A MATTER OF TRUSTS

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1. Over a decade since the House of Lords decided the seminal case of Stack v Dowden [2007] 2 AC 432, in this session we offer a brief but (we hope!) useful and timely overview of what we perceive to be the modern approach to the determination of three tricky areas of property and equity which affect insolvency practitioners every day, namely:

    a. how the court determines the beneficial ownership of real property (be it an asset being claimed by a trustee as part of a bankrupt's estate, or the asset against which a liquidator or administrator hopes to enforce his/her judgment for, say, loss caused to the Company by a misfeasant director);

    b. the taking of an equitable account between co -owners; and

    c. the operation of the equitable doctrine of exoneration, allowing one co – owner to cast the primary burden of a charge over jointly owned property onto another in certain (recently better defined) circumstances.

A: DETERMINING BENEFICIAL INTERESTS

2. With the advent of land registration it is now an easy task in the vast majority of cases to check the Land Register and thereby determine the legal ownership of a subject property. But the potential for separation of legal and beneficial ownership means that the enquiry does not end there : the Property may be held by the legal owners on trust for themselves or others. That trust might be an expressly declared trust, or it might be a constructive trust based on the common intention of the parties. Below we provide an overview of these types of trust, how they are established and how they can be challenged.

(i) Express Trusts

3. A very important (but surprisingly frequently overlooked) question is whether the legal owner or owners of the subject property have actually declared the beneficial interest position, at the date of purchase or later on, by means of an express trust.

4. By way of revision, at the time of purchase of a property by two or more individuals, the declaration of their respective beneficial interests can be made by placing a cross in the relevant box at section 10 on the TR1 property transfer form that gets lodged at the Land Registry,

declaring that the transferees either hold the property on trust for themselves as joint tenants, or as tenants in common in equal shares, or on some other basis (with a space to fill in the details). Alternatively (or later on, post purchase) it can be done by the execution of a deed of trust (or, sometimes, more informally, by a more homemade declaration of trust as long as it is "*manifested and proved by some writing signed by some person who is able to declare such trust*": s 53(1)(b) of the Law of Property Act 1925).

5. In Pink v Lawrence (1978) 36 P & CR 98, the Court of Appeal emphasised that:

   "*where there is an express declaration of trust, the doctrine of constructive trusts cannot be referred to contradict the expressly declared trust. The doctrine of constructive trusts is one which applies in circumstances where there is no declared trust*"

   and

   "*Once a trust has been effectively declared, it can only be got rid of either by rescinding the document containing the declaration of trust on the ground of fraud or mistake, or rectifying it in the appropriate manner to vary or delete the declaration of trust*"

6. This was again confirmed by the Court of Appeal in Goodman v Gallant [1986] 2 WLR 236 , where it was held that, in the absence of any claim for rectification or rescission, an express declaration of trust conclusively defines the parties' respective beneficial interests and there is no room for the application of the doctrine of resulting, implied or constructive trusts.

7. Goodman v Gallant was approved in Stack v Dowden [2007] 2 AC 432, but with one proviso - at [49] Baroness Hale says that there is no doubt such a declaration is conclusive, **unless later varied by agreement between the parties or by a proprietary estoppel.** What was meant by "agreement between the parties" she did not elucidate, but many practitioners assumed it meant a written variation to the declared trust. Otherwise, a declaration of trust would not be at all conclusive, as in any given case a party could rely on subsequent conduct to found a constructive trust superseding the declared trust.

8. However, subsequently, in Clarke v Meadus [2010] EWHC 3117 (Ch), the Claimant's counsel relied on this passage to seek to argue just that - that a party could, in the face of an existing declaration of trust, still rely on a later constructive trust (in this case a "remedial constructive trust" allegedly arising to give effect to a promise made by the Defendant, the Claimant's mother, to transfer her half share in a property to the Claimant upon her death – unsurprisingly proprietary estoppel was argued in the alternative). The master struck out the claim, concluding that there was no detrimental reliance significant enough to be sufficient to found (or "feed") an

estoppel of the scale sought by the Claimant (ie that half of the property be transferred outright to her) and a claim based on a constructive trust was not permissible where there has been an express declaration of trust. Warren J allowed the Claimant's appeal. He considered :

> *"The Master did not, however, give any consideration to the question whether a constructive trust might have arisen as a result of matters which took place after an express declaration of trust... He did not address the question whether a constructive trust might have arisen after that date to displace the express trusts declared. Nothing in Stack v Dowden or Goodman v Gallant can be read as suggesting that this is not possible: it all depends on the facts."* [42].

