TLATA Update

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1. Inference and imputation
2. Recent cases of note
3. Brexit Britain

Article I wrote for FLJ in 2017 on inference and imputation

"From a drop of water

A logician could infer the possibility

Of an Atlantic or a Niagra

Without having seen or heard of one or the other"

(Arthur Conan Doyle, the Adventures of Sherlock Holmes)

Introduction

1. In domestic cases involving a dispute about the fact and/or extent of a party's beneficial interest in property, the search is primarily to ascertain the parties' intentions, whether expressed or inferred (Jones v Kernott, para 31).

2. If a property's legal title is held in two parties' joint names (A and B), the law presumes that both parties (A and B) hold the beneficial interest under a joint tenancy. If legal title is in a party's sole name (A), the presumption is that A is the sole beneficial owner. The other party (B) must satisfy the court that he has *some* beneficial interest in the property before pursuing a quantification of that interest. In the latter 'sole name' case, and absent a written declaration of trust, the court relies principally on oral agreements or the parties' conduct in relation to the property to infer a common intention constructive trust in favour of B. If the court is able to infer such an agreement but is unable also to infer the proportions in which the beneficial interest is to be held (its quantification), it is permissible for the court to impute, i.e., to attribute to the parties an intention as to how the beneficial interest is held: thereby to *quantify* and to declare those beneficial interests.

3. This article will consider the meaning, interplay and limits of the concepts of inference and imputation. These two terms have caused much consternation. What *can* you infer? What *can't* you impute? How does the Judge do either or none? The Court of Appeal has sought in recent judgments to shed some light on this dark art.

Logic and inference

4. The study of logic encourages systematic and disciplined thinking. It helps us to define terms, to validate truths and to judge correctly. In logic, rules of inference (strictly, implication) are used to draw conclusions from premises that are known or assumed to be true.

5. Broadly, an inference may be deductive or inductive. A deductive inference relies on all given premises being valid and true to reach a true conclusion. A famous example of this is:

   Premise 1 All men are mortal

   Premise 2 Socrates is a man

   Conclusion Socrates is mortal (true)

6. Conversely, an inductive inference is a reasoning in which the given premises are viewed as supplying *strong evidence* for the truth of the conclusion: observations are made, patterns are drawn and a theory or explanation is then inferred. An inductive inference, however, allows the conclusion to be false, for example:

   Premise The sun rose and set last Thursday

   Conclusion The sun will rise and set next Thursday

7. Inductive inference is used to *form* the hypothesis or theory. Deductive inference is used to *test* that hypothesis or theory in specific situations. To this mix should also be added abductive reasoning, which is a hybrid-type: this process relies on proceeding to the most likely possible explanation based on an incomplete set of observations.

8. Putting to one side scientific- and logic-inference and returning to the law of trusts, "*an inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in light of their actions and statements*" (*Stack v Dowden*, para 126).

9. This trusts-based definition appears to rely on a mixed inductive and abductive reasoning process: one through which the court proceeds to the most probable inferred result based on a selection of (often incomplete) observations and findings. That assessment is made, of course, within the domestic context of the parties' relationship and in light of their conduct in relation to the disputed property.

Imputation

"Blessed is the man to whom the Lord will not impute sin"

(Romans 4, King James Bible)

10. An imputation differs from an inference in that an imputation represents something as being done or possessed by someone: it relies on *attributing* a conclusion to a given set of circumstances.

11. In the trusts-world, imputing the parties' intention is a matter of last resort. Attributing a conclusion may, however, be essential if the court has inferred that a party has a beneficial interest in a property. The question of what that beneficial share is in percentage terms demands an answer: it cannot be left unanswered, as the court is then impotent by failing to effectively resolve the parties' dispute (Oxley v Hiscock, Chadwick LJ, para 69). It is, after all, 'the court's duty to reach a decision on even the most difficult case' (Lord Walker, Jones v Kernott, para 36).

12. An imputation involves the court *imposing* a resolution on the parties rather than inferring one from their discussions and/or conduct (Jones v Kernott, Lord Kerr, para 72). An imputed intention, therefore, is one which is *attributed* to the parties, even though no such actual intention could be [inferred] from their actions and statements and even though they had no such intention (Stack v Dowden, Lord Neuberger, para 126). An imputation is arguably as far as a judicial construct can go.

    "….the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended" (Stack v Dowden, Baroness Hale, para 61).

    "…[the court] may have no alternative but to ask what [the parties'] intention as reasonable and just people would have been had they thought about it at the time" (Jones v Kernott, para 47).

13. Is the difference between an inference and an imputation simply semantic or does it have more general import? For Lord Kerr in Jones v Kernott, the difference was highly relevant and, as such, necessitated drawing a strong demarcation line between the two (Jones v Kernott, para 73). For Lord Collins, the difference would 'hardly ever matter' and 'what is one person's inference will be another person's imputation' (Jones v Kernott, para 65). Lord Walker and Lady Hale did not view the practical difference between an inference and an imputation as being 'so great' (Jones v Kernott, para 34).

<u>The limits of inference and imputation</u>

14. The Court of Appeal has taken great care in a number of recent judgments to define the limits of the use of imputation in trust cases. The first constraint relates to the stage of the court's analysis in which an imputation is permitted.

When an imputation is impermissible

15. In cases in which a property is registered in the sole name of one party (A), then B must surmount two hurdles. First, B must demonstrate that he has some beneficial interest in the property *at all*. Second, he must convince the court as to the appropriate share of that beneficial interest. In cases in which parties are joint beneficial tenants at the point of purchase by joint registration, B must still demonstrate (1) an actual or inferred intention to change the beneficial ownership before (2) convincing the court as to the appropriate sharing of the beneficial interests (based either on an express or inferred agreement or, in the absence of such an agreement, on imputation).

