stack, and Oxley made simple: a practitioner's view', [2011] Conv 123-139, 134-5 and McFarlane and Mitchell (n 5), [15-132].

[42] The only statement to this effect determinative of a decision has so far been that of Master Bowles in the High Court in Insol Funding Co Ltd v Cowlam [2017] EWHC 1822 (Ch), [99]. Since Insol, the principle has been mentioned, albeit obiter, in two other High Court cases, by HHJ Paul Matthews in Wall v Munday, [2018] EWHC 879 (Ch), at [21]; and by HHJ David Cooke in Downes v Downes, [2019] EWHC 491 (Ch) at [9].

[43] See T Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] Conv 104, 115; S Gardner and K Davidson, 'The Supreme Court on Family Homes', [2012] LQR 178, 179, and more recently the doubts expressed in Gardner (n 5), 377.

[44] [2018] A.C. 631. Of the members of the Board in Marr, Lord Neuberger sat on Stack, Lord Kerr and Lord Wilson on Jones, and Baroness Hale on both.

[45] Marr (n 6).

[46] Statute of Frauds 1677, c 154, s 7.

Lorenzo Maniscalco
lm632@cam.ac.uk

because on it turned the question of whether a presumption of resulting trust should apply or whether the case should be treated as falling within the 'domestic/consumer' context, so that the presumption of resulting trust could not be raised.[47]

At first instance, in the Supreme Court of the Bahamas, Isaacs J thought that where A had paid for the entire purchase price of a property, he could raise a presumption of resulting trust for a full interest and that B had failed to rebut it.[48] In the Bahamian Court of Appeal, Allen P – delivering the only reasoned judgment – found that the presumption of resulting trust was rebutted by evidence of an email between A and his solicitor indicating that A intended B to hold beneficially 50% of the properties jointly owned.[49] In the Privy Council, Lord Kerr, delivering the judgment of the Board, held that the courts below had erred in applying the presumption of resulting trust. That was not because he thought the case fell within the 'domestic/consumer' context, but because 'save perhaps where there is no evidence from which the parties' intentions can be identified, the answer is not to be provided by the triumph of one presumption over another.' He added that '[i]f it is the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership [...] the resulting trust solution may provide the answer.'[50]

Marr v Collie can be seen as both the logical development and the *reductio ad absurdum* of the line of cases going back to *Springette* – those in which the 'common intentions' of the parties were misleadingly described as taking effect by rebutting an otherwise applicable presumption.[51] If it is true that the common intentions of the parties can operate to 'rebut' a presumption of resulting trust – as in *Springette* – or the so-called presumption that equity follows the law – as in *Stack* and *Jones* – then what presumption applies is immaterial. Whenever they can be identified, the common intentions of the parties should take precedence over them. Under this view, it is irrelevant whether the informal common intentions had been detrimentally relied upon by the party claiming under them.

This seems to be the way in which the decision has been read in academic commentary too. Dr Juanita Roche in a comment described the decision as a 'return to orthodoxy', arguing that 'the presumption arising from joint names and the presumption of resulting trust are merely different starting points for the same process - namely working towards an evidence-based conclusion as to the intentions of these particular parties regarding this particular property.'[52] The editors of the latest edition of *Megarry & Wade* similarly state that in cases of purchase of property in joint names for the purpose of investment 'the court must search for the true intention of the parties and should not resort to presumptions about the parties intentions.'[53] Much along the same lines, the editors of *Emmett and Farrand on Title* have suggested that there is a parallel between the decision of the court in Marr and that in another recent Privy Council decision, *Gany Holdings v Khan* - a case involving a gratuitous transfer of shares by a settlor to trustees, in which Lord Briggs explained

[47] See n 35.
[48] Marr (n 6), [15]-[24].
[49] Ibid., [24]; *Collie v Marr*, [2012] SCC Civ App 134, [13]-[14].
[50] Marr (n 6), [54].
[51] See n 29-44.
[52] J Roche, 'Returning to clarity and principle: the Privy Council on Stack v Dowden', (2017) CLJ 493-6.
[53] S Bridge, E Cooke, M Dixon, *Megarry & Wade: The Law of Real Property* (London: Sweet & Maxwell, 2019), [10-016].

