

## Answers to end of chapter Q&A

### **Question 1: Compare and contrast resulting and constructive trusts. Why do you think the majority of the House of Lords in *Stack v Dowden* [2007] 2 AC 432 preferred the constructive trust as a means of determining rights in the home?**

This question requires you first to consider the similarities and differences between the resulting and constructive trust and then to consider why the latter type of trust was preferred in *Stack v Dowden* as the means of determining rights to the home. Both the resulting and constructive trust may be used by a claimant to establish a beneficial interest in the absence of an expressly declared trust. The differences between the doctrines relate to their underlying rationale and the means by which beneficial shares are quantified. As regards their rationale, the general feature of the resulting and constructive trust are summarised in part 1. You may also find it useful to review the discussion of these different types of trust in chapter 14. In part 1 of this chapter we have highlighted a particular overlap between the purchase money resulting trust and inferred agreement constructive trust; both of which may be claimed by a person who has made a direct contribution to the purchase of property in the name of another. We have seen that these trusts may be distinguished on doctrinal grounds, but that the majority of the House of Lords in *Stack v Dowden* preferred a pragmatic distinction. The majority considered that the constructive trust should be used in the “domestic consumer context” and the resulting trust in the commercial context. The reason the majority of the House of Lords preferred the constructive trust a means of determining rights in the home relates to how beneficial interests are quantified in each type of trust. Under the resulting trust, a claimant obtains an interest in proportion to his or her contribution. Under the constructive trust, beneficial interests are quantified by reference to the common intention of the parties. This enables evidence beyond their contributions to be taken into account, as we have seen in the discussion in part 2.2.

### **Question 2: What do you understand is meant by the “common intention” of the parties in the context of the constructive trust? Does the parties’ common intention provide a satisfactory basis for ascertaining ownership of the home?**

This question requires you both to identify what is meant by the parties’ “common intention” and then to assess whether you consider this to be a satisfactory basis for ascertaining ownership of the home. The two parts of the question are connected, as your assessment of the use of common intention will be influenced by what is meant by the concept. The meaning of common intention was considered in *Stack v Dowden*. As we have seen in part 2.1.2, Lord Neuberger took a narrower view of the meaning of common intention than the approach endorsed by the majority. The key difference in their Lordships approaches is whether it is legitimate for courts to “impute” rather than “infer” a common intention. Lord Neuberger considered that the courts could infer an intention “objectively deduced to be the subjective actual intention of the parties” but not impute one where “no such actual intention can be deduced from their actions and statements”. The majority considered that an intention could be imputed; Lord Walker suggested that this had been implicitly accepted by the House of Lords in its previous decision in *Lloyds Bank v Rosset*. In part 2.4 of this chapter we have also highlighted academic discussion of the

meaning of common intention; in particular the views of Bottomley, Piska and Gardner. You may find it helpful to consider the views of these commentators in assessing whether you think that the parties' common intention to be a satisfactory basis for ascertaining ownership of the home: would your view change if the interpretation offered by each of these commentators was adopted? You may also find it useful to consider what could be used in place of common intention. We have noted in part 2.4 that academic commentators have not found consensus in suggesting alternative bases and you may find it helpful to read some alternative views (see, e.g. those referred to in fn 64). We have also noted in part 2.4 that the Law Commission abandoned its attempt to replace common intention. You can read their views in Law Commission Report No 278, *Sharing Homes: A Discussion Paper* (2006), [3.76]-[3.78].

**Question 3: Are the problems of gender stereotypes that have been encountered in ascertaining the existence of detriment inherent in the adoption of the test provided by Nourse LJ in *Grant v Edwards* [1986] Ch 638? Is Browne-Wilkinson VC's test (in the same case) preferable?**

To answer this question you should review the extract from *Grant v Edwards* in part 2.1.2 and the discussion of the different approaches to detriment taken in that case by Nourse LJ and Browne-Wilkinson VC. We have noted in that discussion that Nourse LJ's test of detriment requires conduct on the part of the claimant that he or she could not reasonably be expected to do unless he or she was to have an interest in the home. The adoption of this test has led courts to reject conduct that it considers reasonable for the claimant to have undertaken by reason of the parties' relationship. We have seen that in applying this approach the courts have tended to measure a claimant's conduct against gender stereotypes. It is as a direct result of this that domestic work such as child care has been rejected as constituting detriment; a rejection that we have seen has led to a powerful feminist critique. You may draw your own conclusion as to whether you consider this to be inherent in Nourse LJ's test, or merely the consequence of how that test has been interpreted and applied in subsequent case law. Browne-Wilkinson VC suggested that detriment should be established by any conduct undertaken by the parties as part of their joint lives. It seems likely that the adoption of this test would have led to a broader range of conduct being accepted as detriment. A party who takes on a domestic role in a relationship contributes to their joint lives even if (on Nourse LJ's approach) such conduct can be rejected as detriment on the basis that it is conduct a claimant can reasonably be expected to do even without having an interest in the home. With this in mind it seems possible, at the least, that one of the key criticisms of the operation of the constructive trust could have been avoided if Browne-Wilkinson VC's test of detriment had been adopted in preference to that provided by Nourse LJ.