16. In stage 1 in a sole name case, B must prove that there was an agreement *in principle* for him to share in the beneficial interest. That agreement may be express or inferred. It cannot be imputed. Imputing an agreement *in principle* to share in the beneficial interest would *attribute* an agreement to the parties [to share the beneficial interest], even though no such agreement ever existed. Given that the Stage 1 analysis requires an agreement *in fact* (express or inferred), then attributing such an agreement even though it never *in fact* existed, is clearly wrong. Conversely, an inferred agreement at Stage 1 of the analysis is fully justifiable, as an inference is a factual conclusion drawn from observations of the parties' conduct. It is inductive or abductive reasoning.

17. In *Capehorn v Harris & Another [2015] EWCA Civ 955* the Court of Appeal overturned the District Judge's finding in a sole-name case that, "*looked at in the round, she should impute to the parties an acceptance that [Mr H] has acquired a beneficial interest in [the farm]"*. The District Judge had elided the two stages of analysis. She had imputed an intention to the parties in the Stage 1 analysis rather than identifying an actual agreement (express or inferred) that Mr H should have any beneficial interest in the farm.

18. In *Barnes v Phillips [2015] EWCA Civ 1056*, a joint names case, the Court of Appeal allowed an appeal in which the first instance Judge rejected the argument that there was an express intention to vary the presumption of equal beneficial shares and then moved directly to consider what intention should be imputed to the parties as to the way in which the shares were held. In doing so the Judge had failed to address the critical step in the analysis: was there *in fact* an express or inferred agreement between the parties to depart from an equal beneficial share? On the facts of this case, the Court of Appeal inferred from the parties' conduct the necessary intention to change their beneficial interests.

Imputation and overall fairness

19. The second constraint relates to how the court actually imputes the proportions in which parties are to share the beneficial interest. Of course, the court must base its imputation on factual conclusions as to the parties' conduct. Just how does the court, however, translate those findings and conclusions into a percentage?

20. The answer to the vexed question of what the court can impute and how it does so is provided in Jones v Kernott (see para 51): "the answer is that each [party] is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property". The course of dealing (conduct) in relation to the property should be given a broad meaning, allowing a multitude of factors to be accounted for including, for example, contributions to the property and the arrangements made from time to time to meet mortgage payments, council tax and utilities, repairs, insurance and housekeeping (Oxley v Hiscock). However, such conduct and circumstances of the case as may justify an imputation *must* be referable to the parties' dealings with the property in question. Broader family events and wider context on their own and *unrelated* to dealings with the property, such as the length of the cohabitation, should not influence the imputation drawn as to the beneficial shares in which the property is held.

21. The fact is that in cases of lengthy cohabitation involving grown-up children, the financially weaker party has very limited financial claims on separation. In deviating from circumstances related specifically to the parties' dealings with the property itself, therefore, the court risks imposing a fair solution on the parties based on a more general intention to 'right the wrongs' of an often unfair legal landscape. The Court of Appeal reiterated the restrictions on imputing a fair solution in *Graham-York v York [2015] EWCA Civ 72*:

"It is essential, in my judgment, to bear in mind that, in deciding in such a case what shares are fair, the court is not concerned with some form of redistributive justice. Thus it is irrelevant that it may be thought a "fair" outcome for a woman who has endured years of abusive conduct by her partner to be allotted a substantial interest in his property on his death. The plight of Miss Graham-York attracts sympathy, but it does not enable the court to redistribute property interests in a manner which right-minded people might think amounts to appropriate compensation. Miss Graham-York is "entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property". It is these last words, which I have emphasised, which supply the confines of the enquiry as to fairness."

Conclusion

22. To impute is not to infer and vice versa. An inference draws a reasonable conclusion from observed facts. An imputation constitutes a conclusion beyond that which can be inferred. It imposes the conclusion on the parties. The difference between the two is more than semantic, even though the court's factual findings and observations in support of both may be very similar or, indeed, exactly the same. The one is a process of reasoning applied to the question as to whether a beneficial interest should be shared, whilst the other is really no more than conjecture invoked as a last resort for the court to remain a final and effective tribunal. The real issue is, given the intellectual contortions necessary to understand the law in its current form, how much longer can this continue to be the only solution for unmarried couples in dispute over property ownership?

Please read the following statements and decide, in each case, whether each decision reached has been inferred or imputed (or both or neither).

1. You are sitting in a lecture in July: it's not as interesting as you had hoped from the billing and none of the speakers is as good looking in real life as their website photos suggested. Never mind. You look out of the window and see thick grey clouds above, people with coats on, hoods up and some of them have umbrellas open. You decide that:
   a. it is raining
   b. it is going to rain for most of the day

2. You are walking down the street. There are cars parked on both sides of the road. You see a door open on one of the terraced houses half-way down the street and a dog runs out onto the road. The dog has its tail between its legs. A man comes to the open door and waves a black plastic bag in the air in one hand and a spoon in the other. You think that
   a. the dog has done something wrong
   b. the dog doesn't belong to the man who opened the door
   c. the dog has 'had a go' at the man's dinner
   d. the dog was desperate to get out for a wee

3. You are sitting in the pub. You see a man and a woman on the street outside. They are waving their hands in the air. One of them appears to have a knife in their hand. You decide that
   a. Their marriage is over
   b. They argue just like siblings do
   c. Their marriage is over and that there is a risk of death to one or both of them

4. You are sitting in the Question Time audience. You are in the back row. The panelists are discussing immigration. Mr. Fruitloop is on the panel from GBINP (the Great British Independence Now Party). You can't hear every word he is saying but you catch the odd 'illegal immigrant' comment and there are 'boos' coming from the audience.

   a. You decide that he is indeed the bigot you thought he was.