Lorenzo Maniscalco
lm632@cam.ac.uk

that – insofar as the intentions of the parties were clear – these obviated the need to have recourse to presumptions.[54]

This approach seems to assume that the common intentions of the parties ought to take precedence over the application of any presumptions because they can fill the evidentiary gap that triggers the need for presumptions in the first place. The problem is easy to see - the presumptions are relevant in cases involving trusts of land precisely because the informal common intentions of the parties are unable to establish an enforceable trust. The parallel that the editors of Emmett and Farrand draw with Gany Holdings is straightforwardly misleading. Gany Holdings was not a case involving land – when a trust is declared over personalty, any evidence that the settlor intended a trust is going to be sufficient to discharge the burden of proof and establish it, obviating the need for presumptions.[55] If the meaning of the decision in Marr v Collie, and indeed the correct interpretation of Stack and Jones, is that the courts will simply give effect to the parties' informal common intentions as long as they can be clearly identified, what has to be explained with some urgency is how this can be reconciled with section 53 (1) (b).

A return to orthodoxy in this area should recognise the following points. First, unless a trust has been declared in writing, the starting point in any case involving a dispute about beneficial ownership of land owned jointly will be to determine whether a presumption of resulting trust applies.[56] Secondly, if (and only if) a presumption of resulting trust applies and can be raised, the next question is whether it can be rebutted by any informal evidence that the party claiming under the resulting trust held an intention inconsistent with it– crucially, it is not relevant to this question whether that intention is common to both parties. Thirdly, regardless of whether a presumption of resulting trust can be raised, an informal common intention may be given effect to by the court under a CICT when it has been detrimentally relied upon by the party claiming under it. On the facts of Marr, either (i) a presumption of resulting trust applied and was rebutted, as found by the Court of Appeal of the Bahamas, or (ii) no presumption of resulting trust could be raised and therefore – in the absence of detrimental reliance on a contrary common intention – the parties simply held their legal interests beneficially.

3. Where the parties have declared a trust expressly: common intentions and express trusts

A similar ambiguity about the role that common intentions play in setting up CICTs has disrupted the development of the law on how informal common intentions may interact with an enforceable express trust declared by the parties. The majority of academic and judicial pronouncements on this subject are in agreement that, when two parties enter into an express declaration of trust, there should not be any room to give effect to a CICT if they shared a common intention inconsistent with the express declaration.[57] The current consensus is that much turns on timing. Two types of cases can be distinguished. Type (i) cases are those in which an informal common intention subsisted before or at the time of the express declaration, and type (ii) cases where it arose after the express declaration of trust. There is a strong academic consensus that a CICT cannot be

[54] J Farrand and A Clarke, Emmett and Farrand on Title, (London: Sweet & Maxwell, 2020), [11.114.02].
[55] See Gany Holdings (PTC) SA v Khan [2018] UKPC 21, [17].
[56] See n 8.
[57] See among many statements of the law in this sense Snell's Equity (n 5), [24-048].

Lorenzo Maniscalco
lm632@cam.ac.uk

established in a type (i) scenario, but there is some judicial and academic support for the view that a CICT can arise in a type (ii) case.[58]

In a recent article on this topic Professor Simon Gardner has defended this distinction, saying that the unavailability of a CICT in type (i) scenarios is justified because the declaration of trust leaves no ambiguity about any 'common intention' that the parties may have held about how their interest in the property should be allocated. Where the informal agreement preceded the declaration of trust, the express trust would amount to a settlement of any claim they might previously have had against one another.[59] In other words, any rights that the parties may have accrued against one another through their previous dealings would have been varied by the express declaration of trust.

This approach seems to be based on the assumption that CICTs are trusts created by the parties' agreement, so that the trust will not come into being if it has been excluded by a subsequent agreement. However, as mentioned, CICTs are trusts created not by the agreement itself, but by operation of law in circumstances where it is unconscionable for a party to insist on their strict legal rights, and indeed with compliance with formalities. To return to Gardner's distinction, in a type (ii) scenario, the claimant would effectively be arguing that after entering in the formal agreement, they detrimentally relied on an unenforceable informal one, on the assumption it would take precedence over the previous, enforceable one. In a type (i) scenario, the claimant would instead be arguing that they entered into the formal agreement subject to an understanding that the parties would be bound by an inconsistent simultaneous informal agreement, rather than the one formally entered into.

It would not be impossible for the law to develop so that detrimental reliance on informal agreements in type (i) scenarios cannot support a CICT. It has been argued that the concept of 'unconscionability' – at least in other doctrines where it is involved, such as proprietary estoppel – can help identify the outer boundaries of equitable interventions to uphold informal agreements where doing so would undermine the policy behind the statutory formality.[60] For instance, it has been recognised that it is not unconscionable for a party to go back on an informal common intention in circumstances where the parties were expecting to formalise their agreement.[61] It is possible to draw on that reasoning and argue that, insofar as parties in type (i) situations have followed their informal dealings with a formal declaration of trust, it cannot be unconscionable for either of them to go back on whatever common intention they had previously reached. However, the current decisions governing type (i) cases have been unable to develop the law consistently in this sense for two reasons. First, the authorities on point have neither identified the basis of CICTs in detrimental reliance and unconscionability nor relied on cases that did so – they seem instead to have excluded the availability of informal evidence of the parties' intention on the basis, similar to that offered by Gardner, that the evidence from the written declaration of trust should, where available, be regarded as conclusive of what the parties intended. Secondly, despite this finding, the current authorities have also explicitly recognised that it may be unconscionable for a party to insist on their rights under a formal declaration of trust where a contrary informal

