Chan Yuen Lan *v* See Fong Mun
[2014] SGCA 36

Case Number : Civil Appeal No 64 of 2013

Decision Date : 24 June 2014

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Engelin Teh SC, Mark Yeo (instructed), Simon Jones and Alice Tan (A C Fergusson Law Corporation) for the appellant; Lim Seng Siew, Ong Ying Ping (instructed), Lai Swee Fung and Susan Tay (Unilegal LLC) for the respondent.

Parties : Chan Yuen Lan — See Fong Mun

Trusts – Resulting Trusts – Presumed Resulting Trusts

Trusts – Constructive Trusts – Common Intention Constructive Trusts

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 3 SLR 685.]

24 June 2014 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 Two persons in an intimate relationship, whether married or otherwise, often acquire real property for communal and/or familial and/or investment purposes. The property may be put in one person's name only (a "single-name" case) or in the names of both persons (a "joint-names" case). One person may have contributed more to (or even all of) the purchase price of the property, or it may be that both have contributed equally. Alternatively, the parties may have had discussions on how much of a stake each of them should have in the property. Suppose that some (or many) years later, the relationship breaks down, and the parties then disagree over who is entitled to the beneficial ownership of the property. Suppose, further, that the legal owner(s) of the property never executed a declaration of trust in relation to the property. What then is the legal position?

2 If the parties are married and they initiate matrimonial proceedings, matrimonial legislation applies, and each party will secure what the court determines is just and equitable from the pool of matrimonial assets (see s 112(1) of the Women's Charter (Cap 353, 2009 Rev Ed)). If the parties are not married, then the dispute over the beneficial ownership of the property is simply determined by the usual applicable common law principles.

3 Disputes of this nature – *viz*, disputes over the beneficial ownership of property which is used by parties in a marital, quasi-marital, familial or other intimate relationship, where the legal title to the property is vested in one or more of the parties – are the focus of this judgment. For conciseness, we shall, where appropriate in this judgment, refer to such disputes as "property disputes", and as "domestic property disputes" specifically where they arise in a domestic context, *ie*, in relation to property which is used for domestic purposes ("domestic property").

4 In the present case, two octogenarians were involved in a tussle over the beneficial ownership

of 24 Chancery Lane ("the Property"). The Property is registered in the wife's sole name. It is said to be currently worth about $20m. An unusual feature of these proceedings is the fact that neither the wife nor the husband commenced – or indicated any intention to commence – matrimonial proceedings. The question of who is entitled to the beneficial ownership of the Property therefore falls simply to be decided by the applicable common law principles, *ie*, the law of trusts. For completeness, we should mention that, sadly, the wife passed away after the appeal was heard. Counsel nevertheless agree that this development has no bearing on the outcome of this appeal.

5 At a broader level, this case provides an opportunity to revisit *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*"). Over the course of the last few years, some issues have arisen in a number of High Court decisions as to the proper application of *Lau Siew Kim*. This appeal provides a useful opportunity for clarifying the legal position on those issues. We shall also examine a number of recent developments in this area of the law, some of which were canvassed by the trial judge ("the Judge") in his judgment below (reported in *See Fong Mun v Chan Yuen Lan* [2013] 3 SLR 685 ("the Judgment")).

The facts

Background

6 The appellant, Mdm Chan Yuen Lan ("Mdm Chan"), and the respondent, Mr See Fong Mun ("Mr See"), married in 1957. Their three children, Mr See Hang Chong ("SHC"), Ms See Seow Meng ("SSM") and Mr See Hung Yee ("SHY"), were born in 1958, 1960 and 1962 respectively. The children grew up in Singapore, but received their tertiary education abroad. SHC returned to Singapore in 1979; SSM, in 1982; and SHY, in 1984. Mr See, by his own admission, also had a mistress. He said that the affair started in 1988, while Mdm Chan said that her husband's infidelity began in 1979 or 1980. To this day, Mr See still lives with his mistress.

7 Mr See is a self-made man. He developed and owned an engineering business, and in 1955, he bought his first property, a house at 11 Borthwick Drive ("the Borthwick property"). He met Mdm Chan, a hairdresser, and married her in 1957. Mdm Chan quit her job to become a full-time homemaker in or around January 1958. Initially, Mr See and Mdm Chan lived in a rented unit at 15A Lorong 40 Geylang, but in 1967, this unit and the unit below (15 Lorong 40 Geylang) were purchased for $20,000 in Mdm Chan's sole name. The units were subsequently sold in 1972 for $60,000.

8 In 1969, Mr See bought two properties in his sole name. One was a house at 100 Joo Chiat Walk ("the Joo Chiat property"), while the other was a house at 41 Goldhill Avenue ("the Goldhill property"). According to Mr See, the Goldhill property was used as the family home. In the same year, Mr See incorporated See's Engineering Company Pte Ltd ("SEPL") to take over his engineering business. Mr See initially held 35% of SEPL's shares and Mdm Chan, 20%, with the remaining 45% shareholding dispersed among Mr See's extended family members.

9 In November 1975, Mr See executed a written declaration of trust over part of his SEPL shares in favour of his three children. Mdm Chan did the same over part of her SEPL shares.

10 Earlier, Mr See had in 1974 incorporated Tat Mun Pte Ltd ("TMPL") to hold his property investments. Initially, Mr See and Mdm Chan held one share each in TMPL, but 50,000 shares were allotted to Mr See in 1975, making him the majority shareholder of TMPL. In that same year, the Borthwick property and the Joo Chiat property were transferred to TMPL. In 1980, all the SEPL shares held by Mr See's extended family members were transferred to TMPL, making TMPL a 45% shareholder

of SEPL.

11 In late 1983, the Property was purchased in Mdm Chan's name alone. The events surrounding this purchase ("the Purchase") are described in greater detail below at [12]–[18].

Events surrounding the Purchase

12 The circumstances surrounding the Purchase form the nub of the present dispute. In January 1983, Mr See turned 55. He became entitled to withdraw his Central Provident Fund ("CPF") monies amounting to some $490,000, which he did. His affidavit evidence was that he wished at that time to purchase a bungalow where his entire immediate family could live together, so he instructed his eldest son, SHC, to begin looking for a suitable property.

13 In August 1983, SHC located the Property. The asking price was $1.38m for the Property itself, with an additional $400,000 payable if the furniture and fittings were purchased as well. Mr See instructed SHC to take an option to purchase the Property for $1.78m. Such an option was duly given by the seller to SHC "and/or his nominee". The option was exercised by SHC in September 1983.

14 An important meeting then took place between Mr See, Mdm Chan and SHC around September or October 1983 ("the 1983 Meeting"). This was before completion of the Purchase. It is undisputed that the parties agreed at that meeting that the Property would be purchased in Mdm Chan's sole name, and that Mdm Chan agreed then to provide a sum of around $250,000 (her estimate of her life savings at the time) for the Purchase.

15 Mr See's case (supported by SHC) was that the stated intention at the time of the 1983 Meeting was to minimise the amount he would have to borrow from banks, in order to avoid paying unnecessary interest. As a result, it was agreed at the 1983 Meeting that Mdm Chan would provide an interest-free *loan* of her life savings to Mr See, which would be repaid "in a year or two". It was also agreed – on one condition – that the Property would be put in Mdm Chan's sole name because Mdm Chan had expressed a desire to tell her friends that she had a house in her name. The condition was that Mdm Chan should acknowledge Mr See as the true owner of the Property. Mr See said that Mdm Chan agreed to this condition, and he then told SHC to instruct the lawyers to prepare the "appropriate documents".

16 Mdm Chan, on the other hand, narrated a very different version of the material events. She said that in exchange for providing her entire life savings for the Purchase, the Property was to be owned by her absolutely. There was no reason otherwise for her to take out all her life savings to fund the Purchase. Contrary to what Mr See contended, the money which she provided was not a loan. Indeed, at the 1983 Meeting, Mdm Chan had referred to the Property as "My Money. My House." She needed the Property for financial security because of Mr See's infidelity, and not because she had any intention of bragging to her friends that she owned a property in her name. According to Mdm Chan, Mr See agreed to this to appease her over his affair and his infidelity.

17 After the 1983 Meeting, but three days before completion of the Purchase on 18 October 1983, Mdm Chan executed a power of attorney ("POA") in respect of the Property. By this POA, Mdm Chan authorised Mr See and SHC to (among other things) "take charge of, manage and improve my property" and, in particular, sell the Property for such consideration as they saw fit and give receipts for the monies received.

18 On 18 October 1983, the Purchase was completed. A contemporaneous handwritten note was prepared by SHC, who listed down the sources of the purchase price of the Property, which totalled

$1,831,758.90. [note: 1] The breakdown recorded was as follows:

(a) $290,000 from Mdm Chan (it turned out that Mdm Chan had more than $250,000 in her life savings);

(b) $400,000 from a HSBC Bank term loan in Mdm Chan's name ("the HSBC Term Loan");

(c) $400,000 from TMPL's overdraft facility with HSBC Bank ("the TMPL Overdraft");

(d) $8,117.35 from an account jointly held by Mr See and SHC;

(e) $10,000 from SHC; and

(f) $723,641.55 from Mr See's savings and CPF monies.

Events after the Purchase

19 The parties and their three children moved into the Property soon after it was purchased.

20 In July 1984, TMPL became the sole shareholder of SEPL. In November 1984, Mr See transferred all except one of his shares in TMPL to SHC, SSM and SHY.

21 In 1986, about three years after the Purchase, TMPL sold the Joo Chiat property for $265,000.

22 On 21 August 1988, Mr See purportedly dictated a memo ("the First Memo") in which he stated that he was the owner of the Property, and that Mdm Chan was only holding the Property on his behalf (the full text of this memo can be found in the Judgment at [6]). In the First Memo, Mr See also instructed his three children not to make any direct or indirect claim against Mdm Chan in connection with the Property. The signatures of all three children – but *not* Mdm Chan – appeared at the bottom of this memo. On the same day, Mr See purportedly dictated another memo ("the Second Memo") in which he stated that he had decided to distribute the shares in TMPL and SEPL to his children and sought, *inter alia*, confirmation from them that they would not remove him from his position as chairman and managing director of these companies. Again, the signatures of the three children appeared at the bottom of the Second Memo. At the trial below, SHC confirmed that he wrote the First Memo and the Second Memo (collectively, "the two Memos"). According to him, Mr See dictated the text to him in Cantonese and he then wrote it down in English.

23 In the proceedings below, Mdm Chan (with the support of SHY, one of the signatories of the two Memos) disputed the creation of the First Memo. Her case was that the fictitious contents of that memo were written in only *after* the children's signatures were executed so as to buttress Mr See's position in the action.

24 For many years, the status quo prevailed – the Property remained in Mdm Chan's sole name, and the POA remained in force. Then, on 5 April 2011, Mdm Chan revoked the POA (she claimed that SHC was trying to obtain the title deeds to the Property in order to sell the Property). The revocation of the POA prompted Mr See to seek a declaration that the Property belonged to him beneficially.

The pleadings

25 In his pleadings, Mr See averred that he had provided the whole of the purchase price of the Property (SHC seemed content to accept that the monies contributed by him could be attributed to

Mr See). According to Mr See, the sum of $290,000 which he had obtained from Mdm Chan was merely a loan which was repaid about three years after the Purchase, when the Joo Chiat property was sold in 1986 (see [21] above) and the sale proceeds of $265,000 paid to Mdm Chan. Mr See also denied that the presumption of advancement applied in favour of Mdm Chan, relying on the 1983 Meeting, with the POA and the First Memo as evidence of this meeting. Mr See thus sought a declaration that Mdm Chan held the Property under a resulting trust for him.

26 Mdm Chan conceded that she did not provide the entire purchase price of the Property. According to Mdm Chan, the Property was a gift from Mr See. She claimed that it was agreed that she would own the Property absolutely, and this was evidenced by her willingness to: (a) provide $290,000 in cash; and (b) allow her salary, bonuses and dividends from SEPL and TMPL, as well as possibly her CPF funds, to be applied towards the repayment of the HSBC Term Loan. In the alternative, Mdm Chan resisted Mr See's claim on the basis that the presumption of advancement applied in her favour. Mdm Chan therefore counterclaimed for a declaration that she was the true owner of the Property.

The decision below

27 In relation to the purchase price of the Property, the Judge found that:

(a) The $290,000 provided by Mdm Chan to Mr See for the Purchase was a loan which had been repaid in full to Mdm Chan. In making this finding, the Judge noted that Mr See was not able to produce any receipts evidencing repayment of the $290,000, but commented (at [8] of the Judgment) that that was "unsurprising" since the alleged repayment took place more than two decades ago. The Judge placed greater emphasis on the fact that Mdm Chan did not adduce any evidence refuting Mr See's claim that the $290,000 had been repaid in full, and also did not allude to any requests for repayment over the years which were ignored by Mr See. The $290,000 therefore *did not* represent a direct contribution by Mdm Chan to the purchase price of the Property (see the Judgment at [8]).

(b) Even though the HSBC Term Loan was taken out in Mdm Chan's name (see [18(b)] above), it was in fact Mr See who repaid that loan in full. The Judge also found that it had been agreed at the time of the Purchase that Mr See would be the one to repay the HSBC Term Loan. Therefore, the amount represented by this loan should be taken as Mr See's direct contribution to the purchase price of the Property (see the Judgment at [8]–[9]).