9. Not being a final hearing, this judgment is of no real precedential value, but it might well pave the way for an argument that a common intention (as opposed to a remedial) constructive trust based on later events can supersede a declaration of trust (thus sidestepping the requirement for a Claimant to show he or she has suffered a level of detriment sufficient to feed a proprietary estoppel). This would certainly be very odd, juristically and we have grave doubts about whether it is right. In any event, we consider there would have to be very strong evidence of the joint co-owners actually changing their mind in respect of the declaration before the Court could find that they intended it should no longer regulate their property interests, and the Court should not countenance such an argument based on inference alone (as opposed to evidence of express discussions).

10. Setting aside the suggestion that a party may be able to rely on conduct postdating the declaration of trust, to escape the effect of the declaration they must seek to have it rectified on the basis of mistake or rescinded on the basis of some vitiating factor (eg fraud, misrepresentation, duress, undue influence etc),. The most usual circumstances relied upon in the authorities is common mistake (or a unilateral mistake of which the other party is aware) as to the meaning and effect of the "trust". These sorts of claims can best be countered by seeking to obtain the conveyancing solicitor's file and establish that advice was given in respect of the effect of the transaction, But this will not be effective in a case where any such advice could not have been understood.

11. By way of example, in Hapeshi v Allnatt [2010] EWHC 392 (Ch) the Court considered that the fact that the TR1 transfer form contained a declaration that a mother and son held the property in equity as joint tenants was of little relevance as it was apparent that the mother could not read English and there was no evidence that at the time of the transfer she understood what a joint tenancy was. The Court therefore ignored the express declaration of trust and held that the mother's share was 50%, the son's share was 25% and another son's share was 25%.

12. On a practical level, the person seeking rectification of the declaration of trust bears the burden of proving the facts upon which they rely, but the Court may be able to grant relief without actually employing the machinery of rectification (and perhaps even without a formal counterclaim). This is because "*where the deed is rectifiable the doctrine of estoppel by deed will not bind the parties to it and therefore the court may be able to give effect to the true position between the parties by some more direct form of relief without actually going through the machinery of rectifying the document in question*" (Pink v Lawrence, above at p 101, relying on Wilson v Wilson [1969] 1 WLR 1470).

ii Constructive trusts

13. Section 53 LPA 1925 (requiring a declaration of trust to be manifested and proved by some writing) expressly does not affect the creation or operation of resulting, implied or constructive trusts (see s 53(2)). The classic formulation of a constructive trust in the context under discussion is one which arises where a person acts to his detriment in reliance upon a common intention that he will acquire an interest in property. In order to establish the existence of such a trust, the claimant must demonstrate, first, a common intention (either express or to be implied from the surrounding circumstances) that both parties should have a beneficial interest in the property and, secondly, that the claimant has acted to his detriment on the basis of that common intention, so that it would be inequitable for the legal owner to deny the claimant his interest..

14. Cases where there was an express common intention pose less juristical difficulty, for obvious reasons. In cases where the Court is required to infer the parties' intentions from conduct, historically the Court had been inclined to finding that the parties intended a Claimant who had made financial contribution to the property (to its purchase, by way of deposit or mortgage and/or its upkeep) to have an interest (based on, essentially, a resulting trust analysis) , but has had more difficulty with indirect financial contributions (such as paying for other household expenditure, which may have freed up the owner's own funds to pay the mortgage).

15. Something of a sea change was heralded by what remain the lead cases of Stack v Dowden [2007] 2 A.C. 432 and Jones v Kernott [2012] 1 AC 776. We consider the following propositions can be determined from those judgments, and the judgments which followed:
    Joint name cases

16. In joint names cases (where a family home is in the joint names of a cohabiting couple and both are responsible for any mortgage, but without any express declaration as to beneficial interests):

(i) they are joint tenants in law and, on presumption, equity. The starting point is that equity follows the law, and the onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership ;

(ii) this presumption may be displaced by showing the parties had a different common intention when the home is purchased, or at a later stage they formed the common intention that their shares should change;