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[58] Clarke v Meadus [2013] WTLR 199. See S Gardner, 'Understanding Goodman v Gallant' [2015] Conv 199-209. Cf C Bevan, 'The search for common intention: the status of an executed, express declaration of trust post-Stack and Jones', 135 (2019) LQR, 673-80 arguing that CICTs should not be available in either type (i) or (ii) cases.

[59] Gardner (n 58), 203.

[60] For an argument in this sense in the context of proprietary estoppel see M Dixon, 'Confining and Defining Proprietary Estoppel: The Role of Unconscionability' (2010) 30 LS 408.

[61] The issue has been addressed in the context of parties failing to formalise an agreement as required under Law of Property (Miscellaneous Provisions) Act 1989, c 34, s 2 (1). See Herbert v Doyle (n 40), [57] per Arden LJ. See also the application of this principle in Matchmove (n 40), [30]-[39].

Lorenzo Maniscalco
lm632@cam.ac.uk

agreement has been detrimentally relied upon by the other, as long as the claim is framed under a proprietary estoppel.

As to the first point, the highest authorities on type (i) situations are the Court of Appeal judgment in Pink v Lawrence and that in Pankhania v Chandegra.[62] In both cases land was conveyed expressly on trust for A and B jointly, but A argued that B's name was only added in order to assist in securing a mortgage. In both cases it was found that the previous agreement could not support a CICT, but neither judgment featured any discussion of the basis on which CICTs are established, and no reference was made to either detrimental reliance or unconscionability. Further, the court on both occasions relied on authorities where the role for informal common intentions was excluded in a different, unrelated context. The court in Pink cited as authority the decision of the Court of Appeal in Wilson v Wilson and a passage of Lord Upjohn in Pettitt which said that, where available, an express declaration of trust 'concludes the question of title as between the spouses [...] for all time'.[63] Neither of these cases decided the point that arose in Pink.[64] The decision in Wilson concerned the power of the court to vary an express trust under section 17 of the MWPA 1882 to give effect to the informal common intention of the parties – a question that became obsolete when the House of Lords in Pettitt recognised that no discretion at all was afforded to the court under section 17.[65] The obiter statement of Lord Upjohn in Pettitt, as I have considered before, concerned the kind of evidence by reference to which a court should identify a trust as established by the parties, not the circumstances in which detrimental reliance upon a common intention should call for the enforcement of a CICT.[66] The reason neither case could consider the point relevant to Pink is that the basis in detriment and unconscionability of CICTs was only identified by Lord Diplock in the later case of Gissing.[67]

Patten LJ in Chandegra relied on the same authorities, and also on the decision of the Court of Appeal in Goodman v Gallant.[68] Goodman is often cited as an authority for the principle that a CICT may not apply in a type (i) situation,[69] but it is far from clear that the case itself concerned a CICT, and Professor Gardner has recently suggested it was in all probability a case concerning a resulting trust.[70] If it was, the case is as uncontroversial as it is irrelevant to the point. A resulting trust arises because of a gap in the evidence to establish an express trust, and can therefore not be raised when evidence of an express declaration of trust is available.[71] Either way, Goodman, like Wilson and Pettitt, provided no reason for excluding a CICT where an express trust had been declared by the parties.

As to the second point, at the same time as excluding the enforcement of trusts based on informal common intentions, the courts have found that it may be unconscionable for a party to insist on their rights under an express trust, if the other's detrimental reliance on an inconsistent informal agreement or promise supports a proprietary estoppel. The origin of this principle is a reference by Patten LJ in Chandegra to an obiter statement made by Lady Hale in Stack which said that 'a

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[62] Pink v Lawrence (1978) 36 P & CR 98 CA (Civ Div); Pankhania v Chandegra [2013] 1 P & CR 16. Gardner (n 60), identified an earlier case in Leake (formerly Bruzzi) v Bruzzi [1974] 1 WLR 1528, but this case did not explicitly identify the trust being raised as a CICT. The rule was also applied by the Court of Appeal in Roy v Roy [2012] EWCA Civ 1438 without discussion.
[63] Wilson (n 15); Pettitt (n 16), 813.
[64] This has also been pointed out in Gardner (n 60), 200.
[65] See n 16.
[66] See n 17.
[67] n 20.
[68] Goodman v Gallant [1985] Fam 106.
[69] See Snell's Equity (n 5), [24-048].
[70] See Gardner (n 58), 200-202.
[71] n 8.