(c) Although TMPL was the borrower in name in relation to the TMPL Overdraft (see [18(c)] above), it was undisputed that Mr See controlled TMPL. For all intents and purposes, TMPL could be equated with Mr See, and it would be entirely artificial to consider that the liability undertaken for the TMPL Overdraft was not a direct contribution from Mr See (see the Judgment at [9]).

(d) There was no credible evidence to indicate that Mdm Chan had in fact contributed to the repayment of either the HSBC Term Loan or the TMPL Overdraft. While SHY claimed that it was well known that Mdm Chan had contributed a "substantial sum" towards the Purchase either through "immediate financial contributions at the time of acquisition or subsequent repayment of the loans" (see the Judgment at [10]), SHY had no personal knowledge of this, having returned to Singapore only after the Purchase (see, likewise, [10] of the Judgment).

(e) In view of the above, the Judge was satisfied that Mr See had paid the whole of the purchase price of the Property (see the Judgment at [10]).

28 In relation to the presumption of advancement, the Judge found that:

(a) The presumption of advancement was rebutted on the facts. There was no convincing reason why Mr See would spend so much money and incur substantial financial risks so that he could give a large house to a woman with whom his marriage existed in name only. A man nearing retirement age who had just fallen in love with another woman was unlikely in the circumstances to scrape together $1.8m from multiple sources to buy a house, which would undoubtedly have been his most expensive acquisition, as a gift to his wife in name (see the Judgment at [11]).

(b) The POA, when viewed in the light of the circumstances at the time of the Purchase, supported Mr See's account that he did not intend to make an outright gift of the Property to Mdm Chan and that Mdm Chan accepted this arrangement (see the Judgment at [12]).

(c) Mdm Chan's account that Mr See took from her $290,000, which was less than 20% of the purchase price of the Property, in exchange for placing the Property in her sole name was neither realistic nor credible (see the Judgment at [12]).

29 In relation to the First Memo (see [22] above), the Judge found that:

(a) It was not possible from the face of the First Memo to conclude that it was forged. The only evidence on the authenticity or otherwise of this memo was the evidence of SHC (who had transcribed the memo and who said that it was genuine) and SHY (who said that the memo was a forgery and that he had never seen it until discovery). The Judge found SHC a more measured and candid witness than SHY, and saw no positive reason to believe SHY's bare allegations (see the Judgment at [7]).

(b) In any event, the First Memo was of little probative value as it was executed five years after the Purchase and was of limited relevance in discerning either Mr See's or Mdm Chan's intentions at the time of the Purchase (see the Judgment at [12]).

30 The Judge then went on to observe that:

(a) The facts of the case "indicated a classic situation of a common intention constructive trust – the defendant holding the legal title [o]n trust for the plaintiff pursuant to an express agreement as to beneficial ownership prior to the acquisition of the matrimonial home" (see the Judgment at [17]). The constructive trust analysis was "a sounder solution [than the resulting trust analysis] where proven express common intentions of the parties [were] concerned" (see the Judgment at [19]).

(b) Even though Mr See's pleaded claim was based on a resulting trust rather than a constructive trust, he was still entitled to the Property. He had contributed the entirety of the purchase price of the Property and had not intended to give full beneficial ownership to Mdm Chan; the beneficial interest in the Property thus resulted back to him (see the Judgment at [19]–[20]).

The arguments on appeal

31 On appeal, Mdm Chan submitted that the Judge erred when he relied primarily on the credibility of the witnesses in arriving at his decision that Mr See had full beneficial ownership of the Property. She contended that the Judge failed to appreciate the significance of the objective evidence in the form of certain contemporaneous documents (namely, the POA and handwritten notes by SHC). The

inference properly drawn from those documents was that Mr See had agreed to gift the Property to Mdm Chan in return for the latter contributing her life savings and her future income from SEPL and TMPL to the Purchase – and the evidence showed that Mdm Chan had indeed paid a substantial part of the purchase price of the Property. In the alternative, Mdm Chan submitted, if there was no such agreement to gift the Property to her, she was still entitled to rely on the presumption of advancement, which was not rebutted by the objective evidence.

32 In contrast, Mr See's position on appeal was that the Judge rightly found that: (a) Mdm Chan had agreed to Mr See being the person who would repay the HSBC Term Loan; and (b) the $290,000 contributed by Mdm Chan was meant to be a loan which would be repaid by Mr See. Therefore, it was Mr See who had paid the entire purchase price of the Property, and the presumption of resulting trust arose in his favour. Independently of this presumption, Mr See submitted, there was also direct evidence, in the form of the POA as well as his and SHC's evidence of what transpired at the 1983 Meeting, that he intended to retain beneficial ownership of the Property. Thus, Mr See never intended to benefit Mdm Chan, which was significant in two ways: it rebutted any presumption of advancement which Mdm Chan said arose in her favour, and more importantly, it gave rise to a resulting trust in Mr See's favour.

33 Notably, in his submissions before this court, Mr See abandoned any serious reliance on the First Memo, preferring instead to focus on the POA, SHC's handwritten notes and the oral evidence given by himself and SHC. Mr See's counsel conceded that the First Memo was hardly conclusive since Mdm Chan was not a signatory to it; moreover, it was executed five years after the Purchase. We should point out here that the Judge's observation (at [12] of the Judgment) that the First Memo was adduced primarily to support Mr See's original pleading that SHY was exercising undue influence on Mdm Chan was inaccurate. On the contrary, it was clear from Mr See's own pleadings that he was relying on the First Memo to bolster his account of what took place at the 1983 Meeting. [note: 2]

***Lau Siew Kim* revisited**

34 As mentioned earlier, the arguments deployed before us centred on the device of the resulting trust. In particular, both parties relied on this court's decision in *Lau Siew Kim* to bolster their submissions.

35 In *Lau Siew Kim*, the appellant married the respondents' father ("the father") in December 2000. In April 2000, shortly before their marriage, the appellant and the father bought a property as joint tenants. This property was their matrimonial home, and a mortgage in both their names was taken out to part-finance the purchase. In March 2004, the appellant and the father bought another property as joint tenants. Again, a mortgage in both their names was obtained to part-finance the purchase. The father passed away intestate in November 2004, and the appellant, as the survivor, became the sole legal owner of both properties. The respondents, who were the father's sons, sought a declaration that the appellant held the properties on trust for the father's estate.

36 This court approved of the view that a presumption of resulting trust arose when a person made a voluntary payment to another person or paid (wholly or in part) for the purchase of property which was vested in the other person (see *Lau Siew Kim* at [34] and [46]). Since the appellant and the father had contributed unequally to the purchase price of the properties, the presumption of resulting trust arose. However, on the facts, a strong presumption of advancement (due to the spousal relationship) also arose, which was not rebutted. Thus, the presumption of advancement *itself* rebutted the presumption of resulting trust, and the appellant held the properties absolutely (see *Lau Siew Kim* at [142] and [146]).

37 In the proceedings below, Mdm Chan and Mr See sought to prove that they had each contributed financially towards the Purchase – Mdm Chan, that she had provided her life savings of $290,000 plus her dividends, salary and bonuses from TMPL and SEPL; and Mr See, that he had paid the whole of the purchase price of the Property. As mentioned earlier (at [27(e)] and [28] above), the Judge found that Mr See had contributed the whole of the purchase price, and that the presumption of advancement was rebutted on the evidence. Accordingly, he ruled that Mdm Chan held the whole of the Property on a resulting trust for Mr See.

What does the resulting trust respond to?

38 Professor Robert Chambers ("Prof Chambers"), in his seminal book *Resulting Trusts* (Clarendon Press, 1997), argues that the resulting trust is a response to a *lack of intention* on the part of the person providing the purchase price to benefit the recipient (the "lack-of-intention analysis"). In other words, according to Prof Chambers, a resulting trust would arise whenever the intention of the transferor to benefit the recipient is vitiated or absent. This view has the judicial support of Lord Millett, who stated in the Privy Council case of *Air Jamaica Ltd and Others v Joy Charlton and Others* [1999] 1 WLR 1399 (at 1412):

> Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust, it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest – he almost always does not –since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient.

39 Proponents of the lack-of-intention analysis argue that it adequately explains why the different types of resulting trusts arise. For example, it explains both: (a) the purchase price resulting trust; and (b) the resulting trust that arises on the failure of an express trust to exhaust the entire beneficial interest. However, critics have argued that the lack-of-intention analysis expands the scope of resulting trusts beyond acceptable bounds (see Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("*Westdeutsche*") at 708–709). For example, if a resulting trust arises whenever the intention to benefit the recipient is vitiated, it is possible to argue that *whenever* X pays Y money while labouring under a mistake, a resulting trust would arise over the money because X's intention to benefit Y has been vitiated by the mistake. Indeed, under a wider thesis espoused by the late Prof Peter Birks (in *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2005) at p 305) and Prof Chambers (in *Resulting Trusts* at p 225) based on the lack-of-intention analysis, a resulting trust would arise as a proprietary response to certain instances of unjust enrichment.

40 The other main competing (and more classical) view of the nature of resulting trusts was espoused by Lord Browne-Wilkinson in *Westdeutsche*. In *Westdeutsche*, a bank transferred substantial amounts of money to a local authority pursuant to swap agreements which were subsequently held to be *ultra vires* the local authority. Although it was not disputed that the bank was entitled to recover the monies, the question arose as to whether compound or simple interest was payable by the local authority. This in turn depended on whether the local authority held the monies as a trustee at the point of receipt on the basis of a resulting trust. In concluding that a resulting trust did not arise over the monies, Lord Browne-Wilkinson rejected the lack-of-intention analysis of the resulting trust. Instead, he explained (at 708) that a resulting trust arose from the presumed *common intention* of the parties (the "positive-intention analysis"):

> Under existing law a resulting trust arises in two sets of circumstances: (A) [W]here A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B … (B) Where A transfers property to B on

express trusts, but the trusts declared do not exhaust the whole beneficial interest … Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. … [emphasis in original omitted]

41 It has been suggested, however, that the positive-intention analysis is not easy to reconcile with the case law on resulting trusts. For instance, it is difficult to square this approach with the cases in which the transferor had a clear intention to part with the beneficial interest (*eg*, *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291). Further, there is no reason in principle why the recipient's intention is relevant to the creation of a resulting trust, and Lord Browne-Wilkinson's explanation blurs the distinction between resulting trusts and common intention constructive trusts. Extra-judicially, Lord Millett has also criticised Lord Browne-Wilkinson's approach to resulting trusts in *Westdeutsche* as an "*unduly narrow view*" [emphasis added] (see Peter Millett, "Review Article: Resulting Trusts" (1998) 6 RLR 283 at p 284).

42 The Judge, at [18] of the Judgment, expressed the opinion that "*Lau Siew Kim* was equivocal on whether the court was concerned with the transferor's intentions or both parties' presumed intentions under a resulting trust analysis". In doing so, it appears that the Judge was alluding to the fact that this court in *Lau Siew Kim*, while endorsing Prof Chambers' lack-of-intention analysis of the resulting trust, also referred to the decision of Lord Browne-Wilkinson in *Westdeutsche*.

43 With respect, we disagree that *Lau Siew Kim* was equivocal. This court quite firmly stated (at [35] of *Lau Siew Kim*) that a resulting trust may arise independently of the presumption of resulting trust so long as it can be shown that the transfer *was not intended to benefit the recipient*, and conversely, a resulting trust may not arise if it can be shown that the transfer was indeed intended to benefit the recipient. The intention of the recipient is therefore irrelevant to the question of whether a resulting trust has arisen. *Westdeutsche* was referred to in *Lau Siew Kim* for the limited purpose of illustrating the circumstances in which a resulting trust is presumed to arise.

44 As can be seen from [38]–[41] above, much ink has been spilt on the correct doctrinal basis of the resulting trust (see, for example, Prof Chambers' views in *Resulting Trusts*; William Swadling, "Explaining Resulting Trusts" (2008) 124 LQR 72; and John Mee, "Presumed Resulting Trusts, Intention and Declaration" [2014] CLJ 86). We are of the view that going forward, the lack-of-intention analysis may potentially provide a more sensible basis for the principled yet pragmatic development of this equitable doctrine.

45 In this regard, we note that several High Court cases have already interpreted *Lau Siew Kim* as an endorsement of the lack-of-intention analysis. For example, in *Yong Ching See v Lee Kah Choo Karen* [2008] 3 SLR(R) 957, Lai Siu Chiu J held at [41]:

Lau Siew Kim is significant as it clarifies that first, a lack of consideration required for the presumption [of resulting trust] is not a requirement for the resulting trust and secondly, that the lack of intention to benefit the recipient required for the resulting trust is precisely the fact being inferred when the presumption is applied. … With an absence of intent to transfer beneficial ownership, this operates to establish defective consent by the transferor. …

46 Similarly, in *Lin Chao-Feng v Chuang Hsin-Yi* [2010] 4 SLR 427, Judith Prakash J held at [16]:

The text, *Resulting Trusts* by Robert Chambers (Clarendon Press, Oxford 1997), states at p 32 that the facts which give rise to a resulting trust are:

(a) a transfer of property to another,

(b) in circumstances in which the provider does not intend to benefit the recipient.