(iii) The common intention is to be deduced objectively from their words and conduct. Sometimes it will be based upon their express agreement (ie an 'express common intention') sometimes inferred from other evidence (ie an 'implied common intention') . In Stack at [69], Baroness Hale identified a non-exhaustive list of factors, as evidence of the parties' intentions: including the reason the home was acquired, the nature of the relationship, how the purchase was financed initially and subsequently, and how the parties arranged their finances and discharged their outgoings. To this list can be added the financial contributions (or lack of them) to the maintenance of children, unless it is clear that to do so would result in double liability, e.g. arrears owed to the Child Maintenance Service (see Barnes v Phillips [2015] EWCA Civ 1056, para 41);

(iv) where there is no evidence as to their joint intentions on quantum of the interest at the outset, or that intention has changed but it is not possible to determine the new intention, each is entitled to "*that share as the court considers fair, having regard to the whole course of their dealings with regard to the property*" (following Oxley v Hiscock [2004] 2 FLR 669 at [69]) and this" *should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to determining the parties' actual intentions*" (Jones v Kernott, above, at [51].

(v) when deciding each parties' "fair share", as the Court of Appeal emphasised in Grahame v York [2015] EWCA Civ 72, it is essential to bear in mind that the court is not concerned with some form of "redistributive justice" (so it was irrelevant that it might be thought a 'fair' outcome for a woman who had endured years of abuse from her partner to be allotted a substantial interest in his property on her death) . The fair share is decided by considering the parties' dealings in relation to the property' [22].The Court should also not be led astray simply by the length of co-habitation [26]. Further "*the judicial evaluation of the fair share is only one in respect of which there is only one right answer. It is an exercise the outcome of which should only be disturbed by an appellate court if it falls outside the ambit of reasonable decision making*" [25].

Sole name cases

17. In cases where property is held in the sole name of one person**,** there is a two stage analysis :–

    a. First the person claiming a beneficial interest must show there was a common intention, deduced objectively from their words or conduct, that they should have an interest in the property (even if there was no agreement as to the precise extent of that interest);

    b. Second, if the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, again (as in the joint names cases) the court may impute an intention that the person was to have a fair beneficial interest and may assess the quantum of that fair share in the light of the whole course of dealing between the parties **in relation to the Property** and the same factors as identified in Stack v Dowden, above, at [69] above will also be relevant here (Jones v Kernott, above, at [52]). It is important to have in mind that, where a property is purchased in the name of one part only, even with the aid of a substantial contribution from the other, there is no presumed starting point of equality of interests (Graham York v York, above, at [25])

Commercial Property

18. Different principles may apply to the ownership of commercial property (e.g. buy to let investments). In Laskar v Laskar [2008] 2 FLR 589 , where a daughter assisted her mother to buy an investment property on a buy to let basis, the Court of Appeal applied essentially a resulting trust analysis, and the shares of a rental property held by mother and daughter were defined as two-thirds / one-third in accordance with their respective financial contributions.

19. However, in Marr v Collie [2017] UKPC 17 , where various investment properties were purchased by a couple in joint names over a long relationship, the Privy Council disagreed with the first instance court which had applied resulting trust principles, adopting the “Laskar approach”.

20. The Privy Council considered it would be wrong to (and Lasker did not require them to) always consign the reasoning in Stack (including the presumption that equity followed the law) to the purely domestic context and “*There is no reason to doubt its possible applicability to property purchased by a couple in an enterprise reflecting their joint commercial, as well as their personal commitment*”.[40]. .

21. The Privy Council identified that. in Laskar, the co-funding of the purchase was required because the mother could not have afforded to buy the house herself and it was thus a joint investment impelled by her circumstances. Although the relationship was familial, the financial venture on which the parties had embarked was not associated with a mutual commitment to each other for the future, and the investment could therefore be characterised as a purely financial one, designed to pay dividends to each of the participants but shorn of the aspiration for future equal sharing of proceeds [48]. But where a property is bought in the names of a cohabiting couple, even as an investment, it does not follow inexorably that the resulting trust solution inevitably applies, and there is no strict demarcation between the purchase of a family home, and the purchase of an investment property in whatever circumstances that took place [49].

22. The Privy Council considered that, save perhaps where there is no evidence at all from which the parties' intentions may be identified, the answer is not to be provided by the triumph of one presumption over another (ie the presumption of joint beneficial ownership where parties buy in joint names in a domestic relationship, the presumption of resulting trust when if bought in a wholly non – domestic situation). Instead, context is key in the search of for the parties' true intentions (see [53-55]). Thus the case was remitted for the parties' intentions to be properly examined.