**Question 4: To what extent do you consider it desirable to extend the reasoning in *Stack v Dowden* [2007] 2 AC 432 to determine the creation of a trust in sole legal owner cases?**

In this chapter, we have noted that while *Stack v Dowden* concerned only the issue of quantification of beneficial shares in case of joint legal ownership, the decision may also impact on the creation of a trust in a case involving sole legal ownership (see part 2.1). This question requires you to assess the extent to which you consider such an extension

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of the reasoning to be desirable. It will be useful for you first to review the discussion in this chapter on the creation of a trust (part 2.1) and the approach taken to quantification in *Stack v Dowden* (part 2.3). As we have seen, the creation of a trust requires the existence of a common intention. In *Lloyds Bank v Rosset*, Lord Bridge considered that this, in turn, could be established expressly through discussions between the parties or could be inferred where a claimant has made a direct contribution to the purchase. Prior to *Stack v Dowden*, the quantification of beneficial shares was thought to be based on “fairness” (*Oxley v Hiscock*), but *Stack v Dowden* changed the criterion to common intention. In the context of quantification, the majority took a broad approach to the evidence from which a common intention can be found. This is explained in paragraphs [68]-[70] of Baroness Hale’s judgment, which are extracted in part 2.3. The majority considered that a common intention can be imputed as well as inferred (see part 2.1.2). Further, we have seen that Lord Walker appeared to analyse *Rosset* as accepting the possibility of an imputed intention for the purposes of creating a trust (p 564). As a result of *Stack v Dowden*, the same criterion now governs both the creation of a constructive trust and the quantification of beneficial shares.

However, applying *Rosset* to the former issue and *Stack v Dowden* to the latter, the evidence from which a common intention can be found differs. You may take the view that this position should be maintained. If so, you should consider the rationale for using conduct as evidence of a parties’ common intention for one purpose, but not the other. However, there are two alternative views that need to be assessed. First, in *Stack v Dowden* Lord Walker suggested that “the law has moved on” from *Rosset*. His particular concern was that the courts should take into account indirect contributions to a purchase as evidence of a common intention. We have explored his views in part 2.1.2. Secondly, a more radical suggestion is that the broad approach to establishing the parties’ common intention in *Stack v Dowden* should be applied equally both to the question of creation of a trust and quantification of shares. We have explored this argument in part 2.5.

**Question 5: What are the advantages and disadvantages of determining ownership of the home through the application of property law principles? Is the Law Commission justified in singling out relationship breakdown between cohabitants as a situation to be dealt with outside property law principles?**

In part 1 of this chapter we noted the four key situations where ownership of the home falls to be considered by the application of property law principles. We have noted that where the issue of ownership arises as a matter of property law, the question for the court is what each party *actually* owns. This is in contrast to legislative schemes which, on divorce or the dissolution of a civil partnership, confer on the court a discretion to determine what each party *ought* to be given. Hence, to answer this question it is useful to consider the situations in which ownership of the home may arise and think about whether, in those circumstances, the court should be constrained into identifying the parties’ actual rights or should be able to vary those rights. Different considerations may arise, for example, when the court’s decision will impact on third parties (such as a secured creditor) from when the decision will affect only the parties themselves (such as a relationship breakdown). Currently, the position on the breakdown of a relationship between parties who have cohabited without marriage or entering a civil partnership stands in stark contrast to the situation where a marriage ends in divorce or a civil partnership is dissolved.

The property rights of cohabitants on the breakdown of their relationship remains determined by the application of property law principles. In the other cases of relationship breakdown, the courts have access to statutory schemes that enable them to make a property adjustment order. The Law Commission has recommended replacing the application of property law principles on the breakdown of a relationship between cohabitants who have lived as a couple in a joint household where certain eligibility criteria are met. We have explored these recommendations in part 4. Previously, the Law Commission considered whether a single scheme should be provided to determine ownership of a shared home in all cases where the issue arises (outside situations covered by existing statutory schemes). To understand the reasons for this change you will find it useful to read Law Commission Report No 278, *Sharing Homes: A Discussion Paper* (2002, part VI) and Law Commission Report No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007). The Law Commission's recent recommendations may go some way to removing the current unfavourable treatment of cohabitants on the breakdown of their relationship, when compared to the position on a divorce or the dissolution of a civil partnership. Those recommendations therefore deal with the situation that has given rise to most criticism under the current law. Whether you consider those recommendations to go far enough may depend on your assessment of the advantages and disadvantages of using property law principles.