This statement of the law was accepted by the Court of Appeal in *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*") at [35].

47 And more recently, Belinda Ang Saw Ean J held in *United Overseas Bank Ltd v Giok Bie Jao and others* [2012] SGHC 56 at [14]:

> The Court of Appeal in *Lau Siew Kim* explained that where a transfer of property to another takes place for which the recipient does not provide the whole of the consideration, the lack of intention to benefit the recipient on the part of the purchaser is the fact that is being inferred when the presumption of resulting trust is applied. …

48 That said, we are mindful that the courts should tread carefully in this area of the law because an unduly wide doctrine of resulting trusts and the potential blurring of the distinction between claims based on unjust enrichment and claims based on resulting trusts might have unsettling effects on the rights of third parties and the security of commercial transactions. For example, Prof Graham Virgo has pointed out in *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) at p 598:

> … [I]f the absence of intention analysis [of resulting trusts] is to be recognized, it is vital to define the notion of the vitiation of the claimant's intent restrictively. … [J]ust because the claimant's intention to benefit the defendant has been vitiated for the purposes of identifying a ground of restitution for unjust enrichment, it does not necessarily mean that the claimant's intention to benefit the defendant has been vitiated for the purposes of identifying a resulting trust. A more restrictive interpretation of when the claimant's intention will be vitiated needs to be adopted before a resulting trust can be recognized.

The relevance of presumptions when there is direct evidence

49 Another issue which has arisen is the relevance of the twin presumptions of resulting trust and advancement where there is direct evidence of the intentions of the transferor. In the present case, the Judge's conclusions on the parties' intention were made on the basis of direct evidence adduced before him, and not through recourse to either the presumption of resulting trust or the presumption of advancement (see the Judgment at [16]).

50 In *Lau Siew Kim* at [59], this court expressed the view that:

> Just like the presumption of resulting trust, the presumption of advancement is "no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution" … It should be treated as "an evidential instrument of last resort where there is no direct evidence as to the intention of the parties rather than as an oft-applied rule of thumb": see *Teo Siew Har v Lee Kuan Yew* [1999] 3 SLR(R) 410 ("*Teo Siew Har*") at [29]. … It is therefore apparent that the presumption of advancement will operate only where there is no direct evidence that may reveal the intention of the parties; only then will there be any necessity to *infer* or *presume* intention. [emphasis in original]

51 The above passage was subsequently read by Lai J in *Neo Hui Ling v Ang Ah Sew* [2012] 2 SLR 831 (at [25]) as suggesting that "the two presumptions of resulting trust and advancement should

only operate when there is no evidence from which to prove or infer the intention of the transferor". We are in broad agreement with Lai J on this point. It is true that there can generally be no justification to resort to presumptions, however much they may reflect the norms, customs and mores of society, if the court is faced with the *actual* intentions and desires of the transferor. In *Lau Siew Kim*, the father was no longer alive; thus, it was necessary to rely on the presumptions and the circumstantial evidence in order to divine his intentions with respect to his contributions towards the purchase price of the properties in question.

52 However, the question in every case where the claim is based on the existence of a resulting trust is still whether there is any direct *evidence that may adequately reveal the intention of the transferor*. In this regard, we endorse the observations of Chan Seng Onn J in *Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] 4 SLR(R) 783 (at [116]) concerning the role of presumptions where the evidence, although available, is unsatisfactory or equivocal:

> If the court could discern a clear intention on the part of the deceased to gift all the moneys in the joint account to the survivor from the evidence before it, then there should be no need to apply any presumption of a resulting trust to aid the fact-finding or decision-making process. Only when the court is not able to find any clear intention or if the evidence is inconclusive either way as to what the deceased's real intention might be, then in this rather limited and exceptional situation (where the evidence is so finely balanced on either side) should the court apply the evidential presumption of a resulting trust to tilt the balance in favour of the estate of the deceased (who solely contributed the moneys in [the] joint account).

The type of contribution which gives rise to the presumption of resulting trust

53 In *Lau Siew Kim*, this court affirmed (at [112]–[113]) that: (a) a resulting trust crystallised at the time the property in question was acquired; and (b) as a result, strict orthodoxy required the quantification of each party's share of the beneficial interest in the property to be determined by reference to his financial contributions to the purchase price of the property at the time the property was acquired. This court then considered (at [114]–[117]) what amounted to a "direct" contribution to the purchase price and referred, *inter alia*, to the dicta of Peter Gibson LJ in the English Court of Appeal case of *Curley v Parkes* [2004] EWCA Civ 1515 ("*Curley*") at [14]:

> … Because of the liability assumed by the mortgagor in a case where monies are borrowed by the mortgagor to be used on the purchase, the mortgagor is treated as having provided the proportion of the purchase price attributable to the monies so borrowed. Subsequent payments of the mortgage instalments are not part of the purchase price already paid to the vendor, but are sums paid for discharging the mortgagor's obligations under the mortgage …

54 Notwithstanding the conceptual straitjacket limiting the types of payments which can be treated as "direct" contributions to the purchase price of a property, this court sought to draw a distinction (at [116] of *Lau Siew Kim*) between: (a) contributions made to the repayment of a mortgage on the basis of an agreement made when the mortgage was taken out; and (b) payments made towards discharging a mortgage without any prior agreement, holding that only the situation in (a) could give rise to a beneficial interest in the property concerned by way of a resulting trust.

55 On further reflection, we are minded to consider whether this ought to be relaxed further to take into account the realities of mortgage repayment. In *Modern Land Law* (Routledge, 9th Ed, 2014), Dr Martin Dixon ("Dr Dixon") criticises the narrow view of mortgage repayments taken by *Curley* (*viz*, that mortgage repayments can never count as contributions towards the purchase price of the property), and argues persuasively that (at p 176):

> … [I]t is not immediately apparent why repayment of a mortgage (or the financing of its debt if the mortgage is interest-only) that was used to purchase the property cannot be regarded as making a contribution to its acquisition at the relevant time. It takes only a little imagination to regard the mortgagee as the agent of the purchasers, paying at the time of purchase, with the mortgagee being repaid as agent with interest by the contributors. …

He reiterates these views in his article "Resulting and constructive trusts of land: the mist descends and rises" [2005] Conv 79 (at pp 82–83) concerning the nature of mortgage repayments.

56 We also note that in *Stack v Dowden* [2007] 2 AC 432 ("*Stack*"), a case which we return to in much greater detail below, Lord Neuberger of Abbotsbury suggested (at [117]) that equitable accounting could be invoked "in a suitable case" as a possible mechanism for retrospectively adjusting, after the date of acquisition of the property, the parties' respective shares of the beneficial interest in the property in a manner which was consistent with the resulting trust analysis:

> … [L]iability under a mortgage … will normally be a relevant, often a very important, factor, because, as Lord Walker points out, the overwhelming majority of houses and flats are acquired with the assistance of secured borrowing. There is attraction in the notion that liability under a mortgage should be equivalent to a cash contribution. On that basis, if a property is acquired for £300,000, which is made up of one party's contribution of £100,000, and both parties taking on joint liability for a £200,000 mortgage, the beneficial interest would be two-thirds owned by the party who made the contribution, and one-third by the other. If one party then repays more of the mortgage advance, equitable accounting might be invoked to adjust the beneficial ownerships at least in a suitable case. Such an adjustment would be consistent with the resulting trust analysis, as repayments of mortgage capital may be seen as retrospective contributions towards the cost of acquisition, or as payments which increase the value of the equity of redemption.

57 The strict rule concerning the attribution of mortgage repayments (as evinced by, *inter alia*, *Curley*) was once again questioned by Lord Neuberger, this time sitting in the English Court of Appeal, in *Laskar v Laskar* [2008] 1 WLR 2695 ("*Laskar*") (discussed briefly below at [141]). In considering how a £43,000 mortgage taken out in joint names ought to be treated in a resulting trust situation, Lord Neuberger observed at [27]:

> There is obvious force in the claimant's contention that, as she and the defendant took out a mortgage in joint names for £43,000, for which they were jointly and separately liable, in respect of a property which they jointly owned, this should be treated in effect as representing equal contributions of £21,500 by each party to the acquisition of the property. It is right to mention that I pointed out in paras 118–119 in [*Stack*] that, although simple and clear, such a treatment of a mortgage liability might be questionable in terms of principle and authority.

The issues arising in this appeal

58 In our view, considering that the parties pleaded their cases based solely on the doctrine of resulting trust, the following issues arise for our decision in this appeal:

(a) Did Mr See pay the whole of the purchase price of the Property ("Issue 1")?

(b) Did Mr See intend to benefit Mdm Chan by the contributions which he made to the purchase price of the Property ("Issue 2")?

(c) If the evidence on Issue 2 is unsatisfactory and inconclusive, did the presumption of

advancement operate to rebut any presumption of resulting trust ("Issue 3")?

59 As mentioned earlier, although the Judge decided that Mdm Chan held the Property on a resulting trust for Mr See, he suggested (at [17] of the Judgment) that the facts also indicated "a classic situation of a common intention constructive trust". In view of the upheaval in this area of the law in England, we propose to examine this suggestion briefly after considering the facts of the instant case.

Some preliminary observations

60 As a preliminary point, we feel constrained to make some observations on the state of the evidence and the witnesses in this case. First, the daughter, SSM, was not called upon to testify at the trial. Her evidence would have been of assistance in relation to the question of the authenticity of the First Memo, of which she was a signatory.

61 Second, the lawyer who drafted the POA was not called on to give evidence. According to Mr See, the lawyer no longer had any personal recollection of the POA. His evidence, if available, would have been of much assistance to the court in ascertaining the purpose of preparing the POA and what Mdm Chan understood by executing the POA.

62 Third, SHY was studying abroad in 1983 and only returned to Singapore in 1984. He therefore had no personal knowledge of any of the events leading up to the Purchase and could not offer any admissible evidence on those events. As a result, Mdm Chan's case rested principally on her own evidence and her submissions of law.

63 Fourth, and as adverted to by the Judge (*eg*, at [10] of the Judgment), the oral testimony of Mdm Chan was not very helpful to the court as she had lost most, if not all, of her memory of the relevant events which transpired. Her common refrain in cross-examination was that she had forgotten or did not know what had happened at the material time. This is *not*, of course, meant to be a criticism of her in any way.

64 Mdm Chan's memory deficit underscores the fifth point that we wish to make here, which is that the events surrounding the Purchase took place some three decades earlier. That was a very long time ago. It was therefore understandable that the documentary evidence in this case was not complete. That said, we note that some potentially vital evidence was not adduced (whether due to the effluxion of time or to other reasons).

65 We are acutely aware that an appellate court should be slow to overturn a trial judge's findings of fact, especially where they hinge on the trial judge's assessment of the credibility and veracity of witnesses, unless: (a) the findings can be shown to be plainly wrong; or (b) the conclusions reached by the trial judge are against the weight of the evidence; or (c) the inferences drawn by the trial judge are not supported by the primary or objective evidence on record. With regard to the trial judge's assessment of the credibility and veracity of witnesses, this court very recently held in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] SGCA 27 (at [50]–[56]) apropos cases where the material events took place a long time ago:

> 50 … [A] witness's ability to recollect the material events and the accuracy of his recollections are inversely proportional to the length of time that has elapsed from the occurrence of the events to his appearance on the witness stand. … *A court should thus be slow to label a witness untruthful where there are gaps in his recollection of events after a significant period of time has elapsed between the occurrence of the events in question and the trial.* As a rule of thumb,

the longer the lapse of time between the happening of the event or matter being recollected and the witness's appearance on the witness stand, the less the reliance that should be placed on pure oral evidence and the more searching the court ought to be in assessing and testing that evidence.

…

54 Witnesses are also particularly vulnerable and susceptible to suggestion and misinformation where the passage of time has allowed the original memory to fade. As pithily observed by Elizabeth F Loftus in "When A Lie Becomes Memory's Truth: Memory Distortion After Exposure to Misinformation" (1992) 1 Curr Dir Psychol Sci 121, "[i]n its weakened condition, memory – like the disease-ridden body – becomes especially vulnerable to repeated assaults on its very essence" (at p 121). …

…

56 The above is meant to highlight the danger of over-reliance on the recollection of witnesses in the witness stand. Conversely, a witness should not be found to be less credible merely because of gaps in his memory, particularly where a long period of time has passed since the occurrence of the events in question. We reiterate that ultimately, the trial judge has to consider the *totality* of the evidence in determining the veracity, reliability and credibility of a particular witness's evidence. This includes contemporaneous objective documentary evidence.

[emphasis in original]

66 In reaching his decision, the Judge, having found SHY and Mdm Chan to be unreliable witnesses, was much more willing to give Mr See and SHC the benefit of the doubt whenever there were difficulties with their evidence. In contrast, difficulties with Mdm Chan's evidence were not charitably assessed and were taken to buttress Mr See's case.