B: EQUITABLE ACCOUNTING

23. The principles of equitable accounting were developed by the courts of equity to enable an adjustment to be made to the division of the net proceeds of sale of a co-owned property in appropriate cases.

24. As regards moneys paid, the general position is that :

    a. a credit will be allowed to a party who has made payments in respect of repairs or improvements that have increased the capital value of the property: "*Credit is allowed only for one half of the lesser of the actual expenditure and any increase in the value realised thereby.*" (In <u>re Pavlou (a bankrupt)</u> [1993] 1 WLR 1046, per Millett J at page 1049);

b. Credit should also normally be given for mortgage payments, making no distinction between capital or interest 'I can see no reason why, if an account is taken, the party paying the instalments should not be entitled to set a due proportion of the whole of the instalments paid against the share of the other party. The mortgagee will normally have a charge on the property for principal and interest and a right to possession and sale to enforce his charge. The payment of instalments due under the mortgage operates to relieve the property from the charge and gives rise to an equitable right of contribution by the co-owner who has not paid his due proportion of the instalments." (In In re Gorman [1990] 1 WLR 616 , per Vinelott J at page 626.

25. It has been the usual practice of the Court to allow, from the date of bankruptcy, any credit due for future interest payments to be set off against the liability of the co-owner r to pay an "occupation rent" to the trustee in bankruptcy. In Gorman (above) Vinelot J stated (at page 625 G) "*In some cases, to avoid the necessity of expensive and protracted inquires and accounts, the courts have treated mortgage interest, paid by a tenant in common who has been in sole occupation, as equal to an occupation rent, leaving only an appropriate portion of any capitol repayments to be credited to him*. " He referred to Ormrod LJ's observation in *Suttill v Graham* that "*so far as my recollection goes, it has been the normal practice in this class of case to allow the occupying spouse to take credit for repayments of capital, but not of interest because he or she has had the benefit of the use of the house*", but went on to say that "***That practice is not, of course, a rule of law** to be applied in all circumstances irrespective of, on the one hand, the amount of the mortgage debt and the instalments paid, and on the other hand, the value of the Property and the amount of the occupation rent that ought fairly to be charged. **It is a rule of convenience** and more readily applied between husband and wife and co-habitees than between a spouse and a trustee in bankruptcy of the other co - owner*. " (emphasis added).

26. Re Gorman was cited by Millet J in Re Pavlou [1993] 1 WLR 1046. Referring to the fact that in many cases the court has simply set off the interest element in the mortgage repayments against an occupation rent, he stated "*in my judgment if the trustee in bankruptcy insists on the strict accounts being taken, then he is entitled to do so, unless it can be seen in advance that the amounts are likely to be so similar that the taking of the two accounts would be a waste of time and the costs would outweigh any possible advantage to be gained thereby. In such a case the Court **might** well impose its own solution of directing the interest element in the mortgage instalments to be set off against the use and occupation without any further inquiry*" (p 1051C) (emphasis added).

27. Both of these cases were referred to by Lawrence Collins J in Re Byford [2003] BPIR 1089. The question in issue in that case was whether the same approach (ie only allowing credit for mortgage payments against a set off for occupation rent) applied even in a case where the husband and wife had not separated, and the husband still resided in the property post-

bankruptcy (in both Gorman and Pavlou there had been a separation). The Court found in favour of the trustee that an occupation rent should be paid.

28. All of these cases were referred to in *French v Barcham* [2009] 1 WLR 1124. In that case the judge at first instance had made an order giving the bankrupt's spouse credit for half of the mortgage payments (inter alia), but did not allow an off-set for occupation rent on the basis that anyone seeking compensation for a restriction or exclusion of the right to occupy must fall within the statutory regime set out in s 12 1 15 of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA ", the relevant sections, 12 and 13, are set out in the appendix) and the trustee in bankruptcy did not. This submission was based upon Baroness Hale's observation in Stack v Dowden, above, at [94] that:

