

## FOURTEEN

In the face of judicial inconsistency, when do 3<sup>rd</sup> party contributions give rise to a beneficial interest in FR cases, and how do you quantify and evidence it?

Christopher Miller  
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*“There is nothing consistent in this world but inconsistency”*

Jonathan Swift

*“Consistency is the last refuge of the unimaginative”*

Oscar Wilde

# Contents

- (1) Some examples/ common scenarios
- (2) Some law
- (3) Some practical tips on handling cases
- (4) Some synthesis

# (1) Common scenarios

Example A:

H's father paid 100% of the deposit on a property. The property was registered in H's name. H manages the property and uses the rent from the property to pay the mortgage. The parties never lived in the property. H and father say that the father is the true beneficial owner of the property.

## Example B:

W and W's younger brother are the legal owners of a property. W's brother lives in the property and he paid all of the deposit. The mortgage is in joint names, but brother meets all the outgoings on the property. W and brother both say that the brother is the 100% beneficial owner of the property.

## Example C:

H and W are the joint owners of the FMH. H's uncle, a builder by trade, lives in a 'granny annex' to the FMH and pays £800pcm to H and W which is then used towards the repayments on the mortgage. Uncle and his team stripped the bathrooms and the kitchens in the property (including in the annex) and fitted new bathrooms and kitchens. H and W paid for material only.

## Example D:

W's mother loaned £100,000 to W and H. W and H use the money as a deposit on a house. There was an oral agreement that mother would be paid back when the house was sold. The parties separate a few years later and mother claims an interest in the home.

## (2) Law

Is litigation in this area really that inconsistent?

- Too ‘high level’ a survey might lead to a strongly positive response
- However, a more granular approach suggests some (but only some) seeming inconsistencies have an explanation and, therefore, there is the capacity to offer greater predictability to clients

## The resulting trust

- Now unlikely to be used in cohabitee cases (*Stack v Dowden* [2007] UKHL 17)
- Remains important law as between the spouses and third-party family members
  - Contributions at the time of acquisition (*Pettitt v Pettitt* [1970] AC 777) or subsequently (*Gissing v Gissing* [1971] AC 886 at 907) are likely to give rise to a resulting trust, providing that those contributions are monetary and direct (*Howard v Jones* [1989] Fam Law 231, CA).

– Apparent inconsistencies:

- Arif v Anwar [2015] EWHC 124 (Fam). Son contributed lump sum to parents' home. Parents divorced. A resulting trust arose,
- Buggs v Buggs [2003] EWHC 1538 (Ch) Married couple advanced monies to elderly relative to exercise Right to Buy, but lived rent free. Couple divorced. No resulting trust arose,
- McDonnell v Loosemore [2007] EWCA Civ 1531. £110,000 advanced by relative to enable couple to buy property. No resulting trust arises.

# INTENTION

**“In the absence of evidence to the contrary effect, a contributor to the purchase price will acquire a beneficial interest in the property”**

- Lord Reid in Pettitt

[but with my emphasis]

# Different (and clashing?) legal frameworks

## – Sole name v joint names cases:

- Two ‘paths’ when looking at constructive trusts
- Sole ownership/ ‘qualification’ cases; Lloyds Bank v Rosset [1991] 1 AC 107
- Joint names/ ‘quantification’ cases; Stack v Dowden [2007] UKHL 17/ Jones v Kernott [2011] UKSC 53

- Different considerations apply when a third party is thrown into the mix
  - Laskar v Laskar [2008] EWCA Civ 347 (wrong to apply Stack in a mother/ daughter dispute)
  - *Ratio of Jones* (para 51) makes it clear that the principles contained in the decision apply as between cohabitees and in relation to their family home
- Different considerations (may) apply in relation to whether the property is an investment property or a family home
  - See Jones (as above)

## Consistency in constructive trust/ promisory estoppel cases

- Joint names / ‘quantification’ cases; much easier for contributions points to be argued successfully
- What about sole ownership/ ‘qualification’ cases?
  - Distinguish between Rosset ‘limb 1’ and ‘limb 2’
    - express subsequent agreements (which may or may not be evidenced by contributions)
    - Contributions giving rise to a constructive trust

– Inconsistency in ‘qualification’ cases?