67 This brings us to our sixth observation. Our review of the evidence inclines us to respectfully disagree with the Judge's assessment of Mr See's and SHC's credibility. We agree with counsel for Mdm Chan, Ms Engelin Teh SC, that whether the First Memo was fabricated had a material impact on the credibility of Mr See's and SHC's evidence. Mdm Chan contended that the First Memo was fabricated by Mr See and SHC to support Mr See's version of what transpired at the 1983 Meeting. In support of this contention, SHY pointed out that the two Memos were both written on paper purporting to be "Circular Resolutions" [note: 3] of a company which was not named, and that he, SHC and SSM, being directors of SEPL and TMPL, were in the habit of pre-signing blank directors' circular resolutions. SHY averred that the text of the First Memo was written only after the memo had been pre-signed by SHC, SSM and him.

68 The Judge held (at [7] of the Judgment) that since "neither [SHC's nor SHY's] account was inherently unbelievable", his finding as to whether the First Memo was fabricated "could only be based largely on credibility". On that basis, he decided that the First Memo was not fabricated, but had no probative value as to the events which took place during the 1983 Meeting. With respect, having viewed actual copies of the two Memos tendered in evidence and having regard to the procedural history behind the production of these documents, we have grave doubts as to their authenticity.

69 As mentioned, the First Memo was allegedly prepared on the same day as the Second Memo. A visual inspection of the Second Memo suggests that the body text was written only after the signatures of SHC, SSM and SHY were already on that memo as the last line was deliberately written

closer to the penultimate line so as to avoid crossing over the signatures. [note: 4] In fact, some of the words in the last line appear to curve over the top of SHC's signature in order to avoid crossing over his signature. In our view, this is somewhat suspicious and indicates that the Second Memo was probably fabricated. Given that the First Memo was written on the same day as the Second Memo, it would be reasonable to infer that the First Memo was likely to have been fabricated as well.

70 Further, it was undisputed that the originals of the two Memos were inspected by Mdm Chan's solicitors on 8 June 2012, and that following such inspection, notice was given by Mdm Chan's solicitors on 18 June 2012 challenging the authenticity of these two documents. Notwithstanding that, on the first day of the trial, Mr See explained to the court that he had lost the originals of the two Memos, and confirmed the next day that he was still not able to find them. At no time was there an explanation by Mr See as to why he decided to take possession of these documents *notwithstanding the notice of challenge as to their authenticity*. This was highly suspicious, to say the least. Given these circumstances, we are of the view that the Judge ought to have drawn the appropriate adverse inferences against Mr See and SHC.

71 This leads us to our seventh and final observation. On the whole, it appears to us that SHC and SHY were the real litigants behind this action, and that the respective cases put forth by Mr See and Mdm Chan were largely an attempt by SHC and SHY to reconstruct versions of the material events which would be favourable to their cause based on whatever documentary evidence there was available. We are therefore of the view that the evidence of Mr See, Mdm Chan, SHC and SHY as to the parties' intentions had to be approached with extreme caution, and that the documentary evidence played a central role in this case.

Issue 1: Did Mr See pay the whole of the purchase price of the Property?

72 We turn now to Issue 1. The Property is held in Mdm Chan's sole name, and hence, she is deemed to be absolutely entitled to the Property unless the presumption of resulting trust arises. The question in the present appeal, however, is not whether the presumption of resulting trust applies – it patently does since Mdm Chan conceded that she did not contribute the whole of the purchase price of the Property. Instead, the question is whether Mr See contributed the whole of the purchase price. Where this is concerned, it is not in dispute that the funds listed at [18(d)]–[18(f)] above should be attributed to Mr See. We therefore turn to examine to whom the $290,000, the HSBC Term Loan and the TMPL Overdraft (*ie*, the items at [18(a)]–[18(c)] above) should be attributed.

The $290,000 contribution by Mdm Chan

73 As mentioned, Mdm Chan's case was that the $290,000 was her contribution of her life savings towards the purchase price of the Property, and not a loan. In this regard, besides relying on her own evidence, she pointed to a handwritten note made by SHC prior to the Purchase, [note: 5] which categorised the $250,000 as "CASH" from "MUM" (*ie*, Mdm Chan), and not as a "LOAN" (there is a $40,000 difference between the sum stated in that note and the amount eventually contributed by Mdm Chan because Mdm Chan subsequently found out that she actually had $290,000 in her life savings). The relevant parts of that handwritten note read as follows: [note: 6]

> **24 CHANCERY LANE**
>
> …
>
> FUNDS: <PURCHASE>

CASH $630,000 (CPF)

$250,000 (MUM)

$390,000 (BORTHWICK)

$1,270,000

LOAN 400,000

$1,670,000

…

[underlining in original; emphasis added in bold and bold italics]

74 In our view, the appropriate inference to be drawn from this handwritten note, which was used for the See family's own reference, is that Mr See and SHC were discussing at that time how much they would have to borrow in the form of *bank* loans, in an attempt to minimise the amount of interest to be paid. Therefore, we are unable to accept Mdm Chan's construction of the handwritten note as it is not supported by its context.

75 Mdm Chan, however, made a valid point about one part of the Judge's reasoning. The Judge believed Mr See's account that Mdm Chan had advanced a loan, which was repaid in 1986 using the sale proceeds of the Joo Chiat property. Mdm Chan's *failure to request for repayment over the years* was seen by the Judge as supporting the inference that Mr See *had* indeed repaid the said loan (see the Judgment at [8]). With respect, we find ourselves unable to agree with the Judge. Mdm Chan never said that she asked for repayment of the $290,000 which she contributed. In fact, her case rested on the premise that that sum was *not* lent to Mr See. Her failure to request for repayment was therefore at best equivocal.

76 As there is no doubt that the $290,000 initially belonged to Mdm Chan, the burden was on Mr See – and not Mdm Chan – to show that that sum was properly characterised as a loan. In this regard, Mr See's evidence that he agreed at the 1983 Meeting to take a loan from Mdm Chan was supported only by SHC's evidence of what transpired at that meeting. There was no document executed pursuant to the alleged agreement that Mr See would take a loan of $290,000 from Mdm Chan, so what existed was a purported oral agreement. The only other evidence supporting the characterisation of the $290,000 as a loan was Mr See's testimony that he *repaid* this loan in 1986 out of the proceeds of sale of the Joo Chiat property. SHC supported this story – in fact, it was SHC who claimed that he issued the cheque from TMPL for Mr See to sign and repay Mdm Chan. Yet, neither a copy of the said cheque nor the corresponding cheque stub was produced in evidence. Nor did Mr See produce any evidence from TMPL's records to show that TMPL had indeed issued such a cheque to Mdm Chan. Given that the Joo Chiat property was sold for $265,000, it seems odd that no record was kept of the issuance of a cheque for such a large sum. In this regard, we note that Mdm Chan said in cross-examination that she *had* been repaid the $290,000. [note: 7] However, for the reasons stated above (at [63]), we would be hesitant to take Mdm Chan's evidence at face value.

77 Given that there was simply no documentary evidence whatsoever that the $290,000 from Mdm Chan was a loan or that it had been repaid, much came down to the self-serving statements of Mr See and SHC. In view of that, we respectfully disagree with the Judge's conclusion that the

$290,000 was properly characterised as a loan. On the contrary, we find that the $290,000 should properly be attributed to Mdm Chan as her contribution to the purchase price of the Property.

The TMPL Overdraft

78 Mdm Chan's case on the TMPL Overdraft of $400,000 was twofold. On the one hand, she argued that the whole of that overdraft should be attributed to her on the sole account of her having signed a guarantee for the overdraft. [note: 8] In the alternative, Mdm Chan pointed out that Mr See had conceded in cross-examination that there was an agreed arrangement between them whereby she was to receive about 65% of what he received from SEPL and TMPL, except for dividends and profit. She asserted that she allowed her future income from SEPL and TMPL to be applied towards the repayment of the TMPL Overdraft, and thus, part of that overdraft should be attributed to her as her contribution to the purchase price of the Property. [note: 9]

79 SHC testified that the use of the $400,000 from the TMPL Overdraft was purely fortuitous as the plan was for TMPL to sell the Borthwick property and use its sale proceeds to partially fund the Purchase. However, as the completion date of the Purchase was one month before the completion date of the sale of the Borthwick property, the lack of synchronisation necessitated drawing down from the TMPL Overdraft as a form of bridging finance. SHC further testified that the TMPL Overdraft was repaid in November 1983 following the completion of the sale of the Borthwick property. This date was confirmed by SHC's handwritten notes and was also accepted by Mdm Chan. [note: 10]

80 It was not disputed that at the material time, Mr See owned all but one of the 50,002 shares in TMPL. On that basis, the Judge treated the use of the sale proceeds of the Borthwick property as Mr See's direct contribution to the purchase price of the Property. Oddly, despite Mdm Chan's contentions above, she did not challenge this finding. We therefore see no reason to interfere with the Judge's finding on this point, and it necessarily disposes of both of Mdm Chan's arguments on the TMPL Overdraft. Accordingly, we are in agreement with the Judge that that $400,000 overdraft should be attributed to Mr See.

The HSBC Term Loan

81 It is not disputed that the HSBC Term Loan of $400,000 was granted to Mdm Chan and not Mr See. A letter from HSBC tendered in evidence shows that Mdm Chan executed a first registered mortgage for $1.4m over the Property to secure the payment obligations under the HSBC Term Loan as well as her guarantees of up to $1m in relation to an overdraft facility for SEPL and the TMPL Overdraft. Neither Mr See nor SHC were named as guarantors in HSBC's letter and they did not claim to be.

82 Subject to what we have discussed briefly at [53]–[57] above, the HSBC Term Loan would be attributed to Mr See if he can establish that: (a) he repaid this loan; and (b) he made repayment pursuant to an agreement which he had with Mdm Chan at the time the mortgage was taken out (see *Lau Siew Kim* at [116]).

Who repaid the HSBC Term Loan?

83 SHC claimed that he issued cheques quarterly from SEPL and TMPL to Mr See for him to repay the HSBC Term Loan. There was no documentary evidence (such as cheque stubs) to support this. Notwithstanding this, Mdm Chan did not appear to deny that Mr See made those repayments. In any event, the Judge noted that there was no credible evidence that Mdm Chan had contributed to the

repayment of this loan. Again, before this court, Mdm Chan asserted that she *allowed* her future income under her agreed arrangement with Mr See (see [78] above) to be applied towards the repayment of the HSBC Term Loan, which was in her name. However, she stopped short of claiming that Mr See agreed that he would use the sums representing her future income to repay the loan, and in any event, she had no documentary evidence to support such a contention. In the premises, we see no reason to disturb the Judge's finding that it was Mr See who repaid the HSBC Term Loan.

Was there sufficient evidence of a prior agreement that Mr See would repay the HSBC Term Loan?

84 SHC's evidence was that at the 1983 Meeting, it was agreed that Mdm Chan need not worry about repaying the HSBC Term Loan (even though it was in her name) as Mr See would take care of that. There was no documentary evidence of this alleged agreement. Hence, there was only Mdm Chan's evidence that she could not recall exactly what was agreed at the 1983 Meeting against the evidence of Mr See and SHC, both of whom said that it was with Mdm Chan's agreement that Mr See took on the obligation of repaying the HSBC Term Loan.

85 The Judge was of the view that Mdm Chan did not give a cogent reason as to why the parties would have reasonably accepted that she had the means to repay the HSBC Term Loan. By 1983, she had been a housewife for at least 25 years, and there was no evidence of her actual financial position. The Judge concluded that it was implausible that the parties would have agreed that Mdm Chan, who was dependent on the household income which Mr See gave her, would be responsible for discharging the HSBC Term Loan. We agree with the inference drawn by the Judge. It was inconceivable that Mdm Chan, a homemaker who had just contributed her entire life savings towards the purchase price of the Property, would have undertaken the risk of being personally exposed to HSBC without at least some form of tacit assurance from Mr See that he would be responsible for paying off the HSBC Term Loan.

86 In any event, even if we were not prepared to find the existence of a prior arrangement that Mr See would pay off the HSBC Term Loan, given that Mr See repaid the whole of that loan by himself, we would be willing to consider the remedy of equitable accounting to adjust Mr See's and Mdm Chan's respective shares of the beneficial interest in the Property so as to attribute the $400,000 from the HSBC Term Loan to Mr See (see our discussion above at [53]–[57]).

87 On that basis, we are of the view that the $400,000 from the HSBC Term Loan was properly attributed to Mr See.

Our conclusion on Issue 1

88 In view of the foregoing analysis, we find that Mdm Chan contributed a total of $290,000 and Mr See, a total of $1,541,758.90 to the $1,831,758.90 purchase price of the Property. The starting point, therefore, is the presumption that Mdm Chan holds 84.17% of the beneficial interest in the Property on a resulting trust for Mr See.

Issue 2: Did Mr See intend to benefit Mdm Chan by his contributions to the purchase price of the Property?

89 Given the existence of the presumption of the aforesaid resulting trust, we move on to consider whether Mr See intended to benefit Mdm Chan by his contributions to the purchase price of the Property. This depends on what was actually said at the 1983 Meeting, details of which can be found at [14]–[16] above. To recapitulate, Mdm Chan claimed that she wanted the Property to be put in her name because she was feeling insecure due to Mr See's infidelity. It was therefore "inherently

probable" that Mr See bought the Property in her name to appease her and to assuage his guilt.