> *"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"*

29. The first instance decision in French was successfully appealed. Blackburne J stated (at paragraph 35):

> *"When a trustee in bankruptcy has been appointed of the estate of a co-owner so that that co-owner's interest vests in the trustee, but the other co-owner remains in occupation of the property, application of the principle will ordinarily, if not invariably, result in the occupying co-owner having to account to the trustee of the beneficial interest to which the bankrupt co—owner was formally entitled for an occupation rent. This is because it is not reasonable to expect—even if it were otherwise practicable for him to do so-the trustee in bankruptcy to exercise the right of occupation attaching to the interest in the property that vested in him on his appointment as trustee of the bankrupt co-owner. If it could be shown that the occupying co-owner was given by the trustee to understand that no occupation rent would be charged or was unaware of, and had no reasonable means of discovering, the other co-owner's bankruptcy, the court might take the view that it would not be just to require the occupying co-owner to pay an occupation rent. But short of such circumstances it is difficult to see why the occupying co-owner should not be charged an occupation rent*."

30. Blackburne J concluded (at [46]) that on sale of the property, the bankrupt's spouse was liable to be reduced by a sum equal to one half of the property's letting value from time to time since the bankruptcy, and the Trustee agreed not to claim a figure which exceeded the mortgage and

insurance payments made (ie the set off was not only restricted to the interest element of the mortgage).

31. While the decision whether to allow the Trustee occupation rent is in the discretion of the Court, the previous authorities particularly *French v Barcham*, suggested that ordinarily it should be allowed. That was, until Snowden LJ's decision was handed down in Davis v Jackson and Another [2017] EWHC 698 (Ch)

32. This was a case on extremely unusual facts:

    a. Mrs Jackson, purchased the property in March 2003 in her sole name, funded partly by an interest-only mortgage, and she moved to live in the property with her four children (but not with her estranged husband, Mr. Jackson, who never lived at the Property).

    b. About a month later in April 2003, and for reasons which the Judge described as "*wholly unclear* " Mrs. Jackson executed a trust deed declaring that she held the property on trust for herself and Mr. Jackson in equal shares, which deed was countersigned by Mr. Jackson who declared that he agreed to pay half of the mortgage payments in consideration of being entitled to half of the equity of the property. Notwithstanding the terms of the deed, Mrs. Jackson continued to pay all of the interest payments under the mortgage and all of the household costs alone and Mr. Jackson made no contributions.

    c. Mrs. Jackson started to experience cash flow problems and could not keep up with the repayments under the mortgage and the mortgagee took proceedings and obtained an order for possession of the Property in April 2005. To avoid eviction, Mrs Jackson re-mortgaged with a new mortgage lender in March 2007 who required the title to the Property to be transferred into Mr. and Mrs. Jackson's joint names and for both of them to be liable for repayment of the new mortgage loan The TR1 filed in March 2007 had the relevant box ticked to indicated that they held the Property on trust for themselves as joint tenants. Again Mrs. Jackson paid all the mortgage instalments and costs of upkeep.

    d. In August 2013, a bankruptcy order was made against Mr Jackson, and, after unsuccessful attempts by the Trustee to negotiate a buy out of Mr. Jackson's interest by his wife, in 2015 the Trustee applied for an order for a declaration that he held a 50% beneficial interest in the proceeds of sale and also an order for sale and division of the sale proceeds 50/50, both of which was granted. Mrs Jackson appealed against the declaration and order for sale. While Snowden J refused the appeal, he did vary the order for sale to provide that it should be subject to an equitable account to be taken between the Trustee and Mrs. Jackson in relation to the division of the anticipated proceeds of sale of the property.

33. Snowden LJ agreed the question of occupation rent should be dealt with under general equitable principles (rather than the statutory regime under TOLATA), but he did not find the remainder of Blackburn J's analysis in French convincing, for two reasons.

    a. First (at [61]), the default position (outside the bankruptcy context) where one co-owner is not in occupation should be that no occupation rent is payable (see Jones (AE) v Jones (FW) [1977] 1 WLR 438 and Dennis v McDonald [1982] Fam 63).Thus there ought to be some conduct by the occupying party, or at least some other feature of the case relating to the occupying party, to justify a court of equity concluding that it is appropriate or fair to depart from the default position and to order the occupying party to start paying rent. In *French's* case, Blackburne J rejected a similar argument, suggesting (at para 40) that *Dennis's* case and *Pavlou's* case had moved away from the idea of a forcible or active exclusion by one co-owner of another as a condition for rent to be paid, and instead explained the concept of exclusion as a "state of affairs" in which the question was focussed on whether it was reasonable for the non-occupying party to exercise his right of occupation or not, rather than the conduct of the party in occupation. However, because it would invariably be unreasonable for a trustee in bankruptcy to seek to take up occupation, Blackburne J's approach would have the result, as a virtually immutable rule, that an occupation rent should be payable, and the effect of Blackburne J's approach would be to invert the default position in any case involving a trustee in bankruptcy.