Lorenzo Maniscalco
lm632@cam.ac.uk

declaration of trust is regarded as conclusive unless varied by subsequent agreement or affected by proprietary estoppel.'[72]

A proprietary estoppel is triggered where one party's detrimental reliance on an unenforceable assurance or representation by another that they can expect to receive a specific proprietary interest makes it unconscionable for the latter not to fulfil their promise, or make good the detriment suffered in reliance.[73] It is beyond the scope of this paper to engage with the question of whether there are (or indeed ought to be) any differences between the doctrine of proprietary estoppel and CICT, or whether the latter should be subsumed within the former.[74] However, it is well known that the parallels between the two are so strong that they have often been juxtaposed in judicial writings, and are routinely pleaded as alternatives on the same facts.[75] There is also some judicial support for the view that the 'unconscionability' that triggers CICTs is the same as that triggering a proprietary estoppel.[76] Given the similarities between CICTs and proprietary estoppel, and their common link to unconscionability, it is rather troubling that the court in Chandegra failed to provide any reason to distinguish the two in this context.

Unfortunately, this statement has since been treated as a rule. It was recently considered in the High Court by Judge Elizabeth Cooke in Gaspar v Zaleski.[77] This was a case where A contributed to the purchase price of land, and declared an express trust under which he shared the beneficial interest with B. A argued that A and B had previously agreed that B would not acquire her share unless she contributed herself to the purchase price. Judge Cooke did not think a common intention could be found in this case,[78] but she added that even if she was wrong, such an agreement between the parties would not have amounted to such 'a clear representation [by B] that [B] was renouncing her share in the Property' as would be capable of supporting a proprietary estoppel. Relying on Chandegra and Lady Hale's obiter statement, Judge Cooke held that only the latter would have been capable of displacing the express trust.

Judge Cooke did place the appropriate emphasis on the basis of CICTs in detrimental reliance and unconscionability, but at the same time her decision highlights the arbitrariness of the current distinction. If CICTs and proprietary estoppel are indeed separate doctrines, it is far from clear where and how (and indeed why) their dividing boundaries should be identified. Judge Cooke's focus on the clarity of the representation seems to be an attempt to do so, but it is far from clear that a proprietary estoppel always requires such a clear representation to be established.[79] In fact, it may seem counter-intuitive for the more flexible 'equity' awarded under proprietary estoppel to be available in narrower circumstances than the CICT's fully fledged beneficial interest. Either way, it is unfortunate that this unwelcome added layer of uncertainty should have originated from a line of cases that have failed to identify the correct basis for enforcing CICTs.

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[72] Stack (n 27) at [49] (my emphasis), cited in Pankhania (n 62), [13].
[73] Thorner v Major [2009] 1 WLR 776, [29].
[74] See e.g. YK Liew, 'The Secondary-Rights Approach to the "Common Intention Constructive Trust"' [2015] Conv 210, 215-9.
[75] See e.g. Grant v Edwards [1986] Ch 638, 655; Rosset (n 24), 129; Banner Homes v Luff Developments [2000] Ch 372, 397-8; Oxley v Hiscock [2004] EWCA Civ 546 at [66]; Matchmove (n 40); Herbert (n 40). Cf Stack (n 27), [37].
[76] Culliford (n 26), [69].
[77] Gaspar v Zaleski [2017] EWHC 1770 (Ch).
[78] Ibid., [75]-[78].
[79] For instance, it is perfectly possible for a proprietary estoppel to be based on acquiescence alone. See J Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in S Bright (ed), Modern Studies in Property Law (Oxford: Hart Publishing, 2011), Vol 6, 175, 182. See also Thorner (n 73), [54]-[55] per Lord Walker.

Lorenzo Maniscalco
lm632@cam.ac.uk

The conceptual error at the heart of both the restrictive role of informal common intentions where a trust has been declared and of their overextended role when it has not is the same. It lies in the misleading assumption that CICTs are trusts established by the common intentions of the parties, so that (i) if no express trust has been declared in writing the courts should simply enforce their common intentions, rather than have resort to presumptions, and (ii) if a written declaration can be found, it should simply take precedence over any other evidence of the parties' intentions. This wrongheaded approach goes back to the historical origins of CICTs in cases decided under the MWPA 1882, it is high time the law in this area aligned itself with the long-established basis of CICTs in detrimental reliance and unconscionability.

Lorenzo Maniscalco
lm632@cam.ac.uk