5. You get home after a stressful day at the office and turn on the TV. The news is on. The anchor looks particularly concerned. The picture cuts to your local court. There is a police team surrounding the building with guns drawn. Someone with a high-viz jacket has a megaphone. You know that one of your partners was involved in a case on the third floor today and his client had a previous conviction for weapon possession. You decide that:

   a. There is an armed person in the court building;
   b. There are armed people in the court building;
   c. The partner's client has kicked off
   d. The partner's client took a gun to court
   e. There is a bomb threat at the court

Claims to a declaration of beneficial ownership – TLATA 1996

INFERENCE AND IMPUTATION: where does it come from and how far does it go?

Overview

Registration in joint names

1.TR1?

2.In *Stack v Dowden* [2007] 1 FLR 1858 (HL) a couple had cohabited over 27 years and raised four children together, latterly in jointly owned property. The woman had made the greater capital contribution and had the higher earnings and established a beneficial entitlement of two thirds. However, '*cases in which the joint legal owners are to be taken to have intended their beneficial interest should be different from their legal interest* ***will be very unusual'*** (and see *Fowler v Barron* [2008] 2 FLR 831). This is not so unusual, as subsequent case law has shown.

3.The starting point where there is joint legal ownership is that there is joint beneficial ownership. The burden is on the party who wishes to show other than joint beneficial ownership.

4.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.

5.The Supreme Court has given further guidance in *Jones v Kernott* [2012] 1 FLR 45. A family home was bought and registered in the joint names of the parties, paid for jointly and occupied by them and their two children for 8 years. Upon the relationship ending, they tried unsuccessfully to sell the property. An insurance policy was then divided equally and the man went on to buy his own property. He made no further contribution to the family home, which was thereafter solely funded by the woman.

6.The Supreme Court has established the guiding principle that where a family home is in the joint names of a cohabiting couple and both are responsible for the mortgage, without any express declaration as to beneficial interests

(i) they are joint tenants in law and, on presumption, equity;

(ii) this presumption may be displaced by a different common intention expressed when the home is purchased, or at a later stage;

(iii) otherwise, a common intention may be deduced objectively (inferred) from their conduct, as in *Gissing v Gissing* [1971] 1 AC 886 at [906] and *Stack v Dowden* at [69];

(iv) where there is no evidence as to their joint intentions at the outset, or that intention has changed but it is not possible to determine the new intention, each is entitled to such share as the court considers fair, having regard to the whole course of their dealings with regard to the property: *Oxley v Hiscock* [2004] 2 FLR 669 at [69] followed; and

(v) each case turns on its facts.

7.In Barnes v Phillips, CA (see below), the fact that the man received the full benefit of monies released by way of a re-mortgage on the jointly owned property shortly before the relationship ended was good evidence of an inferred common intention to vary the parties' interests in the property.

8.Different principles can apply to the ownership of commercial property (e.g. buy to let investments), see *Laskar v Laskar* [2008] 2 FLR 589, CA, where 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.

Registration in a sole name

9.Where a property is registered in the name of one party, but is occupied by both of them, they may have agreed to a sharing of the beneficial interest or each party may have made a financial contribution to purchase costs, mortgage costs and household bills, but there may be no express agreement or declaration of trust.

10. In the case of such an asset (owned in law by one person but another claims to share a beneficial interest in it), a two-stage analysis is required to determine whether a common intention constructive trust arises.

11. First, the person claiming the beneficial interest must show that there was an agreement (express or *inferred* from conduct) that he should have a beneficial interest in the property owned by his partner, even if there was no agreement as to the precise extent of that interest.

12. Secondly, if such an agreement can be shown to have been made, then absent agreement or inference on the extent of the interest, the court may *impute* an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of that fair share in the light of the whole course of dealing between them in relation to the property; see Jones v Kernott, para 64.

13. The principles where the family home is in the name of one party only were considered in *Jones v Kernott* [2012] 1 FLR 45, at [52].

51. In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in Gissing v Gissing [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in Stack v Dowden, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual

intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick LJ in Oxley v Hiscock [2005] FAm 211, para 69. In our judgment, "the whole course of dealing ... in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

52. This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above.

53. The assumptions as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, are not appropriate to the ascertainment of beneficial interests in a family home. Whether they remain appropriate in other contexts is not the issue in this case.

14. Care must be taken not to *impute* an intention within the first stage: *imputation* only applies to the second stage in determining the appropriate beneficial interest, see Capehorn v Harris and Another [2015] EWCA Civ 955.

15. The legal framework was common ground between the parties at trial and again before us on appeal. In relation to assets acquired by unmarried co-habitees or partners, where an asset is owned in law by one person but another claims to share a beneficial interest in it a two stage analysis is called for to determine whether a common intention constructive trust arises. First, the person claiming the beneficial interest must show that there was an agreement that he should have a beneficial interest in the property owned by his partner even if there was no agreement as to the precise extent of that interest. Secondly, if such an agreement can be shown to have been made, then absent agreement on the extent of the

interest, the court may impute an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of the fair share in the light of all the circumstances: see ***Oxley v Hiscock* [2004] EWCA 546**, **[2005] Fam 211**; ***Stack v Dowden* [2007] AC 432**; ***Jones v Kernott* [2011] UKSC 53**.

16. There is an important difference between the approach applicable at each stage. At the first stage, an actual agreement has to be found to have been made, which may be inferred from conduct in an appropriate case. At the second stage, the court is entitled to impute an intention that each person is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property. A court is not entitled to impute an intention to the parties at the first stage in the analysis.