90 In our view, the main obstacle in Mdm Chan's case was the existence of the POA (see [17] above). According to Mr See, at the 1983 Meeting, an agreement was reached between him and Mdm Chan that the Property would be put in her name so that she could brag about it to her friends – on condition that she acknowledged him as the true owner of the Property in an "appropriate legal document". Mr See claimed that the POA, which was subsequently executed, was the embodiment of that acknowledgment. SHC confirmed that that was indeed how the POA came about. The Judge agreed with Mr See. He said that the POA, when viewed in the light of the circumstances at the time of the Purchase, supported Mr See's account.

91 On appeal, Mdm Chan challenged Mr See's account of the events surrounding the execution of the POA on the basis that the POA could not be considered an "appropriate legal document". She argued that:

(a) The POA was wholly ineffective to show that the designated attorney was the true beneficial owner of the Property. A declaration of trust should have been *but was not* used.

(b) That a declaration of trust should have been but was not used was even more glaring given that Mr See had executed a written declaration of trust not too long before the Purchase (see [9] above).

(c) The only reason why a power of attorney, and not a declaration of trust, was executed was because Mr See wanted at that time ***only*** *to retain control over the Property* and not to claim beneficial ownership over it as well. This could be seen from the fact that SHC was also named as one of the attorneys in the POA – there was no reason to do so if Mr See intended to retain beneficial ownership of the Property *himself*.

We appreciate the force of these arguments and agree with Mdm Chan that the POA is ineffective in showing the existence of any agreement between the parties that Mr See was to be the true beneficial owner of the whole of the Property.

92 However, Mdm Chan's submissions still do not explain why, if the Property was truly a gift to her, she willingly allowed Mr See to exercise control over the Property. Mdm Chan claimed that the POA was not explained or translated to her in Cantonese, and she therefore never understood the effect of the POA. In the proceedings below, the Judge took the view that Mdm Chan's signature on the POA was *prima facie* evidence that she had acceded to its contents; moreover, the court must assume that the lawyer drafting the POA would have explained its effect to Mdm Chan. There being no evidence to the contrary apart from Mdm Chan's words, we respectfully agree with the Judge that Mdm Chan did not discharge the burden (which lay on her) of proving that she did not understand the effect of the POA. We also agree with the Judge that Mdm Chan's story was unrealistic and incredible – there was no convincing reason why Mr See, a man nearing retirement who had just begun an affair, would make the biggest purchase of his life, only to gift it to someone who was his wife in name only. We therefore find that Mr See had no intention to benefit Mdm Chan by his contributions to the purchase price of the Property.

93 For the sake of completeness, we would add that any presumption of advancement in this case (which would have been weak in view of the state of the relationship between the parties at the time of the Purchase) would have been negated by the circumstances discussed above, and thus, it is unnecessary for us to deal with Issue 3 (at [58(c)] above).

The common intention constructive trust: a "sounder solution"?

The common intention constructive trust: a "sounder solution"?

94 Our analysis at [58]–[93] above is sufficient to dispose of this appeal. We now turn to address the Judge's comment (at [19] of the Judgment) that the common intention constructive trust analysis is "a sounder solution" than the resulting trust analysis. In coming to this view, the Judge referred to two recent English decisions: *Stack* and *Jones v Kernott* [2012] 1 AC 776 ("*Jones*").

Overview of the common intention constructive trust

95 The foundational authorities in English law on the common intention constructive trust are *Pettitt v Pettitt* [1970] AC 777 ("*Pettitt*") and *Gissing v Gissing* [1971] AC 886 ("*Gissing*"). The common intention constructive trust was developed to mitigate the arithmetic rigour of the resulting trust when ascertaining property rights upon the breakdown of a relationship in the domestic context. At the time *Pettitt* and *Gissing* were decided, the Matrimonial Causes Act 1973 (c 18) (UK) ("the MCA 1973 (UK)") had not been enacted yet, and the English courts lacked a flexible, discretionary power to depart from a strict application of hard-nosed property law when dividing matrimonial assets. The common intention constructive trust still remains relevant today in England in cases which fall outside the scope of matrimonial legislation.

96 Prior to *Stack* and *Jones*, the leading case on the essential elements of a claim by one party for a common intention constructive trust over a property held in the sole name of another party was *Lloyds Bank Plc v Rosset and Another* [1991] 1 AC 107 ("*Rosset*"). In *Rosset*, a married couple purchased a property in the husband's sole name with the aid of a mortgage and cash from the husband's family trust. The wife made no financial contribution to the acquisition of the property or the cost of renovating it, but assisted in the building works. The mortgagee bank subsequently brought possession proceedings, and the question was whether the wife had acquired any interest in the property that had priority over the mortgagee's claim. The House of Lords held that the wife had failed to establish any interest in the property. The following passage in the speech of Lord Bridge of Harwich in *Rosset* (at 132–133) encapsulates his view as to when a common intention constructive trust arises:

> The first and fundamental question … is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only … be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.
>
> In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily satisfy the inference necessary to the creation of a constructive trust. But … it is at least extremely doubtful whether anything less will do.

97 Lord Bridge's dicta in *Rosset* was approved and applied by this court in *Tan Thiam Loke v Woon Swee Kheng Christina* [1991] 2 SLR(R) 595 ("*Tan Thiam Loke*") at [18]. Under the approach in *Rosset*, X acquires a beneficial interest in a property by way of a common intention constructive trust when he relies to his detriment on a common intention that the beneficial interest in the property is to be shared. Such a common intention may: (a) arise from an express discussion; or (b) take the form of an inferred common intention, as evidenced by direct financial contributions by X to the purchase price of the property; or (c) in exceptional situations, arise from other conduct by X which gives rise to an implied common intention. *Rosset*, however, left it unclear where the resulting trust fit into the analysis. For example, since it appeared possible from *Rosset* that direct financial contributions to the purchase price of a property could lead to the acquisition of a beneficial interest in the property both under a resulting trust *and* a common intention constructive trust, it was uncertain whether the applicable principles for quantifying the parties' respective shares of the beneficial interest in the two situations would be the same or different.

98 There appears to have been a dearth of reported cases on common intention constructive trusts in Singapore ever since the decision in *Tan Thiam Loke*. One reason could be the perceived restrictive nature of this remedy following *Rosset*. Whatever the reasons, the court is generally constrained by the manner in which counsel decide to present their clients' cases. For example, in *Lau Siew Kim*, both the appellant and the respondents were content to rely on the law of resulting trusts to resolve their dispute. Similarly, in this case, notwithstanding the Judge's references to *Stack* and *Jones*, both Mr See and Mdm Chan, perhaps for reasons of economy, declined to take up his invitation to consider the applicability of the common intention constructive trust, and the appeal before us was argued purely on the basis of resulting trust principles. Nevertheless, we note that there have been cases of property disputes (as defined at [3] above) where the parties advanced their claims on the alternative bases of: (a) a resulting trust; (b) a common intention constructive trust; and (c) proprietary estoppel (see, for example, the recent case of *Quek Hung Heong v Tan Bee Hoon (executrix for estate of Quek Cher Choi, deceased) and others and another suit* [2014] SGHC 17 ("*Quek Hung Hong*")).

99 We acknowledge that the interaction between the resulting trust and the common intention constructive trust (and, dare we say, proprietary estoppel) is complex and confusing, and has given rise to much controversy (see, for example, the observations of Vinodh Coomaraswamy J in *Quek Hung Hong* at [116] and those of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211 at [71]). Further, we are mindful of the importance of identifying the correct default legal regime to apply to property disputes, especially in the domestic context. In this regard, we agree with what A J Cloherty and D M Fox said in their article "Proving a trust of a shared home" [2007] CLJ 517 (at p 518):

> Identifying the applicable regime is obviously important: if the parties separate it determines what share, if any, each party has in the equity in the house. Once identified, it is equally important to know the starting point for that regime's application to a particular case. In principle, it should give a structure to the parties' negotiations, and, in the heat of post-separation animosity, help to distinguish relevant from irrelevant evidence. Ideally, a clear view of that starting point should prevent litigation, which is often … paid for out of the shrinking sale proceeds of the parties' former home.

100 It is thus hoped that the following discussion on the common intention constructive trust will provide *some* clarity for lawyers when advising their clients on this difficult area of the law.

The English position

101 The House of Lords case of *Stack* and the UK Supreme Court case of *Jones* firmly establish that under English law, the common intention constructive trust is the more appropriate tool for quantifying each party's share of the beneficial interest in domestic property disputes (as defined at [3] above) where the property concerned is a family home purchased in the joint names of a cohabiting couple. Both cases are difficult to reconcile with *Pettitt*, *Gissing* and *Rosset*, although none of the latter three cases has been overruled.

The decision in Stack

102 The salient facts of *Stack* are as follows. S and D were in a 19-year relationship. They were not married and, hence, fell outside the scope of the MCA 1973 (UK). A few years into their relationship, D bought a house in her sole name, where the parties lived together and raised four children. The £30,000 purchase price of the house was financed by: (a) a £8,000 down payment from D's building society account; and (b) a £22,000 mortgage in D's name, which D repaid on her own. It was unclear whether S made any contributions to D's building society account. Extensive improvements were made to the house. Although S was responsible for most of these renovations, it was difficult to put a figure on how much they affected the final sale value of the house. The house was sold some years later, and D received a net amount of about £66,000 from the sale. The parties subsequently bought another property in their joint names ("the joint-names property") for £190,000. Over 65% of the purchase price of that property (*ie*, £129,000) came from funds in D's building society account, which, at that time, included the £66,000 from the sale of the previous house. The balance of the purchase price came from a £65,000 loan secured by a mortgage in the joint names of D and S and two endowment policies, one in the parties' joint names and the other, in D's sole name. The interest on the mortgage and the premium on the endowment policy in the parties' joint names (eventually totalling about £34,000) were paid by S. S contributed £27,000 and D, over £38,000 towards repayment of the mortgage loan. The parties did not execute a declaration of trust over the joint-names property. It was undisputed that both parties had a beneficial interest in that property; the issue in *Stack*. therefore, was simply the quantification of the parties' respective shares of the beneficial interest. The judge at first instance held that the beneficial interest in the joint-names property should be split 50:50 between D and S. D appealed. The English Court of Appeal disagreed with the judge at first instance and held that the beneficial interest should be split 65:35 in favour of D. S then appealed. The House of Lords upheld the English Court of Appeal's decision, but with Lord Neuberger adopting a different line of reasoning from that adopted by the other law lords (*viz*, Lord Hoffmann, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Baroness Hale of Richmond (collectively, "the majority in *Stack*")).

(1) The approach of the majority in *Stack*

103 In what appears to be a recasting of the law as traditionally understood, the majority in *Stack* held that the resulting trust analysis ought not generally to play any role in the resolution of domestic property disputes. For instance, Lord Walker held (at [31] of *Stack*):

> … In a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the names of one or two legal owners) the resulting trust should not in my opinion operate as a legal presumption, although it may (in an updated form which takes account of all significant contributions, direct or indirect, in cash or in kind) happen to be reflected in the parties' common intention.

104 Similarly, Baroness Hale, with whom the other members of the majority in *Stack* agreed, cited with approval (at [60] of *Stack*) the following passage from Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 4th Ed, 2004) ("*Elements of Land Law* (4th Ed)") at

para 10.21:

> In recent decades a new pragmatism has become apparent in the law of trusts. English courts have eventually conceded that the classical theory of resulting trusts, with its fixation on intentions presumed to have been formulated contemporaneously with the acquisition of title, has substantially broken down. … Simultaneously the balance of emphasis in the law of trusts has transferred from crude factors of money contribution (which are pre-eminent in the resulting trust) towards more subtle factors of intentional bargain (which are the foundational premise of the constructive trust). … [T]he undoubted consequence is that the doctrine of resulting trust has conceded much of its field of application to the constructive trust, which is nowadays fast becoming the primary phenomenon in the area of implied trusts. …

105 Baroness Hale continued (likewise at [60] of *Stack*):

> … There is no need for me to rehearse all the developments in the case law since *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886 … *The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions*, ***actual, inferred or imputed*** *, with respect to the property in the light of their whole course of conduct in relation to it.* [emphasis added in italics and bold italics]

106 The majority in *Stack* held that in the domestic context, if the property concerned was held in joint names, the starting point was the presumption that the parties were also joint tenants in equity, regardless of whether or not they had made equal contributions to the purchase price of the property (*cf* the resulting trust approach, where there is a presumption that the beneficial interest in the property is held in proportion to the contributions made by each party to the purchase price, *regardless* of how the property is held in law). The burden, the majority in *Stack* held, was on the party seeking to displace the equal division of the beneficial interest to show that the parties had a different common intention, and this was "not a task to be lightly embarked upon" (see *Stack* at [68]). This was evidentially the case because the court was dealing with the allocation of property rights, an area where certainty in the law was a principal consideration. In fact, Baroness Hale went so far as to say (at [69] of *Stack*):

> At the end of the day, … cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be *very unusual*. [emphasis added]

107 In the same paragraph, Baroness Hale attempted to give a non-exhaustive list of factors which might shed light on the parties' intentions:

> In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only

one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. …

(2) The minority approach in *Stack*

108 Lord Neuberger, although agreeing with the majority in *Stack* on the result, disagreed with the use of the common intention constructive trust as the default analytical tool. He accepted that the nature of the relationship between the parties would have a bearing on the inferences to be drawn from their discussions and actions, and that the domestic context could give rise to very different factual considerations from the commercial context (see *Stack* at [103] and [107]). Nevertheless, he argued that: (a) the same principles should apply to assess the apportionment of the beneficial interest between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship (see *Stack* at [107]); and (b) consistency required the approach to be the same regardless of whether the property was held in the name of one party or in the names of all the parties (see *Stack* at [114]).