- *James v Thomas* [2007] EWCA Civ 1212 (renovation and mortgage payments referable to relationship not ownership)
- *Morris v Morris* [2008] EWCA Civ 257 (working for free, developing facilities and creating a business did not create an interest)
- *Le Foe v Woolwich* [2001] 2 FLR 970 (indirect marital contributions which enabled the mortgage payments to be made ‘counted’)
- *Graham-York v York & Ors, Leeds BS* [2016] 1 FLR 407 (financial and non-financial contributions ‘counted’)

- Why do we not have clearer guidance on the impact of contributions?
  - The Courts consider that this would be a matter for Parliament, not for the Courts, to define; *Thompson v Humphrey* [2009] EWHC 3576 (ChD)
  - Only common theme is that the contributions must be relevant to **intention**
- NB this government fast tracking reform (but likely to be in relation to cohabitation disputes only)

– Inconsistent approach to detrimental reliance?

- Are courts more generous to lay persons when a bank is involved?(see *Nilsson & Anor v Cynberg* [2024] EWHC 2164 (Ch))
- Detrimental reliance remains central if arguing subsequent changes to ownership (NB often the context of promisory estoppel); *Guest v Guest* [2022] UKSC 387
- Does not **HAVE** to be pecuniary; *Davies v Davies* [2017] 1 FLR 1286 at [38 (although it definitely helps if it is)

## The role of the TR1

- Ordinarily determinative (see e.g. Stack)
- Pankhania v Chandegra [2012] EWCA 143 (not an FR case); conclusive on the issue of beneficial ownership UNLESS:
  - Rectified
  - Displaced by subsequent agreement
- Latter is likely to give rise to substantial variation in judicial approach (see e.g. Gallarotti v Sebastianelli [2012] 2 FLR 1231)

## Imputation versus inference

- Imputation only relevant if ‘qualification’ passed but no common intention apparent from course conduct as to ‘quantification’ (see e.g. Stack)
  - Very fine line between two processes
  - Oxley v Hiscock [2004] 2 FLR 669 inference drawing
- Just being named on the title in order to enable a mortgage to be raised is unlikely to give rise to an interest and permit imputation; Re Share (Lorraine) [2002] 2 FLR 88

# (3) Handling cases

Detailed instructions from an early stage

- What happened
- **WHY** did it happen (remember e.g. James v Thomas)
- Detrimental reliance (remember e.g. Guest v Guest)

Early strategy

- Is this a joint or sole ownership case?
- Has there been an express agreement?
- Has the nature of the trust morphed over time?

## Forensic process

- Land Registry
- Conveyancing file
- Witnesses?
- Contemporaneous communications
- Bank statements
- Other financial records (e.g. what has HMRC been told?)

- Quantification
  - Distinguish between sole ownership/joint ownership cases
  - Use *Oxley v Hiscock* [2004] 2 FLR 669
  - Use imputation in joint ownership cases (but only if you cannot infer shares)
  - Argue through the lens of intention

## (4) Synthesis

- The greatest inconsistencies appear to be around sole ownership cases (and predominantly seem to be generated by ‘hard facts’ relating to bankruptcy, death etc)
- There will remain considerable variation in outcome for quantification cases, but that is probably attributable to factual nuance, rather than inconsistency in applying the law

- TR1s are important, but not quite as immutable as older authorities might suggest
- Intention remains a pivotal concept
- Detrimental reliance continues to be pivotal concept (but, potentially, with a more flexible approach to its nature)
- Resulting trusts continue to be a key consideration where 3<sup>rd</sup> parties are involved in FR proceedings

# Contact information

Christopher Miller

[cmiller@fourteen.co.uk](mailto:cmiller@fourteen.co.uk)

020 7242 0858

FOURTEEN

14 Gray's Inn Square

London, WC1R 5JP