Establishing a fair share and the whole course of dealing

17. The requirement for the court to establish a fair share, having regard to the whole course of the parties' dealings in relation to the property, was established in *Stack v Dowden* [2007] 1 FLR 1858 (HL).

18. **In Graham-York v York [2015] EWCA Civ 72** the Court of Appeal clarified that

(a) in deciding what a party's fair share is in a property, the court is not concerned with some form of 'redistributive justice'; instead

(b) the 'fair' share is decided only by considering the parties' dealings in relation to the property (emphasis added); and

(c) there is no presumed starting point of equality of interests, even in cases involving a substantial financial contribution from a non-owner.

22. It is essential, in my judgment, to bear in mind that, in deciding in such a case what shares are fair, the court is not concerned with some form of redistributive justice. Thus it is irrelevant that it may be thought a "fair" outcome for a woman who has endured years of abusive conduct by her partner to be allotted a substantial interest in his property on his death. The plight of Miss Graham-York

attracts sympathy, but it does not enable the court to redistribute property interests in a manner which right-minded people might think amounts to appropriate compensation. Miss Graham-York is "entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property". It is these last words, which I have emphasised, which supply the confines of the enquiry as to fairness.

23. *The judge can perhaps be criticised for omitting these qualifying words from her formulation at her paragraph 42, set out at paragraph 13 above. But to my mind it is clear from the balance of that paragraph, and from her paragraph 43, that the judge focused on the relevant consideration, which was the extent of Miss Graham-York's contribution, both financial and non-financial, in relation to the property which was their family home for many years.*

24. *In this regard I do not consider that reference to the evaluations made by judges in other cases is of particular assistance. Reference was made on the appeal to Webster v Webster, [2009] 1 FLR 1240; [2008] EWHC 31(Ch), a decision of His Honour Judge Behrens. That was a case of sole legal ownership by the male partner and cohabitation for twenty seven years. Both partners worked although the male partner had the greater income. There was much better evidence than here of the woman's regular contribution, which was significantly less than that of her partner. Judge Behrens did not in the event have to assess the extent of the woman's interest, because that issue had become academic in the light of his intended disposition under the Inheritance (Provision for Family and Dependants) Act 1975, which was that the property in question should be transferred to her outright. He did however indicate that having regard to the whole history of the dealings between them it was unlikely that he would have assessed it at 50% and probable that he would have assessed it at between 33% and 40%. I note incidentally that in separate proceedings in the Chancery Division, with which we are not concerned, there are outstanding disputes concerning the validity of one or more wills of the deceased and Miss Graham-York has additionally made an application under the 1975 Act.*

25. *Reference to that case does however, I consider, throw into sharp focus three features of the debate. First, as established in Oxley v Hiscock itself, at paragraph 38 of the judgment of Chadwick LJ, in the case of a property purchased in the name of one party only, even with the aid of a substantial contribution from the other, there is no presumed starting point of equality of interests. Oxley was a case of sole ownership by the man with considerable financial contribution from the woman. It led only to a 40% share being regarded as her fair entitlement. Second, therefore, the suggestion in the present case that equality of interests is the only fair solution is quite hopeless. Third, the judicial evaluation of the fair share is not 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.*

26. *It is also I think possible to be led astray by the length of the cohabitation. It is obviously true that in the normal case the non-financial contribution is likely to*

be proportionately greater the longer the cohabitation. But to be set against that in the present case is the judge's damning finding at paragraph 23 of her judgment that "even if she were telling the truth about her financial contribution during the 33 years of their cohabitation it does not amount to much".

19. There may be a change of beneficial ownership **after** the property has been acquired, but the court **will be slow to infer this from conduct alone**, without evidence of an express agreement (*James v Thomas* [2008] 1 FLR 1598; *Morris v Morris* [2008] EWCA Civ 257 (CA)).

20. The Court of Appeal has held on several occasions that fairness between the parties generally (as opposed to relative to the property in question) is not the basis for the court's decision; to argue what may be considered fair is the 'impermissible question', in the absence of evidence of the parties' intentions derived from a survey of their whole course of dealings (*Holman v Howes* [2008] 1 FLR 1217).

inference ***noun*** **1** an act of inferring, especially of reaching a conclusion from facts, observation and careful thought. **2** something which is inferred, especially a conclusion.

impute ***verb*** (***imputed***, ***imputing***) (*usually* **impute something to someone** or **something**) **1** to regard (something unfavourable or unwelcome) as being brought about by them. **2** to believe it to be caused by them or it; to attribute • *imputed his failure to laziness*. **imputable** ***adj***. **imputation**

infer ***verb*** (***inferred***, ***inferring***) **1** *tr & intr* to conclude or judge from facts, observation and deduction. **2** *colloq* to imply or suggest. **inferable** or **inferrable** ***adj***.

INFER: Deduce or conclude (something) from evidence and reasoning rather than from explicit statements:

IMPUTE: Represent (something, especially something undesirable) as being done or possessed by someone; attribute:

THE FUNCTIONAL DYSTOPIA OR THE DYSFUNCTIONAL UPTOPIA?: FAIRNESS AND IMPUTATION

C = Claimant and D = Defendant

Graham-York v York [2015] EWCA Civ 72

1. Parties in a 'dysfunctional' relationship from 1976 to D's death in 2009. 2 children. "*Sadly, and in spite of the length of the cohabitation, it is…not a case in which natural love and affection can be said to have been at the forefront of the relationship. Mercenary considerations to appear to have been to the fore…."* [16]
2. Subject property occupied by them from 1985 to 2009. Purchased in 1982 for £55,000 with a mortgage of £45,000 and registered in D's sole name.
3. C continued to live at property after D's death; mortgage arrears of £58,238 accrued and the mortgagee sued for recovery and possession. Total mortgage stood at £449,561. Mortgagee issued proceedings against D's son as his personal representative. C joined to proceedings and she claimed beneficial interest by virtue of a common intention constructive trust that pre-dated the mortgage and, therefore, was an overriding interest taking priority over the mortgage.
4. At 1st instance, C afforded a 25% beneficial interest; order for sale made; mortgagee to redeem full outstanding mortgage; C entitled to 25% of the remainder.
5. C appealed arguing (1) her beneficial interest is 50% and (2) her interest should rank ahead of the mortgagee's (later abandoned).
6. C had no significant source of income. There was little evidence of value of the property (last offer for purchase of £1.2m in 2011). D's son claimed the property was worth £1.75m.
7. By the time of the appeal, the mortgagee's total outstanding secured amount was £632,681.
8. Neither party challenged the principle of C's beneficial interest, rather the quantification of such interest.
9. Findings at first instance:
   a. Whatever income C made as a group singer, she would have paid to D

b. C contributed her earnings to the joint expenditure of the home but this contribution was small
c. Property was re-mortgaged in 1990 for £274,295; money which was used to redeem other loans of D
d. After 1985, C had various business interested that generated circa £30,000
e. C cooked the meals and looked after the children
f. Sparse evidence of financial contribution by C to the property
g. No findings about D's income but finding made that he paid for all household outgoings
h. No express agreement as to the beneficial interests in the property

10. The Judge's finding that C contributed a small amount to the property necessarily left the remainder of the contribution to have come from D.
11. If no finding can be made as to an express agreement regulating the beneficial interests in the property, the answer is 'that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property' (Oxley v Hiscock). Of course, the court is looking to determine the result which reflects what the parties must, in light of their conduct, be taken to have intended; NOT looking to impose a result which the court itself considers fair.
12. Common intention is to be deduced objectively from the parties' conduct (in the absence of an express agreement): 'the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by the party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party' (Gissing v Gissing). If no common intention can be ascertained, then defer to Oxley v Hiscock.
13. The Court of Appeal reminded practitioners of the following:
    a. The court is not engaged with some form of redistributive justice;
    b. The parties' course of dealing in relation to the property is all that is relevant as to the question of fairness;
    c. Any suggestion that 'equality of interests' is the only fair result is 'quite hopeless'

d. Do not be led astray by the length of the cohabitation;
e. An appeal court will only interfere with a determination as to beneficial interests if it falls outside the ambit of reasonable decision-making.

Barnes v Phillips [2015] EWCA Civ 1056

1. Joint names case.
2. Original decision 85 / 15% tenants in common (Respondent and Appellant respectively)
3. 1996 purchase of property for £135,000. £25,000 from savings and joint mortgage. Both contributed to costs of improvements to 2005.
4. During the relationship, A purchased 3 rental properties in his sole name.
5. Property re-mortgaged in 2005 and money (£66,000) used to clear A's debts.
6. 2005 separation.
7. 2005 – 2008 A paid mortgage to tune of £22,000 and R to tune of £12,000.
8. From 2008, R paid mortgage on her own and without financial help re: the children.
9. No written or oral agreement about change of beneficial interests.
10. HHJ 'imputed' an intention [to alter beneficial interests] by considering what is fair.
11. **An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties in light of their actions and statements.**
12. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. (Stack v Dowden) i.e., imputing what their intentions as reasonable and just people would have been had they thought about it at the time.
13. FIJ had 'missed out' the crucial step of determining whether there was any

intention (actual or inferred) to change the beneficial interests.

14. The A's receipt of 25% of the equity to meet his own debts very shortly before the relationship ended is sufficient to draw the inference of a common intention to vary their interests in the property.

15. **In principle, it should be open to a court to take account of financial contributions to the maintenance of children (or the lack of them) as part of the financial history of the parties….save in circumstances where it is clear that to do so would result in double liability.** (Query here, how are such payments or lack of them referable to their conduct and dealings in relation to the property???)

CASE UPDATES

Wodzicki v Wodzicki [2017] EWCA Civ 95

1. At first instance, decision made that the property was held on trust. Appellant sought declaration that he is the sole beneficial owner of the property.

2. Property purchased in 1988 by appellant's father, George: property registered in joint names of George and his wife. Property purchase financed by loan secured on a property jointly owned in France over 8 year term. The mortgage stated that the finance was provided to 'purchase a property to be occupied as a primary residence by the daughter of the borrower (the appellant)'.

3. Appellant paid £5,000 in repairs and various outgoings for the property but not the mortgage, which was repaid by George and his wife.

4. George visited the property but he and his wife never lived there.

5. George dies intestate in 2010. George's wife sought possession of the property in 2013.

6. In 2010 George's wife wrote to the appellant stating 'if you give up any entitlement to inheritance under French law, I could gift you the house in London (the property) and you would have the house for yourself alone without having to share it'.

7. The appellant claimed that George had told her that when he finished repaying the mortgage, and when he thought she was 'ready', he would transfer the property to his daughter.

8. The judge accepted that there had been an agreement for the appellant to have a life interest in the property by means of occupation.However, the judge refused the submission that the appelland had sole beneficial ownership of the property.

9. The judge did not, however, accept that the appellant was the sole beneficial owner of the property. She said in her judgment at [30]-[31]:

"30. The fact that it was put in joint names of George and the Claimant militates against that intention because it was not necessary to put it in their joint names to secure the mortgage. The loan was secured on the house which they had built in

France. The fact that George put the English house in joint names is evidence that he intended his wife to be the joint owner and never made known to her expressly or impliedly that his daughter was to be the sole owner.