109 Lord Neuberger argued that the question of "the ownership of the beneficial interest in property held in the names of two people" should be considered in "a structured way" (see *Stack* at [108]). He preferred to state that where the only evidence available was the extent of each party's contributions to the purchase price of the property, the beneficial ownership of the property would be held in the same proportions as the parties' respective contributions to the purchase price, *ie*, the resulting trust analysis would apply. To him, this was a matter of both principle and logic (see *Stack* at [110] and [114]).

1 1 0 *But, that was not to say that the common intention constructive trust analysis was irrelevant*. Lord Neuberger was prepared to accept that if there was *more* evidence available than the parties' respective contributions to the purchase price of the property, the court might be able to deduce an agreement or understanding amounting to an intention as to how the beneficial interest in the property would be held. In this way, the resulting trust could be rebutted by a common intention constructive trust (see *Stack* at [124]).

111 In relation to the quantification of each party's share of the beneficial interest in the property, Lord Neuberger, unlike the majority in *Stack*, drew a sharp distinction between an inferred and an imputed common intention, holding that the court could infer a common intention on the part of the parties, but could not impute to them a common intention (at [125]–[127] of *Stack*):

125 While an intention may be inferred as well as express, it may not, at least in my opinion, be imputed. That appears to me to be consistent both with normal principles and with the majority view of this House in *Pettitt v Pettitt* [1970] AC 777, as accepted by all but Lord Reid in *Gissing v Gissing* [1971] AC 886, [at] 897H, 898B-D, 900E-G, 901B-D, 904E-F, and reiterated by the Court of Appeal in *Grant v Edwards* [1986] Ch 638, [at] 651F-653A. The distinction between inference and imputation may appear a fine one (and in *Gissing v Gissing* [1971] AC 886, [at] 902G-H, Lord Pearson, who, on a fair reading I think rejected imputation, seems to have equated it with inference), but it is important.

126 An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. 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. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.

127 To impute an intention would not only be wrong in principle and a departure from two decisions of your Lordships' House in this very area, but it also would involve a judge in an exercise which was difficult, subjective and uncertain. (Hence the advantage of the resulting trust presumption). [*sic*] It would be difficult because the judge would be constructing an intention where none existed at the time, and where the parties may well not have been able to agree. It would be subjective for obvious reasons. It would be uncertain because it is unclear whether one considers a hypothetical negotiation between the actual parties, or what reasonable parties would have agreed. The former is more logical, but would redound to the advantage of an unreasonable party. The latter is more attractive, but is inconsistent with the principle, identified by Baroness Hale at paragraph 61, that the court's view of fairness is not the correct yardstick for determining the parties' shares (and see *Pettitt v Pettitt* [1970] AC 777, [at] 801C-F, 809C-G, 826C).

112 Lord Neuberger nevertheless appeared willing to adopt a broader approach than that adopted in *Rosset* as to the factors which could be taken into account when discerning the parties' common intention. He accepted that (at 129 of *Stack*):

It is hard to identify, particularly in the abstract, the factors which can be taken into account to infer an agreement or understanding, and the effect of such factors. Each case will be highly fact-sensitive, and what is relevant, and how, may be contentious, whether one is considering actions, discussions or statements, even where there is no dispute as to what was done or said.

113 Lord Neuberger went on to observe that while the court should take into account all the circumstances of the relationship between the parties, it did not mean that all these circumstances were of *primary or equal* relevance to the ascertainment of the parties' common intention (see *Stack* at [131]). In his view, most of the factors cited by Baroness Hale provided part of the vital background – but *only the background* – against which any alleged discussion, statement or action concerning the parties' common intention was to be assessed. For that reason, he considered Baroness Hale's endorsement of considering the parties' whole course of dealing in relation to the property (see [105] above) too imprecise, as it gave insufficient guidance on what was primarily relevant, that is, the dealings which cast light on the beneficial ownership of the property (see *Stack* at [144]). To Lord Neuberger, the conduct of the parties was only relevant insofar as it threw light on the question of what the parties intended their respective shares of the beneficial interest in the property to be. In his opinion (see *Stack* at [145]):

… "Undertaking a survey of the whole course of dealings between the parties" should not, I think, at least normally, require much detailed or controversial evidence. That is not merely for reasons of practicality and certainty. As already indicated, I would expect almost all of "the whole course of dealing" to be relevant only as background: it is with actions, discussions and statements which relate to the parties' agreement and understanding as to the ownership of the beneficial interest in the home with which the court should, at least normally, primarily be concerned. Otherwise, the inquiry is likely to be trespassing into what I regard as the forbidden territories of imputed intention and fairness.

114 Finally, Lord Neuberger accepted that there was nothing wrong in principle with *subsequently* altering, after the date of acquisition of the property, the parties' respective shares of the beneficial interest in the property as it stood on the date of acquisition in the event of a change in their

common intention after that date. However, in his view, such an alteration of the quantification of each party's share of the beneficial interest required "compelling evidence", which would normally involve "discussions, statements or actions, subsequent to the acquisition, from which an agreement or common understanding as to such a change [could] properly be inferred" (see *Stack* at [138]), although he appeared to accept that it was possible to infer a common intention to alter a party's share of the beneficial interest if that party carried out "significant improvements to the home" (see *Stack* at [139]).

115 On the evidence, Lord Neuberger was satisfied that S could not establish a claim to more than 36% of the beneficial interest in the joint-names property, and indicated that he was more comfortable with putting S's contribution at around 30% (see *Stack* at [122]). However, since D was prepared to concede that S should have a 35% share of the beneficial interest, Lord Neuberger was in agreement with the result reached by the majority in *Stack*.

The decision in Jones

116 A few years later, *Jones* reached the UK Supreme Court. The facts of *Jones* can be summarised as follows. J and K were in a relationship. Like the couple in *Stack*, they were not married and they too fell outside the scope of English matrimonial legislation. In 1985, J and K purchased a property in their joint names for £30,000. Part of the purchase price was raised by way of an endowment mortgage in the parties' joint names, which was repaid out of a joint account. J and K cohabited at the property for eight years until they separated in 1993, at which point K moved out of the property (which was estimated to be worth about £60,000 by then). It was accepted that when K moved out, the beneficial interest in the property was split 50:50 between the parties. From then on, J assumed sole responsibility for the outgoings and maintenance of the property, financial support of the children and all mortgage repayments in respect of the property.

117 In 1995, two years after K moved out of the property (which was worth about £70,000 by then), the parties cashed in a joint life insurance policy (different from the endowment policy which secured the mortgage on the property) and shared the proceeds. These proceeds allowed K to put down a deposit for the purchase of his own home. Eleven years later, in 2006, K sought to claim a beneficial interest in the property, whereupon J sought a court declaration that, *inter alia*, the entire beneficial interest in the property belonged to her. At the time of the first instance hearing, the property was worth around £243,000. As in the case of *Stack*, the question here was again one of quantification of the parties' respective shares of the beneficial interest in the property. In particular, the issue was whether each party's share of the beneficial interest had changed over time.

118 At first instance, the county court judge concluded that the common intention of the parties changed after K moved out of the property and focused on his own home, and held that the beneficial interest should be split 90:10 in favour of J. K appealed. The English High Court, applying *Stack*, upheld the county court judge's decision. K appealed again. The English Court of Appeal, by a 2:1 majority and likewise applying *Stack*, disagreed that the evidence supported the finding that the parties' common intention changed after their separation and declared that the beneficial interest should be split 50:50. This time, J appealed. The UK Supreme Court reversed the decision of the English Court of Appeal and reinstated the 90:10 split in favour of J. Although all five members of the UK Supreme Court were in agreement with the result, four separate judgments (comprising a joint judgment by Lord Walker and Baroness Hale JJSC, and separate judgments by Lord Collins of Mapesbury, Lord Kerr of Tonaghmore and Lord Wilson JJSC) were issued, the main disagreement being whether it was more appropriate to infer or impute a common intention to split the beneficial interest in the property 90:10 in the light of the evidence.

119 In their joint judgment, Lord Walker and Baroness Hale JJSC said that the logical inference was that K's beneficial interest in the property crystallised in 1995 when the joint life insurance policy was cashed in and he bought a new home for himself. From that point on, it could be inferred (and did not have to be imputed) that the common intention of the parties was that J would have the sole benefit of any capital gains in the property after that time (see *Jones* at [48]). Based on a rough calculation of the parties' respective financial contributions to the purchase price of the property, Lord Walker and Baroness Hale were satisfied that it would be wrong to interfere with the findings of the first instance judge.

120 Lord Walker and Baroness Hale JJSC also took the opportunity to clarify the principles laid down in *Stack*. In particular, they clarified that: (a) the regime set out in *Stack* applied to both joint-names cases and single-name cases; and (b) it was appropriate in some circumstances to impute an intention to the parties (*ie*, to attribute to them an intention which they did not have) in order to arrive at what the court considered to be a fair result.

121 Having considered all four judgments in *Jones*, the following is our attempt to summarise the inquiry now adopted under English law when apportioning the beneficial interest in domestic property:

(a) The starting point is that equity follows the law. It is therefore presumed: (i) in joint-names cases, that the parties are joint tenants in both law and equity; and (ii) in single-name cases, that the party who does not own the property at law also does not have a beneficial interest in it (see *Jones* at [16], [51(1)] and [52]).

(b) The first question is whether the above presumption can be displaced by showing that the parties had a common intention to hold the beneficial interest in the property differently from the way in which the legal interest was held at the time the property was acquired. In single-name cases, as part of that inquiry, the court will ask whether there was a common intention that the party who did not own the property at law was to have any beneficial interest in it at all. In answering this question, the court is permitted to look for either an express or an inferred intention, objectively deduced from the evidence. However, it is not permitted to impute an intention to the parties (see *Jones* at [17], [51(2)], [52] and [64]). The task of ascertaining whether the parties intended to hold the beneficial interest in the property differently from the way in which the legal interest was held is not a task to be "lightly embarked upon" (see *Jones* at [12]). Nevertheless, if it is embarked upon, the court is to ascertain the parties' common intention as to their respective shares of the beneficial interest based on their whole course of conduct in relation to the property (see *Jones* at [12], [13] and [51(3)]). Financial contributions are but one of the factors for the court to consider in deciding what the parties commonly intended (see *Jones* at [51(5)]).

(c) If the first question is answered in the affirmative, then the second question is how to quantify each party's share of the beneficial interest in the property. In answering this question, the court will refer to the common intention of the parties, again objectively deduced. This intention may be an express *or an inferred one*. But, if it is impossible to divine a common intention as to the proportions in which the beneficial interest is to be shared, the court will *impute* to the parties an intention which they never had, so that each party is entitled to a share which the court considers fair, having regard to the whole course of dealing between them in relation to the property (see *Jones* at [31], [33], [47], [51(3)], [51(4)] and [64]). Again, financial contributions are but one of the factors for the court's consideration in deciding what is fair (see *Jones* at [51(5)]).

(d) The third question is this: notwithstanding the parties' common intention at the time the

property was acquired, whether the parties' common intention changed over time to reflect a different quantification of each party's share of the beneficial interest in the property (see *Jones* at [14] and [51(2)]). To answer this question, the steps in questions one and two above are repeated once again.

The scope of Stack and Jones in the English courts

(1) Single-name and joint-names cases

122 Although *Stack* and *Jones* were both cases where the domestic property concerned was held at law in the *joint* names of both parties and, therefore, were strictly speaking about the quantification of each party's share of the beneficial interest in the property, they have been applied to a wide array of situations where the property in question was held in a single name (see, *eg*: (a) *Re Piper* [2011] EWHC 3570 (Admin), where a wife claimed a half share in a property held in her husband's name in criminal confiscation proceedings against the husband; (b) *Geary v Rankine* [2012] EWCA Civ 555 ("*Geary*"), where G claimed a share in a property purchased for business purposes by R and held in R's name; (c) *Thompson v Hurst* [2012] EWCA Civ 1752 ("*Thompson*"), where T claimed that the starting point in the division of the beneficial interest in a property held in H's name should the same as that in a joint-names case because the parties would have liked to be joint legal owners of the property, but were prevented by "external factors" (at [16]) from doing so; (d) *Aspden v Elvy* [2012] EWHC 1387 (Ch); and (e) *Gallarotti v Sebastianelli* [2012] EWCA Civ 865 ("*Gallarotti*")).

123 In our view, this is unsurprising, given that, as mentioned above, Lord Walker and Baroness Hale JJSC expressly stated in *Jones* (albeit in *obiter dictum*) that a single regime applied to both joint-names and single-name cases, albeit with different starting points.