    b. Secondly, Blackburne J's approach excluded the possibility of the court having any regard to the position that existed prior to the bankruptcy, or to the conduct or circumstances of the non-bankrupt party such as agreements between the parties about occupation etc. The Judge considered cases such as Jones (above - where Lord Denning MR plainly thought that the stepmother, who had inherited her husband's interest in the property and had become a tenant in common with her stepson, should not be entitled to claim an occupation rent because of the agreements between her deceased husband and the son) and Chhokar v Chhokar [1984] FLR 313, while both cases with extreme facts, illustrated that the court can have regard to the circumstances in existence before the tenant in common seeking payment of an occupation rent acquired his interest [67].

34. At [68] Snowden J accepted that, in most bankruptcies, the unpaid creditors of the bankrupt will be innocent parties who have not chosen to become involved in a dispute with the bankrupt's

spouse over a matrimonial home, and may well also have a legitimate expectation that the bankrupt's interest in the property should either be realised quickly or in some way used to raise money to pay their debts. In many cases this consideration may go a long way to justify a conclusion that it would be unfair to allow an occupying co-owner to resist an order for sale for a substantial period whilst also refusing to pay rent in the meantime. However, he went on to say:

69 Whilst plainly relevant, I do not think that these arguments can be conclusive. They seem to pre-suppose that a trustee in bankruptcy is entitled to an immediate order for sale and that creditors should be compensated in some way for any delay. That may not always be the case: e g if the property market is rising, the trustee may benefit from a delay, especially if he has also not had to contribute to payment of the mortgage.

70 In the end, I do not think that I need to reach a firm conclusion as to whether Blackburne J's analysis in French's case or Lawrence Collins J's decision in Byford's case are correct or not.

71 I say that, first, because it is apparent from the authorities to which I have referred, and in particular Pavlou's case, Byford's case and Murphy's case that the court has a broad equitable jurisdiction to do justice between co-owners on the facts of each case. I would prefer to found my decision upon that overriding principle, which in my view entitles the court to have regard to the position prior to bankruptcy, including any agreements and understandings to which the non-occupying owner was a party before his bankruptcy; as well as the effect of an order for payment of rent on both sides to the argument.

72 Secondly, and in any event, I think that the unusual facts of this case make it readily distinguishable from each of the other authorities to which I have referred, and which Blackburne J considered. Each of the other bankruptcy cases to which I have referred were dealing with a situation in which the trustee in bankruptcy obtained his interest in the relevant property by operation of law from a co-owner who at some point at least had a right to occupy the property. In each of those cases the original co-owners acquired their jointly owned property with the common intention and purpose that they would live in it together as their family home, and they all did so for some period. The joint acquisition of a matrimonial home to be lived in by both parties was also the situation in the non-bankruptcy case of Dennis v McDonald [1982] Fam 63 .

73 I think that the position as regards occupation rent may be materially different where, as in the instant case, the property in question ***** *was acquired to provide a home for one* *co-owner alone, and the bankrupt never had, nor was intended to have, any right of occupation of the property at all.*

35. That being so, Snowden J cold not see how it could be in accordance with equity or justice for the Trustee, who has simply had Mr Jackson's interest in the Property vested in him, automatically to become entitled to claim an occupation rent from Mrs Jackson. "The Trustee has in no sense been excluded from the Property; and it is not merely that it is unreasonable for the Trustee to start occupying the Property with Mrs Jackson and her children; the true position is that Mr Jackson never had such a right at all. I therefore do not see how the Trustee can in effect claim to stand in a better position and charge Mrs Jackson rent in place of seeking to occupy the property."