31. That would explain the content of the August 2010 letter from the Claimant to the Defendant offering that if the Defendant disclaimed her share of the French inheritance the Claimant would transfer the London house to her alone. That suggests to me that at that time the Claimant was proceeding on the basis that she was not the sole beneficial owner of the London house and that she and the Defendant both had beneficial interests in it. This is contrary to the case pleaded for her that the Defendant had no beneficial interest in the house."

10. The judge held that the appellant and respondent beneficially owned the property in the proportions to which they had respectively contributed to its purchase, maintenance and outgoings, i.e. on the basis of a resulting trustThe judge held that, as George repaid the mortgage in 1996 but had not thereafter transferred the property to his daughter, the inference was that he had not determined that she was at any point in time **ready** to receive the benefit of that transfer. **On appeal, that was an inference open to the judge.**

11. The starting point was joint beneficial ownership by George and his wife. George had never told his wife that he intended his daughter to have a share in the property. George's wife's letter to the daughter confirmed that she did not think the daughter had any interest in the property.

12. The appellant argued that the judge should not have applied a resulting trust analysis but should have imputed to the parties an intention that the appellant was in all the circumstances the sole beneficial owner. This imputation was not permissible. **First, the judge had inferred an actual intention. Second, if an actual agreement is inferred, it leaves no room for an imputation. Third, a constructive trust approach (Jones v Kernott) is not appropriate given the lack of relationship between the appellant and George's wife.**

The case of Davis (as Trustee in Bankruptcy of Jackson) v Jackson [2017] EWHC 698

a. Married couple but estranged from 2001 and lived apart

b. W re-mortgaged family home, raised £36,000 deposit, purchased a second property with a mortgage and moved to the second property. Title and mortgage to second property in W's sole name.

c. 2 years later, W executed declaration of trust stating that the second property was held by her on trust for H and W in equal shares / she also agreed to pay half the mortgage payments

d. The purpose of this declaration of trust is unclear!

e. W paid all the interest payments on the mortgage and household costs herself

f. W faced financial difficulty a few years later. Possession proceedings. H intervenes and property is transferred to joint names in law with a joint mortgage. H continues to make no payments to the mortgage. TR1 indicated joint tenants.

g. Five years later, H is declared bankrupt. Trustee seeks to realise his half share in the second property.

h. W bound by the TR1 and the declaration of trust.

i. Equitable account: W paid mortgage interest of £103,000 between purchase date and H's bankruptcy. £123,000 to date of trial. W entitled to claim a credit of one half of the payments of interest which she made under the mortgage until date of trial. Trustee argued that, after H's bankruptcy, credits to W for mortgage payments should be offset against an occupation rent in favour of the Trustee. The court decided that, although TLATA guidelines apply, the court is not bound to follow these and can rely on the older case law. The reason for this decision is that, pursuant to 12(2) TLATA, a beneficiary (the Trustee) does not have a right to occupy land 'if it is unsuitable for occupation by him'. Clearly, it would not be suitable for the Trustee to actually occupy the property with W, hence the argument that no compensatory payment is due to the Trustee.

j. As the second property had been purchased to provide a home for the W and not for H and W together, H never had, nor was he intended to have, a right to occupy the second property himself. Therefore, it would not be equitable for the Trustee, who simply has H's interest in the second property vested in him, to claim an occupation rent.

k. Therefore, the proceeds of sale were divided equally subject to W receiving credit for one half of all the mortgage payments made from date of purchase to date of sale.

TLATA 1996 (referable to equitable accounting)

12 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.

13 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).

14 Applications for order.

(1)Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2)On an application for an order under this section the court may make any such order—

(a)relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

(b)declaring the nature or extent of a person's interest in property subject to the trust,

as the court thinks fit.

(3)The court may not under this section make any order as to the appointment or removal of trustees.

(4)The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this Act.

Marr v Collie [2017] UKPC 17

1. Various properties purchased by 2 men over a long relationship (1991 – 2008). Most purchased in joint names. Most were investment properties.
2. At 1st instance the Judge adopted the Laskar v Laskar approach to the investment properties – i.e. that Stack v Dowden principles only applied in the domestic consumer context and that where the primary purpose of the purchase was as an investment (even if there was a personal relationship between the parties), resulting trust principles should apply.
3. The PC's view was that 'to consign the reasoning in Stack to the purely domestic context would be wrong'. There is no reason to doubt the possible applicability of the starting point of joint legal ownership leading to joint beneficial ownership to property 'purchased by a couple in an enterprise reflecting their joint commercial, as well as their personal commitment' (40).

40. *At para 56 of her opinion in* Stack *Lady Hale expressed the fundamental principle in commendably clear and simple terms: "the starting point where there is joint legal ownership is joint beneficial ownership". Although that statement was made in a case where the dispute between the parties was in relation to property which was a family home, 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. When Lady Hale said, in para 58, that, "at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved", it is clear that she did not intend that the principle should be confined exclusively to the domestic setting. Of course, when the conveyance occurs in circumstances where the parties are involved only in a personal relationship, the fact that they have elected to have the property in their joint names may make it easier to infer an intention that they should share the beneficial ownership. But that does not mean that where there is a commercial dimension to the acquisition of the property, the decision to have the legal ownership declared to be jointly shared is bereft of significance. The intention of the parties will still be a crucial factor.*

4. The PC distinguished the case from Laskar v Laskar [2008]. Oh goody goody, context, once again, is everything!

48. In Laskar, of course, the co-funding of the purchase was required because the mother could not have afforded to buy the house herself. This was 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. The investment could therefore be characterised as a purely financial one, designed to pay dividends to each of the participants but shorn of any aspiration for a future equal sharing of proceeds. Further, as stated in para 8 of Lord Neuberger's judgment, the judge had found that there were no discussions between the parties as to the ownership of the beneficial interest in the property, and it does not appear to have been suggested that the court could or should infer any intention in that connection on the part of the parties.