(2) Beyond cohabitation relationships

124 The English courts have also accepted that the approach of the majority in *Stack* and the UK Supreme Court in *Jones* (referred to hereafter as "the approach in *Stack* and *Jones*" where appropriate to the context) extends beyond cohabiting couples to other domestic relationships. This is perhaps unsurprising as well since Baroness Hale referred to the presumption of equality in joint-names cases applying "at least in the domestic consumer context" (see *Stack* at [58]). An example of this is *Adekunle v Ritchie* [2007] EW Misc 5 (EWCC) ("*Adekunle*"), where a mother had the opportunity to buy a house at a substantial discount under a government scheme. As she was unable to obtain the necessary loan by herself (due to her age and financial position), her son (who lived with her) agreed to be a party to the mortgage and the other registered owner of the property. When the mother died without making a will, her administrators applied for an order to sell the house and divide the sale proceeds between her ten children under the rules of intestacy. The son who had lived with the mother while she was alive opposed the application. HHJ Behrens accepted that the approach of the majority in *Stack* (*Jones* had not been decided yet at that time) applied outside home-sharing arrangements which involved a sexual relationship (see *Adekunle* at [65]).

125 The approach in *Stack* and *Jones* has also been applied outside familial relationships. In *Gallarotti*, two close male friends, G and S, bought a flat together with the help of a mortgage. The flat was purchased in the sole name of S, who paid a larger initial cash contribution and repaid a much larger share of the mortgage. The parties initially orally agreed that they would each have a 50% interest in the flat. No declaration of trust was made to this effect. However, when the parties realised that they were going to make unequal contributions to the purchase price of the flat, there was a subsequent oral agreement that G would pay a larger proportion of the mortgage repayments. This did not happen. The parties subsequently fell out and G commenced proceedings to determine his

share of the beneficial interest in the flat. The evidence showed that S paid about 75% of the total cost of the flat while G paid approximately 25%.

126 The judge at first instance held that the parties held the beneficial interest in the flat in equal shares. On appeal, the English Court of Appeal disagreed and substituted a finding that the beneficial interest in the flat should be split 75:25 in favour of S. In coming to this conclusion, Arden LJ agreed with the judge at first instance that the common intention constructive trust analysis (as espoused by the majority in *Stack* and the UK Supreme Court in *Jones*) would apply in view of the close friendship between G and S. However, she found that the initial oral agreement between the parties (on a 50:50 split) did not cover the situation at hand. Instead, she inferred from the parties' course of conduct that they intended their respective shares of the beneficial interest in the flat to reflect, in substance, their respective financial contributions to the purchase price of the flat (which would have been the result under the resulting trust analysis had there been no common intention).

The key drivers for the decisions in Stack and Jones

127 The decisions in *Stack* and *Jones* stand out for propounding a refreshed approach to the determination of each party's share of the beneficial interest in domestic property when domestic property disputes arise – an approach which will, in most cases, leave no room for the resulting trust to operate (see *Jones* at [24], [25] and [53]). The English departure from the resulting trust solution, so far as domestic property is concerned, appears to be the consequence of changing economic and social conditions in England. The rise in property prices in England (as well as in other parts of the UK), coupled with the dramatic increase in the number of unmarried couples living together (some with dependent children) over the past 50 years, has led to calls for reform in the law concerning the apportionment of property rights for persons outside the reach of the MCA 1973 (UK).

128 Attempts at legislative reform in the UK, however, have thus far been unsuccessful. For example, prior to *Stack*, the UK Law Commission set out in 2001 to review the law in this area, which it felt was (see *Eighth Programme of Law Reform* (Law Com No 274, 2001) at p 7):

> … widely accepted [to be] … unduly complex, arbitrary and uncertain in application. It is ill-suited to determining the property rights of those who, because of the informal nature of their relationship, may not have considered their respective entitlements.

129 In 2002, however, the UK Law Commission published *Sharing Homes: A Discussion Paper* (Law Com No 278, 2002), which, after an extensive review of the law in England and other common law jurisdictions (including, *inter alia*, Canada and Australia), concluded (at para 1.31(1)):

> It is quite simply not possible to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered.

With this background in mind, the English judiciary believed that the evolution of the law of property to take into account changing social and economic circumstances would have to come from the courts rather than from the UK Parliament (see *Stack* at [46]).

130 Further attempts at law reform following *Stack* were also unsuccessful. After *Stack*, the UK Law Commission published *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) in July 2007, which proposed the introduction of a structured judicial discretion to order property adjustments on the breakdown of a relationship between couples in certain relationships, provided the specified eligibility criteria were met. Despite this, the UK government

announced in 2011 that it had no plans to change the law. It was with these developments (or the lack thereof) in mind that the UK Supreme Court in *Jones* confirmed (at [78]) that it was possible to *impute* to the parties "[a] common intention which impresse[d] a constructive trust upon the legal ownership of the family home". We note parenthetically that there was a recent (unsuccessful) attempt in late 2013 to introduce a private member's Bill (*viz*, the Cohabitation Rights Bill (HL Bill 49)) [note: 11] which sought to implement certain recommendations of the aforesaid 2007 UK Law Commission report.

131 Another factor which appears to have influenced the decisions in *Stack* and *Jones* is the growing view amongst English judges that the assumptions underlying the resulting trust approach to domestic property disputes are no longer appropriate. As we mentioned earlier, the majority in *Stack* agreed (at [60]) with the observation by Kevin Gray and Susan Francis Gray in *Elements of Land Law* (4th Ed) at para 10.21 that:

> … [T]he balance of emphasis in the law of trusts has transferred from crude factors of money contribution (which are pre-eminent in the resulting trust) towards more subtle factors of intentional bargain (which are the foundational premise of the constructive trust). …

In a similar vein, the UK Supreme Court pointed out in *Jones* (at [53]) that "[t]he assumptions as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, [were] not appropriate to the ascertainment of beneficial interests in a family home".

132 A further driver for the approach in *Stack* and *Jones* is, perhaps, the greatly diminished operation in England of the presumption of advancement, which would have tempered the presumption of resulting trust. Indeed, abandoning the presumption of advancement whilst retaining the presumption of resulting trust would place an even greater emphasis upon "crude factors of money contribution" (see *Elements of Land Law* (4th Ed) at para 10.21), an emphasis which the English judiciary now considers too narrow (see *Jones* at [24]). In this regard, we note that the presumption of advancement will be abolished in England when s 199 of the Equality Act 2010 (c 15) (UK) comes into force.

The reception to Stack and Jones in England

133 As Lord Walker and Baroness Hale JJSC themselves observed in *Jones* (at [2]), the reception in England to the new approach to domestic property disputes heralded by *Stack* has "range[d] from qualified enthusiasm … to almost unqualified disapprobation".

134 For instance, Kevin Gray and Susan Francis Gray, the authors of *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) (which was published prior to the decision in *Jones*), laud the approach in *Stack* as "a bold strategy … to escape from a generation of restrictive case law on the law of trusts" (at para 7.3.72).

135 At the other end of the spectrum, the doctrinal soundness of the approach in *Stack* and *Jones* has been questioned (see William Swadling, "The common intention constructive trust in the House of Lords: An Opportunity Missed" (2007) 123 LQR 511; Adrian Briggs, "Co-ownership and an equitable non sequitur" (2012) 128 LQR 183; Martin Dixon, "Editor's Notebook: The Still Not Ended, Never-ending Story" [2012] Conv 83; and John Mee, "Jones v Kernott: inferring and imputing in Essex" [2012] Conv 167).

136 Aside from doctrinal problems, the approach in *Stack* and *Jones* has been criticised for being a "litigation-generator" because of the large degree of subjectivity and uncertainty which it has

introduced into the realm of property law where domestic property disputes are concerned. In his case note on *Stack* (see "Editor's Casenotes" [2007] Conv 352), Dr Dixon points out (at p 353) that despite Baroness Hale's insistence that "the enquiry into ownership should not be lightly embarked on because of what it might cost the parties" (thus recognising the need for certainty in this area of the law), her non-exhaustive list of factors (at [69] of *Stack*) which the court can consider in apportioning, in the absence of a written declaration of trust, the beneficial interest in the property concerned among the disputing parties is "the property lawyers' equivalent of Pandora's Box" which would lead to precisely the opposite result.

137 In fact, the ease with which the default starting position can be displaced is illustrated by the decision in *Stack* itself, where, despite the relatively unexceptional facts (if we may say so), much was made of the fact that the circumstances were "exceptional" in order to justify the alteration of the *prima facie* 50:50 division of the joint-names property to 65:35. Dr Dixon, in "The never-ending story – co-ownership after Stack v Dowden" [2007] Conv 456, thus observes (at p 459):

> … [D]espite the insistence in *Stack* that it should be difficult to subvert a joint-tenancy of the legal title, it was clear that the factors listed in [69] [of *Stack*] were so wide-ranging that nearly any case could be made "special". …

138 Dr Dixon also points out that the search for fairness between the parties under the approach in *Stack* and *Jones* might lead to huge hidden litigation costs since the wide list of non-exhaustive relevant factors which can be taken into account makes it difficult for solicitors to advise their clients on the likelihood of a successful claim in domestic property dispute cases. For this reason, Dr Dixon is of the view that the approach of Lord Neuberger in *Stack*, in the absence of any legislation, is preferable because of the certainty which it affords. He argues in his 2007 case note on *Stack* (see [136] above) at p 353:

> … The wholly different approach of Lord Neuberger – what might be called a traditional Chancery approach – is in marked contrast to that of the majority. Of course, it [*ie*, the approach of the majority in *Stack*] will only end in tears – probably those of the Court of Appeal faced with a stream of litigation instigated by dissatisfied claimants seeking a re-adjustment of their "share" of the house on the basis of the fluid, equitable jurisdiction favoured by the majority. Indeed, the real irony might well prove to be that the bill payer in a relationship – usually the working man – can use the principles of *Stack* to reduce the alleged share of his partner – usually the non-working mother.

139 It has also been pointed out by commentators that the lower courts which have applied *Stack* and *Jones* have readily displaced the presumption of equality in joint-names cases where the parties make unequal contributions to the purchase price of the property, and – ironically – have given much weight to the financial contributions made by each party. In the result, the division of the beneficial interest in such cases has tended to be very close to the proportions in which the parties contributed to the purchase price of the property. Extra-judicially, Lord Neuberger has observed in "The Conspirators, The Tax Man, The Bill of Rights and A Bit about the Lovers", a lecture delivered to the Chancery Bar Association on 10 March 2008, that:

> 15. … There appeared to be two factors which together persuaded the majority [in *Stack*] that the presumption [of equality] was rebutted (see paras 87 to 91 and para 11). The first was that one of the parties had "contributed far more to the acquisition" than the other. The difference was not, in fact, that great – not even 2 to 1. More importantly, it is scarcely a convincing reason. If the parties had contributed equally, there would be no issue as to beneficial shares. The issue only arises where the contributions are unequal. If the presumption of equality is to be

rebutted because the contributions are significantly different, it is a pretty useless presumption: the only time you need it, it isn't there.

16. The second factor was that Mr Stack and Miss Dowden kept their assets separate from each other (save for the house itself and an associated endowment policy) and each paid for different aspects of the household expenses. I find it hard to believe it is a particularly unusual state of affairs in the present day even as between married couples. Further, if anything, it can be said to suggest that the parties intended the house to be shared equally because they did not keep their respective investments in the house in separate names. …

17. Are these facts telling enough to live up to discharging the "considerable burden" said by Lord Walker (para 14) to face a party seeking to rebut the presumption? Lady Hale said (at para 92) that these two factors, on their own, did indeed render *Stack* "a very unusual case" and justified a departure from the principle of equality[.] However, I suspected at the time that this would mean that almost every case would be "very unusual", and that most cases would end up with a *de facto* resulting trust apportionment. …

140 Finally, it seems to us that having dramatically different approaches to property disputes, depending on whether the dispute concerned arises in a domestic or a commercial context, leads to the additional problem of identifying what cases are truly "domestic".

141 For example, in the English Court of Appeal case of *Laskar*, a mother and her daughter purchased a property under a government scheme. The property was sold to them at a discount because the mother had previously occupied the property as a secured tenant. The purchase was financed through a mortgage in the joint names of the mother and the daughter and their joint contributions towards the deposit for the property, with the daughter added as a joint owner because the mother could not afford to buy the property by herself. After the purchase, the mother moved out of the property and the joint mortgage was repaid using income received from renting out the property. The mother subsequently fell out with her daughter, and the latter sought to realise her interest in the property. Lord Neuberger (sitting in the English Court of Appeal) concluded (at [17]) that while the approach of the majority in *Stack* could in principle apply to property jointly held by a mother and her daughter, it would not apply in *Laskar* because the property had been purchased not as a home, but as an investment.

142 The approach in *Laskar* can be contrasted with the more recent approach of the English Court of Appeal in *Geary*. In *Geary*, the couple were in a relationship, but were not married to each other. R, using cash, purchased a property in his sole name for the purposes of running a guesthouse business. G later helped R in running the guesthouse business. When the parties fell out, G sought to argue that she had a beneficial interest in the property by way of a common intention constructive trust. Although G's claim eventually failed, what is interesting for our purposes is that the English Court of Appeal in *Geary* was willing to adopt the approach in *Stack* and *Jones* (albeit with a higher burden of proof to displace the default starting position (see *Geary* at [18])) even though the property in question had been purchased not as a home, but for investment and business purposes.