36. He further explained that:

"76 In reaching that conclusion I have not ignored the fact that the Trustee adopted an entirely reasonable approach and did not push for an order for sale immediately that he might have been entitled to do, that he very properly sought to ascertain whether Mrs Jackson was interested in buying out his interest, and that Mrs Jackson did not engage with that suggestion but resisted possession proceedings. The result has been that sale of the Property has been delayed and creditors might think that they should be compensated in some way for that. But against the very unusual factual background to which I have referred, I simply do not think that these factors make it equitable to charge Mrs Jackson a rent for continuing to occupy the Property that she alone was always intended to occupy without charge.
77 Moreover, Mrs Jackson has paid all of the mortgage instalments and all of the other outgoings in respect of the Property. The simple fact is that Mr Jackson has contributed nothing other than his willingness to assume personal liability for the re-mortgage of the Property in 2007—which has never been called upon. On the figures that I have given above, the Property has increased in value by something in the region of £254,000 since its acquisition, the equity on sale would be about £246,000, and Mrs Jackson has alone paid mortgage instalments of about £123,906 to achieve that result. If Mrs Jackson were to be charged occupation rent for the period since the vesting in the Trustee of Mr Jackson's interest in the Property, so as to offset the substantial mortgage payments which she has continued to make after that time, the result will, to my mind, represent an unjust windfall for Mr Jackson's creditors. As I see it, the extremely limited involvement that Mr Jackson and the Trustee have had with the Property will be fully and properly reflected in a limited share in the increased equity once Mrs Jackson has been given credit for all of the mortgage payments that she has made."

37. Clearly this case was decided on the basis of some very extreme and unusual facts, but Snowden J's more general critique of what has become the default position of setting of an occupation rent against mortgage payments post-bankruptcy is likely to provide the springboard for more arguments over whether this is invariably justified in other, more mainstream cases, in the future.

C: **THE EQUITY OF EXONERATION**

38. The classic statement of the equity of exoneration is that where A who is the joint owner of property, joins in a mortgage over that property to secure a loan for the benefit of B as a surety, A will be entitled to have the secured debt discharged so far as possible out of the beneficial interest of B to the exoneration of A's beneficial interest.

39. In Re Pittortou [1985] 1 WLR 58, Scott J held (p61):

> *"As a general proposition, if there is found to be a charge on property jointly owned, to secure the debts of one only of the joint owners, the other joint owner, being in the position of a surety, is entitled, as between the two joint owners, to have the secured indebtedness discharged so far as possible out of the equitable interest of the debtor"*

40. Much more recently, in Lemon and Wood v Chawda: (then) Chief Registrar Baister held (at [46]):

> *"As Re Pittortou makes clear there is a presumption that the equity of exoneration arises in the circumstances described, irrespective of the existence of an express agreement (see the Halsbury passage cited by Scott J supra). However, there can be circumstances which "do not justify the inference, or indeed…negate the inference". (para 49): "It seems to me that in circumstances in which a husband and wife operate as the Chawdas have, pooling their earnings and profits, administering their financial affairs jointly and enjoying together a prosperous life, if not an extravagant one such as that of the Pagets, it is as unattractive as it is artificial for one of them to take the benefits while at the same time seeking to enforce an individual right in one respect only to the disadvantage of the other spouse (or in this case his creditors)."*

41. Thus, the following propositions emerge from the case-law cited above for exoneration to apply:

    a. the (usually) wife must have charged her property or, if she is the joint owner of the property with her husband, she must have joined in a mortgage of the property;

b. she must have done so for the purposes of her husband; and

c. The money borrowed must have been borrowed and applied for the benefit of the husband alone. (these three propositions were formulated by counsel for the trustee in *Chawda* and seemingly approved by Chief Registrar Baister at paragraphs 42 and 44).

d. Nonetheless, while there is a presumption that the equity of exoneration arises in the circumstances described (irrespective of an express agreement), there can be circumstances which do not justify the inference or negate the inference. Such a circumstance may arise where a husband and wife operate as a family unit, pooling their earnings and profits, administering their financial affairs jointly and enjoying together a prosperous life (*Chawda* at paras 46-9).

42. The question of whether an indirect benefit to the Claimant co -owner is sufficient to negate the equity was recently considered by the Court of Appeal Williams v Onyearu [2017] EWCA Civ 26; [2018] Ch. 137 (the first occasion on which any issue on the equity of exoneration had arisen for decision by the Court of Appeal since Paget.). In this case a husband and wife owned their home as tenants in common in equal shares.in 2005 a loan secured on a matrimonial home had been made to support the husband's business as a solicitor (and out of which he paid the creditors of his practice). He was subsequently made bankrupt in 2011. The trustee in bankruptcy argued that the bankrupt's wife had received an indirect benefit from this loan as it had enabled the bankrupt to apply drawings from his business to meet the monthly interest payments on the original mortgage from the bank. The Court disagreed, and refused to make an order for sale on the basis that the secured loan exhausted the trustee's equity in the property