49. The Board does not consider, therefore, that Laskar is authority for the proposition that the principle in Stack v Dowden *(that a conveyance into joint names indicates legal and beneficial joint tenancy unless the contrary is proved) applies only in "the domestic consumer context". Where a property is bought in the joint names of a cohabiting couple, even if that is as an investment, it does not follow inexorably that the "resulting trust solution" must provide the inevitable answer as to how its beneficial ownership is to be determined. Lord Neuberger did not intend to draw a strict line of demarcation between, on the one hand, the purchase of a family home and, on the other, the acquisition of a so-called investment property in whatever circumstances that took place. It is entirely conceivable that partners in a relationship would buy, as an investment, property which is conveyed into their joint names with the intention that the beneficial ownership should be shared equally between them, even though they contributed in different shares to the purchase. Where there is evidence to support such a conclusion, it would be both illogical and wrong to impose the resulting trust solution on the subsequent distribution of the property.*

5. So we look to the context of the case, and is there a clash of presumptions? There may be if there is NO OTHER EVIDENCE as to intention, but that is surely a very rare case!

53. If what Lady Hale described as a "starting point" (that joint legal ownership should signify joint beneficial ownership) is to be regarded as a presumption, is it in conflict with the presumption of a resulting trust where the parties have contributed unequally

to the purchase of property in their joint names? A simplistic answer to that question might be that, if the property is purchased in joint names by parties in a domestic relationship the presumption of joint beneficial ownership applies but if bought in a wholly non-domestic situation it does not. In the latter case, it might be said that the resulting trust presumption obtains.

54. The Board considers that, 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. In this, as in so many areas of law, context counts for, if not everything, a lot. Context here is set by the parties' common intention - or by the lack of it. If 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 but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the answer.

55. Of course, the initial intention (or lack of it) at the time of purchase may change. This was the reason that the majority in Stack v Dowden *emphasised that examination of the course of conduct of the parties over the years in which they dealt with the property is relevant. And it is why an intense examination is warranted of why the properties acquired in this case in 2008 were purchased in joint names. By that time, many of the contributions which, according to Mr Marr, he expected Mr Collie to have made, had not materialised. Why did he continue to agree that the properties should be acquired in joint names?*

Armstrong v Onyearu & Another [2017] EWCA Civ 258

1. H and W owned home as tenants in common in equal shares.
2. H declared bankrupt in 2011 (in 2005 a loan was secured against the house to meet liabilities of H's solicitor's practice).
3. TIB applied for order for sale. Two courts below refused order for sale on basis that the equity of exoneration applied between H and W so that W was entitled to a charge over H's share in the property, which exhausted his beneficial half interest.
4. TIB argued that W had received an 'indirect benefit' of the debt of her co-owner to the extent that the loan secured on the property had allowed H's solicitor's practice to continue and, therefore, the source of the family's income. To that extent, TIB argued that W was not entitled to rely on the equity of exoneration.
5. The Court of Appeal affirmed the first instance decisions.
6. The equity of exoneration operates as follows:

1.Where property jointly owned by A and B is charged to secure the debts of B only, A is or may be entitled to a charge over B's share of the property to the extent that B's debts are paid out of A's share. This is known as the equity of exoneration. Although this label, and its origins in the protection given by equity to married women's property rights before the Married Women's Property Act 1882, lends an obscure, even archaic, air, it is best understood as part of the relief more generally given to sureties against the principal debtor. It is as much a feature of contemporary law as it was of equity in the 18th and 19th centuries.

7. The availability of the equity is determined according to the actual or presumed intention of the parties (that the equity should apply). Rarely is there actual evidence!
8. Property purchased for £165,000 in 2000. Secured facility ref: the business debts amounted to £121,000.
9. First instance judge relied on the following factors to establish that the equity of exoneration applied:

15. In his judgment, Deputy Registrar Middleton stated that he did not understand there to be any difference between counsel as to the principles to be applied. He was reminded and accepted that "it is necessary in applying these principles to have regard to the facts of the individual case." In concluding that the equity of exoneration applied in favour of Mrs Onyearu, the Deputy Registrar relied principally on the following factors: the business loan was the sole liability of Mr Onyearu and was applied in paying debts of his practice for which he was alone liable (subject to any liability of his salaried

partner from 2005); neither Mrs Onyearu nor any other member of the family had any involvement of any kind in Mr Onyearu's practice; Mrs Onyearu had her own income; Mr and Mrs Onyearu maintained separate accounts and they did not pool their income in a joint account over which they both had control; there was no evidence of a prosperous lifestyle (unlike in some of the authorities to which he was referred). He said that "although this was a family unit it was a family in which family members had their own resources which could be used to support the family." He accepted that it could be said that, in a sense, Mrs Onyearu derived a benefit from the business loan:

> *"I appreciate that the payments to his creditors could, in a sense, be to the benefit of Mrs Onyearu in that they would enable Mr Onyearu to continue to practice which would in turn mean that he would be in a position to pay the mortgage instalments until 2010 as described in paragraph 4 of Mr Onyearu's first witness statement at page 40. However, I consider that this indirect benefit was not what was envisaged in the decision in* re Pittortou*."*

10. The TIB case centred on whether a co-owner who enjoyed an indirect (as opposed to direct) benefit from the secured indebtedness was entitled to the presumption/inference was that the indebtedness should be discharged out of the principal debtor's share. No authority on this point (i.e. displacing any inference in favour of the equity of exoneration).

11. TIB focused on the very normal family / joint circumstances of this case and the relatively common circumstances that may apply in other cases up and down the country.