Different approaches in other Commonwealth countries

143 We also note with interest that other Commonwealth jurisdictions such as Australia and Canada have not followed England in adopting the common intention constructive trust to resolve domestic property disputes, but have instead developed their own distinct approaches.

Australia

144 The Australian courts have moved away from the common intention of the parties and have instead adopted the concept of "unconscionability" as the basis for imposing a constructive trust where the domestic property in question is a shared home. Under this approach, the Australian courts view the sharing of a home as a joint venture focused on the pooling of resources, and the imposition of a constructive trust as a means of preventing the unconscionable retention of disproportionate contributions to the joint enterprise (see *Baumgartner v Baumgartner* (1987) 164 CLR 137).

145 The benefit of such an approach is the avoidance of the search for a common intention which the parties might never have had. The risk, of course, is that opening up the analysis beyond the common intention of the parties leads to an increase in the unpredictability of outcomes and the same problem of spiraling litigation costs highlighted by Dr Dixon above (at [138]). The situation is made more complex as it appears that in Australia, the resulting trust and the common intention constructive trust are still pleaded alongside this modified form of constructive trust in domestic property dispute cases (for a recent example, see *Sivritas v Sivritas* [2008] VSC 374).

146 That said, we should also point out that common law trust doctrines now play a reduced role in Australia in resolving domestic property disputes following the enactment of legislation (at both federal and state levels) to deal with domestic property disputes between partners in a de facto relationship (which falls outside the scope of matrimonial legislation) upon the breakdown of their relationship. Such statutory recourse is available to an aggrieved partner in a de facto relationship provided he or she can show that certain criteria have been fulfilled (see further Adrian J Bradbrook *et al*, *Australian Real Property Law* (Thomson Reuters, 5th Ed, 2011) at para 8.375 *ff*).

Canada

147 The Canadian courts, in contrast, have developed the "remedial constructive trust" based on their law of unjust enrichment to address the property consequences of the breakdown of domestic relationships. In order to establish a claim for unjust enrichment in Canada, the claimant must show: (a) an enrichment of the defendant; (b) a corresponding deprivation on the part of the claimant; and (c) an absence of any juristic reason for the enrichment (see *Pettkus v Becker* [1980] 2 SCR 834 ("*Pettkus*"), which was affirmed in *Kerr v Baranow* [2011] 1 SCR 269).

148 The rationale for imposing a remedial constructive trust in situations where the above criteria are fulfilled was explained as follows by Dickson J in *Pettkus* at [41]:

> … [W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

149 It should be noted that "enrichment" in this context has been interpreted widely to include both financial and non-financial contributions (*eg*, domestic and maintenance works). Like the Australian courts, the Canadian courts have departed from the English common intention constructive trust because of the danger that it involves "the judicial quest for that fugitive common intention" (*per* Dickson J in *Pettkus* at [20]).

150 Having said that, the Canadian courts will only grant the proprietary remedy of a remedial constructive trust where monetary compensation is inappropriate or insufficient (see *Peter v Beblow* [1993] 1 SCR 980 at 987–988 and *Shannon v Gidden* (1999) 178 DLR (4th) 395 at [21]–[24]). We have three observations to make on the applicability of the Canadian approach in Singapore:

(a) First, the risk of inherent uncertainty and spiraling litigation costs under the Australian approach is also inherent under the Canadian approach, where there even appears to be a remedial discretion for the court to determine whether a party is awarded a personal or a proprietary remedy.

(b) Second, as this court observed in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [176], the Canadian position on unjust enrichment is different from the position adopted in Singapore.

(c) Third, even assuming that a proprietary remedy is available in a claim for unjust enrichment, it is uncertain what the unjust factor ought to be. In this regard, Etherton LJ (who, incidentally, formed part of the coram in the English Court of Appeal cases of *Geary* and *Thompson*), writing extra-judicially in "Constructive trusts: a new model for equity and unjust enrichment" [2008] CLJ 265, attempted to explain *Stack* by reference to the law of unjust enrichment, and suggested (at pp 280–281) that a new unjust factor of "unconscionability" ought to be recognised for policy reasons. Although the grounds of unjust enrichment are not closed, a ground based on unconscionable behaviour, in our respectful view, appears to be unduly vague and uncertain (see the discussion in *Anna Wee* at [100]–[103]).

Should Singapore adopt the approach in Stack and Jones towards domestic property disputes?

151 The question then arises as to whether this court ought to adopt the approach in *Stack* and *Jones* and use the common intention constructive trust (or, alternatively, either the Canadian approach or the Australian approach discussed above) as the primary device for resolving domestic property disputes.

152 In our view, the recent developments in England as well as the disparate approaches adopted in Commonwealth countries such as Australia and Canada to domestic property disputes reveal that no solution is free from difficulties. Further, it is clear that the position in England has developed in response to its changing economic and social landscape. In this regard, this court expressed the view in *Lau Siew Kim* (at [61]) that in Singapore, "the presumption of advancement still accords with the community's contemporary societal norms and expectations in particular situations". While this view might change as our society evolves, we do not think that at present, we ought to depart from it. Further, we are persuaded by the force of the criticisms (as discussed above) which have been laid against the approach in *Stack* and *Jones*, in particular:

(a) the increased risk of litigation because of the large degree of subjectivity and uncertainty which the approach in *Stack* and *Jones* has introduced into the realm of property law where domestic property disputes are concerned (see [136]–[137] above);

(b) the difficulty of identifying the applicable legal regime due to uncertainty as to whether or not a property dispute falls within the domestic context (see [140]–[142] above); and

(c) related to the first and second criticisms, the risk of increased and disproportionate litigation costs because under the approach in *Stack* and *Jones*, it will be difficult for solicitors to advise their clients on the likelihood of a successful claim in domestic property dispute cases (see [138] above; see also [145] and [150(a)] above *vis-à-vis* the Australian and the Canadian approaches respectively).

153 As mentioned at [99] above, the approach which our courts should take in resolving property

disputes, especially in the domestic context, must provide proper guidance to the parties, who will most probably (we hope) seek legal advice on their property rights once their relationship breaks down. Of course, the best method of preventing such disputes from even arising is for lawyers advising parties on the acquisition of a property to ask the latter to seriously consider at the outset how the property ought to be divided in the event of a breakdown in their relationship (however uncomfortable and unpleasant this conversation might be). The reality, unfortunately, is that this is often not done for one reason or another. For this reason, we are of the view that Lord Neuberger's minority approach in *Stack* has much to commend it.

154 First, and most importantly, it provides pragmatic and clear guidance on when a resulting trust and when a common intention constructive trust, each of which is a distinct concept, applies in this complex and difficult area of the law. This in turn facilitates informed negotiations after a relationship has broken down, and prevents unnecessary and costly litigation.

155 Second, and related to the first point, Lord Neuberger's approach removes the unclear distinction that has emerged in England between the domestic and the commercial contexts, thus ensuring better consistency of results.

156 Third, this approach prevents the court from imputing to the parties an intention which they never had *vis-à-vis* the quantification of their respective shares of the beneficial interest in the property concerned; that is, it prevents the court from foisting upon the parties an intention which they never had in order to achieve a "fair" result. This ensures that the common intention constructive trust, if successfully invoked, is not used as a smokescreen for the courts to effect "palm tree" justice in an unprincipled and arbitrary manner.

157 Fourth, as Paul S Davies and Graham Virgo, the authors of *Equity & Trusts: Text, Cases and Materials* (Oxford University Press, 2013), observe (at p 447), the upshot of Lord Neuberger's approach is that the common intention constructive trust would also be applicable in the commercial context. The authors argue that this would be a welcome development of the law since there is no policy reason why the presumption of resulting trust in a commercial context cannot be rebutted by the common intention of the parties (although principle would suggest that it would be easier to rebut this presumption in the domestic context).

158 Fifth, the use of the resulting trust as the default analytical tool in the absence of any evidence of a common intention between the parties as to how the beneficial interest in the property concerned is to be held is also consistent with the lack-of-intention analysis of the resulting trust discussed above.

159 It may be that the approach advocated by Lord Neuberger would lead to outcomes which some people might perceive as "unfair" in certain cases. We acknowledge that. However, we are ultimately of the view that subjective fairness may not be the most appropriate yardstick to apply in resolving property disputes, and that each party's share of the beneficial interest in the property concerned ought to be determined in a principled and fairly predictable manner. Having said that, we accept that the resulting trust analysis may require further refinement. We are also cognisant that this judgment does not (and is not intended to) resolve all issues concerning the application of the resulting trust as well as its difficult and intricate relationship with the common intention constructive trust (and, indeed, the doctrine of proprietary estoppel). It is, however, hoped that these doctrines can continue to develop in a coherent and principled manner under the approach which we have adopted.

160 In view of our discussion above, a property dispute involving parties who have contributed unequal amounts towards the purchase price of a property and who have not executed a declaration

of trust as to how the beneficial interest in the property is to be apportioned can be *broadly* analysed using the following steps in relation to the available evidence:

(a) Is there sufficient evidence of the parties' respective financial contributions to the purchase price of the property? If the answer is "yes", it will be presumed that the parties hold the beneficial interest in the property in proportion to their respective contributions to the purchase price (*ie*, the presumption of resulting trust arises). If the answer is "no", it will be presumed that the parties hold the beneficial interest in the same manner as that in which the legal interest is held.

(b) Regardless of whether the answer to (a) is "yes" or "no", is there sufficient evidence of an express or an inferred common intention that the parties should hold the beneficial interest in the property in a proportion which is different from that set out in (a)? If the answer is "yes", the parties will hold the beneficial interest in accordance with that common intention instead, and not in the manner set out in (a). In this regard, the court may not impute a common intention to the parties where one did not in fact exist.

(c) If the answer to both (a) and (b) is "no", the parties will hold the beneficial interest in the property in the same manner as the manner in which they hold the legal interest.

(d) If the answer to (a) is "yes" but the answer to (b) is "no", is there nevertheless sufficient evidence that the party who paid a larger part of the purchase price of the property ("X") intended to benefit the other party ("Y") with the entire amount which he or she paid? If the answer is "yes", then X would be considered to have made a gift to Y of that larger sum and Y will be entitled to the entire beneficial interest in the property.

(e) If the answer to (d) is "no", does the presumption of advancement nevertheless operate to rebut the presumption of resulting trust in (a)? If the answer is "yes", then: (i) there will be no resulting trust on the facts where the property is registered in Y's sole name (*ie*, Y will be entitled to the property absolutely); and (ii) the parties will hold the beneficial interest in the property jointly where the property is registered in their joint names. If the answer is "no", the parties will hold the beneficial interest in the property in proportion to their respective contributions to the purchase price.

(f) Notwithstanding the situation at the time the property was acquired, is there sufficient and compelling evidence of a subsequent express or inferred common intention that the parties should hold the beneficial interest in a proportion which is different from that in which the beneficial interest was held at the time of acquisition of the property? If the answer is "yes", the parties will hold the beneficial interest in accordance with the subsequent altered proportion. If the answer is "no", the parties will hold the beneficial interest in one of the modes set out at (b)–(e) above, depending on which is applicable.

161 Using the present case as an illustration of the application of this framework, the starting position would be that the parties' respective shares of the beneficial interest in the Property at the time of its acquisition would be in the same proportions as their respective contributions to the purchase price of the Property, that is, 84.17:15.83 in favour of Mr See (step (a)). In the present case, the evidence as to the parties' common intention (if indeed there was one) at the 1983 Meeting was unsatisfactory and it would not be justified to depart from the apportionment of the beneficial interest indicated by the presumption of resulting trust (step (b)). We were satisfied that there was sufficient evidence to indicate that Mr See did not intend to benefit Mdm Chan by any of his financial contributions to the purchase price of the Property (step (d)), and the presumption of advancement

was not applicable either in view of the state of their relationship at the material time (step (e)). There being no argument that Mr See and Mdm Chan subsequently agreed to hold the beneficial interest in the Property in a different manner after the date of acquisition of the Property, step (f) was not applicable.

Conclusion

162 For the reasons set out above, we allow this appeal in part and declare that Mdm Chan holds only 84.17% of the beneficial interest in the Property, as opposed to the whole of the beneficial interest, on a resulting trust for Mr See.

163 Mdm Chan is entitled to 15% of her costs in this appeal. The parties are to bear their own costs of the hearing below. The usual consequential orders shall apply.

[note: 1] Appellant's Core Bundle ("CB") vol II, p 112.

[note: 2] Statement of Claim (Amendment No 1) at paras 15–16 (in Record of Appeal vol II, pp 20–21).

[note: 3] CB vol II, pp 77–78.

[note: 4] CB vol II, p 78.

[note: 5] CB vol II, p 111.

[note: 6] *Ibid*.

[note: 7] Respondent's Supplemental Core Bundle, pp 54–55.

[note: 8] Appellant's Case ("AC"), para 82.

[note: 9] AC, para 28.

[note: 10] AC, p 6D.

[note: 11] Available at http://services.parliament.uk/bills/2013-14/cohabitationrights.html <last accessed 17 June 2014>.

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