43. Richards LJ, giving judgment for the Court of Appeal, affirmed the Courts below. He considered that it was clear that English law does not regard an indirect benefit to be itself sufficient to deny a right of exoneration to the surety. He pointed out that an indirect benefit of the type relied on in this was far from certain to accrue as any benefit was subject to a double contingency: first, that the husband's business would survive and, secondly, that it would be profitable. Thus any benefit to Mrs Onyearu was too remote to provide a basis for inferring or presuming that her intention was to bear the burden of the loan equally with her husband. Further, as at the date of the secured loan, any anticipated benefit was, as in *Parsons v McBain [2001] FCA 376* , incapable of valuation and unlikely to bear any relation to the amount of the loan. The Court gave a very useful summary at [43]:

43 The position in English law following In re Pittortou [1985] 1 WLR 58 *can be summarised as follows. First, where jointly-owned property is charged to secure the indebtedness of one of the joint owners, there is an evidential presumption that the parties intended that, as between themselves, the liability should fall on the debtor's share of the property. Second, the circumstances of the case may be such that this presumed intention does not arise at all. Lindley MR gave some examples in* Paget v Paget [1898] 1 Ch 470 *and the facts of that case, where the borrowing was incurred by the husband to repay debts incurred to fund the couple's joint lifestyle and where the conclusion on the evidence was that the wife had for her own good reasons deliberately made provision for her husband's debts, provided another example. These are cases where the debts to be paid, although in law the debts of one co-owner (A), are in substance the debts of the other co-owner (B) or of A and B jointly. Third, the presumed intention arising under the first proposition above, which follows from the nature of the transaction and the position generally of a surety, may be rebutted by evidence of a different intention. Fourth, in the absence of evidence of an actual contrary intention, evidence that the debt is incurred for the direct benefit of B will rebut the presumed intention. Fifth, while it used to be the case that household expenses were ordinarily the responsibility of the husband, the same is no longer the case, as shown by* In re Pittortou *where the burden of borrowings by one joint owner to fund the ordinary living expenses of both co-owners is assumed to be shared equally between them. Sixth, the equity applies to borrowings by one co-owner to fund his or her business, even though the other co-owner may derive some indirect benefit from the business, by way of contributions to joint living expenses from the business owner's income. Seventh, the intention of the parties is to be determined as at the time the charge is given, although subsequent events may be considered for the light they shed on what the intention was: this was agreed between counsel before us, rightly so in the light of what this court said in* Paget v Paget [1898] 1 Ch 470 *, 473. Eighth, the particular facts of each case need careful consideration to determine whether the equity applies.*

44. Further, Richards LJ was not persuaded that the law in this area should be changed to accommodate what was said to be the relationship between cohabiting couples in their family affairs in current times. He considered that the clear trend in the law has been to provide financial emancipation to women and to enable couples to keep their property and financial affairs separate to such extent as they desire. Richards LJ considered that it was consistent with this trend that the law should continue to treat couples separately where one stands surety for the debt of the other, unless the circumstances or the evidence show otherwise. It will be interesting to keep a look out for future cases in which the limits of this principle is further tested.

APPENDIX

.Section 12 of TOLATA provides:

"The right to occupy

"(1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time— (a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or (b) the land is held by the trustees so as to be so available.
"(2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.
"(3) This section is subject to section 13 ."

Section 13 provides:

"Exclusion and restriction of right to occupy

"(1) Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.
"(2) Trustees may not under subsection (1)— (a) unreasonably exclude any beneficiary's entitlement to occupy land, or (b) restrict any such entitlement to an unreasonable extent.
"(3) The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12 .
"(4) The matters to which trustees are to have regard in exercising the powers conferred by this section include— (a) the intentions of the person or persons (if any) who created the trust, (b) the purposes for which the land is held, and (c) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12 .
"(5) The conditions which may be imposed on a beneficiary under subsection (3) include, in particular, conditions requiring him— (a) to pay any outgoings or expenses in respect of the land, or (b) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.
"(6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to— (a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or (b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.
"(7) The powers conferred on trustees by this section may not be exercised— (a) so as prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12) from continuing to occupy the land, or (b) in a manner likely to result in any such person ceasing to occupy the land, unless he consents or the court has given approval.
"(8) The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c) ."