12. The Court of Appeal helpfully summarises the authorities regarding the equity:

43. The position in English law following Re Pittortou *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. Sir Nathaniel Lindley MR gave some examples in* Paget v Paget *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 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 *at p.473. Eighth, the particular facts of each case need careful consideration to determine whether the equity applies.*

13. And what of the modern law and modern family circumstances?

79. I am not persuaded that the law in this area should be changed to accommodate what is said to be the relationship between co-habiting couples in their family affairs in current times, still less what that relationship ought to be. Couples arrange their financial and family affairs in an infinite variety of ways. There is no standard template, nor is it any business of the courts to suggest that there is a particular way in which couples ought to arrange these matters. Some couples completely share their income and other financial resources, while others keep them rigidly apart, and there are many variations between those ends of the spectrum. Nor do I find the concept of operating as "one family unit" a helpful, or even usable, test. Most families operate, in some senses, as a unit but that says nothing about their financial affairs or arrangements. Some families, as in Re Chawda*, no doubt pool all their resources and liabilities, but that finding is based on an examination of the evidence in the particular case. It does not proceed from an assumption as to how families operate or ought to operate.*

80. 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. The reforms started by the Married Women's Property Acts 1870 and 1882 took many years to complete. For example, it was only in 1973 that a wife could elect to have her earned income taxed separately from that of her husband and it was not until 1990 that completely separate taxation was introduced for wives and husbands. It is 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.

81. The question whether an indirect benefit is sufficient to displace the right to exoneration is applicable as between all debtors and sureties, although in practice, of course, the issue of indirect benefit is most likely to arise in the case of co-habiting

couples.

82. It is clear from the cases that English law has not regarded an indirect benefit to be itself sufficient to deny a right of exoneration to the surety. Mr Passfield rightly did not submit that Re Chawda went that far: there was very much more than indirect benefits in that case. The benefit must be direct or closely connected to the secured indebtedness. I regard the judgment of Morgan J in Day v Shaw *as consistent with this, and there is nothing inconsistent in* Graham-York v York*. This is the approach adopted by the Federal Court of Australia as recently as 2001.*

83. An indirect benefit of the type relied on in this case is far from certain to accrue. In the present case, any benefit was subject to a double contingency: first, that the firm would survive and, secondly, that it would be profitable. Further, the intention as regards the equity is to be inferred as at the date of the transaction. As at that date, the prospect of benefit was wholly uncertain and incapable of any valuation. As the court said in Parsons v McBain *at [24], "the exoneration to which the surety is entitled could hardly be defeated by a benefit which is incapable of valuation, and even if it were so capable, the value is unlikely to bear any relationship to the amount received by the principal debtor." In general, the benefits must be capable of carrying a financial value: in my judgment,* Cadlock v Dunn *was correctly decided, and Mr Passfield did not submit otherwise.*

84. I should add that I do not accept the open-textured approach advocated by Mr Parker. While each case requires a careful examination of the facts, I do not consider that the court should simply looks at all the circumstances of the case and decide the appropriate inference to draw, without the guidance of principles to ensure consistency of approach.

BREXIT BRITAIN

1. EU Reg 2201/2003 (Brussels II) is complemented by EU Reg 4/2009 (Maintenance Regulation). They are procedural rather than substantive laws. They ensure complimentary rules as to jurisdiction and enforcement. Not always without criticism: the race to issue (*lis pendens*) can often prevent reflection and mediation.

Article 19 Lis pendens and dependent actions

- 1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

- 2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

- 3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court. In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

2. EU Regulations are directly applicable (i.e. they do no require any conversion into domestic law or implementation into domestic law).

3. If a Hard Brexit is followed (whatever that may be), we may lose Brussels II. The *lis pendens* element may of Brussels II may well be open for amendment. That may please some. However, the Great Repeal Bill intends to 'convert' (that is the White Paper wording) all EU law into domestic law with the option for UK legislatures to then choose which to retain and which to ditch in the longer-term. This is a method designed simply to maintain some order at the initial stage of Brexit. The Great Repeal Bill intends to repeal the European Communities Act 1972, to convert EU law 'as it stands at the moment of exit' into UK law and to create powers to make secondary legislation (to allow corrections to be made to converted laws that will no longer work).

4. The jurisdiction of the ECJ is most likely to be ended by Brexit. The Great Repeal Bill will do away with the duty to consider and follow ECJ judgments. From the White Paper: "*the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the ECJ's case*

law as it exists on the day we leave the EU. Everyone will have been operating on the basis that the law means what the ECJ has already determined it does, and any other starting point would be to change the law. Insofar as case law concerns an aspect of EU law that is not being converted into UK law, that element of the case law will not need to be applied by the UK courts…." ……." we propose that the Bill will provide that historic ECJ case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court" …

5. The EU law working group considers that there are 3 scenarios for the post-Brexit future in relation to Brussels II

    i. Brussels II is incorporated into UK law and matters continue as they are at present with full reciprocity with all other EU member states (ECJ decisions remain binding on the UK)

    ii. Brussels II incorporated but without reciprocity

    iii. Brussels II does not remain in UK law post-Brexit requiring a new divorce jurisdiction law: this would return us to a complete *forum conveniens* system

6. There will be a long and involved debate about the appropriate system of jurisdiction post-Brexit. Would the ultimate result be close to that which we currently have or a more hierarchy-based model of jurisdiction.

7. As to children matters, jurisdiction based on the habitual residence of the child appears in domestic law (FLA 1986) and is a feature of the 1996 Hague Convention (to which England is bound). All EU States are contracting states of the Hague Convention. Article 23 of the Hague Convention also provides for similar automatic recognition of children orders from other member state countries.

Andrew Commins

St John's Chambers

July 2017